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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JOEL BHIKOO

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Deborah M. Howes, adjudicator

For the Grievor: Ariane Pelletier and Andrea Tait, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN

For the Respondent: Adrian Bieniasiewicz, counsel

Heard at Calgary, Alberta,
October 12 to 14, 2010.
Written submissions filed September 11, 24 and 26 and October 2, 2012.

I. Grievances referred to adjudication

[1] The grievor, Joel Bhikoo, was a correctional officer with the Correctional Service of Canada ("the Service") at the Drumheller Institution ("the institution") until October 15, 2009. The Service rejected him on probation under section 62 of the *Public Service Employment Act* ("the *PSEA*"), enacted by sections 12 and 13 of the *Public Service Modernization Act*, S.C. 2003, c. 22, because he breached the *Standards of Professional Conduct in the Correctional Service of Canada* ("the *Standards*") and was not suited for continued employment.

[2] The grievor filed two grievances, which he referred to adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *PSLRA*"), enacted by section 2 of the *Public Service Modernization Act.* Both grievances refer to his rejection on probation. At the hearing, the grievor clarified that one grievance was about him being suspended during an investigation, which led to his rejection on probation. In final argument, the grievor asked that I address the grievances as they were written and that I consider both as grieving the rejection on probation, because the suspension is an issue secondary to the termination. This decision does not deal with the matter of the grievor's suspension because of his comment in final argument and because he did not address the suspension in his closing arguments.

[3] The Service raised a preliminary objection to my jurisdiction to hear the grievances about rejection on probation.

[4] To decide the question of jurisdiction, I focus on these two more specific questions:

a) Has the Service complied with the requirements of the *PSEA* when it rejected the grievor on probation?

b) Was the grievor's termination of employment a contrived reliance on the *PSEA*, a sham or a camouflage?

To address those questions, I had to hear all of the parties' evidence.

II. Summary of the arguments

A. For the Service

[5] The Service presented its case first. It asserted the *PSLRA* bars the adjudication of a grievance about a termination that falls under the *PSEA*. The grievor's rejection on probation falls under the *PSEA*. If an employer rejects an employee on probation and provides statutory notice or pay in lieu, then adjudication is barred.

[6] If the reason for rejection on probation is challenged by an employee, an employer need only show that it had an employment-related reason for the termination for an adjudicator to lack jurisdiction. The Service said it had an employment-related reason for rejecting the grievor during probation, which arose from his statements made during and after an inmate escort assignment. His actions exhibited conduct that breached the *Values and Ethics Code for the Public Service* ("the *Code*"), the *Commissioner's Directive 060 - Code of Discipline* ("Directive 060"), and the *Standards*. It asked me to dismiss both grievances for lack of jurisdiction. In support of its argument, the Service relied on the following 14 cases:

- *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33;
- *Ross v. Treasury Board (Correctional Services Canada)*, 2003 PSSRB 97;
- *Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39;
- *Arnould v. Treasury Board (Fisheries and Oceans Canada)*, 2004 PSSRB 80;
- *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 72, and *Chaudhry v. Canada (Attorney General)*, 2007 FC 389;
- *Wright v. Treasury Board (Correctional Service of Canada)*, 2005 PSLRB 139;
- *Melanson v. Deputy Head (Correctional Service of Canada)*,

2009 PSLRB 33;

- *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175;
- *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39;
- *The Queen v. Ouimet*, [1979] 1 F.C. 55 (C.A.);
- *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL);
- *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); and
- *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529.

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

[7] The grievor admitted he engaged in serious conduct but argued the Service did not provide him with a fair process before terminating his employment. He expected a lesser penalty. He expected the Service to discipline him, not reject him on probation.

[8] The grievor said I have jurisdiction over the grievances if he can prove the Service acted in bad faith, which would not accord with the *PSEA*. He claimed the Service made the decision to terminate him in bad faith. He acknowledged the Service's good faith conduct is presumed and that he must prove its alleged bad faith.

[9] The grievor asserted the Service decided to terminate him after an apparent disciplinary process that did not provide him due process, did not respect or follow the Treasury Board's *Guidelines for Discipline* ("the guidelines"), and did not provide full document disclosure. That lack of diligence is evidence of bad faith, which would give an adjudicator jurisdiction. In addition, he felt the Service imposed too harsh a penalty, considering that it did not consistently enforce the *Standards*, that he attempted to resolve the matter early and that he admitted his conduct. The grievor sought reinstatement effective either September 25, 2009 (the date of his suspension) or October 15, 2009 (the date of his termination), with full compensation. Alternatively, he asked me to reduce the sanction.

[10] In support of his argument, the grievor relied on two cases: *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311; and *Dhaliwal v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2004 PSSRB 109.

III. Reasons

A. Legislative and jurisdictional framework

[11] Employees may refer a termination grievance to adjudication if it falls within the parameters of the legislation, specifically paragraph 209(1)(*b*) of the *PSLRA*, which states:

> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> . . .
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty . . . .*

[12] Adjudicators do not have jurisdiction over every type of termination. Paragraph 211(*a*) of the *PSLRA* prohibits adjudicators from dealing with terminations under the *PSEA*. It states:

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

[13] One termination that falls under the *PSEA* is a rejection on probation. Sections 61 and 62 of the *PSEA* enable an employer to establish a probation period for employees and to reject employees during probation. Those sections read as follows:

> ***61.*** *(1) A person appointed from outside the public service is on probation for a period*
>
> *(*a*) established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial

> Administration Act*; or*
>
> *(*b*) determined by a separate agency in respect of the class of employees of which that person is a member, in the case of an organization that is a separate agency to which the Commission has exclusive authority to make appointments.*
>
> *(2) A period established pursuant to subsection (1) is not terminated by any appointment or deployment made during that period.*
>
> ***62.** (1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> *(*a*) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act*, or*
>
> *(*b*) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,*
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> *(2) Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*

[14] Several adjudicators and the Federal Court have interpreted paragraph 209(1)(*b*) and section 211 of the *PSLRA* and earlier statutory provisions dealing with rejection on probation. The cases cited at the hearing by the parties review relevant case law when dealing with a rejection on probation. However, at the time, *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, had not been decided yet.

[15] *Tello* does not alter the basic principles which an adjudicator applies to this type of case. However, it does change one aspect of the required proof. In the case law pre-*Tello,* adjudicators looked to the employer to prove that it had

an 'employment-related' reason for the rejection on probation. At paragraph 111 of *Tello*, the adjudicator held that the grievor would henceforth bear the obligation to prove the employer acted for a reason other than an 'employment-related reason' or a reason other than one relating to the grievor being unsuitable for employment. The parties take no issue to the application of *Tello* to the grievances before me.

[16] The following two legal principles apply to an adjudicator's assessment of jurisdiction in cases of rejection on probation:

- First, the adjudicator must determine whether the employee was subject to probation, whether the rejection occurred during the probation period and whether the employer gave appropriate notice or payment in lieu of notice. The employer need not establish cause.

- Second, after the employer has proven that the requirements of the *PSEA* have been met, the burden shifts to the grievor. The grievor then bears the legal and evidentiary burden of establishing that the employer's decision to reject on probation was a contrived reliance on the *PSEA*, a sham or a camouflage. That burden imposes a very high standard or threshold for the grievor to surmount to demonstrate that the rejection was not based on a *bona fide* dissatisfaction with the employee's suitability to perform the duties of his or her position (pre-*Tello* cases referred to an 'employment-related reason').

The standard of proof for both questions is a balance of probabilities. I first determine whether the Service met the requirements of the *PSEA*. I then deal with the issue of contrived reliance on the *PSEA*, sham or camouflage.

B. Applying legislative and case law principles to the decision to reject on probation

1. Has the Service met the requirements of the *PSEA*?

[17] The Service must prove the grievor was on probation, was rejected during probation and received the appropriate notice or payment in lieu of notice. The Service does not have to prove on a balance of probabilities that it

had cause to reject the grievor on probation; this is not a case of just cause for dismissal.

[18] The fact of the grievor's status on probation was undisputed. The grievor began indeterminate employment as a correctional officer with the Service on May 29, 2009. He was to serve 12 months' probation, ending on May 28, 2010. Further, the fact that the grievor's rejection occurred during his probation period was not challenged.

[19] There was also no dispute about the notice of rejection on probation provided to the grievor. On October 15, 2009, Warden Mike Hanly gave the grievor a letter of termination citing the following reasons for rejecting the grievor:

. . .

> *In making my decision, I have considered the following factors:*
> - *Your behaviour on September 14, 2009 and September 19, 2009 which resulting in you having been found to have breached the Commissioner's Directive 060;*
> - *Your lack of understanding and minimization of the seriousness of your actions; and*
> - *Concerns with your ability to adhere to the Standards of Professional Conduct.*
>
> *The expectation of Correctional Officers within the Correctional Service of Canada is that they conduct themselves in a professional and responsible manner. During your recently completed correctional training program and on the job training, you have been made repeatedly aware of the specific job duties, requirements, standards of performance and conduct expected of a Correctional Officer. Furthermore, upon receipt of your employment offer, you were provided with copies of CSC's Values and Ethics Code and the CSC Standards of Professional Conduct.*
>
> *Having considered all of the above, I have concluded you are not suited for the position of a Correctional Officer with the Correctionnal* [*sic*] *Service of Canada and that I have no alternative but to reject you on probation.*
>
> *As such, I am obliged to advise you that your employment with the Correctional Service of Canada*

> *as a Correctional Officer is terminated effective immediately, October 15, 2009. You will receive one month's pay in lieu of notice . . . .*
>
> . . .

[20] In summary, the grievor was on probation, was terminated during his probation and received the required notice of rejection on probation. The Service met the requirements of the *PSEA*.

2. Was the grievor's termination of employment a contrived reliance on the *PSEA*, a sham or a camouflage?

[21] I now turn to the allegations that the Service had a reason other than an 'employment-related reason' for the rejection on probation or acted in bad faith, which since *Tello* is restated to be a contrived reliance on the *PSEA*, a sham or a camouflage on the part of the Service. The grievor bears the legal and evidentiary burden of establishing either. Again, the burden is onerous.

[22] The grievor does not assert an alternative reason he believes motivated the Service. Rather, he implies that the Service must have had an alternative reason because of three grounds which he groups collectively under 'bad faith'. First, the Service discriminated against him by requiring a higher standard of him than of other officers and by enforcing the *Standards* against him but not consistently enforcing the *Standards* against other officers. Second, the Service did not provide him a fair process during the investigation and did not follow its investigation guidelines or provide him with full document disclosure. Third, the Service did not consider his admission of misconduct as a mitigating factor when determining its response to his misconduct; if it had considered his admission, the Service would not have rejected him on probation. These three grounds are the primary arguments advanced by the grievor in support of his argument that I have jurisdiction to deal with his grievances. For the reasons that follow, I reject each of the grievor's allegations that his termination of employment was a contrived reliance on the *PSEA*, a sham or a camouflage. I deal first with the reasons for rejection stated by the Service and then each of the grievor's argument's about a contrived reliance on the *PSEA*, a sham or a camouflage on the part of the Service.

a. Reasons for termination

[23] The Service's reasons for rejecting the grievor on probation are set out in the termination letter. The investigation report prepared by Assistant Warden, Operations Tracey Farmer and the evidence of Warden Hanly support the reasons given.

[24] I find the grievor's admitted breach of the *Standards* gave the Service a *bona fide* dissatisfaction with his suitability to perform the duties of his position. He acknowledged the seriousness of that conduct and its inappropriateness. He acknowledged that his conduct breached the *Standards* and that he put himself and his partner at risk. The details of my reasons and findings of fact on this matter follow.

[25] From the outset of his employment, the grievor was aware of his obligations as a correctional officer and agreed to carry out those obligations to the expected level. The grievor signed and returned his letter of offer, marking the portion stating that he accepted ". . . this offer and the related terms and conditions of employment." The letter of offer outlined many of the terms and conditions of employment, including that the grievor had to maintain peace officer status and that he was required to observe the *Code.*

[26] On the same day, the grievor signed a copy of the *Standards* and undertook to maintain the levels of professionalism and integrity contained in the *Standards*. They required the grievor, as an employee, to ensure at all times that his behaviour showed he was worthy of trust and confidence and that his work contributed to the protection of society. It required him to meet high standards of honesty and integrity.

[27] The grievor also attended the correctional officer training program between February and May 2009. He then reported to the institution for work. He completed his on-the-job training on May 29, 2009. His training included instruction in handling firearms safely and in conducting security escorts. The grievor was well trained and knew his responsibilities and obligations.

[28] The evidence about the two key events, the September 14 and 19, 2009 incidents of misconduct, was mostly unchallenged. The grievor admitted to

some of the alleged misconduct. He presented a different view of a few portions, and he disagreed with how his intentions were portrayed by the Service's witnesses and the documents.

[29] On September 14, 2009, the grievor and another correctional officer, Jeremy Ahearn, were assigned to conduct a security escort of an inmate to a medical appointment outside the institution. Officer Ahearn was armed, but the grievor was not. Both officers completed the escort briefing and threat-risk assessment, and signed the escort briefing instructions form. The grievor agreed to ensure the safe custody of the inmate without causing the inmate undue embarrassment. The briefing instructions form states in part:

. . .

> *2. The escorting officer(s) will be charged with and shall be responsible for the safe custody and discipline of this(hese) inmate(s). . . .*
>
> . . .
>
> *14. The escorting officer(s) will make every effort to ensure the safe custody of the inmate(s), as well as the protection of the public, while not causing undue embarrassment to the inmate(s). . . .*
>
> . . .
>
> *16. Escort officers who are authorized to carry firearms may deploy them consistent with the Situation Management Model, only when necessary and when no less violent means exist to prevent the escape of an inmate who poses an imminent or future threat of death or grievous bodily harm to anyone.*

. . .

[30] Officer Ahearn and the grievor escorted the inmate to the appointment and waited during the medical procedure. The medical staff informed them the inmate might have to urinate on the return trip and that he might have some difficulty urinating because of his medical condition.

[31] On the return trip, Officer Ahearn and the grievor stopped once in Calgary to allow the inmate to use a washroom. Near Strathmore, the inmate requested another stop. Officer Ahearn chose to stop on a road near a field outside town. The grievor stood closest to the inmate (about three to six

metres away), who was near the back door of the transport van. Officer Ahearn stood further from the inmate (about three to seven metres away) with the firearm and was about one to three metres from the grievor.

[32] The inmate moved slowly and appeared to have difficulty completing his task. He suggested the grievor might have to scare him.

[33] The grievor told Officer Ahearn he had "a way to scare [the inmate]" and asked Officer Ahearn for the firearm so that he could "make the inmate piss." Although he was smiling (and considered it funny), the grievor told Officer Ahearn he was serious. The inmate apologized for taking so much time. Officer Ahearn encouraged the inmate to take the time required because the officers were on overtime. During the stop, the grievor continually asked Officer Ahearn for the firearm, so that he could make the inmate urinate.

[34] Officer Ahearn tried to ignore the grievor's requests for the gun. He did not want to engage the inmate at that location and did not want to joke in front of him. He knew that the Service's policy prohibited him from drawing his gun except in cases involving grievous bodily harm. At one point, the grievor leaned towards Officer Ahearn, put out his hand and said, "I'm serious, give me the gun." Officer Ahearn replied, "Stop," and put his body between the grievor and the gun to prevent the grievor from taking it. Officer Ahearn suspected the inmate did not hear all the requests for the gun.

[35] In the van, with the inmate in the back behind a glass barrier, the grievor raised the matter again. He suggested it would have been funny and Officer Ahearn "should have given me the gun, I'd point it at [the inmate] and make him pee." When the officers returned to the institution, the grievor repeated his statement. Officer Ahearn ignored it.

[36] On September 19, 2009, the grievor and Officer Ahearn were in the control room in Unit 8 of the institution, with other staff present. The grievor again brought up the inmate and the gun, said that his request was serious at the time of the original event, and said that it would have been very humorous.

[37] On September 23, 2009, Officer Ahearn sought advice from Correctional Manager Dave Weiss. Officer Ahearn's primary concern was the grievor's

request to give up the firearm. Mr. Weiss recommended that he file an officer's statement and observation report. The report triggered an investigation.

[38] On September 23, 2009, Officer Ahearn told the grievor that he had filed a report about the grievor's comments. The grievor called Steve Briggs, a representative of his bargaining agent, the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN ("the bargaining agent"). Mr. Briggs said he would look into it. The grievor learned an investigation was underway from his brother, a senior correctional officer. The grievor knew he had done something wrong and expected discipline. He knew he had breached "some standards." He had threatened someone and had put himself and his partner at risk.

[39] On September 25, 2009, Mr. Briggs and the grievor went to see Assistant Warden Farmer. The grievor told Assistant Warden Farmer he wanted to talk because he had done something stupid and inappropriate. Assistant Warden Farmer did not allow the grievor to speak; instead he read out a letter from Warden Hanly suspending the grievor pending investigation and sent the grievor home.

[40] Warden Hanly ordered an investigation and suspended the grievor because he had two concerns about the reported incidents. The first was that the grievor would find humour in humiliating an inmate in medical distress. The second was that the grievor, a trained correctional officer, would ask another correctional officer to give up a sidearm for the sole purpose of embarrassing and humiliating an inmate for the grievor's own amusement. If the grievor could exercise such poor judgment, he was a risk to himself, other staff and inmates in the institution.

[41] The investigation ensued, and Assistant Warden Farmer gathered the reports prepared by Officer Ahearn, Mr. Weiss and Pat Hummel, who first interviewed the inmate. He also obtained the inmate's written complaint. Assistant Warden Farmer's investigation relied on those reports and the inmate's complaint. His report confirmed the events of September 14 and 19, 2009. It revealed that the inmate heard the grievor's comments on September 14. Assistant Warden Farmer concluded the grievor breached Directive 060 in the following four ways:

. . .

> *a) He failed to responsibility discharge his duties under paragraph 5(g) by repeatedly requesting the gun for the purpose of coercing an inmate to urinate. This contravened the use of force policy, the fire arm safety program and the situation management model which dictates appropriate staff response to inmate behaviour.*
>
> *b) His actions and statements to treat the events as funny would discredit the Department, public service and professionalism of all correctional officers, contrary to the conduct and appearance obligations in paragraph 6(c).*
>
> *c) His actions and attempts to coerce Officer Ahearn through repeated verbalizations was a disregard of policy, training and safety practices concerning fire arms. When the inmate heard the statements, it placed both officers in jeopardy that the inmate would believe the statements and decide to retaliate. This was a breach of paragraph 7(f) dealing with the relations with other staff members and established safety procedures.*
>
> *d) He breached paragraph 8(a) dealing with relationships with offenders that prohibits maltreatment, humiliation, harassment or abuse by work or action to an offender. When the inmate heard the grievor's statements, he was subject to maltreatment and humiliation for not being able to urinate, in circumstances the medical staff brought to the officers awareness.*
>
> . . .
>
> [*Sic* throughout]

[42] Finally, Assistant Warden Farmer concluded that, even though the grievor's intention was to joke, his overall conduct showed a lack of understanding about the law, policy and appropriate relationships with both staff and inmates.

[43] Warden Hanly then arranged a meeting with the grievor and his bargaining agent to obtain the grievor's perspective. The grievor admitted to making the statements in humour, which was poor judgment on his part. He denied reaching for the gun but acknowledged using his hands to talk and recognized that Officer Ahearn might have interpreted his hand gestures in an

unintended way. They arranged to meet two days later for Warden Hanly's final decision.

[44] Warden Hanly considered the investigation report and individual observation reports, as well as the grievor's rebuttal. He concluded the incident occurred and the grievor asked for a weapon so that he could intimidate or frighten an inmate into urinating. Warden Hanly concluded the grievor did not understand the seriousness of his conduct and was concerned about whether the grievor would follow standards and orders in the future. He considered the *Code,* the *Standards* and Directive 060. He concluded the grievor violated the following sections of the *Standards* and Directive 060:

- *Standards*
  - Standard one: responsible discharge of duties – to conduct oneself in a manner that reflects positively on the public service.
  - Standard two: conduct and appearance – to present oneself in a manner that promotes a professional image, both in words and actions.
  - Standard three: relationships with other staff members – to not inhibit the work of fellow employees or coerce employees to participate in illegal activity or misconduct.
  - Standard four: relationships with offenders – to promote a safe and secure workplace and to respect offenders' civil and legal rights.
- Directive 060
  - Paragraph 5(g): the grievor was prepared to use a firearm, contrary to the policies on the use of force and the safe use of firearms, for the purpose of making an inmate urinate.
  - Paragraph 6(c): he discredited the Service, tarnished its image and undermined the confidence of the public by his actions, and he negatively affected his ability to do his job in the future.
  - Paragraph 7(f): he asked a fellow officer to surrender a weapon and disregarded established safety procedures.

- Paragraph 8(a): the inmate heard the grievor's statements, which resulted in the mistreatment, humiliation, embarrassment and abuse of the inmate.
- The principal value underlying Directive 060: staff must respect the dignity of individual inmates and their ability to change.

[45] On October 15, 2009 Warden Hanly informed the grievor that he was rejected on probation.

[46] At the hearing before me, the grievor admitted that his statements were "stupid, inappropriate, and jeopardized the Code and ethics." He acknowledged that he repeated his statements more than once on September 14, 2009 and again on September 19, 2009. However, he again stated that he meant it as a joke. He called it "black humour," which the institution staff used to relieve pressure. He thought Officer Ahearn also saw the humour. The grievor denied reaching for the gun but said he talks with his hands. Initially, he knew his conduct was wrong, but he thought it would blow over.

[47] In summary, the Service determined the grievor was unsuitable for the position of a correctional officer. The grievor's conduct gave the Service grounds to hold a *bona fide* dissatisfaction with the grievor's suitability. The obligation then shifts to the grievor to demonstrate that there was another reason for his termination.

b. Discrimination

[48] The grievor first says the Service discriminated against him by requiring a higher standard of him than of other officers and it did not consistently enforce the *Standards*. While explaining his own conduct, the grievor identified instances in which he felt that Officer Ahearn or other officers had not strictly complied with standards or procedures but were not disciplined. To the grievor, it meant that the Service had treated him more harshly than others. I do not agree.

[49] None of the other officers were probationary employees and none of the instances referred to occurred during those officers' probationary period. This

distinguishes the grievor's case from the cases he would use as comparable. Such comparables may be part of a just cause analysis but the grievor's probationary employment could be terminated on notice, or payment of notice, without having to establish cause. He was not an employee who could expect to be terminated only for cause. As Justice De Granpré stressed in *Jacmain v. Attorney General (Can.) et al.*, [1978] 2 S.C.R. 15, the whole intent of a probationary period is to give an employer an opportunity to assess an employee's suitability for a position. The Service could choose to retain the grievor and use discipline to alter his behaviour, or it could choose to reject him on probation. That the Service chose the later option does not in itself demonstrate discrimination or equate to a contrived reliance on the *PSEA*, a sham or a camouflage on the part of the Service.

c. Fair process

[50] The grievor next asserted the Service acted in bad faith because it made the termination decision following a quasi-disciplinary process during which the Service did not provide him due or fair process, did not respect or follow the disciplinary investigation guidelines, and did not provide him full document disclosure. He felt he did not receive a fair process that enabled him to present his side of the story, that followed the standards for investigations, or that involved a weighting of relevant information affecting the Service's decision. He felt his interview with Warden Hanley was rushed and that he was not fairly heard. He also felt the Service should not have vetted the documents given to him because it affected his ability to respond. He says the process was so flawed that it nullifies the decision to reject him on probation.

[51] For the purposes of deciding this case, I need not determine whether a probationary employee is entitled to a fair process when being rejected on probation. However, I have examined the process that the Service led the grievor to understand it would use, as well as the provisions of the collective agreements and guidelines supplied by the grievor, and do not find any merit in the points raised by the grievor.

[52] The grievor referred to three documents that establish the process he says the Service should have used. These documents set the process and standards for investigations and disciplinary action. Whether intended or not,

the process used by the Service and communicated to the grievor in the letters from Warden Hanly mirrors the process steps and requirements in the these documents.

[53] Article 17 of the collective agreement signed by the Treasury Board and the bargaining agent on June 26, 2006 for the Correctional Services Group bargaining unit deals with:

- providing the employee at least two days' notice of and the ability for employee representation at any meeting to conduct a disciplinary hearing or render a disciplinary decision;
- allowing the employee representation at any administrative inquiry, hearing or investigation conducted by the employer where the actions of an employee may have had a bearing on the events or circumstances leading thereto;
- allowing the employee to access documentation used during the disciplinary investigation; and
- upon request, allowing the employee to tape record a disciplinary interview.

[54] Section C of Part III of the "Global Agreement" between the Service and the bargaining agent particularly deals with suspending the employee with or without pay pending the investigation, if the employee's continued presence creates a serious or immediate risk to staff, inmates, the public or the Service's reputation. It also requires an update to the suspension status every three weeks.

[55] Appendix 1 of the guidelines provides guidance to managers with respect to discipline. The guidelines do not exempt probationary employees and do not refer to rejection on probation as one of the possible outcomes of the process. I summarize the procedural requirements in this document to include the following:

- launching an investigation into alleged wrongdoing as close as possible to the relevant incident;

- conducting a fair and objective investigation that considers and provides the background information leading to the incident, input from witnesses and the employee's response, an analysis of the facts, and the conclusion as to whether or not misconduct has taken place;

- in the context of administrative due process, providing the employee information about the alleged wrongdoing and giving him or her the opportunity to respond privately;

- complying with applicable collective agreement requirements;

- allowing the employee to access documentation of the outcome of the interview, including the investigation report;

- determining whether a breach of conduct occurred before deciding the appropriate response; and

- once a decision on disciplinary action is made, informing the employee as soon as practicable.

[56] I conclude the Service followed the process the grievor said it should have followed.

[57] On September 23, 2009, Officer Ahearn reported the grievor's conduct to Mr. Weiss and then filed an observation report. Warden Hanly ordered an investigation when he first became aware of the events.

[58] On September 25, 2009, Warden Hanly suspended the grievor without pay pending the outcome of the investigation. He sent a letter to the grievor concerning a "suspension without pay pending review of allegations" which said, in part:

. . .

> *Accordingly, I will be formally reviewing the allegations and the circumstances surrounding this matter and any other relevant information that may arise as this review. This review may lead to disciplinary action up to and including demotion and/or termination of your employment. You will have the right to be represented by a person of your*

choice throughout the process.

. . .

Warden Hanley went on to explain he was suspending the grievor without pay and without access to the worksite because his presence at the institution created a serious risk to the staff or inmates or to the Service's reputation. The letter also provided the grievor notice of the allegations against him. Part III-C of the Global Agreement contemplates a suspension without pay for the reasons given.

[59] The review or investigation began as close to the incident date as possible, and Assistant Warden Farmer was an objective investigator charged with completing the review. Assistant Warden Farmer completed his report, entitled "Disciplinary Hearing Background Report" in five days. Whether this was a disciplinary investigation or a review of alleged misconduct, the Service mirrored the steps and standards in the collective agreement and guidelines. The grievor had notice of the allegations, was given the opportunity for representation and had the incident examined in a timely manner by an objective person. The review included all witnesses.

[60] On October 2, 2009, after Assistant Warden Farmer released his report, Warden Hanly sent the grievor a "Disciplinary Hearing Notice" providing the grievor written notice of a meeting set for October 9, 2009 and a vetted copy of the investigation report (including the supporting observation reports and inmate complaint). The notice informed the grievor that he could have representation at the meeting, would be able to discuss the findings and his actions, and would be able to provide clarification or a rebuttal to the finding that he breached the *Code*. It also told him that his suspension would continue for a further three weeks. At the request of the grievor, Warden Hanly rescheduled the disciplinary hearing to October 13, 2009. By taking these steps, the Service met any obligation in Article 17 of the collective agreement or the guidelines to provide the grievor with information about the allegations and an opportunity to provide his story in private. It also gave him two days' notice of such a meeting and an opportunity for representation.

[61] The grievor and Mr. Briggs attended the October 13, 2009 disciplinary hearing. Warden Hanly and Assistant Warden Farmer were present. The

interview with the grievor lasted 30 minutes. Although this meeting was labelled a "disciplinary hearing," no discipline was imposed. The grievor received a copy of the recording and a transcript, which he acknowledged was mostly accurate. From the recording and the transcript, I am satisfied the grievor and his representative were able to present information about the events at issue, the grievor's admissions and objections to any information about those events, the investigation process, and the next steps. Warden Hanly asked more than once if the grievor had more information to provide. If the grievor and Mr. Briggs felt rushed, they raised no such concerns at the meeting or in the two days following the interview before Warden Hanly met with them again. In my view, the bargaining agent's representation role cannot be limited to a silent observer if it believes the process is flawed; it should raise its process concerns at appropriate times during the process.

[62] On the matter of disclosure of documents, the Service gave to the grievor a copy of every document it relied on at the hearing before me. When the Service first provided the documents to the grievor, as part of its review process, the Service vetted the grievor's copies, by removing the names of the inmate, Officer Ahearn and Mr. Hummel, as well as any other identifying information, such as birth dates. The grievor said the vetting affected his ability to respond to the allegations. I cannot agree. The grievor knew of the events under investigation and the persons involved. His only duty on September 14, 2009 was to be an escort. The event was of limited scope and involved a few persons. The vetting removed personal identifiers, not information about the events. The grievor would have known all the details of the events. He also knew, by September 23, 2009, that Officer Ahearn had reported the incident and an investigation had begun. This enabled the grievor to revisit the events personally and to preserve his memory of the events. He was fully able to respond at the interview of October 13, 2009 and did so by admitting to most of his alleged misconduct. The vetted documents did not impair his ability to participate or to defend his actions.

[63] On October 13, 2009, the parties arranged to meet two days later for a hearing to receive Warden Hanly's final decision. On October 15, 2009, Warden Hanly, the grievor and Mr. Briggs met again, and Warden Hanly rejected the grievor on probation. Again, the Service met any obligations to

give the grievor notice and allow representation.

[64] From the beginning of the review, Warden Hanly indicated he had several different options open to him. Warden Hanly did not decide which option to select until the investigation and the grievor's own admissions established that the grievor had breached the *Standards.* This again complies with the guidelines to make a decision after all the information is available. At that point, Warden Hanly decided to reject the grievor on probation, rather than apply a disciplinary penalty.

[65] In summary, I find the evidence does not support the allegations of lack of fair process (bad faith) raised by the grievor. The evidence shows no deficiencies in the process the Service chose to use before deciding to reject the grievor on probation.

d. Effect of the admission of misconduct

[66] The grievor next argued the Service should have given him credit for admitting to his conduct. If I were dealing with the merits of a disciplinary action resulting in termination, where just cause was the test (which is not the case here), I could consider evidence about admitted conduct when assessing the proportionality of the disciplinary action. That approach is not used in rejection of probation cases, such as these grievances. In response to the grievor's conduct, the Service had a range of options open to it. It chose an option applicable only to probationary employees. That option does not enable an adjudicator to examine the proportionality of the choice exercised.

C. Conclusion

[67] This case fits squarely into the two legal principles concerning jurisdiction to deal with a grievance about rejection on probation, drawn from the *PSLRA* and the cited case law. I conclude that section 211 of the *PSLRA* bars an adjudicator from hearing the grievances because the events in both grievances involve a termination (rejection on probation) under the *PSEA*. The rejection on probation met the requirements of the *PSEA*, and the grievor was unable to prove a contrived reliance on the *PSEA*, a sham or a camouflage. As a result, I have no jurisdiction to deal further with the grievances.

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

(*The Order appears on the next page)*

IV. Order

[69] I declare that I am without jurisdiction to hear these grievances.

[70] I order the files closed.

November 9, 2012.

Deborah M. Howes,
adjudicator