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Citation: 2010 PSLRB 67



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

ODA KAGIMBI

Grievor

and

**DEPUTY HEAD
(Correctional Service of Canada)**

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Herself

For the Respondent: Anne-Marie Duquette, counsel

Heard at Montreal, Quebec,
March 8 to 11, 2010.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] The grievor, Oda Kagimbi, was hired as a correctional officer (CX-01) at Cowansville Institution on December 19, 2006 after successfully completing 13 weeks of specialized training at Collège Laval. On September 17, 2007, the grievor was rejected on probation.

[2] On September 18, 2007, the grievor filed a grievance contesting her rejection on probation and alleging that it was without just and sufficient cause. The grievor requests that she be reinstated and that she be paid the salary and benefits owing. The grievance was filed with the support of her union, which later withdrew. Thus, the grievor represented herself at her grievance hearing.

[3] The following is the letter from the Warden of Cowansville Institution to the grievor describing the reasons behind the employer's decision:

[Translation]

...

REJECTION ON PROBATION

This letter is to inform you that I have carefully reviewed your actions in your capacity as a correctional officer 1 at Cowansville Institution since your hiring on December 19, 2006.

From your arrival at the institution, several reported facts have indicated that you have had difficulty performing your duties. For those reasons, we had you take a second complete two-week training session in March 2007. Despite those additional two weeks of training, no improvement was noted in your performance. You do not meet the expected objectives with respect to mastering security equipment and mastering security posts as well as the ability to learn and the ability to react to a critical incident, among others.

You were called to meetings a few times since the beginning of your probation. You were informed of your deficiencies and of what was expected of you. In addition, we offered you assistance, which you never used, despite your performance never improving.

After an analysis in good faith of your suitability for your duties, it is clear that you are not suited to hold the position for which you were hired. Therefore, I have concluded that you are unable to meet the employment requirements of a correctional officer.

Consequently, pursuant to subsection 61(1) of the Public Service Employment Act, I have decided to reject you on probation. The rejection is effective September 17, 2007 at 12:00 p.m.

You have the right to file a grievance if you believe that you have been treated unfairly or if you feel aggrieved by this decision.

I wish you the best of luck with the new challenges in your future.

France Poisson

...

II. Objection to the adjudicator's jurisdiction

[4] The Correctional Service of Canada ("the employer") objected to the adjudicator's jurisdiction to hear and decide the grievor's grievance, arguing that recourse to adjudication, pursuant to section 209 of the *Public Service Labour Relations Act (PSLRA)*, is excluded by the provisions of section 211 of the *PSLRA* in the case of a rejection under section 62 of the *Public Service Employment Act (PSEA)*.

[5] The grievor contested the employer's objection, claiming that the rejection decision was made in bad faith and in an arbitrary and abusive manner and that it was unrelated to her employment.

[6] The employer then raised a second objection to the grievor's position on the grounds that she was attempting to change the scope of the grievance by alleging bad faith on the part of the employer, which was not mentioned in her grievance. In support of its objection, the employer invoked *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[7] I held a pre-hearing conference to clarify the employer's two objections. The grievor explained that the concept of "rejection without just and sufficient cause" was broad enough to encompass the concept of an abusive rejection and a deception to deprive her of the protection accorded her by law. I took the employer's objections under reserve, subject to hearing the merits of the grievance. Given the employer's objections, the grievor had the burden of proof and therefore presented her evidence first.

III. Grievor's testimony

[8] The grievor testified in support of her grievance. On January 18, 2007, she met with her supervisor, Correctional Supervisor Benoît Leduc. He told her that he had been informed that she was experiencing problems performing her duties, that she seemed to lack confidence and that she required constant supervision. Mr. Leduc asked her if she felt comfortable at the different work posts. The grievor did not understand the meaning of the intervention because, after four weeks of work, she had not yet had the opportunity to be assigned to each post. Mr. Leduc did not mention any specific incidents where she was lacking and did not set any performance objectives or any timelines for improvement.

[9] In February 2007, Mr. Leduc met with the grievor to inform her that a group of trainees were about to start their training at Cowansville Institution and that he wanted her to take a second training session. During the second training session, Nicolas Matte, a CX-01 correctional officer, supervised the grievor and another trainee. Two weeks after the session, Suzanne Legault, the institution's assistant warden, Marc-André Boutin, a supervisor, and Francine Boudreau, a union representative and unit manager, met with the grievor. The first question was whether the training session "had gone well," and then, the discussion focused mainly on a flyer entitled, "[translation] The Enigmatic Oda," a hundred copies of which had been found in patrol cars. Mr. Leduc insisted that the grievor identify the persons whom she felt might have been behind this inappropriate act. An investigation was to have been conducted. When the grievor contacted the union representative about the incident, the representative told her that "[translation] she had to protect her members" with respect to the incident. The grievor was uncomfortable with the incident because she was never informed of the results of the investigation.

[10] The grievor testified that her colleagues made fun of her, asking her to use the institution's loudspeaker system to call certain inmates that did not exist.

[11] On August 8, 2007, the grievor received a memo from Mr. Leduc informing her that a meeting would be held with her in September 2007 to evaluate her performance. The memo stated the following: "[translation] The purpose of this meeting is to go over the deficiencies that have been pointed out to you since the beginning of your probationary period." On Sunday, September 16, 2007, Mr. Leduc called the grievor at home to ask if she would be at work the next day. She answered that she would be. At

10:00 on September 17, 2007, the grievor was on patrol when she was called to a meeting at 11:00 with the institution's warden. She was told to bring a union representative to the meeting. Taken by surprise, she asked Mr. Leduc to find her one.

[12] At the meeting, France Poisson handed her a negative performance assessment for December 19, 2006 to September 17, 2007 that she was to read sign.

[13] The assessment report attributed the following incidents to the grievor as evidence of her unsuitability:

[Translation]

...

Ms. Kagimbi has been employed as an AC1 at the CSC since 2006-12-19. Since her arrival, a number of facts reported by several employees indicated to us that Ms. Kagimbi was having difficulty carrying out her duties. The employee has also had problems adjusting since her arrival and appears to lack confidence. She requires almost constant supervision. A meeting was held with supervisors Benoit Leduc and Marc-André Boutin on 2007-01-18 to discuss the matter. After no evident improvement, the decision was made to provide the employee with a second complete training session, meaning an additional two weeks. The training supervisor reported that Ms. Kagimbi had certain difficulties. In short, the employee was unable to demonstrate safe and satisfactory performance at work.

...

Officer Kagimbi did not demonstrate during her probationary period that she had the required skills to effectively perform her duties as a correctional officer. Instead, it was evident on several occasions that she had considerable difficulty adapting, reacting and being effective in her duties. For example, in May 2007, when an inmate attempted to hang himself in the isolation unit, Ms. Kagimbi did not react, even though her colleague told her on several occasions what was taking place. She did not try to call for backup or to find a knife. She simply continued to carry out her task, which consisted of collecting the inmates' trays. Again in May 2007, she did not intervene when an inmate became threatening and aggressive in the institution's hospital. At that time, Ms. Kagimbi was on duty to ensure the safety of the medical personnel, and it was a nurse who had to act by calling for backup. Ms. Kagimbi did not move and did not try to calm the inmate. In late May 2007, she had problems controlling the barred gates at the service

entrance, and a technician was almost hit by one of the gates. In the end, the gate struck a working tractor. In short, she had a great deal of difficulty controlling the different gates. In June 2007, I was informed through a report that she had a great deal of trouble communicating using the radio and often did not seem to understand when she was being spoken to. She often asked that messages be repeated, and we had to call her several times before getting an answer. In August 2007, Ms. Kagimbi lost her handcuff key; a search was conducted, and fortunately the key was found.

In addition, Ms. Kagimbi benefitted from an additional two-week training period for a total of four weeks compared to two weeks for all other employees. She was called to meetings on several occasions to inform her of her shortcomings, and help was offered if she needed it. Despite those efforts, she never asked for assistance, and her performance did not improve.

...

Ms. Kagimbi experiences significant difficulty making decisions (see section 1). The institution's correctional supervisors do not have confidence in this employee and often have to ensure that she is in a position where she will be supervised by other employees as much as possible.

...

[14] The grievor testified that she learned of the criticisms only on September 17, 2007. She did not agree with the assessment. Not only had the unsatisfactory conduct never been brought to her attention, but also it was highly exaggerated and inaccurate. At that meeting, the grievor explained her point of view, but Ms. Poisson immediately handed her a letter of rejection on probation. Mr. Leduc arrived at the meeting a few minutes late and stated that he had based his assessment on the observation reports that he had been given. The grievor testified that the employer gave her copies of the reports in question only two years later, in preparation for the hearing.

[15] The grievor defended the alleged incidents. According to her, the assertion that she appears to lack confidence is unfounded. On the contrary, she often worked alone at certain posts, including when on patrol, at tower 2, at central control and at the main entrance. Her work was never criticized. The grievor considers the January 18, 2007 meeting inconsequential because Mr. Boutin simply asked her if she was comfortable at the different posts. He did not mention any shortcomings or areas

for improvement; nor did he set any timelines for improvement. As for the second training session, the grievor pointed out that she had not yet been assigned to all posts and that, therefore, she could not respond to such a question. She really had no choice but to take the training. She did not see the value in retaking training that she had already successfully completed.

[16] The grievor testified that radio communications were often hard to understand because of static and because they cut out during messages. She did not want to guess at what was said, so she asked for messages to be repeated until she understood what was being communicated. Mr. Boutin apparently told her that she should be able to “[translation] guess” the contents of a message based on the time of day.

[17] The grievor stated that the emergency that Officer Brunelle mentioned, about the inmate wanting to hang himself, was exaggerated, especially because of the delay of several days between the incident and the officer writing his report. When Officer Brunelle noticed that an inmate in isolation was not doing well, he went to get help. The grievor observed the inmate and waited for backup to arrive. She did not know that the inmate wanted to hang himself. No serious consequence arose from the incident other than the inmate being sent to the hospital. The grievor testified that she also completed a report about the incident but that the employer did not produce it at the hearing.

[18] In response to the criticism of not controlling an inmate in the institution’s hospital, the grievor testified that the nurse prematurely called for backup because the inmate calmed down when he noticed that the grievor was present as a correctional officer, and everything went back to normal.

[19] The grievor further testified that the incidents of operating the gates, giving a personal alarm to an inmate and providing a shift report by radio were never brought to her attention as improper, and therefore, she did not have an opportunity to improve.

[20] The grievor testified that, in her opinion, the failure by the institution’s management to set objectives for her and to set a timeline for meeting those objectives, its failure to inform her of her deficiencies and to allow her to correct her mistakes, and its failure to let her know that her employment was at risk before

terminating her probationary period represented bad faith and disguised its intention to dismiss her after her first few weeks of employment.

IV. Testimony of France Poisson

[21] Ms. Poisson was the warden at Cowansville Institution, a medium-security facility, when the grievor was rejected on probation. Ms. Poisson testified that Cowansville Institution has 22 buildings in a “campus” configuration. Since the risk of escape is lower, there are fewer controls within the perimeter. However, the outside perimeter is controlled as for a maximum-security facility. The institution has 450 inmates and 250 employees.

[22] Mr. Leduc was the manager of all correctional officers, a responsibility he carried out 24 hours a day, 7 days a week. Supervisors helped him manage each shift. Ms. Legault was the assistant warden in charge of personnel planning and training coordination.

[23] Ms. Poisson explained that correctional officers (CX-01) are assigned on a rotating basis to two types of positions: static security and dynamic security. Static security involves the constant observation and risk assessment of the inmates’ environment, including the perimeter, the entrances and the tower. Some positions require carrying a weapon. Dynamic security involves escorting inmates to the hospital or observing inmates in the yard or in the cellblocks. In either position, correctional officers must know how to prevent and anticipate the situations that arise and to react appropriately, and they must be able to identify and interpret inmate behaviour. After 12 weeks on the job, a new correctional officer must demonstrate independence and sufficient mastery of the responsibilities of each post.

[24] The supervisors observed during the grievor’s first weeks of employment that she was holding back and that she was not fully assuming her duties. Therefore, a decision was made that a second training session might be helpful in developing her skills. The second training period was a warning that the grievor’s performance was unsatisfactory and that her job was at risk. The second training session was ineffectual. The grievor still lacked confidence and had not mastered the equipment. Mr. Leduc was given the responsibility of evaluating her performance based on her complete file, observation reports and the comments of the instructor, Mr. Matte. The outcome was that the grievor was not independent and that she was unable to do the

work of the posts to which she had been assigned. The rejection was based on Mr. Leduc's assessment report. The grievor was not expecting a negative report and was taken by surprise. The reasons for the rejection on probation were explained to her at the September 17, 2007 meeting. Ms. Poisson signed the letter of rejection on probation.

V. Testimony of Nicolas Matte

[25] Mr. Matte is an CX-01 correctional officer. He has also been an instructor for six years. Mr. Matte assessed the grievor during her second training session from February 9 to 20, 2007. At the request of Mr. Boutin, the person in charge of trainees during their training, Mr. Matte prepared two observation reports about the grievor's second training session.

[26] Mr. Matte's first report covers general observations about the grievor's work and reads as follows:

[Translation]

...

Training of Officer Kagimbi, Oda

Mr. Boutin, in this report I would like to share with you my concerns about CX-1 Officer Oda Kagimbi. In my view, Ms. Kagimbi has benefitted from the second training session that we provided and the improvement in her general knowledge of CX work is evident, but I remain concerned about several issues related to her lack of security knowledge. It is my opinion that the problems experienced by Ms. Kagimbi were due to a significant lack of self-confidence, a lack of general knowledge of the environment and a lack of understanding of the language, and several situations that occurred during the training showed me that she does not, in my opinion, have the skills required for CX work and even that her presence in several posts compromises the institution's security. After 12 weeks of initial training at the personnel college, 10 weeks of work as a CX-1 and a second recruit training session of 10 days, I sincerely believe that Ms. Kagimbi is not ready to assume security posts on her own, and I do not understand how the people at the college could have believed that Ms. Kagimbi had the qualifications and skills for CX work.

*I am available should you require further information.
Nicolas Matte, Recruit Training.*

...

[27] The second report relates specific observations of the grievor's interactions and reads as follows:

[Translation]

...

Supplementary information to the 2007-03-02 report

Examples of conduct or situations that led me to write the 2007-03-02 report on Officer Kagimbi.

1. Throughout the training, Officer Kagimbi asked me very few questions (fewer than five) about the jobs that we were reviewing. I had to ask her on several occasions if she understood what was said. She seldom spoke to me during the 10 days.

2. Ms. Kagimbi did not appear to want to take part in the demonstrations that I proposed, always leaving it to trainee Nicolas Leblond to do the simulations/demonstrations. To make sure she had the correct techniques, I asked her to do a few demonstrations; she appeared very nervous and often floundered. During explanations or simulations, she always held back and seemed to not want to be involved.

3. Several times during the simulations that I forced her to do, Ms. Kagimbi demonstrated that she had no mastery of the security equipment, for example, checking the .38 revolver, using the Garrett metal detector at the main entrance or handling shackles.

4. At several of the training posts, I realized that Ms. Kagimbi did not understand the general safety context of the CX work or that she was too uncomfortable to be able to act safely.

During training on the metal detector at the visitors' entrance, Ms. Kagimbi did not want to use the Garrett on employees entering the institution, preferring to let trainee Leblond search them. After about 45 minutes, trainee Leblond gave the Garrett to Ms. Kagimbi giving her no choice but to scan the people entering. When Ms. Kagimbi tried to search the people, she never spoke to them, preferring to keep her distance. When the detector went off, she let the people go through as though nothing had happened. If the people did not stop, she let them go through. Even after two training sessions and several months of experience, any one would have been able to enter with anything.

...

[28] At the hearing, Mr. Matte added that, during the second training session, he explained to the grievor the aspects of the work that she should have learned during her training at the college and that it was not his responsibility to redo that training. Mr. Matte testified that, in most instances, the grievor did not actively take part in the work and always left it to the recruit with whom she was paired to do the demonstrations and practical activities. He also observed that, in general, the grievor did not really join with the group of correctional officers, that she did not respond well to radio communications and that she lacked self-confidence.

[29] Under cross-examination, Mr. Matte explained that the tasks of all posts had been reviewed in detail during the second training session and that he expected the grievor to ask questions if she did not understand the work or if she needed clarification. In addition, detailed “post orders” are available either at the location of a post or electronically.

[30] Generally, no report is made if the training is successful. In the grievor’s case, Mr. Matte prepared two reports at Mr. Boutin’s request in which he backed up his assessment of the grievor’s lack of confidence and of her lack of intervention with people with whom she needed to interact at the different posts. His assessment of the grievor’s linguistic problems was based on her problems understanding radio communications. He based his assessment on her lack of knowledge of the prison environment and the inappropriate way in which she dealt with the security environment at security posts.

VI. Testimony of Benoît Leduc

[31] Mr. Leduc was the supervisor responsible for the grievor at the time of her rejection on probation. He prepared the correctional officers’ assignments for each shift and approved overtime and handled emergencies, support to emergencies and replacements. Mr. Leduc was responsible for monitoring the grievor’s work and her attendance. He worked 12-hour shifts but not necessarily during the same shift as the grievor. He had little contact with the grievor and had to rely on the observations of the 14 front-line correctional supervisors with respect to the quality of her work. The grievor’s performance reports were prepared at the request of the immediate supervisors.

[32] Mr. Leduc received the following general comments from the supervisors: a lack of knowledge and inappropriate conduct at security posts, with escorts, in handling firearms, and in assessing inmates' behaviour. On two occasions, Mr. Leduc asked the grievor how her work was going and offered her assistance if required. He had two conversations with her, one about her lack of spontaneity in relation to radio communications and the other about her lack of interaction with him and her colleagues.

[33] Before proposing the training session, Mr. Leduc met with the grievor to explain her shortcomings and to suggest that she find someone she trusted to help her understand the work. He told her not to hesitate to speak to the front-line correctional supervisors or to him if she had questions. The grievor declined to have a union representative present for this discussion. The grievor did not question the fact that she had to repeat the training, and she did not react to Mr. Leduc's suggestions. An offer of a second training session is not common practice and signalled to the grievor that she had to improve if she wanted to successfully complete her probationary period.

[34] Mr. Leduc asked Mr. Boutin to prepare an assessment report on the training session. At her request, he gave the grievor time to gain some experience. However, the negative reports about her performance continued. The grievor did not appear to understand the risks associated with the work and did not take certain situations seriously. Mr. Leduc mentioned the following incidents, which occurred during the training, as evidence: taking no action to control an inmate during an escort, damaging a barred gate because she did not know how to operate it correctly, providing a personal alarm to an inmate, taking no action when an inmate indicated that he was going to hang himself, failing to respond in a timely manner to a radio communication when she was patrolling the exterior perimeter, and losing a handcuff key.

[35] Although no incident was major when it occurred, Mr. Leduc felt that each was serious enough and that other similar incidents could eventually compromise the security of the institution. According to Mr. Leduc, the monthly incidents that followed a second, closely supervised, training session, along with the lack of general confidence, independence and integration observed by other supervisors, indicated that the grievor did not have the predisposition to become a correctional officer.

Therefore, he prepared an assessment report based on those factors, which was given to the grievor on September 17, 2007.

[36] Under cross-examination, Mr. Leduc testified that he did not make the decision to terminate the grievor after the second training session because, in a conversation with her shortly afterwards, she requested time to become familiar with the work. Mr. Leduc added that it was not the employer's job to re-teach what had been taught at the college and that any correctional officer, once sworn in, must quickly integrate once he or she has worked at each post. The supervisor's job is not to directly monitor each employee or to meet with him or her for each incident, but rather to be available to answer questions, if necessary. The correctional officer is responsible for taking the initiative if he or she does not understand the task or is having problems.

[37] Mr. Leduc explained that a log is kept where all incidents are recorded. It is part of the daily morning briefings. Specific reports follow in a timely manner. Mr. Leduc also explained that there are certain critical aspects of a correctional officer's (CX-01) work relating to the safety and security of the institution and to all employees, including working at the institution's entrance, patrolling the sectors, reacting appropriately in emergencies, handling firearms correctly, and radio communications. Success at the college is not a guarantee of success as a correctional officer in an institution.

VII. Employer's objection to the presentation of rebuttal evidence

[38] The employer objected to the grievor presenting rebuttal evidence on the grounds that she had not shown that there had been camouflage, improbity or bad faith and that, consequently, there was no evidence from the employer to refute. It referred to *Guest et al. vs. Canada Customs and Revenue Agency*, 2003 PSLRB 89, in support of its position.

[39] I dismissed the employer's objection on the ground that, under procedural rules, since the grievor presented her evidence first, she must have an opportunity to respond to the employer's evidence, if applicable. I explained to the grievor that rebuttal evidence is used to respond to new facts raised by the employer or to explain contradictions, but not to adduce new evidence or evidence that could have been adduced initially. I suspended the hearing.

[40] The grievor decided not to take advantage of this opportunity and chose to proceed directly with her arguments.

VIII. Summary of the arguments

A. For the grievor

[41] The grievor argued that she was terminated for unfair reasons. First, Mr. Leduc asked for reports but did not make any effort to verify the facts, so his assessment of the incidents was arbitrary. Making her retake training that she had already completed successfully, rather than pointing out areas for improvement, showed malice. The reports were full of unfounded statements, and the incidents were exaggerated. The purpose of the second training session and the subsequent reports was merely to support the employer's decision to reject her.

[42] The grievor pointed out that the reasons for the rejection on probation are not in keeping with the criteria set out in established case law. The grievor was never informed of the employer's expectations, and she was never advised of her deficiencies. The grievor did not receive the support required to improve and to achieve specific objectives. The employer did not give her reasonable time to improve and did not warn her that her employment was at risk. Having had only a few months, the employee did not have the opportunity to fully learn the responsibilities of the different posts before the employer decided to terminate her employment. The grievor was unaware of her deficiencies before the September 17, 2007 meeting, the day of her rejection.

[43] The reports used as the basis for her rejection were prepared without her knowledge, and she did not have an opportunity to contest them or to re-establish the facts. In evaluating her performance, the employer disregarded the discomfort created by the flyer about her, "[translation] The Enigmatic Oda," which had circulated, and the teasing that she had experienced because of the "false" list of inmates whom she was asked to call on the intercom system.

[44] The grievor argued that the incidents reported by certain employees were merely hearsay and that she was never informed of them. Therefore, she did not have an opportunity to improve her performance. She further argued that the employer's statement that she "[translation] appeared to lack confidence" is a value judgment unsupported by fact. The grievor disagreed that she required constant supervision

because she often worked alone when on patrol, in the tower, in the control centre or at the main entrance.

[45] The grievor argued that rejection on probation amounts to capital punishment in the labour relations context, and consequently, the employer's decision must have been made for just and sufficient cause and in good faith. The grievor claimed that, on the contrary, her rejection was not justified by the circumstances and that she was rejected in a cavalier manner without warning. The grievor argued that the people she trusted belittled her rather than helping ensure her success.

[46] In support of her position that her rejection was unjustified, the grievor referred me to *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, and *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52.

B. For the employer

[47] The employer argued that the grievor was rejected on probation because she was unable to achieve the employment objectives. At the September 17, 2007 meeting, the employer explained to the grievor the reasons for the rejection. It argued that a grievance against a rejection on probation under section 62 of the *Public Service Employment Act*, although it may be filed, is excluded from an adjudicator's jurisdiction under section 211 of the *PSLRA*.

[48] After successfully completing a 13-week training program at Collège Laval, the grievor signed an offer of employment, which provided for a 12-month probationary period. She signed her work description, which set out her work objectives.

[49] The orders for each job post are posted. Mr. Matte reviewed them in detail with the grievor during her second training session. Although the grievor successfully completed the college training, it did not guarantee her long-term employment. She had to prove herself during the probationary period.

[50] The grievor's difficulties were evident from the initial weeks of her employment. The grievor was unable to respond to communications in a timely manner. She stated that the line would cut out, and she asked for messages to be repeated, sometimes more than once. The grievor kept to herself and did not associate with other officers.

Despite several invitations by her supervisor, Mr. Leduc, the grievor did not seek him out to discuss her work or to tell him that things were not going well.

[51] Mr. Leduc, the supervisor responsible for the grievor, did not always work at the same time as the grievor. However, that did not prevent the grievor from speaking with the front-line correctional supervisors to enhance her knowledge and to help her feel more comfortable at each post.

[52] The flyer entitled “[translation] The Enigmatic Oda” was taken very seriously, and management acted immediately by meeting with the persons concerned. That incident was not held against the grievor.

[53] The grievor was informed of her lack of confidence at the January 18, 2007 meeting, when the second training session was suggested. The employer offered her the support of a union representative, which she declined. The grievor should have understood that the meeting was important to her continued employment. The grievor should have known that a second training session is not often offered.

[54] Mr. Matte’s report after the training session identified the grievor’s continuing shortcomings. Even during the training, the grievor remained aloof and did not ask questions, preferring to let her co-trainee, Nicolas Leblond, handle the demonstrations. Mr. Matte commented that the grievor did not appear familiar with the basic principles of prison safety and security. Mr. Matte believed that the grievor did not have the inherent ability to become a correctional officer. Incidents involving the grievor continued after the second training session. In general, the incidents demonstrated a lack of confidence and an inability to react quickly to situations in the prison environment.

[55] In spite of everything, at the grievor’s request, Mr. Leduc allowed her more time to assimilate the information taught by Mr. Matte. During that time, the evaluation period continued, and the number of incidents grew.

[56] Mr. Leduc recommended that the grievor’s probation be terminated based on Mr. Matte’s two reports and on seven other reports. All the reports identify employment-related problems. The grievor did not deny the facts but rather Mr. Leduc’s interpretation of them.

[57] The employer argued that the probationary period is a warning. That warning is part of the letter of offer of employment. The rules governing the probationary period differ from those that apply to an indeterminate position. During probation, the employer has considerable leeway in assessing the grievor's performance. The employer must consider the probationary period as a whole and not just isolated incidents. In this case, the employer determined that the grievor had not adapted to the work environment, despite all the available assistance. The employer did not have to prove a fault. The employment-related reason is clear and is not a camouflage.

[58] In support of its position, the employer cited the following decisions: *Burchill; Chaudhry v. Canada (Attorney General)*, 2008 FCA 61; *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72; *Canada (Attorney General) v. Penner*, [1989] F.C.J. No. 461 (QL) (C.A.); *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529; *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (QL) (T.D.); *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175; *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91; *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73; *Dalen v. Deputy Head (Correctional Service of Canada)*, 2006 PSLRB 73; and *Holloway v. Treasury Board (Environment Canada)*, PSLRB File No. 166-02-23676 (19930702).

IX. Reasons

[59] *Jacmain v. Attorney General et al.*, [1978] 2 S.C.R. 15, *Penner* and *Leonarduzzi* effectively summarize the legal context governing the jurisdiction of an adjudicator appointed under the *PSLRA* in cases of rejection on probation. The applicable principles are not the same as those governing the termination of an employee appointed for an indeterminate period.

[60] Subsection 62(1) of the *PSEA* stipulates as follows that the deputy head may reject an employee at any time while on probation:

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

...

[61] Although section 209 of the *PSLRA* provides that an employee may refer a termination grievance to adjudication under the circumstances that it details, section 211 excludes from adjudication a termination under the *PSEA*, and notably, a rejection on probation.

[62] While those provisions appear definitive at first glance, simply claiming rejection on probation pursuant to subsection 62(1) of the *PSEA* does not automatically extinguish an adjudicator's jurisdiction. However, that jurisdiction is limited to verifying that the decision to reject the employee on probation was made in good faith and for employment-related reasons.

[63] In *Penner*, the Federal Court of Appeal reiterated that the purpose of the probationary period is to enable the employer to assess an employee's suitability for a job. If the employee does not have the necessary aptitudes, he or she may be rejected without recourse to adjudication. In *Jacmain*, it was clearly stated that the employer's decision must have been made in good faith and, if that is the case, the adjudicator is without jurisdiction over a rejection on probation. In *Leonarduzzi*, the Federal Court ruled that, if the reason for the rejection is related to the employee's employment, such as his or her performance or conduct, the employer does not have to justify the rejection as appropriate in the circumstances. Thus, the employer does not have to adduce evidence of just cause but simply some evidence that the rejection was made for employment issues and not for some other purpose (see *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139).

[64] Given the position of the courts, the bar is high for a grievor alleging that his or her termination resulted from a deception or camouflage or that it was made in bad faith. In light of the exclusion wording of section 211 of the *PSLRA*, the grievor had the burden of proof of demonstrating that, on the balance of the evidence, the employer acted in bad faith. In *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33, the adjudicator pointed out that the employer does not have to follow the disciplinary process during the probationary period but may reject the employee for an employment-related reason. However, the employer may not simply invent an employment-related reason to camouflage other reasons that had nothing to do with the employee's aptitude to perform the work (see *Dhaliwal*).

[65] I share the opinion expressed in *Maqsood* that, even if the employer errs in deciding to terminate the probationary period, the rejection cannot be contested if the reasons for the decision are employment related.

[66] In this case, the employer stated as reasons for rejection the grievor's inability to achieve expected objectives with respect to the mastery of security equipment and the mastery of security posts as well the ability to learn and the ability to react to a critical incident.

[67] In light of the circumstances of this case, I find that the grievor did not demonstrate that the employer's decision to reject her on probation was made in bad faith. As was required, the employer adduced enough evidence that the rejection was related to employment issues and not for some other purpose.

[68] I was not convinced that the second training session that the grievor was required to attend was unreasonable in this case. The grievor did not object when the second session was suggested to her, and she did not raise the issue with the instructor. Indeed, she had little discussion of the subject with Mr. Leduc or with Mr. Matte. It is too late at the time of her rejection on probation, some six months later, to object to the employer's decision.

[69] The incidents for which the grievor was criticized were not imaginary since she did not deny them. She contested Mr. Leduc's interpretation of the facts. It is my view that Mr. Leduc did not need to investigate each incident and to meet with the grievor. Mr. Leduc testified that the front-line supervisors were responsible for following up on the incidents, and the grievor did not adduce any evidence other than her testimony that the supervisors failed to follow up. The grievor called Mr. Blanchard to testify, who spoke favourably of the grievor's performance. However, Mr. Blanchard did not witness the incidents alleged against the grievor, and therefore, his testimony does not serve to corroborate the grievor's version of the facts.

[70] The grievor did not demonstrate that the performance standards applied to her were different from those applied to other correctional officers. To explain, Ms. Poisson testified that, after 12 weeks of work, all new correctional officers must demonstrate independence and adequate mastery of the responsibilities of each post. Mr. Leduc testified that the employer does not re-teach the college's training and that a correctional officer must integrate quickly, with the assistance of a superior or the

front-line correctional supervisors to answer questions, if needed. The correctional officer is responsible for asking questions if he or she does not understand the task or is having problems.

[71] The prison environment is unforgiving, and mistakes can have serious, or even fatal, consequences. A correctional officer is responsible for not only his or her own safety but also that of his or her colleagues. The 13-week course at the college is the first rigorous step, and the probationary period in the institution is the second. As Mr. Leduc indicated, successfully completing the college training does not guarantee a successful probation within an institutional environment. The employer cannot hesitate if it believes that the probationary employee is not suitable for the job. Nor can it compromise its responsibility for the security of an institution if it believes that the employee is not able to perform the assigned duties.

[72] As stated earlier in this decision, the criteria governing the probationary period are different from those governing an employee appointed for an indeterminate period. The employer is required to assess the employee's performance, but it does not have to support the employee, other than providing him or her with the opportunity to demonstrate that he or she has the necessary abilities to perform the job. As per *Penner*, and contrary to the principles governing terminating an employee appointed for an indeterminate period, the employer does not have to counsel or warn the employee. The probationary period is a warning that the employer expects exemplary performance, because it will decide based on that period whether to confirm employment for an indeterminate period once the probationary period has been completed.

[73] Even though the grievor stated that she was surprised by the employer's decision to reject her, because she was not informed of the negative reports about her, it is my opinion that the element of surprise does not make the employer's decision a deception or camouflage, given that the reasons invoked were employment related. The grievor could have been informed of the results of the second training session had she asked her supervisor. This was one of Mr. Leduc's criticisms concerning her lack of interest and involvement with her performance.

[74] In addition, the grievor did not deny the incidents for which she was criticized but rather challenged their interpretation. The employer has considerable leeway when interpreting facts because it will need to abide with the consequences of its decision.

The employer does not have to interpret the facts exactly, insofar as the facts are indeed related to the grievor's employment, performance or conduct. If they are, the rejection on probation will be judged as conforming with the principles set out in the legislation, as interpreted by case law.

[75] Although this approach may seem arbitrary and may seem to leave the adjudicator with no discretion, it is the principle that the federal public service has chosen to apply in assessing the probationary period. As an adjudicator, my jurisdiction is drawn from the legislative framework, and I have no authority to rule outside the limits imposed on me.

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

(The Order appears on the next page)

X. Order

[77] The grievance is dismissed.

May 19, 2010.

PSLRB Translation

**Michele A. Pineau,
adjudicator**