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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

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BETWEEN

**JOHN FREZZA**

Grievor

and

**DEPUTY HEAD  
(Department of National Defence)**

Respondent

Indexed as

*Frezza v. Deputy Head (Department of National Defence)*

In the matter of an individual grievance referred to adjudication

**Before:** John G. Jaworski, a panel of the Federal Public Sector Labour Relations and  
Employment Board

**For the Grievor:** Michael Fisher, counsel

**For the Respondent:** Kétia Calix, counsel

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Heard at Toronto, Ontario,  
January 6 to 9, June 2 to 5, and November 17 to 20, 2015.

## REASONS FOR DECISION

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### **I. Individual grievance referred to adjudication**

[1] John Frezza (“the grievor”) was employed at the Department of National Defence (DND or “the employer”) as an outreach/return to work/casualty tracking coordinator (“RTW coordinator”). By letter dated May 31, 2010 (“the May 31 letter”), he was rejected on probation from this position effective June 30, 2010.

[2] On June 9, 2010, the grievor filed a grievance against the employer’s decision to reject him on probation stating that it was disguised discipline, was done in bad faith, and violated his rights. As relief, he requested that he be immediately reinstated without any loss of pay or benefits and that all monies owed to him be paid.

[3] On January 14, 2013, the grievor referred his grievance to the Public Service Labour Relations Board (PSLRB) for adjudication under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*), alleging a termination of employment for disciplinary reasons.

[4] On February 7, 2014, the employer objected that a PSLRB adjudicator had no jurisdiction to hear the grievance as it was a rejection on probation.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the PSLRB 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 *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] 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 name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal*

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*Public Sector Labour Relations Act* (“the Act”).

[7] The respondent called four witnesses, Colonel Gerard Blais, Major (retired) Gilles Legacy, Maj. (retired) Lynda Brady, and Chief Warrant Officer Wayne Quinn. The grievor testified and called one witness, CWO (retired) Michel Nassif.

[8] I find that I have jurisdiction to hear this matter. I further find that the employer’s actions in rejecting the grievor on probation amounted to a sham and a camouflage and were done in bad faith. They amounted to disguised discipline and a termination of employment, rather than rejection on probation for legitimate reasons.

## **II. Summary of the evidence**

[9] By letter dated March 26, 2009, the grievor was offered a full-time indeterminate position with the employer, classified at the AS-04 group and level, as an RTW coordinator with the Joint Personnel Support Unit (JPSU) of the Directorate of Casualty Support Management (DCSM) in Toronto, Ontario, effective June 11, 2009. He was subjected to a one-year probationary period from the effective date.

[10] The relevant portions of the May 31 letter terminating the grievor’s employment stated as follows:

...

*Please be advised that this decision is based on careful consideration of your performance during the probationary period. Specifically, although you were provided with extensive guidance and mentoring, you did not demonstrate the willingness to modify your behaviour in order to correct your serious performance deficiencies. As a result, your actions had a negative impact on the unit’s credibility with our Partners and with the local Commanders.*

...

[11] The Canadian Armed Forces (“CF”) is composed of the Army, Navy, and Air Force. Military personnel (“members”) are either regular or reservists, and each of them belongs to a unit that has a chain of command (“c-of-c”). All members also have an occupation or trade that they carry out within their units, which are located at military bases (“Canadian Forces Bases” or CFBs) throughout and, at times, outside the country.

[12] When a member is ill or injured, medical treatment is provided by the CF, which has medical units that include medical personnel, hospitals, and clinics. Depending on the illness or injury suffered, a member may not be in a position to continue to carry out his or her normal work functions within the unit, and if someone else must carry out that member's work, the member's position has to be filled. However, in the CF, if a member becomes ill or injured and cannot carry out the functions of his or her occupation or trade within the member's unit, then he or she must still remain in a unit and within a c-of-c.

[13] The DCSM is a group within the DND that develops policies governing non-medical care and social and financial support for ill and injured members. The JPSU falls under the DCSM's command. It was created in 2008 due to the influx of injured and ill members arising primarily from the conflict in Afghanistan and the inability of the DCSM's existing system to cope and to provide the support services needed.

[14] Before the JPSU became operational ("stood up"), members who were injured or ill and could not carry out the functions of their occupations or trades would remain within the command structure of their units. However, they would be administratively moved ("posted") to a notional location called the "Service Personnel Holding List" (SPHL). It allowed a unit's commanding officer ("CO"), also referred to in the evidence as Officer Commanding ("OC"), the ability to backfill the position made vacant due to the injury or illness. Ill or injured members remained within their operational units' c-of-c.

[15] With the JPSU's creation and implementation, injured or ill members were no longer placed on an SPHL within their operational units but were posted to the JPSU. This meant that the c-of-c of their operational units were no longer responsible for them; their administrative c-of-c became the JPSU.

[16] The JPSU was divided into different regions across the country and consisted of both military and civilian personnel. At the relevant time, Col. Blais was the Director of the DCSM and the OC of the JPSU and was located at DND headquarters ("NDHQ") in Ottawa, Ontario. The OC for the Southern Ontario region ("Sthn. Ont.") JPSU, headquartered in Toronto, was Maj. Legacy.

[17] "Integrated Personnel Support Centres" (IPSCs) were part of the JPSU and were set up across the country. From the evidence submitted, the IPSCs were staffed by

civilians. At the time of the facts leading up to and including the grievor's termination, the JPSU-IPSC system was not fully operational. At that time, the JPSU operated approximately 28 IPSCs where its services were offered to members and where its staff worked.

[18] At the time relevant to the facts relating to this grievance, the Sthn. Ont. JPSU was composed of two IPSCs that were fully up and running, in Toronto and in London, Ontario, and two more at different operational stages, at CFB Borden and CFB Meaford.

[19] An "Area Service Unit" (ASU) is a location, usually a CFB but not always, at which, before the JPSUs, personnel and services responsible for the members on the SPHL were located. After the JPSUs stood up, the ASUs still existed and contained the JPSUs, which provided support services to members.

[20] Each IPSC had a manager. During the relevant time, the managers for the Sthn. Ont. JPSU responsible for the Toronto and London IPSCs were as follows:

- Lucienne Rossignol, between June 11 and November 2, 2009;
- CWO Quinn, between November 2, 2009, and March 12, 2010; and
- Maj. Brady, between March 12 and May 31, 2010.

[21] At the time material to the events that are relevant to this grievance, the following were the case:

- Maj. Legacy was still an active member;
- Maj. Brady was retired and was a civilian DND employee and, like the grievor, was on probation;
- at the time of the hearing, CWO Quinn was an operations officer with the JPSU;
- Captain Sean Clark was Maj. Legacy's adjutant ("adjt.") for the Sthn. Ont. JPSU;
- Capt. Frederick Egan was the platoon commander for the Sthn. Ont. JPSU for at least both London and Toronto and was physically located

in London;

- Warrant Officer Myra Meier was a senior non-commissioned officer with the Sthn. Ont. JPSU located in Toronto;
- Capt. Fortier was the director of military careers and was stationed at NDHQ;
- Chief Petty Officer David Gingras was the career manager (“CM”) for stewards and was stationed at NDHQ;
- CWO Nassif was the JPSU subject matter expert (“SME”) on RTW matters and was located in Ottawa;
- Percy Purpura was an AS-04 at the Toronto IPSC with the Sthn. Ont. JPSU and a colleague of the grievor;
- “32 CF Health Services” (“32 HSvcs”) was the CF health services unit located in Toronto;
- Dr. Nguyen, was a medical officer (“MO”) and the acting base surgeon at 32 HSvcs;
- Barbara Sigurdson was a case manager located at 32 HSvcs;
- “31 CF Health Services” (“31 HSvcs”) was the CF health services unit located at CFB Borden; and
- Gary Vienneau held the RTW coordinator position with the Sthn. Ont. JPSU in the London IPSC.

[22] The work description for the grievor’s position could require him to carry out some or all of the outreach, return to work, and casualty tracking job functions. He was required to work closely and cooperatively with other federal government, DND, and CF organizations to achieve results related to the mandates of the JPSU and DCSM.

[23] The evidence disclosed that the Sthn. Ont. JPSU, both before the grievor started working there and during his tenure, was a difficult and troubled work environment. The evidence also disclosed that the JPSU as a whole, including the Sthn. Ont. JPSU,

was experiencing what could best be described as growing pains.

[24] Before he was appointed, the grievor had roughly 30 years of non-continuous service with the CF. His highest and final rank was Master Warrant Officer; he was a senior non-commissioned officer. He had also worked extensively in the railroad industry in administration, sales, and marketing.

[25] In 2005, near the end of his military career, the grievor was in Ottawa working at the DCSM where he stayed until he reached the compulsory release age of 60. He did work similar to what would later be required of him in his RTW coordinator position with the JPSU, and he reported directly to CWO Quinn. In 2008, before turning 60, the grievor competed for and was successfully appointed to the RTW coordinator position in the Sthn. Ont. JPSU.

[26] The evidence disclosed that after he had been offered the RTW coordinator position, the employer approached him, and they entered into an arrangement that he would move from Ottawa to Barrie, Ontario, and spend two days per week at CFB Borden and the other three days at the Toronto IPSC office. The arrangement was mutually convenient as the evidence revealed that the employer intended to have him located full-time at the IPSC at CFB Borden (which was in the Barrie area). The plan was mutually beneficial as it would alleviate the need to move the grievor twice, once from Ottawa to Toronto and then again from Toronto to Barrie. Under this arrangement, the employer would pay for the grievor to move only once, from Ottawa to Barrie, and until he was permanently located at the IPSC at CFB Borden, it would also pay his travel expenses under the Treasury Board ("TB") *Travel Directive* for travel between Barrie and Toronto whenever he worked out of the Toronto IPSC.

[27] On August 1, 2009, the grievor and his wife moved to Barrie from Ottawa.

[28] As the RTW coordinator, the grievor was the link between the c-of-c, the injured or ill member, and health services, with respect to an RTW. In addition to RTW coordination, his duties also included casualty tracking and outreach. He described casualty tracking as being done via a spreadsheet, updated weekly, of all persons who were posted to the Sthn. Ont. JPSU or whom it was tracking. When a call came in about a member who was posted to the Sthn. Ont. JPSU, the information was tracked by placing comments in the spreadsheet. Outreach duties were described as going to outside units and organizations and giving presentations on the JPSU's services.

[29] CWO Nassif testified about posting a member to the JPSU at the time in question; he stated that the process was not “cut and dried”. The CF healthcare system treats an injury or illness and the potential resulting disability with its own medical facilities. However, a member may be posted in one part of the country or even abroad with no support system. It may be that the best support and service for that member is in a part of the country other than where his or her operational unit is located.

[30] For example, a member could be based in Halifax, Nova Scotia, and working there in some capacity. If he or she is injured or becomes ill and cannot work and would then be off work for a time, it may be best for him or her to return to and live and recover at home, where there is a support system. If that home and family are in Toronto, then moving the member there would be appropriate, and he or she should be posted to the Sthn. Ont. JPSU. This would allow the member to report administratively to the JPSU closest to where he or she is living and recovering. The JPSU, through its IPSCs, would provide the recovery support services (social and financial) where the member is located. The system was set up so that the JPSU would provide the same services to injured or ill members via the IPSCs throughout the country.

[31] The evidence disclosed that to post a member to the JPSU, the CO of the member’s operational unit makes a request for that posting. This request goes to a number of different persons and units, including the CM of the ill or injured member subject to the request.

[32] The different trades and occupations within the CF have different CMs, and every member has a CM. Once a CM receives a request to post to the JPSU from a CO, a determination is made based on a number of variables as to where that member is to be posted. CWO Nassif testified that members lived and recovered in the area of responsibility (“AOR”) of a particular regional JPSU but that they were not actually posted to that JPSU. Key to posting a member included what would happen to him or her. The decision was based on a number of factors and involved not only the member but also his or her medical professionals, CM, and operational CO.

[33] CWO Nassif also testified that not all injured or ill members required all the services provided by an IPSC. RTW assistance was but one service, and it was not always required.



[34] The JPSU has no jobs; it is an administrative unit where ill or injured members report while not working in their usual occupations or trades with their operational units. The grievor stated that part of the RTW coordinator function was to find work for members who fell within his AOR. He said that he would look for work based on where the members were and on their identified limitations, including medical employment limitations (“MELs”). If a suitable RTW position was found, the member would sign a contract. The member’s operational unit would not have any financial or administrative responsibilities as they would fall to the JPSU.

[35] The evidence of the grievor and CWOs Quinn and Nassif disclosed that the RTW process, which allowed the grievor to become involved with assisting an ill or injured member, was triggered by the delivery of a form identified as the “Canadian Forces Health Services Group Employment Limitations for Return to Work Worksheet”, referred to colloquially as “the CF 2018”.

[36] The CF 2018 is filled in by an MO, and copies are distributed to several persons and organizations. CWO Nassif stated that an MO prescribes an RTW and that the CF 2018 puts a member into the RTW process. Among other things, it sets out the geographic and occupational employment limitations that would affect the member on returning to work.

[37] The grievor stated that it was a member’s responsibility to provide him a copy of the CF 2018. The grievor stated that he could do a number of things after receiving it, depending on the following:

1. the member’s MELs;
2. the member’s unit and its location; and
3. the member’s location.

[38] The evidence disclosed that despite the JPSU’s creation, old habits died hard, that processes that should have changed did not necessarily change but lingered, and that terminology and jargon predating the JPSU era was still used, which caused confusion.

**A. Issues with the grievor's conduct**

[39] The behaviour that led to the grievor's termination of employment was attributed to his communication skills.

[40] The grievor's first supervisor, Ms. Rossignol, did not testify. However, an email she sent to Maj. Legacy, at his request (after events that will be later described in this decision) and dated May 14, 2010, was entered into evidence. The grievor and CWO Quinn addressed the events it sets out.

[41] In that email, Ms. Rossignol set out concerns that either she noticed or others had brought to her attention, including the following:

- the grievor displayed a lack of respect towards female colleagues;
- his demeanour was described as disrespectful and discourteous in meetings both internal to the JPSU and with external partners; and
- his email correspondence with her was demanding, directive, and blatantly disrespectful.

[42] In an earlier email dated September 28, 2009, to Maj. Legacy, Ms. Rossignol outlined her concerns about the grievor's conduct at that time and stated that she wanted to discuss it with Maj. Legacy. She identified that her concerns were about being both a female and a civilian. She also set out that she had received complaints from others.

**B. Regional Adapted Fitness Specialist**

[43] A "Regional Adapted Fitness Specialist" (RAFS) has a role in the physical rehabilitation of ill or injured members. Not every injured or ill member will necessarily require the services of a RAFS; nor necessarily will every injured or ill member who is receiving the services of a RAFS require the services of the RTW program. However, those services could and did intersect.

[44] An email about the grievor dated October 29, 2009, was sent by a RAFS (anonymized in this decision as "RAFS A"; some other names are also anonymized) to Maj. Legacy. It spoke of a briefing RAFS A had provided to a number of people, including the grievor. According to the email, RAFS A characterized the grievor as

asking many questions about an issue that, in her view, was not relevant to him. RAFS A had the impression that the grievor was resistant to the program and she found his attitude unacceptable. She stated that she felt that the grievor had undermined her abilities in front of everyone at the presentation.

[45] RAFS A did not testify.

[46] CWO Quinn replaced Ms. Rossignol as the grievor's supervisor in late October or early November 2009. In his evidence, CWO Quinn described the issue involving RAFS A as one of how to pass information contained in the CF 2018 to the RAFSs, to facilitate their work. CWO Quinn described this as a discussion and specifically said that it was not heated. He also explained the issue in an email to the grievor on April 6, 2010, and in the performance appraisal ("Civilian Performance Review Report" or "CPRR") of the grievor that he completed, that was dated March 26, 2010, and that covered June 11, 2009, to March 12, 2010.

[47] The evidence on this disclosed that RAFS A had requested that the grievor provide her with copies of the CF 2018s with respect to a number of members he was managing. He took the position that she did not need to be provided with the CF 2018s to do her work. His supervisors viewed that as being uncooperative with RAFS A and as not building good working relationships with other personnel that were integral to the JPSU's success.

### **C. Incident involving Capt. Evans**

[48] Capt. Evans is a registered nurse; she worked out of 31 HSvcs at CFB Borden. She did not testify.

[49] The grievor testified that he was tasked with giving a course to assisting officers (AOs) at CFB Borden. COs assign AOs to liaise with members' families in serious injury or death situations to help members and their families navigate the events taking place. He stated that to give the course, he needed speakers, and he wanted a particular nurse from 31 HSvcs to speak, so he contacted her directly. This direct contact resulted in Capt. Evans emailing the grievor on February 25, 2010, and advising him that the request should come through her office. She went on to ask him to send the request directly to her and said that she would see that it was processed.

[50] The grievor responded within half an hour and provided Capt. Evans with a copy of the original request that he had sent to Nurse "A". The relevant portions of his response are as follows:

*Good day Capt. Evans:*

*My request was submitted to the Team Leader - Case Management, [name], and read as follows;*

*28 August 09*

*DCSM will be conducting an AO training session on 14-15 Oct. in Borden. Accordingly, I would like to inquire if someone from CF Case Management would be available to give a 50 minute lecture focusing on the interactions with between CM and AO's WRT SI/VSJ Mbrs.*

*Please note, any power point presentations are to be in English and French and send to me ahead of time.*

*If you can confirm sap, it would be appreciated and I will follow-up with further details as to location and timings - closer to the event.*

*Thank you*

*John*

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*[name], replied that she would undertake the tasking, however the course scheduled for 14-15 Oct 09, was cancelled and is now scheduled to run 3-4 March 10.*

*[name] was contacted again, and I was advised she will be giving this period.*

*There is, and always has been a close working relationship between Case management and DCSM/IPSC's. I apologize if this has cause you a problem, but I would have expected that either my request would have forwarded to Ops & Trg, or I be directed to same.*

*Kind regards,*

...

[Sic throughout]

[51] Capt. Evans replied on Friday, February 26, 2010, at 8:07 a.m., confirming that in essence she understood and advising that no problem had been caused. She stated as

follows in her final paragraph:

...

*No problem caused, I would just ask that in future, once Case Management confirms they are available for a requested task, that you contact either myself or [name] in Ops & Trg so that we may staff through the appropriate channels and track accordingly.*

*Thanks again,*

...

[52] The grievor replied to Capt. Evans that same day at 8:24 a.m., stating as follows:

*Good day Capt Evens [sic]*

*This is redundancy that I truly do have time for. If CM are available and they advised you then this should suffice.*

*Have a great day...*

...

[53] Capt. Evans took offence to the grievor's final email and forwarded the chain to her CO, who in turn emailed the chain to Maj. Legacy and advised that he would like to speak to him about it.

[54] Maj. Legacy testified that he read the grievor's last email as telling Capt. Evans that her request was redundant and that he had no time for it. He saw it as an abrasive response. Maj. Legacy said that he instructed the grievor to apologize, which he did. But his apology sparked more controversy. He emailed Capt. Evans' CO, (with a copy to Maj. Legacy) on February 26, 2010, at 10:43 p.m., as follows:

*I have reread the emails - my apologies, however I am not part of the unit, nor am I aware of all internal unit processes.*

*As with other units where I have engaged key speakers for this national course, I have always dealt with the primary POC to confirm their availability. If the key is to receive the information, and the Case Mgr did indeed advise of the request, would this not suffice for the requirement?*

*While I wear many hats, I can conform to the request, if required, but to initiate an internal unit process is something that may be difficult to remember a year from now when the next request might come.*

...

[55] Maj. Legacy testified that the grievor's apology was not conducive to a good relationship with 31 HSvcs, stating that Capt. Evans's original email merely asked the grievor to do something in the future and his response had been inappropriate. Maj. Legacy described the grievor's apology as "saying he was sorry because he had to, but then stating, well he isn't part of their unit." Maj. Legacy forwarded the entire email chain to CWO Quinn, stating as follows:

*Are you kidding me. "My apologies, however..." This is like saying, "I have to say I'm sorry, but this is how its going to work anyways...". We need to talk about this.. again. When is his year probation over?*

[Sic throughout]

[56] CWO Quinn testified about the exchange between the grievor and Capt. Evans. He characterized the grievor's reply to Capt. Evans, referring to redundancy, as somewhat derogatory; the problem was the tone. He said the following:

- 31 HSvcs was at CFB Borden;
- the grievor was responsible for CFB Borden;
- the grievor would eventually work full-time at CFB Borden; and
- working with Health Services was important.

[57] On Monday, March 1, 2010, at 2:45 p.m., the grievor sent another email to Capt. Evans, copying her CO and Maj. Legacy and stating as follows:

...

*Even though I reread your message, a second time, I read it incorrectly. Accordingly, I was asked to reread my message, which I have now done, and I own [sic] you a big and sincere apology.*

*My reaction was as a result, (rightly or wrongly) of interpreting your message to mean that you wanted me to send you a request, even though you were made aware by the CM, and hence the word redundancy.*

*I have now reread your email and actually see that you were asking in future events -"No problem caused, I would just ask*

*that in future”.*

*While I am extremely embarrassed over this whole matter, I am more sincerely truly sorry, for my email. Please realize I did not mean any disrespect to you, your rank or position.*

...

**D. The Memorandum of Expectations, the CPRR, and performance management**

[58] The evidence disclosed that Maj. Legacy thought about disciplining the grievor with respect to the Capt. Evans incident and that he had made some inquiries about rejection on probation. In the end, after having some discussions, he determined that the grievor’s performance issues would be dealt with by a performance management plan that he and CWO Quinn would draft.

[59] On March 25, 2010, Maj. Legacy issued a “Memorandum of Expectations” (“memo of expectations”) to the grievor. It contained 10 paragraphs, and the subject line referenced the grievor’s communications with Capt. Evans and her CO of February 26 and March 1, 2010. The stated purpose of the memo of expectations was to “. . . detail the expectations of [the] unit in respect [of a] performance deficiency.” Its formality was “. . . based on the culmination of a number of incidents; however it will focus on the poor judgement on [the grievor’s] part in respect to the tone used in the written communication between [the grievor] and members of 31 Health Services.”

[60] Paragraphs 2 through 5 set out what occurred in the grievor’s email exchange with Capt. Evans, identified the problems with his emails, and pointed out the inappropriate tone and how he apologized. Paragraph 5 advised him that the incident was being documented because he was a probationary employee and that this one together with other isolated incidents displayed poor judgement on his part.

[61] Paragraphs 6 and 7 advised the grievor of the following:

- he had been screened-in for the position based on an experience criteria of negotiating with senior officials, and he had to show improvement in his dealings with other staff, both within and external to the unit;
- he had to show a willingness to be a team player in the unit;
- he had to allow others to work effectively with him;

- he was expected to work respectfully with all colleagues and service partners;
- when disagreements occurred, he was to enhance the working relationship through positive and effective negotiation skills;
- his written work, particularly emails, had to be respectful at all times;
- his correspondence to ill or injured CF members had to be objective and factual;
- his correspondence could be interpreted differently by others based on the perception of the reader and the style of his writing;
- his supervisor would review his written work to assist him in the effectiveness of that work to ensure that it met expectations; and
- he was expected to be receptive to constructive criticism provided to assist him.

[62] Paragraph 8 set out that for the remainder of his probationary period, the grievor would be debriefed on his performance by his supervisor, a minimum of once every two weeks, to focus on the level of cooperation he was providing to colleagues and service partners and the standard of his written and staff work. It further stated that his supervisor would be tasked with liaising with Human Resources (HR) to coordinate training for effective writing skills and time management in which he was expected to participate. It also stated that training, if available, would take place as soon as possible, during the probation period.

[63] Paragraph 10 advised the grievor that further violations of work expectations might result in disciplinary action.

[64] Hard on the heels of the Capt. Evans incident and the memo of expectations, CWO Quinn completed the grievor's first CPRR, dated March 26, 2010. CWO Quinn testified that he delivered the CPRR and met with the grievor. However, CWO Quinn was to leave his position with the Sthn. Ont. JPSU and would be replaced by Maj. Brady, who would be tasked with implementing the memo of expectations.



[65] That CPRR covered the time that the grievor was managed by Ms. Rossignol and CWO Quinn (nine months). It had the following five potential rating points: “Unable to assess”, “Did not meet most”, “Met most”, “Met all”, and “Surpassed”. The grievor was assessed at “Met most”. Under the section for manager or supervisor comments, CWO Quinn stated as follows:

*From his previous employment with DCSM, Mr Frezza brings significant experience and knowledge to his new role within JPSU. He has the ability to be a significant asset to daily operations of the IPSC. He is undoubtedly committed and dedicated to helping injured/ill soldiers, veterans and their families. Notwithstanding his experience, Mr Frezza must strive to control his emotions in the performance of his duties. He has achieved several noteworthy accomplishments during this observation period, however those accomplishments are being overshadowed by negative feedback of an isolated number of inappropriate incidents which were examples of poor judgement by Mr Frezza, and simply unacceptable. Mr Frezza has the ability to be a positive contributor to JPSU, however he must exercise better judgement in his personal actions and written staff work, and strive to achieve positive outcomes by ensuring that his relationships with all partners, stakeholders and staff remains professional and respectful at all times, regardless of the circumstances. Mr Frezza, has the potential and commitment to be a strong contributor to the welfare of injured and ill CF personnel. He must strive to ensure that his best assets are not overshadowed by lapses in judgement.*

[Sic throughout]

[66] The grievor disagreed with that assessment and emailed his comments and concerns to CWO Quinn on March 29, 2010, at 11:11 p.m. CWO Quinn responded via a three-page email dated April 6, 2010.

[67] As the grievor’s incoming new supervisor in late March of 2010, Maj. Brady was tasked with debriefing him, as set out in the memo of expectations. She carried out a total of three biweekly performance reviews. A written record was produced, in addition to a face-to-face meeting being held. She testified about his performance and the three reviews, which were held as follows:

- for March 26 to April 9, 2010, the written review is dated April 8, 2010 (“the April 8 review”);
- for April 12 to April 23, 2010, the written review is dated

April 26, 2010 (“the April 26 review”); and

- for April 26 to May 7, 2010, the written review is dated May 7, 2010 (“the May 7 review”).

### **1. The April 8 review**

[68] The April 8 review assessed the grievor’s performance as being generally good, with a few exceptions related to his communication style. Two specific incidents were set out:

1. a presentation on March 29, 2010; and
2. his email communications.

[69] At a presentation on March 29, 2010, the grievor provided a RTW briefing. Maj. Brady referred to the presentation as being good overall but commented that the good part was overshadowed by the grievor listing the RAFSs as a “challenge”; the grievor had identified an issue with the RAFSs as “things getting complicated if there are too many fingers in the pie.” Maj. Brady stated that she, Capt. Clark, and Maj. Legacy all saw the comments as a blunder, while the grievor did not realize his *faux pas*. After the presentation, Maj. Brady spoke to the grievor. She stated that he did not recognize his error, namely, identifying other JPSU team members as challenging, which others took as him identifying the RAFSs as a problem. She stated that his action showed a lack of tact and thought.

[70] The issue with respect to the grievor’s email communications was identified as him not knowing when to change from email to telephone communication to clarify information and to bring in his supervisor when the communications moved up the organizational structure.

[71] Despite the two issues Maj. Brady identified in the April 8 review, she largely identified the grievor as showing definite improvement.

### **2. The April 26 review**

[72] In the April 26 review, Maj. Brady again indicated that the grievor’s overall performance was consistent with the April 8 review and that his daily performance and client services were generally good. However, she highlighted unsatisfactory judgement

again, focusing largely on email communication. She identified the four judgement issues as follows:

- a client contact sheet (“CCS”) email;
- a birthday wish email;
- a print job; and
- a homelessness initiative email.

[73] With respect to the CCS matter, Maj. Brady’s evidence was that she assigned the grievor the task of providing her with the CCS by the end of a certain week, that she instructed him that there was no need for more email, and that he should call if further discussion was needed. He sent an email that indicated that it was likely that he would not complete the CCS in the time frame as instructed. Maj. Brady identified his email as showing “a lack of concurrence or attention to detail” to her “no more email request” and rather than state that the task likely would not be completed, he should have noted that extra time might be needed. She stated that she requested that he not email because she was inundated with them. She said she did not need small and short emails and that she wanted people to just “pop their head into her office.”

[74] The birthday card email was harmless. The grievor sent it to Maj. Brady and everyone in the Sthn. Ont. JPSU. It was marked “urgent” and had the birthday card attached, thus requiring recipients to not only open the email but also to then click on the attachment to open the card.

[75] Maj. Brady stated that she appreciated the card and the sentiment and that she noted that the grievor was displaying team building and morale boosting. Maj. Legacy, who was part of the email chain, complained to her about the email. He stated that he was involved in a repatriation meeting and was away from his office when he received it. He said that he was unable to open the attachment on his Blackberry and that therefore he had to return to his office to open it. He found out then that in fact it was not urgent. He emailed Maj. Brady, stating that while he also appreciated the thought behind the card, it should not have been marked urgent.

[76] After the grievor was instructed that in the future, he should not mark emails as urgent that were not urgent, Maj. Brady testified that she expected him to apologize to

Maj. Legacy. However, instead, the grievor advised him on how to fix his Blackberry problem. This caused Maj. Legacy to complain to Maj. Brady about the grievor not understanding the issue.

[77] The grievor testified about his discussion with Maj. Legacy and the advice he provided about the Blackberry problem. He stated that after he apologized to Maj. Legacy, he informed him about solving the issue with opening attachments, at which point Maj. Legacy told him that he had not had a problem opening the attachment. When Maj. Legacy was cross-examined on this point, he said that he did not recall this discussion.

[78] The print job issue was that many people in the office used the same printer, and the grievor had picked up Maj. Brady's print job by mistake. She wrote the following in the April 26 review:

...

*... 15 Apr. A simple error occurred where John picked up my print job by error. The issue I had with this was not with the error itself but with his almost complete lack of reaction when I brought it to his attention. While an apology was not offered, he proceeded to offer reasons for the paperwork mix up. As I explained to John during our discussion of this incident 15 Apr, the mistake itself was not the issue, his handling of the mistake and lack of a quick apology was the issue. More sensitivity and common courtesy are required....*

...

[79] In her evidence, Maj. Brady stated that the problem was not that the grievor picked up the print job by mistake but that he did not say, "Sorry, picked up by mistake."

[80] The fourth issue identified as a problem in the April 26 review was with respect to a homelessness initiative email that Maj. Brady had sent to the IPSC staff for information. The grievor responded via email, outlining some concerns. She said that the concerns he raised were not the problem; again, she said that he should have brought them up orally versus via email. A second issue was that he used the phrase "I have gone to school on your reply . . .", in his response, which she interpreted as inappropriate. She indicated that had he phoned or spoken to her in person, then that phrase would likely have been avoided.

### **3. The May 7 review**

[81] The May 7 review was the final one, and the grievor's performance was rated as good with no issues of significant concern. The final paragraph stated as follows:

*. . . In summary, Mr Frezza has shown significant improvement in his communication, has used the advice provided and used the telephone on greater occasions, and is seeking additional training. I'm confident Mr Frezza is actively working to improve his performance, and can be an effective member of the JPSU.*

[82] In her evidence, Maj. Brady stated that as of the May 7 review, there were no issues, his work was of high quality, and his performance was good. She stated that in her opinion, he could be an effective member of the Sthn. Ont. JPSU.

[83] As part of the CPRR process, CWO Quinn had suggested some courses for the grievor to take to assist with his performance issues. The issue of courses was also raised during the grievor and Maj. Brady's discussion at the April 26 and May 7 reviews. The evidence disclosed that while some courses would have benefitted the grievor and that he considered taking them, none was offered between the CPRR and his termination.

[84] Maj. Brady stated that she brought a list of potential training courses for the grievor to the CPRR meeting. He stated that he looked into registering and taking them; however, none were available for him to take between the CPRR meeting and his termination.

[85] In her examination-in-chief, Maj. Brady stated that she wanted the grievor to improve his performance deficiencies. She stated that the Sthn. Ont. JPSU and IPSC they were working within was a very difficult work location. She stated that she felt that with the right guidance and training, the grievor had the opportunity to be a good employee. She stated that she felt that she and the grievor could work together to ensure he got through his probation and that he could be a highly competent AS-04.

### **E. Evidence of Col. Blais**

[86] Col. Blais testified that he made the decision to reject the grievor on probation. He stated that given the CF's role, it is important to maintain relationships with partners and clients, which have to be sound and harmonious to ensure that ill and injured members receive the services they require. He testified that he had known the

grievor for a long time but that he had not directly supervised him.

[87] Col. Blais said that the grievor's technical knowledge was not a problem; it was his relationship with the JPSU partners. He described the grievor's relationship with partner organizations as "tenuous at best". Col. Blais stated that according to the reports he received from Maj. Brady, for every step the grievor took forward, he took two steps back. He stated that the grievor was an impediment to the partnerships and that he had to remove the grievor from his duties.

[88] With respect to the grievor's interaction with health services, Col. Blais pointed to a conflict with a case manager. When the grievor was asked to apologize, he did so; however, he also stated why he was right. That upset the Base Surgeon and required the grievor to write a second apology letter.

[89] With respect to the RAFSSs, Col. Blais stated that the grievor refused to provide them with information that they needed because he did not feel that they needed it. The matter had to be escalated to a high level to be resolved.

[90] Col. Blais said that despite the grievor acknowledging that his conduct was inappropriate, his apologies, and his efforts to change, Col. Blais did not feel that the grievor's conduct would change.

#### **F. Ordinary Seaman "AB"**

[91] Ordinary Seaman (OS) "AB" was a steward in the Navy whose operational unit was a naval vessel based out of CFB Esquimalt, near Victoria, British Columbia. Her home and family were in Hamilton, Ontario. In early 2010, she was ill.

[92] A series of email chains were entered into evidence with respect to OS AB, dating to February of 2010. The first is an email dated February 26, 2010, and sent to Mr. Purpura at 7:42 a.m. from Lieutenant P. M. Pasturczyk, who was part of OS AB's c-of-c on the vessel she served on. Its relevant portions state as follows:

*I received your contact information from Bob Witteveen here in Esquimalt, from your phone message I understand you are on leave until 4 Mar 10. I am writing you to advise you of [OS AB] . . . a steward onboard HMCS [name of vessel] who has recently been diagnosed with a serious illness. The message attached confirms this designation. . . .*

*. . . has been placed on TCAT and given 30 days sick leave*

*initially. Our base hospital has approved and made arrangements in Toronto for her to begin her convalescence with her NOK [next of kin] in Hamilton and continue with her treatment through ASU Toronto. . . .*

. . .

[93] Bob Witteveen was the RTW coordinator at the IPSC at CFB Esquimalt. The same day on which Lieut. Pasturczyk emailed Mr. Purpura, Mr. Witteveen emailed the grievor at 12:06 p.m., forwarding to him Lieut. Pasturczyk's email to Mr. Purpura and stating as follows:

. . .

*I am not sure if HMCS [name of vessel] has been able to reach Percy [Mr. Purpura] and I feel that IPSC Toronto should be involved early on in this particular case. I am forwarding the info below to allow the IPSC to contact HMCS [name of vessel] in support of [OS AB] to ensure the Unit, family and mbr [sic] are well supported.*

*Do not hesitate to contact me if you have any additional questions.*

. . .

[94] Within 25 minutes of receiving Mr. Witteveen's email, the grievor emailed CWO Quinn and copied Maj. Brady, advising that he was detained by another matter that day and that Mr. Purpura was away. So, he asked CWO Quinn if he could look into the matter. Within two hours of receiving the grievor's email, CWO Quinn emailed Lieut. Pasturczyk, copying the grievor, Mr. Purpura, Maj. Brady, and Mr. Witteveen, and stating as follows:

. . .

*I tried to contact you this afternoon, however your department had apparently shut down for the afternoon.*

*I am the Acting Service Manager for IPSC Toronto. I wanted to acknowledge your note, and perhaps discuss additional detail to assist. We can certainly assist with any administrative requirements. I noted that she will receive treatment through ASU Toronto, so we will also work through the CF Case Manager in providing assistance.*

*If you would like to discuss this in further detail, you may call me on Monday (at the Ottawa number) or Mr John Frezza.*

...

[95] At 2:36 p.m., on February 26, 2010, Ms. Sigurdson emailed CWO Quinn, stating as follows: “Hi Wayne I do know about this person she is en route home this weekend. I will get a [sic] further info from Capt Cane next week”. Within 15 minutes of that email, CWO Quinn responded, adding the grievor to the email chain and stating as follows:

...

*Roger that, and I will pass on anything in the event that Lt(N) Pasturczyk calls.*

*John: Please note in case you get the call on Monday. My main concern is to find out what the unit’s intent is regarding posting to JPSU, and any other administrative items they would like us to look into. If they call you, please provide the feedback to Barb and myself. I will debrief OC/Adjt once we have more detail on the intent and plan ahead.*

...

[96] No evidence was provided as to who Capt. Cane was or what role he or she had, if any, with respect to OS AB and her interaction with the Sthn. Ont. JPSU.

[97] At 3:56 p.m. on February 26, 2010, CWO Quinn emailed Ms. Sigurdson, Maj. Legacy, and Capt. Clark (copying the grievor and Mr. Purpura), stating as follows:

*Just spoke with Lt(N) Pasturczyk.*

*Member is on 30 days sick leave and first TCat paperwork has been submitted. Nothing yet initiated, however Lt(N) Pasturczyk believes that posting to SPHL likely to be recommended to chain of command. I explained that this should be actioned as a posting to JPSU, and likely assignment to IPSC Toronto.*

*Lt(N) Pasturczyk is member’s supervisor, and in contact with family. He will pass on to family that the IPSC is here to provide administrative support, and will ask the OS to contact us at her convenience.*

*Did not get into prognosis, simply that illness is significant, but there is hope that the OS will recover and return to duty. I suspect that we will be looking at an initial period of strict recovery under care of med services, and when appropriate, then slide into RTW. Will know more once member has reported to 32 CF H Svcs and Barb has met with her.*



*For Barb: Perhaps after your meeting with member, we can get together to confirm plan for OS. From discussion with unit rep, I would suggest that once the dust has settled regarding treatment, we should likely get the posting issue addressed.*

*For OC/Adj: For your info. Nothing definitive on posting.*

...

[Sic throughout]

[98] On March 17, 2010, at 9:25 a.m., Dr. Nguyen at 32 HSvcs (Toronto) emailed OS AB's CO, Commander R. J. Lewis Manning, (copying Lieut. Pasturczyk, Ms. Sigurdson, and others), stating as follows:

...

*RECOMMENDATION FOR PLACEMENT ON SPHL*

*1. Due to medical reasons, [OS AB] should be placed on the Area Support Unit Toronto Service Personnel Holding List (SPHL), IAW ref. 100/00.*

*2. For your consideration.*

...

*Distribution List*

*Action*

*ASU Toronto/CO*

*Information*

*32 CF H Svcs C/Bsurg*

*32 CF H Svcs C/Clinic Manager*

...

[99] Ms. Sigurdson forwarded that email to Maj. Brady on March 30, 2010, at 1:34 p.m., stating: "Not sure if I sent this to you or not". On March 31, 2010, at 3:17 p.m., Maj. Brady in turn forwarded Ms. Sigurdson's email to Maj. Legacy, Capt. Clark, Mr. Purpura, the grievor, WO Meier, and others.

[100] On March 29, 2010, Cmdr. Lewis Manning wrote the following letter ("the March 29 letter"):

...

*Distribution List*

*REQUEST FOR SPHL POSTING*

[ID Number and CF Member name] *STWD*

*References: A. Memo 6640-1 (SPHL) 32 CF H SVCS C  
RECOMMENDATION FOR PLACEMENT ON SPHL 17 Mar 10  
(enclosed)*

*B. CANFORGEN 100/00 ADMHRMIL 061 161430Z AUG 00*

*1. At reference A, V. Nguyen, the Acting Base Surgeon, 32 CF H SVCS C, has stipulated that [OS AB] has serious medical limitations, will not be fit to return to normal duties for over six months and is a good candidate for SPHL. [OS AB]'s position is essential to the unit's operations and a replacement is required.*

*2. It is requested that [OS AB] be placed on the Service Personnel Holding List (SPHL) in ASU Toronto UIC 3536 for employment through Return to Work and Transition Centre (RTWC).*

...

*Distribution List*

*Action*

*NDHQ/ D MIL C 2 / 2-2-2 STWD CM//*

*Information*

*MARPACHQ/J11*

*CF H Svcs C(P)/BSurg*

*32 CF H SVCS C//BSurg/Clinic Manager//*

*ASU Toronto/CO*

*IPSC Esquimalt/OIC*

*IPSC Toronto/OIC*

[101] On Friday, April 16, 2010, at 10:17 a.m., OS AB emailed Ms. Sigurdson, stating as follows:

...

*How are you? I've been doing well, I was curious as to whom I would speak to on the issue of the back to work protocol, if there was an extension or an email. As well as if you by any chance could give me the email of Captain Cane, I would greatly appreciate this. Thank you.*

...

[102] On Monday, April 19, 2010, at 12:25 p.m., Ms. Sigurdson replied, copying Maj. Brady into the email chain and stating as follows:

*In regards to back to work it is a Medical Drs decision to assess your fitness for it.  
If you are anxious to begin a RTW you need to discuss that with Dr Ngyuen, he will refer you to our RTW program.  
Currently it is in the works to have you moved administratively to Toronto to the IPSC/JPSU so this will be addressed with that move as well.  
I am copying the manager of that unit who will receive you just for an FYI that you are keen to RTW.*

...

*You will need to sit down with the Dr so you wil need to make an appointment tell the desk it is about Return to work (at 3900 the MIR).*

[Sic throughout]

[103] On April 19, 2010, at 2:07 p.m., Maj. Brady emailed WO Meier and Capt. Clark, stating that she had heard that OS AB might be posted to the London IPSC and that she was seeking confirmation of it. On April 21, WO Meier replied, stating that both she and Capt. Egan had a copy of OS AB's CF 2018 and that she had heard nothing further on where OS AB would be posted.

[104] On April 22, 2010, Capt. Egan emailed WO Meier, Maj. Brady, and Capt. Clark, stating that the previous week, he had been in Toronto, that a discussion had occurred about where OS AB would be posted (IPSC London or IPSC Toronto), and that that decision should be left to the CO of her vessel at CFB Esquimalt. Capt. Egan confirmed that he had received OS AB's CF 2018 and that he had had it since March 15, 2010. His understanding was that OS AB was still a member of her operating unit and under the command of the CO of that vessel; however, he understood that she was residing in the Hamilton area.

[105] On April 23, 2010, Capt. Clark emailed Capt. Fortier in Ottawa, copying Capt. Egan in London, inquiring about the intent of the CO of OS AB's operating unit, stating as follows: "My team is chomping at the bit to assist the member . . .". Capt. Fortier responded by email on April 26, 2010, at 10:59 a.m., advising Capt. Clark that he understood that OS AB's CO at CFB Esquimalt intended ". . . to request SPHL in

Esquimalt and TD as required to Toronto with family, file is pending CO's Ltr [sic]." Capt. Clark then forwarded the entire email chain to Maj. Brady and Capt. Egan at 10:59 a.m. that same day. And at 3:08, Maj. Brady emailed Capts. Clark and Egan, copying WO Meier, the grievor, and others, acknowledging the email information and confirming that she had received OS AB's CF 2018. She stated as follows: "We've also just received a CF 2018 for the mbr [sic] - who's in our AOR now temporarily at least - to start on a RTW program."

[106] On Monday, May 3, 2010, at 1:21 p.m., OS AB emailed Ms. Sigurdson, enquiring about the status of her RTW protocol and advising that she had spoken to Dr. Nguyen the previous Monday and that he had given the recommendation for it. At 1:25 p.m., Ms. Sigurdson replied and copied the grievor as well as Mr. Vienneau in London, stating as follows:

*Your referral was sent to Johnn [sic] Frezza here at Toronto's IPSC.*

*I have copied him, I think that however it will be handled by London since Hamilton falls under them. I think you will be contacted very shortly but you can either email Gary or call him at [phone number].*

[107] On May 4, 2010, at 8:16 a.m., the grievor forwarded the May 3, 2010, emails to Maj. Brady simply stating as follows: "Lynda We had discussed." Maj. Brady replied at 9:27 a.m., copying Ms. Sigurdson, Mr. Vienneau, and Capts. Clark and Egan and stating as follows:

...

*Thanks, John.*

*Barbara, last heard fm Adjt JPSU is CO's intent is to request SPHL in Esquimalt and TD "as required" to Toronto area with family. A CO's ltr is pending to move this one to the next stage.*

*Fm earlier discussions with JPSU, we were advised to treat member as a walk in pending further direction. We don't have any auth or enough details yet to start a RTW plan - ie what dates will she be in the area, for how long, frequency of trips, etc.*

*I talked to Sean again this am and confirmed no change to that direction.*

*Can you please advise [OS AB] to wait out on contacting the Svcs Coord. Once we get more details on the CO's intent, and*

*confirm the suitability of a RTW plan, we can initiate contact, likely thru you.*

...

[Sic throughout]

### **1. May 6, 2010**

[108] At 10:00 a.m., a posting order for OS AB (“the May 6 posting”) was emailed from Chief Petty Officer Gingras (OS AB’s CM) to Capt. Fortier. It identified that OS AB was posted to “the Toronto JPSU effective May 7, 2010.” Capt. Fortier forwarded the May 6 posting and email chain to the Sthn. Ont. JPSU at 10:27 a.m. Capt. Clark forwarded the entire email chain (including the May 6 posting) at 11:17 a.m. to Maj. Legacy and Brady, WO Meier, and others. The email stated as follows:

...

*Subject: FW: POSTING INSTR [OS AB] STWD*

*Importance: High*

*All,*

*Please see below the long awaited posting instr for subj mbr (as of tomorrow). Note that this is a dir post, as opposed to the original proposal we all got to see.*

*IPSC Toronto please take appropriate steps and report to this HQ when in clearance complete.*

...

[Sic throughout]

[109] At 1:30 p.m., Maj. Brady forwarded the email chain on to the grievor as well as to Mr. Purpura and Ms. Sigurdson, copying WO Meier and one other person. The email stated as follows:

...

*Importance: High*

*FYI, all.*

*John, as we already have a CF 2018 for RTW, pls add [OS AB] to your list of clients for RTW and any other addit svc reqrs. WO Meier, pls introduce the OS to John during in clearances.*

*Barbara, FYI. New info since this am's meeting.*

...

[Emphasis in the original]

[Sic throughout]

[110] At 11:04 a.m., concurrent with the email chain making its way through the Sthn. Ont. JPSU, OS AB emailed the grievor directly, stating as follows:

*Good morning Sir,*

*I recently spoke to CPO Gingras about my posting to Toronto IPSC. I wanted to know the status of the process of my back to work protocol. There is the suggestion that I work at the Canadian Forces College with the Stewards there, which would be of help with completion of my QL4s package. Thank you so much for your time.*

[OS AB]

...

[111] At 1:49 p.m., WO Meier emailed OS AB, stating as follows:

*Subject FW: POSTING INSTR OSB [OS AB] STWD*

*Good day OSB [OS AB]*

*While I have heard your name around the IPSC (Integrated Personnel Support Centre) it was not until today that I received your posting message. I hope you are aware of this recent posting (though I was just speaking with John Frezza, who said he had mentioned it to you). I have included the posting message below for your reference.*

*What I would like to do at this point is set up a meeting time with you to come to our location in Denison Armouries (1 Yukon Lane, Toronto) for your in clearance and to meet you. My week is open from Tuesday (after 1000hrs) to Friday - so if you could let me know a good date - it will take about 2 hours to go through the forms I need to you to sign as well as in clearance in to [sic] the base.*

...

[112] At 3:03 p.m., OS AB replied, indicating that she was available anytime during the week to take care of the paperwork.

[113] At 2:31 p.m., the grievor replied to OS AB, copying WO Meier and stating as follows:

...

*Further to our conversation date.*

- 1. I received your 2018-E, dated 26 April 10, indicating RTW as follows:
  - a. Clerical work*
  - b. Light physical tasks only.*
  - c. 1/2 days - 4 days a week**
- 2. Discussions occurred where you might not be posted here, hence the reason no contact made with you;*
- 3. Given your MEL's (Medical Employment Limitations, it does not appear working with the stewards at the college is an option at this time;*
- 4. Given a choice of working in Toronto or London you prefer Toronto;*
- 5. Now that we have received your posting message, your supervisor, WO Meier, will be in contact with you and when you come in for your intake process I look forward in meeting you;*
- 6. I will give you a copy of your 2018-E for your records;*

...

[Sic throughout]

[114] The grievor forwarded that email to Maj. Brady, who replied at 2:45 p.m. that same day and stated, "Good work, thanks, John!"

[115] While giving his evidence, the grievor was shown a copy of his email chain with OS AB (which he had forwarded to Maj. Brady). He testified that he spoke with OS AB on May 6, 2010, before sending his email that day at 2:31 p.m. He said that OS AB told him that she wanted to carry out her RTW near her home in Hamilton but then mentioned wanting to do it at CF College (located in Toronto). She provided the grievor with her career supervisor's name. The grievor said he got in touch with that person and verified that OS AB's MELs would not allow her to carry out her RTW at the CF College.

[116] The grievor testified that OS AB told him of living in Hamilton and of having no car and that her father worked in Toronto and drove to work. When she went for her medical appointments in Toronto, her father drove her. The grievor testified that she

told him that she would be able to be driven to and from work by her father. The grievor found OS AB a work placement at HMCS [redacted], a naval reserve unit in Hamilton, close to her home.

[117] The grievor was brought to the email chain of April 16 to 26, 2010, and was asked what he did once he received the CF 2018. He testified that he suggested to Maj. Brady that they start a RTW process with respect to OS AB, as doing so would have been consistent with the usual practice. The grievor was then brought to the email chain of May 3 and 4, 2010, in which OS AB was looking for an update. The grievor responded that he suggested to Maj. Brady that since they had the CF 2018, they could start an RTW process. He said that she told him to hold off.

[118] The grievor was brought to the email chain of May 6, 2010, which had attached the May 6 posting, and was asked what he did when he received Maj. Brady's emails. He said that he would have started to implement the RTW program. He specifically said that he would have looked at the file, seen the March 29 letter, and noted that on the original on the second page, it was copied to the "IPSC Toronto/OIC". He stated that when he saw the March 29 letter, he asked the administrative assistant why he had not seen it before. He stated that she told him that she had given it to Maj. Brady when it arrived.

[119] On May 6, 2010, at 1:38 p.m., CPO Gingras emailed a second posting for OS AB, dated May 6, 2010 ("the amended posting"), to Capt. Fortier and forwarded it to Capt. Clark, who however did not forward it until 8:22 a.m. the next day to Maj. Legacy and Brady, WO Meier, and Capt. Egan. Capt. Clark stated as follows: "Please note that the dates have been amended. This will facilitate HHT etc. Note that HMCS [vessel name] still has admin lead on facilitating this and all other pers admin [sic] until she is posted."

## **2. May 7, 2010**

[120] At 8:52 a.m., Maj. Brady emailed the amended posting (and email chain) to the grievor and Mr. Purpura, stating simply as follows: "FYI, change of posting date. Myra's already on the email below."

[121] The posting date was changed from May 7, 2010, to June 30, 2010. No evidence was produced as to why the May 6 posting was amended.



[122] The grievor was asked what he did when he saw the amended posting. He said that he was unhappy because the alleged stated reason for amending the posting date was to help OS AB carry out a house-hunting trip, which was not needed because OS AB was not at CFB Esquimalt or on her vessel but was already in Hamilton. The grievor stated that he made these concerns known to Maj. Brady immediately; he said that she did not know what to do. He stated that he does know that she informed Maj. Legacy.

[123] At 9:07 a.m., WO Meier emailed OS AB, confirming that she had received the amended posting and suggesting a meeting for June 30, 2010, at 1:00 p.m. At 11:42 a.m., OS AB emailed WO Meier and the grievor and stated as follows:

*Good day WO Meier,*

*The 30th of June works for me and I was aware of this change when I read over my amended posting message. If it is at all possible to get onto a back to work program sooner rather, then almost two months from now, just so I have something to do. I would very much like to be of some help. Initially, in Hamilton as I still have pending specialist appointments for the month of June. Thank you for your time.*

...

[Sic throughout]

[124] At 3:58 p.m., the grievor emailed WO Alma Bungay at HMCS [redacted] in Hamilton, where he had arranged for OS AB's RTW program. The email set out the following:

- OS AB had been recently posted to Sthn. Ont. JPSU from her operational unit, and upon her medical recovery, anticipated for the end of June, she would be posted back to her operational unit;
- OS AB's RTW program based on her MELs was half-days and light duties, four days a week;
- OS AB was to be permitted to carry out the RTW program at HMCS [redacted];
- the Sthn. Ont. JPSU would retain supervision and administrative

matters over OS AB;

- HMCS [redacted] would provide OS AB with direction; and
- HMCS [redacted] would have no financial obligation.

### **3. After May 10, 2010**

[125] On May 10, 2010, WO Bungay forwarded the grievor's email of May 7, 2010, (on OS AB's RTW program) to her CO, who in turn approved HMCS [redacted]'s participation.

[126] At 10:03 a.m., on May 11, 2010, Capt. Egan emailed WO Meier, copying Maj. Brady and stating as follows:

...

*I spoke with the Adjt yesterday wrt the subj mbr. I know on the posting msg that it indicates that mbr is posted to Toronto eff 30 Jun 10. That said, we understand she is on TD in Hamilton, and is looking for a place with her fiance to live. I am going to contact the mbr to see where she intends on living, and see which MIR she is using and make a determination as to which IPSC is best to serve her based on the geography. . . .*

[Sic throughout]

[127] "MIR" is an acronym for medical inspection room and was described to me to be a medical clinic.

[128] Maj. Brady forwarded that email to the grievor at 10:57 a.m. that same morning. Five minutes later, the grievor replied to her, stating that OS AB had told him and WO Meier of wanting to start a RTW program as soon as possible. He also stated that he had made arrangements for her to carry out her RTW program at HMCS [redacted], which was near her home, and that it had nothing to do with her posting date. He advised Maj. Brady that OS AB was coming to see him the following day and that he had also so advised WO Meier. Five minutes after his email to Maj. Brady, she replied, acknowledging his email and advising that they might have to seek authority to start the RTW earlier than the posting date if doing so was OS AB's desire. She instructed the grievor to speak with WO Meier and Capt. Egan (if necessary) and to keep them both advised of developments. She also told him that there was no need to copy her on

the email traffic — a verbal update at their biweekly meeting would be sufficient.

[129] At 11:36 a.m., on May 11, 2010, Maj. Brady emailed the grievor, WO Meier, and Capt. Egan (copying Maj. Legacy and Capt. Clark), stating as follows:

*All, I've discussed this subj with both John and Capt Egan. Both are in agreement with the desire to get [OS AB] onto a RTW soonest, and as early as next wk fm the plans John has put in place.  
Given the posting date is 30 Jun, Capt Egan will confirm we have all the nec auth to proceed, update to fol to all.*

...

[Sic throughout]

[130] At 11:46 a.m. on May 11, 2010, Maj. Legacy replied, stating as follows:

...

*I was told yesterday that [OS AB] is in Hamilton which is in London's AOR. Why was she posted to Toronto and why is Toronto arranging her RTW? At this time we have no authority on this individual until she is posted to us.*

[131] At 12:53 p.m. on May 11, 2010, Maj. Brady replied, copying the grievor, WO Meier, and Capts. Clark and Egan and stating as follows:

...

*You have the same question I have WRT authority. I discussed the matter with John this am, and he advises fm a RTW perspective, there should be no concerns. I've since asked Fred to check into it fm a C2 perspective.  
Not sure who selected posting location; we received the posting msg with this info from the Adjt on Fri.*

...

[Sic throughout]

[132] Maj. Legacy replied to everyone in the email chain at 1:17 p.m. as follows:

***Capt Egan/WO Meier,***

- 1. The member is posted and therefore asked the member where her place of residence will be after COS Date. I would assume IPSC London since her specialist appointment are in Hamilton.*

***Capt Clark,***

2. *Confirm with the Adjt HMCS [name of vessel] if they have a return to work coordinator and if they have any objections with the member participating in a return to work program with HMCS [redacted] until her COS date.*
3. *After confirmation from the IPSC Staff; if place of residence is London, contact career manager and have the message ammended to reflect posting to IPSC London.*

***Linda/Capt Egan,***

4. *Hamilton is in London's AOR. I want to start respecting the AOR boundries as I have staff the IPSC to meet the requirement of those specific. Posting to IPSC is not reflective of the health care they received 32 Health Svc in Toronto. So even if a member being seen by the medical staff in Toronto does not mean that it's the IPSC that the member is posted to. Unfortunately, in this case, the MO's recommendation was that she be posted to IPSC Toronto and I didn't questioned it because I was not aware that she was in Hamilton until yesterday.*
5. *London has two AS-04s one Capt and one WO because of their large AOR while Toronto will end up with one AS-04 and one WO. IPSC Toronto cannot afford to take cases that are not in their AOR.*

[Emphasis in the original]

[Sic throughout]

[133] The final email in the chain came from Capt. Egan, who responded to everyone at 1:31 p.m. on May 11, 2010. He advised that he had spoken to OS AB that morning and confirmed that she was not looking to move, that she was living with her parents in Hamilton, and that her specialist appointments were out of Hamilton but that she was seeing the MIR in Toronto.

[134] The grievor testified that he would start an RTW process only once he had a CF 2018. He recalled that he received the CF 2018 on either April 26 or 28, 2010, and that he would have then had a discussion with Maj. Brady. He said that he was aware that Hamilton was in London's AOR but that OS AB was being seen at 32 HSvcs in Toronto, which had recommended she be posted to Toronto. He said that before receiving the May 6 posting, he would have done preliminary work.

[135] The grievor stated that the amended posting only changed the posting date from May 7, 2010, to June 30, 2010, and did nothing else. OS AB was still living in Hamilton and was still being seen by healthcare professionals in the Sthn. Ont. JPSU.

[136] Maj. Brady confirmed that an ill or injured member who cannot work at his or her job or needs to leave it is transferred to the JPSU. She said that often, rehabilitation is underway or will be soon. Postings are made so that the member can be near his or her family.

[137] Maj. Brady described OS AB's situation as complicated. She confirmed that the Sthn. Ont. JPSU was aware of OS AB's situation early and that it was aware that she was coming. Maj. Brady identified two issues. The first was that the posting date was quite quick, in that there was usually a 30-day gap, but that they had received a posting message on May 6, 2010, effective the next day, and then, on the next day, it was amended to the end of June 2010. The second issue she identified was that two IPSCs in the Sthn. Ont. JPSU were less than 100 km apart: Toronto and London. She stated that the posting message for OS AB stated that she was to be posted to the Toronto IPSC; however, she said that they later learned that OS AB was living in Hamilton. She said that this was an issue because Hamilton was between Toronto and London; hence, a discussion had to take place.

[138] Maj. Brady indicated that initially, there was no CF 2018 for OS AB, but then one was received, which was the "green light" for them to initiate an RTW process for her. Maj. Brady confirmed that the RTW could proceed regardless of the posting message, which was a command issue.

[139] Maj. Brady stated that the May 6 posting posted OS AB to Maj. Legacy's c-of-c. As such, OS AB reported to WO Meier, who in turn reported to Capt. Egan, who reported to Maj. Legacy. Maj. Brady testified that when the amended posting was received, OS AB was no longer within the Sthn. Ont. JPSU c-of-c; she was still posted to her operational unit at CFB Esquimalt.

[140] As of the May 6 posting, OS AB was living in Hamilton and had been for some time. She was receiving medical treatments in Toronto and Hamilton. Maj. Brady confirmed that while OS AB was someone else's administrative responsibility, the Toronto IPSC had the authority to start a RTW process as one had been authorized via the CF 2018.

[141] At some point after the amended posting was received, likely on May 11, 2010, the grievor contacted CWO Nassif about the matter. CWO Nassif described the contact from the grievor as “a concern for a member who may be falling through the cracks.” CWO Nassif felt strongly about the matter, stating that the worst thing was “a member falling through the cracks.” He stated that based on the information provided by the grievor, he felt that Maj. Legacy was “missing the boat.”

[142] During his testimony, CWO Nassif went through all the documents with respect to OS AB from the initial emails of late February of 2010 up to and including those on May 7, 2010, dealing with the amended posting. He testified that the point of the JPSU standing up was to ensure that injured and ill members did not fall through the cracks, which was an issue with the former SPHL system, specifically with members who had been in Afghanistan. He stated that posting a member to the JPSU and the CF 2018 are two different processes.

[143] CWO Nassif stated that the reason for all the communications, the emails, and the copying of information to the Sthn. Ont. JPSU was that given the way the process was set up, the member’s (OS AB’s) CO, as well as her treating physician, would likely have had discussions with her about her care, recovery, and RTW. CWO Nassif described the email chains as a “heads up” to the Toronto ASU, the Sthn. Ont. JPSU, and the Toronto IPSC, as an “[OS AB] is coming your way; be ready” message.

[144] CWO Nassif was shown the email chains between OS AB and WO Meier both before and after the amended posting and was asked that given that OS AB was in Hamilton and wanted to start an RTW, what stopped the JPSU from making it happen. He stated that nothing would have stopped it as long as her MELs permitted it and she was in the vicinity of where the RTW program would take place.

[145] CWO Nassif was shown the grievor’s May 11, 2010, email at 11:03 a.m. to Maj. Brady and was asked about the grievor’s actions in arranging the RTW for OS AB at HMCS [redacted]. He replied that the grievor’s actions were “totally appropriate.” CWO Nassif was shown Maj. Brady’s reply email sent that same day at 11:07 a.m., which stated to the grievor that with respect to OS AB’s RTW, the JPSU had the “. . . need to seek authority to start the RTW earlier than the posting date if that’s the mbr’s [sic] desire.” He stated that he did not believe any authority was needed, just “a friendly phone call.” As for who would make that call, CWO Nassif stated it could have

been anyone — Maj. Brady or Maj. Legacy or even the grievor.

[146] CWO Nassif was then shown Maj. Brady and Maj. Legacy's email exchanges on May 11, 2010, at 11:36 a.m. and 11:46 a.m., in which Maj. Brady indicated that the grievor and Capt. Egan agreed with the plan to get OS AB into a RTW program sooner and as early as the following week, with the plans that the grievor had in place, and that Capt. Egan would confirm that they had the necessary authority to proceed. Maj. Legacy's response, which was that the Sthn. Ont. JPSU had ". . . no authority on this individual [OS AB] until she is posted to us", was put to CWO Nassif. He was asked how accurate it was. He said that it was accurate but that it was also a grey area. In answering, he stated that there are different cultures in the CF, depending on the service branch. He said that the Air Force is more open to doing the right thing while the Army is more rules-oriented. He went on to state that Maj. Legacy was with the Army.

[147] CWO Nassif was asked what he thought when he saw all the emails that the grievor had sent to him about OS AB. He replied that he thought as follows: "[the grievor] thought something was wrong and he knew that I was at NDHQ and he wanted me to do something." CWO Nassif stated that he had stressed in his training of the RTW coordinators the ethics and the paramountcy of getting people back to work and not letting them fall through the cracks. His view was that OS AB was falling through the cracks. On that point, he said that he emailed Maj. Legacy on May 11, 2010, at 3:20 p.m., as follows:

*Good day sir, I hope all is well with you. I recently spoke with John Frezza and he made me aware of an issue about a member who was prescribed a return to work. I don't have all of the specifics but even if the member's posting message has not been officially received by Toronto but a copy of the CF 2018 has been made available to the RTW Coord, he should pursue setting up an RTW plan for that individual and not keep the member waiting for a long period of time before beginning the RTW, especially when the member is keen to begin a RTW and the member's chain of command concurs. The RTW process could still happen as the official posting message arrives. Your thoughts. We can discuss this when you come up for the OC Conf in Ottawa.*

[148] When asked why he sent the email, CWO Nassif said that he hoped that the RTW for OS AB would start and that she would be cared for. When asked why he did not wait until the amended posting date, he stated that if the member was in Hamilton, the

IPSC had already been in communication, and everyone agreed, then the RTW should have been done. The idea was to move forward on the plan, and the paperwork (posting) would follow.

[149] Maj. Legacy responded to CWO Nassif's email on May 11, 2010, at 3:52 p.m., stating as follows:

*Afternoon chief, putting "hope all is well" and "john frezza" in the same para is usually a contradiction for me. We can discuss next week.*

*As far as this specific case is concern, I agree with what you're saying.*

*I've forward a separate email with the direction that was sent out earlier this afternoon. Basically, john should not be involved with a case that is not in his AOR, or put a member that is not posted to us on RTW without concurrence of her chain of command.*

[Sic throughout]

[150] At 7:49 p.m. on May 11, 2010, Maj. Legacy emailed the grievor, stating as follows:

...

*I don't know if you talk to Mr Nassif before or after I had sent my directions after lunch today, but in case it was after and I was not clear I will clarify.*

*I agree with everything Mr Nassif as written below, including and underlining the part that specifies "and the member's chain of command concur". To my knowledge HMCS [vessel name] did not auth RTW for this member, the member has not yet been posted to us, giving us no authority to put her on RTW.*

*As per my earlier directions, the Adjt will talk to the unit and get auth for RTW. Until then, wait out.*

*Again, this is direction. No need to reply to this email.*

[Sic throughout]

[151] At 9:17 p.m. on May 11, 2010, the grievor responded, stating as follows:

...



*Acknowledging the fact that you stated your email was a directive and it was not necessary for me to respond, I am compelled to do so.*

*Having reread Mr. Nassif's email below, I too would concur with the section that specifies:*

*"even if the member's posting message has not been officially received by Toronto but a copy of the CF 2018 has been made available to the RTW Coord, he should pursue setting up an RTW plan for that individual and not keep the member waiting for a long period of time before beginning the RTW, especially when the member is keen to begin a RTW and the member's chain of command concurs".*

*Mr. Nassif's then continues*

*"The RTW process could still happen as the official posting message arrives".*

*Mr. Legacy, please note that contained in the Mbr's file in IPSC, is a message from the Mbr's parent unit, which basically states, Mbr will be posted to us and requests that we assist the Mbr with RTW / Transition. I will provide you with a copy of this message, when I return to the office tomorrow, 12-May-10.*

*As the RTW Coordinator for IPSC, Toronto I have been acting upon the CF 2018-E, issued by the MO.*

*[Sic throughout]*

[152] On May 12, 2010, at 8:32 a.m., Maj. Legacy forwarded the entire email chain to Maj. Brady (copying Capt. Clark), starting with CWO Nassif's email of May 11, 2010, at 3:20 p.m., and stated as follows:

*Lynda,*

*1. I did not reply back to John yesterday for two reasons:*

*a. I was not going chance that he did not come to work because I'm stressing him out and miss his grievance appointment this morning; and*

*b. I needed to calm myself down to the point that I was not going to reach through the blackberry and cause some serious damages.*

*2. Three problems with the email below:*

*a. Respect for the chain of command: I believe that my*

*direction was clear as to what needed to happen. I even told him not to reply back to me because I didn't want him to get himself into more trouble. Yet, he felt compelled to do so. Personally, if I would have been in his position, I would have gone to my supervisor if I had more to add on the subject.*

*b. Passage of information: After all the discussion that occurred by phone/email/face to face regarding us not having authority to do RTW with this member, John apparently have a message on the member's file giving us authority to do so? Why was this not shared before, is he hording information to be used whenever he feels like, with whoever he feels like?*

*c. Why did he feel inclined to put Mr Nassif on his distribution list? The technical advise had been received and was not argued. Was the intent to try to discredit me with our higher HQs?*

*3. I'm planning on replying to his email later this morning, basically highlighting the three points in para 2, unless you feel that as his supervisor that it should be address by you and I should not be putting more fuel in the fire.*

...

[Sic throughout]

[153] In the version of that email produced to the grievor pursuant to his access to information and privacy ("ATIP") request, the portion of it that stated as follows was redacted: "I needed to calm myself down to the point that I was not going to reach through the blackberry [sic] and cause some serious damages [sic]."

[154] Maj. Brady replied to Maj. Legacy at 9:15 a.m. on May 12, 2010, stating as follows:

*Morning Gilles, unbelievable.*

*I fully concur with all your comments below and recommend you address them directly to John. It appears that even after an intense 6 wks [sic] of "very blunt" regular performance review and counselling by me, John continues to fail to listen and respond appropriately.*

...

[155] In the version of that email produced to the grievor under his ATIP request, the word "unbelievable" was redacted.

[156] Only at the hearing and at my insistence were the unredacted versions of the emails sent on May 12, 2010, at 8:32 a.m. and 9:15 a.m. produced.

[157] When he was brought to the grievor's May 11, 2010, 9:17 p.m., email response to him referring to the authority on file (the March 29 letter) and his exchange with Maj. Brady on the morning of May 12, 2010, Maj. Legacy stated that the March 29 letter should have been produced immediately.

[158] In cross-examination, Maj. Legacy was asked if the grievor should have been faulted for replying to the email of May 11, 2010 at 7:49 p.m., to which he stated, "No." Also in cross-examination, it was put to Maj. Legacy that the email reference the grievor made in his reply to Maj. Legacy on May 10, 2010, at 9:14 p.m., was the first time the reference to the authority (the March 29 letter) had been brought to his attention and that it had infuriated him. He replied, "Yes."

[159] In his evidence-in-chief, Maj. Legacy stated that it took the grievor a week to provide the March 29 letter to him. When it was put to him in cross-examination, he said the following: "I recall it took a number of days; three or four days." He later admitted that the grievor had sent it the next day.

[160] In cross-examination, Maj. Legacy was brought to Maj. Brady's email of May 12, 2010, at 12:02 p.m., in which she stated to the grievor: "Pls [*sic*] do not reply to this email", and was asked if whether the grievor had felt a need to reply to the email, he should have replied. Maj. Legacy stated, "Yes." The follow-up question was, "That isn't something he should be reprimanded for?", which Maj. Legacy concurred was correct.

[161] In cross-examination, Maj. Legacy confirmed that CWO Nassif was a technical expert and SME in RTW matters and that not only was it not wrong for the grievor to speak to CWO Nassif but also that the grievor had been encouraged to speak to him for advice on RTW matters. Maj. Legacy also admitted that if CWO Nassif gave him advice on an RTW matter, he would strongly consider that advice.

[162] Immediately after his email exchanges on May 11, 2010, with CWO Nassif and the grievor, Maj. Legacy spoke with the Chief Human Resources Officer (CHRO). Not satisfied with her advice, he emailed Simon Lachaine (another HR professional) the next day, stating that he had spoken with the CHRO the previous day and that she had

advised that there was not enough documented information to reject the grievor on probation. In his evidence, Maj. Legacy agreed that he was seeking a different opinion from Mr. Lachaine. He stated that he was looking for more time to “paper” the file against the grievor. It was also at this time that Maj. Legacy requested the information on the grievor from Ms. Rossignol and CWO Quinn to support his position of recommending the grievor for rejection on probation.

[163] Concurrent with the discussions Maj. Legacy was having with HR professionals, he continued to discuss the matter with Maj. Brady. At 10:59 a.m. on May 12, 2010, he forwarded her his May 11, 2010, email chains with CWO Nassif and with the grievor, stating as follows:

...

*After consideration and advise from the Adjt, I decided to pull myself back and not get myself involved personally and stop this email war with one of your staff. This will allow me to I keep the moral high ground when and if situations are pushed up to my level. As mentioned in previous email I see some problems with some of your staff in Toronto that you need to address:*

- 1. **Respect for the Chain of Command:** When direction is given they should not be challenged directly by the staff. If they are not in agreement with the direction, they need to inform you and you may challenge me if you feel that it is appropriate or instruct them to carry on.*
- 2. **Passage of information:** Your staff need to make their case to you when there is a problem and they have the information or extenuating condition that needs to be brought forth. In this case, John should have produced the message from the unit as soon as the question of authority came up. Please fax me a copy to this message when you get it from John. . . .*
- 3. **Tech Net vs. Command Net:** I encourage the staff to use their Tech Net for advice. They need to be aware that this is advise, not orders. If I give direction, regardless of the advice of the Tech Net or even in contradiction to the advices, then my orders are the ones to be followed not the advice.*

*For your action*

*[Sic throughout]*

[164] At 10:58 a.m. on May 12, 2010, Sandi Hill, the administrative assistant for the Sthn. Ont. JPSU and Toronto IPSC, and identified in cross-examination by Maj. Legacy as his administrative assistant, emailed the grievor a copy of the March 29 letter.

[165] On May 12, 2010, at 12:02 p.m., Maj. Brady responded to the grievor's email of May 11, 2010, at 9:16 p.m., to Maj. Legacy, stating as follows:

*John,*

*We'll discuss later this afternoon.*

*If you haven't already done so, pls send the correspondence you speak of fm the unit to the OC ASAP today. Pls do not reply to this email.*

[Sic throughout]

[166] Maj. Legacy was asked in cross-examination about the reference in Maj. Brady's email that stated, "Pls [sic] do not reply to this email", specifically if whether the grievor felt the need to reply he should have done so and should not have been reprimanded for it. Maj. Legacy stated that he agreed.

[167] At 2:29 p.m. on May 12, 2012, in accordance with Maj. Brady's 12:02 email, the grievor sent Maj. Legacy, Maj. Brady, and Capt. Clark a copy of the March 29 letter, and stated simply as follows: "Good day Major Legacy: Attached pls [sic] find letter from Mbr's [sic] CO."

[168] At 2:43 p.m. that same day, Maj. Legacy replied to Maj. Brady and Capt. Clark about the grievor's email, stating as follows:

*Sean,*

*Back to original direction given yesterday afternoon. Get posting date and location changed ASAP, if not possible contact HMCS [vessel name] for auth to place mbr on RTW on their behalf.*

*Linda,*

*Brief Mr. Frezza as to the difference between being info or being action on a correspondance and what constitute authority.*

[Sic throughout]

[169] Maj. Brady was pointed to the reference to an ASU that was in the May 6 posting, the amended posting, Dr. Nguyen's March 17 email, and the March 29 letter. When she was asked when she received or saw the March 29 letter, she said that it was during the flurry of email activity after May 7, 2010, when Maj. Legacy was asking about authorization. She stated that the grievor said that there was a memo on file and that he would provide it as soon as he got in to work.

[170] Maj. Brady stated that Maj. Legacy was quite displeased; she said "his nose was out of joint". She said that she was sure the IPSC had authority to launch the RTW and that the March 29 letter would have eliminated the problem.

#### **G. The temporary duty expenses**

[171] CWO Quinn testified that when the JPSU was stood up, it was divided into eight regional locations, and that the IPSCs within the regional JPSUs were being stood up in phases.

[172] When the grievor was hired, the IPSC at CFB Borden was not one of the locations being stood up in the initial phases. He testified that when he was advised that he had been successful in the competition for an RTW coordinator position, he said that CWO Quinn approached him and asked if he would mind working in Borden three days per week and two in Toronto. CWO Quinn testified that it was never intended that the grievor would move to Toronto. He was moved from Ottawa to Barrie and was working out of CFB Borden three days per week and commuting to Toronto the other two days. The employer had agreed to pay the grievor his TB temporary duty ("TD") expenses for his commute to Toronto.

[173] Maj. Legacy stated that he understood that the grievor was hired to work in Toronto but that there was an agreement that he would live in Barrie and commute to Toronto. He confirmed that he understood this was arranged because it was anticipated that the grievor would eventually work full-time at CFB Borden. Maj. Legacy testified that he was upset that this arrangement was struck and approved in Ottawa and that no one had bothered to discuss it with him ahead of time. He said that his problem was that the grievor received benefits in the form of the TD for the commute that other people in his AOR did not receive. He also said that by living in Barrie instead of Toronto, the grievor obtained the benefit of a larger house for less money. Maj. Legacy said that he felt this benefit should have offset the grievor's travel costs,

that it created a strain on his budget, and that he did not like it and therefore put an end to it.

[174] Maj. Legacy sent the email ending the grievor's TD on October 23, 2009, stating as follows:

*References: A. Email from Mr Quinn dated 13 Jul 9 (attached)  
B. Meeting Mr Frezza/Maj Legacy/MWO Desroches 1330 hrs  
21 Oct 09*

*Mr Frezza*

*1. This email is a follow up to our meeting and to provide you with my guidance in writing. As per Ref A, you were authorized to use Borden/Barrie as your place of employment since Borden was set up as a Satilite Unit to support Borden and Meaford for an **interim period**. Since the direction came out, the following have occurred, that removed requirement to have Borden as a Satilite Unit:*

- a. IPSC Meaford is now operational with their own staff;*
- b. Phase III has now been delayed until further notice;*
- c. Direction from DCSM has reduced the requirement to have an AS4 on location; and*
- d. Restriction on the employment of TD funds within the department.*

*2. As discussed during our meeting, you place of employment as of 21 Oct 09 is IPSC Toronto situated in the Denison Building. Therefore TD will no longer be offered for your travel from Borden to Toronto as the Satilite will no longer exist. To assist in providing you time to figure out what your commuting arrangement will be, Borden, as a satilite unit will cease on 28 October. Therefore TD will be authorized from 21-28 October inclusively for your travel from Borden to Toronto.*

...

[Sic throughout]

[175] The grievor testified that Maj. Legacy told him that the arrangement was fraudulent, which in cross-examination, Maj. Legacy denied.

[176] After his termination of employment, pursuant to the grievance process, the grievor was reimbursed for all his TD after October 28, 2009.

### **III. Summary of the arguments**

#### **A. For the employer**

[177] The employer argued that the Board is without jurisdiction to hear this matter by virtue of s. 211 of the *Act*. It stated that the grievor's termination of employment was a rejection on probation under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[178] *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, states that the burden of proof rests on the employer to demonstrate that the grievor was on probation, given notice or compensation in lieu of notice, and provided with a letter stating why he was rejected on probation, all of which was done. Sections 61 and 62 of the *PSEA* and s. 211 of the *Act* give the deputy head the authority to reject someone on probation, with which the Board cannot interfere.

[179] Once the employer has satisfied its burden, the burden of proof shifts to the grievor to demonstrate that the decision to terminate his or her employment by way of a rejection on probation was a sham, camouflage, or contrived reliance under the *PSEA* or was done in bad faith. The employer submitted that the grievor has failed to satisfy this burden.

[180] The grievor was hired for the RTW coordinator position effective June 11, 2009, and was subject to a 12-month probationary period. The essential qualifications and statement of merit criteria for the position included experience negotiating and working with senior-level officials and management; being able to communicate orally and in writing; having effective interpersonal skills, diplomacy, and tact; and having the ability to work under pressure.

[181] The employer submitted that the evidence clearly demonstrates that the grievor was rejected on probation for legitimate employment-related reasons. Col. Blais determined that the grievor was not suitable for his position.

[182] Col. Blais testified that technical skills and knowledge were not an issue with the grievor; it was his communication style and tone and the impact it had on the relationships that the JPSU was trying to build with other units and partners.

[183] The grievor had several managers during his probation. CWO Quinn had informal discussions with him and provided informal counselling on his performance



issues. He testified that his discussions with the grievor took place weekly, and a number of the documents entered into evidence demonstrated the counselling and guidance that he provided to the grievor.

[184] Despite those counselling sessions and discussions, CWO Quinn noted that there were still performance issues, which led to the incident with Capt. Evans. The CPRR completed by CWO Quinn noted performance issues, which the grievor was required to work on to improve. As part of the CPRR process, a meeting was held on March 25, 2010, involving the grievor, CWO Quinn, and the grievor's incoming manager, Maj. Brady, during which CWO Quinn again noted the performance issues and provided advice to the grievor.

[185] Maj. Legacy issued the memo of expectations in the same time frame as the March 25, 2010, meeting, and the CPRR was issued. The CPRR, the March 25 meeting, and the memo of expectations informed the grievor of management's expectations; they identified his work performance issues to him and gave him the opportunity to improve his performance.

[186] As a result of the memo of expectations, the CPRR, and the March 25 meeting, Maj. Brady held biweekly meetings with the grievor, which were to provide him with tools, guidance, and counselling such that he could improve the work performance issues. During the meetings, Maj. Brady went through the issues that came up, and discussions took place. She testified as to what occurred during the meetings, and written reports of each biweekly assessment were presented to the grievor at the meetings and were entered into evidence.

### **1. OS AB**

[187] Two issues were noted. One was with respect to authority. The grievor knew about documentation, namely, the March 29 letter about OS AB, and did not inform the employer of it until after 9:00 p.m. on the evening of May 11, 2010, only after CWO Nassif sent an excerpt from it to Maj. Legacy. The grievor shared the letter with CWO Nassif but not with his superiors at a time when management (Majs. Legacy and Brady) were questioning their authority to deal with OS AB.

[188] The second issue was that Maj. Legacy told the grievor not to reply to his email of May 11, 2010, at 7:49 p.m., and he did reply.

[189] Before *Tello*, the jurisprudence held that the burden of proof on the employer was to demonstrate that an employee was rejected on probation for legitimate employment-related reasons. Once the employer proved it, the burden shifted to the grievor to prove that the rejection was in reality a sham, a camouflage, in bad faith, or discriminatory, which would have given the Board jurisdiction. *Tello* changed this. Now, an employer need not demonstrate a valid employment-related reason for the rejection on probation. The employer also referred me to *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, *Rahman v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2013 PSLRB 6, *Rahman v. Canada (Attorney General)*, 2013 FC 1007, and *Warman v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 103.

[190] In *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 19, the adjudicator noted that an employer need not even give an employee an opportunity to correct performance deficiencies or even tell the employee his or her shortcomings. He stated that it was not up to an adjudicator to determine if the employer acted fairly in handling a grievor's shortcomings. *Kagimbi* held that the employer can have managed a grievor's probation period poorly, as long as it did not do so in bad faith. The employer's failure to follow its own guidelines was insufficient reason for the Board to interfere, as the guidelines were not legally binding on the employer.

[191] *Rahman* stands for the proposition that how the employer assesses the employment is irrelevant as long as the rejection on probation is not based on a contrived reliance, a sham, a camouflage, or bad faith.

[192] *Fell v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 2, holds that it is insufficient to show that the employer made mistakes or that a grievor was not given enough chances, which would not amount to a sham or camouflage. The grievor must show that the grounds were a disguise for improper or unacceptable reasons.

[193] *Kubinski v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 87, held that the employer was not required to warn a grievor before rejecting him or her on probation. In addition, the fact that a grievor might have had multiple supervisors over the course of a probationary period does not give rise to a finding of bad faith, a sham, a camouflage, or disguised discipline.

[194] The employer warned the grievor because it wanted him to succeed.

[195] The Board cannot look at the reasons behind the rejection on probation to determine if they are reasonable. That is not the test. Unless the grievor can demonstrate that the employer's actions amounted to a sham, a camouflage, bad faith, or a contrived reliance on the *PSEA* amounting to disguised discipline, the Board has no jurisdiction.

[196] With respect to credibility, the employer referred me to *Faryna v. Chorny*, [1952] 2 DLR 354.

[197] The employer submitted that the grievor did not meet his burden. As such, it requested that the objection to jurisdiction be upheld and that the grievance be dismissed.

#### **B. For the grievor**

[198] The grievor started his job in June of 2009. Initially, performance issues were raised informally. He had discussions with CWO Quinn, which he did not consider counselling because of their relationship. Things changed in March of 2010 at the time of his CPRR and the issuance of the memo of expectations.

[199] Before rejecting the grievor on probation, the employer had to inform him of its expectations and that they were not being met and give him the opportunity to improve. It had to also give him the tools to improve. This was the process that the employer established.

[200] While the grievor never did receive the training he was supposed to, he did what he was supposed to do, and yet, he was still terminated for the OS AB incident. This is the sham and camouflage. It was arbitrary and in bad faith. There is no merit behind what the employer said about the OS AB incident.

[201] While the employer referred to *Kagimbi* and stated that it did not have to be transparent, it does not mean that the Board cannot evaluate the employer's actions against its own standard to determine if it acted in a manner that equates to a sham, bad faith, or a camouflage. All the facts must be examined, and all the facts in this case show that the rejection on probation was indeed a sham and a camouflage and in bad faith.

**1. Facts**

[202] Col. Blais acted as a rubber stamp. While he stated that the decision to reject the grievor on probation was legally his, in reality, he had no involvement in it. He was not involved in managing and supervising the grievor; nor was he involved in the counselling. Everything was delegated to Maj. Legacy and then to the grievor's immediate supervisors (Ms. Rossignol, CWO Quinn, and Maj. Brady).

[203] Col. Blais relied on the information provided to him by Maj. Legacy. He took his word for it at face value. Col. Blais agreed that he relied on the information provided by his subordinates. If the information provided by subordinates is not correct or is wrong, then it is bad faith.

[204] CWO Quinn's evidence was that the morale in Toronto was low. He attributed it to Maj. Legacy's leadership style. This was pronounced with the grievor. The standing-up of the JPSU and the IPSCs created difficulties in understanding the roles the organizations, both military and civilian, played. The evidence disclosed considerable opposition to the grievor's RTW coordinator role. All these problems were more pronounced due to the stress of repatriating soldiers from Afghanistan arriving at CFB Trenton, Ontario, and being brought to Toronto.

[205] While Col. Blais suggested that the grievor had performance issues before his Compulsory Release Age, the documentary evidence (his final CPRR as a member) disclosed none. When this was pointed out to Col. Blais, he backpedalled, suggesting that by not mentioning the grievor's shortcomings in his final CF CPRR, he did the grievor a favour. Covering up shortcomings does not help employees; it sets them up for failure.

[206] Ms. Rossignol was the grievor's first supervisor. Her documentary evidence, put forward by the employer, made scathing allegations against him; yet, they had never been brought to his attention, and he did not learn of them until after the termination of his employment. Ms. Rossignol never testified. The documents she produced were sent to Maj. Legacy when he was papering his file looking for support to reject the grievor on probation. Her material should be given little or no weight.

[207] CWO Quinn took over from Ms. Rossignol. While an incident allegedly occurred about a case manager, Ms. Sweeny, complaining that the grievor had asked for a

diagnosis and that Maj. Legacy had asked CWO Quinn to speak to the grievor about it, CWO Quinn had no recollection of it. However, he stated that not all case managers were necessarily cooperative with the new JPSU and IPSC setup. The grievor's evidence was that he never asked for a member's diagnosis, only for sufficient information to complete his casualty tracking form, which he was required to do.

[208] CWO Quinn's evidence was that there was a rift in the IPSC; there were systemic problems, both within the JPSU and IPSC, as well as in outside units and other organizations that were to work together. The different organizations were protecting their turfs.

[209] CWO Quinn testified that he told Maj. Legacy that the medical community was quick to jump to conclusions about the grievor because of his position and the work environment.

**a. The Capt. Evans incident**

[210] The grievor admitted that he should not have done what he did, and he apologized. There is no doubt as to the sincerity of his apology.

[211] Almost immediately after this happened, Maj. Legacy began to look at a rejection on probation. He stated that he "heard" that the grievor was a "loose cannon" at CFB Borden. CWO Quinn testified that he told Maj. Legacy to exercise caution because the grievor was doing a good job at CFB Borden.

[212] CWO Quinn and Maj. Legacy did not agree on things. Maj. Legacy wanted to reprimand the grievor. CWO Quinn was trying to set the grievor up to succeed, while Maj. Legacy was papering his file for a rejection on probation.

**b. The CPRR**

[213] The CPRR set out some deficiencies of the grievor.

[214] While counsel went through them point by point, it is sufficient to state that they were largely issues of how to develop and implement processes within the JPSU, IPSC, and the partner organizations. These though were not the reasons articulated by Col. Blais either in his letter of termination or his testimony for reasons for the termination of the grievor's employment.

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**c. The memo of expectations**

[215] The point of the memo of expectations was to give the grievor an opportunity to change, improve, and succeed. Both CWO Quinn and Maj. Brady agreed. It was produced nine months into the probationary period. CWO Quinn testified that while issues were identified, they were such that there was an opportunity for the grievor to fix them. Maj. Brady was responsible for performance management, biweekly meetings, and looking into training for the grievor.

[216] CWO Quinn's view was that the grievor had potential, that errors could be fixed, and that he could succeed. Maj. Legacy was not interested in the grievor succeeding; he was interested in pulling him down.

[217] The biweekly performance assessments disclosed that the grievor was making progress, to the point that by the final biweekly assessment carried out by Maj. Brady, there were no issues. Then the OS AB matter occurred.

[218] Maj. Legacy has credibility issues. The test for credibility is articulated in *Faryna*. It is apparent from the documentary evidence that he had a negative impression of the grievor, which began to form shortly after the grievor started with the JPSU.

**d. Travel allowance**

[219] The prime example of the initial negative impression is the travel allowance. The evidence, both documentary and oral, disclosed Maj. Legacy's clear and direct disdain for the grievor. Maj. Legacy was upset that the grievor was receiving the travel allowance. He was upset because it had been approved in Ottawa. He thought that the grievor did not deserve it. The evidence on this issue clearly disclosed the negative attitude and opinion that Maj. Legacy had of the grievor early in the grievor's tenure.

[220] The evidence disclosed that the travel allowance was approved in Ottawa, not just for the grievor but for others. Maj. Legacy was convinced that there was a double standard and accused the grievor of fraud with respect to the meal allowance portion of the allowance. This is a serious allegation against an employee. This accusation of breaking the law was made in addition to cancelling the allowance.

**e. Maj. Brady's birthday card**

[221] The grievor sent an email with an attachment that was marked urgent to the members of the JPSU and IPSC in Toronto. It was a birthday card for Maj. Brady. It made her smile until she found out it upset Maj. Legacy. Her position then became the following: "It shouldn't have made me smile"; now she says it is wrong. This is historical revisionism.

[222] Maj. Legacy stated that he could not open the attachment. This is not a performance issue. The lesson was learned. The grievor apologized but Maj. Legacy did not like the apology, so Maj. Brady jumped in, thinking that the grievor needed counselling.

[223] The grievor's evidence was that when he spoke to Maj. Legacy after the birthday card incident, Maj. Legacy told him that he had always been able to open the attachment. This was put to Maj. Legacy in cross-examination. He did not deny that this discussion took place or that he did not get his Blackberry fixed. He said he did not remember.

[224] If Maj. Legacy did not get his Blackberry fixed, this shows a negative attitude. And if he could open the attachment, he deliberately undermined the grievor. The grievor submitted that it is more likely than not that Maj. Legacy said what he did to the grievor about having always been able to open the attachment.

**f. OS AB**

[225] In his evidence-in-chief, Maj. Legacy spoke of the email of May 11, 2010, at 7:49 p.m., and the grievor's reply that same day at 9:11 p.m. He said it infuriated him because the grievor replied and because this was the first time he had been briefed about the situation.

[226] Further in his evidence-in-chief, Maj. Legacy said that when he asked for the document in question that gave the JPSU and IPSC Toronto authority, it took a week for the grievor to get it to him, and it did not say that OS AB would be posted to them or was to be on a RTW program. In cross-examination on this issue, he said it took three or four days for the grievor to provide it to him. Then, when pushed, he admitted it took the grievor only one day.

[227] Maj. Legacy also admitted in cross-examination that if the grievor saw a need to reply to his email of May 11, 2010, at 7:49 p.m., he should not have been faulted for doing so. If he could not be faulted because he saw a need to reply, it would not be worthy of discipline. Maj. Legacy acknowledged that he had been petty.

[228] However, Maj. Legacy maintained that the March 29 letter did not give the Sthn. Ont. JPSU or the Toronto IPSC authority over OS AB. This contradicted the evidence of both Maj. Brady and CWO Nassif, who testified that it did give them authority and that it authorized the RTW program.

[229] There was no evidence as to why OS AB's posting date was changed from May 7, 2010, to June 30, 2010. In cross-examination, it was put to Maj. Legacy that he requested or initiated the delay to OS AB's posting. In response, he suggested that Maj. Brady had initiated it. In re-examination, he suggested again that the Sthn. Ont. JPSU and Toronto IPSC had no authority over OS AB and then said that he did not know why the posting was delayed. None of this made any sense because OS AB was already in Hamilton.

[230] Maj. Legacy acknowledged that both the May 6 and the amended posting do mention posting to JPSU Toronto; however, he wanted OS AB posted to the London IPSC.

[231] CWO Nassif stated in his evidence that if it is known that a member is coming into an AOR, then that member is to be taken care of; it is irrelevant as to where he or she eventually goes. In the end, the only issue that Maj. Legacy had with OS AB was the location: London or Toronto. His nose was out of joint. OS AB's CO wanted her posted to Toronto. Maj. Legacy's evidence is different from that of Maj. Brady, CWO Nassif, and the grievor.

[232] In his evidence, Maj. Legacy attempted to maintain a distinction between the SPHL and the JPSU; there is none. The SPHL became the JPSU. If he is given the benefit of the doubt, then he does not know his job, and the grievor and OS AB both suffered as a consequence. If he is not given the benefit of the doubt, he misled the hearing or at worst, he lied.

[233] The grievor submitted that Maj. Legacy should not be given the benefit of the doubt and that the entire scenario involving OS AB was a sham, a camouflage, and in



bad faith.

**g. Maj. Brady and the biweekly reviews**

[234] By her own admission, until the grievor was rejected on probation, Maj. Brady had not even seen the work description for his position and had no RTW experience. She was also new to the public service, and the counselling and reviews she did involving the grievor were her first. Her approach was militaristic, which was not conducive to assisting members involved in an RTW.

[235] Maj. Brady conducted three biweekly reviews; each one showed improvement for the grievor. The first one indicated that his performance was generally good. The difficulties that she identified were small, but she did indicate that he was improving. The second of the biweekly reviews showed more improvement, but again, a couple of minor issues were identified. The final of the biweekly reviews, which is positive, states that the grievor was showing advancement.

[236] Shortly after the final biweekly review, the OS AB issue occurred. Maj. Legacy stated that the grievor regressed, and therefore, Maj. Legacy decided to reject him on probation.

[237] If there is nothing to the OS AB issue, then the grievor should not have been rejected on probation.

[238] The grievor did his best but was being undermined in part by systemic issues and in part by Maj. Legacy's actions.

[239] When reviewing the OS AB matter, it is clear that Maj. Brady and Maj. Legacy put Maj. Legacy's needs above the needs of ill and injured members. The fundamental principle of the JPSU is to get an ill and injured member back to work as soon as possible and for that member to be given the opportunity to recover and to keep his or her career on track.

[240] The Sthn. Ont. JPSU and the Toronto IPSC were well aware that OS AB was coming. The CF 2018 was in their hands, and she wanted to get back to work.

[241] CWO Nassif stated that there were considerations with respect to what went into posting an ill or injured member. The considerations were where the CO of the member wanted the member to go, where the member wanted to go, where the

member's CM wanted him or her to go, and where the treating physicians wanted the member to go. CWO Nassif also stated that NDHQ rarely goes against a doctor's orders with respect to ill or injured members.

[242] Once the May 6 posting was received, the grievor had already been in contact with OS AB. For whatever reason, the posting was amended. No one could explain why. Although there was some talk about a house-hunting trip, it was a red herring, as OS AB was already in Hamilton living with her parents and was not looking for a place to live.

[243] CWO Nassif testified that what happened with OS AB should not have happened. Just because the posting date changed did not mean that the member should not have been taken care of. Someone should have picked up the phone.

[244] In cross-examination, Maj. Brady was walked through the details of the OS AB matter, her circumstances, her RTW program, and the May 6 posting and the amended posting. She stated that it was up to Maj. Legacy and Capt. Evans to determine the IPSC that OS AB was posted to and that what she needed or wanted was immaterial. Yet, it is a known fact that OS AB had transportation to Toronto via her father and not to London, which was likely why the CO of her operating unit out of CFB Esquimalt, Dr. Nguyen, and her CM all decided to post her to Toronto.

[245] Maj. Brady suggested that posting to London made sense to minimize transport, but this made no sense with respect to OS AB because she did not have a car, and her father drove to work daily to Toronto. The only person this was convenient for was Maj. Legacy, which was to make sure that all his employees stayed in their AORs.

[246] Also interesting was that in her evidence, Maj. Brady questioned whether OS AB had a disability, yet the documentation made it obvious. Maj. Brady stated that a disability exists only if a member is then discharged from the military. This is shocking. CWO Nassif said that the change from Toronto to London did not appear to have been done for OS AB but for Maj. Legacy, for his own reasons.

[247] The RTW process was not only underway, but also, it had been arranged. OS AB was a vulnerable, ill member. While the grievor might not have told Maj. Legacy about the March 29 letter, he certainly did not withhold it from anyone.

[248] On May 11, 2010, the RTW for OS AB was already in place, yet Capt. Evans thought that OS AB was in Hamilton only for a house-hunting trip. The grievor told Maj. Brady, that the RTW was arranged (which had nothing to do with the posting), and OS AB was already in Hamilton and could start working. From May 6 to May 11, 2010, the grievor spoke to OS AB three times. Yet, when he went to Maj. Brady with the information, her concern was with his hand gestures. In cross-examination, she was asked about this, to which she referenced an “Italian talking with his hands”. Despite this, Maj. Brady wrote to Maj. Legacy and told him that both the grievor and Capt. Egan agreed that the RTW was cleared to proceed. Maj. Legacy jumped in about the IPSC being Toronto and stated that it should be London. All of a sudden, Maj. Brady was onside with Maj. Legacy.

[249] In the end, having OS AB in the London IPSC was good for Maj. Legacy and therefore good for Maj. Brady. It was about what was good for them versus what was good for OS AB.

[250] The grievor was responsible to CWO Nassif on an RTW subject-matter basis, which is CWO Nassif’s area of expertise. The grievor wrote to CWO Nassif and set out his concerns, which CWO Nassif acknowledged and verified were appropriate. CWO Nassif engaged the grievor in assisting him with writing the May 11, 2010, email in which he set out his concerns to Maj. Legacy.

[251] Maj. Legacy responded to CWO Nassif’s May 11, 2010, email questioning the authority. In his email to the grievor about the matter of whether the Sthn. Ont. JPSU had authority, Maj. Legacy told the grievor not to respond. He responded because he knew that the authority was in the file, which was what he told Maj. Legacy.

[252] While in his email, Maj. Legacy told the grievor that there was “[n]o need to reply to this email”, Maj. Legacy knew that he would respond, which he did. The next morning, Maj. Legacy looked for reasons, any reasons, to get rid of the grievor. At that point, Maj. Legacy made enquiries about a loophole that he could use. He did not like the advice he received, so he looked elsewhere.

[253] The grievor referred me to *Penner* as the foundational case with respect to the Board’s jurisdiction.

[254] *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), [1993] C.P.S.S.R.B. No. 192 (QL), set out that the principles of determining the Board's jurisdiction in these types of cases. At page 11, when referencing the Federal Court of Appeal, the adjudicator stated that the authority to reject on probation is not entirely unfettered. A proper exercise of this authority requires that the employer find, in good faith, during the probationary period that the employee is unsuitable for the position to which he or she was appointed. At page 12, the adjudicator stated that a blatant disregard of even elementary notions of fairness in assessing a grievor's conduct is a cogent consideration when determining whether the employer acted in good faith.

[255] *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, affirms the decisions in *Penner* and *McMorrow*. In *Dhaliwal*, the adjudicator reviewed how good faith is defined. While the grievor might not be entitled to procedural fairness, the way that the employer approached the facts involving the grievor might or might not be relevant. The fact that it set guidelines that it did not follow goes to the decision-making process and can result in a finding of bad faith.

[256] *Rousseau v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 91, affirms the decision in *Penner* and other Public Service Staff Relations Board decisions. The burden is on the grievor. The mere allegation of a reason to reject on probation is not sufficient for the employer; there must be a reason.

[257] *Tello* does not change anything. The substance is the same. Bad faith must be gleaned from everything.

[258] Finally, the grievor referred me to *Dyson v. Treasury Board (Department of Fisheries and Oceans)*, 2015 PSLREB 58, and submitted that the approach set out in that case is the one I should take with respect to him. He stated that there was no basis for rejecting him on probation.

[259] The employer did not start a formal process with the grievor until eight months into his probationary period. It should have provided him with formal training before then. When it crammed those requirements on him when it did, he met the expectations.

[260] The facts surrounding the OS AB situation amount to a sham. As set out in *McMorrow*, the employer's decision-making process is not unfettered because its decisions could have a devastating impact.

[261] The grievor submitted that the rejection on probation was a sham, a camouflage, arbitrary, and in bad faith. Therefore, I have jurisdiction, and the grievance should be allowed and the grievor reinstated.

### **C. Employer's reply**

[262] CWO Quinn testified that he held weekly meetings and discussions with the grievor that amounted to informal counselling about performance issues.

[263] The memo of expectations was a joint effort of Maj. Legacy and CWO Quinn to inform the grievor of management's expectations to ensure he had the tools to improve his work performance.

[264] Maj. Legacy was not the grievor's manager but was made aware of deficiencies in the grievor's performance by his manager.

[265] With respect to the suggestion that Maj. Legacy had disdain for the grievor because of the travel allowance issue, the evidence suggested that Maj. Legacy was upset because he was not kept in the loop, not that he had such disdain.

[266] Ms. Rossignol's email raised a number of issues. While she did not testify at the hearing, Maj. Legacy received her email and acknowledged receiving it. While he did not share the email with the grievor, it does not amount to bad faith. Nothing turns on her email.

[267] The grievor filed grievances against his CPRR and the memo of expectations. They were denied. He did not refer them to adjudication; therefore, they cannot be challenged in this grievance.

[268] Both Maj. Legacy and CWO Quinn admitted that the Toronto IPSC had issues.

[269] The comment about the grievor being a "loose cannon", which he attributed to Maj. Legacy, was actually mentioned in an email to Maj. Legacy.

[270] The decision to reject the grievor on probation was based on his suitability, which was communicated to him.

[271] The issue with the Capt. Evans incident was the tone associated with the communication, and it was not the first time the issue of communication had been brought up. The memo of expectations was created after this incident.

[272] The employer submitted that even without the OS AB incident, the rejection on probation could stand.

[273] The employer submitted that when Maj. Legacy testified, some of the emails that were relevant to the matter were not put to him, which might have triggered errors in his testimony. The fact that Maj. Legacy did not have those emails should not affect his credibility.

[274] Maj. Legacy had real concerns about boundaries with respect to the IPSCs and about the timely sharing of information.

[275] According to the grievor, the direction not to reply to the May 11, 2010, email was a setup, but there was no evidence of one.

[276] The OS AB incident did not lead to rejecting the grievor on probation; it was just the last in a series of incidents.

[277] The employer sought advice from HR, which happens all the time. Lawyers give advice all the time. Clients can take it or reject it. What the client does with the advice does not equate to acting in bad faith.

[278] The fact that Maj. Brady did not have experience is irrelevant; she managed the grievor's work performance, and she provided the tools he needed to succeed. It is up to the employer to decide if the grievor an appropriate fit; it knows its workplace, its needs, and what its operations need. The employer is in the best position to know if a person is suitable for a position.

[279] It is not within the Board's jurisdiction to decide the criteria against which the grievor should be evaluated; it is up to the employer.

[280] The employer tried to get the grievor to take training courses. Maj. Brady and CWO Quinn stated that during the March 25, 2010, meeting, they discussed training

with the grievor, and Maj. Brady did look into training courses. She provided him with the documents such that he could register for the courses. The grievor did sign up for training courses, but it was too late.

[281] With respect to CWO Nassif providing advice, he was not in the c-of-c and could not give orders to the grievor.

#### **IV. Reasons**

[282] The initial question before me is one of jurisdiction. Section 211 of the *Act* states as follows:

*211 Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*

*(a) any termination of employment under the Public Service Employment Act; or*

*(b) any deployment under the Public Service Employment Act, other than the deployment of the employee who presented the grievance.*

[283] The jurisprudence in this area is quite settled. The Federal Court has succinctly set out the generally accepted test at paragraphs 51 and 53 of *Chaudhry v. Canada (Attorney General)*, 2007 FC 389, as follows:

*[51] In these circumstances, the employer satisfied the adjudicator that it had met the burden of proof which required it to show some evidence of an employment-related reason for a rejection on probation. In this regard see Canada (Attorney General) v. Leonarduzzi (2001), 205 F.T.R 238, at para. 37, where Lemieux J. wrote:*

*Specifically, the employer need not establish a prima facie case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose.*

...

*[53] Once the employer's onus was met, the burden shifted to the employee to show bad faith. In this regard, the adjudicator concluded that the Applicant had not shown that the Rejection on Probation was a sham or made in bad faith.*

[284] In *Kagimbi v. Canada (Attorney General)*, 2014 FC 400, in upholding the PSLRB's decision, the Federal Court stated that the *PSEA* had been drafted in such a manner as to provide the employer with a great deal of flexibility during the probation period "... precisely so that it can evaluate the skills of a potential employee." The Court went on to state that the employer's decision to dismiss the employee was a decision that was made in good faith; "... i.e. that it was based on dissatisfaction as to the employee's abilities to do the work in question."

[285] Col. Blais made the decision to terminate the grievor for the reasons set out in his letter of May 31, 2010, which were based on information provided to him by other individuals. The reasons satisfy the test enunciated in *Tello* and as such satisfy the initial burden of proof that the decision to terminate the grievor was based on employment-related reasons.

[286] However, that does not end the inquiry. As set out in the jurisprudence, a grievor may be able to satisfy an adjudicator that he or she has jurisdiction if the grievor can, on a balance of probabilities, establish that the termination was not effected for a legitimate employment-related reason but for some other contrived reason or that it was disguised discipline, a sham, a camouflage, or in bad faith. Paragraph 127 of *Tello* states as follows:

*[127] As the grievor was unable to establish that the decision to reject him on probation was arbitrary, he bears the burden of demonstrating that the termination of employment is a "sham" or a "camouflage." As noted by the Federal Court of Appeal in another context (Dansereau v. Canada (1990), [1991] 1 F.C. 444 (CA), at page 462) bad faith cannot be presumed and an employee seeking to provide evidence of bad faith "... has an especially difficult task to perform. ..."* In *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), an adjudicator noted, at page 14, that, in his view:

...

... if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. ...

... It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a



multitude of sets of facts that may result in a conclusion of bad faith . . . keeping in mind of course that good faith should always be presumed. . . .

. . .

[287] For the reasons that follow, I find that the employer's actions amounted to a sham and a camouflage and were in bad faith, all of which amounted to disguised discipline in terminating the grievor's employment.

[288] In his May 31 letter, Col. Blais stated the reason for the rejection on probation was that the grievor, although provided with extensive guidance and mentoring, did not demonstrate the willingness to modify his behaviour to correct his serious performance deficiencies, which negatively impacted the JPSU's credibility with its partners and local commanders.

[289] In his testimony, Col. Blais stated that the grievor's technical knowledge was not a problem; his relationship with the JPSU's partners was. Col. Blais called it tenuous at best and stated that the grievor was an impediment to the partnerships. Thus, Col. Blais had to remove him from his duties. Col. Blais went on to state that despite the grievor's acknowledgement that his conduct was inappropriate, his apologies, and his efforts to change, he did not feel that the grievor's conduct would change.

[290] The evidence of Col. Blais did not align with the other evidence put forward at the hearing, either oral or documentary. His decision is only as sound as the facts he relied on to make it, which Maj. Legacy and Brady provided to him.

[291] The facts disclosed that while the grievor was having difficulties in the way Col. Blais described them, Maj. Legacy set a course of action in motion with CWO Quinn, who was supervising the grievor at the relevant time. That course was then implemented by Maj. Brady, who had taken over for CWO Quinn. It was set out in the memo of expectations provided to the grievor on March 25, 2010, together with his one and only CPRR, which he received the next day. This memo of expectations set out the incident involving Capt. Evans and what would be done to resolve his performance problems.

[292] The memo of expectations clearly indicated that Maj. Brady would debrief the grievor biweekly, focusing on the level of cooperation he was providing to his

colleagues and the service partners.

[293] Three biweekly debriefings took place, involving a meeting and a written assessment. Maj. Brady assessed the grievor's work over the two-week period preceding each review meeting and provided the written assessment. These biweekly assessment meetings (debriefs) took place on April 8, April 26, and May 7, 2010.

[294] The May 7, 2010, written assessment stated as follows:

...

*In summary, Mr Frezza has shown significant improvement in his communication, has used the advice provided and used the telephone on greater occasions, and is seeking additional training. I'm confident Mr Frezza is actively working to improve his performance, and can be an effective member of the JPSU.*

[295] In her evidence before me, Maj. Brady stated that with the completion of the May 7, 2010, biweekly assessment, no issues remained, that the grievor's work was of high quality, and that he had shown good performance. She stated that he could be an effective member of the JPSU.

[296] The employer had determined that the appropriate course of action for dealing with the grievor's shortcomings was to performance-manage him to bring his performance up to par. As Maj. Brady's evidence was that this performance management was successful, it would certainly be bad faith if the employer attempted to stand behind what occurred before the May 7, 2010, biweekly assessment as the reason to reject him on probation. Consequently, what caused the employer to terminate the grievor's employment must have occurred after May 7, 2010.

[297] It is clear from the evidence presented and the arguments made that what set the wheels in motion to rejecting the grievor on probation were the events of OS AB's posting to the Sthn. Ont. JPSU and his involvement in her RTW.

[298] The CF is a unique organization, which is run differently from the public service. Members of the military are subject to a command structure (c-of-c). The JPSU was a military unit where ill or injured members were posted to from their operational units. The JPSU was set up to address a problem assisting ill and injured members. It was to provide members with a c-of-c to report to and through that would

administer them through their care, recuperation, and rehabilitation until they were fit to return to duty, and that would not interfere with the c-of-c of their operational units. The concept makes sense. The JPSU's responsibility is over ill and injured members, and the operational units' responsibilities are over members wherever they are posted and involve the duties they have been assigned.

[299] Being a military unit, the JPSU had a military command structure. At the top was Col. Blais. Each different region had a CO (or OC). At the relevant time, the Sthn. Ont. JPSU was commanded by Maj. Legacy, who reported directly to Col. Blais. Reporting to Maj. Legacy was Capt. Evans, and in turn, reporting up to him was WO Meier. Capt. Clark was Maj. Legacy's adjt., or executive assistant. Any ill or injured member posted to the Sthn. Ont. JPSU reported through that c-of-c upwards, eventually to the top, Col. Blais.

[300] The evidence disclosed that regional JPSUs also had attached to them a civilian arm — the IPSCs — which were staffed by civilians and provided support services to ill or injured members. The employees, like the grievor, Maj. Brady, and Mr. Purpura, were not members but employees in the public service as defined by the *Act*. The IPSCs were managed by a manager. The Sthn. Ont. JPSU had two fully operational IPSCs, in Toronto and London, both of which appear to have been managed first by Ms. Rossignol, then by CWO Quinn, and finally by Maj. Brady. As a civilian employee, she reported to Maj. Legacy. The grievor and Mr. Purpura reported directly to Maj. Brady.

[301] Therefore, the JPSU had two distinct organizational structures, one military, in which posted ill or injured members reported through a military c-of-c, and the other a part of the public service that was a civilian organization providing services to ill or injured members. The regional JPSUs and IPSCs were themselves often part of larger military or DND groupings. The Sthn. Ont. JPSU serviced the Toronto and London ASUs, CFB Meaford, and CFB Borden, which are military bases with other military units.

### **The OS AB matter**

[302] OS AB was a member with an illness. As of late February 2010, she was on the Sthn. Ont. JPSU c-of-c and both the Toronto and London IPSC's radar. Lieut. Pasturczyk, who was in the c-of-c of her operational unit, emailed several persons in the Sthn. Ont. JPSU on both the military and civilian sides. The essence of his email was to alert the

Sthn. Ont. JPSU that OS AB was coming.

[303] On February 26, 2010, CWO Quinn emailed Maj. Legacy, Ms. Sigurdson, and Capt. Clark (Maj. Legacy's adjt.), copying the grievor and Mr. Purpura, and stated that it was likely that OS AB's unit would post her to the SPHL (JPSU) and would assign her to the Toronto IPSC. He also stated that everyone involved would know more once OS AB reported to 32 HSvcs (in Toronto) and Ms. Sigurdson had met with her.

[304] On March 17, 2010, Dr. Nguyen, the acting base surgeon at 32 HSvcs, wrote to OS AB's operational unit and suggested that she be placed on the SPHL for the Toronto ASU. Two things stand out. First, as I stated earlier in this decision, old habits die hard, and old terms were still being used. Because the SPHL no longer existed, the term Dr. Nguyen must have meant to use was "JPSU". Indeed, the witnesses who worked in the area stated as much. Second, he worked out of 32 HSvcs, which is in Toronto, and as such, OS AB would have had to have been there to be seen by him if he was providing this assessment. Ms. Sigurdson forwarded his communication to Maj. Legacy, his adjt., Capt. Clark, Maj. Brady, the grievor, and others.

[305] On March 24, 2010, Cmdr. Manning, OS AB's CO, wrote the March 29 letter, which stated the following, based on Dr. Nguyen's advice:

- OS AB would not be fit for a return to normal duties for over six months;
- she was a good candidate for the SPHL; and
- she should be placed on the SPHL in Toronto for employment through a RTW.

[306] Based on all the evidence, it is obvious that in the March 29 letter, Cmdr. Manning was saying that OS AB should be posted to the Sthn. Ont. JPSU in Toronto for employment through RTW as she was a good candidate for it.

[307] The March 29 letter was copied to the CO of the Toronto ASU and the officer in command ("OIC") of the Toronto IPSC. No one was identified to me as the CO of the ASU; however, that OIC was Maj. Legacy.

[308] In his evidence, the grievor stated that he obtained a copy of the original March 29 letter from the Toronto IPSC file. He stated that in this copy, the reference to “IPSC Toronto/OIC” had been highlighted in yellow. He stated that he received it from the administrative assistant for Maj. Legacy and Brady and that the assistant’s practice was to highlight the reference when a copy was provided to Maj. Brady.

[309] Between late March and the receipt of the May 6 posting, numerous email exchanges occurred between several individuals of the Sthn. Ont. JPSU (both in the c-of-c and on the public service side). They included in part a discussion of whether OS AB would be posted to London or Toronto because she was living in Hamilton.

[310] On May 6, 2010, OS AB was posted to the Sthn. Ont. JPSU, effective the next day. The posting itself stated that she was being posted from the specific vessel she was serving upon to the Toronto JPSU. Later that day, the May 6 posting was amended. The only change was the effective date, to June 30, 2010. No explanation was ever provided for that change. As on the original May 6 posting, the amended posting stated that she was being posted from her specific vessel to the Toronto JPSU.

[311] There is no reference whatsoever to an IPSC in either the original or the amended May 6 posting. Again, old habits die hard, and terms were used interchangeably with respect to the terms “posted and posting”.

[312] From the evidence, members were posted to military units. At the relevant time, OS AB’s operational unit was a navy vessel at CFB Esquimalt. She was being posted to the JPSU, a military unit. Before the JPSU was stood up, ill and injured members were posted to the SPHL, which was a notional list within a unit. With the structure change, operational units had the option to request that ill and injured members no longer stay within the c-of-c of their operational units but that they be posted to the JPSU. The evidence disclosed that the JPSU had regions and that Maj. Legacy commanded the Sthn. Ont. JPSU region. It included, at least, what would be considered Metropolitan Toronto as far west as London and Hamilton and as far north as the southern shore of Lake Huron, which encompassed CFBS Meaford and Borden.

[313] Via both the May 6 and the amended posting, OS AB was posted to the Toronto JPSU. However, this is another misnomer, as there was no Toronto JPSU; the only conclusion is that it meant the Sthn. Ont. JPSU, because that one was responsible for Toronto.

[314] The evidence did not disclose that members were posted to IPSCs. While a number of email exchanges mention OS AB's posting to the Toronto or London IPSC, they are inaccurate, as the IPSCs were work units providing services to members. Whether OS AB lived in Hamilton, Toronto, London, Barrie, or CFB Borden, once posted to the Sthn. Ont. JPSU, she fell under Maj. Legacy's c-of-c. Maj. Brady managed both IPSCs that would have serviced OS AB's support needs (either London or Toronto).

[315] The evidence revealed that OS AB was keen to participate in a RTW process. Cmdr. Manning stated in the March 29 letter that she ". . . is a good candidate for SPHL" and requested that she be placed on it in Toronto for employment for a RTW.

[316] From all the evidence, the grievor did what he was supposed to do to arrange an appropriate RTW program for OS AB, so much so that on May 6, 2010, at 2:45 p.m., Maj. Brady emailed him, stating, "Good work, thanks, John!"

[317] Indeed, even after the amended posting message was received, activity continued to further OS AB's RTW program — the grievor exchanged emails with WO Bungay at HMCS [redacted], Capt. Evans, and Maj. Brady with respect to OS AB's potential RTW, including a reporting email on May 11, 2010, at 11:03 a.m.

[318] At 11:36 a.m. on May 11, 2010, Maj. Brady emailed the grievor, WO Meier, and Capt. Egan, copying Maj. Legacy and his adjt., Capt. Clark, stating as follows:

*All, I've discussed this subj with both John and Capt Egan. Both are in agreement with the desire to get [OS AB] onto a RTW soonest, and as early as next wk fm the plans John has put in place. Given the posting date is 30 Jun, Capt Egan will confirm we have all the nec auth to proceed, update to fol to all.*

[Sic throughout]

[319] Things appeared to take a turn for the worse for the grievor after that email. Within 10 minutes, at 11:46 a.m., Maj. Legacy replied that he had learned only the previous day that OS AB was in Hamilton, which he stated was in London's AOR.

[320] I find it suspicious that in that email, Maj. Legacy stated that he had learned only the day before that OS AB was in Hamilton, given the significant amount of email traffic that appeared to take place within both his c-of-c and his civilian organizational structure, namely the following:

- On April 19, 2010, at 2:07 p.m., Maj. Brady emailed WO Meier and Capt. Clark (Maj. Legacy's adjt.) about OS AB's posting, specifically raising the issue of posting her to the London IPSC.
- On April 22, 2010, Capt. Egan emailed WO Meier, Maj. Brady, and Capt. Clark, again about the discussions he had had about OS AB's posting either to London or Toronto, and stating that the decision should be left to OS AB's CO at CFB Esquimalt (Cmdr. Manning).
- On April 23, 2010, Capt. Clark emailed Capt. Fortier (the director of military careers in Ottawa), copying Capt. Egan, about OS AB, and Capt. Fortier replied on April 26, 2010. Capt. Clark forwarded the entire email chain to Capt. Egan, Maj. Brady, WO Meier, the grievor, and others.
- On May 3, 2010, OS AB emailed Ms. Sigurdson about the status of the RTW process, stating that she had spoken to Dr. Nguyen and that he had recommended it. That email and Ms. Sigurdson's reply were forwarded to the grievor and the RTW coordinator in the London IPSC, all of which the grievor forwarded to Maj. Brady and Capts. Clark and Egan.

[321] Capt. Clark was Maj. Legacy's adjt. Capt. Egan was second in the c-of-c of the Sthn. Ont. JPSU, reporting directly to Maj. Legacy. WO Meier reported to Maj. Legacy through Capt. Egan. Maj. Brady was the public service manager of the Toronto and London IPSCs, reporting directly to Maj. Legacy. There is no question or doubt that at the very least, the three people closest to Maj. Legacy, one of whom I would describe as his executive assistant (Capt. Clark), were certainly aware of an issue involving determining the IPSC appropriate for handling OS AB because of where she lived. It is difficult to fathom that all this went on without someone briefing Maj. Legacy.

[322] From the evidence, Maj. Legacy seemed to have had an issue with where OS AB was to be posted. However, he appears to confuse that posting with the IPSC's provision of services to her. The evidence before me disclosed that these are two different and distinct things. Posting a member changes his or her c-of-c, meaning who the member reports to. In this case, OS AB was being posted to the Sthn. Ont. JPSU.

[323] There were no individual JPSUs for Toronto, London, CFB Meaford, or CFB Borden.

[324] Maj. Legacy and his staff, be it his c-of-c (Capts. Egan or Clark) or the civilian (Maj. Brady), used the term “posting” loosely to refer to which IPSC would deliver services to OS AB. However, it is not accurate and is different from posting. They also appeared to use the terms “JPSU” and “IPSC” interchangeably. That misuse is obvious given the language Maj. Legacy used in his email of May 11, 2010, at 1:17 p.m., in which he asked Capts. Egan and Clark, WO Meier, and Maj. Brady to do certain things, namely, to confirm certain information. He also asked Capt. Egan and WO Meier (who were subordinate to him in the military c-of-c) to find out where OS AB would reside. He stated that he assumed it was the London IPSC, based on an assumption that her specialist appointments were in Hamilton. He asked Capt. Clark to confirm with the adjt. of her operational unit (at CFB Esquimalt) if they had an RTW coordinator and if they had any difficulty with OS AB participating in an RTW program with HMCS [redacted]. Finally, he instructed Capt. Clark as follows: “. . . if place of residence is London, contact career manager and have the message ammended [*sic*] to reflect posting to IPSC London.”

[325] The irrefutable facts disclose that whether OS AB was posted effective May 7, 2010 (as set out in the May 6 posting), or June 30, 2010 (as set out in the amended posting), the following was the case:

- OS AB was living in Hamilton;
- she was being posted to Maj. Legacy’s military c-of-c, the Sthn. Ont. JPSU;
- she could receive IPSC services from either the London or Toronto office; and
- Maj. Brady managed both the London and Toronto IPSCs.

[326] Maj. Legacy’s email of May 11, 2010, at 1:17 p.m., appears to have been predicated on misinformation or false information. At that time, OS AB was living in Hamilton, not London, and she was seeing Dr. Nguyen, who was based at 32 HSvcs in Toronto. Capt. Egan confirmed this to Maj. Legacy at 1:31 p.m. and confirmed that her



specialist appointments were in Hamilton.

[327] In addition, sometime after May 6, 2010, and before May 11, 2010, at 2:59 p.m., the grievor and CWO Nassif (the DND RTW SME) had a telephone conversation. Both of them testified as to the substance of their discussion without the other in the hearing room, and their evidence was congruent. The discussion was about OS AB's amended posting and what appeared to be, in their opinion, brakes being applied on a RTW program for her that had already been negotiated and had been ready to go. They stated that it appeared that an ill member was falling through the cracks.

[328] As a result of his discussion with the grievor, CWO Nassif emailed Maj. Legacy about OS AB at 3:20 p.m. on May 11, 2010, stating as follows:

*Good day sir, I hope all is well with you. I recently spoke with John Frezza and he made me aware of an issue about a member who was prescribed a return to work. I don't have all of the specifics but even if the member's posting message has not been officially received by Toronto but a copy of the CF 2018 has been made available to the RTW Coord, he should pursue setting up an RTW plan for that individual and not keep the member waiting for a long period of time before beginning the RTW, especially when the member is keen to begin a RTW and the member's chain of command concurs. The RTW process could still happen as the official posting message arrives. Your thoughts. We can discuss this when you come up for the OC Conf in Ottawa.*

[329] Maj. Legacy responded on May 11, 2010, at 3:52 p.m., stating as follows:

*Afternoon chief, putting "hope all is well" and "john frezza" in the same para is usually a contradiction for me. We can discuss next week.*

*As far as this specific case is concern, I agree with what you're saying.*

*I've forward a separate email with the direction that was sent out earlier this afternoon. Basically, john should not be involved with a case that is not in his AOR, or put a member that is not posted to us on RTW without concurrence of her chain of command.*

[Sic throughout]

[330] Maj. Legacy and the grievor exchanged emails on May 11, 2010, as follows:

[Maj. Legacy to the grievor at 7:49 p.m.]

...

*I don't know if you talk to Mr Nassif before or after I had sent my directions after lunch today, but in case it was after and I was not clear I will clarify.*

*I agree with everything Mr Nassif as written below, including and underlining the part that specifies "and the member's chain of command concur". To my knowledge HMCS [vessel name] did not auth RTW for this member, the member has not yet been posted to us, giving us no authority to put her on RTW.*

*As per my earlier directions, the Adjt will talk to the unit and get auth for RTW. Until then, wait out.*

*Again, this is direction. No need to reply to this email.*

[The grievor to Maj. Legacy at 9:17 p.m.:]

...

*Acknowledging the fact that you stated your email was a directive and it was not necessary for me to respond, I am compelled to do so.*

*Having reread Mr. Nassif's email below, I too would concur with the section that specifies:*

*"even if the member's posting message has not been officially received by Toronto but a copy of the CF 2018 has been made available to the RTW Coord, he should pursue setting up an RTW plan for that individual and not keep the member waiting for a long period of time before beginning the RTW, especially when the member is keen to begin a RTW and the member's chain of command concurs".*

*Mr. Nassif's then continues*

*"The RTW process could still happen as the official posting message arrives."*

*Mr. Legacy, please note that contained in the Mbr's file in IPSC, is a message from the Mbr's parent unit, which basically states, Mbr will be posted to us and requests that we assist the Mbr with RTW/Transition. I will provide you with a copy of this message, when I return to the office tomorrow, 12-May-10.*

*As the RTW Coordinator for IPSC, Toronto I have been acting upon the CF 2018-E, issued by the MO.*

[Sic throughout]

[331] After his email exchanges late in the day on May 11, 2010, with both the grievor and CWO Nassif, Maj. Legacy emailed Maj. Brady at 8:32 a.m. on May 12, 2010, forwarding her his email exchanges with both the grievor and CWO Nassif and stating as follows:

...

1. *I did not reply back to John yesterday for two reasons:*

*a. I was not going chance that he did not come to work because I'm stressing him out and miss his grievance appointment this morning; and*

*b. I needed to calm myself down to the point that I was not going to reach through the blackberry and cause some serious damages.*

2. *Three problems with the email below:*

*a. Respect for the chain of command: I believe that my direction was clear as to what needed to happen. I even told him not to reply back to me because I didn't want him to get himself into more trouble. Yet, he felt compelled to do so. Personally, if I would have been in his position, I would have gone to my supervisor if I had more to add on the subject.*

*b. Passage of information: After all the discussion that occurred by phone/email/face to face regarding us not having authority to do RTW with this member, John apparently have a message on the member's file giving us authority to do so? Why was this not shared before, is he hording information to be used whenever he feels like, with whoever he feels like?*

*c. Why did he feel inclined to put Mr Nassif on his distribution list? The technical advise had been received and was not argued. Was the intent to try to discredit me with our higher HQs?*

3. *I'm planning on replying to his email later this morning, basically highlighting the three points in para 2, unless you feel that as his supervisor that it should be address by you and I should not be putting more fuel in the fire.*

...

[Sic throughout]

[332] It is obvious from the emails that Maj. Legacy was upset with the grievor consulting CWO Nassif.

[333] When it provided the grievor that email as part of his ATIP request, the employer redacted the portion that reflected Maj. Legacy's clear animosity and physical threat towards him. It was not produced in unredacted form until I so ordered during the course of the hearing.

[334] It is clear that Maj. Legacy was angry about the following:

- the grievor speaking with CWO Nassif; and
- the grievor allegedly keeping information about OS AB from him and Maj. Brady.

[335] The document that Maj. Legacy alleged that the grievor was hoarding was the March 29 letter from Cmdr. Manning. This is the same communication that the grievor had obtained from OS AB's file and that was identified as being copied to the OIC of the Toronto IPSC, who was none other than Maj. Legacy. It is also the document that the grievor said, when he obtained it from OS AB's file, was highlighted by the admin assistant; he testified she did that to indicate that Maj. Brady had seen it.

[336] When he testified before me, Maj. Legacy not only alleged that the grievor had the March 29 letter and did not share it but also that when he asked the grievor to provide it to him, it took the grievor over a week to deliver it. Later, in cross-examination, he changed his testimony to suggest that it took three to four days. Finally, he conceded that in fact it was delivered to him on May 12, 2010, as the grievor had stated he would in his email to Maj. Legacy.

[337] In her response to Maj. Legacy's email of May 12, 2010, at 8:32 a.m., Maj. Brady immediately concurs with his assessment, stating as follows:

*Morning Gilles, unbelievable.*

*I fully concur with all your comments below and recommend you address them directly to John. It appears that even after an intense 6 wks [sic] of "very blunt" regular performance review and counselling by me, John continues to fail to listen and respond appropriately.*

...

[338] Immediately after his email exchanges with CWO Nassif and the grievor on May 11, 2010, Maj. Legacy spoke with the CHRO, and not satisfied with her advice, he emailed another HR professional, Mr. Lachaine. In that email, Maj. Legacy stated that he had spoken with the CHRO the day before and that she had advised that there was not enough documented information to reject the grievor on probation. In his testimony before me, Maj. Legacy agreed that he sought a different opinion from Mr. Lachaine. He stated that he was looking for more time to paper the file against the grievor.

[339] Concurrent with the discussions Maj. Legacy was having with HR professionals, he continued to discuss the matter with Maj. Brady. At 10:59 a.m. on May 12, 2010, he emailed her, stating as follows:

. . .

*After consideration and advise from the Adjt, I decided to pull myself back and not get myself involved personally and stop this email war with one of your staff. This will allow me to I keep the moral high ground when and if situations are pushed up to my level. As mentioned in previous email I see some problems with some of your staff in Toronto that you need to address:*

- 1. **Respect for the Chain of Command:** When direction is given they should not be challenged directly by the staff. If they are not in agreement with the direction, they need to inform you and you may challenge me if you feel that it is appropriate or instruct them to carry on.*
- 2. **Passage of information:** Your staff need to make their case to you when there is a problem and they have the information or extenuating condition that needs to be brought forth. In this case, John should have produced the message from the unit as soon as the question of authority came up. Please fax me a copy to this message when you get it from John. . . .*
- 3. **Tech Net vs. Command Net:** I encourage the staff to use their Tech Net for advice. They need to be aware that this is advise, not orders. If I give direction, regardless of the advice of the Tech Net or even in contradiction to the advices, then my orders are the ones to be followed not the advice.*

*For your action*

[Sic throughout]

[340] Early on in the grievor's tenure at the Sthn. Ont. JPSU, Maj. Legacy appeared to develop an animosity towards him, which arose out of the travel arrangement the grievor had reached with the employer at the national level.

[341] This animosity that Maj. Legacy had towards the grievor was also evident in his exchanges with Maj. Brady immediately following his May 11, 2010, exchanges with CWO Nassif and the grievor, namely, as follows:

- *Afternoon chief, putting "hope all is well" and "john frezza" in the same para is usually a contradiction for me. We can discuss next week.*
- *I needed to calm myself down to the point that I was not going to reach through the blackberry and cause some serious damages.*

[342] I also find that Maj. Legacy was not entirely truthful with the Board when it came to the facts with respect to his interactions with the grievor, specifically as dealt with earlier with respect to both Maj. Legacy being delivered the March 29 letter and the issue of the emailed birthday card for Maj. Brady.

[343] With respect to that card, Maj. Legacy testified that he was on his way to a repatriation meeting and was away from his office when he received the email. He said that he could not open the attachment on his Blackberry and that he had to return to his office to open it, which is when he found out that it was not in fact urgent.

[344] In her email to the unit after the birthday card was sent and Maj. Legacy had spoken to her about it, Maj. Brady stated that Maj. Legacy was on his way to Trenton and that he had to stop at the office to review the email attachment.

[345] Maj. Legacy's version of events does not satisfy the test set out in *Faryna*. If the email was truly urgent, and he was away from the office and on the road, he could have easily called any of the other 10 people in the email chain, including Maj. Brady and Capt. Clark, his adjt. He could have also emailed them and told them that he could not open the attachment and asked what it was about, considering that his Blackberry is both a phone and an email client.

[346] In his evidence on this issue, the grievor stated that after he had apologized to Maj. Legacy, he tried to tell him how he could fix his Blackberry such that he could open attachments. He said that Maj. Legacy told him he could always open the

attachment. When put to him in cross-examination, Maj. Legacy's response was not that it did not happen but that he could not recall the discussion.

[347] Based on the facts, it is obvious to me that after the grievor's final biweekly performance review of May 7, 2010, the only thing that occurred that caused the employer to reject the grievor on probation was his actions after May 10 and before May 12, 2010, with respect to the OS AB file. In fact, this is exactly what Maj. Brady alluded to in her response to Maj. Legacy's May 12, 2010, email at 8:32 a.m., when she stated as follows: "It appears that even after an intense 6 wks [sic] of 'very blunt' regular performance review and counselling by me, John continues to fail to listen and respond appropriately."

[348] Despite the employer stating that what the grievor did was wrong and alluding to the fact that it was the same behaviour that was being performance managed, not only was it not, but also, the oral evidence of both Maj. Legacy and Brady did not support their position, let alone what the May 31 letter stated and what Col. Blais said.

[349] Nothing disclosed in the evidence about what the grievor did with respect to OS AB's file in any way could be found inappropriate, let alone could fall within the meaning of Col. Blais's reasons for terminating his employment. Three things occurred between May 10 and 12, 2010, which appear to have set Maj. Legacy on the path to terminating the grievor's employment, as follows:

1. The grievor contacted CWO Nassif, and their discussion led to CWO Nassif's email to Maj. Legacy of May 11, 2010.
2. The grievor responded to Maj. Legacy's May 11, 2010, email at 7:49 p.m.
3. The grievor keeping information with respect to the authority over OS AB (in the form of the March 29 letter) from the Sthn. Ont. JPSU c-of-c.

**A. Contacting CWO Nassif on or about May 11, 2010**

[350] CWO Nassif was the JPSU and DCSM SME with respect to RTW issues. His job was to be available to provide advice to RTW coordinators. The grievor was one, and it was entirely appropriate for him to seek advice on RTW issues from CWO Nassif.

[351] While Maj. Legacy might have been the OC of the Sthn. Ont. JPSU, he certainly was not any sort of RTW expert. I find not only that there was nothing wrong with the grievor seeking CWO Nassif's advice and expertise but also that doing so was entirely appropriate. It certainly could not have been seen as going over Maj. Legacy's head because CWO Nassif did not report to Maj. Legacy. The grievor raised a concern about what both he and CWO Nassif had identified as a potential risk of an ill member falling through the cracks. In fact, as the evidence disclosed, this was entirely the type of problem that the new JPSU system was intended to remedy from the old system.

[352] And not the grievor but CWO Nassif wrote to Maj. Legacy on May 11, 2010, raising the issues that he and the grievor had discussed and felt were important. CWO Nassif could have chosen not to email Maj. Legacy. But it is puzzling that Maj. Legacy stated in his email to the grievor at 7:42 p.m. that day that he agreed with everything that CWO Nassif had stated. If he agreed with CWO Nassif, then where is the problem? Indeed, in his cross-examination, he confirmed that CWO Nassif should be consulted with respect to RTW matters and stated that he would likely take CWO Nassif's advice in this area.

**B. The grievor's email reply to Maj. Legacy at 9:17 p.m. on May 11, 2010**

[353] It was submitted that the grievor should not have emailed Maj. Legacy in reply because Maj. Legacy stated, "No need to reply to this email." But the grievor responded at 9:17 p.m. to Maj. Legacy's email of May 11, 2010, sent at 7:42 p.m.

[354] Quite frankly, this is preposterous. The grievor's response was entirely appropriate because at issue was OS AB's RTW process and whether there was authority to carry it out. Maj. Legacy was setting out instructions in his emails that were based on erroneous facts. The grievor knew they were erroneous and believed that he had seen something stating that there was authority to carry out the RTW and that OS AB's c-of-c not only concurred with this but also had initiated the process. He was doing nothing more than speaking truth to power, telling his boss the true state of affairs. The grievor was truly between a rock and a hard place. It appeared that Maj. Legacy was unaware of the March 29 letter. However, this created the third issue, because when he told Maj. Legacy of the March 29 letter, Maj. Legacy accused him of hoarding information.



[355] Finally, on this point, when it was put to him in cross-examination whether the grievor should have been faulted for replying to him, Maj. Legacy said, “No.”

**C. Alleged hoarding of information (the non-disclosure of the March 29 letter)**

[356] This allegation by Maj. Legacy is just blatantly wrong. While he viewed it as hoarding, the facts clearly disclose that the March 29 letter was in a file relating to OS AB and that it had been sent to the Sthn. Ont. JPSU and copied to the OIC of the Toronto IPSC. The OIC of the Sthn. Ont. JPSU was Maj. Legacy. He was also the person to whom the manager of the two IPSCs that were part of the Sthn. Ont. JPSU reported, namely, Maj. Brady.

[357] Maj. Brady stated in her evidence that she saw the March 29 letter at some point during the flurry of activity after May 7, 2010. And the grievor stated that when he saw the original copy of it on or about May 11, 2010, the reference to the OIC Toronto had been highlighted by the office administrative assistant. Highlighting was used to designate what Maj. Brady had seen.

[358] Perhaps Maj. Brady did not see the March 29 letter when it was sent, or perhaps she had seen it when it arrived and promptly forgot about it. Either way, it is irrelevant, as the document had been sent and received and had been in the file relating to OS AB at the relevant time. It does not seem likely that both Maj. Legacy and Brady did not see it. If I give them both the benefit of the doubt, I am left confounded by the position they both took with respect to the grievor bringing this relevant document to their attention. In essence, they found that his behaviour was such that it warranted the loss of his job.

[359] If neither Maj. Legacy nor Brady saw the March 29 letter, how could it have been inappropriate for the grievor to bring it to their attention? It was not inappropriate. It was entirely appropriate for him to do that if he thought it was relevant to their decision-making process, which in fact it was, specifically because, according to Maj. Brady, she testified that it was. While she said that she was sure that the JPSU and IPSC had the authority to continue with the RTW process (after the amended posting arrived), she said that the March 29 letter would have eliminated this issue.

[360] There is also absolutely no evidence that the grievor hoarded the letter.

[361] The evidence also disclosed that once the IPSC had a copy of the CF 2018, it had the authority to start the RTW process. This was also the evidence of Maj. Brady, who stated in her testimony that while initially, the IPSC did not have the CF 2018, when it received that document, it was the green light for it to initiate the RTW process. Yet, the mention of the March 29 letter appears to have been the catalyst for Maj. Legacy to seek help from HR to reject the grievor on probation. This makes absolutely no sense.

[362] I am cognizant that the posting placed OS AB within the Sthn. Ont. JPSU's c-of-c and that there were issues with respect to the reporting structure for her vis-à-vis the JPSU. However, her posting and the RTW were separate matters, and whether she was actually posted to the Sthn. Ont. JPSU and whether the March 29 letter gave the authority to that JPSU is irrelevant. Whether or not OS AB was posted did not result in the grievor being terminated from his employment.

[363] I find that the grievor's employment was terminated for reasons other than any that were legitimate and employment related. The rejection on probation was a sham, a camouflage, and done in bad faith, and it amounted to disguised discipline of the grievor. It is clear that Maj. Legacy was angry and upset at the grievor for speaking to CWO Nassif about OS AB's situation and that CWO Nassif's email to Maj. Legacy and the subsequent email exchange with the grievor infuriated Maj. Legacy. This is borne out by Maj. Legacy's emails the next morning (May 12, 2010) to Maj. Brady, suggesting that the grievor was not following directions or was not understanding them. There is no such evidence. The grievor merely sought advice from CWO Nassif and then produced documentation to his superior that disclosed information that no one seemed to possess, namely, OS AB's c-of-c not only concurred with her being part of a RTW program but also had initiated the process.

[364] Therefore, I have jurisdiction to hear the grievance, and the grievance is allowed.

[365] As I have not heard evidence with respect to the mitigation of losses, I shall retain jurisdiction to deal with the matter of damages. While I urge the parties to resolve this matter on their own, they shall, within 15 business days of the date of this decision, provide their availability to the Board for a hearing on the matter of damages.

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

*(The Order appears on the next page)*

**V. Order**

[367] I have jurisdiction to hear this matter.

[368] The grievance is allowed.

[369] The grievor is to be reinstated at the AS-04 group and level.

[370] I shall remain seized of this matter to deal with damages.

[371] The parties shall meet immediately and attempt to agree on the appropriate amount of damages, failing which a hearing shall be scheduled.

[372] Within 15 business days of the date of this decision, the parties shall provide the Board with their availability with respect to a hearing on damages.

March 12, 2018.

**John G. Jaworski,  
a panel of the Federal Public Sector Labour  
Relations and Employment Board**