

Date: 20031024

File: 166-02-31841

Citation: 2003 PSSRB 97



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**DANNY ROSS**

Grievor

and

**TREASURY BOARD  
(Correctional Services Canada)**

Employer

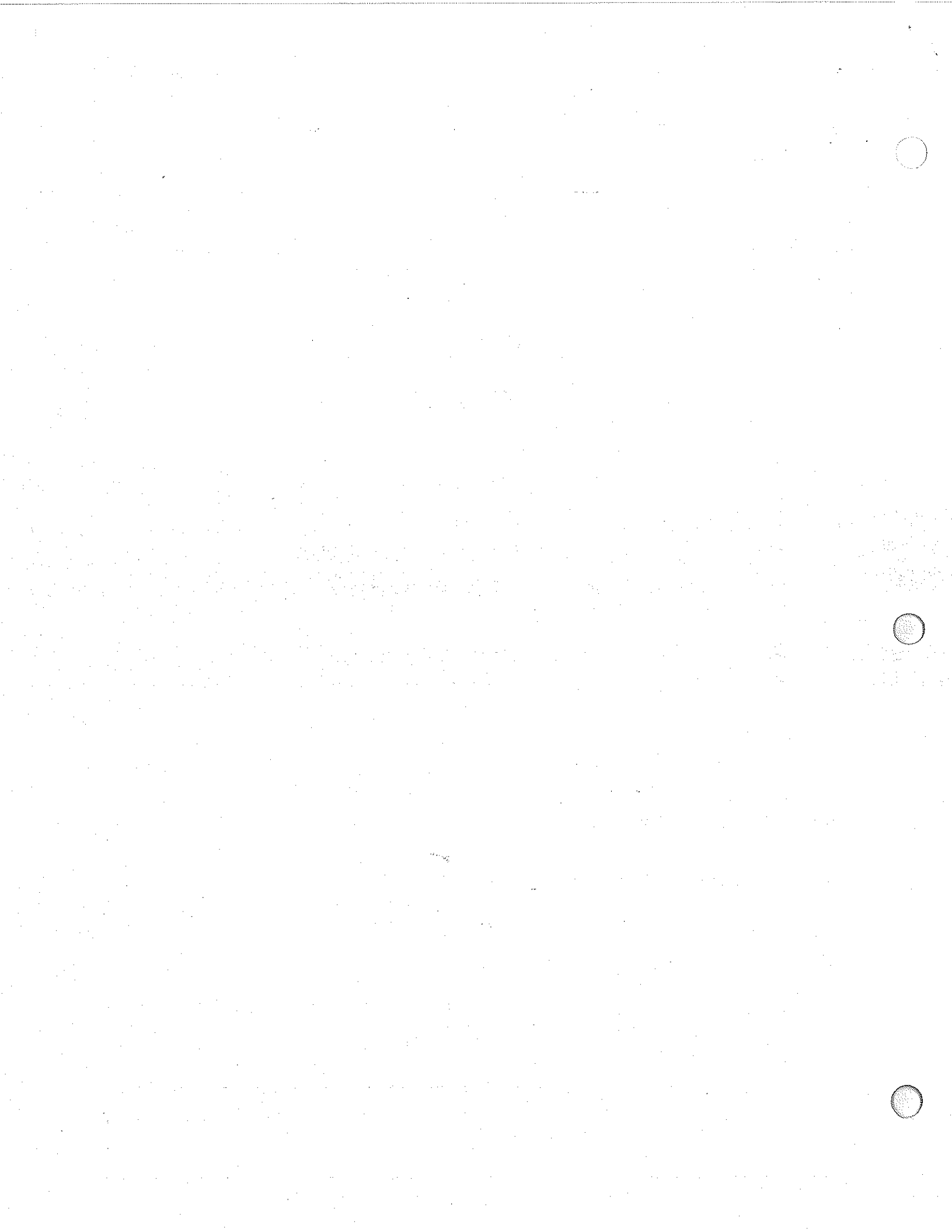
***Before:*** Yvon Tarte, Chairperson

***For the Grievor:*** Himself

***For the Employer:*** Marie-Josée Lemieux

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(Decided without an oral hearing.)



## DECISION

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[1] In June 2002, Mr. Ross, who had worked as a Correctional Officer (CX-1) at the Kent Institution in British Columbia, grieved his rejection on probation. The documents purporting to refer this matter to adjudication were forwarded to the Public Service Staff Relations Board (PSSRB or Board) in January 2003 by the grievor's bargaining agent, UCCO-SACC-CSN.

[2] The employer's letter of termination dated June 5, 2002, read in part:

*I regret to inform you that by the authority delegated to me by the Deputy Head, under Section 28 of the Public Service Employment Act, I hereby give notice of my decision to reject on probation your employment from your position as a Correctional Officer 1, (CX-01), position number 25100, effective the close of business, June 05, 2002.*

*The reason for my decision is that you have committed serious infractions under the Code of Discipline. Under Standard One, Responsible Discharge of Duties, in that you failed to take action or otherwise neglected your duty as a peace officer by not recording in the J/K logbook your time on duty or your security rounds that you were required to conduct. And, Standard Two, Conduct and Appearance, whereby you were found to be sleeping on duty on May 9, 2002, and that you removed a ghetto blaster from the work location and took it to your home without permission. Furthermore, you failed to follow protocol and did not report for your scheduled shift on March 31, 2002. Your actions leave me no other alternative but to reject on probation your employment.*

[3] In its reply to the grievance, the employer reiterated that Mr. Ross had been rejected on probation for cause given that by his actions, he had "failed to perform the duties of a Correctional Officer to the standards of the performance required."

[4] By letter dated January 30, 2003, the employer objected to the jurisdiction of an adjudicator appointed under section 92 of the *Public Service Staff Relations Act* (PSSRA) to hear this matter. The employer argued in part:

*The wording of section 92 of the Public Service Staff Relations Act (PSSRA) does not support this reference to adjudication. Mr. Ross's grievance does not relate to the interpretation or application of a provision of a collective agreement or an arbitral award or a disciplinary action resulting in suspension or a financial penalty, or termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act (FAA). In addition, there is a prohibition in subsection 92(3) of the PSSRA of a*

*reference to adjudication by the Board of a termination of employment under the PSEA.*

*Justice Lemieux in the Leonarduzzi Decision, Federal Court of Canada, Trial Division, T-1231-99, at page 16, paragraph 37, said:*

*"...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"*

*He further added at paragraph 40 of the same decision:*

*"...The issue at hand is that of a dismissal, which the grievor is alleging was made in bad faith, and for which the employer has not given an employment related reason except to say the respondent did not meet the required standards. The employer, however, does not tell the respondent why he did not meet those standards. Therefore, the employer cannot rely on subsection 28(2) to reject employees without giving a bona fide reason."*

*In his letter of rejection on probation, Mr. Ross was informed that he was rejected on probation because of employment related reasons of committing serious infractions under the Code of discipline.*

*Thus, the employer respectfully submits that an adjudicator has no jurisdiction to hear this matter and requests that this reference to adjudication be dismissed without a hearing for lack of jurisdiction.*

[5] On April 28, 2003, UCCO-SACC-CSN advised that it would not represent Mr. Ross at a hearing before the Board.

[6] On April 29, 2003, the Board wrote to Mr. Ross advising him that the Board had received notification that his bargaining agent would no longer be representing him and requesting that he advise the Board regarding whether or not he was prepared to proceed with the hearing scheduled for June 5, 2003. The letter was sent to Mr. Ross via Priority Post but was returned to the Board as unclaimed.

[7] The Board again wrote to Mr. Ross on May 22, 2003, advising him that the Board had decided to deal with the employer's preliminary objection by way of written submissions and advising him that his written submissions were due by June 12, 2003. Again, this letter went unclaimed.

[8] The Board made inquiries and confirmed that the letters had been sent to the correct address.

[9] On June 10, 2003, the grievor faxed a brief note to the Board, indicating that he had retained counsel who needed time to familiarize herself with his case. Mr. Ross's counsel was advised, by way of letter dated June 12, 2003, that she should submit written representations on the issue of jurisdiction to the Board on or before August 15, 2003. A copy of this response to counsel was also sent to Mr. Ross.

[10] On July 10, 2003, a copy of the tentative hearing schedule was sent via facsimile to the grievor's counsel, proposing October 21-24, 2003, as hearing dates for the grievance. Although the Board requested that any proposed changes should be submitted to the Board by July 30, 2003, no comments were submitted by the grievor's counsel.

[11] The Board had not received any submissions from either the grievor or his counsel on the issue of jurisdiction by August 15, 2003. On August 28, 2003, counsel for the employer wrote to the Board and requested that the reference to adjudication be dismissed on the basis of the employer's submissions. The Board wrote to the grievor's counsel on August 29, 2003, advising her that no submissions had been received and that the matter would therefore be referred to the Board for a decision. No response was received to this communication.

[12] Finally, on October 2, 2003, the Board again wrote to the grievor's counsel and advised her that the proposed hearing for October was cancelled and that the question of jurisdiction would be decided upon based on the material submitted. Again, no response was received to this communication.

[13] A determination of the jurisdictional question requires a review of certain provisions of both the PSSRA and the *Public Service Employment Act* (PSEA). The relevant provisions of the PSEA are as follows:

*28.(1) An employee who was appointed from outside the Public Service shall be considered to be on probation from the date of the appointment until the end of such period as the Commission shall establish by regulation for that employee or any class of employees of which that employee is a member.*

(1.1) A probationary period established pursuant to subsection (1) is not terminated by any appointment or deployment of the employee made during the period.

(2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.

[14] The relevant provisions of the PSSRA are as follows:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.

(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with

*respect to any termination of employment under the Public Service Employment Act.*

[15] In any case involving a rejection on probation, the employer must establish that the termination of employment was during a period of probation and that the reason or reasons for termination were related to employment issues and not for any other purpose. In presenting evidence to show that a rejection on probation has occurred, the employer need not establish just cause or the merit of the stated employment-related reasons for rejection.

[16] In this case, the grievor has acknowledged that his termination was a rejection on probation. The employer's letter of rejection on probation was filed with the Board and is referred to earlier in this decision. The employer has determined that Mr. Ross's misconduct during his period of probation made him unsuitable for continued employment as a correctional officer. The fact that such misconduct could have led to the imposition of disciplinary sanctions is irrelevant since the employer has decided to exercise the powers given to it by section 28 of the PSEA rather than impose disciplinary measures.

[17] I am satisfied that the employer has acted in good faith on the ground that Mr. Ross was unsuitable for the position of correctional officer. Having come to this conclusion, I am left without jurisdiction in this matter.

[18] This reference is therefore dismissed for want of jurisdiction.

**Yvon Tarte,  
Chairperson**

OTTAWA, October 24, 2003.

