Date: 20121001

File: 566-02-3950

Citation: 2012 PSLRB 103

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

BRIAN WARMAN

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Employer

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Beth Bilson, adjudicator

For the Grievor: Himself

For the Employer: Adrian Bieniasiewicz, counsel

Heard at Abbotsford, British Columbia,
June 19 and 21, 2012.

Individual grievance referred to adjudication

[1] Brian Warman ("the grievor") was hired by the Correctional Service of Canada ("the employer") as a Correctional Officer 1 ("CX-01") effective May 8, 2009. His place of employment was Mission Institution, a medium security federal penitentiary for men. The grievor was rejected on probation on April 14, 2010 and grieved the termination of his employment.

[2] Counsel for the employer made representations concerning an objection to the jurisdiction of the Public Service Labour Relations Board first raised in a letter from the employer to the Board on October 26, 2011. She noted that section 209 of the *Public Service Labour Relations Act* ("the *PSLRA*"), enacted under the *Public Service Modernization Act* ("the *PSMA*"), S.C. 2003, c. 22, s. 2, which provides for the referral of individual grievances to adjudication under certain circumstances, is subject to an exception in section 211, which reads in part as follows:

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

Section 61 of the *Public Service Employment Act* ("the new *PSEA*"), enacted under the *PSMA*, ss. 12 and 13, provides that employees appointed to a position from outside the public service will be subject to a probationary period. Section 62 of the *PSEA* indicates that during the probationary period, the employer may terminate the employee by giving notice of a specific date of termination or by paying the employee in lieu of notice.

[3] Counsel for the employer argued that these provisions make it clear that the Board has no jurisdiction to adjudicate a grievance where an employee is rejected on probation. He conceded that the jurisprudence indicates that the Board does have jurisdiction in the limited circumstance where the basis for the termination is not employment-related, and the account given by the employer is a "sham" or "camouflage" or improper reasons for termination, such as discrimination. He argued that the onus resting on the employer is to show that the circumstances of the termination match the criteria set out in the *PSEA* – that is that the grievor was an

employee at the time of the termination, that the termination occurred during the probationary period, and that the grievor was given appropriate notice of the termination or pay in lieu of notice. Though the employer is not required to establish cause for the termination, he conceded that in practice, it is usual for the employer to state some basis for the rejection on probation. The burden then shifts to the grievor to demonstrate that the basis cited by the employer is merely a disguise for an illicit motivation.

[4] As the success of the jurisdictional objection depends on a finding with as to whether the grievor is able to meet the onus of showing the grounds for the termination to be a sham or camouflage, I reserved my ruling on the objection until the hearing had been concluded.

[5] The grievor raised an issue with regard to disclosure of certain documents in the employer's possession that were the subject of a request he had made through the Access to Information and Privacy Office. The employer initially stated that it had responded to the request, and had provided much of the documentation listed in the request, though it said it had withheld some documentation it was exempted from providing. After the hearing of evidence had begun, the employer indicated that it had been advised that, though the documentation had been prepared, it appeared not to have been forwarded to the grievor. Arrangements were made to forward the documentation to the grievor electronically, and the hearing was adjourned for a day to permit him to review it. I am satisfied that the grievor had sufficient opportunity to consider the documentation and to incorporate it into his submissions at the hearing. The grievor did not raise any other objections.

Summary of the evidence

[6] The employer called two witnesses, Corinne Justason, who at the time of the grievor's employment, was the Deputy Warden of Mission Institution, and Crystal Glaister, who as Acting Correctional Manager, was the grievor's direct supervisor during the latter part of his period of employment.

[7] The grievor called one witness, Anthony Irving, a Correctional Officer 2 ("CX-02"), who was a partner of the grievor. The grievor himself elected not to give evidence, a choice he reconfirmed after the hearing was adjourned for thirty minutes to permit him to consider his options.

[8] Ms. Justason identified both the letter of offer dated May 5, 2009 (exhibit E-1), specifying that the grievor would be on probation for twelve months from the date of his appointment, and the letter dated April 14, 2010 (exhibit E-2) rejecting him on probation and indicating that he would be paid one month compensation in lieu of notice. Both letters bore the signature of the warden of Mission Institution.

[9] The letter rejecting the grievor on probation referred to three performance evaluation reports (PERs) completed by two different correctional managers during the grievor's employment. The letter stated:

> *Despite being provided feedback, both formally and informally, there was no significant improvement noted. You have been consistently encouraged to review policy and procedures as they apply to your position and have been encouraged to seek out advice from Correctional Managers and senior staff. There is little indication that you have taken any initiative to learn from your performance issues or taken responsibility for your errors.*
>
> *For these reasons, I have determined that you are not personally suitable to be employed as a Correctional Officer.*

[10] Ms. Justason testified that she handed this letter to the grievor in person on April 15, 2010, in the presence of a bargaining agent representative, Graham Walker. She did not recall that the grievor asked any questions at that time.

[11] Ms. Justason also testified about the circumstances surrounding a letter of reprimand she had issued to the grievor in September 2009. An incident which occurred on July 13, 2009 had led to an investigation; charges of misconduct were made against the grievor's then partner, who was subjected to a disciplinary suspension. Though the grievor himself was not implicated in this misconduct, the investigator reported that the grievor had not been forthcoming as a witness, and had given differing accounts of the events. Ms. Justason testified that at a disciplinary hearing, at which the grievor and a bargaining agent representative were present, the grievor said that he had been reluctant to be candid because he felt pressured by the circumstances, and acknowledged that he had been "deliberately vague" about what actually happened.

[12] Ms. Justason said that after this disciplinary hearing, the grievor was understandably anxious about what the outcome would be, as she had made it clear in the course of the hearing that an immediate rejection on probation was an option. She

said that she consulted the human resources and labour relations offices to consider what the response should be. She ultimately decided not to proceed with a rejection on probation, and issued the letter of reprimand. Ms. Justason met with the grievor to discuss the letter. In this meeting, she was blunt with him about her concerns about his failure to be forthright during the investigation into the July incident. She told him she would be watching him carefully to see whether he was developing his ethical and other abilities, and that rejection on probation was still a possibility. She said that the grievor was thankful that he would not be rejected on probation at that time, and he did not grieve the letter of reprimand.

[13] In cross-examination, the grievor asked Ms. Justason whether she remembered his saying that when he met with the investigator, he had just come back from a vacation and his memory was not clear. Ms. Justason said that she did recall that he had been on leave sometime around the investigation, but not that the grievor had suggested that this affected his memory of events. When the grievor asked whether she had "heard things about [him]" prior to the disciplinary hearing, she said that she could not recall anything other than the investigator's report, and her contact with the grievor at the disciplinary hearing itself. She also said that, as the letter of reprimand indicated, the grievor had acknowledged being "deliberately vague" during the investigation. She did consider the pressure he was under and the intimidation he might have felt as a mitigating factor, but did not think it excused what she regarded as a breach of the Code of Discipline (exhibit E-5) for correctional employees. She indicated that the decision not to reject him on probation at that early point in his employment was made in order to give him further opportunities to demonstrate integrity, civility and other attributes that would make him suitable for permanent employment.

[14] Ms. Justason testified that around the beginning of April 2009, she was provided with the PER completed by Ms. Glaister as part of the "twelve-month review" of the grievor's performance (exhibit E-7). She said that as deputy warden, she was not directly responsible for the supervision of correctional officers, who reported to correctional managers. A number of the correctional managers did report to her, and she relied on them to provide periodic assessments of the correctional officers under their supervision. She was apprised of personnel and other issues that correctional managers encountered in their supervision of correctional officers, and she played a role in shaping any recommendations to the warden when necessary.

[15] In the case of the 12-month PER concerning the grievor, Ms. Justason reviewed it carefully, as well as the rebuttal that had been provided by the grievor, who had registered his disagreement of the assessment of his performance contained in the document. She was aware of the reviews that had been done at the six month and nine month mark after the beginning of the grievor's employment, and the indications in those PERs that he had been failing to meet performance objectives in several categories. She discussed the PER with Ms. Glaister and then appended hand-written comments to the PER, concurring with the conclusion of Ms. Glaister that the grievor should be rejected on probation.

[16] Ms. Glaister testified that when the grievor was rejected on probation in April 2010, she was Acting Correctional Manager and had been his direct supervisor since sometime in September 2009. She was responsible for completing the final PER. She had also carried out his performance review nine months after he commenced his employment; the six-month review had been done by his previous supervisor, Aaron Fitzgerald.

[17] Ms. Glaister said that, as Acting Correctional Manager, she was responsible for three of the five units at Mission Institution, and supervised approximately 24 correctional officers, including both CX-01s and CX-02s. She referred to the work description for CX-01s (exhibit R-8), and explained that much of the responsibility of officers in this position is associated with "static security" – monitoring and observing inmates, searching cells for contraband and unauthorized goods, participating in mobile patrols, and making counts of inmates. An officer in the CX-02 position is more involved in "dynamic security" involving interaction with inmates, and is usually involved in programming and assessments for a caseload of a number of inmates.

[18] Ms. Glaister said that the first PER she completed for the grievor was at the nine-month mark (exhibit E-9), and it was signed by her and the grievor on October 2, 2009. She gathered information from correctional officers and correctional managers, and also drew on her own observations of the grievor. She reviewed the six-month PER that had been completed by her predecessor, Mr. Fitzgerald (exhibit E-10), and summarized that document in the body of the nine-month PER.

[19] Ms. Glaister noted that there were a number of comments in the nine-month PER to the effect that the grievor was learning and improving; on the other hand, concerns remained in certain areas, and the assessment indicated that he had failed to meet two

of the five objectives: desire to learn and change, and integrity. In the six-month PER, Mr. Fitzgerald had found that the grievor failed to meet three of the objectives: respect, desire to learn and change, and results orientation. One concern Ms. Glaister noted in her review was that the grievor tended to be very assertive in his interactions with inmates; although some degree of forcefulness was to be desired, her concern was that he was not always respectful. Another concern was a reluctance on the grievor's part to take responsibility for his own errors, and to admit that he still had things to learn about the job. In the "Action Required" section of the PER, Ms. Glaister had indicated:

> *Officer Warman needs to demonstrate that he can accept responsibility for all his actions and mistakes. Officer Warman is required to demonstrate the [sic] he can accept direction and learn from managers, MCCP [Main Communications and Control Post] and senior staff.*

[20] With regard to the discussion with the grievor about the nine-month review, Ms. Glaister testified that she could not recall saying "You're going to make a really good CX-02." She said she did wish to encourage the grievor to improve his performance. In the conversation, she remembered acknowledging his interest in the CX-02 responsibilities, but she also told him he would have to be sure to master the CX-01 duties.

[21] The grievor was invited to discuss the PER with Ms. Glaister, and they went over the document together. She indicated that she was not sure whether she had made any changes in the document at his request; she had amended several of the PERs she was doing at the same time, but was not sure whether the grievor's was one of these. In any event, he signed the PER and ticked the box indicating that he concurred with the evaluation. Ms. Glaister testified that she had told him specifically that it was his choice whether to agree with the assessment or not to agree with it.

[22] In preparing for the 12-month review, Ms. Glaister again sought information from a number of sources. She had conversations with a number of correctional officers and correctional managers, and made notes of these conversations (exhibit E-11). She tried to gather some information about the grievor's experience in the training program before he commenced his employment, but said she did not get a response from his instructors. She said that she tried to obtain a range of perspectives, and her notes indicated that she seems to have succeeded in this; some of the

employees she talked to worked more closely with the grievor than others, and there was a wide spectrum of opinion about his performance. She used the information to prepare the PER, which concluded that the grievor met only one of the five performance objectives, and which included a recommendation that the grievor be released. She reviewed the document with the grievor, who signed the document, but did not agree with its contents; he provided a rebuttal to the assessment, which was considered by Ms. Glaister in her discussions with Ms. Justason about whether the final recommendation to the warden should be to reject the grievor on probation.

[23] In the PER, Ms. Glaister noted both negative and positive comments about the grievor's performance, and recorded comments from other employees indicating that the grievor continued to develop skills. At the same time, the review recorded concerns that the grievor was resistant to direction, for example, that he challenged orders that were given to him, that he was perceived by some employees as arrogant, that he was slow to use opportunities for informal resolution of issues with inmates, and that he showed interest in taking on duties associated with the CX-02 position but did not make sufficient effort to master CX-01 duties. The earlier reviews at six months and nine months were summarized, including a reference to his part in the investigation for which he was reprimanded in September.

[24] Specific examples of performance concerns were provided. One of these was an incorrect count of inmates which necessitated a recount. Another was the grievor's failure to secure the Visits and Communications area properly when he was relieving an employee there. In both cases, the examples were presented to illustrate the grievor's failure to seek appropriate direction or information when necessary. Further examples related to his repeated use of red pen in the logbook after being told this was inappropriate, and taking an inmate to the furnace room without proper authorization.

[25] Ms. Glaister pointed out that the notes she took of conversations with other employees included both positive and negative comments about the grievor. Some employees found him to be too "nonchalant" about his duties; one employee reported him turning up with a sandwich in his hand when called for assistance, and another that he declined to respond to a request for information because he was "on his break." Others suggested that he was resistant to taking advice or direction.

[26] Other employees whose opinions were recorded in the notes, however, stated that they were impressed by the grievor's skills. They saw him not as questioning authority, but as trying to understand how things were done and how he could improve his performance.

[27] Ms. Glaister conceded that she was provided with significant positive feedback on the grievor's performance. Despite this, however, she concluded that, overall, the information she had raised serious concerns as to the grievor's suitability for employment as a correctional officer, and that his release should be recommended.

[28] Ms. Glaister was extensively cross-examined by the grievor. She conceded that she was not privy to all information concerning the grievor's activities while employed at Mission Institution. She could not know, for example, exactly when he was performing duties in the living unit to which he was regularly assigned, and when he was called to perform other duties. She said that an effort was made during the probationary period to assign CX-01s to most of the posts associated with the CX-01 position, so that they could gather the requisite skills. She expressed the view that CX-01s would normally complete their probationary period having performed in nearly all the relevant posts, although she said that no "check list" was used to record these rotations. She did not have specific knowledge of what specific posts the grievor had experience in, and the comments in the PER reflected the opinions conveyed to her by other employees that the grievor did not regularly seek out opportunities to try out the full range of duties required in the CX-01 position.

[29] For many of the assessments recorded in the final PER, she had relied on the perceptions of others, and she denied that these should be written off as "hearsay," as in a number of cases they derived from direct observations made by those providing the information to her. She indicated that in seeking out comments from other employees, she had tried to talk to employees from a wide range of positions. There were certainly others she did not talk to who might have expressed opinions, but she was satisfied that she had obtained a cross-section of opinion. Although she was not in a position to observe the grievor at all times, she did draw on her own observations of him in drawing up the PER.

[30] The grievor asked Ms. Glaister if the views of a correctional manager about an officer might be affected by seeing the name of that officer in reports provided by other officers about particular incidents, and he produced several examples

(exhibits G-3, G-4, G-5 and G-6) of Officer's Statement/Observations Reports (OSORs) where officers were identified by name in connection with particular incidents. Ms. Glaister responded that she hoped this kind of information would not cause a correctional manager to be biased. With respect to reports and the investigator's notes concerning the specific incident on July 13, 2007 that had led to the reprimand of the grievor, Ms. Glaister said she could not recall having any access to documentation in which the grievor was identified, other than the investigation report itself.

[31] Ms. Glaister said that, in the case of other recruits who were being reviewed according to the same timetable as the grievor, she followed the same process of gathering information from other employees. She admitted that she had spent more time on the grievor's assessment, because of the concerns that had been flagged in respect of his performance. By way of comparison, she stated that in only one other case had a probationary officer failed to meet a performance objective, at the six-month stage, and his performance improved after that.

[32] The grievor's witness was Mr. Irving, who testified that in his 16 years as a CX-02, he had worked with more than 20 partners. The grievor had become his partner, as he recalled, in August 2009. He had known the grievor's previous partner, whose suitability to train a new officer was, in Mr. Irving's view, "mixed." The previous partner's relationship with inmates and staff was "hot and cold," in Mr. Irving's experience.

[33] Mr. Irving testified that when he was first assigned to be the grievor's partner, he was somewhat apprehensive because he had heard that the grievor was arrogant. He stated that instead he found the grievor to have good skills, and to be questioning a lot of things out of a genuine desire to learn. He found that the grievor had some good ideas that led him to do new things. One example he gave was the grievor's suggestion as to how they might organize their rounds of inspection of the unit, which Mr. Irving felt addressed some security concerns; the practice they adopted was subsequently borrowed by other officers.

[34] Mr. Irving said that the grievor was interested in learning how to do the kinds of reports Mr. Irving had to complete for the case management of his assigned inmates. He allowed the grievor to assist him with some of the files, and felt he had learned to do these reports to an acceptable standard. He also observed incidents where the grievor took appropriate action to protect the safety of inmates and staff.

[35] Mr. Irving said that he had heard rumours about the grievor, including the rumour that he was "arrogant," and concurred with the grievor that such rumours might be a form of harassment.

[36] Mr. Irving said that he had been involved in several recounts over his career, and said that a miscount could be caused by a number of things. There had never been any disciplinary consequences for him when these miscounts had occurred.

[37] When he was approached by Ms. Glaister for an interview about the grievor's performance for the 12-month review, Mr. Irving said that he had asked to have someone present with him to witness the conversation. He said that he did not have any previous experience of his words being distorted by Ms. Glaister, but he thought that it was wise to ensure that his statements were properly recorded. He said he had heard reports about previous statements of his that had not been accurately reported. Mr. Irving said that he was not asked to comment on any probationary officers other than the grievor.

[38] Mr. Irving provided a character reference for the grievor at the time of the disciplinary investigation in the summer of 2009 (exhibit G-7). Under cross-examination, he conceded that when he wrote the letter, he had been the grievor's partner for less than two weeks, but he affirmed that he thought the statements he made at the time were accurate. He also sent an e-mail message to Ms. Justason and to the warden, Diane Knopf (exhibit G-8), when the grievor was rejected on probation, asking them to reconsider this decision, and to give the grievor another chance to demonstrate that he could succeed.

[39] Mr. Irving said that the correctional manager assigned to a unit would typically visit the unit on a daily basis, and would be called in if necessary to address specific issues in the unit. He said that these visits were typically quite brief, and expressed the opinion that it would be necessary for a correctional manager to be present on a more sustained basis to gain an accurate impression of the interaction between an officer and inmates.

[40] In cross-examination, Mr. Irving agreed that it is important for officers to be forthcoming in investigations to ensure that the truth can be known. Mr. Irving was not present at the incident that led to the investigation of the conduct of the grievor's co-worker in the summer of 2009, nor did he participate in the investigation. He had

concluded that the grievor had responded to the investigation the way he did because he was frightened, and Mr. Irving felt that the grievor could learn from the experience. After the investigation, Mr. Irving's own experience with the grievor was a positive one, and he had tried to convey this in his interview with Ms. Glaister leading up to the 12-month review. He acknowledged that his positive statements were reflected in the PER. He further testified that he had not been aware of any of the contents of the earlier reviews, or of the fact that the grievor had been assessed as failing to meet a number of objectives. Nor had he been aware of the contents of the 12-month PER when he wrote to ask for reconsideration of the grievor's rejection on probation. Under re-examination, he agreed with the grievor that performance evaluations are not "the most accurate way" of assessing performance.

Summary of the arguments

[41] The grievor argued that the assessment of him was unfair and unfounded. He said that because of this, he had been denied a real opportunity to demonstrate that he could succeed as a correctional officer. He sensed that much of the information relied on by Ms. Glaister in the 12-month review was tainted by the gossip and rumour among employees going back to the investigation of the summer of 2009. The grievor said that he was blamed by other employees because the investigation had resulted in the suspension of a co-worker. Other employees formed a hostile view of him even if they were in no position to evaluate his day-to-day performance of his duties.

[42] The grievor argued that he had borne a disciplinary penalty after the investigation and had not grieved it. He thought this should be the end of it, and that it should not still be resurfacing in the final evaluation of his probationary period some months later. He said he had explained that his blurry memory of the July 13 incident itself after his vacation was responsible for his hesitations in recounting it to the investigator, and that he thought Ms. Justason understood the pressure he was under. He also cited the example of his involvement in the recount. He said that this incident was not thoroughly investigated by supervisors, but it was still being mentioned in his final PER.

[43] The grievor said that the positive opinions contributed by people who worked with him on a day-to-day basis were basically ignored, and the resulting assessment was skewed by the influence of hearsay, rumour and innuendo. The cloud cast over

him from the time of the investigation made it impossible for him to show that he could be a good officer.

[44] Counsel for the employer reminded me of his objection to my jurisdiction in this case. He said that the purpose of a probationary period is to give the employer an opportunity to assess whether an employee is suitable for the position to which they have been appointed.

[45] Counsel for the employer said that, far from demonstrating that the employer was fabricating reasons for releasing the grievor, it had given him a number of opportunities to demonstrate that he could improve and succeed. At the time, shortly after the grievor's appointment, when the investigation report found that he had been less than forthcoming, the employer did not use this as a reason to release him, but allowed him to continue. According to the six-month assessment, the grievor was failing to meet the majority of performance objectives, but the employer did not release him at that time, instead specifying in the PER the actions the grievor should take to improve his performance. At the time of the nine-month review, the PER stated that some aspects of the grievor's performance had improved, but he was still failing to meet two of the performance objectives. Again the employer permitted him to continue, and gave him further advice about what he would need to do to succeed on probation.

[46] In the final assessment, the employer concluded that the grievor was only meeting one of the performance objectives, and this finally led to a recommendation by Ms. Glaister and Ms. Justason that he be rejected on probation. Ms. Glaister had gone to considerable lengths to obtain a range of opinions about the grievor's performance. To be sure, some of it was positive; Mr. Irving, for example, spoke highly of the grievor, as he was entitled to, but counsel for the employer noted that he was not privy to earlier performance evaluations or to the assessments of other employees.

[47] Counsel for the employer argued that the evidence falls far short of the heavy burden the grievor must meet of showing that the rejection on probation was not based on employment-related considerations.

Decision

[48] As indicated at the outset of this decision, the employer raised an objection to the jurisdiction of an adjudicator under the *PSLRA* to hear a grievance concerning the termination of a probationary appointment made under the new *PSEA*. The only circumstances under which an adjudicator would have jurisdiction would be where the decision of the employer to bring the probationary appointment to an end had been made in bad faith.

[49] In *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), the Federal Court of Appeal made comments concerning the relationship between the *Public Service Staff Relations Act* (the predecessor to the *PSLRA*) and the *PSEA* which have provided considerable guidance to the Board in approaching the jurisdictional question we are faced with here. Though the language of the *PSEA* appeared to give complete discretion to an employer to release a probationary employee without recourse, the Court, at pp. 440-441, found that it would be anomalous to regard this discretion as absolute:

> *. . . 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.*
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> *. . . 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.*

[50] Adjudicators of the Board have had numerous occasions to consider the limits of their jurisdiction in this context, and, even prior to the statutory amendments included in the *PSMA*, it is clear from the decisions of adjudicators that an allegation that the grounds cited for a decision to reject on probation were a "sham" or a "camouflage" would not be lightly accepted.

[51] In *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, an adjudicator re-examined the earlier jurisprudence of the Board in light of the statutory

amendments made in the *PSMA*. Subsection 28(2) of the *Public Service Employment Act* ("the former *PSEA*"), R.S.C. 1985, c. P-33, 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.*

[52] As cases like *Penner*, indicate, both the Board and the courts interpreted this provision by taking into account the purpose of a probationary period. In *Jacmain v. Attorney General (Can.) et al.*, [1978] 2 S.C.R. 15, at pages 38-39, the Supreme Court of Canada described the distinctive circumstances of a probationary employee:

> *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* Re United Electrical Workers & Square D Co., Ltd. *[(1956), 6 Lab. Arb. Cas. 289] at p. 292:*
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> > *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. . . .*

[53] In the case of a probationary employee, the general approach was not to view the term "for cause" in section 28 as signifying a requirement that the employer establish "just cause" in the same degree that he would have to with respect to a permanent employee covered by a collective agreement. Rather, the provision was interpreted to require the employer to make a determination in good faith – that is, a determination related to the probationary employee's suitability for long-term

employment – that the employment relationship should be terminated during the probationary period.

[54] In section 62 of the new version of the *PSEA*, reproduced earlier, any reference to "cause" was removed, and the new provision simply states that an employer may notify an employee on probation that his or her employment will be terminated at the end of a specified notice period.

[55] In *Tello*, the adjudicator considered whether this change in the language of the *PSEA* altered the considerations an adjudicator must canvass when deciding the question of jurisdiction under section 211 of the *PSLRA*. The adjudicator also considered the impact of that part of the decision of the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, dealing with the broad legal obligations of public sector employers.

[56] The adjudicator in *Tello* concluded that the effect of the decision in *Dunsmuir* was to bring nearly all public sector employment within the contractual paradigm associated with private sector employment. The significance of this is that a public sector employer is not bound by the canons of procedural fairness as understood in administrative law, but by the more minimal obligation to act in good faith that pertains to private sector employers. The employer's obligations can, of course, be altered by agreement, as they typically are for permanent employees under collective agreements.

[57] The adjudicator in *Tello* held that the employer's obligations under the new *PSEA* and the principles in *Dunsmuir* must still be assessed in light of the purpose of the probationary period:

> *[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. . . .*

[58] What has changed, according to *Tello*, at paragraph 111, is the burden of proof for the parties:

> *. . . 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.*

[59] The burden is thus no longer on an employer to establish a legitimate employment-related reason for the termination; the burden is on the grievor to show that the decision of the employer is a "contrived reliance on the *PSEA*, a sham or a camouflage." The approach outlined in *Tello* has been adopted by adjudicators in a number of subsequent decisions; see *McMath v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 42, *Ducharme v. Deputy Head (Department of Human Resources and Skills Development)*, 2010 PSLRB 136, *Boshra v. Deputy Head (Statistics Canada)*, 2011 PSLRB 97, and *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67.

[60] In this case, the grievor indicated his sense that the decision of the employer to terminate his probationary employment was triggered by gossip and rumours among his co-workers who blamed him for the suspension of his partner after the incident of July 13, 2009. He felt that it was unfair that the fallout from this incident lingered through all the subsequent assessments of his performance, and characterized the comments of other employees gathered at the time of the 12-month review as "hearsay." His only witness, Mr. Irving, attested that he had heard rumours about the grievor's difficult personality, and that his own experience of the grievor altered the preconceptions he had formed.

[61] I have concluded that the evidence put forward by the grievor falls short of meeting the onus of establishing that the employer acted in bad faith, or that the reasons it cited in its letter of termination were a sham or camouflage. The burden on a grievor in this situation is admittedly a difficult one to meet. In the case of the termination of one of the grievor's permanent co-workers, which would be governed by the just cause standards, there might indeed be limits on the significance the employer would be entitled to attach to an event early in the employee's career for which the employee had already been disciplined. The jurisprudence under both the former and the new *PSEA* make it clear that such limits do not apply in the case of a probationary employee, and the employer is entitled to take into account any factors that may bear on a judgment as to the long-term suitability of the employee.

[62] The grievor was unable to demonstrate an absence of good faith on the part of the employer. As the employer witnesses testified, they considered terminating the grievor's probationary appointment at a number of stages, including the point at which he was disciplined for failing to be forthright in the disciplinary investigation of his colleague, and after the six-month and nine-month reviews, both of which indicated that he was failing to meet important employment objectives.

[63] In preparation for the 12-month review, Ms. Glaister gathered comments from a wide range of employees. As her notes indicate, these employees expressed a variety of opinions, and had come in contact with the grievor in a variety of ways. The PER which she drafted reflected aspects of these comments which were both positive and negative about the grievor's performance. Though the grievor tried to suggest that the dissatisfaction of the employer was based on one or two incidents with which they seemed to be obsessed, the 12-month PER does not support this proposition, nor do

the six-month and nine-month PERs; they all refer to a variety of observations and examples, which ultimately led the employer to the conclusion that the employment of the grievor should not be continued. There were undoubtedly colleagues, like Mr. Irving, who saw potential in the grievor and thought he should be given a permanent appointment, but the employer was not obligated to prefer the views of co-workers who supported the grievor, and was entitled to conclude that the balance lay in favour of his termination.

[64] The grievor also suggested that Ms. Justason was really not qualified to formulate a recommendation for his termination, as she did not directly supervise him, and had had limited contact with him. As is common in complex organizations, Ms. Justason delegated significant authority in human resources matters to others, and relied on those who reported to her to carry out their responsibilities diligently. In this case, Ms. Justason expected Ms. Glaister to lay the groundwork for the final assessment, and trusted her to convey any points of significance. She discussed the assessment with Ms. Glaister, and together they agreed on the recommendation that should go to the warden. This kind of process is a common one for employers to follow, and though Ms. Justason did not herself have many opportunities to observe the performance of the grievor directly, this does not mean that her involvement in the final result rendered it arbitrary.

[65] I find that I do not have jurisdiction over this grievance.

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

(The Order appears on the next page)

Order

[67] I order the file closed.

October 1, 2012.

Beth Bilson,
adjudicator