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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ERIC CHAREST

Grievor

and

DEPUTY HEAD
(Department of Public Works and Government Services)

Respondent

Indexed as
Charest v. Deputy Head (Department of Public Works and Government Services)

In the matter of an individual grievance referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Marc Séguin, counsel

Heard at Ottawa, Ontario,
September 12 to 14 and 16, 2016,
and January 18, 2017.
(FPSLREB Translation)

I. Introduction

[1] Eric Charest ("the grievor") is an asset manager with the Department of Public Works and Government Services ("the department"). He is classified at the AS-07 group and level. He filed a grievance against the decision to assign him a "satisfactory -" performance rating in his 2012-2013 performance evaluation. Because of that decision, he did not receive performance pay for the year in question. According to him, that decision was unreasonable, and his performance evaluation amounted to disciplinary action resulting in a financial penalty.

[2] The grievor referred his grievance to adjudication on June 27, 2014.

[3] The deputy head ("the respondent") argued that the case could not have been referred to adjudication because the grievor's performance evaluation was an administrative matter. It pointed out that the rating assigned to him in his performance evaluation did not amount to disciplinary action and that the fact that he did not receive performance pay after his evaluation did not amount to a financial penalty.

[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 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 ss. 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 s. 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 ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board, the *Public Service Labour Relations and Employment Board Act*, and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board,

the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[6] To ease reading, in this decision, the term "Board" refers to the Public Service Labour Relations Board, the Public Service Labour Relations and Employment Board, and the Federal Public Sector Labour Relations and Employment Board. Likewise, the term "*Act*" refers to the *Public Service Labour Relations Act* and the *Federal Public Sector Labour Relations Act.*

[7] For the following reasons, the Board lacks the jurisdiction to hear the case and to render a decision on the merits.

II. Background

[8] Since the grievor is employed in a managerial or confidential capacity, i.e., in an excluded position, he is not a member of a bargaining unit. Depending on the overall rating assigned to him in a performance evaluation, he may be entitled to performance pay. The assigned rating must reflect his performance compared to expectations established in advance. To be eligible for performance pay for 2012-2013, the grievor had to obtain a "fully satisfactory" rating, but he was initially assigned an "unsatisfactory" rating.

[9] On July 16, 2013, the grievor wrote to his new director that he was disappointed in how his performance pay file had been managed. According to him, his 2012-2013 evaluation had been based on false, misleading, and unfounded information. He requested that his former director's negative comments be removed from his evaluation.

[10] On July 19, 2013, the grievor attended a one-hour meeting with his new director, the director general, and a Labour Relations representative. He submitted a series of documents supporting his position that his former director's comments had been unfounded.

[11] On August 12, 2013, the grievor was notified that a decision had been made about his performance rating, which the Director General had changed from "unsatisfactory" to "satisfactory -".

[12] On September 13, 2013, the grievor filed a grievance about his performance

evaluation. As a corrective measure, he requested that his former director's comments be removed from his evaluation and that his performance rating be re-evaluated.

[13] On October 15, 2013, a grievance hearing was held at the first level of the grievance process. At the hearing, the grievor stated that he wanted his performance rating increased to "fully satisfactory". He submitted several documents and arguments to support his grievance.

[14] On December 12, 2013, the Acting Chief of the Real Property Team - Crown Managed Assets rendered a decision at the first level of the grievance process. She dismissed the grievance because she did not find sufficient grounds to raise the grievor's performance rating to "fully satisfactory".

[15] The final-level hearing of the grievance process was held on May 7, 2014. The grievor submitted a case history and a large number of documents.

[16] On June 6, 2014, the Assistant Deputy Minister of the Real Property Branch rendered a decision at the final level of the grievance process. Based on all the facts available to him, he decided to increase the grievor's performance rating for the 2012-2013 evaluation year to "satisfactory". However, that rating did not make him eligible for performance pay because employees must obtain a rating of "fully satisfactory" to receive it. The June 6, 2014, decision noted that to obtain the "fully satisfactory" rating in the future, the grievor was encouraged to "[translation] continue improving [his] communication skills with [his] clients and managers."

[17] Consequently, on June 19, 2014, the grievor wrote to the Assistant Deputy Minister. He asked for details about his communication deficiencies.

[18] On June 27, 2014, the grievor referred his grievance to adjudication.

[19] When the grievance was referred to adjudication, the grievor's performance rating had already been increased to "satisfactory".

[20] On June 30, 2014, the Board notified the grievor by letter that although he had referred his grievance to adjudication under s. 209(1)(b) of the *Act*, which deals with disciplinary action resulting in termination, demotion, suspension, or financial penalty, it could not open a file until it precisely understood the disciplinary measure that had been imposed on him.

[21] On July 7, 2014, the grievor sent a letter to the Board requesting that his grievance be heard under s. 209(1)(b) of the *Act* on the grounds that his supervisor had lied when he had evaluated the grievor's performance and that he had acted in bad faith to prevent the grievor from receiving his performance pay. At all times throughout the process, s. 209(1)(b) read as follows:

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

[22] On August 23, 2016, a pre-hearing conference was held in preparation for the hearing that was scheduled for September 12, 2016. During it, the respondent raised an objection to my jurisdiction to hear the grievor's grievance. It argued that he had not been subject to disciplinary action under s. 209(1)(b) of the *Act* because none had been imposed on him that had resulted in termination, demotion, suspension, or financial penalty. For that reason, it pointed out that the Board did not have jurisdiction to hear the case.

III. The nature of the grievance referred to adjudication

[23] In its arguments, the respondent raised another objection by invoking *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), on the grounds that in his grievance, the grievor did not allege that denying him performance pay had amounted to disciplinary action resulting in a financial penalty. As a result, the respondent submitted that he could not have referred this matter to adjudication.

[24] In addition to *Burchill*, the respondent cited *Laughlin Walker v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 62, for the principle that the nature of a grievance may not be changed once it has been referred to adjudication. The respondent argued that the terms "disciplinary action" and "financial penalty" are not mentioned in the initial grievance and that as a result, the issue could not have been referred to adjudication.

[25] The grievor replied that the respondent acted in bad faith to deprive him of his

performance pay.

[26] According to *Burchill*, once a grievance has been processed at the different levels of the grievance process, it cannot be changed to a different grievance once it is referred to adjudication. As mentioned as follows at paragraph 27 of *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2016 PSLREB 19: "*Burchill* reasoning is applied to prevent one party from raising a new issue at [adjudication] … that might take the other party by surprise. It is, essentially, a matter of procedural fairness." Consequently, based on that reasoning, the nature of a grievance cannot be changed after it has been referred to adjudication. However, *Burchill* does not preclude specifying the nature of a grievance at adjudication.

[27] In *Laughlin Walker*, Ms. Laughlin Walker requested that an acting-pay grievance be characterized as a disciplinary grievance, even though no disciplinary action had been mentioned during the grievance process. The adjudicator ruled that the grievance had arisen out of Ms. Laughlin Walker's disappointment at the outcome of a reclassification process. He added that at no time during the grievance process had either party treated the grievance as disciplinary. Thus, he found that Ms. Laughlin Walker could not establish a link between what she considered shortcomings in the reclassification process and the disciplinary action that she felt that she had been subjected to.

[28] In this case, the grievor alleged in his grievance that his former director had lied when he had evaluated the grievor's performance and that he had acted in bad faith to prevent the grievor from receiving his performance pay. I find that unlike in *Laughlin Walker*, what the grievor considered the respondent's lies and bad faith was connected to the disciplinary action that he believes he was subjected to, which was being deprived of his performance pay. The respondent could not maintain that it was taken by surprise due to being unaware of it.

[29] The respondent also cited *Spacek v. Canada Revenue Agency*, 2007 PSLRB 115. In that decision, the adjudicator specified at paragraph 89 that jurisdiction had to be considered, given the grievance's wording. Ms. Spacek did not allege bad faith or disguised discipline in her grievance. Consequently, the adjudicator found that he could not rule on those allegations.

[30] However, in this case, the grievance's wording clearly mentions bad faith. In

addition, at the hearing, the respondent's witnesses submitted ample evidence supporting the decision not to award the grievor performance pay for the year in question. Therefore, the issue did not surprise the respondent.

[31] I note that the respondent also cited other decisions to support its position. Although I reviewed each one, for the sake of brevity, I chose to cite only those mentioned earlier because they clearly reflect the case law on the matter.

[32] As a result, this objection is dismissed.

IV. Issue

[33] The matter in dispute is whether the grievor's performance rating amounted to disciplinary action that resulted in a financial penalty under s. 209(1)(b) of the *Act*. In other words, was his performance rating based on grounds other than a proven good-faith dissatisfaction with his performance, i.e., was it camouflage, deceit, or a contrived interpretation by the respondent?

V. Analysis

[34] The *Act* establishes a scheme applicable to grievances filed by federal public sector employees. Under it, certain grievances cannot be referred to adjudication, which means that the decision at the final level of the grievance process is final, subject to judicial review in Federal Court. However, employees have the right to refer grievances to adjudication on other matters that are deemed more important (see *Canada (Attorney General) v. Grover*, 2007 FC 28 at para. 46). Therefore, under s. 209(1)(b) of the *Act*, a grievance may be referred to adjudication only if it involves disciplinary action that results in termination, demotion, suspension, or financial penalty.

[35] The Board does not have jurisdiction to hear a grievance that essentially relates to a performance evaluation. However, it can review the circumstances of the matter to ensure that the grievor's performance rating was not really disciplinary action that resulted, for example, in a financial penalty, as defined in s. 209(1)(b) of the *Act*. If the conditions for assigning the performance rating in question were not present at the relevant time and the respondent did not base its decision on factual evidence, then it may then be found that the respondent acted on a contrived interpretation, camouflage, or deceit. (see *Canada v. Rinaldi*, Federal Court file T-761-96 (19970225)).

[36] Thus, it is appropriate to review the circumstances of the matter to ensure that the "satisfactory" performance rating, which did not entitle the grievor to performance pay, was based on a good-faith evaluation of his expected performance.

[37] As for the burden of proof, the onus was on the respondent to establish some evidence that the grievor's performance rating was related to his performance and not to any other factor (see, in the context of a rejection on probation, *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529 at para. 37). Once the respondent discharges that burden of proof, the grievor must establish that the performance rating was based on grounds other than a good-faith evaluation of his performance. As noted in *Rinaldi*, the grievor must establish that "… the conditions required to apply it were in fact not present at the relevant time…". That burden is recognized as very heavy.

[38] It should be noted that the parties submitted a large number of documents to support their respective positions. The grievor submitted packages of documents in evidence to demonstrate that he had done excellent work. Likewise, the respondent submitted abundant evidence supporting its initial decision to first assign the grievor an "unsatisfactory" rating and then to change it to "satisfactory -".

[39] However, this grievance was referred to adjudication under s. 209(1)(b) of the *Act*, which stipulates that after a grievance has been referred to the final level of the applicable process without a satisfactory result, the grievor may refer to adjudication any grievance about a disciplinary action that resulted in termination, demotion, suspension, or financial penalty.

[40] In this case, at the final level of the grievance process, the grievor's performance rating was raised to "satisfactory", and all the former director's negative comments were removed from the performance evaluation. Consequently, for the 2012-2013 evaluation period, the grievor satisfactorily met the basic requirements of his position. However, the respondent informed him that to receive a "fully satisfactory" rating in the future, he was encouraged to "[translation] continue improving [his] communication skills with [his] clients and managers."

[41] Consequently, in its decision at the final level of the grievance process, the respondent chose to waive the deficiencies that had until then been invoked with respect to the grievor's performance. Those issues with the grievor's performance had supported its initial decision to assign him the performance ratings first of

"unsatisfactory" and then of "satisfactory -". The respondent then focused on the grievor's communication shortcomings with his clients and managers to support its decision to assign him the "satisfactory" performance rating, which did not entitle him to performance pay.

[42] Therefore, the issue before me is determining whether the grievor's "satisfactory" rating (which did not allow him to receive performance pay) was in fact a disciplinary action that resulted in a financial penalty. Thus, I will examine all the evidence, to establish whether it was more likely than not that on a balance of probabilities, the grievor's "satisfactory" rating was based on a proven good-faith dissatisfaction with his performance or on camouflage, deceit, or a contrived interpretation by the respondent.

A. Evidence about the grievor's communication problems

[43] Myles Forget, the senior director of the Real Property Branch, National Capital Operations Area, and Rick DeBenetti, who was the director general of the National Capital Operations Area at the relevant time, were called as witnesses to support the respondent's position.

[44] Mr. Forget has worked with the department for 33 years and was the grievor's supervisor from 2010 to 2013. He said that the grievor did not have any performance issues for 2010-2011 and 2011-2012. However, for 2012-2013, his performance deteriorated, and Mr. Forget had to take action to address the grievor's performance problems, including holding weekly one-on-one meetings to discuss his accomplishments and issues and sending emails with areas for improvement. As an additional measure, he also reassigned the grievor to another building, at 455 Boulevard de la Carrière, as of September 10, 2012.

[45] Mr. Forget affirmed that as part of the mid-year evaluations, he consulted Labour Relations of the department's Human Resources division and contacted the grievor to measure his progress with his objectives for the current evaluation year. Subsequently, around November 21, 2012, he gave the grievor five recommendations, including the following:

> [Translation]
>
> …

> • *Eric is encouraged to consider courses and additional training to improve his written correspondence and communication skills.*
>
> …

[46] The difficult relationship of the grievor and Mr. Forget did not improve. Approximately three months later, the grievor asked if he could stop working for Mr. Forget. Mr. DeBenetti accepted his request and reassigned him elsewhere. On February 20, 2013, Mr. Forget formally announced changes to the lease-purchase lease-back team. He announced that the grievor would join the crown-managed buildings team on February 25, 2013, and that another employee would replace him in his former position.

[47] On April 24, 2013, Mr. Forget made the following comments, among others, on the grievor's performance to a committee that was specifically charged with reviewing and approving performance evaluations for the manager group:

> ***Overall Performance during Review Period***
>
> *1. Removed management responsibility for 73 Leikin in September 2012 for the following reasons:*
>
> - *Failure to maintain professional working relationship with P&FM service provider.*
> - *Failure to maintain client relations. Client asked for him to be removed as AM [Asset Manager].*
>
> …
>
> *3. Daily Interaction with RPT Director*
>
> - *The relationship was in no way a professional, respectful and what would be considered a civil working relationship. It was a constant battle, especially over the last year.*
>
> …
>
> - *Failed to consistently demonstrate respect to the Director and his decisions but worse than that he failed to respect the position leaving continuous doubt of his ability to accept rank and authority.*
>
> …

[48] At the hearing, Mr. Forget explained that even though he knew that the

discussion with the grievor about his communication problems would be difficult and that it could have exacerbated the situation, he had no choice but to have the discussion, given the severe tension between everyone involved, including clients and service providers.

[49] As for the grievor, he affirmed that he had held an asset manager position with the department for more than 10 years. He added that he had been eligible for performance pay every year. At the hearing, he affirmed that he had always received performance pay, except for the 2012-2013 evaluation year. He pointed out that things had gone downhill for him after Mr. Forget's arrival in November 2010. Mr. Forget was his supervisor from November 2010 to February 2013. Starting in June 2011, the grievor met with Mr. DeBenetti to discuss his problems with Mr. Forget.

[50] The grievor affirmed that there were no grounds justifying the decision to assign him a "satisfactory" rating, which deprived him of performance pay for the year in question.

1. <u>Removal from management of 73 Leikin Drive</u>

[51] At the hearing, Mr. Forget described the grievor's communication problems with his clients. First, he explained that responsibility for 73 Leikin Drive was withdrawn from the grievor due to his communication problems with the building's management services provider. He explained that the grievor's relationship with that provider had seriously deteriorated. Mr. Forget acknowledged that the provider did not have a good understanding of its contractual obligations. However, he said that that obstacle was surmountable and that the department was obligated to act professionally at all times. Unfortunately, the grievor and the provider's representatives had exchanged inappropriate messages, and as a result, the provider requested that the grievor be excluded from meetings. According to Mr. Forget, it was imperative that the grievor improve his performance in that area.

[52] Mr. Forget explained that even after discussing the issue with the grievor several times, the grievor's relationship with the provider's representatives did not improve. Mr. Forget emphasized that the provider had informed him that if the grievor did not change his behaviour, then it would file a harassment complaint against him. With respect to that building, Mr. Forget specified that the department's role was to optimize resources and to act reasonably, not to insist that the building be managed

the department's way. According to Mr. Forget, the grievor and his team were attempting to remove the building's management from the provider, which was not the department's mandate. Instead, it was to build a relationship with the provider.

[53] Mr. Forget stressed that that was why, at mid-year, he issued recommendations to the grievor to correct his communication problems. Finally, due to the tension between the grievor and the service provider's representatives, Mr. Forget was forced to assign the grievor to another position, at 455 Boulevard de la Carrière. According to Mr. Forget, that assignment was not punishment but was the right direction for the department.

[54] As for Mr. DeBenetti, he also confirmed that the grievor had trouble working with certain representatives of companies that owned buildings and with client departments.

[55] Mr. DeBenetti also confirmed that more and more, the majority of buildings occupied by public servants are being managed by the private sector, which rents the buildings to departments. That is a major change. In such cases, the department's role is limited to expressing expectations and needs to the companies that own the buildings; the department cannot tell them how to manage the buildings. According to some of the complaints made by representatives of the companies that own the buildings, relating to the grievor was difficult because he told them how to manage the buildings.

[56] In response to the decision to remove him from managing 73 Leikin Drive in September 2012, the grievor expressed that he had not been specifically informed mid-year that a related performance issue existed. Furthermore, he explained that despite the complaints against him, he had respected the contract between the department and the building's management services provider and had protected the government. According to him, he and his team had adequately and rigorously managed the contract for 73 Leikin Drive. He had protected the government's interests and had ensured that services rendered were cost-effective. However, the building's management services provider did not provide acceptable service to the department, which resulted in conflicts between him and his team on one hand and him and the provider's representatives on the other. As a result, conducting business became more difficult.

[57] The documentary evidence that the grievor submitted corroborated the fact that the department had received a complaint letter from the management services provider at 73 Leikin Drive. In it, the provider complained about the grievor's attitude and that of his team.

[58] On September 9, 2012, the grievor and his team's assignment to 73 Leikin Drive ended. On September 10, 2012, he was assigned to 455 Boulevard de la Carrière.

[59] Mr. Forget specified that additional communication problems between the grievor and his client subsequently arose following his reassignment on September 10, 2012, to 455 Boulevard de la Carrière. The Department of National Defence was the new tenant of that building. Problems arose when the grievor and his team were to oversee the transition process of that department's move to that building. According to Mr. Forget, the grievor failed to consider the client's requests and simply dismissed them, without examining them.

2. Daily interactions with the Real Property Team's director

[60] At the hearing, while describing the grievor's communication problems with his managers, Mr. Forget also mentioned their difficult interactions. He acknowledged that over time, he had found it particularly difficult to deal with the grievor's combative and aggressive attitude towards him. He described how it was extremely difficult to interact with the grievor every day. The grievor constantly fought him while Mr. Forget tried to explain to him what was expected of him.

[61] Therefore, Mr. Forget consulted Human Resources and familiarized himself with the different procedures for such situations, and he followed the instructions he received. He met regularly with the grievor one-on-one to help him with his work. He also emailed him detailed instructions and a performance improvement plan.

[62] As for the grievor, he affirmed that the assertion was false that he had not maintained a civil, professional, and respectful relationship with his director.

B. Finding on the issue of the Board's jurisdiction

[63] In this case, it must be determined whether the "satisfactory" performance rating assigned to the grievor (which did not lead to receiving performance pay) was disciplinary action that resulted in a financial penalty under s. 209(1)(b) of the *Act*.

[64] Since the respondent pointed out that I do not have the jurisdiction to hear this matter, it had to prove to me that the grievor's performance rating was based on a proven good-faith dissatisfaction with his performance.

[65] The respondent referred me to *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57, in support of his position that a performance evaluation is not within the Board's jurisdiction. It also referred me to *Rogers v. Canada Revenue Agency*, 2010 FCA 116, and to *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, supporting its position that the term "financial penalty" must mean more than a simple "loss". At paragraph 91 of *Chafe*, the adjudicator noted the following:

> *… the term "financial penalty" must mean something other than a simple "loss." It must have some disciplinary aspect attached to it, such as a fine, imposed on an employee for some failing or wrongdoing on his or her part.…*

[66] As for him, the grievor pointed out that due to his troubled relationship with his former director, the decision was made to not grant him performance pay, and that the purpose of that decision was to impose discipline on him. According to him, the respondent did not base its decision on any factual evidence.

[67] At the final level of the grievance process, the negative comments of the grievor's former director were removed from the grievor's performance evaluation. However, the final-level decision noted that to receive the "fully satisfactory" rating in the future, the grievor had to "[translation] continue improving [his] communication skills with [his] clients and managers."

[68] According to the definition of "satisfactory" in the performance evaluation grid, that rating is assigned when some deficiencies appear in an employee's performance. The definition reads as follows:

> [Translation]
>
> ***Satisfactory***
>
> *This category represents performance that is adequate overall. The employee reasonably meets the requirements of the position. He or she meets many of his or her work objectives and achieves many of the results planned with the supervisor. For example, the work is generally completed on time, but sometimes deadlines are not met; on occasion, additional*

> *instructions and supervision may be required; the majority of policies and procedures are well understood, but some objectives are not met. The employee clearly needs to retrain or upgrade his or her skills and knowledge, especially to receive the "fully satisfactory" performance rating.*
>
> …

[69] Having examined all the evidence that both parties submitted, I am satisfied that the respondent has proved that it is more likely than not that the grievor had communication problems with his clients and managers during the year in question. Therefore, I am satisfied that the conditions necessary for assigning the "satisfactory" rating were present at the relevant time. The respondent demonstrated that the communication deficiencies for which the grievor was criticized included the fact that he did not "[translation] hear" client requests and did not act professionally with his managers.

[70] I note that at the hearing, the grievor affirmed that he was never informed that some of his clients had been dissatisfied with his services. According to him, his former director made that assertion to take revenge on him. However, that claim was contradicted by evidence that he himself submitted during the hearing that demonstrated that the department had received the complaint letter of the management services provider of 73 Leikin Drive, in which the company complained about the grievor's attitude and that of his team.

[71] Consequently, given that evidence, I find that the respondent discharged its burden of proof and demonstrated that the grievor's performance rating was based on a proven good-faith dissatisfaction with his performance, i.e., in the circumstances of this matter, the grievor had communication problems with his clients and managers during the year in question.

[72] As a result, I reject the grievor's claim that there were no grounds justifying the decision to prevent him from receiving performance pay. In my opinion, his "satisfactory" performance rating (without performance pay) was based on a proven good-faith dissatisfaction with his communications methods. Thus, in my view, the rating did not result from camouflage, deceit, or a contrived interpretation by the respondent. Facts logically support the decision to assign him that rating.

[73] Finally, I note that although financial consequences might have been associated

with the "satisfactory" performance rating, they did not transform performance pay not being paid into a financial penalty within the meaning of s. 209(1)(b) of the *Act*.

[74] In conclusion, the evidence in this case does not support a finding that the grievor was subject to disciplinary action.

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

(The Order appears on the next page)

VI. Order

[76] I dismiss the respondent's objection that the grievor changed the nature of his grievance after it was referred to adjudication.

[77] I dismiss the grievance.

July 28, 2017.

FPSLREB Translation

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board