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Citation: 2004 PSSRB 10

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JEAN BRATRUD

Grievor

and

OFFICE OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS CANADA

Employer

Before: Ian R. Mackenzie, Board Member

For the Grievor: Steve Eadie, Professional Institute of the Public Service of Canada

For the Employer: Neil McGraw, Counsel

Heard at Toronto, Ontario, August 26 and 27, 2003.
Written Representations filed: September 11 and 25, and October 2, 2003.

[1] This decision is a preliminary ruling on the jurisdiction of an adjudicator to hear the grievance of Ms. Jean Bratrud. This grievance relates to a performance appraisal received by the grievor on May 29, 2001, for the period April 2000 to March 2001. Ms. Bratrud is an employee of the Office of the Superintendent of Financial Institutions (OSFI), in the Financial Institutions Group. In her grievance, Ms. Bratrud contends that her performance appraisal was inaccurate and misleading and that she was held to a different standard from other employees. She also alleges that the performance appraisal was punitive and disciplinary in nature, as well as constituting an abuse of authority under Article 41.01 of the collective agreement. As corrective action, she requested that changes be made to her appraisal; that remuneration lost (performance pay) as a result of not receiving a higher rating be paid retroactively; that an apology from the supervisor who wrote the appraisal be proffered for the damage caused to her reputation; and that a transfer out of the Financial Institutions Group be arranged.

[2] In the first level reply issued by the employer on January 4, 2002, the grievance was partially allowed: the employer agreed to destroy the performance appraisal and to prepare a new appraisal with a rating of "consistently meets expectations". She was provided with performance pay commensurate with the revised rating. Assistance from an outside third party was offered to assist the grievor and her manager in establishing performance goals and establishing ongoing performance feedback. In the final level reply, dated July 16, 2002, the employer made further changes to the narrative of the appraisal to incorporate some of the comments made by her representative at the grievance hearing. An assignment and a lateral appointment were also offered to Ms. Bratrud in the final level reply.

[3] Ms. Bratrud's representative, Mr. Steve Eadie, wrote to the Board on July 30, 2003, to raise issues regarding the disclosure of documents that he considered relevant to the grievance. His request for documents from the employer on March 12, 2003, was only partially agreed to by the employer. The employer, in an email to Mr. Eadie dated March 25, 2003, refused to disclose corporate information for confidentiality reasons.

[4] The Board replied to Mr. Eadie's request for a pre-hearing conference as follows:

> *With reference to your request for the documentation pertaining to Ms. Bratrud's performance, I suggest that you direct your request to the employer once again. In this regard, I refer you to the decision of the Supreme Court of Canada in* Canadian Pacific Air Lines Ltd. v. Canadian Air Lines Pilots Assn, *[1993] 3 S.C.R. 724, wherein Mr. Justice Gonthier, for the majority, ruled that the Canada Labour Relations Board had no jurisdiction to order the production of documents in advance of a hearing. In light of the similarity in language of paragraph 118(a), now 16(a) of the* Canada Labour Code *and paragraph 25(a) of the* Public Service Staff Relations Act, *the Public Service Staff Relations Board applies the same restriction when ordering the production of documents in advance of a hearing.*
>
> *If the employer refuses to provide you with the material that you request, you may wish to ask the Board to issue a summons duces tecum, which you could then serve on the appropriate person, indicating that you wish him or her to attend the hearing and to produce the material in question. If that person fails to produce it at the hearing, the matter can then be referred to the adjudicator assigned to hear the reference to adjudication of your grievance, who, if he or she deems the material to be relevant, can order its production. If the production of the material at this late stage places you at a disadvantage in the conduct of your case, you may request an adjournment from the adjudicator to enable you to review the material in question.*

[5] At the commencement of the hearing on August 26, 2003, the question of the disclosure of documents was still at issue. On August 27, 2003, Mr. Eadie served a *subpoena duces tecum* on the employer requesting the following documents:

> *All the following work completed by Ms. Jean Bratrud for the period January 2000 to June 2001*
>
> *a) Supervisory Plans*
>
> *b) Top of File Completion Notes*
>
> *c) Risk Assessment Summaries*
>
> *d) On-site Review Schedules*
>
> *e) Management Letters/Reports*
>
> *f) Speaking notes used on Delivery of Management letters to Institutions*
>
> *g) Section Notes including appended notes and spreadsheets for the following topics: Integration, Re-Insurance;*

> *Segregated Funds; Strategic Planning; Future Outlook; Capital.*

[6] The employer representative objected to producing the specified documents based on vagueness, confidentiality and relevancy. Mr. McGraw submitted that the request was a "fishing expedition" and was open-ended. It was difficult to know what the grievor was looking for, he submitted.

[7] Mr. McGraw submitted that the main test for whether disclosure is required is relevancy. He argued that it was difficult to see how the information requested goes towards meeting the case presented by the grievor. The only relevance of these documents is to prove that there are inaccurate statements in the performance appraisal -- an area that is outside the jurisdiction of an adjudicator. An inaccurate statement in a performance appraisal does not equal discipline or harassment. Under the collective agreement, there is a provision that allows employees to present their objections to a performance appraisal and have them put on file (article 35). Mr. McGraw submitted that there was no "probative nexus" between the grievor's case and the documents requested.

[8] In addition, Mr. McGraw argued that the *Office of the Superintendent of Financial Institutions (OSFI) Act* requires confidentiality of all information obtained about financial institutions. Section 22 of the *Act* sets out the requirements for confidentiality as follows:

> ***22.*** *(1) Subject to subsection (3), the following information, and any information prepared from it, is confidential and shall be treated accordingly:*
>
> *(*a*) information regarding the business or affairs of a financial institution, foreign bank, bank holding company or insurance holding company or regarding persons dealing with any of them that is obtained by the Superintendent, or by any person acting under the direction of the Superintendent, as a result of the administration or enforcement of any Act of Parliament;*
>
> *(*b*) information received by any member of the committee established by subsection 18(1), or by any person referred to in subsection 18(5) designated by any member of that committee, in the course of an exchange of information permitted by subsection 18(3); and*
>
> *(*c*) information furnished to the Superintendent pursuant to*

> *section 522.27 of the* Bank Act*.*
>
> *(2) Nothing in subsection (1) prevents the Superintendent from disclosing any information*
>
> *(*a*) to any government agency or body that regulates or supervises financial institutions, for purposes related to that regulation or supervision,*
>
> *(*a*.01) to any other agency or body that regulates or supervises financial institutions, for purposes related to that regulation or supervision,*
>
> *(*a*.1) to the Canada Deposit Insurance Corporation or any compensation association designated by order of the Minister pursuant to subsection 449(1) or 591(1) of the* Insurance Companies Act*, for purposes related to its operation, and*
>
> *(*b*) to the Deputy Minister of Finance or any officer of the Department of Finance authorized in writing by the Deputy Minister of Finance or to the Governor of the Bank of Canada or any officer of the Bank of Canada authorized in writing by the Governor of the Bank of Canada, for the purposes of policy analysis related to the regulation of financial institutions,*
>
> *if the Superintendent is satisfied that the information will be treated as confidential by the agency, body or person to whom it is disclosed.*

[9] Mr. Eadie submitted that there was a nexus between the grievance and the documents requested. This is not only because there are factual inaccuracies in the appraisals, but also because cumulatively the appraisals represent an effort to discredit the grievor. Mr. Eadie argued that one cannot begin to look at the case without being able to examine the discrepancy between the documents and the appraisal. Mr. Eadie submitted that the request was for "not a lot" of documents and that most, if not all, were on the shared computer drive.

[10] Mr. Eadie referred me to *Slavutych v. Baker,* [1976] S.C.R. 254, and *Transamerica Life Assurance Co. of Canada v. Canada Life Insurance Co.* 27 (1995), O.R. (3d) 291. In *Transamerica*, the court ruled that the confidentiality provision in the *OSFI Act* was a statutory provision and not an absolute bar to the disclosure of material. Mr. Eadie submitted that the test was one of balancing the need for confidentiality with the needs of the interested party. In this case, the impact on OSFI of disclosure was extremely limited, whereas, if the material was not disclosed, the grievor's ability to

present her case would be severely restricted. He submitted that the balance favours the release of the documents.

[11] Mr. McGraw submitted that the subpoena, on its face, was not specific enough and would require a large amount of work on the part of the employer to locate. The central point is relevancy, Mr. McGraw submitted. This adjudication is not meant to review the performance appraisal. Mr. McGraw stated that it is inappropriate to order disclosure when the matter is not adjudicable.

[12] Mr. McGraw also submitted that there is a high level of trust between OSFI and financial institutions. If it became known that all documents could be disclosed in the context of a grievance on a performance appraisal, the relationship with financial institutions would be seriously undermined.

[13] I reserved on the issue of disclosure. My ruling on this issue appears below, at paragraph 98.

[14] Counsel for the employer also raised an objection to my jurisdiction to hear this grievance on the basis that the grievance was not adjudicable. The parties requested a preliminary ruling on jurisdiction. Evidence was adduced solely for the purpose of determining the issue of jurisdiction. One witness testified on behalf of the grievor, the grievor testified, and there was one witness for the employer. Written arguments were submitted by the parties on the issue of jurisdiction.

Evidence

[15] Ms. Bratrud joined the public service in 1974 and started working at the Department of Insurance, the forerunner of OSFI, in 1978. In 1997, she moved from the Ottawa office to work in the Toronto office in the Life Insurance Division. Her position was Manager of the Life Insurance Team. She was the Relationship Manager for two insurance companies. Mr. Frank Mackowiak became her supervisor in May of 2000 and supervised her until the end of February of 2001. The performance appraisal at issue in this grievance was for the 2000-01 fiscal year.

[16] Ms. Bratrud testified that up until her appraisal for 2000-01, she had always received good appraisals, ranging from “good to very good” (Exhibits G-4 and G-5). Carol Shevlin was the senior director of the Financial Institutions Group at OSFI in 1997 for approximately 18 months, and was two levels above Ms. Bratrud. Ms.

Bratrud's supervisor at the time, Ms. Lepatko, reported to her. Ms. Shevlin had left her position by the time Mr. Mackowiak became Ms. Bratrud's supervisor. Ms. Shevlin testified that she considered herself a friend of Ms. Bratrud but was not close. She testified that Ms. Bratrud was actively encouraged to transfer to the Toronto office because of her reputation as an analyst. According to Ms. Shevlin, Ms. Bratrud took her work "incredibly seriously".

[17] Around the time of her move to the Toronto office in 1997, a new supervisory framework for OSFI was introduced. This new framework represented a significant change in the way that OSFI conducted business. Mr. Mackowiak, in his testimony, referred to it as "a new direction" for OSFI. He testified that he was asked to be the acting director of the Life Insurance Division for a period of ten to eleven months, commencing in 2000, in order to "bring the work of the group more in line" with the supervisory framework.

[18] Ms. Bratrud testified that the division was understaffed. She also testified that the individuals hired by Mr. Mackowiak were unable to travel outside the Toronto area and were therefore unable to help her with her site visits to life insurance companies. Ms. Bratrud testified that she felt that Mr. Mackowiak did not have much experience in life insurance or knowledge of the area. Her general relationship with Mr. Mackowiak was not good, she testified. He did not respond well to her explanations of issues. Ms. Bratrud said that Mr. Mackowiak would say things such as "I don't have to listen" and "you don't know what you are talking about". Ms. Shevlin also testified that Ms. Bratrud confided in her about difficulties she was having with Mr. Mackowiak. Ms. Shevlin described Mr. Mackowiak's management style as "authoritarian". Notes prepared by Mr. Mackowiak of his interactions with Ms. Bratrud were also introduced as evidence (Exhibit G-12).

[19] Ms. Bratrud testified that Mr. Mackowiak told his staff that if they implemented the changes he was proposing, there would be no problems with their performance appraisals. Mr. Mackowiak testified that he did not recall saying this.

[20] Ms. Bratrud testified that Mr. Mackowiak never discussed her performance appraisal with her, prior to "throwing it on her desk". She testified that he told her "she would not like this". Mr. Mackowiak testified that it was standard practice at OSFI not to discuss an appraisal with an employee until the manager "vetted it" with his supervisor. He also testified that he handed the appraisal to her and mentioned

that the appraisal contained things she would like and things she would not like. He testified that it was his intention that the appraisal be discussed, but this meeting never happened.

[21] The initial performance appraisal provided an overall rating of "inconsistently meets expectations". Mr. Mackowiak noted in the section for supervisor's comments the following:

> *Jean has significant technical knowledge of life insurance business and products. She adopted the practices advocated by her previous director and her knowledge was not effectively used to supervise life companies according to the supervisory framework. When that director resigned her office, a decision was made to re-focus the group in the direction of the framework. That re-focus initially resulted in significant hardship for Jean and the entire FIG-411 group. To her credit, Jean began to show signs that she was accepting the required changes towards the end of the year. Now that she has traversed the period of change, in order to attain an overall "consistently meets expectations" rating, Jean must move forward with*
>
> - *Better focus on effectiveness of risk management and improved implementation of the supervisory framework, and*
>
> - *Better teamwork, which would be demonstrated by improved interaction with her colleagues throughout OSFI, regardless of any differences she may have with them.*

[22] The appraisal noted that the supervisory framework was not being applied as intended and this was the environment that Ms. Bratrud faced when she initially transferred to the Toronto office. Mr. Mackowiak testified that his predecessor had not been applying the framework correctly.

[23] The appraisal also noted that a key area for Ms. Bratrud's improvement was financial analysis. Ms. Bratrud testified that she was stunned to read this, as she was always considered to be excellent in financial analysis. Mr. Mackowiak testified that he could see no evidence of financial analysis in the files.

[24] In the revised appraisal (Exhibit G-7), prepared after the internal grievance hearing, the supervisor's comments were eliminated and the "special considerations" section was amended to read as follows:

> *This was a challenging year for Ms. Bratrud in that an acting director was appointed and implemented changes to the manner in which the group conducted its supervisory activities to make them more consistent with the supervisory framework.*

[25] Mr. Mackowiak testified that he stood by the comments he made in the first appraisal. He also testified that he did not have discipline in mind when he wrote Ms. Bratrud's appraisal. He stated that he did not regard an appraisal as a disciplinary tool. He testified that his intention was to point out areas where improvements could be made.

[26] Ms. Bratrud testified that the contents of the original appraisal were known within OSFI and that some people knew about it before she did. She testified that she was shunned and made to feel like a pariah within OSFI. Mr. Mackowiak testified that, other than sharing it with his supervisor, he did not discuss her appraisal with anyone. A summary of performance appraisals results was circulated within OSFI (Exhibit G-11) that broke down the ratings on a percentage basis only. Ms. Bratrud testified that a list of people and their ratings was prepared and, she believed, was circulated to managers. She also testified that it was difficult for her to obtain a suitable lateral transfer because of her appraisal. Mr. Mackowiak testified that he did not expect the appraisal to have an impact on her career.

[27] Ms. Bratrud showed her appraisal to Ms. Shevlin. Ms. Shevlin testified that her reaction was "shock and disbelief", and that the person being described in the appraisal was not the Jean Bratrud she knew. Ms. Shevlin testified that the impact of a poor performance appraisal at OSFI was "incredibly career-limiting". Other senior directors would not be willing to take her on because her reputation was damaged. Ms. Shevlin also testified that at a meeting with the Assistant Superintendent, John Doran, he spoke disparagingly of Ms. Bratrud and was dismissive of her work.

[28] The performance ratings also have financial consequences. The Administrative Guidelines for performance pay (Exhibit G-11) indicated that an employee who "inconsistently meets expectations" was entitled to a 1.5% in-range increase, and no cash bonus. Employees assessed as "consistently meets expectations", "often exceeds expectations" and "consistently exceeds expectations" were entitled to a 3% in-range increase and cash bonuses of between 2 and 12%. After her appraisal was amended, Ms. Bratrud received a retroactive adjustment to her salary, without interest.

[29] Ms. Bratrud testified that she went on sick leave in June 2000. When she returned to work in December, she was not given any work to do until February 2001. She had difficulties in obtaining sufficient work to keep busy. She introduced as evidence a series of emails (Exhibit G-9) that showed a series of requests for work from April to July 2002. She testified that she was not invited to team meetings or lunches on her return and that many people no longer spoke to her. She also testified that she was offered only lateral positions that were term assignments and she was concerned about losing her indeterminate status. In cross-examination, she said that she was happy in her current position at OSFI.

Arguments

[30] Arguments were submitted in writing. The full submissions are on file with the Board, and I have summarized the arguments below.

For the Employer

[31] The employer objects to my jurisdiction to hear this grievance since, in essence, it is an attempt to refer a performance appraisal to adjudication, which clearly falls outside an adjudicator's jurisdiction. On the one hand, there has been no evidence that Ms. Bratrud's performance appraisal constitutes any kind of disciplinary action resulting in termination, suspension or financial penalty (s.92(1)(*b*), *PSSRA*). On the other hand, there has been no real evidence presented to demonstrate that the performance appraisal constitutes harassment as defined in the collective agreement. In essence, the employer feels that this grievance is an attempt to do indirectly what cannot be done directly, namely, challenge the content of a performance appraisal at adjudication.

[32] Mr. McGraw noted that, as stated in the final level grievance reply, the original performance appraisal has been removed from the grievor's personnel file and been destroyed. The amended performance appraisal (Exhibit G-7) is the appraisal on file and, for the purposes of determining whether there has been discipline, only this version should be considered. Further, it was admitted during the testimony of the grievor that she has received all increases and bonuses that correspond to a rating of "Consistently Meets Expectations" for the year 2000-2001. Therefore, in order to determine whether or not there has been discipline resulting in a financial penalty, only the amended appraisal should be considered. To do otherwise would be

equivalent to considering whether a $500 fine was reasonable when it was reduced to $100 prior to the reference to adjudication.

[33] Mr. McGraw submitted that there is nothing in the performance appraisal that can be considered disciplinary in nature. To conclude otherwise would make all performance appraisals disciplinary in nature if they contained any form of criticism of an employee's work. There has been no evidence of any form of corrective action. A performance appraisal is purely an administrative action. As stated in *Canadian Labour Arbitration* by Brown and Beatty at 7:4210, a written warning that forms no part of an employee's record for the purpose of determining the severity of future discipline does not constitute a disciplinary action. Therefore, a performance appraisal cannot be considered a disciplinary action.

[34] Mr. McGraw noted that this concept has been applied consistently by the PSSRB, notably in *Porter* v. *Treasury Board (Department of Energy, Mines and Resources),* PSSRB File No. 166-2-752 (1974), where the adjudicator found that it is only where a performance appraisal is made predominantly for disciplinary reasons that any question arises of disciplinary action. He goes on to explain that it is not sufficient for an employee to show that he is "financially worse off", but that an employee must demonstrate that this was the result of "disciplinary action". The burden of proof, therefore, lies with the grievor. He goes on to say that "the concept of disciplinary action is not sufficiently wide to include any or every action taken by the employer which may be harmful or prejudicial to the interests of the employee". He explains how for discipline to exist, there must be a breach of discipline or misconduct. He applies the reasoning of *Robertson* v. *Treasury Board (Department of National Revenue),* PSSRB File No. 166-2-454 (1971) to state that disciplinary action is taken in response to what the employer considers to be some kind of voluntary malfeasance.

[35] Mr. McGraw submitted that in *Veilleux* v. *Treasury Board (Public Service Commission),* PSSRB File No. 166-2-11370 (1982), it was argued that the appraisal was within the exclusive jurisdiction of the employer under the terms of section 7(1)(*d*) and (*i*) of the *Financial Administration Act*, and that the appraisal should speak for itself. The adjudicator agreed, and stated that "in this matter, the employer rated the grievor "entirely satisfactory" when it evaluated his performance. It is hard to conceive of this as a punitive measure, and hence disguised disciplinary action". Mr. McGraw also referred me to *Gagne* v. *Treasury Board (Labour Canada*), PSSRB File No. 166-2-14901

(1985). Mr. McGraw submitted that there has been no evidence of any kind of disciplinary action related to the contested performance appraisal. To paraphrase the words in *Veilleux (supra)*, the employer does not see how a "Consistently Meets Expectations" rating can be viewed as being disciplinary or punitive in nature.

[36] Mr. McGraw concluded that, therefore, an adjudicator does not have the jurisdiction to hear this file as a disciplinary matter, since the grievor has failed to discharge her burden of proof in demonstrating that the appraisal constitutes a form of disguised discipline.

[37] Mr. McGraw noted that the grievor has also alleged that the performance appraisal violates the collective agreement since it constitutes harassment, specifically abuse of authority, prohibited by section 41.01 of the collective agreement. The employer objects to an adjudicator's jurisdiction to hear this matter on these grounds since it is simply an attempt to do indirectly what cannot be done directly. It is clear that the Board's role is not to engage in a process of reviewing performance evaluations.

[38] Mr. McGraw submitted that this was the case for a number of reasons. It is not in the interest of the Board to open the door to performance appraisal reviews. An adjudicator is not in the best position to properly judge and review a year's worth of work at a hearing. There is nothing in the collective agreement or the various pieces of federal legislation that envisages this type of process. Mr. McGraw referred me to *Foreman* v. *Treasury Board (Indian and Northern Affairs Canada),* 2003 PSSRB 73. Mr. McGraw argued that in this case there is no evidence to demonstrate that this is a case of collective agreement interpretation. This is simply the case of an employee who is not satisfied with her performance appraisal and the final level response of the grievance procedure. This does not make the matter adjudicable.

[39] Mr. McGraw submitted that the only examples given by the grievor of statements in the appraisal that could constitute harassment are in the original appraisal. Both of these statements were described by the grievor as being "threats", which fall under the definition of harassment and abuse of authority. First of all, it must be noted that these statements have been removed in the amended version of the grievor's evaluation. Secondly, the allegation is clearly an exaggeration and is far removed from a threat to the grievor's career or advancement. In fact, statements such as these are common practice in performance evaluations: an indication as to

areas that need to be improved or maintained in order to sustain or increase a rating in the future. At best, these statements are ones that the grievor feels are incorrect, but they do not constitute a threat of any kind.

[40] Mr. McGraw argued that this is truly the bulk of the grievor's complaint. She feels that the statements and ratings in both the original and amended versions of the contested performance appraisal are incorrect. She disagrees with the assessment of Mr. Mackowiak and OSFI management. However, this is not sufficient for the Board to have jurisdiction in reviewing the matter.

[41] Mr. McGraw noted that the collective agreement provides, at Article 35.02(c), that employees who disagree with their appraisal may present written counter arguments to the appraisal, which will be attached to the appraisal and placed on their file. This is the appropriate remedy for employees who feel that an appraisal does not justly reflect their performance. It was Mr. McGraw's submission that a reference to adjudication of such a disagreement is an abuse of process and should be rejected by the Board.

[42] Mr. McGraw submitted that, as stated in *Ansari* v. *Treasury Board (Department of External Affairs)*, PSSRB File No. 166-2-14680 (1984), a grievance against a performance appraisal is not adjudicable under the *PSSRA* and any attempt to remove or destroy the appraisal is an attempt to do indirectly what cannot be done directly. Further, in *Largess* v. *Treasury Board (Transport Canada*), PSSRB File Nos. 166-2-17666 and 17667 (1988), it was found that a grievance on the content of a performance appraisal did not involve a question of interpretation or application of the collective agreement. The adjudicator noted that the performance appraisal was not frivolous or based on bad faith, which is also the case here.

[43] Mr. McGraw noted that in *Ahad* v. *Treasury Board (Department of National Defence),* PSSRB File Nos. 166-2-15480, 16038 and 16233 (1987), it was made clear that there is nothing in the collective agreement that would allow an employee to resort to grievance adjudication to obtain a review of the contents of a performance evaluation. There is no such provision in the collective agreement in this case, either.

[44] Mr. McGraw also submitted that in *Joanisse* v. *Massie,* PSSRB File No. 161-2-319 (1985), which dealt with a complaint under section 20 of the *PSSRA*, the Board noted that a complaint could not be used to adjudicate a grievance that had exhausted the

departmental grievance procedure and that is not adjudicable under the *Act*. While this case is not a complaint, the principles of this decision are relevant.

[45] In conclusion, Mr. McGraw submitted there is no evidence to demonstrate that this grievance deals with a disciplinary matter or the interpretation of the collective agreement. It is, quite simply, the case of an employee who disagrees with a performance appraisal and has exhausted the departmental grievance procedure. For good reason, this is not a matter that is adjudicable and an adjudicator should not take jurisdiction.

For the Grievor

[46] Ms. Bratrud's claims are: that she has been disciplined through the performance appraisal issued to her by Mr. Mackowiak and subsequent actions taken by the employer; and that article 41.01 of the collective agreement, Harassment, has been violated through Mr. Mackowiak's abuse of authority, supported by the employer.

[47] Mr. Eadie argued that as a grievor may be aggrieved in a number of ways, a grievance may contain several claims made by a grievor. Such is the case in Ms. Bratrud's grievance. Throughout the course of the grievance process some, all or none of the claims made can be addressed. In this case, only some of Ms. Bratrud's concerns have been looked at, but not addressed to her satisfaction – such as changes to the content of her performance appraisal. Some have not been addressed at all, such as the claim of abuse of authority. All of these issues have been before the employer since the filing of the grievance.

[48] Mr. Eadie submitted that there is nothing indirect in the attempts to bring this case before the Board. The performance appraisal is evidence of discipline and abuse of authority. The employer has not addressed the question of harassment but has in fact ignored it. In looking at the final level response, that issue was not addressed at all. It is easier for the employer to try to restrict this grievance to the content of the performance appraisal, but that is not the only issue outlined in the grievance.

[49] Mr. Eadie noted that the grievance asks for changes to the performance appraisal and, to some degree, this has occurred. However, the changes have not been to the satisfaction of the grievor. The adjudicator might decide that he/she cannot alter the wording of the performance appraisal, but this does not mean that he/she

does not have jurisdiction to hear the grievance. The changing of the performance appraisal is only one of the potential remedies set out in the grievance.

[50] Mr. Eadie noted the employer argument that it has changed the overall performance rating to a "meets expectations" rating and that as it has paid out the money for that rating, the grievance is resolved. Mr. Eadie submitted that this perspective was simply not logical. If this notion were to be carried to its logical extreme, employers would be allowed to discipline, act arbitrarily and in bad faith, and abuse their authority on a performance appraisal, knowing full well that they would not be held accountable. Before the reference to adjudication, all they would have to do would be to revise the worst aspects of the appraisal and that would be it.

[51] It was Mr. Eadie's position that damage done by the original appraisal is not necessarily undone by the upgrading of that appraisal many months later. The fact that some of the content is changed does not address the issue as to whether the original appraisal was disciplinary. Nor do changes to the content of the appraisal address the question of whether there was an abuse of authority.

[52] Mr. Eadie noted that counsel for OSFI uses the analogy of a $500 fine being reduced to a $100 fine to suggest justification for the use of the amended appraisal. He agreed with the concept that there was a fine issued in this case. However, in terms of the question of discipline, the issue is not the severity of the discipline or the fine, but the fact that there was discipline and a fine at all.

[53] Mr. Eadie submitted that it was the original performance appraisal which gives rise to the claims of Ms. Bratrud. Ms. Bratrud testified that the performance appraisal the employer claims is on file is not much better than the first. That is because even though the rating has been upwardly adjusted, the narrative contains much of the same offensive material as the first. Further, just because the sharpness and severity of the original tone of the appraisal may have been softened somewhat, that does nothing to indicate whether the first appraisal was disciplinary or an abuse of authority.

[54] Mr. Eadie noted that the employer has stated that there has been no discipline as alleged in the grievance and therefore jurisdiction cannot be taken under 92(1)(*b*) of the *PSSRA*. It is the grievor's view that this appraisal constitutes a written warning. While not in the conventional format, the appraisal is disciplinary. While hidden

behind the façade of the performance appraisal, discipline is intended. It is disguised discipline. It is the grievor's position that the discipline was issued in bad faith, is an abuse of authority and had a concrete negative financial impact.

[55] Mr. Eadie referred me to the discussion of discipline in *Brown & Beatty (supra)* (7:4210). Two ideas that emerge are "misconduct" justifying discipline, and "behaviour which is of a culpable nature and which may be amenable to correction through the institution of some kind of disciplinary penalty". Did Mr. Mackowiak consider the grievor's actions misconduct worthy of discipline? The evidence he gave would indicate he had a mission to change her behaviour and that he tried to do that orally and met with resistance. So he put the concerns down on paper. His notes (Exhibit G-12) indicate he spoke with Jean on a number of occasions. Mr. Eadie noted that there remain several questions about the accuracy of the notes. However, the notes do provide evidence of how Mr. Mackowiak felt she was approaching the concerns he was raising.

[56] Mr. Eadie noted that in examination-in-chief, Mr. Mackowiak denied using the performance appraisal for discipline because this was not its purpose. However, his evidence indicating what he was trying to do, when compared to the appraisal, shows that he was trying to find a vehicle to change very specific ways that Ms. Bratrud was insisting business should be done. He was addressing very specific areas where, in his view, she had shown resistance in oral discussions.

[57] Mr. Eadie argued that Mr. Mackowiak used the performance appraisal as a vehicle to warn in writing that certain specific actions Ms. Bratrud was performing were not acceptable to OSFI and that she would have to change. He submitted that Mr. Mackowiak offered specific ways in which she should change in order to meet OSFI's standards. Mr. Eadie submitted that he was really suggesting, without wanting to write a disciplinary letter to that effect, that Ms. Bratrud was insubordinate, not in line with OSFI's way of doing business and the expectation was that she had better shape up.

[58] Mr. Eadie submitted that this performance appraisal is distinguished by being, in reality, a written warning, which was to go on record, done by a requisite authority and would be considered in any determination of future discipline. Mr. Mackowiak was not asked and did not volunteer whether the appraisal would be used in any future disciplinary steps. Ms. Bratrud was clear that she saw this as a first step towards further discipline. Mr. Eadie referred me to *Domtar Gypsum* v. *United*

Steelworkers of America, Local 14994 (1996), 56 L.A.C. (4th) 266. Mr. Eadie also referred me to *Calgary Housing Authority* v. *Alberta Union of Provincial Employees (1990),* 10 L.A.C. (4th) 129 when a critical performance evaluation is seen as the equivalent to disciplinary warning. Even oral warnings, where evidence is adduced that they will form part of the employees' record, "may be characterized as being disciplinary in nature" (*Brown and Beattie, supra*).

[59] With regard to *Porter (supra)*, Mr. Eadie submitted that the grievor does not dispute that "the concept of disciplinary action is not sufficiently wide to include any or every action taken by the employer which may be harmful or prejudicial to the interests of the employee". He also agreed with the reasoning in *Robertson (supra)*, where it is stated, "…that disciplinary action is taken in response to what the employer considers to be some kind of voluntary malfeasance". Mr. Eadie submitted that evidence of the employer's belief that Ms. Bratrud has voluntarily done wrong is contained in the performance appraisal and in Mr. Mackowiak's testimony alongside evidence that the employer expected certain behaviours under her control to change. While Ms. Bratrud does not agree that she was guilty of the behaviours indicated, she does agree that the behaviours were within her control to change had she been guilty of them. Mr. Eadie referred me to examples from the original performance appraisal that indicates specific wrongdoing by Jean Bratrud and ways she is expected to improve. Ms. Bratrud testified as to the importance of all of these items in her job. Taken together, the criticisms levied constitute an express written warning.

[60] Mr. Eadie noted that in *Robertson (supra)*, the adjudicator stated that "…the essential distinction is between that which is voluntary, or within the employee's control, and that which is involuntary, being not within the employer's control or capacity". Mr. Eadie submitted that, following this reasoning, if an action was within the employee's control then it would be open to disciplinary action by the employer. And following that, while it might not be the preferred approach by employer or employee, there could be occasions where an employee is disciplined through his or her performance appraisal, if that were the chosen route to attempt to modify behaviour. The performance appraisal would in these situations assume the role of written warning.

[61] Mr. Eadie argued that in *Veilleux (supra)*, the adjudicator, contrary to counsel for OSFI's assertions, never agreed to the statement "the appraisal should speak for itself".

The adjudicator did state that "in this matter the employer rated the grievor 'entirely satisfactory' when it evaluated his performance. It is hard to conceive of this as a punitive measure, and hence disguised disciplinary action". That does not fit the case of Ms. Bratrud in which she was rated "does not meet expectations". However, even if one were to think that the revised performance appraisal were the one to be used, the adjudicator in *Robertson (supra)* also refers to the *Towers* case, PSSRB File No. 166-2-206 (1970), where the adjudicator found on the evidence that an increment had been denied for disciplinary reasons in the face of a favourable evaluation and that such disciplinary action was not justified.

[62] Mr. Eadie submitted that *Gagné (supra)* is distinguishable from this case because in *Gagné* there was never any claim that the performance appraisal was disciplinary. In that case, the grievor said that the refusal to assign him more difficult assignments was disciplinary. However, there was no evidence of that. Mr. Eadie noted that in this case, the grievor had provided reasons why the employer may have felt discipline was necessary and evidence of Ms. Bratrud's frustration with simple discussions. It is also Ms. Bratrud's claim that the employer disciplined her by suspending her "de facto" on her return to work by not providing her with work. Ms. Bratrud testified that she wasn't given anything to do until February, she e-mailed several times asking for work (Exhibit G-9) and was ignored, and the institutions she monitored were not referred to her. This was, in fact, a paid suspension that resulted in her eventually leaving the area that she had originally been happy working in and accepting a lateral transfer. Mr. Eadie submitted that there is only one conclusion to be drawn: OSFI attempted to discipline Ms. Bratrud and used the performance appraisal as the vehicle to do so. When she resisted, the employer punished her further by effectively suspending her.

[63] Mr. Eadie also submitted that the comments of counsel for OSFI on the burden of proof were only partially true. The grievor does have the burden of providing evidence to the extent that the adjudicator can see what the case will look like, but the burden of proof then shifts to the employer to show how that evidence is not good enough. OSFI is making the objection to jurisdiction; the burden of proof is the employer's. It must prove that the evidence put forward cannot lead to the conclusion that the performance appraisal was disciplinary.

[64] Mr. Eadie submitted that Ms. Bratrud is financially worse off, and this is a direct result of the disciplinary action taken as described above. This appraisal was not just used to establish competence but to discipline, and this act of discipline resulted in a loss of pay. Mr. Mackowiak knew the financial impact of his actions were both short and long term. Ms. Bratrud had her appraisal changed and her increase and bonus adjusted over a year after the original appraisal was given to her. She was offered no interest on the money withheld and she has not attained the level of in-range increase or bonus she had received the two previous years and to which she thinks she is entitled. The difference here is $1200 for in-range salary and $5000 in lump sum bonus. All of this money is applied for purposes of pension. The financial impact in addition to this is the less concrete but no less important claim that the appraisal has destroyed her credibility and reputation internally and externally. Reputation is something she testified to as being essential to perform her functions as a regulator. There are also the restrictions on her potential income through loss of promotion. Exhibit G-11 shows that OSFI tracks and monitors evaluations and that by virtue of the original appraisal issued, Ms. Bratrud finds herself in the 5% group of poor performers. In a small organization, this has long-lasting and devastating consequences. Ms. Bratrud testified that even a lateral transfer became a problem as a result of the appraisal.

[65] Mr. Eadie submitted that article 41.01 of the collective agreement (Exhibit G-1) is clear in intent and meaning. Its purpose is to ensure a harassment-free workplace. Ms. Bratrud's claim is that first Mr. Mackowiak and then OSFI, by avoiding this issue, are in violation of this article of the collective agreement, particularly because the original appraisal authored by Mr. Mackowiak is merely written evidence of his continuing campaign against Ms. Bratrud. Also, the failure of the employer to correct the inaccuracies and career-damaging statements found in the appraisal, as well as taking actions certain to humiliate her, are party to Mr. Mackowiak's abuse of authority. None of the issues brought forward in grievance hearings regarding Mr. Mackowiak's treatment of Ms. Bratrud were addressed. The employer focused on changes to the appraisal.

[66] Mr. Eadie stated that what makes this matter adjudicable is Ms. Bratrud's claim that there has been a violation of the collective agreement. Whether it is a legitimate claim is up to the adjudicator to decide after the evidence is put before him. Mr. Eadie submitted that there has been evidence adduced pointing to a pattern of behaviour.

Ms. Bratrud described the environment she had worked in under Mr. Mackowiak. This was uncontested by Mr. Mackowiak and OSFI. Mr. Eadie submitted that while the grievor's whole case in this regard is not before me, evidence has been put in suggesting that there is motivation for such action. Evidence establishing a context has been put in.

[67] Mr. Eadie noted that it is OSFI's position that "the only examples given by the grievor of statements in the appraisal that could constitute harassment are in the original appraisal". Mr. Eadie stated that he did not agree that these are the only two, nor did he agree that the examples are to be found only in the original appraisal. No evidence has been put forward to support OSFI's position. Ms. Bratrud made reference to threats in her testimony but also mentioned: being shunned; being provided with no work; having her supervisor say he would "get the goods on Jean", "you don't know what you are talking about", "I can do what I want"; having him make accusations which were unfounded; having him make the work environment hostile – this was confirmed by an exodus of her colleagues for that very reason. She testified credibly as to why she did not take the issue forward – she was going to ride out his term and it would be over and it would just bring more trouble to complain because the people that she would be complaining to were aligned with Mr. Mackowiak. Then, after he was gone, came the appraisal.

[68] Mr. Eadie submitted that in abuse of authority claims, context is a key factor. Obviously, Ms. Bratrud disagrees with the factual nature of the comments made in the appraisal, but more than that she objects to the demeaning manner in which those comments are delivered, especially given her position and reputation within OSFI and the Life Insurance division at the time. Abuse of authority is interpreted under Treasury Board and elsewhere as being much broader than just threats. Mr. Eadie also referred me to Abuse of Authority in the Workplace: A Form of Harassment, by Jean Maurice Cantin. Mr. Eadie concluded that it was clear from the evidence provided that Ms. Bratrud was subject to abuse of authority by Mr. Mackowiak. The employer provided no evidence as to why the adjudicator should not take jurisdiction under the collective agreement.

[69] Mr. Eadie agreed that article 35.02(c) of the collective agreement was open to Ms. Bratrud. But, as she expressed in her testimony, she chose the route she has because it addresses the issues. She has the right to make the most meaningful choice

under her collective agreement. Certainly, setting the factual record straight and having that on file would be only one small component in addressing issues of the nature Ms. Bratrud is bringing forward.

[70] With reference to *Ansari (supra)*, the conclusions drawn by the adjudicator in this case are drawn as a result of a very different set of facts, Mr. Eadie submitted. There was never any argument made in the *Ansari* case that the performance appraisal was disciplinary or that it was an abuse of authority under a collective agreement article. The grievor requested that appraisals be removed from files and destroyed, as the employer could not have accurately dealt with matters after a lapse of so much time. Essentially he raised a process issue – timeliness as defined by the grievance procedure of the collective agreement. Ms. Bratrud is not making a process argument. Her argument is that the actual appraisal constitutes a written example of abuse of authority and that abuse of authority is not permitted under article 40.01.

[71] Mr. Eadie responded to the argument of the employer with regard to the question of attempting to do indirectly what could not be done directly. Abuse of authority is not limited to certain situations. It could be found in a staffing promotion, it could be found in a daily relationship, it could be found in a staff meeting. If we said that under this clause of the collective agreement we were bringing forward an abuse of authority and that this occurred in a staff meeting, would we be disqualified from bringing forward our complaint? No. Then for what reason would an abuse of authority complaint brought forward because of a performance appraisal be automatically disqualified? In both cases, the merits of the question of whether there was a legitimate complaint would have to be investigated. This is not doing indirectly what you cannot do directly. In fact, if one were to look closely here, one could make the case that it is the employer who is guilty of just that. It has tried not to deal with the issue of harassment and avoid adjudication by pretending that the grievance is solely about the performance appraisal.

[72] Mr. Eadie submitted that *Largess (supra)* dealt with grievances concerning rejection on probation and the use of the performance appraisal in that situation, and it is not relevant here. Further, the adjudicator did not find that *a* grievance on the content of a performance appraisal did not involve a question of interpretation or application of the collective agreement. He did find that "there is not involved *here* a question of the interpretation or application of a collective agreement or arbitral award

and in any event, the grievance has not the required approval of the bargaining agent and its representation".

[73] Mr. Eadie distinguished *Ahad (supra)* in that no allegations or grievances were made that the performance review was either disciplinary or a violation of a harassment clause. This is not the same jurisdictional issue in front of me.

[74] Mr. Eadie also submitted that *Joanisse* v. *Massie (supra)* deals with a section 20 complaint and is not relevant.

[75] Mr. Eadie noted that there are several aspects to the requested remedy. The employer has focused on trying to resolve the rating of the performance appraisal, hoping that the other claims would go away. It has never acknowledged that there was a problem. It has certainly never offered or attempted to deal with the harassment issue through the steps of the grievance procedure. And the grievor has not been satisfied with those responses. While the grievor would like to see further changes to her appraisal, that should not be, given the grievance and the range of corrective actions suggested, the determining factor in whether the grievance is heard or not.

[76] Mr. Eadie stated that he saw no clear restrictions on the ability of an adjudicator to adjust an appraisal should it be found to be disciplinary or an abuse of authority. There are other remedial actions that could be taken, as well. Even if an adjudicator was not able to order an apology, it is within his/her power to find fault with the employer's actions, acknowledge that they have been inappropriate actions, and make a declaration to that effect. There may be other remedies available, he submitted.

Reply of Employer

[77] Mr. McGraw submitted that the statement of the grievor's representative on the burden of proof is clearly incorrect. It is trite law to state that when a grievor alleges that an action constitutes disguised discipline, the burden of proof belongs to the grievor, and not the employer, to establish that the action was disciplinary and within an adjudicator's jurisdiction under section 92(1)(*b*) of the *PSSRA* (*Flynn* v. *Treasury Board (National Defence),* PSSRB File No. 166-2-29015 (1999); *Canada (Attorney General)* v. *Leonarduzzi* (2001), 205 F.T.R. 238(FCTD)).

[78] The employer has the burden of establishing that the administrative measure, in this case, the performance appraisal, was a legitimate use of an administrative

procedure. The employer has met its burden in this case. Through Mr. Mackowiak's testimony and a simple reading of the performance appraisal, it is clear that the appraisal is not a sham. The burden of proof, on the balance of probabilities, belongs to the grievor to demonstrate that the financial penalty she alleges she suffered is "attributable to disguised discipline".

[79] Mr. McGraw submitted that to accept the grievor's argument that the original appraisal should be used to determine whether there was any disguised discipline in this case is nonsensical and renders the entire grievance procedure useless. Why would the employer consider arguments and implement changes prior to the reference to adjudication if these would be ignored and forgotten? While Ms. Bratrud may not be satisfied with the changes that were made, these changes are the context that governs the reference to adjudication.

[80] Mr. McGraw stated that OSFI rejects the claim that the in-range increase and lump sum payment constitute a financial penalty in the sense contemplated by the *PSSRA*. Even if one were to accept the grievor's argument that the original performance appraisal constitutes a financial penalty since Ms. Bratrud received a lower in range increase, the employer submits that the revised performance appraisal has remedied this situation. Once again, this demonstrates why the original appraisal should not be used to determine whether there has been discipline in this case.

[81] Mr. McGraw submitted that further, while the original appraisal may help establish the history and context of the complaint that there has been a violation of the collective agreement, it is still the revised performance appraisal that is the object of the reference to adjudication. The grievance states quite clearly that the appraisal violates the collective agreement. Therefore, if there is a violation, it must be the revised version that violates the collective agreement, since the original version no longer exists. The replies at all levels of the grievance procedure confirm this fact. The original appraisal may assist the grievor in establishing the context of her grievance, but it is the revised version, as it existed prior to the reference to adjudication, which is the object of the reference.

[82] Mr. McGraw noted that the grievor's representative states that, in his view, the performance appraisal constitutes a written warning. The grievor attempts to argue that "this appraisal is being used to ground a step in the disciplinary process". However, she presents no evidence to support this allegation and, in fact,

demonstrates the exact opposite. Ms. Bratrud admits that she is very happy in her new position. She has not been disciplined in any way, shape or form. It is inappropriate for the grievor to challenge Mr. Mackowiak's testimony on this point when the question was never put to him.

[83] Mr. McGraw submitted that Ms. Bratrud has been unable to establish that the performance assessment is anything other than "a critical assessment of [her] work performance". There has been no "further" discipline, nor any evidence that any discipline would follow.

[84] Mr. McGraw argued that all of the cases cited by the employer are still consistent with the Board's general view that performance appraisals are a legitimate form of constructive criticism. The grievor has not demonstrated that anything in the performance appraisal, the original or the revised, could be construed as disciplinary in nature.

[85] Mr. McGraw submitted that the cases cited by the grievor have no application in this grievance since they do not fall within the line of cases of the Board. They clearly deal with different collective agreements and different enabling legislation, conferring jurisdiction in different circumstances. Further, in *Domtar (supra)*, it is clear in reading the performance letter in issue that it would be used for further discipline since it contained the following statement that "failure to maintain a consistently high standard will result in your removal from the apprenticeship program". There has been no such statement in Ms. Bratrud's performance evaluation. The only comparative statement made would be one made to indicate what would need to be done to maintain or improve a performance rating, which is clearly not disciplinary in nature. Also, in *Calgary Housing Authority (supra)*, there was a direct threat to the employee's employment ("if Mr. Nelson wishes to remain an employee of CHA") which the Board emphasizes is the reason for its conclusion that the performance appraisal was disciplinary in nature. This is clearly not the case here.

[86] Mr. McGraw submitted that the grievor has failed to demonstrate how the performance appraisal constitutes a financial penalty, which is a necessary component of an adjudicator's jurisdiction. Even if the employer were to concede, which it clearly does not, that the appraisal constituted a written reprimand, an adjudicator would still have no jurisdiction since there has been no financial penalty. The alleged claims of damaged credibility and reputation, loss of promotion and problems in receiving a

lateral transfer, which are contradicted by the grievor's own testimony, do not confer upon an adjudicator the jurisdiction to hear this case.

[87] Mr. McGraw argued that the grievor has failed to meet her burden of proof to demonstrate that the performance appraisal constitutes a form of disguised discipline. An adjudicator therefore lacks jurisdiction to hear the merits of the grievance on this point.

[88] Mr. McGraw submitted that the statement by Mr. Eadie that the employer is "pretending that the grievance is solely about the performance appraisal" is misleading since that is precisely the allegation made in the grievance. All of the allegations made by the grievor regarding the work environment are collateral to the grievance. They are only relevant to the extent that they assist the adjudicator in rendering a decision on the substance of the case.

[89] Mr. McGraw submitted that the grievor has not been able to demonstrate how the performance appraisal could constitute harassment. This is not a *bona fide* question of interpretation. This is a matter that is subject to the grievance procedure but has not been resolved to the satisfaction of the grievor. However, just because the matter is grievable does not mean it is a matter that can be referred to adjudication.

Reasons for Decision

[90] Ms. Bratrud is alleging that the performance appraisal she received from her supervisor, Mr. Mackowiak, is disciplinary in nature and constitutes harassment under the collective agreement. The employer has submitted that an adjudicator does not have jurisdiction over this matter.

[91] An adjudicator's jurisdiction over grievances is set out in section 92 of the *PSSRA*. The jurisdiction of an adjudicator is limited to three areas: the interpretation or application of a provision of a collective agreement; disciplinary action resulting in suspension or financial penalty; or termination or demotion pursuant to the *Financial Administration Act*. The grievor's representative submits that I have jurisdiction on the basis that the appraisal constitutes disguised discipline and on the basis that there has been a breach of the collective agreement. I will deal first with the contention that the appraisal constitutes disguised discipline.

[92] The jurisprudence of this Board has been consistent in its treatment of performance appraisals (see *Porter, supra; Hassan, supra; Veilleux, supra; and Ansari, supra*). Although there may well be financial consequences associated with a performance appraisal, those consequences do not constitute a "financial penalty" under the *PSSRA*.

[93] The grievor bears the burden of proof in cases where disguised discipline is alleged. There was no evidence that the performance appraisal was being used for disciplinary purposes – either explicit or disguised. An adjudicator has no jurisdiction over written reprimands, so even if I accepted Mr. Eadie's argument that the comments in the appraisal constitute a written reprimand, I would be without jurisdiction. It is also worth noting that the financial consequences of the initial appraisal were addressed when the overall rating was changed to "consistently meets expectations". In conclusion, I find that grievance does not relate to disciplinary action under section 92 of the *Act*.

[94] I now turn to the question of whether the grievance involves the interpretation or application of the collective agreement. The collective agreement has an anti-harassment clause:

> *41.01 The Institute and the Employer recognize the right of employees to work in an environment free from sexual and personal harassment and agree that harassment will not be tolerated in the work place. For the purpose of this clause, harassment includes abuse of authority.*

[95] In essence, the allegation in the grievance is that the performance appraisal itself constitutes an abuse of authority by Mr. Mackowiak. Section 92 of the *PSSRA* gives an adjudicator jurisdiction over the interpretation of a provision of a collective agreement. The grievance clearly refers to this collective agreement provision. I therefore find that I do have jurisdiction to hear this aspect of the grievance; namely, whether the performance appraisal is a breach of the employee's right "to work in an environment free from personal harassment".

[96] I agree with counsel for the employer that the grievance is solely about the performance appraisal and that evidence on the work environment is only relevant to the extent that it provides context for the substantive issue of whether the appraisal constitutes an abuse of authority. The employer's fears that taking jurisdiction will

result in adjudicators "reviewing" performance appraisals are not founded. The narrow scope of enquiry is solely whether the appraisal constitutes an abuse of authority.

[97] At the hearing, there was some evidence introduced on the relationship between the grievor and her supervisor and on the content of the performance appraisal. However, the parties asked for a preliminary ruling on jurisdiction and the testimony was ostensibly for that limited purpose. For that reason, a hearing will be reconvened to allow the parties to introduce any additional evidence relating to the allegation that the performance appraisal constituted an abuse of authority, as well as making submissions on that issue.

Disclosure of Documents

[98] The employer objected to the *subpoena duces tecum* on two grounds: that it was a "fishing expedition" and that it was subject to a confidentiality provision in the *OSFI Act*. I will first address the confidentiality issue.

[99] The importance of confidentiality of financial information is well recognized. The statutory provision in the *OSFI Act* clearly highlights the importance attached by Parliament to keeping the records confidential. However, such a statutory provision does not constitute an absolute bar to compelling the production of documents and information in the possession and control of OSFI:

> *It is well established that confidential information may be subpoenaed and introduced into evidence if ordered by a court. The general rule is that although information is confidential, it must be produced unless the test laid down in Slavutych and Baker (supra) is met. Parliament could have provided that the information and documents at issue here could not be compelled by summons, but in my view, to accomplish this end, specific language to that effect would be required. (Transamerica Life Assurance, supra)*

[100] An adjudicator has the same authority as a superior court of record to order the production of documents "as deemed requisite to the full investigation and consideration of matters within its jurisdiction" (section 25 (*a*), *PSSRA*).

[101] The four-step balancing test for claims of confidentiality was set out by the Supreme Court of Canada in *Slavutych* v. *Baker (supra)*:

> 1. *The communications must originate in a confidence that they will not be disclosed.*
>
> 2. *This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.*
>
> 3. *The relation must be one which in the opinion of the community ought to be sedulously fostered.*
>
> 4. *The injury that would enure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.*

[102] I agree with the court in *Transamerica Life Insurance (supra)* that the first three conditions are met in this case. The fourth condition requires a balancing of the potential injury to the relationship between OSFI and financial institutions and the interests of the grievor. The grievor alleges that the appraisal contains inaccurate information about the work she actually performed during the appraisal year. Without the documents demonstrating her work during the appraisal year, the grievor will find it difficult to make her case. Conditions put on the disclosure of this material can adequately protect the interest of OSFI and financial institutions, while ensuring that the grievor has access to sufficient material to make her case.

[103] The documents requested by the grievor do not constitute a "fishing expedition". The material all relates to Ms. Bratrud's work during the period in question, and Mr. Eadie has been clear on the purpose of obtaining these documents. Mr. Eadie has alleged that the documents will show that the appraisal was inaccurate. Mr. McGraw argued that these documents would not support the grievor's argument. To prevent disclosure on this basis would in effect be to rule on an important aspect of the grievor's case. Whether or not the documents show that the performance appraisal was an abuse of authority is a significant part of the merits of the grievance. Arguments on the relevance of those documents, and the weight to be given to the documents, are issues that should be left to the hearing on the merits, after the documents have been introduced as evidence.

[104] Accordingly, an order requiring disclosure of the documents listed in the August 27, 2003 subpoena is issued, with the following conditions:

1. Names of financial institutions and any identifiers will be blacked out by OSFI;

2. Names of individuals, other than OSFI employees, will be blacked out by OSFI; and

3. The documents, if introduced as exhibits at the hearing, will be sealed and returned to OSFI after the expiry of the period for judicial review, or of any judicial review proceedings.

[105] There is a presumption in favour of open hearings under the *PSSRA*. However, if the above conditions do not adequately protect the confidentiality of the information, I am prepared to consider holding those parts of the hearing where such documents are disclosed *in camera*. The employer can make such an application at the commencement of the hearing, if it wishes, and I will hear submissions at that time.

[106] OSFI will have two weeks from the date of this decision to provide the material to the grievor.

[107] The parties will be advised by the Board of the dates for continuation of the hearing.

Ian R. Mackenzie
Board Member

OTTAWA, February 16, 2004