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Public Service Labour Relations Act

Before an adjudicator

BETWEEN

JAMIE LYNN BARANYI

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Baranyi v. Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: Tiffani Murray, Public Service Alliance of Canada

For the Respondent: Christine Diguer, counsel

Heard at Hamilton, Ontario,
December 6 to 9, 2011, written submissions December 30, 2011,
January 13 and 20, 2012.

I. Introduction

[1] On October 15, 2007, the grievor, Jamie Lynn Baranyi, a border services officer employed by the Canada Border Services Agency (CBSA), failed a written exam. The exam was a component of the Port of Entry Recruitment Training Program (POERT). The POERT was administered on behalf of the CBSA by the Customs and Excise College at Rigaud, Quebec ("Rigaud"). The successful completion of the POERT was a condition of Ms. Baranyi's employment as a border services officer with the CBSA. Her failure eventually resulted in the termination of her employment on June 20, 2008.

II. Individual grievances referred to adjudication

[2] Ms. Baranyi's union, the Public Service Alliance of Canada (PSAC or "the union") grieved her termination. It referred this grievance to adjudication under both clauses 209(1)(b) and 209(1)(c)(i) of the *Public Service Labour Relations Act* (the *Act*) as follows:

> a. the exam procedure was defective in design and application, thereby constituting disciplinary action resulting in termination, and
>
> b. discrimination contrary to Art. 19 of the Collective Agreement between her union and the CBSA.

[3] The CBSA objected to my jurisdiction to hear the second aspect of the grievance. It stated that the matter was never raised in the grievance process. That being the case, it stated that I have no jurisdiction to hear the discrimination grievance. Only matters that have proceeded to the final level of the grievance process can be referred to adjudication.

[4] With respect to the first grievance, the CBSA stated that the grievor's termination was neither unjust nor disciplinary. The successful completion of the POERT at Rigaud was a condition of her continued employment. Ms. Baranyi failed the course. Accordingly, the CBSA was entitled to terminate her employment.

II. Summary of the evidence

[5] Because these grievances involve a termination, the CBSA was prepared to present its case first. On its behalf, I heard the evidence of Helene Helde, who was the administrator at Rigaud when Ms. Baranyi was there; Brad Beattie, who administered and marked the written exam that Ms. Baranyi failed; Lynn Murray, a facilitator and one of the instructors at Rigaud during the relevant time; Graham Noseworthy, now

retired, but Regional Director General for the Niagara Falls-Fort Erie region ("the Region") at the relevant time; and Tony Geoghegan, Acting Regional Director General of the Region at the time of Ms. Baranyi's termination in June 2008, in whose name the letter of termination was signed.

[6] I heard Ms. Baranyi's evidence on her own behalf.

[7] The parties also agreed that the evidence of Jake Baizana (for the union) and Catherine Anderson (for the CBSA) with respect to what transpired at the final- level grievance meeting on March 30, 2009 would be adduced by way of their notes of the meeting. The notes were entered as Exhibits U37 and E38 respectively.

[8] Finally, following the completion of the oral testimony on December 9, 2011, I received extensive written briefs from counsel for the CBSA (dated December 30, 2011 and January 20, 2012) and for the union on Ms. Baranyi's behalf (dated January 13, 2012).

[9] I must say that there was little dispute among the witnesses as to what happened. I see no point in providing an exhaustive précis of their testimonies. It is enough in my view if I set out the facts as I find them to be based on that evidence. In one or two areas, the testimonies of the witnesses and Ms. Baranyi diverged as to what happened. In those cases, I will set out and evaluate the testimony in more detail.

A. <u>The Background facts</u>

[10] Ms. Baranyi testified in direct that she was diagnosed with endometriosis in 1999. The condition included the development from time to time of ovarian cysts that could be extremely painful, heavy menstrual flows, and severe, sometimes debilitating, migraines. Depression and anxiety were, according to her, related conditions that she experienced from time to time. She also had, or developed at some point, irritable bowel syndrome.

[11] On May 7, 2001, Ms. Baranyi was offered (and accepted) a full-time term appointment with the CBSA as a customs inspector, classified PM-02, in the Region. She was hired on probation. The initial term was until June 29, 2001. The following were conditions of her probation (Exhibit U7, tab A):

> *. . . successfully complete the Customs Inspector Recruitment Training Program (CIRTP), which includes the following:*
>
> *a. training associated with Criminal Code enforcement, including personal protection training, which requires physical exertion, officer powers training, and firearms training,*
>
> *b. a 9-week formal training program at the Customs and Excise College in Rigaud, Quebec, to be scheduled by your supervisor* (Exhibit U7, tab A).

[12] The offer noted that "[f]ailure to successfully complete the CIRTP will result in termination of employment." (Exhibit U7, tab A)

[13] Rigaud is the central training facility for customs and border agents and officers. Recruits come from across Canada. They live in residence while taking the courses and take examinations necessary to complete their training and fulfill the conditions of their employment. The training program has evolved over the years as the role of customs inspectors has evolved into that of border services officers and as what was once Canada Customs became the CBSA. Over the years, a significant backlog built up of recruits waiting to take the POERT.

[14] On June 26, 2001, Ms. Baranyi was offered (and accepted) a full-time indeterminate appointment as a customs inspector, classified PM-02, at the Peace Bridge, in the Fort Erie District of what was then Canada Customs. Once again, the resulting employment relationship was ". . . contingent on successful completion of the Customs Inspector Recruitment Training Program (CIRTP)", which included the following (Exhibit U7, tab B):

> *1) a nine-week formal training program at the Customs and Excise College in Rigaud, Quebec to be scheduled by your supervisor.*
>
> *2) training associated with Criminal Code enforcement, including personal protection training, which requires physical exertion, officer powers training and firearms training.*

[15] The offer letter stated that "[f]ailure to successfully complete all components of the CIRTP will result in termination of employment" (Exhibit U7, tab B). Ms. Baranyi testified that she understood that she "had to successfully complete the program at Rigaud."

[16] Mr. Noseworthy was appointed Regional Director General of the Region in 2002. He learned that there was a backlog of officers who, like Ms. Baranyi, had yet to complete their training at Rigaud. He made it a priority to get those officers to Rigaud as soon as possible.

[17] During that period (2002-03), Ms. Baranyi went on short-term disability because of her medical condition. She testified that she was off work for approximately six months and that she returned to work in an accommodated position. She worked from November 2003 until November 2004 in an accommodated position as an acting program services/support officer.

[18] Ms. Baranyi explained that she – in conjunction with her disability provider, Sun Life – had initiated the return-to-work process by meeting with Joanne Brown, who was the chief human resources officer in the Region. Ms. Baranyi provided information from her doctor. She stated that, "between me and the doctor and Sun Life," it was determined that she could return to work on a graduated basis in an accommodated position. The accommodation in question was an appointment to a position that did not require her to wear the heavy belt and attached gear that would otherwise aggravate the pelvic pain associated with her condition.

[19] In November 2004, Ms. Baranyi began to work as a border services officer at the FAST/NEXUS enrolment centre in the Region. It also was an accommodated position. Her disability was the same, but the position was different. Ms. Baranyi testified that, this time, she had no initial meeting with Ms. Brown. Her doctor had simply filled out the appropriate forms necessary to establish her need for accommodation, and she was eventually advised that an accommodated position was open for her at the FAST/NEXUS centre.

[20] On December 7, 2004, the recently formed CBSA offered Ms. Baranyi employment as a customs inspector, classified PM-03, effective October 8, 2004. Attached to the offer was ". . . a document summarizing the pertinent terms and conditions of employment" (Exhibit U7, tab C). Included was the following statement: "This offer of employment is conditional upon your successful completion of the Customs Inspector Recruitment Training Program (CIRTP)" (Exhibit U7, tab C). Ms. Baranyi accepted the offer on December 16, 2004.

[21] The backlog for training at Rigaud continued. Ms. Baranyi continued to work at the FAST/NEXUS centre. By her account, which was not disputed by the CBSA, she was a good worker. She enjoyed her work.

[22] In the spring of 2007, two events happened.

[23] First, Ms. Baranyi was notified that a space had finally become available at Rigaud and that she would attend the POERT there in September. Second, she had been booked for a major surgical procedure (a hysterectomy) on November 13, 2007 which was intended to remedy the debilitating conditions associated with her endometriosis.

[24] Ms. Baranyi had mixed feelings about both events.

[25] Ms. Baranyi testified that, when she learned that she would be going to Rigaud, she "was excited to be able to complete all her training so that [she] could move up the corporate ladder." On the other hand, she feared "that if [she] was not successful at the college [her] position would be terminated." She wondered how she would "find another job if [she] was off on disability." As far as the news of the pending surgery was concerned, she also had mixed feelings. On one hand, she was desperate to have the relief from her symptoms that the surgery promised. On the other hand, she was depressed by the prospect of not being able to have children. She testified that she also was concerned that "the stress of having this surgery in the back of [her] mind" might affect her ability to complete the POERT at Rigaud.

[26] Ms. Baranyi testified that she discussed her concerns about the POERT and her surgery with Mr. Noseworthy and with Doug Branton, her supervisor. She said that she asked to remain in her accommodated position at FAST/NEXUS for two reasons, first, so that she could have her surgery and have time to recover, and second, because she loved her job at FAST/NEXUS. She testified that she was told that she was the last person on the backlog list for the POERT training, that she had to complete the course, and that other people needed accommodation, for whom, at the moment, no other positions were available. Ms. Baranyi testified that she took it to mean that "her time at NEXUS was up."

[27] Ms. Baranyi testified that she discussed her concerns with Carrie Taylor, her Employee Assistance Program (EAP) representative. On May 31, 2007, she emailed Ms. Taylor, writing that she sought a meeting ". . . as I have a few questions and/or

concerns that I would like to discuss privately" (Exhibit U29). She testified that, at the meeting, she discussed her concerns about her pending surgery and the Rigaud course and questioned whether she could remain in the accommodated position at FAST/NEXUS, have her surgery and then go to Rigaud later. She also stated that she would need medical treatment (by which she meant injections that she had to take in a hospital setting every four weeks) while she was at Rigaud. She said that she told Ms. Taylor that she found everything very stressful and that she posed the following question to her: "I don't want to do this, do I have a choice, how do I do this?"

[28] On that point, I am satisfied that Ms. Baranyi and Ms. Taylor met on July 11, 2007. It would not be surprising if, during their meeting, some discussion occurred about the fact that Ms. Baranyi loved her position at FAST/NEXUS. Nor would it be surprising if Ms. Baranyi expressed some concern about the POERT. However, I was not satisfied that those discussions went beyond the casual. In particular, I was not satisfied that anything would amount to a statement that her condition would interfere with her ability to take the POERT at Rigaud or that she required accommodation because of it. Ms. Baranyi did not testify as much. Moreover, on reviewing an email exchange between Ms. Taylor and Ms. Baranyi on July 11 and July 12, 2007, I note that only the following are mentioned (Exhibit U30):

1) the need for Ms. Baranyi to surrender her officer's badge before leaving for Rigaud;

2) the part of her uniform required for the graduation ceremonies at Rigaud;

3) where and how she could receive hospital injections while at Rigaud;

4) her advice to Ms. Taylor that she would require six to eight weeks off work to recover after the surgery; and

5) Ms. Baranyi's question as to where she should report upon her return from Rigaud.

[29] No reference is made to her disability or to it interfering with her ability to undertake the Rigaud training. Nor does Ms. Baranyi make any request to retain her accommodated position or to postpone her trip to Rigaud until after the November surgery. She was familiar with the accommodation process as well as with the impact

of her condition on her abilities. One would have expected to see some reference to those issues in the email exchange had there been any serious discussion that there might have been a problem requiring accommodation. The absence of any reference to any concern about being unable to handle the POERT or of any need for accommodation to permit her to have the surgery before completing the POERT supports a conclusion that neither request was made.

[30] Ms. Baranyi testified that she spoke to Mr. Noseworthy before she went to Rigaud about the same issues. She said that she told him that she "enjoyed being part of the team . . . that [she] understood that [she] had to attend training but asked if [she] could be grandfathered in or appointed to a position." She said that they "discussed what might happen if it did not work out at the college, and he promised [her] that [she] would always have a position in the agency, perhaps something in clerical, or in the finance department, or in the enrolment centre on the U.S. side." She testified that she had that discussion with Mr. Noseworthy both before and after she attended Rigaud.

[31] Mr. Noseworthy's testimony about any discussions he had with Ms. Baranyi before she went to Rigaud was different. His evidence was that, around June 2007, Al Campbell, the manager of human resources in the office, told him that there was an opening for Ms. Baranyi at Rigaud. Mr Campbell assured Mr. Noseworthy that Ms. Baranyi was ready to go and told him that "staff had met with Ms. Baranyi and her supervisor met with her and all, including Ms. Baranyi, felt she would be successful . . . so she was enrolled and went to Rigaud." He testified in direct examination that he might have had some informal discussions with Ms. Baranyi in the office before she went to Rigaud, since there was a lot of traffic between their work sites. But he recalled nothing in particular about the POERT or any concerns on her part about going to Rigaud.

[32] After considering all the evidence, I became satisfied that Ms. Baranyi and Mr. Noseworthy did not discuss any concerns that she might not pass the POERT at Rigaud and that, in particular, he made no promise that she would always have a position at the agency. I reached this conclusion for a number of reasons.

[33] First, it struck me as very unlikely that a person in Mr. Noseworthy's position would in effect guarantee Ms. Baranyi that she would always have position at the CBSA even if she failed the POERT. Passing the exam was a condition of her employment

contract. The evidence was that the condition had been upheld in the past. For Mr. Noseworthy to ignore that condition for Ms. Baranyi would create enormous problems for the CBSA with respect to other employees who failed. It could have created rumours of favouritism, which are always dangerous in large bureaucracies.

[34] Second, had any such promise been made and, in particular, been said before Ms. Baranyi attended Rigaud, one would have expected some reference to have been made to it in writing. Nowhere in the contemporaneous written documents introduced into evidence is any reference made to such a promise. Indeed, no such reference is made in the grievance.

[35] That is not to say that no such discussions occurred. As will be detailed later, I am satisfied that they did occur, but after Ms. Baranyi failed.

[36] Ms. Baranyi started the POERT on September 4, 2007. By that time the CIRTP had been replaced by the POERT which was shorter, being seven rather than the nine weeks long. As I understood from the evidence of the witnesses, including Ms. Baranyi, the shortened period reflected changes to the training that Rigaud was expected to provide, rather than an attempt to cram the same amount of learning into less time.

[37] When Ms. Baranyi arrived at Rigaud in September 2007, she received a number of documents.

[38] One was the POERT "Learner Identification Sheet," which was to be placed in each student's file (Exhibit E13). It requested basic personal information, such as an address and emergency contact information. It had a section for "Other Information: (i.e. medical condition/medication/allergies)." In that section, Ms. Baranyi listed her allergies, that she was on medication, and the following: "Medical Condition-endometriosis–treatment is one Lupron injection administered every 4 weeks by a nurse" (Exhibit E13).

[39] Another was the POERT "Program Handbook" (Exhibit E8). It outlined the lessons and objectives of the program. It stated that self-study was an important part of the program. It noted that, "[a]though you will cover much material on your own, do not hesitate to request assistance from the facilitator if you need individual help or coaching" (Exhibit E8, page 2). Students had to attend all lessons and acquire all the

training information. It stated the following: "In unusual circumstances, such as illness or unforeseen circumstances, measures can be taken to try and ensure you receive the appropriate information to allow you to complete your training" (Exhibit E8, page 22).

[40] She also received a POERT "Program Test Objective Booklet" (Exhibit E9). It detailed the testing and evaluation procedures, which were composed of written exams and simulation exercises. The marking scheme was explained. There were two evaluation points, called "Determination Points," D1 and D2. Each determination point had two written exams and a simulation. To pass the written exams for each determination point the student needed to obtain an average mark of at least 70% over the two written exams, with a minimum of 50% for any one exam (Exhibit E9, page 2). The student was also warned that, "[i]f you experience physical indisposition of sufficient severity to interfere with your performance prior to or during the testing period, you must immediately inform the assessors, or training administrator" (Exhibit E9, page 4).

[41] Both Ms. Helde and Ms. Murray testified that Rigaud's administration and faculty expected the recruits to assume personal responsibility for their performance. The recruits were adults and were treated as adults. They were expected to attend class, to do their reading and to complete their assignments. If they missed a class, they were expected to catch up, either by speaking to the faculty, by obtaining notes from other students or by doing the readings more carefully.

[42] With respect to accommodation, Ms. Helde explained that, in the past, Rigaud had accommodated recruits with disabilities, such as dyslexia. However, Rigaud does not have the facilities to evaluate disabilities or to develop suitable accommodations for them. It relies on recruits and their departmental supervisors to address such issues before the recruits arrive and to inform Rigaud of the details of any necessary accommodations. In Ms. Baranyi's case, Rigaud had not been provided with any information or advice that suggested that she had a disability that would interfere with her performance.

[43] I am satisfied that, on the evidence of Ms. Helde, Ms. Murray and Ms. Baranyi, the administration and teaching staff knew that Ms. Baranyi had endometriosis and that she required treatment (a hospital visit every four weeks for an injection). However, at no point did Ms. Baranyi suggest that her condition would affect her

ability to learn and understand or to study for the exams that she had to write and pass.

[44] The seven weeks of instruction at Rigaud were broken down into two parts. As noted above, each part concluded with a "Determination Point" evaluation that consisted of two written exams and a series of simulations. The first evaluation period (D1) was held on September 17 and 18, 2007. The second evaluation period (D2) was held on October 15 and 16, 2007.

[45] The front page of each written exam for both the D1 and D2 evaluations (each signed by Ms. Baranyi) contained the following notice:

> *IMPORTANT: If you are experiencing any physical or psychological indisposition of sufficient severity to interfere with your performance, it is your responsibility to inform the testing administrator of such indisposition before you begin. If you start the exam despite physical or psychological indisposition, you must accept the test results* (Exhibit E15).

Immediately after the warning, was a space for the student's initials; Ms. Baranyi initialed every exam she wrote.

[46] Ms. Baranyi passed both the simulation and the written exam components of D1 on September 17 and 18, 2007. However, her results on both the closed and the open-book exams were only "fair." It was recommended after that she completely review several portions of the material. In addition, "[i]n view of the Fair results in both exams, we recommend you arrange for an appointment with Brad Beattie (2658) to discuss your progress" (Exhibit E15).

[47] Ms. Baranyi signed the results just under the recommendation. However, she made no effort to set up a meeting with Mr. Beattie to discuss her progress or her exam results.

[48] On Monday, September 24, she attended class. She was not feeling well. By about 11:20, she developed a severe migraine. She felt faint. Her menstrual flow was heavy, caused by the treatment she received for her endometriosis. A classmate took her to the local hospital, where she was admitted overnight; see Exhibits E18 and U21. She was released the next day and returned to Rigaud late that day, Tuesday. As a result, she missed almost two days of classes. On her return, she was required to sign a waiver (Exhibit U20).

[49] On the waiver, Ms. Baranyi stated that she had been absent because she had been ill, and added, ". . . my specialist advised me to attend to the nearest emergency room to have my medication administered and some tests done" (Exhibit U20). The waiver contained the following disclaimer:

> *I hereby agree that neither the CBSA Learning Centre, the POERT program nor the training staff will assume any responsibility regarding the material covered in my absence. However, I will be provided with all the documents distributed while I was away. I am also aware that any material missed will be my responsibility.*

[50] Ms. Baranyi testified that she felt forced to sign adding " . . . I felt that I had no choice but to sign the waiver because to get back into the college I had to sign the waiver and if I didn't return to college I would not have met a condition of employment and then I would be out of a job."

[51] She told Ms. Murray, that she was concerned about missing two days of classroom instruction. Ms. Murray reassured her. She suggested that she get the notes from her classmates and referred her to the available reference material. She could also review a poster in the class, notes on the chalkboard, and notes and materials on Rigaud's intranet site. Ms. Baranyi gathered notes from her classmates.

[52] I should note that Ms. Baranyi took an active part in extracurricular activities while at Rigaud. She participated in extracurricular physical tests and challenges. She attended karaoke night. She also travelled several times with her classmates to the local town, to Ottawa, to Montreal and even to New York City (a seven–hour drive) on the Thanksgiving Day long weekend on October 6 to 8, 2007 (well after her hospital stay). She testified that, on the trips, she studied with her classmates.

[53] Ms. Baranyi took the D2 evaluation on October 15 and 16, 2007, as did her peers. As with the D1 evaluation, it was composed of two parts, simulations, and two written exams, one open book, one closed. Each written exam contained the same warning about physical or psychological indisposition. Each was signed and initialled by Ms. Baranyi (Exhibit E6). Mr. Beattie explained the exam procedure to Ms. Baranyi's class before the exam started. He then left the exam room in the hands of an invigilator (one of Rigaud's administrative staff) while he returned to his office to mark another set of exams. He told the recruits that he would be available if they had any questions during the exam.

[54] During the exam, Ms. Baranyi had at least one question that the invigilator could not address, so Mr. Beattie was called back to the classroom. Ms. Baranyi asked her question, and Mr. Beattie answered. That exchange, and Mr. Beattie's periodic entry and exit of the classroom while the exam was being written, later formed the basis of Ms. Baranyi's complaints about the exam process. I will return to those details later.

[55] Ms. Baranyi completed the exam. However, her overall average on the two exams was less than 70%. That meant that she failed to meet the second condition of the Determination Point II written exams, which meant that she had failed the course, see Exhibit E16. She was the only student in that class who failed the exam. Another student failed the simulation.

[56] Ms. Baranyi's exam was remarked twice by other staff. The final scores varied slightly, but in none did she receive a passing grade. The results were then provided to Ms. Baranyi on October 18, 2007. She refused to sign the assessment report. She was (as per regular Rigaud procedures) escorted to her room, where she was required to pack her belongings, and then was escorted out of the building. She found it extremely upsetting. I am certain that it was.

[57] On October 22, 2007, Ms. Baranyi filed a formal complaint about the exam process writing, in particular about Mr. Beattie's comments ". . . prior to and during the Open Book Exam which I feel hindered my Performance on the Exam" (Exhibit E11) as she wrote in the complaint.

[58] The complaint contained more than three single-spaced pages. It was focused solely on what Ms. Baranyi alleged were the distractions that she said were caused by Mr. Beattie. The distractions included comments by Mr. Beattie that:

> 1) caused her to doubt the answers she had given on her exam while she was writing it,
>
> 2) caused her to feel distracted, and
>
> 3) ". . . caused [her] to panic as his comments reminded [her] that [her] 10 Year career with the Agency was in his hands…" (Exhibit E11, pages 1 and 2).

[59] Some of the flavour of Ms. Baranyi's complaint can be garnered from the following extract (Exhibit E11, pages 1 and 2):

…

> *To my understanding, the proctor is to be present to read us the instructions. At no time should any comments be made. Brad Beattie made several comments prior to the beginning of our open book exam including the following:*
>
> > *Make sure that you don't contradict yourself when answering ... Example: Make the decision to take one course of action per item, don't force pay and seize the same item.*
> >
> > *Decide what you are going to do and don't contradict yourself. For example, frisks and personal searches.*
> >
> > *Remember that this is a deductive exam so do not put any more answers than would be necessary. It is better to not put the answer if you aren't sure of the correct answer because if you put part of the answer in error the whole question will be marked as wrong.*
> >
> > *I will be the one marking your exams and I will be in my office if you have any questions.*
>
> *Brad Beattie made me feel intimidated and hesitant to ask questions and he caused me to panic as his comments reminded me that my 10 year career with the Agency was in his hands.*
>
> *I did ask Brad a question during the open book exam and I feel that his response was a personal attack which caused me to further feel distracted from successfully completing my exam. When I asked him to look at the answer chart that I had written at the bottom portion of the question sheet his response was,*
>
> > *Why would YOU waste so much time? I can't believe that YOU are wasting so much time. What are YOU doing? You have to transfer your answers onto the answer sheet.*
>
> *I feel that this was an insult and a personal attack. I tried to compose myself so that I could finish the exam, however throughout the rest of the exam I was worried that Brad was going to mark my exam with a pre-formed opinion based on a question that I had posed during the exam.*

[60] Ms. Baranyi also complained that Mr. Beattie entered and left the exam room several times, "which several of us found distracting." In addition, he was ". . . Working on the Computers while we were still Writing Our Exams. The Computers Beeped on Several Occasions and this too was quite Distracting" (Exhibit E11, page 2).

[61] The CBSA investigated Ms. Baranyi's complaint. Rigaud was contacted. Mr. Beattie was interviewed. On November 6, 2007, Margaret Rashid, Director General

of Human Resources Programs, emailed Ms. Baranyi. She said that she and Cathy Munroe had reviewed her complaint and had considered information provided by Rigaud management. She advised that they had concluded that Ms. Baranyi had been provided ". . . the same opportunities as all recruits." She wrote that Mr. Beatties's comments ". . . constitute standard information that is provided to all recruits in similar testing sessions." She noted that other evaluators had received Ms. Baranyi's test scores "to eliminate individual evaluator bias," with the same result. She concluded that "no further review is warranted" and advised Ms. Baranyi that she could file a formal grievance if she wished (Exhibit E12).

[62] I pause to note that absolutely no reference was made in the formal complaint to Ms. Baranyi's medical condition. Nor was any complaint made that it interfered with her ability to perform on the exam or that she was not accommodated. Indeed, the detailed accounting in the formal complaint of what had happened, together with the force of her argument, suggests that her condition affected neither her memory nor her reasoning faculties.

[63] I must state that I was satisfied on the evidence that Mr. Beattie did not intimidate or otherwise harass Ms. Baranyi. My finding is based on the testimonies of Ms. Baranyi and Mr. Beattie and on a review of Ms. Baranyi's written account of what happened, contained in her original complaint, dated October 22, 2007 (Exhibit E11), and in her later complaint to the Canadian Human Rights Commission (CHRC) (Exhibit U7, tab N). In my view, Mr. Beattie's conduct, entering and exiting the classroom, was normal in an exam. In any exam, students will from time to time have questions. Invigilators or advisors answer them. Students get up to leave before the exam is over. Books are opened and closed. Papers are shuffled. And, in today's classrooms, computers are turned off. None of that is out of the ordinary.

[64] The best that could be said, based on the evidence, is that Mr. Beattie might have answered Ms. Baranyi's question in an exasperated tone. From the evidence that I reviewed, I am satisfied that he had expressly advised against that approach to exam writing that she questioned him on at the beginning of the exam. Hence any exasperation on his part (if it was expressed). But exasperation is not harassment. It is not ridicule. Nor, in this case, was it prolonged. I was satisfied that, if it happened, it was nothing more than a momentary bump in the course of the exam that did not interfere with her performance. Ms. Baranyi could and did complete the exam as

instructed. She passed it. She just did not achieve the required combined average (Exhibit E16).

[65] Ms. Baranyi may very well have been stressed by having to write and pass the exam. A lot was riding on it. But every recruit writing that exam was under the same stress and faced the same consequences. I can understand that the stress on Ms. Baranyi might have been higher because she had worked longer and so perhaps stood to lose more than a new recruit. But, on the other hand, precisely because she had worked for so long with the CBSA, one might have expected her to find it less stressful because she knew more and had more experience than a new recruit.

[66] I should also point out that the only evidence about any deficiencies in the exam process or the POERT introduced on the grievor's behalf were solely about Mr. Beattie's alleged conduct. No evidence was adduced to suggest that the POERT was too short to train recruits adequately, that there were defects in the simulation evaluation process, or that the training program ". . . was incapable of providing a fair and accurate assessment of [Ms. Baranyi's] performance" (grievance, Exhibit U7, tab F).

[67] Ms. Baranyi returned to her region (or "the Region") following her departure from Rigaud. She met with Mr. Noseworthy on or about October 23. Their discussion forms the crux of her estoppel argument.

[68] Ms. Baranyi testified that she explained what had happened at Rigaud. She testified that she told Mr. Noseworthy that he had always promised her that she would have a job at the CBSA "despite what had happened at Rigaud." She told him that she wanted her concerns about her Rigaud experience addressed. She wanted to be able to write a different version of the exam. She testified that Mr. Noseworthy said that she was an asset to the CBSA because of her tenure and experience and that he did not agree with its policy of terminating officers who failed the POERT exams. She testified that he told her that he "would do what he could to maintain my status with the Agency, perhaps in finance or a clerical position." He told her that she was supposed to be terminated but he did not agree with that policy. She said that he told her to leave it with him and that he would see what he could do.

[69] Ms. Baranyi testified that, one or two days later, Mr. Noseworthy told her that he had spoken with a colleague in Ottawa and that an assignment was available in the CBSA's Operations Branch, Operational Services Division, in Ottawa, under the

direction of Beverly Boyd. She said that Mr. Noseworthy told her that "[her] continued employment or assignment could lead to a permanent place in Ottawa, but that it depended on [her] performance." She accepted the assignment immediately, see Exhibit E22. She said that it was her only offer.

[70] Mr. Noseworthy testified that he did not agree with the policy of terminating officers who failed at Rigaud, at least for those who had worked for some time before going to Rigaud. He testified that, before Ms. Baranyi's case, he had come up with a compromise that, although human resources did not approve of it, had been accepted by the union. The compromise involved demoting the failed candidate to a lesser position (generally clerical) at which they could work and wait the two-year period that Rigaud required before permitting a candidate to try again. He had used that procedure for five other employees who had initially failed the test. Four of those, after the two-year period, tried again, passed and returned to their pre-Rigaud positions.

[71] Mr. Noseworthy testified that, when Ms. Baranyi came back from Rigaud, she was distraught. He said that she expressed concern about how she was treated at Rigaud and that part of the reason she failed was because of Mr. Beattie. He stated that the issue of accommodation never came up – and that "it was never part of our conversation." He testified that he told her about the "five others in the same position and that [he] was prepared to do the same for her for two years." Ms. Baranyi was not happy with the suggestion. She asked him "Is there anything else you can do?" He said that he would try to find her something but that it would be out of the Region. He testified that she "repeated that this was unfair, that she had been a good employee for years." When asked in direct examination about the clerical solution he said that Ms. Baranyi "didn't say 'no,' she just said that it was unfair . . . that it was unfair that she could not be accepted as a border officer . . . that it should be taken into account that she was a good employee and she should just be appointed to the position." Mr. Noseworthy testified that he understood, adding "that it was not in my authority to appoint her as a border officer because the agreement said she had to pass Rigaud and she failed."

[72] I am satisfied of the following after hearing Ms. Baranyi and Mr. Noseworthy:

1) Mr. Noseworthy was prepared to do the only thing within his authority that he could to enable Ms. Baranyi to maintain her employment status for two

more years to allow her the chance to retake the POERT, which was to put her in a clerical position.

2) Mr. Noseworthy had done this before with five other officers who had failed the POERT and he so informed Ms. Baranyi.

3) Ms. Baranyi did not think that it was a fair solution to her situation, since what happened to her at Rigaud was not, according to her, fair or reasonable.

4) Ms. Baranyi asked Mr. Noseworthy if he could come up with a better solution, one that in her mind was more in keeping with her position and status as a border officer.

5) Mr. Noseworthy said that he would do what he could to find something but that anything he found would have to be out of the Region and hence out of his supervisory authority.

6) Mr. Noseworthy found an assignment in Ottawa for Ms. Baranyi with the Operational Services Division.

7) Ms. Boyd offered Ms. Baranyi the assignment, which she accepted.

[73] Ms. Baranyi proceeded with the Ottawa assignment. It was, to her knowledge, temporary, for an initial term of November 26, 2007 to February 29, 2008 (Exhibit E22). However, her understanding and hope, was that, if she worked hard and proved herself, it would turn into a permanent placement. Indeed, the assignment was extended to June 1, 2008 (Exhibit E23).

[74] Unfortunately, it turned out that the assignment could not be extended beyond June 2008. Ms. Baranyi was so advised on or about April 15, 2008. She emailed Mr. Noseworthy on that date in her word ". . . to see if you have any advice or suggestions for me" (Exhibit E24, page 2). She wrote that she was ". . . interested in Temporary or Permanent Positions available at Headquarters [in Ottawa] and I am also interested in Temporary or Permanent Positions available in the Niagara Region . . . [and] in Investigations and Enforcement, Program and Policy Development." She was also interested in temporary or permanent positions across the country (Exhibit E24, pages 2 and 3). She added that she had already applied for an FB-06 senior advisor position at headquarters but that she expected that the competition for that position

would take some time. Finally, she advised that she had filed a grievance about her termination (Exhibit E24, page 3).

[75] That grievance is not in front of me. As noted, it was a termination grievance. In subsequent communications between Ms. Baranyi and Mr. Noseworthy, he suggested that the grievance was premature because she had not yet been terminated. He also pointed out that, since the grievance had been forwarded to the fourth level of the grievance process it was beyond his ability or authority. The grievance was eventually withdrawn.

[76] Ms. Baranyi and Mr. Noseworthy had a few telephone conversations shortly after April 15, 2008. Mr. Noseworthy testified that, during the discussions he told her that "there was still a chance for her to take a clerical position in the Region." She did not respond favourably to that suggestion, but she did not reject it outright. Rather, she repeated her complaint that "it was unfair of the organization to demote [her] when [she] had been a good employee for so long" and, according to Mr. Noseworthy, questioned "why were we putting her in a position of having to choose between taking a demotion or be terminated because she'd failed Rigaud." However, at that point she had other options that she was pursuing so that she could stay in Ottawa.

[77] Mr. Noseworthy agreed in direct examination that Ms. Baranyi "never said 'yes' or 'no' to the clerical offer, she just said it was unfair for her to be treated in this way, and that it was unfair that she was forced to consider a demotion." He testified that he told her that he "understood how she felt but that it was all [he] could do for her to allow her to maintain her employment and try for Rigaud again after two years." Mr. Noseworthy also testified that, when he found out that Ms. Baranyi's assignment was not going to be extended, he spoke to Mr. Campbell and asked what "we could do." Mr. Campbell said, "Sign the letter of termination," but Mr. Noseworthy disagreed. He said, "no, the parachute is still there for her . . . if she wants to take the demotion to clerical I'd make that happen." However, shortly after that, Mr. Noseworthy, who had some health issues, went on leave in early May. He left the office at that point, and Mr. Geoghegan assumed the position of Acting Regional Director General in his stead.

[78] As noted, Ms. Baranyi applied for at least two other positions. For some reason, they did not pan out, and she returned to the Region on or about June 1, 2008, uncertain as to her status and what she would be doing. As it turned out, she eventually met with Mr. Campbell, who handed her the termination letter, dated

June 20, 2008, which is the foundation of one of the two grievances before me (Exhibit U7, tab E). The reason given was her failure to complete the POERT, which meant that she ". . . did not meet this condition of employment as outlined in our letter of indeterminate appointment dated June 26, 2001" (Exhibit U7, tab E).

IV. The grievances

[79] On June 24, 2008, Ms. Baranyi's union filed a grievance on her behalf, pursuant to section 208 of the *Public Service Labour Relations Act* ("the *Act*"). In it, Ms. Baranyi complained in essence that the termination:

1) was made without proper and sufficient cause, was arbitrary, and was therefore unreasonable and wrongful;

2) stemmed from an administrative process (the POERT) that was improperly conducted and delivered and that was incapable of providing a fair and reasonable assessment of her abilities due to numerous defects in the simulation component of its assessment process; and

3) was based on a unilateral change to a condition of her employment, in that she had been provided with a 7-week as opposed to a 13-week course of training.

[80] As remedy, Ms. Baranyi sought the following (Exhibit U7, tab F):

> *That it be declared that the CBSA illegally changed unilaterally a condition of my employment and that I be entitled to complete my 13 consecutive weeks of training. That I be entitled to have a reasonable opportunity to remedy any alleged deficiencies in my performance at the CIRTP (POERT) training process with the appropriate support. I reserve the right to avail myself of whatever further recourse I should see fit to take.*

[81] The grievance was heard at the fourth level of the grievance process on August 24, 2008.

[82] The grievance was discussed at a final-level meeting that took place on March 30, 2009 with Jake Baizana (for the union) and Catherine Anderson (for the CBSA). Their notes were introduced as, respectively, Exhibits U37 and E38.

[83] Mr. Baizana's speaking notes cover two-and-a-half pages. The only notes directly relevant to the CBSA's preliminary objection are as follows (Exhibit U37):

1) "*Grievor has a well documented medical condition that the CBSA was fully aware of and the stress associated with it.*"

2) "*[She] made all necessary arrangements to continue to receive medical treatments while at the college in Rigaud, Quebec.*"

3) "*The grievor was admitted to hospital for treatment of her medical condition during the POERT program. Missed 2 days of training.*"

4) "*CHRC complaint to be filed.*" (Exhibit U37).

[84] The rest of the notes focus on the grievor's complaint that Mr. Beattie's comments and actions caused or contributed to her exam failure. For example, the notes contain the following (Exhibit U38):

1) "*The grievor was constantly subjected to intimidation tactics and told that her career was at stake. The stress severely interfered with her performance at the college and during the testing.*"

2) "*She was subjected to intimidation & harassment from the proctor of the exams Brad Beattie.*"

3) "*The comments made by Brad Beattie made her … question the validity of her answers. Brad Beattie told the recruits that 'He would be the one marking our exams and that we should be careful not to contradict ourselves, their careers were in his hands.*"

[85] Ms. Anderson's notes mention the following "CHRC & formal complaint also started" (Exhibit E38).

[86] On June 3, 2009, Ms. Baranyi filed a 22–page complaint with the CHRC alleging discrimination (Exhibit U7, tab N). The complaint outlined in careful detail her history with the CBSA, her medical condition and treatment, her time at Rigaud, and the circumstances of the exam that she took and failed (Exhibit U7, tab N).

[87] In a letter dated June 22, 2009 the CHRC advised the grievor that it would not deal with the complaint because it could be dealt with under another Act of Parliament and, in particular, the *Act*. It encouraged her to file a grievance if she had not already done so and to have her ". . . allegations of discrimination addressed through the

grievance process" (Exhibit U7, tab N). The CHRC provided a copy of its letter to the CBSA ". . . so that it will have notice of [her] intention to pursue allegations of discrimination against it" (Exhibit U7, tab N).

[88] On or about July 1, 2009 the CBSA delivered its final-level response to Ms. Baranyi's grievance. It denied the grievance, the substantive reason as I read it being the following (Exhibit U7, tab H):

> *A thorough review of your participation during the POERT confirmed that you were treated fairly and provided with the same opportunities as other program participants. The sessions were conducted appropriately and your written exams were reviewed and confirmed by three individuals prior to the final determination being made. Your lack of success was not due to any illness or required/requested accommodation.*

[89] On or about August 7, 2009, the union filed the following: "two copies of the grievances of Jamie Lynn Baranyi, as well as two copies of the Forms 20 [Interpretation or Application of a Collective Agreement, pursuant to subsection 89(1)(*a*)(i) of the *Public Service Labour Relations Board Regulations*] and 21 [Termination, Demotion or Financial Penalty, pursuant to subsection 89(1)(*a*)(ii) of the *Public Service Labour Relations Board Regulations*] necessary for reference of the grievance to adjudication."

[90] The Form 20 filed by the union alleged a violation of article 19 (the no-discrimination clause) of the collective agreement between Treasury Board and the Public Service Alliance of Canada, expiry date June 20, 2007, ("the collective agreement"). It attached a copy of the June 24, 2008 grievance. The Public Service Labour Relations Board ("the Board") opened file 566-02-3033 for this grievance ("File 3033").

[91] The Form 21 stated that the grievor relied on subparagraph 209(1)(*c*)(i) of the *Act* for the reference to adjudication. The union attached a copy of the June 24, 2008 grievance. The Board opened file 566-02-3032 for this grievance ("File 3032").

[92] The union also enclosed in its letter of August 7, 2009 ". . . a copy of the Form 24 [notice to the CHRC] which was sent to the CHRC as of this date." The notice, filed pursuant to subsection 92(1) of the *Act*, described the issues involving the application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*), as the following (Exhibit U7, tab J):

1) discriminatory comments made with regard to her absences that were due for medical reasons;

2) failure to accommodate;

3) termination of employment related to her disability; and

4) a CHRC complaint was filed: Exhibit U7, Tab J.

[93] On August 21, 2009, the CHRC advised the Board that it did not intend to make submissions in the matter referred to in the notice that was sent to it.

[94] The Board sent copies of the two grievances to the CBSA. In an email dated August 26, 2009 the CBSA responded, noting that "[t]here is only one grievance attached" to the Board's letter and that, ". . . as the respondent, we can confirm that we only have record of one grievance filed by this former employee." The CBSA's confusion was highlighted in a subsequent email it sent to the Board. Joanne Kelly noted that there was ". . . only one (1) grievance but two (2) references," and explained that, according to the CBSA's records, the grievance corresponded to File 3032. She went on to observe that File 3033 ". . . deals with Article 19 – Discrimination under the PSAC/FB Collective Agreement" and added that ". . . the grievor did not raise the issue of discrimination in her grievance, therefore, I am confused as to why it is being raised at this time."

[95] The CBSA formalized its objection to the Board proceeding with File 3033 in a letter dated November 10, 2009, on the grounds that discrimination under the collective agreement had never been raised by the union or Ms. Baranyi before that point and that it was not referenced in the original grievance.

[96] The union responded on November 26. It submitted that there were ". . . two material issues before the Board arising out of a single grievance." Of them, ". . . one relates to a termination of employment, and one relates to the obligation not to discriminate, an obligation which forms part of the collective agreement . . ." between the CBSA and the union. It went on to assert as follows:

> *In the course of the grievance process, the CBSA was aware that, among other things, the Grievor alleged that its arbitrary, bad faith and discriminatory decision to terminate her employment was made in circumstances where it knew*

> *or ought to have known of her medical condition and its impact on her work. This is underscored by the fact that the final level reply refers to these aspects of her grievance directly: "Your lack of success was not due to any illness or required/requested accommodation."*
>
> [Emphasis in the original]

[97] The union concluded by submitting that ". . . the human rights issues fall well within the Board's jurisdiction over the subject matter of this grievance" and that the CBSA's objection should be dismissed.

[98] It was determined that the issue would be addressed at the hearing.

V. Summary of the arguments

A. The preliminary objection

[99] At the start of the hearing, the CBSA renewed its objection to the Board's jurisdiction to hear and determine the issue of discrimination under article 19 of the collective agreement.

[100] Counsel for the CBSA submitted that the first notice the CBSA had that Ms. Baranyi was complaining of discrimination, whether under the *CHRA* or article 19 of the collective agreement, came with the filing of the Form 20 notice in File 3033 on or about August 7, 2009. No reference was made to discrimination or to any failure to respond to any request for accommodation in October 2007 (when Ms. Baranyi complained about the exam results) or when she filed her grievance following her termination in June 2008. Counsel for the CBSA submitted that only matters dealt with at the final level of the grievance process could be referred to adjudication. Accordingly, the lack of any reference to discrimination during that process deprived me of jurisdiction; see *Shneidman v. Attorney General of Canada*, 2007 FCA 192, and *Burchill v. Canada (Attorney General), [1981]* 1 F.C. 109 (C.A.). Even if I had jurisdiction, the fact remained that the CBSA had had no real notice of the complaint of discrimination. Too much time had passed without notifying the CBSA for it to be able to consider or respond to the allegation of discrimination. Accordingly, I ought to dismiss the discrimination grievance (that is, File 3033).

[101] The union's representative urged me to dismiss the CBSA's preliminary objection. She submitted that the CBSA was made aware of discrimination at the

final-level meeting in March 2009, and that it was also told at that meeting that a complaint would be filed with the CHRC. In fact, she relied upon *Shneidman* to the effect that the Board had jurisdiction over a reference to adjudication as long as the grievance was sufficiently detailed to give the CBSA notice of its nature; *Shneidman*, at paragraph 27. She distinguished *Burchill* on the grounds that, in this case, a new issue is not being raised. Finally, and in any event, she relied on the Supreme Court of Canada's decision in *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324,* 2003 SCC 42, at para 68, to the effect that grievances should be won or lost on their merits, not on technicalities of form.

[102] I decided at the hearing that I would hear all the evidence before ruling on the CBSA's preliminary objection as to my jurisdiction to hear the discrimination grievance. Having heard all the evidence, and having reviewed the submissions and authorities, I concluded that the CBSA's objection must succeed.

[103] In my opinion, the union's submissions have two difficulties, one legal, the other factual.

[104] First, the question is not a technical one of form. Instead, it goes to my jurisdiction to even consider the matter. As I understand the Federal Court of Appeal's decisions in *Shneidman* and *Burchill* (which are binding on me), a matter can be referred to adjudication under subsection 209(1) of the *Act* only if it ". . . 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 precise matter that the employee wishes to take to adjudication has not been dealt with in the grievance process to the final-level then ". . . the foundation for clothing the Adjudicator with jurisdiction . . . " has not been laid; *Burchill* at paragraph 5; see *Shneidman,* to the same effect. It is vital to my jurisdiction to hear the discrimination grievance that the matter was raised during the grievance process.

[105] That brings me to the second (factual) difficulty I had with the union's submission.

[106] I was not satisfied on the evidence (and the onus was on the union) that the union or the grievor raised the issue of discrimination or accommodation with the CBSA before the grievance was referred to adjudication.

[107] I reached that conclusion for several reasons.

[108] First, nothing in the evidence suggests that discrimination and accommodation were issues that Ms. Baranyi would have thought of or relied upon during the period leading up the final-level meeting.

[109] I will start with the observation that, in fact Ms. Baranyi's condition did not disable or impede her from studying for and taking the Rigaud examinations. I accept as true that the CBSA knew that Ms. Baranyi had endometriosis and that her condition made it difficult if not impossible for her to wear the normal gear associated with being a border agent. Of course, she had been accommodated for that disability in the past. But that does not mean that the CBSA or Ms. Baranyi, would necessarily consider that that disability would interfere with her performance at Rigaud.

[110] The grievor's position at the hearing veered dangerously close to the proposition that, just because she had a disability in one aspect of her work, she should have been accommodated in others. But the fact that one has a disability that affects one's ability to perform certain functions does not mean that one is disabled in all functions. A paraplegic might require accommodation for physical access to the workplace or a lower computer desk, but that does not mean that he or she cannot perform mental or physical tasks not requiring the use of the legs. Similarly, in the matter before me, no evidence was adduced that Ms. Baranyi had limited ability to perform the mental or social tasks associated with learning, studying and preparing for written exams and simulations. It is true that she was under stress, but the stress was not a direct function of her endometriosis. It was the normal stress associated with preparing for and taking exams that she, along with every other recruit at Rigaud, knew would determine their ability to keep their jobs. Such stress is not, in my opinion, a disability; it is a fact of life that everyone experiences to varying degrees. Even if some of the stress that she felt was related to the daily trials of suffering from endometriosis – or concern about the pending surgery – the evidence did not support a finding that it was disabling in any way. After all, she did pass the first evaluation stage, which involved both written exams and a simulation.

[111] I acknowledge that Ms. Baranyi, when she learned of her assignment to Rigaud, floated with her supervisors or her EAP representative in spring or summer 2007 the possibility of putting that assignment off until after her scheduled surgery. On the evidence, that request was not presented in the form of a request for an

accommodation because surgery to be undertaken after she was to attend Rigaud would interfere in some way with her ability to complete the POERT before the surgery. At best, the evidence amounts to no more than a concern that she thought that she might experience stress from the worry about the pending surgery. Even were that so, in Ms. Baranyi's account of her stay at Rigaud, there was nothing mentioned about any such stress affecting her performance. As already noted, the focus was on Mr. Beattie.

[112] I also accept that Ms. Baranyi missed two days of classes because of her hospital stay. But the fact that a student might miss a day or two of classes due to illness or other issues is nothing new. Every student in every school, college or university experiences the same hurdle. It is a fact of student life, if not life itself. In each case, the student must find notes, read the books or discuss with his or her instructors what was missed. Indeed, one might go so far as to suggest that it is part of the learning process. It is certainly not something unique to Ms. Baranyi or to people with her condition.

[113] If Ms. Baranyi's condition did not in fact disable her from attending Rigaud, it is difficult to accept that she (or her union) would have raised it as an issue at the final-level of the grievance process.

[114] Second, and supporting that conclusion, nothing in Ms. Baranyi's conduct or complaints before her grievance in June 2008 suggests that she saw the issue as a question of discrimination or of a failure to accommodate. Had she thought that some form of accommodation were required, she would have asked for it. She was certainly familiar with the accommodation process. She requested accommodation for her condition in the past and received it. She was also given several opportunities while at Rigaud to inform her instructors that she was "experiencing any physical or psychological indisposition of sufficient severity to interfere with . . . [her] performance." Each time she acknowledged in writing that there was no such indisposition. Finally, she did not relate her express and repeated complaints at the relevant time about Mr. Beattie's conduct during the exam in any way to her endometriosis or, indeed, to the fact that she missed two days of classroom time because of her hospital stay. They focused instead solely on what she alleged was harassing or disruptive conduct on his part. She consistently blamed her failure on Mr. Beattie, not on her endometriosis.

[115] The fact that Ms. Baranyi did not think that the issue was discrimination is further supported by the grievance form. It does not contain the word "discrimination" or "accommodation." The allegation is not that she was discriminated against in some way, but that the June 20, 2008 decision was made ". . . without proper and sufficient cause, was arbitrary and was therefore unreasonable and wrongful." The grievance focused solely on the examination process, in part because it covered fewer weeks than had originally been specified, but primarily because of the following (Exhibit U7, tab F):

> *. . . [the POERT] was improperly conducted and delivered, which is rendered invalid by the fact that the training program which was designed and implemented for the purpose of assessing my job skills was incapable of providing a fair and accurate assessment of my performance, due to numerous defects in the simulation testing used in the training program, including, but not limited to, unrealistic simulation scenarios, inconsistency in preparation of actors used in the simulations, inadequate training of assessors, conflicting training advice and assessment criteria, and excessive weighting of certain performance criteria in relation to the overall assessment of the "grievor's performance."*

[116] Nowhere in that text is a suggestion made that the POERT was incapable of providing a fair and accurate assessment of the grievor's performance <u>because of her disability</u>.

[117] Further support for that conclusion is found in the exhaustively detailed complaint that Ms. Baranyi filed with the CHRC in June 2009. It consists of a 22-page single-spaced history of her employment with the CBSA. It covers the episode at Rigaud, her subsequent work assignments in Ottawa and that they were not extended, her termination, and beyond (Exhibit U7, tab N). As for her time at Rigaud, she refers to ". . . the debilitating challenges of long term illness and the debilitating side effects of medical treatments" and to the fact that the Rigaud administration was aware of her condition. However, she does not suggest that the "side effects" interfered with or limited her ability to attend and complete the Rigaud course. Rather, she failed because of the stress associated with being a student in a course that she had to pass to keep her job. As an example, I cite the following, variations of which were repeated a number of times in the complaint:

> *My colleagues and I were constantly reminded of the humiliation, the damage to our reputations, the depression,*

> *the anxiety and the potential for post traumatic stress disorder that we would likely experience should we not be successful at the College.*
>
> *The intimidation tactics, demoralizing & discouraging, and the constant fear that our careers were 'on the line' were actually creating stress so debilitating that we were all in agreement that this stress was indeed enough to severely interfere with our performance at the College.*
>
> …

[118] I cite these passages not to suggest that there was any substance to the characterization of Rigaud that appears in them. Indeed, no evidence was adduced by Ms. Baranyi or anyone else suggesting the administration, teaching staff and facility advisors were anything but professional and courteous, or that the experience of the recruits was much different from that experienced by any student, other than the stress associated with knowing that failure would lead to loss of employment. The passages simply demonstrate that Ms. Baranyi's point was not that her endometriosis led to her failure; rather, it was how Rigaud conducted its training (in particular, she alleged, Mr. Beattie) that led to her failure.

[119] But if that were the case in Ms. Baranyi's CHRC complaint it is difficult to accept that anything different was discussed between Ms. Anderson and Mr. Baizana at the final-level grievance meeting on March 30, 2009.

[120] The other point is that discrimination and accommodation are complex issues involving principles of law and practice that are separate and distinct from those associated with discipline or termination. An assertion that an employee suffered from a disability that required accommodation requires the CBSA to engage a different set of principles and to consider different sets of facts, law and evidence than those associated with discipline or termination. A passing reference in a final level grievance meeting that the grievor will file a discrimination complaint with the CHRC does not in my opinion amount to the type of notice necessary to enable the CBSA to consider the grievance as something to be dealt with under the non-discrimination provisions of the collective agreement, especially given that nothing in the evidence or the facts to that point suggested that discrimination or accommodation was an issue that the CBSA had to deal with.

[121] In arguing that discrimination and accommodation were discussed in a substantive way at the final-level meeting, the union representative relied on the final sentence of the substantive portion of the CBSA's response of July 1, 2009, which was the following: "Your lack of success was not due to any illness or required/requested accommodation." I do not read this sentence as establishing that there was a substantive discussion about discrimination and accommodation at the final-level hearing. In my opinion, it is equally consistent with the CBSA noting that there was no allegation of or reliance upon discrimination based on disability, especially given the overall history of Ms. Baranyi's complaint about what happened at Rigaud.

[122] Accordingly, I am satisfied that neither discrimination nor accommodation was raised at all or at least in any substantive way in either the grievance or the grievance process or, most importantly, at the final-level grievance meeting. That being the case, I am without jurisdiction to hear a grievance with respect to any alleged discrimination under article 19 of the collective agreement, and must dismiss the Form 20 grievance (file 3033).

[123] However, I cannot leave this matter without stating that, even if I am wrong in my conclusion, and even if I have jurisdiction to consider discrimination under article 19 of the collective agreement, I would conclude on the facts and reasons set out earlier that the grievance was not proven.

[124] First, the general rule is that the onus is on the employee to bring a disability to the CBSA's attention so that it can consider the nature of the disability and whether it can be accommodated. On the evidence and the facts, I have found that at no point did Ms. Baranyi tell the CBSA that her endometriosis disabled her in some way from being able to listen, learn or study, or that it affected her ability to reason or to write exams.

[125] Nor is this a case in which the CBSA ought to have known that a problem needed accommodation. There was nothing that it ought to have known because there was no evidence and no indication that Ms. Baranyi's endometriosis had any impact on her memory or on her mental or learning abilities. Indeed, the fact that she worked so well in the FAST/NEXUS office suggests the opposite.

[126] Nor was any evidence adduced that Ms. Baranyi asked for a specific accommodation, even when given the express opportunity (as at the beginning of each exam). Had she asked, the evidence is clear that processes were in place that would

have been triggered. Other recruits who had had disabilities, such as dyslexia, were accommodated in the past. In the absence of any evidence of a disability that could impact performance or of a request for accommodation, there was nothing to engage the CBSA's obligations under either the collective agreement or any human rights legislation. That being the case, Ms. Baranyi's discrimination grievance would not have succeeded on the merits.

B. The termination grievance file 3032

[127] Ms. Baranyi was a member of the core public administration. Thus, she was entitled to refer a grievance to adjudication about a ". . . demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(*e*) of that Act for any other reason that does not relate to a breach of discipline or misconduct," under subparagraph 209(1)(*c*)(i) of the *Act*.

[128] For the purposes of this grievance, I am prepared to proceed on the basis that the CBSA must establish just cause for its decision to terminate the grievor. Just cause in my view is satisfied when the employee fails to satisfy a condition of his or her employment contract, unless something was wrong, or unjust or inappropriate in the CBSA's conduct that caused the employee's failure. The question I must then address and the question the parties took pains to address extensively is whether, in all the circumstances, something in the CBSA's conduct rendered it unfair, unjust or unreasonable to terminate the grievor.

VI. Submissions for the grievor

[129] Ms. Baranyi grieved her termination on the grounds that it was unjust, excessive and arbitrary. As it developed at the hearing, the grievance was grounded on the following basic points:

1) Mr. Beattie's conduct during the D2 written exam constituted harassment and intimidation of such a degree that it interfered with Ms. Baranyi's ability to write the exam.

2) Mr. Noseworthy assured her after she failed the POERT exam that she would always have a position with the CBSA and that such assurances amounted to an estoppel that barred the CBSA from terminating her.

VII. Reasons

A. Harassment during the exam

[130] With respect to the first argument, the grievor's representative submitted that the evidence supported a conclusion that Mr. Beattie's conduct so intimidated and distracted Ms. Baranyi that she was unable to pass the exam. I do not agree.

[131] First, I was not satisfied on the evidence that Mr. Beattie did anything improper or that he humiliated, harassed or confused Ms. Baranyi in any way. He explained the exam procedure. His explanation was given to a student who had already written and passed two exams a few weeks earlier. She was familiar with the process. His departure from the room while the recruits were writing the exam was part of the normal process. He returned to answer her question. The best that could be said on the evidence was that he might have sounded exasperated when he returned to answer Ms Baranyi's question about the process (where to put the answers) that he thought he had already explained at the beginning of the exam. But a sound of exasperation (if in fact there was one) is not a harangue of belittlement. Nor was his entry and exit from the room several times harassment of Ms. Baranyi, in particular, or of the other recruits in general. No one else failed the written exam. Had Mr. Beattie's conduct been anything out of the ordinary, one would have expected more complaints or more failures. Neither appears to have been the case.

[132] Second, most if not all of Ms. Baranyi's complaint is about what might be termed situational stress. She was writing an exam that she had to pass if she wanted to keep her job. It is not surprising that she felt stress. However, the stress was natural. It was not abnormally or inappropriately increased by anything Mr. Beattie did or omitted doing. Moreover, the stress was not so great as to prevent her from writing and passing both exams or from performing and passing the simulation part of the evaluation process. In other words, the stress was not disabling. Ms. Baranyi's performance simply failed to match the required average grade. Although that failure clearly and understandably was upsetting in the extreme, and although its consequence (the loss of her job) obviously had a major impact on her life and finances, it was not the fault of anything the CBSA or the staff at Rigaud did or that they omitted doing.

[133] I can sympathize with Ms. Baranyi's distress at learning that she had failed the exam. But the fault, if there was one, did not lie with either Mr. Beattie or Rigaud or, ultimately, the CBSA. Students fail exams from time to time. It can be nerves or lack of preparation. But in neither case can failure be called unjust, excessive or arbitrary. Nor can it be said to be the fault of the person or institution giving the test.

[134] Nor was it unjust, excessive or arbitrary that Ms. Baranyi was terminated as a result of her failure. Successful completion of the course was a condition of her employment. The CBSA is entitled to set minimum standards for its employees (subject of course to the duty to accommodate) and to insist on those standards as a condition of continued employment.

[135] The union representative suggested that Ms. Baranyi's request, after her failure, to write an alternative version of the exam amounted to a request for accommodation that the CBSA should have accepted. But the grievor wrote an exam for which she had not requested accommodation. She failed it for reasons not connected to any disability. Such facts do not give rise to a right to a second chance by way of an accommodation.

[136] Accordingly, I am satisfied that the termination of Ms. Baranyi's employment by reason of her failure to pass the Rigaud course was not unjust or unreasonable. Nor was there any evidence that the termination was disciplinary in intent. There was no evidence to say that Ms. Baranyi was anything other than a good and valued employee. Indeed, that formed at least part of Mr. Noseworthy's reasoning for offering her the options that he did. Her only failing was her failure to satisfy a condition of her employment: passing the POERT program. Termination following such a failure is not disciplinary in nature.

B. Estoppel

[137] I turn now to the second ground, estoppel. The union submitted that I had jurisdiction to apply the estoppel doctrine. She submitted that it required a clear and unequivocal representation that was intended to affect the legal relations between the parties, made by words or conduct, intended to be relied upon by the person to whom it was made, coupled with a detrimental reliance on it.

[138] The union's submission is that Mr. Noseworthy assured Ms. Baranyi that there would always be a position for her at the CBSA, that she relied upon that assurance

when she took the assignment in Ottawa and that the CBSA was obligated to keep that offer open for her when the assignment did not mature into a permanent position.

[139] The difficulty is that the facts and the law do not support estoppel in this case.

[140] Estoppel, as I understand it, requires at the very least the following two facts:

> 1) One party to a contract makes a representation to the other party that it will not insist upon a particular right available to it under that contract.
>
> 2) The other party changes its position in reliance upon that representation; see *Brown and Beatty*, *Canadian Labour Arbitration* (Online Edition, Canadian Labour Law Library), at para 2:2200 and 2:2211; and *Re Smoky River Coal Ltd v. United Steelworkers of America, Local 7621* (1985), 18 D.L.R. (4th) 742 , at page 746.

[141] What representation did Mr. Noseworthy make? I find that, after the exam, he told Ms. Baranyi the following:

> 1) she could accept a demotion to a clerical or other administrative position, wait two years and then re-apply (by repeating the Rigaud POERT) for her position as a border services officer; or
>
> 2) he would try to find her another position within the public service that she could transfer to and, if successful, obtain permanent employment.

[142] I am satisfied that Ms. Baranyi understood that Mr. Noseworthy was providing her with these two options as an alternative to what her failure to pass Rigaud otherwise obligated him to do: terminate her employment.

[143] I have also found that Ms. Baranyi did not accept or act on the first option. She was not interested in such an "unfair" (according to her) solution to her problem. What she decided to do instead was to accept the second option. She did get, as promised, the assignment to Ottawa. Her position changed, but not to her detriment. Instead of being terminated, she was employed. Instead of taking a demotion, she was employed in a position she considered commensurate with her position as a border agent.

[144] I accept the submission of the union that Mr. Noseworthy never formally offered the clerical demotion to Ms. Baranyi. I also accept that he would have been prepared to offer her the demoted position if she had ever come to him and asked for it.

[145] But that is, in essence, beside the point. Estoppel arises when equity intervenes and bars one party from exercising its rights under a contract when it would be unfair or unjust, because of that party's conduct, to permit it to do so. But where is the unfairness or injustice here? Ms. Baranyi certainly wanted to raise an estoppel against the CBSA. She wanted to bar the CBSA from exercising its contractual right to terminate her based on her failure to pass the POERT. That is the remedy that she seeks, as she put it ". . . reinstatement in my Border Services Officer position effective June 20, 2008 the date of termination." But what conduct on the part of the CBSA could possibly give rise to an estoppel?

[146] One possibility would arise if the CBSA had conducted the POERT or its exam in an unfair or improper way. That indeed was the focus of the termination grievance. But I have found that the facts do not support such a charge.

[147] The other possibility is that the CBSA did or said something that caused Ms. Baranyi, in reliance upon what the CBSA did or said, to shift her position to her detriment. But what did the CBSA (that is, Mr Noseworthy) do or say? The "promises" or "representations" that he made (whether express or implied) to Ms. Baranyi were an offer to demote her to a clerical position (which she refused to accept because it was unfair) or to help her find another position (which he did). How can the result support an estoppel if she, in effect, received exactly what she asked for? It cannot. There was no detrimental reliance if only because her position after Mr. Noseworthy followed through was in fact better than it would have been had he done nothing.

[148] On the other hand, the argument could be that Ms. Baranyi accepted the Ottawa position only because of - and in reliance upon - the promise or representation that she could always have a clerical position in the Region if all else failed. If that were in fact Ms. Baranyi's position, one would expect that it would have been one of the remedies that she sought in her grievance. But her termination grievance does not seek to establish a right via estoppel to a demotion to the clerical position. Rather, the principal remedy it seeks is ". . . reinstatement in [her] Border Services Officer position effective June 20, 2008 the date of termination." Yet, even on her own evidence, she had no right to the position of border services officer once she failed the POERT at

Rigaud. It was never promised to her. Mr. Noseworthy told her that he could not give it to her. For these reasons and on these facts the estoppel argument must fail.

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

(The Order appears on the next page)

VIII. Order

[150] The termination grievance (File 3032) is dismissed. I am without jurisdiction in the discrimination grievance and order File 3033 closed.

May 4, 2012.

Augustus Richardson,
adjudicator