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Citation: 2011 PSLRB 117

Public Service Labour Relations Act

Before an adjudicator

BETWEEN

PELLETIER ET AL.

Grievors

and

TREASURY BOARD
(Department of Human Resources and Skills Development)

Employer

Indexed as
Pelletier et al. v. Treasury Board (Department of Human Resources and Skills Development)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievors: Chloé Charbonneau-Jobin, Professional Institute of the Public Service of Canada

For the Employer: Anne-Marie Duquette, counsel

Decided on the basis of written submissions
Filed June 17 and July 8 and 13, 2011.

I. Individual grievances referred to adjudication

[1] Charles Pelletier, Joseph Robillard, Keith Austin and Ken Turner ("the grievors"), who at all material times were employed in the Innovation, Information and Technology Branch ("IITB") of the Department of Human Resources and Skills Development ("the employer"), responded to an internal job opportunity advertisement for a collective staffing process posted in March 2007. Each grievor filed a grievance contesting the employer's use of a document in the assessment of his candidacy. They were filed on the following dates: Mr. Pelletier on July 25, 2008 (PSLRB File No. 566-02-3836); Mr. Turner on August 15, 2008 (PSLRB File No. 566-02-3837); Mr. Robillard on September 19, 2008 (PSLRB File No. 566-02-3838); and Mr. Austin on August 26, 2008 (PSLRB File No. 566-02-3839).

[2] The grievances alleged that a component of the selection process was not conducted in accordance with article 38 of the Computer Systems Group collective agreement, which had an expiry date of December 21, 2010 ("the collective agreement"). Among the corrective measures requested by each grievor was that their assessments be re-evaluated to allow them entry into the first pool and that their assessments be conducted in accordance with article 38. An additional measure requested by Mr. Turner was that he be indeterminately staffed in his then-current acting position. Article 38, entitled "Employee Performance Review and Employee Files," reads as follows:

> ***ARTICLE 38***
>
> ***EMPLOYEE PERFORMANCE REVIEW AND EMPLOYEE FILES***
>
> ***38.01*** *For the purpose of this Article:*
>
> *(a) a formal assessment and/or appraisal of an employee's performance means any written assessment and/or appraisal by any supervisor of how well the employee has performed his assigned tasks during a specified period in the past;*
>
> *(b) formal assessments and/or appraisals of employee performance shall be recorded on a form prescribed by the Employer for this purpose.*

> ***38.02***
>
> *(a) When a formal assessment of an employee's performance is made, the employee concerned must be given an opportunity to sign the assessment form in question upon its completion to indicate that its contents have been read. An employee's signature on his assessment form shall be considered to be an indication only that its contents have been read and shall not indicate his concurrence with the statements contained on the form. A copy of the employee's assessment form shall be provided to him at the time the assessment is signed by the employee.*
>
> *(b) The Employer's representative(s) who assess an employee's performance must have observed or been aware of the employee's performance for at least one-half (1/2) of the period for which the employee's performance is evaluated.*
>
> *(c) An employee has the right to make written comments to be attached to the performance review form.*
>
> ***38.03*** *When an employee disagrees with the assessment and/or appraisal of his work he shall have the right to present written counter arguments to the manager(s) or committee(s) responsible for the assessment and/or appraisal decision.*
>
> ***38.04*** *Upon written request of an employee, the personnel file of that employee shall be made available once per year for his examination in the presence of an authorized representative of the Employer.*
>
> ***38.05*** *When a report pertaining to an employee's performance or conduct is placed on that employee's personnel file, the employee concerned shall be given an opportunity to:*
>
> *(a) sign the report in question to indicate that its contents have been read;*
>
> (b) *submit such written representations as the employee may deem appropriate concerning the report and to have such written representations attached to the report.*

[3] The grievances were presented at the first and third levels of the grievance process. At each level, the employer stated that, under subsection 208(2) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (“the *PSLRA*”), an adjudicator lacked jurisdiction to hear the grievances, as a redress mechanism for selection processes was provided under the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (“the

PSEA"). At the third level, the employer also stated, that in its view, a performance review, as defined by the collective agreement, had not been completed.

[4] The grievors referred their grievances to adjudication under paragraph 209(1) (*a*) of the *Act* on May 31, 2010 with the support of their bargaining agent, the Professional Institute of the Public Service of Canada. The Chairperson of the Public Service Labour Relations Board ("the Board") referred these matters to me to hear and determine as an adjudicator.

[5] At a pre-hearing conference held at my direction, the parties agreed that the issue of the jurisdiction of an adjudicator to hear the merits of the grievances would be dealt with by written submissions. An adjudicator's authority to determine a matter without an oral hearing is provided under section 227 of the *Act*.

II. Summary of the evidence

[6] The parties submitted the following agreed statement of facts ("the ASF"), which was received by the Board on May 27, 2011:

> 1) *Charles Pelletier, Joseph Robillard, Keith Austin and Ken Turner ("the grievors") work for the Department of Human Resources and Development Skills Canada ("HRSDC") in the National Capital Region. Their positions are classified as CS-02. They are covered by the Computer Systems Group Collective Agreement between the Treasury Board and The Professional Institute of the Public Service of Canada ("the collective agreement").*
>
> 2) *In March 2007, an internal job opportunity advertisement for a collective staffing process for various positions at the CS-03 group and level was posted with the selection process number 2007-CSD-IA-NHQ-18006 (please see attached Job opportunity advertisement and statement of merit). The positions were located across the country and the staffing process was intended to create a pool of "partially qualified candidates" for CS-03 positions to be staffed.*
>
> 3) *The staffing process was open to employees employed in the Innovation, Information and Technology Branch (IITB) within the Service Canada Initiative, occupying a position across Canada and employees of the Department of Human Resources and Social Development (also known as Human Resources and Skills Development Canada) and the Service Canada Initiative occupying a position within the National Capital Region (NCR).*

> *4) This collective staffing process known as Talent Segmentation CS-03 Staffing process was part of a pilot project. The staffing process was performance-based.*
>
> *5) All screened-in candidates received a "CS-03 Collective Staffing Process Candidate's Guide" (please see attached Candidates guide) which stated at page 3: "Unlike previous processes, an exam will not be administered to qualify for the "CS-03 Essentially Qualified Pool". In its place, will be an assessment tool."*
>
> *6) The candidates had to first complete their own assessment in writing and to email the final copy to HR which was then sent to the candidates' managers.*
>
> *7) The "Candidates' Guide" indicates on page 5: "Once your Manager receives your assessment, he/she will review your assessment and evaluate you based on the five tier assessment scale. The evaluation will be based on what you have written as well as your performance."*
>
> *8) As per both the Candidates' and the "Managers' Guide, Managers were not permitted to assist candidates in completing their assessment. Instead, Managers were "encouraged to add examples of their own that demonstrate the abilities and skills and personal suitability of the candidates."*
>
> *9) None of the four grievors had the opportunity to read the assessment done by their supervisors, nor to sign it, nor to formulate written comments, nor present written counter arguments in case they disagreed with the assessment or it contained mistakes.*
>
> *10) The four individual grievances herein were referred to adjudication on May 31, 2010.*
>
> [*sic* throughout]

[7] In their initial submission, the grievors submitted additional facts and exhibits that they assert are relevant to their grievances but that had not been included in the ASF. The grievors state that, originally, eight grievances, including those of the grievors, were filed concerning the same issues and requesting the same corrective measures as those identified by the grievors in this case. The grievors state further that, during the grievance process, the grievances filed by two of the other affected employees were allowed and that the requested corrective measures were granted. The grievors point out an email issued by the employer's representative who heard the two

grievances in which he acknowledges that article 38 of the collective agreement had not been respected.

[8] In response, the employer submitted that the additional facts submitted by the grievors are irrelevant to the current proceedings and that I should not consider them, for three reasons. First, they relate to grievances that are not before me. Second, as adjudication proceedings are *de novo*, an adjudicator is not bound by a position adopted by a representative of a party during the grievance process, all the more so when the grievance in question has not been referred to adjudication. Third, the two grievances were erroneously granted by the employer's representative. The employer states that it acknowledged that error by dismissing the grievances now before me at all levels of the grievance process. The employer asserts that the grievors cannot rely on its error to found a claim that it is thus barred from arguing that the Board lacks jurisdiction to hear these grievances.

[9] The additional facts submitted by the grievors relate to grievances that are not before me. The grievors had the opportunity to propose to the employer that the additional facts should form part of the ASF. Although the issues as stated by the grievors appear similar to those identified in the grievances in this case, those grievances were not referred to adjudication; nor were they included in the ASF. Consequently, in my view I cannot consider those grievances when determining the issue of my jurisdiction to hear the four grievances that were referred to adjudication. Accordingly, for the purposes of this decision, I shall disregard the additional facts submitted by the grievors.

III. Summary of the arguments on jurisdiction

A. For the grievors

[10] The grievors submit that the essential subject matter or "pith and substance" of the grievances is the alleged violation of article 38 of the collective agreement. They state that that provision sets out a definition of a formal assessment of an employee's performance and a process of procedural fairness to be complied with by the employer when it conducts a formal assessment of an employee's performance. Accordingly, the grievors submit that the grievances are a matter of the interpretation and application of a collective agreement provision, which falls squarely within the Board's jurisdiction under paragraph 209(1)(*a*) of the *Act*.

[11] The grievors state that the employer implicitly acknowledged the Board's jurisdiction in these matters when, at the third level of the grievance process, it took the position that a performance review, as defined in the collective agreement, had not been completed. The grievors argue that the employer's position implies that, were a performance review as defined in article 38 conducted within the context of a staffing process, then any breach of the provisions of article 38 would confer jurisdiction on the Board. The grievors further argue that the fact that the performance assessments took place within the context of a staffing process has no bearing on whether article 38 applies. In support of that argument, the grievors refer to *Hureau v. Treasury Board (Department of the Environment)*, 2008 PSLRB 47, and cite the following at paragraph 25, where the adjudicator referred to the collective agreement provision applicable to that case: ". . . It is inconceivable that if a conflict in its interpretation arose that it could not be reviewed by the third party mandated to do so, namely, an adjudicator of the Board."

[12] In *Hureau*, the grievor alleged that the employer, when it provided personal references, did not comply with a provision of the applicable collective agreement setting out its related obligations.

[13] The grievors refer to the employer's denial of their grievances on the basis of subsection 208(2) of the *Act*, which was that another administrative recourse exists under the *PSEA*. The grievors submit that it is misleading to take the position that, since the staffing process provided the context in which the performance assessments took place, the matter falls within the exclusive purview of the *PSEA*. The grievors argue that the grievances allege a violation of article 38 of the collective agreement, which they maintained throughout the grievance process, and that they are not concerned with seeking redress to a staffing process. They state that article 38 is a stand-alone provision, dealing with an employee's performance assessment. In support of that argument, the grievors submit that the issue before me can be distinguished from *Swan and McDowell v. Canada Revenue Agency*, 2009 PSLRB 73, in which the adjudicator ruled that the grievors had not properly raised a violation of a collective agreement provision in their grievances and during the grievance process. The grievors further submit that this matter can be distinguished from *Malette v. Canada Revenue Agency*, 2008 PSLRB 99, in which the adjudicator found that, as the essential subject matter of the grievance concerned staffing and there was no allegation of a violation of a collective agreement provision, he lacked jurisdiction to hear the matter. In this case,

the grievors have all alleged a violation of the collective agreement on the face of their grievances. The grievors also distinguish this matter from *Brown v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 127, in which the grievor alleged discrimination concerning a staffing matter. The adjudicator in that case held that he lacked jurisdiction as a redress procedure was available to the grievor under the *PSEA*.

[14] The grievors submit that, although section 36 of the *PSEA* provides that the review of an individual's past performance and accomplishments may be used as a method of assessment, it does not alter the fact that, as the collective agreement contains a provision governing the procedure to be followed when assessing performance, it should be complied with. The grievors state that the mechanism of article 38 of the collective agreement allows an employee to present his or her point of view in the appraisal of his or her performance, thus preventing the possibility of errors or inappropriate comments appearing in the appraisal. The grievors stress that that is an important protection mechanism due to the impact that an appraisal might have on an employee's career.

[15] The grievors submit that, if the employer's preliminary objection is upheld, the effect would be to render article 38 of the collective agreement devoid of meaning. They argue that, as article 38 refers to "any written assessment and/or appraisal," to interpret that provision as concerning performance appraisals except those conducted in the context of a staffing process would not make sense. The grievors state that the assessment tool used in the collective staffing process in this case demonstrates an intention to formally assess employees' performance by, among other things, requiring that specific examples of an employee's past performance be substantiated by other individuals, referred to as "validators." The grievors submit that the term "formal" used in article 38 indicates an assessment that impacts the employee's professional development and career progression. As the assessment in question was considered when deciding whether an employee should be promoted, the grievors argue that the fact the assessment was done in the context of a staffing process does not change its nature. The grievors submit that an adjudicator of the Board does not have the authority to delete, alter or revise a collective agreement provision or to render it meaningless. On that point, they cite Brown and Beatty, *Canadian Labour Arbitration*, 3rd edition, at paragraph 2:1201.

[16] The grievors submit that the corrective measures that they seek are distinct from the grievances. The grievors state that they do not seek to have the adjudicator review the employer's assessments, which they concede is beyond the adjudicator's jurisdiction. Rather, they seek to have me determine whether the manner in which the employer conducted the assessment violated the collective agreement.

[17] To that end, the grievors submit that, to concentrate the Board's focus on article 38 of the collective agreement, they withdraw part of the relief sought, i.e., having their assessments re-evaluated, thus allowing them to enter into the pool of qualified candidates.

[18] In addition to the decisions cited earlier, the grievors refer to the following: *Bahniuk v. Canada Revenue Agency*, 2005 PSLRB 177; *Ball v. Canada Revenue Agency*, 2007 PSLRB 12; and *Ahad v. Treasury Board (Department of National Defence)*, PSSRB File Nos. 166-02-15840, 16038 and 16233 (19870126). The grievors cite these decisions for two reasons. First, they are cited as the source of the grievors' acknowledgement that the performance reviews, *per se*, are not reviewable by an adjudicator. However, the grievors point out, these decisions also confirm that an adjudicator does have the jurisdiction to determine if there has been a violation of the collective agreement in the manner in which the assessment was conducted, with bad faith and discrimination being cited as examples which would give an adjudicator jurisdiction over the issue.

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

[19] The employer submits that the essential subject matter of the grievances is not the interpretation of article 38 of the collective agreement but rather a challenge to the procedure and results of an internal selection process. The employer stresses that the corrective measures sought by the grievors clearly demonstrate that the pith and substance of the grievances is the staffing process. The employer cites *Singh v. Canada (Attorney General)*, 2001 FCT 577, in support of the argument that the requested corrective measures are beyond the jurisdiction of an adjudicator. The employer submits that the grievors' withdrawal of part of the requested corrective measures does not change that fact.

[20] The employer submits that the grievors misstated the issue by qualifying the matter as being the application and interpretation of a collective agreement provision in which the staffing process provided the contextual framework for the performance

assessments. The employer contends that the grievors are attempting to obtain a ruling on how a deputy head may conduct a selection process.

[21] The employer submits that an adjudicator lacks jurisdiction to rule on the issues of this case, as the dispute is not between the Treasury Board, as employer, and the bargaining agent, but rather between the deputy head and the unsuccessful candidates, namely, the grievors. In support of its submission, the employer traces the legislative scheme of the public service labour and employment regime, which I have set out at length as follows:

> 11. *In 1967, Parliament created a labour and employment regime. Under that regime, staff relations matters were dealt with under the* Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 and appointment matters were dealt with under the* Public Service Employment Act*, R.S.C. 1985, c. P-33. Despite a major modernization of the regime in 2003 (coming into force in 2005), the fundamental separation between labour relations matters and appointment matters remained under the* Public Service Labour Relations Act*, S.C. 2003, c.22, s.2 (the* PSLRA*) and the* Public Service Employment Act*, S.C. 2003, c.22, ss.12, 13 (the* PSEA*).*
>
> 12. *In accordance with section 29 of the* PSEA*, and subject to a few exceptions, the Public Service Commission (the Commission) has the exclusive authority to make appointments, to or from within the public service. Pursuant to subsection 15(1) of the* PSEA*, the Commission can authorize a Deputy Head to exercise the Commission's power to appoint. However, the Commission has the power to rescind or revoke such authorization (subsection 15(2)* PSEA*). In addition, the Commission has to* [*sic*] *authority to conduct investigations and audits on any matters within its jurisdiction (section 17 of the* PSEA*).*
>
> 13. *It is under the Commission's delegated authority that the Deputy Head of Human Resources and Skills Development Canada (HRSDC) launched the selection process number 2007-CSD-IA-NHQ-18006. In accordance with section 36 of the PSEA, it was decided that a document written by the candidates along with a past performance evaluation would be used as assessment methods for the selection process. Indeed, section 36 of the* PSEA *reads as follows:*
>
> > *36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine*

> *whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*
>
> *[Emphasis added]*

14. *In accordance with section 77 of the* PSEA, *following an appointment or proposition for appointment in an internal process, an unsuccessful candidate (such as the grievors) can make a complaint to the Public Service Staffing Tribunal (PSST). If a complaint is allowed, the Tribunal has the authority, subject to section 82 of the* PSEA, *"to take any corrective action that the Tribunal considers appropriate".*

15. *In the circumstances prescribed by the* PSEA, *the Commission or the Deputy Head also have* [*sic*] *the power to investigate a selection process and revoke an appointment (sections 15, 67, 68, 69).*

16. *The Treasury Board, under paragraph 7(1)(e) of the* Financial Administration Act *(*FAA*), may act for the Queen's Privy Council for Canada on all matters relating to human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it. However, such powers do not include or extend to powers in relation to staffing under the* PSEA. *The* FAA *expressly states:*

> *Powers of the Treasury Board*
>
> *11.1 (1) In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may (…)*
>
> *(2) The powers of the Treasury Board in relation to any of the matters specified in subsection (1)*
>
> *(a) do not extend to any matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers in relation to those matters on any authority or person specified in that Act; and*
>
> *(b) do not include or extend to*
>
> *(i) any power specifically conferred on the Public Service Commission under the Public Service Employment Act, or*
>
> *(ii) any process of human resources selection required to be used under the Public Service Employment Act or authorized to be used by the Public Service Commission under that Act.*

> 17. *In addition, when the Treasury Board enters into the negotiation and the signature of a collective agreement with a bargaining agent pursuant to the* FAA *and section 111 of the* PSLRA*, it cannot establish terms and conditions of employment in relation to staffing under the* PSEA*, pursuant to section 113 of the* PSLRA*.*
>
> 18. *The* PSLRA *defines the terms "collective agreement" as follows at section 2: "a "collective agreement" means an agreement in writing, entered into under Part 1 between the employer and a bargaining agent, …" In turns, the word "employer" is defined at section 2 as meaning "Her Majesty in right of Canada as represented by (a) the Treasury Board, in the case of a department named in Schedule I of the Financial Administration Act …". HRSDC is a department named in Schedule I of the* FAA*.*

[22] The employer states that an adjudicator's jurisdiction under paragraph 209(1)(*a*) of the *Act* concerns disputes between parties that have entered into a collective agreement as defined by the *Act*. As this dispute is between the deputy head exercising the authority to staff positions pursuant to the *PSEA* and the unsuccessful candidates, the employer argues that an adjudicator is without jurisdiction.

[23] The employer disagrees with the grievors' argument that upholding the employer's objection would render article 38 of the collective bargaining agreement meaningless. It argues that article 38 relates to the Treasury Board's power to manage human resources under the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*), to determine whether an employee's work is satisfactory.

[24] The employer submits that the assessment conducted in the staffing process was a selection tool used by the deputy head pursuant to section 36 of the *PSEA*, and that it did not constitute a "formal assessment" within the meaning of article 38 of the collective agreement. The employer asserts that the fact that a deputy head chooses to use employees' "past performance" as an assessment tool does not trigger the application of article 38.

[25] The employer submits that, were the Board's adjudicators to rule on a deputy head's conduct during a selection process, serious issues under the *PSEA* could potentially arise. As an example, the employer states that, as no internal staffing process is restricted to a particular group and level of employees, then, should the grievors' position prevail, a deputy head might have to treat differently the candidates

to a selection process depending on which collective agreement, if any, applied. For the employer, such a situation would contradict the principles of equity and fairness set out in the preamble to the *PSEA*.

[26] The employer distinguishes this case from *Hureau*. The employer contends that, in that case, the collective agreement clause alleged to have been violated, which concerned the employer's obligations about providing personal references for employees, did not relate to the conduct of the deputy head. In this case, states the employer, the grievors are attempting to impose an obligation on the deputy head in when using and applying the assessment tool, whereas article 38 of the collective agreement was never intended to provide terms and conditions of employment for a staffing process.

[27] The employer submits that this case is similar to *Brown*, in which the grievor alleged that the employer had violated the no-discrimination clause of a collective agreement in relation to a staffing matter. The adjudicator stated that he lacked jurisdiction as the issue concerned staffing, for which there is a redress mechanism under the *PSEA*. The employer further submits that, in this case, other procedures for redress were available under the *PSEA* and that the fact that the nature or extent of the remedies available before the Public Service Staffing Tribunal ("PSST") differs from those available to the grievors through the adjudication process is irrelevant. The only relevant consideration is whether another procedure for redress is provided under another Act of Parliament that is of some personal benefit to the grievors: *Canada (Attorney General) v. Boutilier*, [1999] 1 F.C. 459 (T.D.), at paragraph 38 to 40; upheld [2000] 3 F.C. 27 (C.A.). A matter that cannot be the object of a grievance also cannot be referred to adjudication: *Boutilier; Public Service Staff Relations Act (Canada) (Re)*, [1974] 2 F.C. 407 (C.A.); *Brown*; *Swan and McDowell*; *Malette*; and *Dhudwal et al. v. Canada Customs and Revenue Agency*, 2003 PSSRB 116.

C. <u>Grievors' rebuttal</u>

[28] The grievors state that the employer's argument that the grievances are not about the interpretation or application of the collective agreement but rather a staffing process relies on the corrective measures sought by the grievors. The grievors submit that that point is irrelevant and that, moreover, such an approach is overly narrow and technical. In support of their position, the grievors cite *Hureau*.

[29] The grievors acknowledge that an employee's right to refer a grievance to adjudication must originate in the *Act* and reiterate that they clearly indicated in their grievances and throughout the grievance process that they were grieving a matter concerning a collective agreement provision.

IV. Reasons

[30] The grievors claim that their grievances concern the interpretation or application of the collective agreement and that they referred their grievances to adjudication under paragraph 209(1)(*a*) of the *Act*, which reads 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*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award. . . .*

[31] The employer argues that the grievors were barred from presenting their grievances by subsection 208(2) of the *Act* because, for staffing matters, a redress mechanism is available to them under the *PSEA*. That provision reads as follows:

> ***208.*** *(2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the* Canadian Human Rights Act.

[32] That principle is reinforced by clause 33.02 of the collective agreement, which reads as follows:

> ***33.02 Individual Grievances***
>
> *Subject to and as provided in section 208 of the* Public Service Labour Relations Act, *an employee may present an individual grievance to the Employer if he or she feels aggrieved:*
>
> *a) by the interpretation or application, in respect of the employee, of*

> *i) a provision of a statute or regulation, or of a direction or other instrument made or issued by the Employer, that deals with terms and conditions of employment; or*
>
> *ii) a provision of the collective agreement or an arbitral award; or*
>
> *(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.*

[33] The grievances filed by each grievor were formulated identically, as follows: "I grieve that the written assessment and/or appraisal of my performance, which formed part of the CS03 Collective Staffing Process #2007-CSD-IA-NHQ-18006, was not conducted in accordance with Article 38 of the CS Group Collective Agreement."

[34] The grievors maintained that position throughout the grievance process, and the bargaining agent's cover letter along with the reference to adjudication forms identified article 38 of the collective agreement as the subject of each grievance. That fact distinguishes the grievors' situation from *Malette*, in which the adjudicator found that the essential matter of the grievance concerned staffing, as the original grievance had not alleged a violation of the applicable collective agreement.

[35] At the third level of the grievance process, the employer stated that, in its view, a performance review, as defined by the collective agreement, had not been completed. Furthermore, in its written submission, the employer argues that the assessment conducted in the staffing process was not a "formal assessment" within the meaning of clause 38.01 of the collective agreement but rather a selection tool used by the deputy head within the meaning of section 36 of the *PSEA*, which reads as follows:

> ***36.*** *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)*(a) *and subparagraph 30(2)*(b)*(i).*

[36] The employer also submits that article 38 relates to the Treasury Board's power to manage human resources under the *FAA* for the purpose of determining whether an employee's work is satisfactory and that it was never intended to provide terms and conditions of employment for a staffing process

[37] In deciding this matter, I must first determine whether the assessment conducted in the staffing process in question is, on its face, captured by the definition in clause 38.01 of the collective agreement cited earlier, which I will reproduce as follows for ease of reference:

> ***38.01*** *For the purpose of this Article:*
>
> > *(a) a formal assessment and/or appraisal of an employee's performance means any written assessment and/or appraisal by any supervisor of how well the employee has performed his assigned tasks during a specified period in the past;*
> >
> > *(b) formal assessments and/or appraisals of employee performance shall be recorded on a form prescribed by the Employer for this purpose.*

[38] Clause 38.01(a) of the collective agreement applies to the following situations: (1) any written assessment or appraisal (2) by any supervisor (3) of an employee's past performance. As stipulated in the ASF, candidates in the performance-based staffing process at issue were required to complete their own assessments in writing. They then e-mailed their assessments to Human Resources, which in turn forwarded them to the candidate's manager. The manager's duty was to review the candidate's assessment and to evaluate him or her according to a five-tier scale, as well as according to his or her past performance.

[39] That process was described as follows in section 1.1 of the *Candidate's Guide* referred to in, and attached to, the ASF:

> ***1.1 CS-03 Collective Staffing Process Overview***
>
> *You will have access to an Assessment Tool that you are to complete by responding to knowledge questions and describing examples of when you demonstrated the abilities and skills, and personal suitability criteria being assessed.*
>
> *Once you have completed your assessment in the allotted timeframe, you will be required to e-mail the final copy to . . . by 23:59 (Pacific Time) Tuesday, December 18, 2007. This e-mail will act as your electronic signature. HR will then send it off to your Manager (substantive or acting CS-04) for verification and comments. Your Manager will review/verify what you have written and will evaluate you for each essential qualification, either alone or with the help of a Team/Project Leader (CS-03), based on the following scale:*

. . .

> *Once Managers have completed reviewing the assessment and evaluating you, they will e-mail their final copy to.... HR will then forward to the Directorate Assessment Committee, regardless of the evaluation that was given.*
>
> *The Directorate Assessment Committee will review all assessments on a case by case basis and then send them to the Review Committee. The Review Committee will conduct their review, and notify HR of the status of each candidate. HR will then notify candidates whether or not they are qualified for the "Essentially Qualified Pool."*

. . .

[40] Based solely on the wording describing the assessment process set out in the ASF and the *Candidate's Guide*, I have no difficulty finding that it could be argued that the assessments completed by the grievors and the one completed by the managers meet the criteria of "... a formal assessment and/or appraisal of an employee's performance..." within the meaning of clause 38.01 of the collective agreement. Article 38 does not contain any qualification of the assessments or appraisals referred to, for example, "annual written assessment" or "quarterly written assessment." Nor does it contain wording excluding article 38 assessments from a staffing process. It simply defines a formal assessment of an employee's performance as "any written assessment and/or appraisal." In my opinion, the assessments completed by the managers following the grievors' self-evaluation within the context of the collective staffing process clearly meet that definition, as well as the criteria set out in article 38, which I have previously identified.

[41] While I have found that the wording of Article 38 arguably creates a link between the staffing process and the collective agreement, that does not dispose of the issue before me. The thrust of the employer's argument against a finding that article 38 applies to a staffing process is based on the legislative scheme and the separation of labour relations and appointment or staffing matters in the public service. The employer argues that the purpose of article 38 of the collective agreement is to allow the Treasury Board as an employer to evaluate an employee's performance as part of its labour relations obligation and that it was not intended to affect the staffing process.

[42] While paragraph 7(1)*(e)* of the *FAA* assigns responsibility to the Treasury Board for human resource management in the federal public administration with the powers set out in subsection 11.1(1) of that Act, such powers are limited by subsection 11.1(2) of the *FAA*, which states:

> ***11.1(2)*** *The powers of the Treasury Board in relation to any of the matters specified in subsection (1)*
>
> *(a) do not extend to any matter that is expressly determined, fixed, provided for, regulated or established by any Act otherwise than by the conferring of powers in relation to those matters on any authority or person specified in that Act; and*
>
> *(b) do not include or extend to*
>
> *(i) any power specifically conferred on the Public Service Commission under the* Public Service Employment Act*, or*
>
> *(ii) any process of human resources selection required to be used under the* Public Service Employment Act *or authorized to be used by the Public Service Commission under that Act.*

Furthermore, while section 111 of the *PSLRA* authorizes the Treasury Board to enter into a collective agreement with a bargaining agent, it is precluded by section 113 of the *PSLRA* from, among other things, establishing a term or condition of employment in relation to the *PSEA*. Section 113 of the *PSLRA* reads in part as follows:

> ***113.*** *A collective agreement may not, directly or indirectly, alter or eliminate any existing term or condition of employment or establish any new term or condition of employment if*
>
> *[…]*
>
> *(b) the term or condition is one that has been or may be established under the* Public Service Employment Act*, the* Public Service Superannuation Act *or the* Government Employees Compensation Act*.*

[43] As may be seen from the above provisions as well as from the history of the legislative scheme set out in the employer's argument which I have reproduced earlier in this decision, the statutory regime has clearly established two self-contained and mutually exclusive spheres of labour relations and staffing. As the Treasury Board is specifically denied the right to act in matters of staffing, it appears to me that an overlap between those two spheres is not intended by the statutory regime. In signing the collective agreement, the Treasury Board did not have the authority to bind the Public Service Commission or the deputy head in relation to any matter concerning

staffing. Accordingly, any collective agreement provisions that concern performance reviews can only refer or apply to such reviews in the context of labour relations. Thus, in my view, any inadvertent use of collective agreement language that could give rise to its importation into the staffing process cannot serve to found a grievance that contests a staffing action.

[44] In this case, while the grievors contest a portion of the staffing process via a collective agreement provision, the pith and substance of the grievances in fact concern the staffing process introduced under section 36 of the *PSEA*. Accordingly, under subsection 208(2) of the *PSLRA*, I lack jurisdiction to hear the grievances.

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

(The Order appears on the next page)

V. Order

[46] The employer's preliminary objection to jurisdiction is upheld.

[47] The grievances are dismissed.

October 20, 2011.

Steven B. Katkin,
adjudicator