Date: 20101221

File: 566-02-3190

Citation: 2010 PSLRB 134

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

ROBERT TELLO

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Tello v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Michel Bouchard, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN

For the Respondent: Anne-Marie Duquette, counsel

Heard at Kingston, Ontario,
August 16 to 19, 2010;
written submissions filed September 20 and 22, 2010.

I. Individual grievance referred to adjudication

[1] Robert Tello ("the grievor") grieved his termination of employment while on probation. The deputy head of the Correctional Service of Canada (CSC) objected to the jurisdiction of an adjudicator to hear the grievance. Although the *Public Service Employment Act* ("the new *PSEA*"), enacted by sections 12 and 13 of the *Public Service Modernization* Act, S.C. 2003, c. 22, does not refer to "rejection on probation", this expression from the *Public Service Employment Act* ("the former *PSEA*), R.S.C., 1985, c. P-33, was used when terminating the grievor pursuant to section 62 of the new *PSEA*.

II. Hearing

[2] At the commencement of the hearing, the grievor objected to the admissibility of the evidence of two police officers to be called as witnesses, based on statutory privilege. The grievor submitted that the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, provides that information could be released to a third party only with consent or under specific circumstances that did not apply in this case. The deputy head submitted that the police officers' testimonies would be oral. In addition, it submitted that the provincial statute was outside my jurisdiction and that any recourse for the grievor was available provincially. I ruled that the police officers' testimonies would be admissible. I reserved on a determination of the admissibility of police reports until such time in the hearing as any such reports were introduced into evidence. The police reports were not introduced into evidence.

[3] The grievor introduced a letter and a note from medical professionals related to health issues that allegedly arose out of his termination of employment (Exhibits G-3 and G-4). I ordered these two exhibits to be sealed.

[4] At the commencement of Constable Christopher Murdock's (a police officer with the Kingston Police Force) testimony, a dispute arose about the date of one of the events relied on by the CSC in its decision to reject the grievor on probation. The letter rejecting the grievor on probation referred to an event on February 26, 2009, but Cst. Murdock testified that the event happened on February 27, 2009. The grievor objected to the relevance of the testimony since it did not relate to the date specified in the rejection on probation letter. The deputy head submitted that there had been some confusion about the date and that there would be testimony about the confusion as well as testimony that the grievor corrected the date in his discussions with the CSC. The grievor submitted that, at this late date, the deputy head could not modify

the letter rejecting him on probation. I reserved on this objection pending the evidence on the confusion about the date that counsel referred to. I have addressed this objection in my reasons.

A. Summary of the evidence

[5] The grievor commenced employment at the CSC as a correctional officer classified at the CX-01 level on August 11, 2008 (Exhibit E-1, tab 1). His probationary period was for 12 months. He was employed at the Kingston Penitentiary. He was rejected on probation on July 29, 2009 (Exhibit E-1, tab 13), on payment of one month's salary in lieu of notice.

[6] The grievor is 43 years old and has had a number of jobs in his career, including working as a truck driver and as a school bus driver. He testified that he has been actively involved in the community as a volunteer. One of his volunteer activities at the time of his employment at the CSC was with the Kingston Police Force. He testified that the job of a volunteer is to be the "eyes and ears" of the police. That role included reporting any suspicious activities to the police and participating in missing-person and evidence searches. The role also involved participating in events and parades, including closing streets.

[7] The grievor was rejected on probation because of off-duty conduct. His work performance was not at issue. After conducting a fact-finding investigation, the CSC determined that the grievor was ". . . no longer suitable for employment with CSC due to concerns regarding [the grievor's] ability to adhere to the CSC's Standards of Professional Conduct and the Code of Discipline . . ." (Exhibit E-1, tab 13).

[8] The CSC's *Code of Discipline* (Exhibit E-1, tab 4) provisions relied on by the deputy head read as follows:

. . .

> *Conduct and Appearance*
>
> *6. Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. Employees dress and appearance while on*

duty must similarly convey professionalism, and must be consistent with employee health and safety.

Infractions

An employee has committed an infraction, if he or she:

a. displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;

b. is abusive or discourteous by word or action, to the public, while on duty;

c. acts, while on or off duty, in a manner likely to discredit the Service;

d. commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service;

e. fails to advise his or her supervisor, before resuming his or her duties, of being charged with a criminal or other statutory offence;

. . .

Conflict of interest

9. Staff shall perform their duties on behalf of the Government of Canada with honesty and integrity. Staff must not enter into business or private ventures which may be, or appear to be, in conflict with their duties as correctional employees and their overall responsibilities as public servants.

Infractions

An employee has committed an infraction, if he or she:

. . .

b. improperly uses his or her title or authority to personal gain or advantage;

. . .

[9] The grievor was also alleged to have breached Standard Two of the *Standards of Professional Conduct in the Correctional Service of Canada* (Exhibit E-1, tab5) (which is the same text as in section 6 of the *Code of Discipline* :

. . .

> ***CONDUCT AND APPEARANCE***
>
> *Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. . . .*

. . .

[10] The grievor was also alleged to have breached the Guidelines 563-1 - CSC badges (Exhibit E-1, tab 6). The relevant sections of those guidelines read as follows:

. . .

> *29. A badge shall only be used for sanctioned CSC activities. It shall not be used at any other time.*
>
> *30. Improper use of the CSC badge constitutes an infraction under the department's* Standards of Professional Conduct*, among others.*

. . .

[11] As part of his initial training, the grievor signed an acknowledgement of receipt of the *Code of Discipline* and the *Standards of Professional Conduct* (Exhibit E-1, tab 2). He also signed a declaration that he had received both documents and that he would undertake to maintain the standards of professionalism and integrity set out in them (Exhibit E-1, tab 3). The declaration also stated that the CSC expected that employees would read and familiarize themselves with the *Standards of Professional Conduct*. Employees were expected to seek guidance from their supervisors if they required an explanation or clarification.

[12] A Security Intelligence Report (SIR) was prepared on March 11, 2009 by Mr. Costa, the security intelligence officer at the Kingston Penitentiary (Exhibit E-1, tab 8). Mr. Costa did not testify. The report did not identify the sources of its information. Donna Morrin, Assistant Deputy Commissioner for Institutional Operations (who signed the letter rejecting the grievor on probation), testified that she believed that Mr.

Costa spoke with the Kingston Police Force. The report stated that, on February 26, 2009, the grievor was ". . . involved in an interaction with a plain clothes officer . . ." of the Kingston Police Force. A second SIR was prepared by Mr. Costa on April 14, 2009, about a reported incident on April 10, 2009 (Exhibit E-1, tab 9). This report also obtained its information from an unidentified source. The report stated that the grievor was ". . . involved in an interaction with a member of the public in which he misrepresented his identity and professional position."

[13] A fact-finding investigation was established by the CSC on June 22, 2009 (Exhibit E-1, tab 7). The initial memo sent to the grievor by Mike Greenham, Chief, Correctional Operations, at the Kingston Penitentiary, listed March 6, 2009 and April 10, 2009 as the dates of the incidents of off-duty conduct (Exhibit E-1, tab 7).

[14] The fact-finding report (Exhibit E-1, tab 11) identified the following issues for investigation:

- The alleged pulling over of a vehicle on February 26, 2009;
- The allegation that Mr. Tello used his title and CSC badge to effect traffic stops and misrepresent himself as a Police Officer; and
- Mr. Tello's alleged failure to advise his supervisor, before returning to duty, of being charged with careless driving.

[15] The investigator, Mr. Greenham, met with the grievor and his Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN ("the bargaining agent") representative on July 2, 2009. At that meeting, the grievor was told that the date of the first incident being investigated was February 26, 2009. The grievor corrected the date at the meeting.

[16] Mr. Greenham did not interview anyone else in the fact-finding investigation. He relied on both SIRs for his information about what he called "the official version." He spoke informally to two officers of the Kingston Police Force who had not been involved in the two incidents. Mr. Greenham showed me his CSC badge and identification. He testified that the badge is to be used only while on duty. He testified that, by using his badge to identify himself, the grievor linked the CSC to the two incidents at issue. He testified that the badge can be intimidating to members of the public.

[17] Mr. Greenham wrote in his report that he relied on the SIRs in his investigation. He testified that he did not rely on the police reports, which were forwarded by Inspector Brian Fleming of the Kingston Police Force to Mr. Greenham on June 19, 2009 (Exhibit E-1, tab 11, annex D). Mr. Greenham sent an email to the Kingston Police Force on June 22, 2009, stating that he was completing an investigation of the grievor that ". . . could lead to termination of employment . . ." and asking for permission for disclosure in accordance with the Kingston Police Force's policy on disclosure (Exhibit E-1, tab 11, annex D). An official with the Kingston Police Force replied on July 9, 2009 that the police could not release the reports for "Human Resource purposes" (Exhibit E-1, tab 11, annex D). The initial release of the reports was for law enforcement purposes. Using them for disciplinary purposes was not considered by the Kingston Police Force to be a consistent use of the information.

1. <u>The incident of February 27, 2009</u>

[18] The first SIR contained the following statement of events (Exhibit E-1, tab 8):

. . .

> *Source information identifies that on February 26, 2009 Officer Robert TELLO, Correctional Officer, Kingston Penitentiary was involved in an interaction with a plain clothes officer. . . .*
>
> *The Police Officer was conducting his duties and driving in an unmarked Police vehicle. Information states that a silver sedan . . . drove up behind the Officer with white flashing strobe lights mounted in the front window. The Officer pulled over to the side of the road. The Officer observed a male driver and a young female child in the passenger seat.*
>
> *The Officer exited his vehicle and identified himself as a Police Officer to Mr. TELLO driver of the vehicle. Mr. TELLO and the Officer engaged in conversation. Mr. TELLO identified himself as a Correctional Officer to the plain clothes Officer and produced his CSC Officer badge as identification.*
>
> *When challenged about the flashing lights, Mr. TELLO stated that he was a volunteer with the Kingston Police.*
>
> *Mr. TELLO was challenged about stopping vehicles and his lack of authority to do so.*

. . .

[19] Cst. Murdock testified about the events of February 27, 2009. On that date, he was driving, in plainclothes, conducting a surveillance of a vehicle. He testified that he had been driving faster than the posted speed limit and that he had been moving in and out of traffic. As he was driving, he saw flashing lights in a vehicle behind him. The flashing lights were white and amber. Cst. Murdock pulled over, got out and approached the car. The grievor got out of the car and stood beside the front of his vehicle. Cst. Murdock testified that a female child, approximately 10 years old, was in the front passenger seat. Cst. Murdock identified himself. He then asked the grievor his name and why he pulled him over. He testified that the grievor showed him his CSC badge and said that he wanted to know what was going on. Cst. Murdock testified that he had not asked for any identification. The grievor also told him that he was a volunteer with the Kingston Police Force. Cst. Murdock testified that he told the grievor that he had no right to pull anyone over and that he would take the incident up with the grievor's superiors. After noting the grievor's licence plate number, he returned to his surveillance activity.

[20] After his return to the police station, Cst. Murdock checked the licence plate number and then confirmed that the grievor was a volunteer with the Kingston Police Force. He spoke to his own supervisor and then completed a report on the incident. He testified that he had found the grievor's behaviour unusual.

[21] Cst. Murdock was not actively involved with the volunteer program and was not sure of the role of a volunteer. He testified that the cars used by volunteers are white and are clearly marked "volunteer." To his knowledge, he did not believe that personal vehicles were used by volunteers while on duty. It is definitely not permitted for volunteers to use flashing lights, he testified.

[22] In cross-examination, Cst. Murdock stated that he was not certain if using flashing lights was illegal and said that he would have to check the *Highway Traffic Act*, R.S.O. 1990, c. H.8. Cst. Murdock said that his first instinct was that the lights were being used in an illegal manner.

[23] The grievor testified that, on February 27, 2009, he was off duty and was driving with a 39-year-old friend. He observed a car driving erratically and wanted to report it to the police. He followed the car to get the licence plate number. When he pulled behind the car, it pulled over and stopped. The grievor got out of his car, and the driver of the other vehicle approached him. The driver asked him what he was doing

and if he was with the Ontario Provincial Police (OPP). The grievor told him that he was not. The driver then showed him his Kingston Police Force badge and asked the grievor who he was. The grievor replied that he was "just a correctional officer," and showed him his CSC identification. He also told the police officer that he had been intending to report erratic driving. The police officer told him that he should not do that and then got back into his car.

[24] The grievor testified that he had the flashing lights for his volunteer role with the Kingston Police Force. He and other volunteers used their personal vehicles for police events, and the lights were for that purpose. He had consulted with more experienced volunteers who had lights in their cars and had learned that it was permitted to have them in his vehicle. The lights are controlled by a switch on the centre console of the car. The grievor testified that it is not possible to know whether the lights are on from inside the car because there is a black casing around them. He testified that the female passenger with him must have turned on the lights. He did not notice that they were on until he was outside his car.

[25] The grievor testified that he was not aware of the guidelines on CSC badges.

[26] Curtis Jackson, Acting Warden of the Kingston Penitentiary at the time, was advised of the incident on March 3, 2009. Mr. Jackson testified that he could not recall who told him about the incident. Mr. Jackson spoke to Insp. Fleming to confirm the incident. He then met with the grievor on the same day. The bargaining agent's local president, David Sly, accompanied the grievor.

[27] Mr. Jackson testified that he did not believe the grievor's explanation for why he had used the lights but that it was not an issue that he "pushed hard on." He testified that he told the grievor that his behaviour had been inappropriate and that he had shown poor judgment. He told him that having the lights in his car, following the vehicle, pulling it over and identifying himself as a correctional officer were all inappropriate acts. Mr. Jackson testified that he had heard that rumours of this incident were circulating in both the Kingston Police Force and the Kingston Penitentiary. He testified that the incident had the potential to cast the CSC's reputation in a negative light.

[28] The grievor testified that, after the meeting of March 3, 2009, he went to his car with Mr. Sly, and that he and Mr. Sly removed the lights from the car. The grievor testified that it took only a few minutes to remove them.

[29] In an email to Theresa Westfall, Warden of Kingston Penitentiary, on March 3, 2009, Mr. Jackson summarized the discussion at the meeting (Exhibit E-1, tab 11, annex C). He wrote that the grievor had been ". . . cautioned as to his questionable behaviour." He also wrote that the grievor was told to get rid of the flashing lights in his car and ". . . not to be doing this type of thing again." Mr. Jackson wrote that it was his impression that the grievor ". . . caught the seriousness of the incident and the appearance of abusing his position of authority, etc." Mr. Jackson confirmed those views in his testimony. He testified that he gave the grievor the "benefit of the doubt." He also testified that he thought that meeting with the grievor was sufficient to ensure that it would not happen again.

[30] On March 4, 2009, Mr. Jackson was provided with a copy of Cst. Murdock's statement (email from Insp. Fleming, Exhibit E-1, tab 11, annex C). On March 6, 2009, Mr. Jackson wrote an email to Ms. Westfall (copied to Michael Jensen, Acting Warden at Kingston Penitentiary, and to others (Exhibit E-1, tab 11, annex C) and concluded as follows:

. . .

> *. . . Mr. Tello's account is consistent with the police officers report of the incident. As a result we have concluded that his actions did not constitute a professional misconduct as a Correctional Officer. I have addressed with him issues of poor judgement and the inappropriateness of his behaviour. He presented as very sincere and clearly has learned from the incident.*

. . .

[31] In his testimony, Mr. Jackson stated that he concluded that the grievor had not committed professional misconduct.

2. <u>The incident of April 10, 2009</u>

[32] The second SIR contained the following statement of events (Exhibit E-1, tab 9):

. . .

> *A member of the public was driving a vehicle . . . when a male person drove up along side at a high rate of speed honking his horn and appearing agitated. The male driver was driving silver 2002 Oldsmobile.*
>
> *The male driver of the Oldsmobile then pulled in front of the member of the public's car and quickly braked forcing the member of the public to take evasive measures to avoid a collision. The member of the public continued driving to their destination. Once stopped the male driver of the Oldsmobile exited his vehicle and approached the other driver. The male then produced a badge and identified himself as a Police Officer. When challenged about his identity the male stated he was a federal agent.*
>
> *This male person has been identified as Robert TELLO, CX1 at Kingston Penitentiary.*
>
> *The member of the public contacted the Police.*
>
> *Further information indicates that TELLO was counseled by Police in regards to a possible criminal investigation for impersonation of a Police Officer. Tello was also charged with careless driving.*
>
> . . .
>
> [*Sic* throughout]

[33] The grievor received a "Certificate of Offence" for careless driving under the *Highway Traffic Act* (Exhibit E-1, tab 10). He subsequently pleaded guilty and paid a fine of $325.

[34] Brent White is a constable with the Kingston Police Force. On April 10, 2009, he answered a dispatch call that arose from a female making a driving complaint. Cst. White testified that the female driver was flustered and upset. She told him that a man in a silver car had honked his horn at her and had motioned for her to pull over. The man in the silver car had then pulled in front of her and had swerved back and forth, stopping her on the roadway. He had stopped in front of her and had screamed at her about a stop sign and then identified himself as a police officer and flashed what looked like a badge. He had continued to ridicule her, and she had asked for his identification. He had told her that he was a federal agent.

[35] Cst. White testified that he believed that the female driver's statement was credible. She told him that she was not interested in pursuing criminal charges. Cst. White went to the grievor's home, but he was not there. Cst. White was beginning to prepare his report when the grievor approached him. Cst. White cautioned the grievor that he was conducting an investigation into an impersonation of a police officer and dangerous driving. He advised the grievor that he could be arrested. Cst. White said that he recognized the grievor as a volunteer for the Kingston Police Force and testified that the grievor was ". . . getting a bit of a break . . ." because Cst. White could have pursued the criminal charges of impersonating a police officer and dangerous driving. Cst. White said that the grievor admitted to being the person following the vehicle and to stopping it. He did not remember the words that the grievor used to describe his role in the event. In cross-examination, Cst. White could not remember if the grievor gave his view of the events. In re-examination, he testified that he did not prevent the grievor from telling his side of the story. Cst. White then testified that the only thing that the grievor told him was that he stopped the vehicle.

[36] The grievor testified that he was driving his daughter and her friend in his neighbourhood and that another vehicle ran a stop sign, forcing him to brake hard and turn left. He honked his horn at the same time. The female driver of the other vehicle slowed down and the grievor observed that the brake lights of her vehicle were on. The grievor straightened out his vehicle and pulled up beside her. He shrugged his shoulders and the male passenger in the other vehicle gave him "the middle finger." The grievor continued driving to his original destination and dropped off his daughter's friend. As he was returning to his house, with his daughter, he noticed the female driver's car parked on a side street. The grievor testified that he was concerned because the other driver had almost hit him and he had had two young girls in the car with him. He was also concerned that she had not stopped. When he approached her vehicle, he asked her if she realized that she had almost hit him and that he had had two little girls in his car. She told him that she was delivering flowers for cancer patients and that she was not from that neighbourhood. The female driver asked the grievor if he was a police officer. He said that he was not. She then asked him if he was a city police officer, to which he said no. She wrote down his licence plate number and asked him if he was with the OPP. The grievor again said no. The female driver asked the grievor who he was. The grievor testified that he did not tell her that he was a federal agent. He initially said that he was a concerned parent, but she persisted in

asking who he was. The grievor told her that he was "just a correctional officer" and showed the driver his CSC identification (including his badge). She told him that she was going to call the police. The grievor then left.

[37] The grievor returned home and then left almost immediately, returning about 15 minutes later. A neighbour told him that a police officer had been looking for him. The grievor noticed a police car parked nearby and approached Cst. White. Cst. White asked him if he was Robert Tello and if he had been involved in an incident. Cst. White then told the grievor what the female driver had told him. The grievor said, "let me tell you what really happened." He then asked Cst. White if she had told him that she ran a stop sign and whether Cst. White would charge her with an offence. The grievor testified that Cst. White told him that he was not going to charge her because she was well known in the community. Cst. White told the grievor that he could charge him with impersonating a police officer but that he would give the grievor a ticket for careless driving instead. He told the grievor to "take care of the ticket" or Cst. White would arrest him. The grievor testified that he felt threatened and paid the ticket. In cross-examination, the grievor testified that he did not complain to the Kingston Police Force.

3. <u>Findings of the CSC</u>

[38] The CSC relied on the findings in the fact-finding report to support its decision to reject the grievor on probation. The report came to the following conclusions:

. . .

> *a) Breach of . . . Code of Discipline, Section 6 e. — Conduct and Appearance: Mr. Tello failed to advise his supervisor, before resuming his duties, of being charged with a criminal or other statutory offence for careless driving . . . on April 10, 2009.*
>
> *b) Breach of . . . Code of Discipline — Conduct and Appearance, Section 6 c.: On February 26, 2009, Mr. Tello acted while off duty in a manner likely to discredit the Service by pulling a vehicle over in the community while using his CSC badge for identification purposes. On April 10, 2009, Mr. Tello acted while off duty in a manner likely to discredit the Service by pulling a vehicle over in the community and initially identifying himself as a police officer, then when challenged identified himself as a federal agent, then used his CSC badge for identification purposes.*

> c) *Breach of . . . Code of Discipline — Conduct and Appearance Section 6 d.: Mr. Tello committed an offence punishable on summary conviction under a statute of Canada, which may bring discredit to the Service when he was charged for careless driving.*
>
> d) *Breach of . . . Code of Conduct — Conflict of Interest Section 9 b.: Mr. Tello improperly used his title of authority to personal advantage when producing his CSC badge for identification purposes to people in the community when effecting traffic stops.*
>
> e) *Breach of . . . Code of Discipline — When interviewed by the Fact Finding's investigating officer, the majority of Mr. Tello's statements did not concur with what the investigating officer has confirmed to be the true course of events. In this regard, Mr. Tello's conduct does not reflect the standards of conduct expected of a Correctional Officer.*
>
> . . .

[39] Mr. Jensen was Acting Warden of the Kingston Penitentiary when the fact-finding report was completed. He convened a meeting with the grievor and his bargaining agent representative on July 27, 2009, to review the report's conclusions and to hear the grievor's response. An audio recording of the meeting was made, and a partial transcript was prepared (Exhibit E-1, tab 12). The deputy head provided a copy of the recording to the grievor at the hearing to determine the accuracy of the transcript. This recording was marked as Exhibit E-2; however, neither party referred the recording in evidence and I have not considered it in this decision.

[40] The grievor testified that it was his impression from the meeting of July 27, 2009, that the careless driving charge was not "a big issue" for Mr. Jensen. The grievor testified that he was not aware that he was required to disclose that he had been charged with an offence under the *Highway Traffic Act*.

[41] Mr. Jensen came to the conclusion that the grievor's employment should be terminated in accordance with section 62 of the new *PSEA*. However, at that time, he did not have the appropriate delegated authority. As a result, he made a recommendation to Ms. Morrin, who was Assistant Deputy Commissioner of Institutional Operations at that time. Mr. Jensen testified that the fact that the grievor had been warned by Mr. Jackson yet had repeated his behaviour was of concern to him. Mr. Jensen testified that he agreed with the findings in the fact-finding report. He also

testified that he relied on the Treasury Board *Guidelines for Rejection on Probation* in coming to his determination. In cross-examination, he was asked whether tickets under the *Highway Traffic Act* were ever reported to him. He testified that he had not heard of such tickets being reported by employees before the grievor's case.

[42] Ms. Morrin testified that she was briefed on Mr. Jensen's recommendation to terminate the employment of the grievor and concurred with it. She read the fact-finding report and agreed with its findings. In cross-examination, Ms. Morrin testified that she initially questioned the conclusion that the grievor was in breach of the *Code of Discipline* because his version of the events was contradicted by the "official version." She testified that, after the conclusion was explained to her, she supported it. She testified that the grievor's use of his CSC badge was of particular concern. She also testified that the grievor was no longer suitable for employment because, after being made aware of his inappropriate behaviour, he repeated it. Ms. Morrin stated that she did not trust that he would not use his authority inappropriately in the future.

[43] Mr. Jensen met with the grievor and his bargaining agent representative at the meeting of July 29, 2009 to present him with the rejection on probation letter. He testified that neither the grievor nor his representative pointed out the error in the date of the first incident.

[44] Matthew Daigneault is a grievance officer with the bargaining agent. He testified that he had been a correctional officer for four-and-a-half years and that he had not been aware that employees were required to report tickets received under the *Highway Traffic Act*. He also testified that he had been made aware only at this hearing of the guidelines on the use of the CSC badge. Mr. Sly testified that, in his 10 years at the Kingston Penitentiary, it was never the practice to report highway traffic offences. Many employees at the Kingston Penitentiary had traffic violations, and none thought that he or she was required to report those tickets. Mr. Sly also testified that he did not know that the guidelines on CSC badges existed.

[45] The grievor testified that the termination of his employment had been difficult financially, emotionally and physically. He provided signed statements from medical professionals to support the health claims. The grievor testified that efforts to find work were difficult because employers wanted to know the reason he left his previous job.

[46] In cross-examination, the grievor was asked if he had had any "personal issues" with any of the deputy head's witnesses during his employment. He testified that he had not.

B. Summary of the arguments

[47] The parties made oral submissions at the hearing. At the conclusion of the submissions, I asked for further submissions in writing on a point not raised by the parties. I have first summarized the oral arguments, followed by the arguments on the additional jurisdictional question.

1. For the deputy head

[48] The deputy head submitted that an adjudicator has no jurisdiction to hear a grievance against a rejection on probation under sections 209 and 211 of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*. The grievor was clearly on probation when his employment was terminated. Flexibility must be accorded to a deputy head when considering the suitability of an employee on probation: see *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; and *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 67.

[49] The deputy head submitted that the lack of jurisdiction did not mean that an employee rejected on probation has no recourse. After the final level of the grievance process, he or she can make a judicial review application to the Federal Court, in accordance with the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[50] The *Code of Discipline* has the force of law. Therefore, a CSC employee, being bound by the established standards of conduct, can be terminated for cause or rejected on probation for his or her off-duty conduct. I was referred to *Canada (Attorney General) v. Tobin*, 2008 FC 740; *Dionne v. Treasury Board (Solicitor General – Correctional Service Canada)*, 2003 PSSRB 69; and *Simoneau v. Treasury Board (Solicitor General of Canada – Correctional Service)*, 2003 PSSRB 57.

[51] The deputy head does not have to demonstrate that the measure taken was appropriate in the circumstances or that there was just cause to reject an employee during his or her period of probation: see *Leonarduzzi*, at paragraph 37; *Kagimbi*, at paragraph 63; *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB

91, at para 95; and *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175, at para 37. The deputy head simply has to put forward minimal evidence that the rejection on probation was based on an employment reason, and nothing else. In other words, the deputy head has to demonstrate it chose a rejection on probation based on a determination that the employee was not suitable for the position because of his or her performance or behaviour: see *Penner*, at paragraph 18; *Chaudhry v. Canada (Attorney General)*, 2007 FC 389, at para 51; *Leonarduzzi*, at paragraph 45; *Kagimbi*, at paragraph 63; and *Rousseau*, at paragraphs 95 and 96. The deputy head need only produce one employment-related reason; see *Maqsood*, at paragraph 37.

[52] The deputy head submitted that it had demonstrated that it rejected the grievor on probation for the following employment-related reasons:

- He committed an offence punishable on summary conviction under a provincial statute, which may bring discredit to the Service (section 6(d) of the *Code of Discipline* and Standard 2 of the *Standards of Professional Conduct*);

- He failed to advise his supervisor, before resuming his duties, that he had been charged with a statutory offence (section 6(e) of the *Code of Discipline* and Standard 2 of the *Standards of Professional Conduct*); and

- On two occasions (February 27 and April 10, 2009) he acted in a manner likely to discredit the CSC and improperly used his title and authority to personal gain or advantage by pulling over a vehicle and using his CSC badge to identify himself (section 6(c) of the *Code of Discipline*, Standard 2 of the *Standards of Professional Conduct*, and sections 29 and 30 of the CSC Badges guidelines).

[53] The grievor was charged with careless driving, to which he pleaded guilty. His explanation that he felt threatened by Cst. White was not credible. Cst. White could not recall the grievor contesting the ticket. In any event, it is no longer open to the grievor to challenge the careless driving charge, since he accepted the ticket and did not contest it. I was referred to *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

[54] The grievor acknowledged receiving copy of the *Code of Discipline*, which contained the requirement to advise his supervisor of a statutory offence. The grievor

knew or ought to have known of that reporting requirement. The fact that other employees were not aware is irrelevant, as is the fact that other employees did not report offences under the *Highway Traffic Act*. The grievor could have asked his supervisor for guidance on the provisions of the *Code of Discipline*. It is very important that such offences be reported, especially careless driving. Employees may be required to drive vehicles as part of their jobs, and careless driving is the most serious offence under the *Highway Traffic Act*.

[55] The improper use of the CSC badge was the biggest concern of Mr. Jensen and Ms. Morrin. The grievor used his badge on two occasions: February 27 and April 10, 2009.

[56] With respect to the February 27, 2009 incident, the deputy head submitted that the version provided by Cst. Murdock was more credible. It is clear that Cst. Murdock only stopped because the lights in the grievor's car were flashing. Whether the lights were turned on by the grievor or by his passenger is irrelevant. It is the grievor's car, and he should have had control of it. The grievor admitted that he had no right to pull people over and arrest them. He showed Cst. Murdock his CSC badge even though Cst. Murdock had not asked to see it. He was using his CSC badge to gain an advantage in the situation. Although there was no direct evidence of his intent, it is clear from the circumstances that gaining an advantage was his intent. The adjudicator in *Simoneau* reached a similar conclusion (at paragraph 50). By using his CSC badge to identify himself, he brought discredit to the CSC, in contravention of the *Code of Discipline*. The CSC was justified in terminating the grievor's employment solely for that incident.

[57] A few weeks after February 27, 2009, the grievor was involved in an altercation with a member of the public in which he again used his CSC badge to identify himself while off duty. The uncontradicted facts are that he took it upon himself to park behind the female driver and to engage in a conversation with her. He walked to the window of her vehicle, just like a police officer. In response to the female driver's repeated questions on whether the grievor was a police officer, he told her that he was a correctional officer and showed her his CSC badge. It is clear that the driver thought that the grievor was linked to the law enforcement community. A CSC badge looks like a police badge.

[58] The deputy head stated that it was hard to understand why someone would call the police if the grievor's version of the facts were true. The only reason the female

driver could have had for calling the police is that she felt that the grievor was using his position of authority improperly. In addition, if the grievor had done nothing wrong, his decision to leave after the female driver told him that she was calling the police was bizarre. It was a perfect opportunity for him to tell his side of the story.

[59] The CSC has to be particularly concerned about employees using their authority as correctional officers with members of the public. The grievor was trained and either knew or ought to have known that it was improper to use his CSC identification while off duty. This is especially true in this case, since he questioned a member of the public as if he were a police officer. He had also been warned by Mr. Jackson that such behaviour was not acceptable.

[60] The deputy head submitted that the evidence is clear that the grievor was rejected for no reason other than an employment-related reason. In fact, the deputy head went beyond its burden of proof and showed that the measure taken was reasonable.

[61] The grievor has the burden to prove that the rejection on probation was done in bad faith and that it was not related to his employment. He had to prove that it was a sham or a camouflage: see *Penner*, at paragraph 17; and *Canada (Conseil du Trésor) v. Rinaldi* (1997), 127 F.T.R. 60 (T.D.), at para. 17. The burden is very difficult to meet, as shown in *Kagimbi*, at paragraph 64, and in *Maqsood*, at paragraph 38. The grievor put forward absolutely no evidence of bad faith, a sham or a camouflage. There were no personal connections or issues between the grievor and the individuals involved in this matter, and nothing demonstrated any disguised motives on the part of the deputy head.

[62] The *Municipal Freedom of Information and Protection of Privacy Act* does not apply to this grievance because an adjudicator in this case has no jurisdiction under that legislation, and that legislation does not speak of the admissibility of evidence before an adjudicator.

[63] The medical documents filed by the grievor are not relevant to the jurisdictional issue before the adjudicator. In addition, the authors of the documents did not testify, so it is not appropriate to rely on the contents of those documents.

[64] The mistake in the date of the first incident contained in the rejection on probation letter was unfortunate but is not determinative. It was clear from the evidence that there was no confusion about the events in question.

[65] The decision in *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL), confirms that this hearing is a *de novo* hearing and that it cures any defects in the investigation process.

2. <u>For the grievor</u>

[66] The grievor submitted that the deputy head did not produce an employment-related reason for the rejection on probation. In the alternative, he submitted that the deputy head acted in bad faith.

[67] The grievor submitted that the CSC alleged in the termination letter that the first incident happened on February 26, 2009. Nothing happened on that day. In fact, the grievor's statement that the events happened on February 27 was considered by the investigator to be one of the inconsistencies in the grievor's account. Two days before receiving the rejection on probation letter, the grievor told Mr. Jensen that the date was wrong. However, the CSC maintained that the incident occurred on February 26. It was not merely a "typo." The date did not matter to the CSC. The deputy head should be strictly held to the grounds alleged in its letter, and it can modify those grounds only if there was a bona fide error, which is not the case. The deputy head did not ask to amend the letter, and it is legally bound by the date that it chose.

[68] In the alternative, the grievor submitted that the CSC could not rely on the February 27, 2009 incident because it had already concluded that there was no breach of the *Code of Discipline*. Mr. Jackson concluded in an email to Ms. Westfall and others dated March 6, 2009 that there was no professional misconduct on the part of the grievor. In the letter rejecting him on probation and at this hearing, the CSC stated that his behaviour actually was a breach of the *Code of Discipline*. After concluding that there was no breach, the CSC cannot change its mind. This is evidence of bad faith on the part of the CSC.

[69] In the further alternative, the grievor submitted that his behaviour on February 27, 2009 was not misconduct. He testified that he was under a positive obligation to report erratic driving. There was no evidence that he intended to gain any

advantage in the encounter with Cst. Murdock, and there is no evidence of wrongful intent. The grievor testified that he thought that the lights in his car were legal, and Cst. Murdock testified that he did not know if they were legal. The grievor did not intend to stop Cst. Murdock; he only intended to get his licence plate number so that he could report him.

[70] The CSC did not rely on the police report but on a report from Mr. Costa, who had no personal knowledge of the incident, did not rate the reliability of his source and did not reveal if the source had any personal knowledge of the incident. The CSC said that it did not rely on the police report, but it was in its possession. The CSC should not be permitted to benefit from receiving the police report.

[71] The conduct of the investigation by Mr. Greenham illustrates bad faith on the part of the CSC. Mr. Greenham was not seriously interested in hearing the grievor's version of events.

[72] A number of witnesses were not aware of the guideline on the use of badges. If senior employees are not aware of the guideline, a new employee cannot be faulted for ignorance of the guideline. There is no evidence that Mr. Jackson told the grievor about the guideline at their meeting about the February 27, 2009 incident.

[73] With respect to the April 10, 2009 incident, the CSC is relying on hearsay evidence (the evidence of Cst. White about what the female driver told him). In contrast, the grievor gave direct evidence about the events. Direct evidence is preferred over hearsay evidence. The best-evidence rule still applies, and the deputy head provided no explanation of why it could not obtain the direct evidence of the female driver. The grievor was unable to test the credibility of her account through cross-examination.

[74] Cst. White's testimony was not credible. The grievor testified that he felt intimidated by Cst. White. The female driver told Cst. White that she did not want to pursue criminal charges, and yet, Cst. White told the grievor that he was conducting a criminal investigation. Cst. White cautioned the grievor about contesting the careless driving charge and told him that he would be arrested and charged if he fought the ticket. The grievor's version of the events was credible, and his admission that he showed the female driver his badge is a good indication of his integrity. There was no

direct evidence that he drove carelessly. In fact, he did not drive carelessly. He paid the ticket only because he felt threatened.

[75] The CSC policy that correctional officers must report *Highway Traffic Act* offences was not known by employees. Mr. Sly and Mr. Daigneault were unaware of the policy. Mr. Jensen testified that he was unaware of the policy until the grievor's case. The audio recording of the meeting with Mr. Jensen is conclusive evidence about reporting traffic tickets. The deputy head's interpretation of the policy is abusive and is in bad faith because the standard was not applied to anyone else.

[76] The grievor admitted to showing his CSC badge for identification purposes. His motives appear legitimate. He was unaware of the badge guidelines, which are not generally known. The grievor gave a reason for showing the badge. The reason is the best evidence available as to his intention. He did not try to represent himself as a police officer. It was found that using his badge in the February 27, 2009 incident was not professional misconduct. The grievor brought up the fact that he used his badge in the second incident. Using that one reason alone constitutes a sham.

[77] Mr. Greenham claims that he did not use the police report in his investigation and that he did not speak to Cst. White. However, without the benefit of any of that information, the CSC decided to reject the grievor on probation. That is bad faith. The grievor was denied an opportunity to respond to the allegations against him. *Tipple* does not apply because the conduct of the CSC at the time of the rejection on probation determines whether there is bad faith. The fact that the investigation was based on flimsy hearsay evidence is further evidence of bad faith. The investigation was a travesty of justice. The fact that the CSC based its decision on information that it was not authorized to use (the police reports) is also evidence of bad faith.

[78] The grievor submitted that I should allow the grievance. He also requested that he be reinstated and that he receive compensation for all pay and benefits, including lost overtime opportunities. He also requested $25 000 for physical and emotional damages suffered as a result of the CSC's actions. The medical reports submitted support his claims of mental anguish. The introduction of medical records is an exception to the hearsay rule, and an adjudicator should simply decide what weight to give them. To support the claim for damages, I was referred to *Honda Canada Inc. v. Keays,* 2008 SCC 39.

[79] *Simoneau* is entirely different from the grievor's situation. The grievor in that case clearly used his status as a correctional officer to obtain lenient treatment.

[80] *Toronto (City)* involved a criminal offence. This case deals with a traffic ticket that did not go to court. It would be a miscarriage of justice if the grievor's testimony on that issue were disallowed. I was referred to *Ontario Nurses' Association v. Extendicare (Canada) Inc. (Kirkland Lake)* (2007), 159 L.A.C. (4th) 30.

[81] The deputy head stated that Cst. White had no personal interest in this matter. His reputation would be seriously tainted were the grievor's version of the events proved true. Cst. White could be subject to charges for his actions, which gives him strong motivation to craft his story. The deputy head stated that, had the grievor felt threatened, he could have called the police. The deputy head agreed that the police were in a position of authority. If that is so, it would explain Cst. White using his power over the grievor. No evidence was adduced that the female driver thought that the grievor was a police officer. The grievor sought Cst. White when he learned that he was looking for him.

[82] I was referred to *Dalen v. Deputy Head (Correctional Service of Canada)*, 2006 PSLRB 73, for an example of off-duty conduct that was not employment-related.

3. <u>Deputy Head's rebuttal</u>

[83] The deputy head submitted that the mistake in the date of the first incident was never raised by the grievor at any level of the grievance process. It was clear that the report and the letter referred to the same incident. In the alternative, the deputy head requested that I amend the letter.

[84] When Mr. Jackson testified, he said that he did not believe the grievor's story about the flashing lights but that he decided not to pursue the issue and not to discipline him. No evidence was adduced that Mr. Jackson told the grievor at the March 3, 2009 meeting that there was no misconduct or no breach of the *Code of Discipline*. With respect to the email written later by Mr. Jackson, the grievor was not copied on it, so he cannot say that it was clear that there was no misconduct. The only thing clear is that the CSC decided not to discipline the grievor. There is a clear link between the events of February 27 and those of April 10, 2009. The decision not to discipline does not give the grievor a clean slate. The language used by Mr. Jackson was an unfortunate choice. Mr. Jackson was no longer at the Kingston Penitentiary and

no longer had any authority over the grievor. Mr. Jackson is not the decision maker, and Mr. Jensen and Ms. Morrin are not bound by his opinion.

[85] In the *Code of Discipline*, there is no mention of intent with respect to a failure to report an offence to a supervisor. The deputy head does not have to prove intent, it has only to prove an employment-related reason. The deputy head disagreed that there was no evidence that the grievor used his badge for personal gain. The deputy head cannot provide direct evidence of intent. The evidence will always be circumstantial. The circumstances show that the grievor used the badge for personal gain. The *Code of Discipline* does not speak of intent, and there is no need to show intent for personal gain.

[86] The CSC did not use the police reports for fact-finding. No evidence was adduced that the CSC unlawfully received the police reports. After my questioning, counsel for the deputy head conceded that the CSC received the police reports but that it did not use them.

[87] Mr. Greenham used information obtained from the grievor to describe the events, and the fact finding report was not one sided. In any event, Mr. Greenham is not the decision maker.

[88] The grievor implied in his submissions that the audio recording of the July 27, 2009 meeting demonstrated the CSC's bad faith. The grievor did not play the recording at the hearing, and there was no opportunity to examine Mr. Jensen about what he said on it.

[89] The deputy head provided the best evidence that it could on the second incident through Cst. White. The deputy head learned the name of the female driver only at this hearing. The Kingston Police Force is prevented from disclosing personal information under provincial privacy legislation. Therefore, the hearsay evidence of Cst. White is the best evidence available.

[90] Cst. White clearly contradicted the grievor's assertion that the grievor had been threatened. A police officer can continue with a criminal investigation even if a victim does not wish to pursue charges. Cst. White testified that the grievor did not challenge the facts that were conveyed to him. Cst. White would have avoided testifying had he

had anything to hide. In answer to my question, counsel for the deputy head conceded that Cst. White was summoned to testify.

[91] *Ontario Nurses' Association*, on which the grievor relies, is based on a very different set of facts. In this case, the grievor pleaded guilty. This fact cannot be revisited.

[92] No evidence was adduced that the CSC was aware that employees were not reporting traffic offences and that their breach of the policy were condoned by the CSC. Mr. Jensen was speaking only of his immediate knowledge of his own squad.

[93] The deputy head was surprised by a claim for damages in a case about jurisdiction. The authors of the submitted medical reports were not subject to cross-examination. The medical reports are inconclusive. *Honda Canada Inc.* dealt with a very different set of facts. Damages are clearly inappropriate.

III. Additional submissions

[94] At the conclusion of the hearing, I asked for further submissions in writing on the following question:

> *Does the change in the language in the statutory provision under the* [new] PSEA *for the termination of probationary employees have any impact on the established jurisprudence on an adjudicator's jurisdiction over rejection on probation? In particular, does the removal of the phrase "reject the employee for cause" (contained in the former subsection 28(2)) and its replacement with "notify the employee that his or her employment will be terminated" (in the new subsection 62(1)) change the test for determining jurisdiction?*

The deputy head replied that the wording of the new *PSEA*, had no effect on the existing jurisprudence on rejection on probation, and the grievor concurred.

IV. Reasons

[95] The jurisprudence of an adjudicator on rejection on probation has been well established by the Federal Courts and in decisions under the *Public Service Staff Relations Act* (*PSSRA*), R.S.C., 1985, c. P-35. In 2005, the provision governing rejection on probation in the former *PSEA* was abrogated and replaced by a new one in the new *PSEA*. The parties have submitted that the change to that provision has had no effect

on the jurisdiction of an adjudicator over rejection on probation grievances. Since it is a jurisdictional question, the agreement of the parties is not determinative; I must examine if the change in statutory language has had any impact on my jurisdiction. For the reasons that follow, I have concluded that the change to the new *PSEA* has not significantly altered the substance of the approach an adjudicator must take when considering whether he or she has jurisdiction over a termination of employment of a probationary employee.

A. Jurisdiction and changes to the new *PSEA*

[96] Until the former *PSEA* was abrogated in 2005, the provision for rejection on probation in that *Act* read as follows:

> ***28.*** *(2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.*

In 2005, that provision of the former *PSEA* for probationary employees was abrogated and replaced by the following provision of the new *PSEA*:

> ***62.*** *(1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> *(*a*) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, or*
>
> *(*b*) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,*
>
> *and the employee ceases to be an employee at the end of that notice period.*

The significant difference between the two provisions is the removal of the phrase “for cause.” The deputy head is still required to take a positive step to terminate an

employee before the end of the probationary period, even though the verb "reject" is no longer in the provision.

[97] The relevant provisions dealing with the jurisdiction of an adjudicator have not changed significantly, and the *PSLRA* currently provides as follows:

> . . .
>
> ***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;*
>
> . . .
>
> ***211.*** *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> *(*a*) any termination of employment under the* Public Service Employment Act*. . .*
>
> . . .

[98] The *Financial Administration Act* (*FAA*), R.S.C., 1985, c. F-11, for its part, sets out the authority of a deputy head for terminations of employment other than terminations under the new *PSEA*:

> ***12.*** *(1) . . . every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*
>
> . . .
>
> *(*c*) establish standards of discipline and set penalties, including termination of employment . . .*
>
> *(*d*) provide for the termination of employment . . . of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;*

> *(*e*) provide for the termination of employment . . . of persons employed in the public service for reasons other than breaches of discipline or misconduct;*
>
> . . .
>
> *(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(*c*), (*d*) or (*e*) or (2)(*c*) or (*d*) may only be for cause.*

[99] The jurisprudence on rejection on probation (prior to 2005) is well known. As stated as follows in *Penner*, at pages 440-441:

> . . .
>
> *. . . an adjudicator seized of a grievance by an employee rejected on probation is entitled to look into the matter to ascertain whether the case is really what it appears to be. That would be an application of the principle that form should not take precedence over substance. A camouflage to deprive a person of a protection given by statute is hardly tolerable. In fact, we there approach the most fundamental legal requirement for any form of activity to be defended at law, which is good faith. . . .*
>
> *. . . an adjudicator . . . is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on the ground that they were dissatisfied with the suitability of the employee for the position. . . .*
>
> . . .

[100] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada was addressing a dismissal of a public office holder. In that case, the employee was not unionized. The Court found that the applicable law governing dismissal was the law of contract, not general principles arising out of public law:

> . . .
>
> *[103] . . . If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.*
>
> . . .
>
> *[105] . . . Moreover . . . where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that*

> *they should be treated differently than private sector employers who engage in similar conduct.*
>
> . . .

[101] As noted by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (at paragraph 94), work is one of the defining features of an individual's life and ". . . any change in a person's employment status is bound to have far-reaching repercussions. . . ." The rupture of the employment relationship is when an employee is at his or her most vulnerable and therefore in need of protection. The Court stated that to ensure adequate protection, employers ought to be held to an ". . . obligation of good faith and fair dealing in the manner of dismissal . . ." (paragraph 95). *Wallace* was a wrongful dismissal case. However, the obligation of an employer to act in good faith remains. There is no policy reason why a deputy head should not have the same obligation as any private sector employer. In fact, adjudicators have applied the principles developed in *Wallace* to cases heard under the *PSSRA* and the *PSLRA*: *Matthews v. Canadian Security Intelligence Service*, PSSRB File No. 166-20-27336 (19990218); *Bédirian v. Treasury Board (Department of Justice)*, 2006 PSLRB 4; *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91; and *Tipple v. Deputy Head (Department of Public Works and Government Service)*, 2010 PSLRB 83.

[102] In the present case, the proscription of the Supreme Court of Canada to refrain from public law approaches in addressing dismissal of public service employees remains. As noted in what follows, the Supreme Court of Canada has long recognized that the principles that apply to probationary employees in the private sector are equally applicable to those in the public service (see *Jacmain v. Attorney General (Can.) et al.*, [1978] 2 S.C.R. 15, discussed at pages 38-39).

[103] It is important to recognize that statutory restrictions on a public authority are still applicable (*Dunsmuir*):

> . . .
>
> *[106] Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to*

> *a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.*
>
> . . .

[104] The employment relationship for public service employees such as the grievor is governed within the statutory framework of the *PSLRA*, the new *PSEA* and the *FAA* (*Penner*). I have set out those provisions at paragraphs 96 through 98.

[105] The plain reading of the *PSLRA* and the new *PSEA* is that a probationary employee can be terminated with notice for any reason (or no reason) and does not have access to adjudication. Under the new *PSEA*, the only restriction placed on the deputy head is that the employee must be within his or her probationary period and notice (or pay in lieu) must be provided. However, "[t]he interpretation of the law is always contextual . . ." (*Dunsmuir*, para. 74). Statutory restrictions on the deputy head's authority still apply and the deputy head must be acting within the new *PSEA* for the termination of a probationary employee to be a valid exercise of the deputy head's discretion.

[106] In *Penner*, the Federal Court of Appeal approached the interpretation of the relevant section of the former *PSEA* (then section 28) by both examining the structure of the legislation and the function of a probationary period. The external context is an important aspect of statutory interpretation. As noted in *A.G. v. Prince Ernst Augustus of Hanover*, [1957] A.C. 436 (H.L.), at 461, (cited in *Sullivan and Dreidger on the Construction of Statutes*, Fourth edition, page 259): ". . . words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. . . ." The ordinary meaning of "probation" and its purpose are important in determining whether the CSC terminated the employment of the grievor on probation in accordance with the new *PSEA*.

[107] In *Jacmain*, Justice de Grandpre, writing for four of the Supreme Court of Canada judges, wrote as follows about the nature of probationary status at pages 38-39:

> . . .
>
> *The case at bar is not a case of disciplinary action. The employee's poor conduct, irascible attitude and unsatisfactory adjustment to his surroundings are valid reasons for his superior's unwillingness to give him a*

> *permanent position in his Service. This seems obvious to me, but I will nevertheless cite the unanimous opinion of the arbitrators in* United Electrical Workers & Square D Co., Ltd. [(1956), 6 Lab. Arb. Cas. 289]*, at p. 292:*
>
> > An employee who has the status of being 'on probation' clearly has less job security than an employee who enjoys the status of a permanent employee. One is undergoing a period of testing, demonstration or investigation of his qualifications and suitability for regular employment as a permanent employee, and the other has satisfactorily met the test. The standards set by the company are not necessarily confined to standards relating to quality and quantity of production, they may embrace consideration of the employee's character, ability to work in harmony with others, potentiality for advancement and general suitability for retention in the company. Although it is apparent that any employee covered by the agreement can be discharged for cause at anytime, the employment of a probationer may be terminated if, in the judgment of the company prior to the completion of the probationary period, the probationer has failed to meet the standards set by the company and is considered to be not satisfactory.
>
> *That case involved a discharge in the private sector. The adjudicator in the case at bar attempted to establish a distinction between the private and public sectors. This proposition was not defended in this Court and I can see no basis for it, particularly since, as I have noted, the wording of s. 28 of the* Public Service Employment Act *is very loose. I would think that in the public sector, as in the private sector, the employee who wants to improve his lot must still take certain risks.*
>
> . . .

[108] The Treasury Board *Guidelines for Rejection on Probation* (modified April 1, 2005) states: ". . . probationary periods are used to assess an employee's performance and conduct after appointment to a position from outside the public service." It states that the manager should be satisfied that the employee is ". . . not suitable for the position. . . ."

[109] In keeping with the guidance of the Supreme Court of Canada to regard the government as an employer in the same way as an employer in the private sector

(*Dunsmuir*), an adjudicator should look at the termination of a probationary period from the perspective of labour law (*Jacmain*). In the private sector, a probationary period is a period of time within which an employer has the opportunity to assess the suitability of an employee for continued employment. This is no different than the purpose of a probationary period in the public service. In *Penner*, at page 438, the Federal Court of Canada referred to ". . . a *bona fide* dissatisfaction as to suitability." Arbitrators have generally held that a private sector employer is to be given a great deal of discretion in making this assessment and an arbitrator must not overrule an employer's decision unless the decision is arbitrary, discriminatory or in bad faith (e.g., see *Canadian Forest Products Ltd. v. Pulp Paper and Woodworkers of Canada, Local 25* (2002), 108 L.A.C. (4th) 399, at page 413).

[110] If a deputy head terminates the employment of a probationary employee without any regard to the purpose of a probationary period — in other words, if the decision is not based on suitability for continued employment — that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new *PSEA*.

[111] In my view, the change between the former *PSEA* and the new *PSEA*, when viewed in the context of the recent jurisprudence of the Supreme Court of Canada on the appropriate approach to public employment, does not significantly alter the substance of the approach that adjudicators should take to grievances involving the termination of a probationary employee. However, the omission of the words "for cause" in section 62 of the new *PSEA* does change the burden of proof requirements. The burden of proof on the deputy head has been reduced. The deputy head's burden is now limited to establishing that the employee was on probation, that the probationary period was still in effect at the time of termination and that notice or pay in lieu has been provided. The deputy head no longer has the burden of showing "cause" for the rejection on probation. In other words, the deputy head does not have the burden of establishing, on a balance of probabilities, a legitimate employment-related reason for the termination of employment. However, the Treasury Board *Guidelines for Rejection on Probation* require that the letter of termination of employment of a probationary employee set out the reason for the decision to terminate employment. The deputy head is still required to tender the letter of termination as an exhibit (normally through a witness) to establish that the statutory requirements of notice and probationary status have been met. That letter will usually

state the reason for the decision to terminate the employment of the probationary employee. The burden then shifts to the grievor. The grievor bears the burden of showing that the termination of employment was a contrived reliance on the new *PSEA*, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment-related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment: *Penner* at page 438) then the grievor will have met his burden. Apart from this change to the burden of proof, the previous jurisprudence under the former *PSEA* is still relevant to a determination of jurisdiction over grievances against a termination of a probationary employee.

B. Jurisdiction

[112] As I have concluded earlier in this decision, the provisions of the new *PSEA* have changed the burden of proof for cases involving the termination of employment of probationary employees. The deputy head no longer has the burden of proving a legitimate employment-related reason for the termination of employment, apart from providing the letter of termination which sets out the reason for its decision. The burden is on the grievor to show the deputy head's contrived reliance on the new *PSEA* or that the rejection on probation was a sham or a camouflage. A termination of employment not based on a bona fide dissatisfaction as to suitability (or for no legitimate "employment-related reason") would be a contrived reliance on the *PSEA*, a sham or a camouflage.

[113] The parties approached this grievance as they have consistently approached all such cases. They also argued the grievance based on the deputy head having the burden of showing that the termination of employment was for employment-related reasons. However, in the circumstances of this case, there is no impact on the result.

[114] There is no dispute that the grievor was on probation at the time of termination and was given pay in lieu of notice of the termination of his employment, as permitted by section 62 of the new *PSEA*.

[115] After reviewing all the evidence, I must conclude that the grievor did not establish that the deputy head acted in contrived reliance on the new *PSEA*, or used a sham or a camouflage. He did not establish that the termination of employment was not a bona fide dissatisfaction as to his suitability for employment. The two grounds

of unsuitability that I have found to be legitimate are the failure to report a statutory offence and the use of a CSC badge while off duty. The grievor freely admitted to those two actions and there is no evidence of bad faith by the CSC in its reliance on them.

[116] It was improper for the CSC to rely on an alleged first incident of February 26, 2009 to support its decision; it is clear that February 27 and not February 26 was the correct date of the incident and the deputy head provided no sensible reason for not correcting the date until this hearing. Mr. Jackson, a person with the authority to review the grievor's behaviour, clearly concluded that there was no breach of the *Code of Discipline* or the *Standards of Professional Conduct* (Exhibit E-1, tab 11). Contrary to the submissions of the deputy head, that conclusion was not an "opinion" of Mr. Jackson — it was a finding. In addition, the fact that the finding was not communicated to the grievor or his bargaining agent is not relevant. Mr. Jackson did provide the grievor with a verbal warning about his behaviour. As noted in *Penner*, dissatisfaction with suitability for continued employment can arise from conduct that could also attract a disciplinary response. There was a choice open to the CSC — discipline or termination on probation. However, once having reached a conclusion on misconduct — in this case, giving the grievor a verbal warning akin to an oral reprimand — , it is not open to the deputy head to rely on that conduct to support the termination on probation.

[117] As for the incident of April 10, 2009, the deputy head was not able to provide any direct evidence to support any of the allegations disputed by the grievor. The deputy head said that it did not know the name of the female driver until the testimony of Cst. White. It maintained that the CSC could not obtain that information because the Kingston Police Force would not release the police report. However, the deputy head provided no evidence that the CSC had asked for the name of the female driver. The deputy head did not refer me to any specific provision of any statute preventing the CSC from asking for that information. Finally, it was open to the deputy head to ask for an adjournment once it learned of the name of the female driver. Direct evidence is always preferable to hearsay evidence. In this case, the direct evidence of the grievor is the best evidence on what happened on that day. His account was not shaken on cross-examination, and I find that his account is the one to be believed.

[118] The testimony of Cst. White was of little value, and consequently, I do not need to determine his credibility. Contrary to the assertion of the deputy head, Cst. White was required to testify at this hearing — he was summoned. The evidence of what the female driver told him is hearsay and is contradicted by the direct evidence of the grievor. The questions of whether the grievor told his side of the story (Cst. White said that he did not recollect) and whether Cst. White told the grievor that he had "better take care of" the ticket or be criminally charged are not relevant to this proceeding.

[119] The deputy head's conclusion that the grievor was impersonating a police officer is not supported by the evidence. The deputy head said that the grievor approached the female driver's car "like a policeman." One would expect that, if a driver wanted to speak to someone after a near-miss accident, he or she would pull up behind the other car and approach the driver's side door. The grievor did not block the female driver's way. He did not initially show her his badge, and he did not tell her that he was a police officer. The deputy head surmised that she must have thought that he was a police officer because she called the police. No evidence was adduced to support that supposition. The fact that the grievor did not stay with the female driver until the police arrived was suggested by the deputy head as some kind of an admission of guilt. No car accident had occurred. The grievor knew that the female driver had his licence plate number, and it was not clear from the evidence if she said that she would call the police right away. There was no sense of urgency that necessitated staying at the scene.

[120] In addition, the deputy head's statement that the CSC badge looks like a police officer's badge was not supported by the evidence. I was shown the CSC badge at the hearing, but I was not shown a police badge or an image of a police badge. Under the circumstances, it is not appropriate for me to take judicial notice of what a police officer's badge looks like, since that would be a critical finding of fact.

[121] The deputy head characterized the ticket given to the grievor as a "summary conviction offence." I have reviewed the *Highway Traffic Act*, and there is no reference to "summary conviction." The ticket given to the grievor is called a "Certificate of Offence." The summary conviction procedure for the prosecution of provincial offences was replaced by the *Provincial Offences Act,* R.S.O. 1990, c. P.33. The offence that the grievor was charged with could have resulted in a fine or imprisonment. It is clearly a statutory offence. However, it is not, on its face, a summary conviction

offence. The deputy head's reliance on the grievor's conviction for a summary offence is therefore unfounded.

[122] At the hearing, the deputy head submitted that the offence of careless driving was of particular concern because driving is sometimes a condition of employment for correctional officers. Apart from the fact that the deputy head led no evidence on this point, it is not open to the deputy head to add additional reasons after the termination of employment.

[123] The deputy head also relied on a finding that the grievor had breached the *Code of Discipline* by not agreeing with the "official version" of the incidents. Ms. Morrin's initial instinct to question this ground was correct. There was no evidence that the grievor lied about any of the incidents. He obviously had a different interpretation of the events, but that does not amount to a breach of the *Code of Discipline*. This was not a legitimate ground on which to assess the grievor's suitability for continued employment.

[124] The grievor admitted that he showed his CSC badge to the female driver. This was in breach of the CSC guidelines on the use of badges. It was clear from the evidence that the grievor and other correctional officers were not aware of this directive. However, the use of official identification as a peace officer, especially a badge, for non work-related activities could be perceived by a member of the public as an abuse of power. I find that this is clearly a bona fide reason on which to assess the grievor's suitability for continued employment.

[125] There was some dispute between the parties about the ticket that the grievor received and that he pleaded guilty to. The deputy head stated that I could not consider the merits of the ticket, while the grievor said that I could. I do not need to determine if the grievor should or should not have received a ticket — the fact remains that he received one and that he did not contest it. The deputy head is relying on the fact that the grievor received a ticket and that he failed to report a statutory offence to his supervisor, contrary to the *Code of Discipline*. Therefore, whether the grievor deserved the ticket is not relevant to this finding of fact. However, the grievor's failure to report the ticket to his supervisor is clearly employment-related, as it is a breach of the *Code of Discipline* that related to his suitability as a correctional officer.

[126] There are two grounds relied on by the deputy head that relate to the grievor's suitability for employment: failing to report a ticket for a statutory offence to his supervisor and using his CSC badge while off duty. Those actions were admitted to by the grievor. The grievor has not proven that the CSC has made a decision on reasons not related to his suitability for employment, that it was a contrived reliance on the new *PSEA*.

[127] As the grievor was unable to establish that the decision to reject him on probation was arbitrary, he bears the burden of demonstrating that the termination of employment is a "sham" or a "camouflage." As noted by the Federal Court of Appeal in another context (*Dansereau v. Canada* (1990), [1991] 1 F.C. 444 (CA), at page 462) bad faith cannot be presumed and an employee seeking to provide evidence of bad faith ". . . has an especially difficult task to perform. . . ." In *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166–02–23967 (19931119), an adjudicator noted, at page 14, that, in his view:

. . .

> *. . . if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. . . .*
>
> *. . . It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith . . . keeping in mind of course that good faith should always be presumed. . . .*

. . .

[128] The deputy head relied on *Tipple* to support its position that any flaws in the investigation process are "cured" by this hearing. *Tipple* applies to grievances decided on their merits. It does not apply to jurisdictional disputes such as this one. This is particularly the case when a grievor alleges bad faith by the deputy head. This hearing cannot "cure" any errors alleged to have been made by the deputy head in bad faith.

[129] I would now like to comment on the use of the police reports. It is clear from the evidence that the CSC received police reports for both incidents. The Kingston Police Force did not authorize the release of the reports for non-law-enforcement purposes. It seems odd that the CSC obtained the police reports when it was clear from

the beginning that they would not be used for law enforcement purposes. The CSC intended to consult the reports only for employment-related reasons. It is hard to determine if the failure of the CSC to be clear about the reports' intended use was duplicitous or if it was in ignorance. Whatever the reason, it is an embarrassment to the CSC that it misused police reports in that manner. I do not have sufficient evidence about the circumstances surrounding the obtaining of the police reports to make any finding of bad faith. Mr. Costa was not called as a witness to answer whether the information that he put in his SIRs came directly from the police reports or from another source.

[130] The conduct of the investigation was also deeply flawed. The only reliable parts of the investigation report are the statements made by the grievor. The investigator reached a conclusion on the grievor's misconduct based on untested hearsay evidence and did not bother to interview either Cst. White or the female driver in the second incident. The grievor was given an opportunity to respond to the allegations which goes a long way towards addressing the imbalance in the investigation report. I do not need to address the findings in the report on the alleged incident of February 26, 2009, as I have already concluded that the CSC was not entitled to rely on those findings in its decision to terminate the grievor's employment.

[131] Considering all the evidence, the conduct of the investigation does not amount to bad faith on the part of the CSC.

[132] The fact that the deputy head relied on the *Code of Discipline* on reporting statutory offences that were not known by correctional officers at the Kingston Penitentiary does not constitute bad faith. The grievor was made aware of his obligation to abide by the *Code of Discipline*.

[133] Accordingly, I find that I do not have jurisdiction over this grievance. Given my findings on jurisdiction, I do not need to address the claim for damages by the grievor.

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

(The Order appears on the next page)

V. Order

[135] I declare that I do not have jurisdiction to hear this grievance.

[136] I order this file closed.

December 21, 2010.

Ian R. Mackenzie,
adjudicator