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Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

DR. MOMIR NESIC

Grievor

and

TREASURY BOARD (Health Canada)

Respondent

Indexed as
Nesic v. Treasury Board (Health Canada)

In the matter of individual grievances referred to adjudication

Before: Catherine Ebbs, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Eric Langlois, employment relations officer, Professional Institute of the Public Service of Canada

For the Respondent: Lesa Brown, counsel

Heard at Ottawa, Ontario,
August 25 and 26, 2015, and January 18 and 19, 2016.

I. Summary

[1] In 2012, Health Canada (HC) declared that it no longer required the services of Dr. Momir Nesic ("the grievor"). Under the workforce adjustment (WFA) provisions of the agreement between the Treasury Board and the Professional Institute of the Public Service of Canada for the Health Services Group (expiry date, September 30, 2014; "the collective agreement"), the grievor became a surplus employee. In August 2013, at the end of his year as a surplus employee, he was laid off. He did not find employment in the federal public service during his year of priority as a laid-off person.

[2] The grievor filed two grievances in which he alleged that HC violated the WFA provisions of the collective agreement. In one ("the GRJO grievance"), he objected to the decision by HC's deputy head to not offer him a guarantee of a reasonable job offer (GRJO). In the second ("the retraining grievance"), he submitted that HC did not follow the collective agreement when considering retraining options for him.

[3] After considering the parties' testimony, evidence, and arguments, I allow both grievances. As the remedy, I declare that in both situations, HC did not fully meet its collective agreement obligations.

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Background

A. The grievor

[5] The grievor started working with HC in 2004. He had determinate positions with

the Marketed Health Products Directorate, the Health Products and Food Branch, and the First Nations and Inuit Health Branch (FNIHB).

[6] From 2006 to 2013, the grievor was a full-time medical officer (classified MD-MOF-03) in the National Capital Region (NCR) at HC's Office of Community Medicine (OCM) in the FNIHB. Among other tasks, he developed research tools, analyzed and developed policies, identified health risks, and provided professional advice.

[7] Before coming to Canada, the grievor completed his studies in medicine and obtained an M.Sc. (in physiology) and a Ph.D. (in pharmacology) in Serbia. While an HC employee, he obtained a master's degree in public health from the University of Waterloo. HC assisted him in this endeavour by permitting him to take leave without pay and by providing him with financial assistance.

[8] The grievor was licensed to practise medicine in Serbia in 1991. In 2007, he was licensed to practise medicine by the College of Physicians and Surgeons of New Brunswick (CPSNB). The CPSNB's registration notice was effective January 8, 2007. It stated that the grievor had a "full license [*sic*]" and noted that his "… practice [was] limited to employment with Health Canada". It was signed by the CPSNB's registrar.

B. Deficit Reduction Action Plan

[9] In 2011, the federal government announced a strategic and operating review, referred to as the Deficit Reduction Action Plan (DRAP). Certain departments and agencies, including HC, were required to review their operations to find efficiencies, which included developing and implementing restructuring and downsizing plans.

[10] As part of the DRAP, HC decided to reorganize the FNIHB's NCR offices. The Office of Community Medicine, where the grievor worked, ceased to exist. A new office, the Inter-Professional Advisory Program Support Directorate, was created. In addition, HC eliminated the MD-MOF positions in the FNIHB's NCR directorate.

C. Workforce adjustment

[11] A workforce adjustment (WFA) occurs when a department's deputy head decides that the services of one or more indeterminate employees will no longer be required beyond a specified date. For the grievor and HC, the WFA rules are found in

the collective agreement under the heading "Objectives" in Appendix "S", which is followed with: "It is the policy of the Treasury Board to maximise [*sic*] employment opportunities for indeterminate employees affected by workforce adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them."

[12] Clause 1.1.1 in Part I of Appendix "S" states as follows:

> *Since indeterminate employees who are affected by workforce adjustment situations are not themselves responsible for such situations, it is the responsibility of departments or organizations to ensure that they are treated equitably and, given every reasonable opportunity to continue their careers as public service employees.*

[13] WFAs involve the following steps:

- The deputy head decides that an indeterminate employee's services are no longer required (the deputy head cannot delegate this authority).
- The employee is notified.
- If the deputy head knows or can predict employment availability in the core public administration (CPA), he or she is expected to provide a GRJO to affected employees, which means that those employees remain surplus until they are provided with at least one reasonable job offer (RJO).
- If a particular employee does not receive a GRJO, he or she has three options from which to choose. First is being declared surplus and being considered a priority for appointment to a position for 12 months. Second is leaving the public service and receiving a cash payment. Third is receiving a cash payment and an education allowance.
- If the employee does not find an indeterminate position during the surplus priority period, he or she is laid off.
- Once laid off, he or she receives another 12 months of being considered a priority for federal government positions.

- For HC employees, the Public Service Commission's (PSC) Priority Information Management System (PIMS) and HC's Employment Continuity Database are used to track priorities and refer employees impacted by WFA situations to employment opportunities.

- The employee could be eligible for up to two years of retraining to facilitate appointment to an alternative position.

D. WFA letter to the grievor

[14] On April 11, 2012, HC gave the grievor written notice that his services in his substantive position were no longer required as of May 1, 2012, because of a lack of work or the discontinuance of a function. Therefore, he had been identified for lay-off no later than August 9, 2013. He was also informed that the deputy head had determined that HC could not provide him with a GRJO.

[15] On August 9, 2012, the grievor chose to be declared surplus and to be considered a priority for appointment to an alternative position for 12 months. In August 2013, at the end of his surplus priority period, he was laid off because he had not found alternative employment. He was a priority as a laid-off person for another year but again did not find alternative employment in the federal public service.

E. The grievances

[16] On June 20, 2012, the grievor filed the GRJO grievance. In it, he stated as follows:

> *I grieve the application of section 1.1.7 of the Workforce Adjustment Appendix of the SH Collective Agreement which states: "Deputy Heads will be expected to provide a guarantee of a reasonable job opportunity in the core public administration".*
>
> *I believe several MD positions for which I qualify and which are currently vacant, one of which could have been offered to me as a guaranteed job offer, but wasn't offered [sic].*

[17] The grievor asked that the respondent be ordered to give him "… a guarantee of a reasonable job offer based on the vacant MD positions that are available and for which [he is] qualified and to be made whole."

[18] HC denied the grievance at both the second and final levels.

[19] On October 28, 2013, the grievor filed the retraining grievance. In it, he alleged that the respondent violated Part IV of Appendix "S" of the collective agreement when it did not offer him retraining. He stated as follows:

> *I grieve that management at Health Canada has violated Part IV (Retraining) of the Workforce Adjustment Provisions found in Appendix S of the Health Services (SH) Collective Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada.*
>
> *More specifically, I am grieving the response received from the employer on October 4, 2013, indicating that the retraining provisions for lay-off priorities will only be applied for positions that are considered to be equivalent or one level lower to my substantive level of a MD-MOF-03.*
>
> *This response came following my application for an SG-05 position within Health Canada; from which I was screened out, despite the employer having made no consideration for retraining.*

[20] The grievor asked for the following:

- that the employer comply with the collective agreement;
- that he be considered for retraining for the SG-05 position within HC that prompted a notice from the respondent on October 4, 2013, indicating that the retraining provisions in the collective agreement would be applied only for positions equivalent to or one level lower than his level;
- that the respondent consider him for future retraining opportunities;
- that the respondent extend his opting period to allow him a further opportunity to secure continued employment;
- that he be compensated for income missed from not being considered for retraining and for not subsequently being staffed into the position; and
- that he be made whole and that he receive any other redress deemed necessary to resolve the issue.

[21] HC denied the grievance at both the second and final levels.

[22] The grievor referred the GRJO grievance to adjudication on June 11, 2013, and the retraining grievance on April 7, 2014. The hearing for the two grievances was held on August 25 and 26, 2015, and on January 18 and 19, 2016. The grievor testified on his own behalf, and the employer called the following witnesses:

- Sony Perron was one of the executives leading HC's DRAP exercise in 2011. In that capacity, he advised HC's Executive Committee and reported to the deputy head. He then became the assistant deputy minister of HC's Corporate Services Branch, and in 2014, he was named the senior assistant deputy minister of HC's FNIHB branch.

- Hilary Flett was manager of the OCM in the FNIHB in 2011 and 2012, when the office was migrating to the new structure. In 2006 and 2007, she reviewed all physician positions in the federal government.

- Lynn Brault was HC's director of workforce management. She helped HC's Executive Committee implement the WFA provisions across HC and provided information on WFA issues to HC employees and managers.

- Michelle Taillon was a senior policy and programs officer with HC's Staffing Policy Centre.

- Véronique Béland was a staffing policy advisor in HC's Staffing Policy Centre and was a subject matter expert for WFA and priority administration enquiries.

- Jim Butler was the Treasury Board Secretariat's (TBS) senior analyst responsible for applying WFA agreements. Among his duties, he advised corporate human resources advisors on applying WFA provisions in collective agreements.

III. The GRJO grievance

A. The collective agreement - Appendix "S"

[23] The collective agreement contains the following definition of "GRJO" (at

Appendix "S":

> [A GRJO] *is a guarantee of an offer of indeterminate employment within the Core Public Administration provided by the deputy head to an indeterminate employee who is affected by workforce adjustment. Deputy heads will be expected to provide a guarantee of a reasonable job offer to those affected employees for whom they know or can predict employment availability in the Core Public Administration. Surplus employees in receipt of this guarantee will not have access to the options available in Part VI of this Appendix.*

[24] An RJO is defined as "… an offer of indeterminate employment within the Core Public Administration, normally at an equal level but could include lower levels. Surplus employees must be both trainable and mobile." Clause 1.1.7 in Part I of Appendix "S" states as follows: "Deputy heads will be expected to provide a guarantee of a reasonable job offer for those employees subject to workforce adjustment for whom they know or can predict employment availability in the Core Public Administration."

[25] Clause 1.1.16 in Part I of that appendix states as follows:

> *Appointment of surplus employees to alternative positions, whether with or without retraining, shall normally be at a level equivalent to that previously held by the employee, but this does not preclude appointment to a lower level. Departments or Organizations shall avoid appointment to a lower level except where all other avenues have been exhausted.*

B. <u>The TBS's approach</u>

[26] A TBS document entitled, "Frequently Asked Questions - Work Force Adjustment Agreements" ("the FAQ document") includes the following about GRJOs:

…

> ***Q21. How does a deputy head determine whether or not to provide a guarantee of a reasonable job offer?***
>
> *Keeping in mind that employees are expected to be trainable and mobile, there are many other factors that deputy heads consider in deciding whether or not to provide an employee with a guarantee of a reasonable job offer, including:*
>
> *1. whether they know or can predict that employment will be available for the affected employee in the core public*

> *administration. This determination should be based on a number of factors, including:*
>
> - *the employee's qualifications and competencies;*
> - *opportunities within the department as well as more broadly within departments and agencies of the core public administration;*
> - *consideration of the current and anticipated number and types of priorities within the Priority Information Management Systems [sic] at the Public Service Commission.*
>
> *2. whether the skills of the employee are very specialized and retraining would be unreasonable (keeping in mind cost, time, and the demand for certain types of skills in the future).*
>
> *It should be noted that although geographic preferences of the employee are taken into account, there is no certainty that a reasonable job offer will necessarily match the employee's preference.*
>
> …

[27] In March 2013, the TBS provided an opinion to HC about the grievor's case. Ms. Béland wrote to the TBS, asking whether a position three levels lower than the grievor's group and level could be considered an RJO. The TBS replied as follows:

> …
>
> *Our policy centre is recommending that salary protection be limited to one level lower and in exceptional circumstances two levels lower. The department who has 'surplused' the employee will make a determination if the lower level position is to be considered a reasonable job offer.*
>
> *… you are contemplating options which are more than two levels below which does not appear to reflect the spirit of the WFA directive.*

[28] Mr. Butler testified that in 2012 and 2013, the TBS advised that surplus employees should normally be appointed to alternative positions at an equivalent level but that appointments could be made to a position one level lower. An appointment to a position two levels lower was possible only in exceptional circumstances and only if no other avenues were identified.

[29] Mr. Butler explained that exceptional circumstances could include the employee

being in a remote location and unwilling to move, having specialized expertise, or reaching the end of his or her priority period.

[30] Mr. Butler stated that in 2015, the TBS changed its advice to departments, stating that they could consider appointing a surplus employee to a position down to three levels lower as a maximum. This was in response to *Public Service Alliance of Canada v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 10, in which the Board found that the TBS's opinion restricting RJOs to two levels lower did not respect the definition of "RJO" in WFA provisions.

C. HC's approach

[31] According to the "Health Canada Work Force Adjustment Guide" (dated March 25, 2012; "the HC WFA Guide"), "… the Deputy Minister is expected to provide a guarantee of a reasonable job offer (GRJO) to employees whose services are no longer required when continuing alternative employment within the Core Public Administration (see note) is expected within the next twelve months."

[32] The HC WFA Guide sets out the following principles:

…

> *10.1 In a WFA situation, there are guiding principles that must remain at the forefront of any decision making:*
>
> *- It must be made in accordance with WFA Directive and/or collective agreements;*
>
> *- It must be free from discrimination. All employees need to be treated fairly, equitably and in the same manner as their colleagues. Employees who are out of the workplace on extended leave (with or without pay) must be considered objectively alongside employees that remain in the workplace;*
>
> *- It must be based on clear, objective, measurable and accurate information; and*
>
> *- It should be considered on a case-by-case basis.*

[33] Section 4.11 of the HC WFA Guide states as follows:

> *4.11. Managers are responsible for ensuring that every effort is made to place affected and surplus employees (those provided with a GRJO or who have selected Option A) who*

> *wish to continue working in the Core Public Administration.*
>
> *The Public Service Commission (PSC) operates the Priority Information Management System (PIMS) whereby surplus employees and laid-off persons, as well as other priorities, are referred to suitable vacancies in the Core Public Administration for which they are qualified or could be retrained….*
>
> *…*
>
> *Health Canada has created a centralized departmental Priority Administration Inventory known as the Employment Continuity Database (ECD). It will be used as an effective and secure means for the administration, referral/record maintenance and placement of affected and surplus employees and laid-off persons with the Department.*

[34] Section 4.5 of the HC WFA Guide contains the following:

> *…In what circumstances would a GRJO not be offered?*
>
> *A GRJO would not be offered when employment cannot be predicted within the next twelve months. Factors to consider when forecasting the availability of jobs include:*
>
> *a. The skills of the affected employees are very specialized and retraining would be onerous and inappropriate;*
>
> *b. The Core Public Administration is no longer employing the skills of the affected employees;*
>
> *c. Other job opportunities in the current location and other locations within the Core Public Administration cannot be found.*
>
> *Other factors that could be examined when determining employment predictability include:*
>
> *a. Employee mobility*
>
> *b. Employee language results*
>
> *c. Employee's skills and competencies.*

[35] Mr. Perron and Ms. Brault explained that to predict whether alternative employment was expected within the next 12 months, HC studied absorption capabilities by examining the number of priority persons seeking employment and the number of vacancies existing or expected to exist within the year, within both the CPA in general and HC specifically. However, they noted that in 2011 and 2012, central

agencies were advising departments to look primarily at their own absorption capabilities because DRAP decisions had led to an increase of surplus employees in many departments and agencies.

[36] HC carried out a study of all its positions at every group and level. In two documents, entitled "GRJO Analysis" and "Absorption Description", the explanatory notes state that absorption was calculated using factors such as expected retirements and transfers out of HC other than retirements. The study also reviewed the PSC's PIMS, information on impacted occupational groups from other science-based departments, and HC staffing plans.

[37] Mr. Perron and Ms. Brault stated that if statistical information, including the GRJO Analysis and Absorption Description documents, showed that there was a possibility that the surplus employee could be absorbed into the CPA or HC, the next step was to examine the particular employee's skills, competencies, and experience.

[38] Mr. Perron suggested that before HC's deputy head would agree to offer a GRJO, she would normally require assurance that a suitable position was vacant immediately.

D. <u>The GRJO decision</u>

[39] At the time it was decided to not offer the grievor a GRJO, the GRJO Analysis and Absorption Description documents showed that there was a good possibility that surplus MD-MOF employees would find employment. The documents stated as follows: "Staffing of health care professional positions (such as doctors (MD) and nurses (NU and HS)) and will [*sic*] remain a priority. As this is also a shortage area, we recommend providing GRJOs."

[40] Mr. Perron testified that MD-MOF positions are very specialized, which reduced HC's capacity to absorb surplus employees from that group.

[41] Ms. Brault stated that before the GRJO decision was made in the grievor's case, HC examined internal vacancies and consulted with other departments that had MD-MOF employees, such as the Correctional Service of Canada and the Department of National Defence. She concluded that no positions were available for anyone, such as the grievor, with a limited licence to practise medicine. She confirmed her finding by talking to different people. She also reviewed MD-MOF advertisements, a number of which required an "unrestricted" or "independent" licence. Ms. Brault determined that

it was less likely that the grievor would find a position within 12 months because of his limited licence.

[42] Ms. Brault did not have any contact with the grievor before HC's deputy head made the GRJO decision, and she did not recall reading his résumé. She stated that normally, when a GRJO is made, a specific position has been identified for the particular employee. Ms. Brault stated that a GRJO analysis typically involves finding a position at the employee's same group and level but also looking more broadly.

E. <u>Communicating the GRJO decision to the grievor</u>

[43] The April 11, 2011, letter advising the grievor that he was being declared surplus and that he would not receive a GRJO stated as follows: "The Deputy Minister has determined that the Department cannot provide you with a *guarantee of a reasonable job offer (GRJO)*." No further reasons were given. On the same date, the grievor requested that HC's deputy head provide him with further reasons for her decision.

[44] On May 2, 2012, Robert Ianiro, acting director general of HC's Human Resources Services Directorate, replied to the grievor's request. Ms. Flett stated that she helped Mr. Ianiro prepare his response, which was as follows:

…

> *A GRJO was not offered because it was determined that employment could not be predicted within the next 12 months within the Department and across federal organizations.*
>
> *As you know, the budget cuts affected all federal organizations and there are a number of licensed physicians including others within Health Canada and other federal organizations that were surplus. Also, the Treasury Board Secretariat Qualification Standards for MOF positions states that the candidate must be eligible for practice in all jurisdictions. We know that many of the federal departments such as Department of National Defence and Correctional Services have developed internal policies that require all physicians to be licensed in the jurisdiction in which they are working. I understand that you have a restricted license from New Brunswick, Registration #07-03179 restricted for employment with Health Canada. Unfortunately, unless you can obtain an unrestricted license, your mobility across federal organizations will be limited.*

[*Sic* throughout]

[45] On May 7, 2012, the grievor advised Ms. Flett that he believed there were errors in the May 2, 2012, communication. In particular, he noted the following:

- the TBS's qualification standard for occupational certification stated that the minimum standard was "… eligibility for a licence to practice medicine in a province or territory of Canada", not in all jurisdictions;
- while some departments may require the licence in the jurisdiction in which the physician is working, it is well known that in addition to the CPSNB, several provincial colleges offer special or administrative licences similar to the regulated licences the CPSNB issues;
- his licence was not restricted. It was a full licence, but his practice was limited to employment with HC (he noted that he provided Ms. Flett with a hard copy of the registration notice in February 2012); and
- the CPSNB's registrar had recently confirmed to the grievor in writing that his licence could be amended if he secured a job in another federal department.

[46] The grievor added the following:

> *The type of physician's occupational certification has never been an issue at the First Nations and Inuit Branch or a barrier to success at Health Canada. It is well known that I am not the first and only FNIHB physician with a limited license to practice. I am surprised to see that the type of occupational certificate has suddenly become a major barrier to job opportunities at* [the public service].

[47] At a meeting on May 25, 2012, Ms. Brault told the grievor that as part of its absorption analysis, HC reviewed other departments' qualification requirements and found that in most cases, a licence without limitations was required. A 2009 review had recommended that HC require a "… license to practice medicine as determined by the College of Physicians and Surgeons" for new staffing in the MD classification as well as Canadian clinical experience. Ms. Brault further stated that the TBS's qualification standard was a minimum standard and that departments could add

other requirements.

[48] At the May 25, 2012, meeting, the grievor advised that he was open to lower-level positions (classified either Biological Science (BI) or Economics and Social Science Services (EC)) if he were given salary protection, meaning that he would continue to receive his MD-MOF-03 salary, which was higher than the highest remuneration levels for the BI and EC groups.

F. HC's response to the grievance

[49] On October 18, 2012, HC denied the grievor's GRJO grievance at the second level and provided the following reasons:

> *Based on a review of the circumstances that existed at the time of your surplus letter in April 2012, I am satisfied that it was not possible to* "know or predict that employment will be available in the Core Public Administration" *for MD-MOF-03 positions.*

[50] On April 23, 2013, HC denied that grievance at the final level and provided the following reasons:

> *GRJOs within Health Canada (HC) are offered using a number of considerations, including but not limited to, the review of absorption capabilities, the number and types of priorities within the Public Service, and a review of the employees' skills, mobility, competencies and credentials. Based on a review of the above considerations, when you received your surplus letter in April 2012, employment could not be predicted for MD-MOF-03 positions within the next twelve (12) months.*
>
> *…*
>
> *Based on a review of the circumstances that existed at the time of your surplus letter in April 2012, I am satisfied that it was not possible to know or predict that employment will be available in the Core Public Administration for MD-MOF-03 positions.*

G. The parties' positions

[51] The grievor made the following arguments:

- HC did not fully review RJO options outside of HC;

- HC did not examine employment opportunities at levels lower than MD-MOF-03;
- the grievor's licence was a major factor in the deputy head's decision to not offer him a GRJO, but HC had insufficient information about it;
- HC had inaccurate information about the TBS's qualification standard for MD-MOF positions in the federal government; and
- several MD-MOF positions were available when the decision to not offer him a GRJO was made, and they should have been considered.

[52] The respondent contended as follows:

- the grievor did not prove any violation of the collective agreement, and HC acted within its managerial authority;
- the decision by the HC's deputy head was justified and was based on adequate information;
- HC understood the limitations of the grievor's licence;
- the grievor did not prove that MD-MOF positions were available; and
- appointments to a lower level were at the employer's discretion.

H. Analysis

[53] The collective agreement states as follows in the definition of "GRJO" in Appendix "S": "Deputy heads will be expected to provide a guarantee of a reasonable job offer to those affected employees for whom they know or can predict employment availability in the Core Public Administration."

[54] Before making a GRJO, deputy heads consider three factors: the CPA's absorption capabilities; those of the relevant department; and the results of assessing the skills, mobility, competencies, experience, and credentials of the affected person. The parties raised the following issues:

1) managerial authority;

2) the TBS's MD qualification standard;

3) the GRJO analysis for MD-MOF-03 positions;

4) the definitions of "GRJO" and "RJO"; and

5) the grievor's evidence of available positions.

1. Managerial authority

[55] As stated in *Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLRB 18, ss. 7 and 11.1 of the *Financial Administration Act* (R.S.C., 1985, c. F-11) grant the respondent broad power to set the general administrative policy for, organize, determine, and control personnel management in the federal public service. When exercising those functions, the respondent may do anything not specifically or by inference prohibited by statute or a collective agreement.

[56] The grievor did not dispute the employer's right to review operations in the DRAP exercise and to conclude that his services were no longer required. However, he argued that the employer violated the collective agreement in how it applied the WFA provisions to his case.

2. The TBS's Medicine (MD) qualification standard

[57] The TBS has set the qualification standards for occupational groups, which are the minimum requirements that all employees in a given occupational group are obliged to meet. Departments may add requirements in staffing processes as needed. The qualification standard for MD positions is as follows:

> ***Medicine (MD) Qualification Standard***
>
> ***Education***
>
> *The minimum standard is:*
>
> - *graduation with a degree from a recognized school of medicine.*
>
> …
>
> ***Occupational Certification***

> *The minimum standard is:*
>
> - *eligibility for a licence to practice [sic] medicine in a province or territory of Canada.*

[58] The TBS's qualification standards document provides the following information about occupational certification standards:

> *1. The term "eligibility" for certification or membership in a professional association means that a candidate has met all academic and occupational requirements with respect to degrees, examinations, experience, etc. without having to have obtained or maintained actual registration, certification or membership.*
>
> *2. For some positions, a licence, or eligibility for a licence, to practice a profession in the province or territory of Canada where the duties are to be performed may be required.*
>
> *3. For some positions, a licence, or eligibility for a licence, to practice a profession in any province or territory of Canada may be required.*

[59] In his letter to the grievor dated May 2, 2013, Mr. Ianiro stated that "… the Treasury Board Secretariat Qualification Standards for MOF positions states that the candidate must be eligible for practice in all jurisdictions", which was an inaccurate description of the TBS's qualification standard in that it was a more onerous requirement. If when examining employment opportunities for the grievor, HC used "eligibility for a license to practice in all jurisdictions" as a minimum standard, instead of "… eligibility for a license to practice medicine in a province or territory of Canada", then its analysis would have missed opportunities that met the TBS's qualification standard but not the standard as described by Mr. Ianiro.

[60] The error in Mr. Ianiro's letter is unfortunate, but I do not believe that it influenced the outcome of this case. Other HC officials involved with the grievor's case, such as Ms. Taillon and Ms. Brault, correctly described the TBS's qualification standard. Also, the GRJO decision did not turn on whether the grievor's licence made him eligible to practise in all provinces or in any province; rather, it was based on the fact that his licence, however described, had a limitation.

3. The GRJO analysis for MD-MOF-03 positions

[61] When the GRJO decision was made, the statistical data showed that there were positive absorption capabilities for MD-MOF-03 positions, meaning that a surplus

employee in the MD-MOF-03 group appeared to have a good chance of finding alternate employment.

[62] The grievor argued that HC did not adequately explore outside opportunities. However, I find that HC had sufficient information about the CPA. The GRJO Analysis and Absorption Description documents included information about the CPA as well as HC specifically. In addition, Ms. Brault stated that she had consulted with other science-based departments. Therefore, I find that HC's analysis of absorption capabilities for MD-MOF positions was adequate.

[63] HC's deputy head decided to not offer the grievor a GRJO because she did not know and could not predict whether he would find alternative employment in the MD-MOF-03 group and level within the year. Her decision was based primarily on the fact that the grievor's licence to practise medicine had a limitation. I find that the deputy head's determination was reasonable.

[64] Ms. Flett stated that in the CPA, including at HC, hiring managers required that candidates have an "unrestricted" or "independent" licence. Also, hiring managers required that candidates be eligible for licensing in the jurisdiction in which they would be working. Ms. Flett stated that that change in hiring practices for MD-MOF positions had occurred after the grievor had been hired in 2006. She suggested that if physicians with limited licences were working in MD-MOF positions, they had likely been hired before the change, as had the grievor.

[65] Ms. Brault explained that in the grievor's case, HC reviewed statistical data, consulted internally, and talked to other science-based departments. Ms. Brault examined job advertisements and spoke to people to review what hiring managers required for occupational certification in MD-MOF positions. She also concluded that managers required that candidates possess licences without limitations.

[66] The grievor argued that when his GRJO decision was made, HC did not have all the information about his licence. It is true that subsequent to the GRJO decision, HC communicated with the CPSNB on a number of occasions to learn more about the grievor's licence and about how he could qualify with the CPSNB to perform clinical duties. The CPSNB's registrar advised HC that the grievor could not perform clinical duties without remedial training, which would include a residency in family practice and certification examinations.

[67] Although HC learned more about the grievor's licence after the GRJO decision was made, I find that the information it had at that time was sufficient. HC knew that the grievor's licence had a limitation, and it knew that managers in the CPA in general and at HC in particular required that candidates possess an unrestricted licence, i.e., one with no limitations.

4. The definitions of "GRJO" and "RJO"

[68] The WFA provisions of the collective agreement include the following statement in Appendix "S":

…

> *It is the policy of the Treasury Board to maximise [sic] employment opportunities for indeterminate employees affected by workforce adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them….*

…

[69] The main vehicle for providing alternative employment to affected employees is the RJO, defined in the collective agreement as "… an offer of indeterminate employment within the Core Public Administration, normally at an equal level but could include lower levels."

[70] Therefore, a GRJO is a guarantee of an offer of employment "… at an equal level but could include lower levels."

[71] Clause 1.1.16 in Part I of Appendix "S" states as follows:

> *Appointment of surplus employees to alternative positions, whether with or without retraining, shall normally be at a level equivalent to that previously held by the employee, but this does not preclude appointment to a lower level. Departments or Organizations shall avoid appointment to a lower level except where all other avenues have been exhausted.*

[72] Identifying a job offer as an RJO is a critical step in the WFA process. Employees who received RJOs and refused them were laid off one month later.

[73] RJO determinations had to be made on a case-by-case basis. What is reasonable in one situation may not be reasonable in another. The preferred practice was to

provide RJOs at a level equal to that of the employee's then-current position. However, the collective agreement recognized that in some situations, it was reasonable to offer a job at a lower level. In *Public Service Alliance of Canada*, at para. 61, the Board stated as follows: "… the use of the word 'could' clearly indicates a possibility that a job offer may be at a lower level and that it should not be discarded prematurely."

[74] In that same case, the Board further stated as follows at paragraph 67:

> *[67] The parties saw the necessity of negotiating Appendix I and including it in the collective agreement. The parties have clearly turned their minds to how to limit the impact of WFA on employees and the possibility that a reasonable job offer may be at levels lower than the employee's current level. They must have intended its results.*

[75] Mr. Butler stated that the TBS's position is that an RJO is normally made at an equivalent level but that if no other avenues exist, then it could be at one level lower than the particular employee's position. In exceptional cases, it could be two levels lower. A job offer at three or more levels lower is not an RJO.

[76] The collective agreement does not contain such a restriction. Instead, it leaves it open for the parties to determine what is reasonable on a case-by-case basis.

[77] I find that the grievor's situation was unique. Mr. Perron stated that MD-MOF positions were very specialized, which reduced HC's capacity to absorb surplus employees in that classification. According to Ms. Flett and Ms. Brault, the grievor's situation was even more challenging because the limitation on his licence further restricted his chances of finding alternative employment in that group. Also, employment opportunities at the MD-MOF-03 level were limited, and there were few equivalent categories.

[78] I find that when HC exhausted all avenues in the search for MD-MOF-03 opportunities for the grievor, it should have explored opportunities at lower levels before deciding not to offer him a GRJO. An RJO at a lower level would have been reasonable in the grievor's case, given that his circumstances and the nature of the MD-MOF positions made it difficult to find alternative employment for him at level.

[79] By limiting its analysis to employment opportunities at the MD-MOF-03 level, HC did not fully meet its responsibilities under the collective agreement's WFA provisions.

5. The grievor's evidence of available positions

[80] HC's deputy head was expected to provide a GRJO for those employees subject to workforce adjustment "… for whom [the deputy head knew] or [could] predict employment availability in the Core Public Administration" (per the GRJO definition in the collective agreement).

[81] In *Professional Institute of the Public Service of Canada*, the former Public Service Labour Relations Board reasoned that the wording in the definition of the applicable collective agreement strongly suggested that a GRJO is "fixed in time", meaning that deputy heads are expected to provide GRJOs to affected employees for whom, at the time the GRJO decision is made, they know or can predict employment availability in the CPA.

[82] The grievor presented evidence about employment opportunities that he said existed when the GRJO decision was made and that proved that HC's deputy head was wrong in her conclusion that she could not predict finding employment for the grievor.

[83] The grievor presented only one appointment process that the evidence confirmed was underway before his GRJO decision was made. It was an inventory advertisement for occupational health medical officers (OHMO) (classified MD-MOF-03). The opening date was February 24, 2011. However, these positions included clinical duties, and the grievor was not able to perform those duties without remedial training, because he had no recent experience providing clinical care. I would not expect the deputy head to have offered a GRJO based on the availability of one inventory process for which the grievor did not meet all the qualifications when his GRJO decision was being made.

[84] The other appointment processes submitted by the grievor were dated after the GRJO decision was made, and I cannot assume that they existed before the date specified on the documents about them. Moreover, the grievor presented no evidence that any of these appointment processes existed at or before the GRJO decision was made.

[85] In addition, the grievor submitted documents about opportunities for an assignment, an acting position, and part-time positions, none of which could be the subject of an RJO.

[86] Therefore, I find that the grievor has not proven that reasonable employment opportunities existed for him when the GRJO decision was made.

I. Findings

[87] I find that HC's analysis and conclusion to not offer the grievor a GRJO in relation to MD-MOF-03 positions were reasonable and were done in accordance with the collective agreement's WFA provisions.

[88] However, by limiting its GRJO analysis to employment opportunities at the same level as the grievor's then-current position and by not exploring opportunities at lower levels, HC violated the collective agreement's WFA provisions in that it unduly restricted the definition of "RJO". As such, HC did not fully meet its responsibilities under those WFA provisions, which included ensuring that the grievor, as an affected employee, was given every reasonable opportunity to continue his career as a public service employee (see clause 1.1.1 in Part I of Appendix "S").

IV. The retraining grievance

A. The collective agreement - Appendix "S", Part IV

[89] Part IV of Appendix "S" of the collective agreement deals with retraining, which is defined as "… on-the-job training or other training intended to enable affected employees, surplus employees and laid-off persons to qualify for known or anticipated vacancies within the Core Public Administration."

[90] Part IV contains the following provisions:

…

> ***4.1.1*** *To facilitate the redeployment of affected employees, surplus employees, and laid-off persons, departments or organizations shall make every reasonable effort to retrain such persons for:*
>
> *a) existing vacancies, or*
>
> *b) anticipated vacancies identified by management.*
>
> ***4.1.2*** *It is the responsibility of the employee, the home department or organization and the appointing department or organization to identify retraining opportunities pursuant to subsection 4.1.1.*

> ***4.1.3*** *Subject to the provisions of 4.1.2 , the deputy head of the home department or organization shall approve up to two (2) years of retraining.*
>
> ***4.2 Surplus employees***
>
> ***4.2.1*** *A surplus employee is eligible for retraining providing:*
>
> > *(a) retraining is needed to facilitate the appointment of the individual to a specific vacant position or will enable the individual to qualify for anticipated vacancies in occupations or locations where there is a shortage of qualified candidates;*
> >
> > *and*
> >
> > *(b) there are no other available priority persons who qualify for a specific vacant position as referenced in (a) above.*
>
> …
>
> ***4.3.1*** *A laid-off person shall be eligible for retraining providing:*
>
> > *(a) retraining is needed to facilitate the appointment of the individual to a specific vacant position;*
> >
> > *(b) the individual meets the minimum requirements set out in the relevant Selection Standard for appointment to the group concerned;*
> >
> > *and*
> >
> > *(c) there are no other available persons with a priority who qualify for the position.*
>
> …

B. <u>The TBS's approach</u>

[91] In the FAQ document, at page 18, the TBS states as follows:

> …
>
> *In conformity with section 4.2.1 of the WFA (Work Force Adjustment) agreements, an individual with a priority for appointment who meets the essential qualifications and conditions of employment of the position to be staffed must be appointed before a priority person who might become qualified with retraining. If none of the priority persons referred meets the essential qualifications, the hiring*

> *manager will then determine if retraining can be provided to a priority person based on his/her operational needs.*
>
> …

[92] Mr. Butler stated that according to the TBS, retraining was available only for RJO situations, and RJOs could be considered only for positions either at level or one level lower than the particular employee's position; two levels lower could be considered only in exceptional circumstances. He acknowledged that the collective agreement's definition of "retraining" did not restrict it to RJO situations. Mr. Butler contended that the TBS's position flowed from the intent of an RJO, which is to maximize employment opportunities for indeterminate employees affected by WFA situations.

C. HC's approach

[93] The HC WFA Guide contains the following information about retraining:

> …
>
> ***11.2 Re-training***
>
> *A surplus employee may be eligible for up to two years of retraining to facilitate appointment to an alternative position identified by management … where other employment is not likely to be available, surplus employees must be considered for retraining that will facilitate appointment to a specific position or to anticipated vacancies where there is a shortage of qualified candidates and no other qualified persons with priority status are available.*
>
> *Most retraining will be on-the-job training, and must be conducted prior to appointment.*
>
> …
>
> *A laid-off person may be eligible for up to two years of retraining where it will facilitate appointment to a specific position, the person meets the official language requirements, qualification standards and conditions of employment for the position, and there are no other qualified persons with a statutory priority available….*
>
> *When a retraining opportunity has been identified, the Deputy Minister must approve up to two years of retraining.*
>
> …
>
> *Retraining may include formal or informal means either*

> *internal or external to the Public Service…*
>
> …
>
> *Although the overall intent of retraining is to allow for "on the job" or other training to enable individuals to qualify for known or anticipated vacancies within the federal public service, this does not prevent a manager from considering short, specific formal courses (i.e. those courses offered through the Canada School of Public Service)….*
>
> …
>
> *In general, the manager has some discretion when it comes to retraining options and these should be considered on a case-by-case basis with respect to the intent of the WFA provisions and in alignment with the limited timeframe [sic] to complete the retraining.*
>
> …

[94] In December 2013, an HC official explained to the grievor that HC hiring managers were responsible for assessing the priorities referred to them to determine whether retraining would in all likelihood provide the knowledge, skills, and/or experience they lacked with respect to meeting the job requirements, based on the statement of merit criteria, within a period not exceeding two years.

D. Retraining decisions about positions more than two levels lower than the grievor's position

[95] The grievor presented evidence about five appointment processes in which HC hiring managers considered him a priority candidate for positions at more than two levels lower than his.

[96] In the first process, the grievor referred himself to an HC appointment process for regulatory advisors (classified SG-SRE-05). On September 25, 2013, he was advised that he would not be considered further because he did not meet two essential merit criteria, namely, "Key Leadership Competency: Excellence through results (Resources)", and "Personal Suitability: Judgment".

[97] The grievor asked whether retraining was considered, and on October 4, 2013, he received the following reply:

> *Good Afternoon, The Senior HR Advisor for this Selection*

> *process has confirmed the Staffing Policy Centre that Re-training for Lay-off priorities only applies to those who are considered equivalent or one level lower (eg. EC-06 going to an EC-05). An SG-SRE05 is considered several levels lower than that of a MD-MOF-03, therefore, you are not eligible for re-training for this appointment process. In your email you state that you have "met the essential requirements of the positions(s)". Persons with a priority entitlement need to meet the essential qualifications of the position in order to be appointed. Please note that as you have not obtained the pass mark for two essential merit criteria … the assessment of the remaining essential merit criteria through exams, Interviews and reference checks will not be completed….*
>
> [*Sic* throughout]

[98] At a later meeting with the grievor, an HC human resources advisor commented on retraining for lack of personal suitability, stating that it could be available for some elements (e.g., leadership) but that for others, like judgment, it was harder to identify suitable training.

[99] In the second appointment process, on November 5, 2013, the grievor was advised that he would not be considered further for a regulatory project manager position (classified SG-SRE-04) because he had not met the following merit criteria:

- knowledge of project management principles;
- knowledge of HC's Marketed Health Products Directorate and the post-market regulation of health products and related activities;
- ability to develop project plans and performance indicators to monitor progress;
- ability to work under pressure to manage competing priorities within strict deadlines;
- ability to analyze complex issues, provide advice, and recommend solutions; and
- ability to communicate effectively both orally and in writing.

[100] HC provided the following email response on November 6, 2013, about retraining:

…

> *In regards to re-training, re-training was considered by the manager; however, as per the WFA (Work Force Adjustment) provisions the intent of retraining is not to re-qualify an employee on multiple essential qualifications as employees are expected to meet the requirements of the position identified. Therefore, the number of qualifications one does not possess should be limited. As you did not meet a significant number of criteria it has been determined that you are not eligible for retraining. In addition, retraining is generally considered for positions at the same group and level or one group and level below and where the position is considered a reasonable job offer.*

[101] In the third appointment process, HC referred the grievor to an appointment process for a scientific evaluator (classified BI-03). On December 4, 2013, he was advised that he had not met the following merit criteria:

- ability to communicate effectively in writing;
- personal suitability - team work; and
- personal suitability - judgment.

[102] HC advised the grievor as follows on December 9, 2013:

> *Whenever priority candidates are not found qualified, managers consider the retraining option for both surplus and lay-off priorities. It is important to remember that the intent of retraining is to provide training to employees to enable them to meet a limited number of qualifications. As well, to be considered for retraining, the appointment has to be either at the same group and level or equivalent; or one level down and would be considered/constitute a Reasonable Job Offer (RJO).*

[103] In the fourth appointment process, the grievor was advised on May 20, 2014, that he would not be considered further for a position classified SG-SRE-03. HC told him that he had not passed the personal suitability questions on judgment and respect for diversity or the knowledge questions on the *Food and Drugs Act* (R.S.C. 1985, c. F-27), the *Medical Devices Regulations* (SOR/98-282), and associated guidance documents.

[104] On retraining, HC stated as follows by email dated May 29, 2014:

> *This is to confirm that re-training was not considered here since re-training is only available as an option for those jobs that would be considered a reasonable job offer (RJO). As we have previously informed you, your substantive level (MD-MOF-03) is more than 2 levels higher that the job you are applying for (SG-SRE-03), therefore, this would not be considered an RJO, and thus re-training or salary protection would not apply.*

[105] In the fifth appointment process, the grievor applied to a process for regulatory officers (classified SG-SRE-04). On December 6, 2013, he was informed that his application would not be considered further as he had not met the essential criterion of "experience supporting or coordinating a project or program or the various stages of a project or program".

[106] HC advised the grievor that retraining eligibility for lay-off priorities "… only applies to situations where the job opportunity is considered a reasonable job opportunity. As this SG-SRE04 would not be considered a RJO, you are not eligible to be considered for re-training for this position."

E. HC's response to the grievance

[107] On January 22, 2014, HC denied the retraining grievance at the second level and provided the following reasons:

…

> *In accordance with the WFA provisions and interpretation from TBS, an individual with a priority for appointment who meets the essential qualifications and conditions of employment of the position to be staffed must be appointed before a priority person who might become qualified with retraining. If none of the priority persons referred meets the essential qualifications, it is the current practice for hiring managers to determine if retraining can be provided to a priority person based on whether or not a person can be trained (on-the-job or with limited formal training) within a reasonable time period and on his/her operational needs.*
>
> *Although the WFA provisions provide surplus employees and laid-off persons with the possibility of being provided with retraining, it is not the intent of the WFA provisions to allow for this entitlement to be for an unlimited number of lower levels; the element of reasonableness must be considered. The intent of retraining is generally provided to job opportunities that are at level which aligns with the Public Service Commission's (PSC)'s priority referral process.*

> *In addition, to be considered for retraining for lower level job opportunities, the opportunity must be deemed a reasonable job offer. Lower level job opportunities that are two (2), three (3) or more are generally not considered a reasonable job offer; therefore, they would not be considered for retraining.*
>
> *Furthermore, it is not the intent of retraining to re-qualify a person on multiple essential qualifications as employees should meet the requirements of the position identified as part of the PSC referral process.*
>
> *In addition, the type of qualification that one does not possess is an important consideration in determining if retraining is possible or not. There are some qualifications, such as personal suitability (i.e. good judgement, flexibility or teamwork), that on-the-job or formal training may not be provided to assist them in acquiring the missing skill-set, as it is a behavioural based competency where one's personal attributes or characteristics determines how they would perform in the position or task to a specific technical skill or knowledge.*
>
> …

[108] On March 5, 2014, HC denied the grievance at the final level and provided the following reasons:

> …
>
> *… I find that you were treated within the intent of Appendix 'S' of the* [collective agreement].
>
> *Previous records indicate that Health Canada's First Nations and Inuit Health Branch invested substantially in your pursuit of further education, which resulted in you obtaining a graduate diploma in Public Health from the University of Waterloo in 2011. During the hearing, you did not demonstrate that at any time during your surplus period, a position was offered to you, conditional on receiving some specific training or acquiring defined skills and competencies through training.*
>
> *In light of the above, I can find no reason to overturn the decision made at the second level. As a result, your grievance is denied and the corrective measures you seek will not be granted.*
>
> …

F. <u>The parties' positions</u>

[109] The grievor made the following arguments:

- HC violated the collective agreement when it decided that retraining could be offered only for an RJO and that an RJO was restricted to positions at level or one level lower, or two levels lower in exceptional circumstances;
- the final-level response showed a misunderstanding of the WFA retraining provisions; and
- his position was unique in that he advised HC that he would accept a position at a significantly lower level than his own.

[110] The respondent contended as follows:

- HC's decision to offer retraining only in RJO situations was supported by the WFA provisions when read as a whole;
- it was not reasonable to offer retraining for positions at a significantly lower level;
- HC officials expended significant time and effort establishing what the CPSNB would require for the grievor to perform clinical duties, and HC's decision to not offer retraining in the form of the CPSNB's required remedial training was reasonable; and
- when applying for positions, the grievor was not forthcoming about his licence's limitation.

G. <u>Analysis</u>

[111] The collective agreement contains the following provision in Appendix "S", Part IV:

> ***4.1.1*** *To facilitate the redeployment of affected employees, surplus employees and laid-off persons, departments or organizations shall make every reasonable effort to retrain such persons for:*
>
> *(a) existing vacancies,*

or

(b) anticipated vacancies identified by management.

[112] The parties raised the following issues:

1) remedial training required by the CPSNB;

2) retraining for positions at significantly lower levels;

3) the grievor's involvement; and

4) the final-level grievance decision.

1. Remedial training required by the CPSNB

[113] On April 27, 2012, the grievor applied to an HC appointment process to establish an inventory for OHMO positions (classified MD-MOF-03). He wrote as follows: "I have a license to practice medicine in the Province of New Brunswick (CPSNB, license #3179) [*sic* throughout]." Later, the PSC referred him to the same process.

[114] On January 2, 2013, the hiring manager advised the grievor that he met the initial screening criteria for the position. The grievor told her that he would confirm with the CPSNB whether he was able to perform OHMO duties, which involved performing medical assessments, prescribing medication, and providing advice.

[115] The grievor advised the CPSNB that he had not performed clinical duties since 2002. The CPSNB then advised him that he would be required to go through remedial training before starting any job that had clinical duties. HC concluded that the retraining option could not be used for that training.

[116] At the hearing, the grievor's representative confirmed that the grievor was not putting at issue the decision about the CPSNB's remedial training. Therefore, I will not make a finding on this question.

2. Retraining for positions at significantly lower levels

[117] Retraining is defined in the collective agreement as "… on-the-job training or other training intended to enable affected employees, surplus employees and laid-off

persons to qualify for known or anticipated vacancies within the Core Public Administration."

[118] Surplus and lay-off priorities are referred to positions or they can refer themselves. Hiring managers assess priority candidates. If one or more of their essential qualifications are not met, they must consider whether with retraining, the priority candidates could meet the qualifications they lack. If so, and if no other priority candidate meets all the essential qualifications, a hiring manager can make an employment offer conditional on the candidate successfully completing a retraining program.

[119] HC's position was that retraining could be considered to help a priority candidate meet knowledge, skills, and/or experience qualifications, which was conveyed to the grievor in an email dated December 9, 2013.

[120] The grievor presented evidence about five appointment processes in which he was found not to meet the essential qualifications for a position more than two levels lower than his own. On each occasion, he asked if the hiring managers had considered the retraining option. Each time, HC clearly informed him that retraining was considered only for RJOs, which were positions at level or one level lower.

[121] HC's position was not consistent with the collective agreement's retraining provisions, which contain no such restriction.

[122] According to clause 4.1.2 in Part IV of Appendix "S" of the collective agreement, HC was one of the parties responsible for identifying retraining opportunities. By applying the arbitrary rule that retraining was only for positions at level or at one level lower, HC fettered its hiring managers' discretion. The collective agreement does not restrict RJOs to positions at level or at one level lower. By doing so, HC acted contrary to the objective of the WFA "Objectives" provision, which states in part as follows: "It is the policy of the Treasury Board to maximise employment opportunities for indeterminate employees affected by workforce adjustment situations, primarily through ensuring that, wherever possible, alternative employment opportunities are provided to them."

3. The grievor's involvement

[123] The respondent alleged that the grievor did not do his part to cooperate with

HC and facilitate the WFA process. It stated that he was not forthcoming in his applications for positions because he did not explain that his CPSNB licence had a limitation.

[124] As already noted, the grievor had a full licence from the CPSNB with practice limited to employment with HC. It is important to examine what he knew about his licence.

[125] The grievor communicated with the CPSNB's registrar before and after being declared a surplus employee and learned the following about his licence:

- In November 2009, in response to his following question, "Could you please clarify if I am allowed to conduct immunization, i.e. to be in direct, unsupervised contact with patients, in Health Canada's facilities?", the registrar answered, "If it is acceptable to your employer."

- On April 30, 2012, the grievor asked if "… the clause on limited practise to employment in Health Canada could be amended on [*sic*] case I get a job offer from another federal department (e.g., PHAC, CIC, HRSDC…etc.)?" Later the same day, the registrar replied, "If you got another federal job we would amend the license [*sic*]."

- On January 3, 2013, the grievor sent the registrar the duties of an HC position that included clinical duties, such as performing medical examinations, and asked if he was allowed to perform them. Later the same day, the registrar responded as follows, "As I don't think you've been involved with patient contact in some time, I don't believe you could perform these duties without a significant period of remedial training."

- On January 3, 2013, the grievor asked for the CPSNB's position on "independent licenses [*sic*]", which was the term used for the requirement for an HC position that did not include clinical work. Later the same day, the registrar replied as follows:

> *We do not use the term 'independent'. You have a full license which, as with all licenses, is restricted to*

> *activity within your recent experience.*
>
> *The position you describe would thus seem to not be precluded by your current license.*
>
> [*Sic* throughout]

[126] The evidence includes several application letters the grievor had sent for different job opportunities. In them, he stated that he had had a licence to practise medicine from the CPSNB since 2007 and did not mention the limitation. However, given the information he received from the CPSNB, I do not find that he was intending to mislead anyone. When he applied, he could not have known whether the CPSNB would qualify him to perform the duties of a job with or without remedial training. He was aware that he would need the CPSNB's confirmation before accepting an employment opportunity. In fact, in the OHMO inventory process, the grievor first raised with the hiring manager the issue that he would have to contact the CPSNB to determine whether it would qualify him to perform all the position's duties.

[127] I further note that the evidence establishes that the grievor actively sought alternative employment and that he began his efforts almost immediately after being notified that he was to be declared a surplus employee. Therefore, I do not agree that he did not do his part to facilitate the WFA process.

4. <u>The final-level grievance decision</u>

[128] In the final-level grievance decision dated March 5, 2014, Mr. Perron noted as follows: "Previous records indicate that Health Canada's First Nations and Inuit Health Branch invested substantially in your pursuit of further education, which resulted in you obtaining a graduate diploma in Public Health from the University of Waterloo in 2011."

[129] The grievor stated that that consideration was irrelevant and that the fact that it was included in the final grievance decision shows that HC did not understand or properly apply the retraining provisions.

[130] Mr. Perron stated that he mentioned the previous financial support to the grievor to show that HC had already supported him by providing him with that educational opportunity to increase his employment potential.

[131] The WFA retraining option is used for surplus or laid-off employees to give

them the competencies they lack to improve their chances of finding employment in their priority periods. It would be contrary to the WFA provisions to refuse retraining because the employer had already financed an employee's education and training before he or she was declared surplus.

[132] It is unfortunate that the previous financial support for studies was mentioned in HC's final-level response because it raises a question about whether that support was a factor in HC's decision to not offer retraining to the grievor.

H. Findings

[133] I find that by applying an arbitrary rule that retraining would be offered only for positions at level or one level lower, HC violated the collective agreement in that it unduly restricted the definitions of "GRJO" and "RJO". In doing so, it did not ensure that the grievor, as an affected employee, was given every reasonable opportunity to continue his career as a public service employee (see clause 1.1.1 in Part I of Appendix "S").

V. Remedy

A. The parties' positions

[134] In the GRJO grievance, the grievor requested as a remedy that he be given "… a guarantee of a reasonable job offer based on the vacant MD positions that are available and for which [he is] qualified and to be made whole". At the hearing, the grievor's representative repeated the grievor's request to have the Board award him a GRJO and asked for compensation for any missed salary.

[135] The respondent submitted that the Board could not provide the grievor with a GRJO since according to the collective agreement's WFA positions, only the deputy head can provide one and only if employment in the CPA is known or could be predicted.

[136] In the retraining grievance, the grievor requested the following:

- that the employer comply with the collective agreement;
- that he be considered for retraining to be eligible for the position that prompted the employer's October 4, 2013, notice;

- that the employer consider him for future retraining opportunities;
- that the employer extend his opting period to allow him a further opportunity to secure continued employment;
- that he be compensated for missed income due to not being considered for retraining and subsequently staffed into the position; and
- that he be made whole and receive any other redress deemed necessary to resolve the issue.

[137] At the hearing, the grievor asked for a declaration that retraining was not limited to RJOs. He asked that he be reinstated as a surplus employee and that he be offered retraining for any position to which he was referred.

[138] The respondent argued that the grievor could not be reinstated, as his position no longer exists. It contended that the only remedy available was a declaration by the Board.

B. Decision - remedy

[139] I find that it is not within the Board's power to offer the grievor a GRJO. In a WFA situation, only the deputy head can determine whether a GRJO will be provided. Furthermore, even if the Board could offer a GRJO, it could do so only if it knew or could predict employment availability in the CPA, and there is no evidence upon which the Board could base such a conclusion.

[140] The grievor asked to be reinstated and compensated. His position is that if HC had not applied the arbitrary rule that retraining was available only for positions at level or one level lower, he would have received an offer conditional on retraining, and he would have completed the retraining.

[141] The evidence is not conclusive on that point. In most of the five situations the grievor presented, HC provided additional reasons for not offering retraining that in my view were reasonable. For example, in certain cases, he was found not to have met multiple essential criteria. In my view, the more competencies and skills that are lacking, the more complicated the retraining program, and the more risk that it will

not be successfully completed or be completed in a timely way. In other examples, the grievor did not meet the criterion of "Personal Suitability - Judgment". It may be difficult to identify an appropriate and effective retraining program for that area.

[142] I further note that it was not a certainty that the grievor would have completed any retraining program. As well, that option would have been available only if no other priority candidate had been available who met all the essential criteria without the need for retraining.

[143] In the circumstances, I conclude that the appropriate remedy in this case is a declaration.

[144] The Board makes the following declarations:

- By limiting its GRJO analysis to employment opportunities at the same level as the grievor's then-current position and by not exploring opportunities at lower levels, HC violated the collective agreement's WFA provisions in that it unduly restricted the definition of "RJO".

- By applying an arbitrary rule that retraining would be offered only for positions at level or at one level lower, HC violated the collective agreement in that by doing so, it unduly restricted the definition of "retraining".

[145] For all of the above reasons, the Board makes the following order:

(*The Order appears on the next page)*

VI. Order

[146] The GRJO and retraining grievances are allowed.

[147] The Board makes the following declarations:

- By limiting its GRJO analysis to employment opportunities at the same level as the grievor's then-current position and by not exploring opportunities at lower levels, HC violated the collective agreement's WFA provisions in that it unduly restricted the definition of "RJO".

- By applying an arbitrary rule that retraining would be offered only for positions at level or at one level lower, HC violated the collective agreement in that by doing so, it unduly restricted the definition of "retraining".

December 20, 2016.

Catherine Ebbs,
a panel of the Public Service Labour Relations and Employment Board