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Citation: 2004 PSSRB 109



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

DAVE DHALIWAL

Grievor

and

TREASURY BOARD  
(Solicitor General Canada - Correctional Service)

Employer

*Before:* D.R. Quigley, Board Member

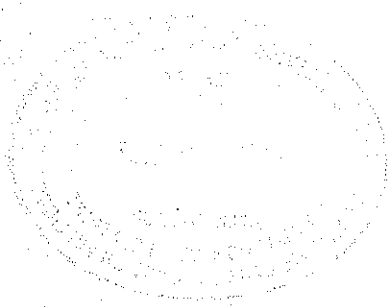
*For the Grievor:* Corinne Blanchette, UCCO-SACC-CSN

*For the Employer:* Richard Fader, Counsel



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Heard at Abbotsford, B.C.,  
May 27, 2004.



## DECISION

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[1] Dave Dhaliwal was advised on May 7, 2003, that he was rejected on probation, effective May 28, 2003. He was employed as a correctional officer (CX-1) at Matsqui Institution, in Abbotsford, B.C., and subject to the Correctional Services group collective agreement between the Treasury Board and the Union of Canadian Correctional Officers-Syndicat des agents correctionnels du Canada-CSN (Codes: 601 and 651; expiry date: May 31, 2002) (Exhibit G-1). In the letter of rejection signed by the Warden, Paul T.L. Urmson (Exhibit E-10), the grievor was advised that he was unreliable and not "personally suitable to be employed as a Correctional Officer", as a result of an inordinate use of leave.

[2] In his opening remarks, counsel for the employer stated that the grievor's rejection on probation was for cause, pursuant to section 28 of the *Public Service Employment Act*, and not disciplinary in nature. He noted that the burden of proof lies with the employer to present the cause for the rejection on probation. Once the cause has been established, the burden of proof shifts to the grievor to prove that the rejection on probation was a "sham" or a "camouflage". In the case at hand, the grievor must prove that the Warden's decision to reject him during his probationary period was for disciplinary reasons.

[3] In her opening remarks, the grievor's representative agreed that the grievor was rejected on probation and received a letter to that effect during his probationary period. However, the grievor alleges that the Warden's decision to reject him on probation was made in bad faith.

[4] Counsel for the employer called one witness, the Warden, and filed 10 exhibits. The grievor testified and three exhibits were filed on his behalf.

### The Facts

[5] Paul T.L. Urmson's 19-year career with the public service has been exclusively with the Correctional Service Canada (CSC) in various institutions throughout Western Canada. He is currently the Warden at Matsqui Institution, a medium-security facility that houses approximately 370 inmates.

[6] The Warden noted that his primary responsibility is to manage the Institution in conformance with the *Correctional Conditional Release Act*, which replaced the *Penitentiary Act* in 1985. He is also responsible for enforcing other acts and

regulations and ensuring the safety and security of staff, inmates and the general public. His direct reports are the Deputy and Assistant Wardens and clerical staff. His indirect reports, which include correctional officers, number approximately 300. He, in turn, reports to Don Demers, the Regional Deputy Commissioner. He has an annual budget of approximately 15 million dollars, as well as a budget of 2.5 million dollars for operational and maintenance costs and is responsible for approximately 50 million dollars in assets.

[7] The Warden stated that there are two types of posts within the Institution that are manned by correctional officers. The "250 post" is manned from Monday to Friday by correctional officers working shifts of 10 to 12 hours. A formula of 1.21 person years (PYs) is used to ensure the required manpower is available to cover off officers who are on leave (i.e. sick leave, annual leave, family-related leave, etc.). The "365 post" is manned by correctional officers 24 hours per day, 365 days per year. The formula for this post is 1.77 PYs. An appropriate number of correctional officers must be on duty at each post for a number of reasons, with safety being foremost. Therefore, to ensure the proper manning of these posts, scheduling is a challenge, as costs must be within the allocated budget.

[8] Each post has a "roster" (shift schedule). The roster covers 14 days and forms part of the collective agreement. The roster includes spare officers to cover off officers who are absent. If no officer is available to cover off another officer, then overtime is scheduled. It is essential that the roster be managed and monitored properly to ensure that the formula meets any changes that have been made to the collective agreement. Representatives of the bargaining agent and employer are currently involved in discussions in an attempt to ensure the validity of the formula.

[9] The Warden identified Exhibit E-1 as the letter that was sent to the grievor on May 21, 2002, offering him an indeterminate position as a CX-1. The letter states, in part:

*Under Section 28 of the Public Service Employment Act, an employee shall be considered to be on probation from the date of appointment until the end of such a period as the Commission may establish for an employee or class of employees. The Deputy Head may, at any time during the probation period, give notice to the employee that he intends to reject the employee for cause at the end of such notice*

*period. The probation period set out for your classification is twelve (12) months....*

[10] The grievor accepted the offer of employment, as stated, on May 27, 2002 (Exhibit E-1).

[11] The Warden identified Exhibit E-2 as a computer printout of the grievor's leave history for 2002/2003. He noted that in accordance with subclause 30.15(b) of the collective agreement, employees are entitled to five days of family-related leave at the beginning of each fiscal year (April 1<sup>st</sup>), whether they are on probation or not.

[12] The Warden identified Exhibits E-3, E-4 and E-5 as memoranda sent on his behalf by Christina Photinopoulos, Acting Coordinator of Correctional Operations, to Lin Wallin, Unit Manager, 1st Floor Living Unit. The memoranda advised Mr. Wallin that the Warden would not sign the leave without pay requests submitted by the grievor, unless a written explanation was provided by Mr. Wallin outlining the issues that led to the overuse by the grievor of his family-related leave credits. The leave without pay requests were submitted to compensate for the grievor's absences, as he did not have any family-related leave credits available to use. The absences were for January 1, 2003 (Exhibit E-4), January 24, 2003 (Exhibit E-3), and February 5, 2003 (Exhibit E-5).

[13] The Warden noted that he spoke to Mr. Wallin and to Brooke Weeks, who was A/Unit Manager, with respect to the grievor's high usage of both his sick leave and his family-related leave credits. He also contacted Susan Mackenzie, the Chief of Personnel, in order to review the grievor's leave records while he attended a 12-week training program for correctional officer recruits. This training, known as "CORE", is compulsory and the recruits must complete and pass it before they are taken on strength.

[14] The Warden testified that Mr. Wallin and Ms. Weeks counselled the grievor with respect to his usage of family-related leave and the need to apply for leave without pay. He identified Exhibit E-6 as a memorandum sent to him by Ms. Weeks on February 13, 2003, following a meeting with the grievor. The memorandum reads as follows:

*Dave Dhaliwal was interviewed on 03/02/12 regarding his Leave Without Pay on 03/01/01, 03/01/24 and 03/02/05. Dave stated that the one-year anniversary of his mother's death is approaching and he is having a very difficult time with it. As a result, he has called in family related leave on the above noted days. He indicated that he was not aware that he had used all of his Family Related Leave and was compliant in signing off the designated Leave Without Pay. Dave indicated that he is seeking assistance through the Employee Assistance Program. He feels with the assistance of EAP, his leave will no longer be an issue. Dave was provided with a copy of his leave record.*

[15] The Warden identified Exhibit E-7 as another memorandum sent on his behalf by Ms. Photinopoulos to Ms. Weeks on March 17, 2003. Again, Ms. Photinopoulos indicated that the Warden would not sign the leave without pay request submitted by the grievor to cover his absence of March 5, 2003, without a written explanation from Ms. Weeks.

[16] On April 17, 2003, Ms. Weeks replied to the Warden, as follows (Exhibit E-8):

*Mr. Dhaliwal has exhausted his sick leave credits on a number of occasions. He has been spoken to in the past regarding this issue, yet the problem still exists. As Dave is still on probation until May of 2003 there has been discussion as to how to best proceed. The Chief of Personnel is currently reviewing the case. In the meantime, Leave Without Pay is being sought for 1.5 hours from 03/03/05. It is recommended that the LWOP be approved until a decision is made as to how to proceed in the case (Approval of the LWOP will also assists (sic) in finalizing the year-end leave process).*

[17] The Warden stated that his concerns were twofold. Not only was the grievor a young man who had exhausted his family-related leave credits, but he had exhausted his sick leave credits, as well. The Warden questioned the grievor's dependability, whether he was committed to the CSC and whether he was exploiting the leave provisions provided for in the collective agreement.

[18] The Warden further stated that when he received Ms. Weeks' memorandum of April 17, 2003 (Exhibit E-8), he was, at that point, considering whether or not to reject the grievor on probation. In reviewing the grievor's leave history for 2002/2003 (Exhibit E-2), he compared the grievor's use of sick leave, family-related leave, leave without pay and vacation leave to his work schedule for the period May 22, 2002, to May 7, 2003. He also included in his analysis the grievor's rest days (Exhibit E-9). The

purpose of his analysis was to determine if there was a pattern of leave utilization by the grievor. The Warden stated that a very clear picture emerged that the grievor's requests for family-related and/or sick leave coincided with his days of rest. For example, on August 16, 2002, after five days of rest, the grievor took four hours of family-related leave; on September 24, 2002, before five days of rest, he took four hours of family-related leave; on November 5, 2002, he extended his five days of rest by taking four hours of family-related leave; on November 8, 2002, before his five days of rest, he took seven hours of family-related leave; on November 26, 2002, before his five days of rest, he took three hours of family-related leave; on December 5, 2002, before his five days of rest, he took 12 hours of sick leave; on December 20, 2002, after five days of rest, he took four hours of family-related leave; on December 22, 2002, he took two days of vacation leave before he began five days of rest, and on January 1, 2003, he took sick leave before his five days of rest.

[19] The Warden stated that the coincidence of the grievor's family-related and sick leave usage with his days of rest was too much to accept. The grievor's actions demonstrated that he was not dependable and was not committed to the CSC. The Warden noted that the grievor's absences were not only an inconvenience, but also an expense to the Institution. After consulting with National Headquarters, he decided to reject the grievor on probation, pursuant to the authority delegated to him under section 28 of the *Public Service Employment Act*.

[20] The Warden explained the rationale for rejecting the grievor on probation. The average correctional officer takes approximately 9 to 9.5 days of sick leave and 2.4 to 2.5 days of family-related leave during a fiscal year. The grievor, however, exhausted his family-related and sick leave entitlements before the end of the fiscal year. The Warden noted that his budget does not allow him to replace correctional officers who exceed those averages. He also noted that although he understands that correctional officers are entitled to take sick leave, it is usually taken to cover, for example, a period of absence due to illness. In less than one year, the grievor exhausted his family-related and sick leave credits and, in addition, requested 23.5 hours of leave without pay. As a result of the grievor's exhaustion of his leave credits, the Warden incurred additional costs to replace him during his absences. The Warden stated that the grievor is not the type of employee whom he has the luxury to afford.

[21] On May 7, 2003, the grievor was given the letter signed by the Warden, dated April 30, 2003 (Exhibit E-10), advising him that he was rejected on probation, effective May 28, 2003.

[22] In conclusion, the Warden stated that after the grievor received the letter advising him that he was rejected on probation, he (the Warden) had a discussion with Claus Hallshmidt, the Institution's psychologist and Employee Assistance Program (EAP) representative, who advised him that the grievor was depressed, was having a difficult time accepting that his employment had been terminated and would not be coming back to work. As a result of this information, the Warden decided to grant the grievor leave with pay from May 8 to 28, 2003; that is, he was paid in lieu of the notice period provided for in section 28 of the *Public Service Employment Act*.

[23] During cross-examination, the Warden agreed that the grievor earned one and one-quarter (1 1/4) days of sick leave credits per month in accordance with subclause 31.01(a) of the collective agreement.

[24] He agreed as well that the grievor's work schedule was four days on, followed by five days of rest. As a result, when the grievor took sick leave or family-related leave, there was a 50 percent chance that this leave would occur either at the start or at the end of his scheduled five days of rest.

[25] He also agreed that his investigation into the number of absences the grievor incurred during his 12-week CORE training revealed that he had taken three days off. He stated, however, that although he never sought a reason for the absences, he felt that three days was unusually high during a 12-week period.

[26] When the Warden was asked to produce the written explanation requested from Mr. Wallin identifying or outlining the issues that led to the exhaustion by the grievor of his family-related leave, he stated that he did not have a copy of any memorandum from Mr. Wallin to that effect. He explained that Mr. Wallin had prepared a note and stored it on the computer's "I" drive. However, because of an agreement reached between the employer and the bargaining agent with regard to privacy concerns, all personal sensitive information stored on the "I" drive is deleted. Therefore, he could not produce a copy of the note Mr. Wallin had prepared.



[27] With respect to the leave without pay requested by the grievor for January 1, January 24 and February 5, 2003, the Warden confirmed that he subsequently approved it. He also acknowledged that Ms. Weeks interviewed the grievor for the first time on February 12, 2003.

[28] As, well, the Warden agreed that although the letter of rejection was dated April 30, 2003, the grievor did not receive it until May 7, 2003, when he presented it to him.

[29] He confirmed that it was after his discussion with Mr. Hallshmidt concerning the grievor's mental state that he let the grievor take leave without pay.

[30] In conclusion, the Warden stated that he did not recall ever having met the grievor prior to giving him the letter of rejection on probation on May 7, 2003.

[31] Dave Dhaliwal began his testimony by outlining the training he received while he attended the 12-week CORE program. In the first month, he learned about the law and how it applies to the CSC's mission statement. In the second month, he had hands-on training on physical and firearm techniques. The third month covered security and personal issues that could affect an employee and his/her career with the CSC, as well as issues surrounding staff well-being. These discussions included avenues available to assist employees with personal problems (i.e. the EAP, the Institution's psychologist, etc.). It was generally agreed that an employee's personal problems were considered to be a detriment to a correctional facility.

[32] The grievor testified that his training began on January 13, 2002. However, he withdrew from the program on February 18, 2002, due to his mother's sudden death on February 17, 2002.

[33] During an emotional and tearful testimony, the grievor detailed the events surrounding his mother's death. On February 16, 2002, his parents celebrated their 31st wedding anniversary. The following evening, during a dinner that included his wife, his parents and his brother, a disagreement occurred. The grievor and his mother exchanged words and, as a result, he left the dinner table and went upstairs. However, shortly thereafter, he heard a frantic call from his father. He immediately returned downstairs to find his mother lying on the floor. His father was yelling at him: "Save my wife. Save my wife." The grievor noted that before he began working at

the CSC, he had worked as a security person and has cardiopulmonary resuscitation (CPR) and first-aid training. Unfortunately, although he gave his mother CPR, he was unable to resuscitate her. He stated: "I gave her her last breath."

[34] The grievor did not inform his classmates of his mother's death. He did, however, mention it to the Assistant Director of CORE Staff College Recruiting, Brian Ferguson, who advised him to take as much time off as he needed before resuming his training. He resumed his training two weeks later and finished the course, ranking second. As well, his classmates elected him Valedictorian. The grievor's representative produced the grievor's CORE marks and assessment (Exhibit G-2).

[35] The grievor testified that he began on-the-job-training on May 8, 2002, and his first official shift as an indeterminate employee was on May 22, 2002.

[36] He noted that prior to joining the public service, he was a manager with the Insurance Corporation of British Columbia (ICBC) and had approximately 50 to 70 employees reporting directly to him. As well, he has occupied various security positions in the law enforcement field.

[37] The grievor testified that at Matsqui Institution he worked a four-day shift (two day shifts (7:00 a.m. to 7:00 p.m.) and two night shifts (7:00 p.m. to 7:00 a.m.)) followed by five days of rest. He noted that if a correctional officer decides to exercise his or her right to use a leave provision, the correctional officer is required to advise the supervisor on duty, preferably giving as much advance notice as possible. However, in reality, 99% of the time a telephone message is simply left with the correctional officer on duty at the Central Control Post, who makes a note of the call and the type of leave requested on the shift schedule.

[38] He noted that an employee's leave history could be found on the *PeopleSoft* program. Each correctional officer has his/her own account and user ID. He stated that in his case, however, even after repeated requests to Ms. Photinopoulos and to an unidentified person at the Personal Health Centre where the program was located, he was never provided with an account or user ID to enable him to access his leave balance.

[39] The grievor explained that the reason he took so much leave (family-related and sick leave) was to allow him to deal with the circumstances surrounding his mother's sudden death. According to his father, if the grievor had not argued with her, she would still be alive today. He noted that after his mother's death, he and his father rarely spoke. At times, the leave he took was to spend time with his father, who was showing signs of being suicidal. The grievor was very emotional during his testimony. He broke down and sobbed: "In my culture, family is everything. I put it above everything else. I lost my mother; I would not lose my father."

[40] In March 2002, the grievor's family, including his father, sister and brother, travelled to India to spread his mother's ashes and did not return to Canada until June 2002. The grievor remained behind and continued to work at Matsqui Institution. During this period of time, he had nightmares and felt responsible for his mother's death. He consulted Sharon Linklater and Claus Hallshmidt of the EAP. He also sought the assistance of the Institution's Chaplain and Sikh Spiritual Consultant, Kuldip Singh Meelu.

[41] The grievor stated: "2002 was like a train wreck for my family". Not only did he lose his mother, but also, on July 12, 2002, his wife and nephew were involved in a serious car accident. His wife's rehabilitation took close to one year and he had to drive her to numerous physiotherapy and medical appointments during that period of time.

[42] The grievor testified that on May 6, 2003, at approximately 7:00 p.m., one of his supervisors informed him that the Warden wanted to see him in his office the next day at 7:00 a.m. He met with the Warden the following day, as requested, and it was then that he was given the letter advising him that he was rejected on probation. He left the Institution after his meeting with the Warden but returned at 7:00 p.m. to begin his scheduled shift. However, at 11:00 p.m., he had to leave, as he was too distraught and felt betrayed.

[43] The grievor noted that he was surprised to hear the Warden testify that he was paid from May 8 to 28, 2003, in lieu of the notice period provided in the *Public Service Employment Act*, as he worked all his scheduled shifts.

[44] The grievor recounted the meeting he had with Ms. Weeks on February 12, 2003. He was at his post on the second floor when Ms. Weeks approached him and stated that as he had run out of family-related leave, he would need to request leave without pay. He apologized to her and indicated that she could deduct the amount from his pay and he signed the leave without pay form provided by Ms. Weeks. This discussion lasted only two or three minutes. They then began talking about his mother's death and his seeking the assistance of the EAP and the Chaplain. This discussion lasted about 10 minutes. At no point did Ms. Weeks state that there were consequences for requesting leave without pay. Her only comment was that he should be careful of his leave usage and that he should monitor it. He testified that he never met with any of his supervisors with respect to his leave usage.

[45] The grievor testified, as well, that he never spoke with Mr. Wallin regarding his leave usage. Also, he and his supervisors, Bob Montgomery, Doug Jaes and Trevor Houston, searched the computer's "I" drive but were unable to locate any note that Mr. Wallin might have prepared.

[46] The grievor concluded his testimony by noting that it was as a result of his mother's sudden death, internal family problems and the serious car accident involving his wife and nephew that he exhausted his family-related and sick leave credits. He commented: "The persons at Staff College were my family during those times. I feel betrayed. I still feel betrayed or I would not be sitting here today."

[47] Counsel for the employer did not cross-examine the grievor.

### Arguments

#### For the Employer

[48] Counsel for the employer referred to the decision in *Todd Boyce v. Treasury Board (Department of National Defence)*, 2004 PSSRB 39, and stated that adjudicators should not second-guess a manager's decision to reject an employee on probation. The issue an adjudicator must turn his or her mind to is whether the decision-maker lied and whether the rejection on probation was a sham or a camouflage.

[49] The decision-maker in this case was the Warden and he clearly states in the letter of rejection that the reason is that the grievor exhausted his sick leave and family-related leave entitlements and, in addition, requested 23.5 hours of leave

without pay. As a result of this inordinate use of leave, the Warden did not feel that the grievor was suitable to be employed as a correctional officer.

[50] Counsel also noted that the grievor's schedule for the period May 22, 2002, to May 20, 2003 (Exhibit E-9), clearly shows that there was a pattern regarding his use of family-related and sick leave; it coincided with his days of rest (i.e. either before or after).

[51] Although the grievor testified as to why he exhausted his family-related and sick leave credits, the Warden was unaware as to the reason when he took the decision to reject the grievor on probation. It was at this adjudication hearing that the grievor explained for the first time the reason for his absences. Counsel argued that regardless of whether the Warden's decision was right or wrong, an adjudicator does not have jurisdiction with respect to any termination of employment under the *Public Service Employment Act*, pursuant to paragraph 92(3) of the *Public Service Staff Relations Act (PSSRA)* or section 11(2) of the *Financial Administration Act*. If it were the intention of Parliament to give adjudicators more scope in their jurisdiction, it would have done so.

[52] Counsel stated that there was nothing in the Warden's testimony that would indicate that he was lying when he made his decision and there is no evidence to indicate that the decision was a sham or a camouflage. The evidence clearly shows that the grievor's numerous absences demonstrated his unreliability, which resulted in additional costs being incurred by the Institution.

[53] In conclusion, counsel for the employer stated that the grievor exhausted his leave credits as fast as he earned them.

[54] Counsel for the employer also referred to the following cases: *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.); *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (T.D.); *Canada (Attorney General) v. Leonarduzzi*, [2001] F.C.J. No. 802; *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33; *Ross v. Treasury Board (Correctional Service Canada)*, 2003 PSSRB 97; *Spurrell v. Office of the Superintendent of Financial Institutions*, 2003 PSSRB 15; and *Archambault v. Canada Customs and Revenue Agency*, 2003 PSSRB 28.

For the Grievor

[55] The grievor's representative noted that pursuant to the collective agreement, a correctional officer is entitled to 15 days of sick leave and five days of family-related leave during a fiscal year. She stated that the grievor's requests for sick leave and/or family-related leave were always approved.

[56] The Warden testified that both Mr. Wallin and Ms. Weeks counselled the grievor with regard to his leave usage. The fact is, he was only counselled once by Ms. Weeks on February 12, 2003, but that was hardly conclusive. Ms. Weeks knew about his mother's sudden death and family problems and, as such, their meeting revolved more around that concern.

[57] Although the Warden requested on three different occasions that Mr. Wallin provide him with a written explanation as to why the grievor needed leave without pay, no documentary evidence was submitted to that effect; the Warden testified that he was unable to produce the note supposedly prepared by Mr. Wallin.

[58] The grievor's representative noted that the grievor had never worked in the federal public service prior to joining the CSC and therefore did not realize that his leave usage was unreasonable. As well, he was never disciplined, either in a corrective or a progressive way, for his leave usage.

[59] Ms. Blanchette argued that the Warden did not give the grievor the required 30 days' notice for a rejection on probation. The grievor received his letter of rejection on May 7, 2003; therefore, he should have been paid until June 7, 2003.

[60] She noted that the Warden testified that after the grievor was given the letter of rejection on May 7, 2003, he was paid until May 28, 2003, in lieu of working. The grievor, however, testified that he worked all his scheduled shifts up to May 28, 2003, and this was not contradicted.

[61] Termination of employment is a very serious matter; it is the last resort in an employee-employer relationship. Whether it was through neglect or just a lack of information, the fact is the employer did not show any compassion towards the grievor and his family. The grievor was not given an appropriate amount of time to improve his leave usage in view of the devastation going on in his personal life. As well, he was not provided with a copy of Ms. Weeks' memorandum of April 17, 2003 (Exhibit E-8).

[62] Ms. Blanchette concluded her arguments by noting that the Warden's decision to reject the grievor on probation was made in bad faith. Therefore, he should be reinstated in his former position as a CX-1 at Matsqui Institution with no loss of pay and benefits.

[63] Ms. Blanchette referred to the following cases: *McMorrow v. Treasury Board (Veterans Affairs Canada)*, PSSRB File No. 166-2-23967 (1994) (QL); *Dekoning v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-2-22971 and 149-2-129 (1993) (QL); and *Anonsen v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-17193 (1987) (QL).

#### Reasons for Decision

[64] An adjudicator's jurisdiction to entertain a grievance concerning a rejection on probation is circumscribed by section 28 of the *Public Service Employment Act*, which states:

*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.*

[...]

*(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.*

[65] Subsection 92(3) of the *PSSRA* states:

*(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 employer under the Public Service Employment Act.*

[66] In cases concerning rejection on probation, adjudicators appointed under the *PSSRA* have rendered a number of decisions, some of which have been the subject of judicial review by the Federal Court. The decision of Lemieux, J. of the Federal Court,

Trial Division, in *Leonarduzzi (supra)*, sets out the principles to be applied by an adjudicator in considering whether or not he or she has jurisdiction to entertain this type of grievance, particularly in light of subsection 92(3) of the PSSRA. Lemieux, J. states, at paragraph 37 of his decision:

*...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.*

[67] He also states, at paragraph 42:

*The respondent submits that the employer must make a prima facie case that the grievor was terminated for just cause. This is not so. A distinction must be made between an employment related reason and "just cause"...*

[68] He then goes on to consider the decision of the Federal Court of Appeal in *Penner (supra)*, whereby Marceau J.A. endorsed the approach taken by the adjudicator in *Smith* (PSSRB File No. 166-2-3017) and expressed the opinion that it was the only one the legislation supports. Marceau J.A. expressed that approach in the following terms, at page 438 of *Penner*:

*...adjudicators have...accepted that they had no jurisdiction to inquire into the adequacy and the merit of the decision to reject, as soon as they could satisfy themselves that indeed the decision was founded on a real cause for rejection, that is to say a bona fide dissatisfaction as to suitability...*

[69] In denying the application for judicial review in *Leonarduzzi (supra)*, Lemieux J. states, at paragraph 45:

*However, as I see it, the adjudicator required only that the employer demonstrate the rejection was for an employment-related reasons, i.e. a dissatisfaction with the suitability of the employee and, as such, was acting in accordance with the provisions of the PSEA...*

[70] In *Penner (supra)*, the Federal Court of Appeal adopted the test articulated by the adjudicator in *Smith (supra)*:

*In effect, once credible evidence is tendered by the employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes to a shuddering halt.*



[71] Once the employer has done so, then the burden of proof shifts to the grievor to demonstrate that the employer's actions were, in fact, a sham or a camouflage or made in bad faith and, therefore, not in accordance with section 28 of the *Public Service Employment Act*.

[72] In this case, by letter dated May 21, 2002 (Exhibit E-1), the grievor was offered an indeterminate position as a correctional officer (CX-1). The letter indicated that his position had a 12-month probationary period. The grievor accepted the offer of employment, as stated, on May 27, 2002.

[73] On May 7, 2003, the grievor received a letter dated April 30, 2003 (Exhibit E-10), advising him that he was rejected on probation, effective May 28, 2003.

[74] The Warden testified that in less than one year as a correctional officer (CX-1), the grievor exhausted his family-related and sick leave entitlement and, in addition, requested 23.5 hours of leave without pay. He also testified that both Ms. Weeks and Mr. Wallin had counselled the grievor on his leave usage. As well, he stated that in reviewing the grievor's leave usage, he noticed a pattern whereby the grievor took family-related or sick leave either before or after his days of rest. The Warden concluded that this was no coincidence, but rather demonstrated overuse of leave.

[75] According to the Warden, on average, a correctional officer takes 2.4 to 2.5 days of family-related leave and 9 to 9.5 days of sick leave. The grievor's use of sick leave and family-related leave increased the Warden's overtime budget and caused him concern as to the grievor's dependability and the manning of his post during his absences. He, therefore, concluded that the grievor was a liability and as the delegated authority, he made the decision to reject the grievor on probation.

[76] On its face, one could conclude that the grievor's rejection on probation was based on a well-founded employment-related reason. However, in my view and that of the Federal Court, the employer's right to reject an employee on probation is not entirely unfettered. When the employer decides that an employee is unsuitable for the position to which he or she was appointed to, it has an obligation to lead evidence regarding how it came to its decision to reject the employee on probation: *Leonarduzzi (supra)*. In other words, although the onus is on the employee to prove bad faith, the employer must demonstrate what rationale, what building blocks were used to reach such a decision. The employer must lead evidence regarding the building blocks that

led to such a decision. If it does so, the issue of good faith will be dealt with, as the evidence will demonstrate that the decision was made in good faith.

[77] In *Penner (supra)*, Justice Marceau, speaking for the Court, reviewed in detail the several reasons for the judgment in *Jacmain* [1978] 2 S.C.R. 15, and concluded as follows, at page 219:

*A camouflage to deprive a person of a protection given by statute is hardly tolerable. In fact, we therefore approach the fundamental legal requirement for any form of activity to be defended at law, which is good faith...The basic conclusion of the *Jacmain* judgment, as I read it, is that an adjudicator appointed under the PSSR Act is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on the grounds that they were dissatisfied with the suitability of the employee for the position. And, to me, this conclusion follows inexorably from the legislation as it is.*

[Emphasis added]

[78] In *McMorrow (supra)*, then Deputy Chairperson P. Chodos noted:

*...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...*

[79] To determine whether the employer's actions were made in good faith, I must examine the meaning of good faith. In the Treasury Board's "Guidelines for Non-Disciplinary Demotions or Termination of Employment for Cause", good faith is defined as: "Means a manner of conduct based upon honesty of intentions and fairness of treatment." The test or procedure/principles adopted by the Treasury Board with respect to the principles of fairness are:

- *the duty to act in good faith;*
- *the duty to fully inform the employee of what is required from him or her;*
- *the duty to inform the employee that he or she is not meeting the requirements of the position, and to inform him or her of the nature of the deficiency and what the consequences will be if he or she continues to fail to meet the requirements of the position;*

- *the duty to provide the employee with the opportunity to make the necessary adjustments to meet requirements;*
- *the duty to assist the employee in making these adjustments; and*
- *the duty to explore reasonable alternative solutions before demoting the employee or terminating his or her employment.*

[80] What evidence is there in this case that the rejection on probation was, in fact, a sham or a camouflage or that the employer showed such disregard for the elementary notion of fairness as to show bad faith?

[81] The grievor's representative made no argument that the rejection on probation was a sham or a camouflage. Therefore, I will explore the accusation of bad faith.

[82] *Black's Law Dictionary*, 7<sup>th</sup> Edition, defines bad faith as a "dishonesty of belief or purpose". The definition then quotes an extract from *Reinstatement (Second) of Contracts* § 205 cmt. D (1981), which states that a complete catalogue of types of bad faith is impossible but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain; lack of diligence and slacking off; wilful rendering of imperfect performance; abuse of power to specify terms; and interference with or failure to cooperate in the other party's performance.

[83] It is clear to me that the Federal Court recognizes the employer's authority to reject an employee on probation for an employment-related reason. That authority alone allows the employer to terminate the livelihood of an employee, which can have enormous consequences. This authority requires the employer to act in good faith when making such a decision. In my view, if a decision is not made in good faith using the guidelines in the Treasury Board's own policy, the result is a decision made in bad faith.

[84] When he joined the public service, the grievor became entitled to sick leave and family-related leave under the relevant provisions of the collective agreement. He sought and received permission from his supervisors whenever he requested leave; at no time was he denied the leave requested. The grievor testified that he suffered a severe emotional and stressful time when his mother literally died in his arms as he gave her her last breath. His father stopped speaking to him, blamed him for his

mother's death and teetered on suicide. Five months after his mother's death, the grievor's wife and nephew were involved in a serious car accident that required the grievor to use his sick leave and family-related leave to take his wife to the doctor and to physiotherapy appointments. As the grievor stated during his testimony, "2002 was like a train wreck for my family."

[85] As well, unbeknown to him, the grievor was the subject of memoranda from Ms. Photinopoulos to Mr. Wallin and to Ms. Weeks with regard to his requests for leave without pay. The memoranda (Exhibits E-3 to E-5 and E-7) state:

*The Warden will not sign the attached Leave with out (sic) Pay forms for Mr. Dave Dhaliwal without a written explanation/summary from you identifying/outlining the issues that have lead (sic) to the overuse of Family related (sic) Leave credits...*

*...Once you have completed your memo to the Warden, please return the entire package and the C.C.O. clerk..., who will forward the entire package to the Warden for signature and further processing with Pay and Benefits.*

[86] The employer did not file in evidence the memorandum that Mr. Wallin allegedly sent to the Warden that explained, summarized or identified the reasons for the grievor's overuse of his family-related leave. According to the Warden, Mr. Wallin apparently stored it on the computer's "I" drive, but documentation stored on that drive is deleted because of privacy concerns.

[87] I have my doubts regarding the existence of this memorandum. Why was no printout of Mr. Wallin's alleged memorandum left on Mr. Dhaliwal's file? I consider that such a document would be important, especially in a case such as this one. Also, when the Warden spoke to Mr. Wallin and to Ms. Weeks about the grievor's leave usage, why was he not informed of the personal problems the grievor was experiencing? Counsel for the employer stated that it was at this adjudication hearing that the Warden heard the reasons for the grievor's requests for leave for the first time. I find it interesting that although the Warden testified that Mr. Wallin and Ms. Weeks counselled the grievor with regard to his requests for leave, the grievor testified that he never met or talked to Mr. Wallin about this. He did testify that he met with Ms. Weeks on February 12, 2003, at which time she advised him that he needed to apply for leave without pay, as he had no family-related leave credits. The grievor apologized and signed the required form. This conversation lasted about two or three

minutes and her only comment to him was that he should be careful of his leave usage and that he should monitor it.

[88] The grievor also testified that he requested on several occasions to be given access to the *PeopleSoft* program to view his leave history, but his requests were ignored. The employer did not rebut his testimony to this effect.

[89] The employer did not produce any evidence that the grievor was advised that he was not meeting the requirements of his position or what was expected of him. There was no letter of consequence. As well, there was no evidence that any corrective action had been taken or that management tried to explore the issues that caused the grievor to exhaust his family-related and sick leave credits. Also, Exhibit E-8, the memorandum from Ms. Weeks to the Warden, was never shared with the grievor.

[90] The employer's right to reject an employee during probation is not an unfettered right. Principles of fairness and natural justice need to be applied. I believe that the employer has a responsibility towards its probationary employees to at least inquire into the reasons behind an employee's lack of performance, attitude or attendance difficulties. If a pattern was alleged by the Employer, surely it should have been addressed by the Employer, but no comments were made toward the Grievor. The Employer approved the leave "no questions asked".

[91] In the case at hand, the grievor's competence, capabilities and conduct were not at issue. He was ranked second after completing his CORE training and elected Valedictorian, thereby indicating that his peers thought highly of him. There were no allegations made by the employer of insubordination, rudeness or misconduct. The sole reason for the rejection on probation was because of his use of sick leave and family-related leave.

[92] Prior to making and rendering a decision, it is incumbent on the decision-maker to seek out and know the facts. It is my belief that the Warden based his decision on honesty of intention; however, it was not based on all of the relevant facts.

[93] I therefore conclude that although there may have an employment-related issue, the employer has failed to abide by its own document, which establishes principles of fairness and defines good faith. I also conclude that the grievor has met its burden in establishing bad faith, as there was a lack of diligence by the employer that would have

given the grievor an opportunity to discuss, defend or make the necessary adjustments to meet the requirements of his position.

[94] Accordingly, for the reasons noted above, I find that this matter is properly before me and within the jurisdiction of this Board.

[95] I would note that in *The Encyclopaedia of Words and Phrases Legal Maxims*, 47<sup>th</sup> Cumulative Supplement, March 2004, Volume 2, under the term "good faith and fair dealing", it states:

*The obligation of good faith and fair dealing (which is incumbent on an employer in relation to the dismissal of an employee without cause) is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, misleading or overly insensitive.*

[Emphasis added]

[96] The employer met its burden in establishing an employment-related cause; however, the grievor has discharged his burden by establishing bad faith.

[97] This grievance is allowed. Dave Dhaliwal is to be reinstated at Matsqui Institution within two weeks of the date of this decision and he is entitled to all pay and benefits that he would have received as of May 28, 2003.

[98] Given my decision, I will not comment on the Grievor's allegation that the rejection or probation was untimely, as the Employer did not meet the 30-day notice requirement, under the PSEA.

[99] I will remain seized of this matter for a period of 30 days in the event that the parties encounter any difficulties in the implementation of this decision.

**D.R. Quigley,  
Board Member**

OTTAWA, August 6, 2004.