Date: 20120123

File: 566-02-3751

Citation: 2012 PSLRB 7

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

PETER KRAHN

Grievor

and

TREASURY BOARD
(Department of the Environment)

Employer

and

PUBLIC SERVICE COMMISSION

Intervenor

Indexed as
Krahn v. Treasury Board (Department of the Environment)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Nao Fernando, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, counsel, Treasury Board

For the Intervenor: Marc Séguin, counsel, Public Service Commission

Heard at Vancouver, British Columbia,
August 23, 2011.

I. Individual grievance referred to adjudication

[1] Peter Krahn ("the grievor") filed a grievance on June 11, 2007, alleging that he was improperly suspended without pay from May 30 until June 25, 2007, when he was put on involuntary leave without pay because of his political activities. He alleged that, among other things, the decision to place him on leave without pay was a violation of articles 5 and 38 of the collective agreement between the Treasury Board and the Professional Institute of the Public Service of Canada (PIPSC) for the Architecture, Engineering and Land Survey Group; expiry date September 30, 2007 ("the collective agreement"). The grievance also questioned the constitutionality of the *Public Service Employment Act*, S.C. 2003, c.22 (*PSEA*), although that aspect of the grievance was eventually withdrawn. When he filed the grievance, the grievor was employed as a technical/litigation advisor, classified ENG-04, in the Strategic Integration Division of Environment Canada ("the employer") in Vancouver, British Columbia.

[2] The employer responded to the grievance at the final level of the grievance process on April 27, 2010, stating that the decision to place the grievor on leave without pay was made by the Public Service Commission (PSC) by virtue of its authority under section 118 of the *PSEA* and that, therefore, the employer did not have the authority to grant the corrective action sought by the grievor. The grievor referred his grievance to adjudication on May 17, 2010.

[3] On August 23, 2010, the PSC advised the Public Service Labour Relations Board ("the PSLRB") that it had a substantive interest in this grievance and sought intervenor status for the purpose of making submissions on the PSLRB's jurisdiction to determine the issue and, were the PSLRB to assume jurisdiction, to participate fully in the substantive issue before an adjudicator. Although the employer supported the PSC's application for intervenor status for the purpose of making submissions concerning the decision that is at the heart of this grievance, the grievor opposed the PSC's request on the grounds that it would prejudice him.

[4] On October 28, 2010, a PSLRB adjudicator determined that the PSC should be granted intervenor status but that the scope of its role in the hearing should be decided by the adjudicator assigned to hear the grievance. The question of the scope of the PSC's role as an intervenor was raised again on July 5, 2011 by the employer. Following a pre-hearing conference on August 11, 2011, I determined that only the

jurisdictional issue would be heard at the hearing scheduled for August 2011 and that the PSC would be granted the right to fully participate on the jurisdictional question.

II. Summary of the evidence

[5] Two witnesses testified at the hearing on August 23, 2011. Carole Lemay, who was at the time of the events in question Director of Labour Relations, Classification and Pay, testified on behalf of the employer. Bernie Claus, who was a PIPSC shop steward at the time in question, testified on behalf of the grievor. The employer entered 22 documents into evidence and the grievor introduced 2 documents. I have summarized only the relevant testimony and documents.

[6] Ms. Lemay testified that the employer was not involved in the grievor's initial request for permission to seek the nomination to be a political candidate in a federal electoral riding, which was made on February 12, 2007 (Exhibit E-1). The grievor wrote directly to the PSC without copying the employer. However, the employer was aware of the grievor's request and as a result, asked him to file a "Confidential Report on Conflict of Interest" (Exhibit E-2). When the PSC sent the letter on March 9, 2007, to the grievor setting out the conditions under which it granted the grievor's request to be a candidate, it copied the employer but did not seek any input from it (Exhibit E-3).

[7] The PSC agreed to the grievor's request for permission to run as a candidate on the understanding that he submit in advance a request for leave without pay, which was to be taken during the election period or during any part of the period in which he was either seeking the nomination to be a candidate or engaging in political campaigning, if it was determined that his ability to perform his duties impartially was impaired. Other conditions were also imposed (Exhibit E-3). This letter noted that the grievor's deputy minister would be advised that he had been granted permission to run and that the PSC had also granted him a leave of absence without pay during the election period.

[8] The employer took no position on the grievor's candidacy. It was officially advised on March 23, 2007, that, subject to any changes in circumstances that might cause it to reconsider its decision, the PSC had granted the grievor permission to run as a candidate. The PSC noted that the employer was obligated to authorize the grievor's leave without pay during the electoral period based on the direction given to it by the PSC (Exhibit E-6). Ms. Lemay testified that the employer did not have the

discretion to alter the PSC's decision with respect to the grievor's request for permission to run as a political candidate, which meant that it could not refuse to grant any subsequent request or requirement for leave without pay for that purpose.

[9] The PSC's Investigations Branch advised the employer on March 20, 2007 that it was initiating an investigation into allegations that the grievor engaged in improper political activities (Exhibit E-4). The investigation ended with the release of a final report on April 27, 2007, which found that the grievor had engaged in improper political activities. The employer did not initiate the investigation, had no role in deciding whether an investigation should be undertaken and did not participate in it. The PSC characterized the employer's role as that of an "interested party" (Exhibit E-4).

[10] Ms. Lemay testified that, during the PSC's investigation, the employer might have been copied on documents sent between the parties but that it did not make submissions and that it took no position on whether the grievor's political activities were appropriate. The employer also took no position on the PSC's findings (Exhibit E-9), was not involved in the decision-making process and considered that it had no discretion with respect to any corrective measures to be proposed, although it was given an opportunity to make submissions (Exhibit E-9).

[11] The investigation report by the PSC (Exhibit E-9) determined that the grievor engaged in improper political activity. Following that, on May 29, 2007, the PSC issued its direction and decision with respect to the corrective measures to be imposed, as a record of decision (Exhibit E-10). That decision ordered that the grievor be placed on a leave of absence from the date of the decision until such time as he demonstrated that he conformed to the conditions set out in the original decision granting him permission to run as a candidate for nomination.

[12] Ms. Lemay testified that, although the employer filled out and signed the grievor's leave without pay forms, it did so for administrative purposes because the PSC had ordered the grievor to go on leave without pay, and it was necessary to give directions to the pay advisors. Ms. Lemay noted that the leave form indicated that the leave was at the the PSC's direction and that it would end only as directed by the PSC. She also testified that, although the PSC had ordered that a copy of its decision be placed on the grievor's personnel file, it would not be relied on in future discipline. In her view, because it was a corrective action taken by the PSC, it was not discipline and would not be considered in a progressive discipline situation. She stated that the

employer did not deem the grievor's behaviour culpable and had no desire to punish him. The employer was simply following the direction received from the PSC. She believed that corrective measures imposed by the PSC differed from discipline imposed by the employer, even though she acknowledged that the outcome appears the same.

[13] Ms. Lemay testified that the grievor was allowed to return to work after he advised the employer on June 25, 2007 that he had not been successful in obtaining the nomination to be a candidate in the federal election (Exhibit E-15). The PSC subsequently advised the employer that it should have been consulted in the decision to allow the grievor to return to work (Exhibit E-16). Further, the PSC indicated to the employer that it would conduct an assessment to determine whether the grievor could perform his duties in a politically impartial manner.

[14] Ms. Lemay testified that, although the employer provided information on the nature of the grievor's job to the PSC and told the PSC that it believed that he could perform his duties in a politically impartial manner, the final decision on his return to work belonged to the PSC. Ultimately, the PSC determined that the grievor's return to work would be effective on the date on which the employer allowed him to return, but the employer was not involved in that decision.

[15] Mr. Claus is an employee of the employer. He testified that the grievor approached him because he was a shop steward with the grievor's union, the PIPSC. The grievor wanted assistance and advice. In his role as a shop steward, Mr. Claus did some internet research and found on the PSC's web page a document that suggested that employees unhappy with the conditions placed on their political activities could grieve and that employees disciplined by their employer because of their political activities had recourse to the PSLRB (Exhibit G-2). Mr. Claus acknowledged that the text box next to the section on recourse in the document tendered in evidence was not original to the document but was added by him.

III. Summary of the arguments

A. For the employer

[16] The employer argued that this grievance does not fall within section 209 of the *Public Service Labour Relations Act* (*PSLRA*) because the action complained of was

neither disciplinary nor a violation of the collective agreement. Although the grievor alleged a violation of articles 5 and 38 of the collective agreement, those articles do not provide jurisdiction. Citing *Canada (Attorney General) v. Lâm,* 2008 FC 874 (FC), the employer contended that article 5 (Management Rights) does not confer any substantive rights. However, as article 38 (Standards of Discipline) deals with discipline, it is necessary to directly address the issue of whether this grievance involves a disciplinary action.

[17] The employer submitted that it is important to remember that three pieces of legislation regulate various aspects of federal public service labour relations, the *PSLRA,* the *PSEA* and the *Financial Administration Act*, R.S.C., 1985, c. F-11 *(FAA).* These three acts were intended to be read together.

[18] Subsection 12(1) of the *FAA* establishes the authority of deputy heads to create standards of discipline and set penalties. The authority to discipline or suspend is given exclusively to deputy heads. The terminology relating to discipline and disciplinary action used in the *FAA* is not used in the *PSEA*. Section 118 of the *PSEA* gives the PSC the authority to conduct an investigation into allegations that an employee violated provisions relating to permissible political activities set out in the *PSEA* and gives the PSC the authority to dismiss the employee or to take any corrective action considered appropriate. Subsection 15(1) of the *PSEA* provides that this authority to conduct investigations and impose corrective action or dismiss employees who are in contravention of Part 7 (Political Activities) of the *PSEA* may not be delegated to deputy heads. Furthermore, section 13 of the *Political Activities Regulations*, SOR/2005-373, underlines the fact that the deputy head has no authority in the process.

[19] The employer argued that the grievor's situation is analogous to the fact situation in *Foster v. Treasury Board (National Defence),* PSLRB File No. 166-02-26267 (19950524)(upheld in [1996] F.C.J. No. 1107 (QL)). In that case, the grievor's employment ended because of the application of section 748 of the *Criminal Code*, R.S.C., 1985, c. C-46, which provided that the employment of a public service employee is vacated if the employee is convicted of an indictable offence resulting in a sentence of greater than five years. The adjudicator held that he did not have the jurisdiction to hear a grievance against a termination of employment resulting from the operation of section 748 of the *Criminal Code* because the termination was the inevitable result of

the application of the *Code* and not the result of an exercise of discretion by the employer. Therefore, it was not a disciplinary action within the mandate of an adjudicator.

[20] The employer argued that, to determine whether an employer action would fall within the boundaries of paragraph 209(1)(*b*) of the *PSLRA*, it is necessary to examine the employer's intent. To constitute discipline, there must have been an intention and the discretion to punish. Further, discipline is not just characterized by the intent to punish or the exercise of the discretion to punish, but also by the ability and intention to rely on the disciplinary action in the imposition of further discipline. The employer cited *Clark v. New Brunswick (Department of Natural Resources and Energy),* [1995] N.B.L.A.A. No. 15 (QL); *Peters v. Treasury Board (Department of Indian Affairs and Northern Development),* 2007 PSLRB 7; and *Canada (Attorney General) v. Frazee,* 2007 FC 1176, in support of these principles.

[21] Citing *Canada (Attorney General) v. Assh,* 2005 FC 734, the employer contended that the fact that not all complaints or grievances can be referred to adjudication does not mean that the system is unfair. Employees can always seek judicial review of grievance decisions that are not adjudicable. The employer also cited *Vaughan v. Canada*, 2005 SCC 11, noting the deference given to the statutory scheme established by Parliament.

[22] The employer argued that the collective agreement does not apply, given the facts of this case. Citing *Lâm*, the employer argued that clause 5.01 (Management Rights) does not confer substantive rights on employees. Furthermore, for article 38 (Standards of Discipline) to apply, discipline is required. In this case, the grievor was not disciplined. The collective agreement does not provide the authority to discipline; the *FAA* does, as noted in *King v. Deputy Head (Canada Border Services Agency),* 2010 PSLRB 125.

[23] The employer argued that, from beginning to end, the matter at issue was a decision of the PSC, which was not within the employer's control. This was not a disciplinary matter over which the employer had any discretion. For the PSLRB to have jurisdiction in this matter, it must fall within the ambit of section 209 of the *PSLRA,* and it does not. This was, quite simply, an action based on the PSC's legislative authority.

[24] The employer also noted that jurisdiction must be found within the legislation; the parties cannot consent to jurisdiction not found within the legislation.

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

[25] The grievor stated that the facts were clear. He was investigated by the PSC for an alleged breach of the *PSEA* and was found guilty. Following that decision, he was sent home on leave without pay as punishment for breaching the *PSEA*. He was required to hand in his security card and his Blackberry, and then, he was sent home on involuntary leave without pay.

[26] The grievor argued that that action had all the attributes of discipline. There was an alleged violation of the *PSEA*, an investigation and the imposition of a penalty, which included a financial penalty. Furthermore, the employer recorded the penalty on his personnel file. Despite Ms. Lemay's evidence that the letter imposing the penalty would not be relied on in future discipline, there was no reason to keep such a record unless it was a record of discipline.

[27] Although section 118 of the *PSEA* refers to "corrective action", the term is synonymous with "disciplinary action", and in this case, it included a financial penalty. Article 35 of the collective agreement, which deals with the grievance procedure, provides that grievances involving a financial penalty are adjudicable, and article 38 (Standards of Discipline) supports that view.

[28] The grievor argued that the employer's jurisdictional objection was simply an attempt to avoid responsibility and to leave him without an effective remedy for the wrong that was done. Such an argument denies the employment relationship between the grievor and the employer and obscures the fact that an involuntary leave without pay is the same as a financial penalty.

[29] The grievor argued that any view that jurisdiction is lost because of another piece of legislation was changed by *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, which established that the essential character of the dispute must be examined. The grievor argued that *Weber* established that, if an arbitrator can grant an effective remedy, deference must be accorded to the arbitration process. In this case, the grievor argued that there is no doubt that I can grant the remedies that he seeks. He also cited *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*,

[1986] 1 S.C.R. 704, and *Allen v. Alberta*, 2003 SCC 13, in support of his argument that labour boards have exclusive jurisdiction over disputes arising from collective agreements.

[30] The grievor also cited *Guenette v. Canada (Attorney General)*, [2002] O.J. No. 3062 (QL), and *Pleau v. Canada (Attorney General),* 1999 NSCA 159, as examples of decisions in which the courts did not recognize the exclusive jurisdiction of labour boards because the disputes did not arise out of collective agreements, and the grievance process could not provide an effective remedy. However, in this case, the grievor contended that the dispute fell within the collective agreement, as the employer violated article 5 (Management Rights).

[31] The grievor argued that the issues are straightforward. I must determine whether he is an employee, whether he has access to the provisions of the collective agreement and whether he has the right to adjudication. There is no essential difference between discipline and sending someone home on leave without pay. The fact that the letter advising him of the involuntary leave without pay was placed on his personnel file, in and of itself, proves that the corrective action was discipline. The grievor suggested that labour relations would be turned on its head if the employer's objection to jurisdiction were to succeed.

C. <u>For the PSC</u>

[32] The PSC argued that Part 7 of the *PSEA* creates a regime to deal with the political activities of public service employees. This regime explicitly balances, in section 112, the right of employees to participate in political activities with the requirement to have a neutral, impartial public service. Furthermore, the notion of non-partisanship is a value enshrined in the preamble to the *PSEA*.

[33] In addition to Part 7 of the *PSEA,* paragraph 11(*c*) gives the PSC a mandate to administer the provisions of the *PSEA* relating to political activities. Although subsection 15(1) allows the PSC to delegate some of its functions to deputy heads, it specifically excludes its powers under Part 7 relating to political activities. It is clear that only the PSC may exercise powers in relation to political activities.

[34] The PSC argued that the rules about political activity by public service employees are clearly articulated in the *PSEA*. Subsection 114(1) provides that

employees who wish to seek nomination as a candidate in a federal election before or during an election period must request and obtain permission from the PSC. Further, subsection 114(3) provides that employees may be candidates in a federal election only if they have ". . . requested and obtained a leave of absence without pay from the Commission." The PSC argued that, if it had not granted such a leave of absence, the only recourse would have been a judicial review application.

[35] Section 118 of the *PSEA* gives the PSC the power to investigate any allegation that an employee failed to comply with any provision of Part 7, and gives the PSC the power to dismiss the employee or impose any other corrective action it considers appropriate if the allegations are substantiated.

[36] The PSC argued that this grievance claims relief over which the parties to the grievance have no authority. In this case, there is a clear link between the matter being grieved and the PSC's decision. In effect, this is a grievance against a PSC decision. But the PSC is not a participant in the grievance. PSC decisions cannot and should not be reviewed by PSLRB adjudicators because the PSC is not part of the process. Furthermore, it would be difficult for a PSLRB adjudicator to order the PSC to do something since it has no jurisdiction or authority over the PSC. A PSC decision under section 118 of the *PSEA* can be reviewed only by way of judicial review. If an adjudicator could review it, then it would be possible that the PSC's decision would be overturned or changed. The PSC argued that such an action would defeat the purpose of section 11 of the *PSEA*.

IV. <u>Employer rebuttal</u>

[37] Concerning the fact that the letter from the PSC ordering the corrective action was placed on the grievor's personnel file, the employer argued that it was given no discretion. The requirement to place the letter on the grievor's file was part of the PSC order.

[38] The employer noted that article 35 of the collective agreement simply mirrors the *PSLRA* with respect to adjudication. Furthermore, there is no remedial vacuum for the grievor, as he has access to the Federal Court for judicial review of the PSC's decision.

[39] The employer contended that it was clear that it could not settle the grievance, which underlines Parliament's intention to create separate regimes.

[40] With respect to *Weber* and *St. Anne Nackawic Pulp & Paper Co. Ltd.,* the employer contended that both the fact situations and the legislation were completely different from those in this case and that those decisions are therefore of little assistance. Furthermore, *Guenette* and *Pleau* have been superceded by both *Vaughan* and *Assh,* as well as by section 236 of the *PSLRA.*

[41] The employer noted that article 5 of the collective agreement (Management Rights) is a recognition of the employer's rights as provided under the *FAA*, which includes its right to discipline. But both the collective agreement and the *FAA* are silent with respect to corrective action taken under the authority of the *PSEA*.

V. Grievor's reply

[42] The grievor noted that the PSC thought at one time that the grievance process was appropriate since it published on its website that recourse was available through the PSLRB, as evidenced in Exhibit G-2. In the grievor's opinion, the employer and the PSC are bound by that document, since it was the PSC's official position at that time.

VI. Reasons

[43] The grievor alleged that he was suspended without pay indefinitely for allegedly engaging in partisan political activity during working hours. He argued that, although the action was characterized as a leave without pay, it had all the earmarks of discipline, in that there was alleged misconduct, an investigation, a decision, the imposition of a financial penalty and a record of the discipline on his personnel file. The grievor argued that his collective agreement gives him the right to refer a grievance against a disciplinary action to adjudication.

[44] However, the employer maintained that the grievor was not suspended but that he was placed on leave without pay by direct order of the PSC, following its investigation. The employer argued that it had no discretion in following the PSC's order, had no input into the PSC's decision and did not participate in the PSC's investigation, other than to provide information as requested. Given those facts, the employer maintained that the grievor was not subjected to a disciplinary action under the *FAA* and that the PSLRB does not have jurisdiction to hear this grievance. The

employer also argued that article 35 of the collective agreement does no more than repeat the language of subsection 209(1) of the *PSLRA*, article 35 applies only if there is a disciplinary action and article 5 does not apply.

[45] The facts are relatively straightforward. The grievor sought permission from the PSC in February 2007 to seek the nomination as a candidate in an upcoming federal election (Exhibit E-1). By way of a letter sent to the grievor on March 9, 2007, the PSC granted him permission to seek the candidacy in his riding (Exhibit E-3), subject to certain conditions, including the requirement that he

> *…submit, in advance for consideration by the Commission, a request for a leave of absence without pay for the period or any part of the period in which you seek nomination…in order to participate in political activities that will raise your visibility, which may impair or be perceived to impair your ability to perform your duties in a politically impartial manner….*

[46] That letter, granting the grievor permission to seek the nomination in his riding and to run as a candidate in the federal election, came directly from the PSC. It stated that the PSC would advise the deputy minister of the grievor's employer that it had not only granted him permission to seek the nomination and to run as a candidate but that it had also granted him a leave of absence without pay for the election period (Exhibit E-3). On March 23, 2007, the PSC officially advised the deputy minister that the PSC had "officially approved" the grievor's request for permission to seek the nomination for his riding and that it had also approved a leave of absence without pay effective the date on which the grievor became a candidate in the election (Exhibit E-6). However, the PSC also advised the deputy minister that it reserved the right to reconsider its decision if any changes occurred in the grievor's circumstances or as a result of any investigation made under section 118 of the *PSEA.*

[47] As it turned out, a complaint had been filed alleging that the grievor had engaged in improper political activities. The PSC's Investigations Branch advised the employer by way of a letter dated March 20, 2007 that, by virtue of its authority under section 118 of the *PSEA,* it was initiating an investigation into the allegations (Exhibit E-4). That investigation was completed at the end of April. On April 27, 2007, the investigation report was released (Exhibit E-9). It found that the grievor had engaged in improper political activity. On May 29, 2007, the PSC advised the grievor

and the employer that it accepted the findings of the investigation report and that it was imposing ". . . corrective measures to prevent this situation from recurring" (Exhibit E-10). The corrective measures were recorded in the "Record of Decision" (Exhibit E-10) as follows:

. . .

> *In accordance with its authority to take corrective measures pursuant to section 118 of the PSEA, the Commission orders that:*
>
> - *the employee be placed on leave of absence without pay from the date of this decision until such time as he can demonstrate that he conforms, to the satisfaction of the Commission, to the conditions listed in the permission that was granted to him pursuant to Record of Decision 07-03-PB-207….*

. . .

[48] Ms. Lemay testified that the employer played no role in any of the decisions made about the grievor's political activity. The employer had no discretion with respect to the leave of absence ordered by the PSC, although for purely administrative purposes, the form was filled out by the employer and signed by the deputy minister. The length of the grievor's leave of absence was determined by the PSC, and the requirement that a copy of the PSC's decision be placed on the grievor's personnel file was also by order of the PSC. Ms. Lemay testified that the employer did not consider the matter disciplinary and that it would not rely on the PSC decision in any future disciplinary penalty it might consider.

[49] It is clear that at the core of what the grievor describes as a disciplinary suspension was a leave of absence ordered by the PSC. From the grievor's perspective, it felt very much like a disciplinary suspension. It was involuntary, it followed an investigation in which his conduct was found in breach of legislation governing the political activities of public service employees and there was a financial consequence. But was it, in fact, a ". . . disciplinary action resulting in termination, demotion, suspension or financial penalty. . . " that would bring it within the ambit of paragraph 209(1)(*b*) of the *PSLRA* or within article 35 of the collective agreement?

[50] Simply describing an action as "disciplinary" does not make it so. Not every action that adversely affects a public service employee is a "disciplinary action". In the

context of labour relations in the federal public service, terminology is important. Not every termination of employment is disciplinary, not every suspension is disciplinary and not every financial loss is necessarily a disciplinary penalty.

[51] To be disciplinary, the action must originate from the employer. While that may appear a statement of the obvious, it is a statement worth repeating. On my reading of the legislation, in particular, the *FAA*, the employer is the Treasury Board. Paragraph 7(1)(*e*) of the *FAA* provides that the Treasury Board acts for the Privy Council in matters relating to human resource management in the federal public administration, including the determination of terms and conditions of employment for public service employees. The Treasury Board maintains the power to establish policies and to issue directives with respect to the powers granted to deputy heads by the *FAA*, but paragraph 12(1)(*c*) gives to deputy heads the power to establish standards of discipline and set penalties, including termination of employment, suspension, demotion and financial penalties. Deputy heads are defined by the *FAA*, in subsection 11(1), in relation to a department in the core public administration, as the department's deputy minister. Under subsection 12.2(1), a deputy head can delegate any of the deputy head's powers or functions relating to human resources management. I think that it is clear from those provisions that the authority to impose discipline in the federal public service is granted exclusively to deputy heads or their delegates through the grant of power in the *FAA*.

[52] The *FAA* must be read in concert with the *PSEA*. Although the *FAA* deals with the legislative authority to establish the terms and conditions of employment for public service employees, the *PSEA* is, as stated in its preamble, concerned with the establishment of a merit-based, non-partisan public service. To that end, the statute establishes the PSC and the Public Service Staffing Tribunal, provides for appointments in the public service, establishes the authority of the PSC to conduct audits and investigations, and, in Part 7, establishes a regime to deal with political activity by public service employees.

[53] Although subsection 15(1) of the *PSEA* authorizes the PSC to delegate many of its powers and functions, such as staffing, to deputy heads, the powers identified in Part 7 (Political Activities) are specifically excluded. Those powers may not be delegated to deputy heads. For the purposes of this grievance, this means that only the PSC may grant permission for a public service employee to seek a nomination or to run

as a candidate in a federal or provincial election, and only the PSC may initiate an investigation under section 118 of the *PSEA*, which includes, among other things, the power to order any corrective measure that the PSC considers appropriate.

[54] As noted, terminology is important. Under subsection 12(1)(c) of the *FAA,* Deputy heads have the exclusive jurisdiction to impose disciplinary sanctions; under section 118 of the *PSEA,* the PSC has the exclusive jurisdiction to impose corrective measures. There is no doubt that those are different actions even though they may have elements in common. On the facts of this grievance, the leave of absence imposed by the PSC was a "corrective measure", not a disciplinary action.

[55] Paragraph 209(1)(*b*) of the *PSLRA* gives the PSLRB the jurisdiction to hear a grievance relating to a ". . . disciplinary action resulting in a termination, demotion, suspension or financial penalty. . . ." This is not such a grievance. It does not relate to a disciplinary action, which, as I have indicated, is the exclusive jurisdiction of deputy heads.

[56] The grievor argued that the grievance is referable to adjudication under paragraph 209(1)(*a*) of the *PSLRA,* on the grounds that the corrective measure imposed by the PSC was discipline for the purposes of the collective agreement and, in particular, for the purposes of article 35 (Grievance Procedure). I disagree. Article 35 simply establishes a grievance process that mirrors the language of the *PSLRA* and that, in fact, explicitly refers back to the provisions of the *PSLRA*. The collective agreement does not and could not extend the jurisdiction of the PSLRB to deal with a corrective measure imposed by the PSC. The parties before me are the employer, that is, the deputy head, and the grievor. The PSC is not a party to the grievance. Furthermore, as a matter of common sense, it is difficult for me to understand how I could order the deputy head to overturn a decision that is within the PSC's exclusive jurisdiction.

[57] I did not find the case law cited by the parties particularly helpful. The *Weber* and *St. Anne Nackawic Pulp & Paper Co. Ltd.* cases cited by the grievor, for example, deal with different factual circumstances and different issues. This is not a case in which the issue concerns overlapping or concurrent jurisdiction and the right of parties to bring civil actions. Nor were the cases cited by the employer on what constitutes discipline particularly helpful in the circumstances of this case, in which the action being grieved was, in fact, a corrective measure ordered by the PSC.

[58] Of all of the case law presented to me, only *Foster* could be considered to be analogous to the facts of this case. In that case, the grievor was convicted of an indictable offence under the *Criminal Code* and was sentenced to a prison term of more than five years. By virtue of section 748 of the *Criminal Code*, his employment was terminated. The employer had no discretion in the matter. The adjudicator found that he did not have jurisdiction because terminations of employment under section 748 of the *Criminal Code* did not fall within the ambit of section 92 of the *Public Service Staff Relations Act* (now section 209 of the *PSLRA*). That decision was upheld on judicial review.

[59] Just as a termination of employment by virtue of the operation of section 748 of the *Criminal Code* is not a disciplinary termination of employment that falls within the ambit of paragraph 209(1)(*b*) of the *PSLRA*, so too a corrective measure imposed pursuant to section 118 of the *PSEA* is not a disciplinary action resulting in a suspension or financial penalty that would fall within the ambit of paragraph 209(1)(*b*) of the *PSLRA*. For these reasons, I find that I do not have jurisdiction over this grievance.

[60] Finally, the fact that the PSC may have suggested, on its website, that recourse to the PSLRB was available is not, in my view, determinative. Jurisdiction must be found in the legislation; it cannot be granted on consent by the parties (see, for example, *Foster).*

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

(The Order appears on the next page)

VII. Order

[62] The objection to jurisdiction is upheld, and I order the file closed.

January 23, 2012.

Kate Rogers,
adjudicator