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Citation: 2013 PSLRB 57

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

RICHARD TUDOR PRICE

Grievor

and

DEPUTY HEAD
(Department of Agriculture and Agri-Food)

Respondent

Indexed as
Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Stephan J. Bertrand, adjudicator

For the Grievor: Himself

For the Respondent: Allison Sephton, counsel

Heard at Ottawa, Ontario,
January 22 and 23, 2013.
Written submissions February 16, March 20 and April 3, 2013.

I. Individual grievance referred to adjudication

[1] Until June 30, 2011, Richard Tudor Price ("the grievor") was employed as an EX-01 with Agriculture and Agri-Food Canada (AAFC or "the employer"). This matter pertains to a grievance he subsequently filed with the Public Service Labour Relations Board ("the Board") on August 5, 2011 and in which he stated as follows:

> *This is to confirm formally that I am grieving my performance review rating for the 2010-11 fiscal year as set out in LOB 163642.*
>
> *According to that letter, I have been assigned a performance rating of "Succeeded–" for that year. This rating results in a reduction in my Pay-at-Risk for 2010-11 relative to a rating of "Succeeded".*
>
> *The "Succeeded–" rating conflicts with an agreement made by the ADM, Human Resources with me on or about November 18, 2010. That agreement included my specifying that my retirement date from the Public Service would be no later than June 30, 2011 and Ms. MacQuarrie taking the necessary steps to change my 2009-10 rating to "Succeeded" and to ensure that my 2010-11 rating would be no less than "Succeeded".*

[2] The grievance was referred to adjudication on February 13, 2012 under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*"), which specifically deals with disciplinary action resulting in termination, demotion, suspension or financial penalty.

[3] Since the grievance did not on its face appear to fall within paragraph 209(1)(*b*) of the *Act*, the Board's Registry requested clarification from the grievor. He subsequently requested that his grievance be referred also under subparagraph 209(1)(*c*)(i), which deals with the demotion or termination of an employee for unsatisfactory performance or for any reason that does not relate to a breach of discipline or misconduct.

[4] In its response, the employer alleged that the grievor had not been subjected to any of the actions contemplated by those statutory provisions, rendering the grievance unadjudicable. It submitted that, therefore, this Board lacked the jurisdiction to hear the matter.

[5] A hearing to deal solely with the employer's jurisdictional objection was scheduled, which led to this decision.

II. Summary of the evidence

[6] At the hearing, I heard testimony from five witnesses, namely, the grievor, Susie Miller, who was at the relevant time a director general of the AAFC's Markets and Industry Services Branch, Heather Smith, who was a director general of the AAFC's Strategic Policy Branch, Catherine MacQuarrie, who was an assistant deputy minister with the AAFC's Human Resources Branch, and Lucia Kuhl, a departmental harassment coordinator with the AAFC's Labour Relations Department.

[7] When the grievor took the stand, he proposed to enter into evidence a detailed written summary of his version of the facts. I ruled that the document ought not to be admitted into evidence but allowed him to refer to it as an aide-memoire during his testimony.

[8] The grievor was hired by the employer in 1982 and was appointed to an EX-01 position in 1986. He remained at that group and level for the next 25 years, until he retired on June 30, 2011.

[9] The grievor testified that, when he was employed with the AAFC, his remuneration consisted of a base salary and a performance award that was determined by a Departmental Management Committee, which conducted a yearly performance review and talent management exercise for executives. As a result, executives were assessed on the delivery of their expected results and on their key leadership competencies and could receive a performance award of a variable percentage, depending on the performance rating assigned to them. The rating descriptors were as follows: (1) "did not meet"; (2) "succeeded–" (minus); (3) "succeeded"; (4) "succeeded+" (plus); and (5) "surpassed". The ratings dictated the percentage amount of the performance award, with the exception of the first rating, which warranted no award.

[10] In mid-July 2010, the grievor was informed that he had been assigned a succeeded- (minus) performance rating for the 2009-2010 review. Disappointed, he consulted with his director general, Ms. Smith, who informed him that she had assessed his performance as succeeded but that her recommendation had not been endorsed by the Strategic Policy Branch's Assistant Deputy Minister, Greg Meredith, or by the Departmental Management Committee. Ms. Smith also testified that she was

unaware of the Committee's reasons for downgrading the grievor's rating and that she did not have a good professional working relationship with Mr. Meredith. The grievor then consulted with Mr. Meredith but received no explanation for the downgrading. That prompted the grievor to complain, in writing, to the deputy minister about the downgrading of his performance rating and the lack of feedback he had received from Mr. Meredith.

[11] The grievor stated that he met with Mr. Meredith a second time after writing to the Deputy Minister, a meeting he described as tense, and ultimately concluded that the prospect of obtaining a succeeded rating for the 2010-2011 performance review period was grim and that deploying to a different branch could improve his chances. In the fall of 2010, with Ms. Smith's support, the grievor was temporarily assigned to a position with the Markets and Industry Services Branch, under Ms. Miller. As a result, during the 2010-2011 review period, the grievor held an EX-01 executive position with the Strategic and Policy Branch, reporting to Ms. Smith, from April 1, 2010 to October 10, 2010, and with the Markets and Industry Services Branch, reporting to Ms. Miller, from October 11, 2010 to March 31, 2011.

[12] In October 2010, the grievor decided to officially contest his 2009-2010 performance rating. However, rather than filing a formal grievance, he opted to meet with Assistant Deputy Minister of Human Resources Ms. MacQuarrie, with the hope of resolving the issue. According to the grievor, during the meeting, which took place on November 16, 2010, Ms. MacQuarrie offered to upgrade his 2009-2010 performance appraisal to succeeded and to guarantee a succeeded performance rating for the 2010-2011 review, in exchange for a letter from the grievor confirming his retirement from the public service as of June 30, 2011. Her offer was conditional on the Deputy Minister's approval, which, according to the grievor, was obtained and confirmed shortly after the meeting. When she testified, Ms. Miller indicated that the grievor told her that such a guarantee had been given to him but did not pursue the issue any further.

[13] During her testimony, Ms. MacQuarrie provided a different version of events. According to her, no offer to guarantee a succeeded performance rating for 2010-2011 was ever made to the grievor; nor was such an offer ever approved by the Deputy Minister. Ms. MacQuarrie indicated that her review of the documentation on file and her discussion with the grievor had enabled her to ascertain that the grievor was

satisfied with his current assignment with the Markets and Industry Services Branch, that he was contemplating retirement, that the 2009-2010 performance assessment had not been documented as well as it should have been, which potentially had impeded the Departmental Management Committee's ability to assign an appropriate performance rating to the grievor, and that allowing him to end his career on good terms certainly appeared more desirable than initiating a grievance process.

[14] Ms. MacQuarrie's testimony was that she agreed to recommend to the Deputy Minister that the grievor's 2009-2010 performance appraisal be upgraded to succeeded and that he be officially deployed to a senior advisor EX-01 position with the Market and Industry Services Branch, pursuant to a pre-retirement special deployment agreement, until his retirement on June 30, 2011. According to Ms. MacQuarrie, those two recommendations were approved by the Deputy Minister and implemented shortly after that, and no other offer was made to the grievor or approved by the Deputy Minister. Ms. MacQuarrie added that the only comment she made about the grievor's 2010-2011 performance review was that, given the apparent lack of supporting documentation for the 2009-2010 review, she strongly recommended to him that he obtain written confirmations of his objectives and achievements from both Ms. Smith and Ms. Miller, so as to provide the Departmental Management Committee with as much information as possible for the upcoming 2010-2011 exercise. Ms. MacQuarrie added that she would have never recommended a guarantee or an immunity of the grievor's performance rating in the middle of a performance period, as it would have served only to undermine the entire performance process.

[15] The grievor did not produce any corroborative evidence or documents to support his version of the agreement he had reached with Ms. MacQuarrie. No other witness was present during his exchange with her, and no written document appears to have captured his alleged version of the terms of the agreement, such as a memorandum of agreement or a memorandum of understanding. The grievor was also unable to provide any documentary evidence, such as a letter or an email, confirming the alleged guarantee or immunity for the 2010-2011 performance review. I noted that the handwritten notes that the grievor made during his meeting with Ms. MacQuarrie, which were entered as an exhibit, make no mention of the alleged 2010-2011 performance rating guarantee.

[16] The grievor confirmed that, shortly after his meeting with Ms. MacQuarrie, he received a letter confirming the assignment of a succeeded rating for 2009-2010, which also confirmed his entitlement to the corresponding difference in monetary compensation, and that he executed a "Pre-Retirement Special Deployment Agreement," which provided as follows:

> *WHEREAS the employee is currently at the EX-01 group and level;*
>
> *WHEREAS the employee has informed AAFC that he intends to retire and resign from his current position at AAFC by June 30, 2011;*
>
> *WHEREAS the employee has made this decision of his own free choice and in consultation with the advisors of this choosing;*
>
> *WHEREAS AAFC has offered the employee a "Pre-retirement Special Deployment" pursuant to Appendix E of the* Directive on Executive Compensation, Special Deployment for Executives.
>
> *WHEREAS AAFC's offer is to deploy the employee to the position of Senior Advisor (position 13051), at the EX-01 group and level, with Market and Industry Services Branch, Ottawa, Ontario, for a specific period of time, following which the employee's resignation from his position with AAFC will be effective;*
>
> *THEREFORE the parties agree as follows:*
>
> *This Pre-retirement Special Deployment will begin on October 11, 2010, and will end on June 30, 2011;*
>
> *During this period, the employee will retain his substantive group and level, EX-01, and will also receive all benefits applicable to the EX group, as well as any salary increases or performance awards that may be approved according to the Executive Group Salary Administration Plan and the EX Performance Management Program. The employee's indeterminate status and terms and conditions of employment remain unchanged.*
>
> *The employee will report directly to Susie Miller, Director General, Food Value Chain Bureau, Market and Industry Services Branch. The employee's duties will be as follows:*
>
> *Develop an action plan to recruit, develop, retain and provide sector knowledge. The Food Value Chain Bureau (FVCB) is responsible for informing policy development,*

> *program development and implementation, and advising senior management and the Minister of issues based on sector knowledge. In addition, this knowledge is used in direct service to the industry and portfolio partners, other government departments, and other levels of government. As staff retire and move to other positions, this sector knowledge goes with them and leaves the Directorate and Department vulnerable.*
>
> *The employee will draw upon his experience working in a sector knowledge capacity, and interview and discuss with FVCB staff. The employee will also work with Director Generals and Directors in other branches to determine the sector knowledge they require from FVCB, as well as what they need internal to their operations.*
>
> *The end result will be a draft action plan for Susie Miller's consideration, as well as discussions at DM or other management fora.*
>
> *If the employee's position is subject to workforce adjustment during this Pre-retirement Special Deployment or prior to his retirement, the employee will be accorded the same treatment and entitlements as all other executives of AAFC, in accordance with the* Executive Employment Transition (EET) *Policy or any other policy in effect at the time.*
>
> *This Pre-retirement Special Deployment may be amended in response to operational requirements, subject to the agreement of the parties involved.*
>
> *The employee understands and accepts that this assignment cannot be extended beyond June 30, 2011.*
>
> *To confirm understanding and acceptance of the aforementioned terms and conditions of this agreement, all parties have signed below.*
>
> *I hereby confirm that I enter into this agreement freely and voluntarily; that I have read Appendix E of the* Directive on Executive Compensation, Special Deployment for Executives*; and that this constitutes my irrevocable resignation from Special Advisor, effective by the last date of the Pre-retirement Special Deployment, being June 30, 2011.*
>
> *I hereby acknowledge the terms and conditions of this agreement.*

[17] During her testimony, Ms. MacQuarrie also indicated that she had discussed upgrading the grievor's 2009-2010 performance rating with Mr. Meredith and that at

no time did he ever object to her recommendation on the basis of needing to maintain some form of discipline or punishment.

[18] The grievor also confirmed that he followed Ms. MacQuarrie's advice and sought from both Ms. Smith and Ms. Miller written confirmation of his objectives and achievements in anticipation of the 2010-2011 performance review exercise. That was corroborated by both Ms. Smith and Ms. Miller, who also confirmed that they had both assessed the grievors' performance as succeeded for that period. Both of them also confirmed that they had never seen any document referencing the alleged 2010-2011 rating guarantee or sought or received any authentication of such a guarantee from anyone at the AAFC.

[19] The grievor retired on June 30, 2011, as he had agreed to. On August 3, 2011, he received a letter from the Deputy Minister informing him that the Departmental Management Committee had completed the 2010-2011 performance rating of all executives and that he had been assigned a succeeded- (minus) rating, which translated into a 6% performance award, representing a lump sum payment of $7 140.00. According to the grievor, that violated the agreement he had reached with the Deputy Minister, through Ms. MacQuarrie, in the fall of 2010, which allegedly guaranteed him a succeeded rating and a 10% performance award, representing a lump-sum payment of $11 900.00. Ms. MacQuarrie denied any breach of their agreement and added that the performance assessments of all executives were reviewed and approved collectively by the Departmental Management Committee and that it was not uncommon for the Committee to assign a rating that differed from a director general's recommendation, resulting in either a downgrade or an upgrade. Ms. Miller corroborated that point when she testified. She confirmed that she provided recommendations for six to eight executives every year and that the Committee did not always endorse them. In fact, during the 2010-2011 review exercise, two of the eight recommendations she made were downgraded, including one for the grievor, and one was upgraded.

[20] Two days after being informed of his 2010-2011 performance rating, the grievor filed this grievance. While he did not mention discipline in his grievance form or during the grievance process, he testified that the downgrade of his performance rating amounted to disguised discipline. According to his calculations, the alleged breach of the agreement represented an immediate loss of $4 760.00, as well as a consequential reduction in his pension of approximately $56.00 per month for the rest

of his life, which he estimated at $10 240.00, using a normal life expectancy of 79 years.

[21] In late September, the grievor met with Assistant Deputy Minister, Market and Industry Services Branch, Steve Tierney, to inquire as to why the Departmental Management Committee had assigned him a succeeded- (minus) rating. Mr. Tierney allegedly cited two examples of shortcomings that had been brought to the attention of the Committee, which the grievor claimed that he was subsequently able to successfully refute. However, a document presented by the grievor at the hearing, which was marked as Exhibit G-19, clearly identified at least eight deficiencies in his performance and noted that the work assigned to him during the applicable period was of lesser scope and breadth compared to other executives at the same level, due in part to his transition into retirement.

[22] When asked who was responsible for allegedly imposing a disciplinary measure on him, the grievor responded that both Mr. Meredith and Rita Moritz, Assistant Deputy Minister, Farm Financial Programs Branch, shared that responsibility. Ms. Moritz had provided some input on the grievor's performance to the Departmental Management Committee since her branch had received files that had been transferred from the Strategic Policy Branch for which the grievor was responsible. Neither individual was called as a witness by the grievor.

III. Summary of the arguments

A. For the employer

[23] The employer argued that the grievance ought to be dismissed for lack of jurisdiction because it does not raise any adjudicable issues. According to the employer, the grievor ought to be prevented from raising disguised discipline because he failed to raise it in his grievance and during the grievance process. The employer referred me to *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.) and to *Shneidman v. Attorney General of Canada*, 2007 FCA 192. The employer added that, even if the grievor were permitted to raise disguised discipline, his failure to establish on a balance of probabilities that discipline or disguised discipline occurred justifies a dismissal of this grievance, which instead deals with employment performance, an issue that cannot be referred to adjudication under section 209 of the *Act*.

[24] The employer submitted that the grievor had to expressly raise the issue of disguised discipline during the grievance process for the grievance to have been properly referred to adjudication and that his attempt to argue that he felt that his performance appraisal resulted in a financial penalty was not sufficient to change the subject of his grievance to disguised discipline. According to the employer, the grievor was required to raise his allegation of disguised discipline during the grievance process. Since he did not, the issue could not be raised for the first time at adjudication. The employer referred me to *Hanna v. Deputy Head (Department of Indian Affairs and Northern Development),* 2009 PSLRB 94, *Zakaib v. Deputy Head (Canadian International Development Agency),* 2009 PSLRB 90, *Veilleux v. Treasury Board (Public Service Commission),* [1982] C.P.S.S.R.B. No. 126 and *Garcia Marin v. Canada (Treasury Board),* 2007 FC 1250.

[25] The employer also argued that this Board has consistently held that performance appraisals are outside its jurisdiction, that disguised discipline must be proven by a grievor on a balance of probabilities, that, to establish that disguised discipline occurred, it must be proven that a culpable act resulted in a disciplinary action, and that, although financial consequences might be associated with a performance appraisal, those consequences do not constitute a disciplinary sanction resulting in a financial penalty within the meaning of paragraph 209(1)(*b*) of the *Act*. The employer referred me to *Hanna*, *Zakaib*, *Bratrud v. Office of the Superintendent of Financial Institutions of Canada*, 2004 PSSRB 10 and *Spacek v. Canada Revenue Agency*, 2007 PSLRB 115.

[26] The employer submitted that the evidence in this case simply did not establish that any disciplinary action or intent to discipline was involved in the grievor's performance appraisal.

[27] The employer further submitted that there was no evidence of bad faith or disguised discipline in this case. In any event, according to the employer, bad faith alone cannot be the subject of a grievance before this Board, as first and foremost, evidence of disguised discipline is required, which the employer argued was clearly lacking in this case.

[28] The employer argued that it is beyond the jurisdiction of the Board to assess whether the grievor's performance evaluation was fair or accurate and that if the grievor felt that his work was unfairly evaluated, the proper recourse would have been

to seek judicial review of that decision, which was not done in this case. The employer referred me to *Canada (Attorney General) v. Assh*, 2005 FC 734.

[29] As for the agreement reached by the grievor in November 2010, the employer argued that the evidence did not establish that the grievor and Ms. MacQuarrie or the Deputy Minister reached a deal guaranteeing the grievor a succeeded rating on his 2010-2011 performance evaluation. According to the employer, that meant that there could not have been bad faith in the implementation of the agreement, since no such deal was ever reached.

[30] Furthermore, the employer submitted that the pre-retirement agreement, which the grievor entered into freely and in consultation with advisors of his choosing, clearly provided that he was going to be subject to the customary performance appraisal process and made no mention of an agreed-upon outcome for the 2010-2011 performance review. The grievor signed the agreement on December 2, 2010, after his conversations with Ms. MacQuarrie on November 16 and 18, 2010.

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

[31] The grievor argued that I had jurisdiction to deal with his grievance on four grounds. First, he referred to internal procedural failings in the processing of his grievance. He submitted that the employer had allowed the integrity of the departmental grievance process to be deceitfully and unfairly undermined, rendering the final-level hearing invalid. According to the grievor, only a *de novo* hearing on the merits could remedy that unfairness and fill the "void."

[32] In essence, the grievor alleged that the employer withheld a document entitled "Grievor Performance – explanation" (Exhibit G-19) during the internal grievance process and that he was not provided with a copy of it until after the final-level grievance hearing, which made it impossible for him, during that process, to address any allegations made in the document. Ms. Kuhl drafted the document in preparation of the employer's final-level response.

[33] Second, the grievor suggested that how the employer dealt with his 2010-2011 performance review amounted to a bad faith exercise. He added that, through a series of actions that were not made in good faith and even bordered on misfeasance, AAFC

senior managers had destroyed the trust and confidence between him and management.

[34] In essence, the grievor alleged that the employer's true objective in 2010 was to end his employment, possibly to facilitate a departmental reorganization. He added that the downgrading of his 2010-2011 performance rating was meant to punish him for complaining to the Deputy Minister about his 2009-2010 performance rating, all of which amounted to bad faith. According to the grievor, the fact that senior employees of the employer had engaged in bad faith during the performance review exercise was sufficient to bring his grievance within the scope of section 209 of the *Act*. In support, the grievor referred to a number of facts that had not been entered as evidence.

[35] Third, the grievor submitted that after receiving his grievance, the employer attempted to justify not implementing the agreed-upon guarantee by relying on two shortcomings that, according to him, were promptly and convincingly refuted. This, according to the grievor, amounted to a disguised disciplinary action resulting in a financial penalty, since the shortcomings pertained to culpable and corrigible conduct and were relied upon to penalize him financially. In particular, the grievor referred to the shortcomings outlined in Exhibit G-19, which specifically mention the grievor's failure to meet a number of fundamental expectations for an EX-01 employee.

[36] Fourth, the grievor suggested that the employer's decision to downgrade his 2010-2011 performance rating to "succeeded–" (minus) violated the November 2010 agreement, therefore rendering his resignation from the public service, which was conditional on the full implementation of the agreement, invalid or involuntary. According to him, it resulted in the conversion of his resignation into a termination "for any other reason" within the scope of subparagraph 209(1)(*c*)(i) of the *Act*, which is adjudicable.

[37] The grievor referred me to a number of authorities, including the following: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, *Knight v. Indian head school division no. 19*, [1990] 1 S.C.R. 653, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, *Akinmayowa v. Canada (Citizenship and Immigration)*, 2011 FC 171, *Schmidt v. Canada (Attorney General)*, 2011 FC 356, *Public Service Alliance of Canada v. Treasury Board*, 2010 PSLRB 88, *Canada (Attorney General) v. Horn*, [1994] 1 F.C. 453 (T.D.), *Attorney General of Canada v. Grover*, 2007 FC 28, *Dubord & Rainville Inc. c. Métallurgistes unis d'Amérique, local 7625*,

1996 CanLII 1508 (QC SAT), and *Cranston v. Canadian Broadcasting Corp.*, 1994 CanLII 7408 (ON SC).

IV. Reasons

[38] For the reasons that follow, I have determined that I do not have jurisdiction over this grievance, as it pertains to a performance appraisal and incidentally to an alleged violation of a verbal agreement between the parties, both of which are not adjudicable matters.

[39] The types of matters that can be referred to adjudication to the Board are specifically set out in section 209 of the *Act*, which reads as follows:

> *Reference to adjudication*
>
> ***209.*** *(1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> *(*a*) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
>
> *(*b*) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> *(*c*) in the case of an employee in the core public administration,*
>
> *(i) 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, or*
>
> *(ii) deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*
>
> *(*d*) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

[40] On his grievance form, the grievor initially indicated that he was referring his grievance to adjudication pursuant to paragraph 209(1)(*b*) of the *Act*. Later, he

informed the Board's Registry that he also wished to refer his grievance under subparagraph 209(1)(*c*)(i). Unfortunately, the facts that were presented to me during the hearing do not support a referral under either provision. Simply put, there was no disciplinary action, no demotion, no termination for unsatisfactory performance and no termination for any reason that did not relate to a breach of discipline or misconduct.

[41] This matter deals with a performance appraisal or performance pay and is not adjudicable under the *Act*.

[42] However, in fairness to the grievor, I will address each of the four arguments he submitted in support of his position that I have jurisdiction over his grievance.

A. <u>Procedural fairness</u>

[43] The grievor's argument about the alleged lack of procedural fairness in the internal grievance process was raised for the first time at the hearing. I agree with the employer's position that, under the rule established in *Burchill*, a grievor ought not to be permitted to raise a new ground so late in the process. However, given the grievor's position that he only became aware of the facts supporting this new ground after the internal grievance process was completed, I'm not convinced that *Burchill* would necessary apply in the circumstances. In any event, this Board has consistently held that hearings before it are *de novo* and are meant to cure any procedural failings that occurred during the grievance process. This was confirmed by the Federal Court in *Schmidt v. Canada (Attorney General),* 2011 FC 356, a decision relied upon and submitted by the grievor in his book of authorities.

[44] During the hearing, the grievor did not offer any compelling evidence to establish that procedural unfairness occurred during the grievance process. However, he was given an opportunity and in fact presented evidence that was obviously intended to rebut the shortcomings listed in Exhibit G-19 and to support his allegation of bad faith. In essence, that opportunity cured any previous procedural defects, assuming of course that I have jurisdiction over this matter.

[45] Accordingly, I disagree with the grievor's position that I should dismiss the employer's objection and hear the merits of his grievance to fill the void. The grievor was provided with a forum to fill that alleged void during his testimony and that of his

witnesses and to convince me that I have jurisdiction over his grievance. He simply failed.

B. Bad faith exercise

[46] The grievor suggested that how the employer dealt with his 2010-2011 performance review amounted to a bad faith exercise. According to the evidence, both Ms. Smith and Ms. Miller understood that their recommendations on the grievor's performance appraisal for 2010-2011 were not final and that the Departmental Management Committee could arrive at a different result and assign a different performance rating. It was also confirmed through the testimonies of Ms. MacQuarrie and Ms. Miller that it was not uncommon for the Committee to change the ratings initially recommended by directors general. Ms. MacQuarrie also testified that other considerations are at play when determining the performance evaluations of executives. In particular, she confirmed that the Committee considered the scope of their work and whether they had supervisory responsibilities and that it conducted a relative examination of each executive's performance in relation to all the other executives. Ms. Miller also confirmed that the grievor was not the only executive from her branch that the Committee downgraded during the 2010-2011 performance review exercise.

[47] The grievor failed to present corroborating evidence to support his allegation that the employer wanted to terminate his employment to facilitate a departmental reorganization or that the downgrading of his 2010-2011 performance rating was motivated by some desire to punish him for raising his dissatisfaction about his 2009-2010 performance rating with the Deputy Minister. In order to establish bad faith, the grievor was required to offer more than his perceptions. Simply put, the grievor failed to establish that senior employees of the employer had engaged in bad faith during the 2010-2011 performance review exercise. No evidence suggested that Mr. Meredith deliberately acted in a manner intended to prevent the grievor from receiving a certain performance rating for reasons unrelated to his performance. In fact, the evidence revealed that another assistant deputy minister, Ms. Moritz, had also raised concerns about the grievor's performance during the 2010-2011 performance review exercise. Her concerns were not even addressed by the grievor in evidence. In addition, no evidence was led to demonstrate how the Committee arrived at its final

decision, the considerations it took into account and whether it considered inappropriate factors during its performance review exercise.

[48] I find that the grievor's bad faith argument is based on a series of assumptions he made, none of which were established by any compelling evidence, and that it clearly lacks the necessary credence to bring his grievance within the scope of section 209 of the *Act*.

C. Disguised discipline

[49] The grievor referred to the shortcomings outlined in Exhibit G-19, which specifically raised alleged failures on his part to meet a number of fundamental expectations for executives and alleged that the resulting effect, namely, the assignment of a succeeded- (minus) rating, amounted to a disguised disciplinary action resulting in a financial penalty. His allegation was based on the fact that the shortcomings in question pertained to culpable and corrigible conduct and were relied upon by the employer to penalize him financially. Unfortunately, he presented no compelling evidence to substantiate his claim.

[50] The grievor admitted in his testimony that he never raised disguised discipline in his grievance form or during the internal grievance process. I agree with the employer's argument that the grievor should not be allowed to raise disguised discipline for the first time at adjudication, based on the well-established *Burchill* principle. Given my earlier comments at paragraph 43 however, I am not prepared to dispose of his argument on that basis alone.

[51] The evidence in this case has revealed that what the grievor considers discipline is simply not so. His characterization of culpable or corrigible acts is non-existent. The shortcomings or lapses referred to in Exhibit G-19 consist of nothing more than standard non-culpable performance issues. Simply put, they are not acts that typically attract disciplinary responses from employers. Neither Ms. Miller nor Ms. Smith suggested that they had any reason to believe that any senior manager at the AAFC intended to discipline or punish the grievor by recommending a succeeded- (minus) rating during the 2010-2011 performance review; nor did they imply that the Departmental Management Committee acted improperly in assigning such a rating to the grievor. As suggested in *Bratrud*, the Board has consistently held that although

there may well be financial consequences associated with a performance appraisal, those consequences do not constitute a financial penalty under the *Act*.

[52] What transpired in this case was not the work of senior managers motivated by bad faith or a desire to punish or discipline an employee for reasons unrelated to his performance. Rather, it was the collective effort of a Committee specifically mandated to review and approve the performance assessments of a group of executives and to ultimately assign appropriate performance ratings to each of them, subject to the deputy minister's approval.

[53] Accordingly, I find that no discipline or disguised discipline was imposed on the grievor in this case.

D. Termination for any other reason

[54] According to the grievor, the Committee's decision to downgrade his 2010-2011 performance rating to succeeded- (minus) constituted a violation of an oral agreement he reached with the employer in November 2010, which rendered his resignation from the public service invalid or involuntary, the resulting effect of which was that his resignation must be considered a termination "for any other reason" within the meaning of subparagraph 209(1)(*c*)(i) of the *Act*.

[55] That provision specifically provides that a grievance may be referred to adjudication if it is related to a demotion or termination under paragraph 12(1)(*d*) of the *Financial Administration Act*, R.S.C. 1985, C.F.-11, 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.

[56] While I seriously doubt that the grievor's proposed scenario could possibly be covered by subparagraph 209(1)(*c*)(i) of the *Act*, there is no need to conduct a full analysis of that argument for one simple reason. The oral agreement was not breached.

[57] An email exchange (Exhibit E-7) is the only document that appears to have captured the terms of the oral agreement between the grievor and Ms. MacQuarrie. It provides as follows:

> *Hello again Catherine:*

> *This is to follow up on our discussion on November 16th and our telephone conversation this morning.*
>
> *This is to confirm that I will make a formal commitment to retire effective no later than June 30, 2011.*
>
> *My commitment takes account of the verbal understanding that we have reached that my performance review concerns will be resolved as discussed.*
>
> *Please could your team provide me with a template for an appropriate letter for me to sign specifying my retirement date?*
>
> *I am in touch with Heather Smith and Susie Miller respectively with regard to Performance Agreement(s) for the two halves of the current fiscal year to ensure that there is adequate documentation and review of my performance this year as per our discussion.*
>
> *Thank you very much for your courtesy and consideration in dealing with my concerns.*
>
> *Sincerely,*
>
> *Richard Tudor Price*

[58] According to Ms. MacQuarrie's evidence, which I preferred over that of the grievor, Exhibit E-7 accurately reflected the verbal agreement that had been reached and confirmed its terms as follows: (i) the grievor would retire on June 30, 2011; (ii) his concerns about his performance review would be resolved as discussed, meaning that the 2009-2010 performance rating would be upgraded from succeeded- (minus) to succeeded; (iii) a pre-retirement special deployment agreement template confirming the grievor's retirement date would be provided to him for his signature; and (iv) he would obtain performance appraisals from both Ms. Smith and Ms. Miller to ensure that adequate documentation was available during the 2010-2011 performance review. Ms. MacQuarrie categorically denied that she or the Deputy Minister ever provided the grievor with a guarantee that he would be assigned a succeeded performance rating for the 2010-2011 review period. Although the grievor alleged that such a guarantee was provided by Ms. MacQuarrie and approved by the Deputy Minister, no independent evidence corroborates his allegation. The fact that the grievor told Ms. Miller that such a guarantee had been given to him is not proof that it was ever given. In fact, I am perplexed by the fact that Ms. Miller never attempted to consult senior management at

the AAFC to validate information that on its face should have appeared to undermine the AAFC's entire performance review process.

[59] I agree with the employer's submission that, if this alleged guarantee was in fact provided and perceived as paramount by the grievor, he would and should have exercised some prudence and insisted on its inclusion in the pre-retirement special deployment agreement. But that did not transpire. Instead, the grievor willingly executed an agreement that bound him to the standard performance appraisal process, without any guarantee as to its outcome.

[60] Accordingly, I find that no violation of the November 2010 verbal agreement between the grievor and Ms. MacQuarrie occurred and that the grievor's resignation from the public service was both valid and voluntary. In no way can the grievor's resignation be considered a termination "for any other reason" within the meaning of subparagraph 209(1)(*c*)(i) of the *Act*.

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

(The Order appears on the next page)

V. Order

[62] The grievance is dismissed.

May 23, 2013.

Stephan J. Bertrand,
adjudicator