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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**TODD BOYCE**

Grievor

and

**TREASURY BOARD**  
(Department of National Defence)

Employer

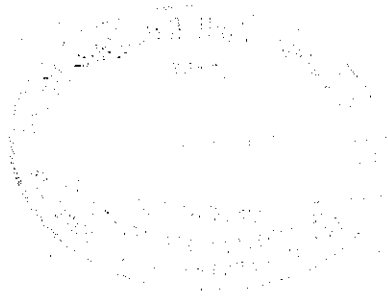
**Before:** Ian R. Mackenzie, Board Member

**For the Grievor:** Yves Rochon, Professional Institute of the Public Service of  
Canada

**For the Employer:** John Jaworski, Counsel

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Heard at Ottawa, Ontario,  
March 3 and 4, 2004.



## DECISION

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[1] Todd Boyce was rejected on probation on June 20, 2003. He filed a grievance against his rejection on probation on July 15, 2003. Mr. Boyce was a CS-1 and is subject to the Computer Systems Administration (CS) group collective agreement between the Professional Institute of the Public Service of Canada (PIPSC) and Treasury Board (Exhibit G-1).

[2] The grievance was referred to adjudication on November 19, 2003. By letter to the Public Service Staff Relations Board ("the Board") on January 7, 2004, the employer submitted that the grievance was outside the Board's jurisdiction. The employer requested that the reference to adjudication be dismissed without a hearing. In its response to the Board, dated February 6, 2004, the bargaining agent submitted that the Board did have jurisdiction on the basis that the action taken by the employer was clearly disciplinary and that Mr. Boyce's termination was in fact a disciplinary discharge. On February 27, 2004, the Board advised the parties that the scheduled hearing would deal with the question of jurisdiction only.

[3] The employer called one witness. The grievor testified and called one additional witness. An order excluding witnesses was requested and granted. Both representatives made opening statements.

[4] During the hearing, the bargaining agent representative, Yves Rochon, objected to the introduction of an investigation report prepared by Warrant Officer Luc Legault. He objected on the basis that this document was not provided to the grievor within a reasonable time, as required under the collective agreement. The report was first seen by the grievor on February 10, 2004. Mr. Rochon also objected on the basis that the author of the report was not going to be called as a witness; therefore, the report could not be properly cross-examined. He referred me to *Vandermeer* (PSSRB File No. 166-2-26848 (1996) (QL)). Counsel for the employer, John Jaworski, submitted that he was not submitting the report for the proof of its contents, but merely to show that this was the document relied on by Lieutenant Colonel (Lt.-Col.) R.R. Schildknecht in reaching his decision to reject on probation. Mr. Jaworski submitted that *Vandermeer* could be distinguished, because in that case the employer was relying on the report for the truth of its contents and called no additional evidence. I allowed the introduction of the document (Exhibit E-6) for the limited purpose of establishing that Lt.-Col. Schildknecht had relied on the document, not for the truth of its contents.

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Evidence

[5] Mr. Boyce's first experience with the Department of National Defence (DND) was as a training consultant from July 2001 to May 2002. He was subsequently hired as a term employee for an initial term from June 24 to January 31, 2003 (Exhibit E-2), as a Junior Help Desk Officer (a CS-1 position) with 76 Communications Group. On December 4, 2003, his term was extended until March 31, 2003 (Exhibit E-3). On February 10, 2003, he was offered an indeterminate position to the same position, effective February 3, 2003 (Exhibit E-3). In the letter of offer for the extension of his term (Exhibit E-3), he was advised that he would remain on probation until June 24, 2003.

[6] The 76 Communications Group provides common network services to DND in the National Capital Region. The Group is responsible for all administrative networks, including fax, cell phones, pagers and computers. The Group is responsible for 14,500 users in 63 buildings. There are approximately 450 military and civilian employees in the Group.

[7] The duties of a Junior Help Desk Officer are to answer telephone and e-mail inquiries from users and rectify computer-related problems. If the problem cannot be fixed over the telephone, the matter is referred to another officer who makes a personal visit. Junior help desk officers also do the set-up and configuration of hardware that needs to be installed and will also set up user accounts. These officers are also responsible for installing new software and updating and upgrading existing software (Summary of Duties, Exhibit E-1).

[8] Lt.-Col. Schildknecht was the Commander of 76 Communications Group from June 2001 to June 2003. He had the delegated authority to reject employees on probation, and it was his decision to reject Mr. Boyce in June 2003. Lt.-Col. Schildknecht informed Mr. Boyce, on June 20, 2003, that he was being rejected on probation and would cease to be an employee as of July 20, 2003 (Exhibit E-5). The reasons given for the rejection on probation were as follows:

*...You are rejected on probation due to the breach of confidence with your employer. The evidence has demonstrated that you can no longer be trusted with network administrative privileges which are required for you to conduct the Service Desk analyst functions, as you would*

*have to access the Department of National Defense network and data.*

[9] Junior help desk officers are given administrative privileges on the network to install software and updates. These administrative privileges also allow the person with the privileges to go into anyone else's computer account and make changes. Administrative privileges also grant access to all the files on each user's network drive (the "Q" drive). Mr. Boyce testified that the administrative privileges do not grant help desk officers access to an individual's e-mail account. However, e-mail accounts have limits placed on storage of e-mails and users often store the overflow of e-mail messages on their "Q" drive. Administrative privileges give access to these stored e-mail messages.

[10] Lt.-Col. Schildknecht initiated an investigation of Mr. Boyce by the National Capital Region Information Security Section (NCR Infosecure) as a result of concerns brought to his attention by André Deschamps, Mr. Boyce's supervisor, and Harold Young, of NCR Infosecure. They raised concerns about the access of user accounts on the server without permission. Lt.-Col. Schildknecht testified that the first indication of any concern arose around March 10 or 11, 2003, when Messrs. Deschamps and Young requested authorization to investigate matters further. There had been rumours in the office that Mr. Boyce had the results of a CS-2 competition that had not yet been made public.

[11] Mr. Deschamps and Luc Legault, of NCR Infosecure, met with Mr. Boyce on March 13, 2003. Mr. Boyce testified that he was not offered union representation for the meeting. He was asked if he had the examination questions in his possession, and he told them that he did not. Mr. Boyce testified that he did not have the questions before he wrote the examination. He testified that he had obtained the examination results after people who had passed the examination were notified.

[12] After the meeting, Mr. Boyce was escorted from the building pending an investigation and was advised that management "would be in touch". He received full pay and benefits during the investigation and up until his rejection on probation. He attended scheduled French language training during this period.

[13] The report of the investigation (Exhibit E-6) and supporting documentation were provided to Lt.-Col. Schildknecht on March 16, 2003. Lt.-Col. Schildknecht testified that the supporting documentation consisted of hard copies of what was found in

Mr. Boyce's account. He reviewed both the report and the documentation. He stated that the documentation revealed that Mr. Boyce had questions for upcoming job competitions in his possession, as well as the results of competitions not yet made public. He also testified that there were numerous personal e-mails that showed disrespect to senior managers, certain peers and clients. Mr. Boyce also had the results of appeals of competitions. The rejection on probation letter (Exhibit E-5) also referred to e-mails "revealing disregard for the service provided" to clients, including deleting client files and waiting for the client to call the service desk to have the files restored.

[14] In cross-examination, Lt.-Col. Schildknecht was asked about the pop-up screen all users see when they log on to their account (Exhibit G-4), which states:

*This computer/network is a DND/CF resource intended for official purposes only. Please note that there shall be no assumption of privacy and that users are subject to monitoring at any time. This network is approved for processing up to "Protected A" information only.*

[15] He testified that employees could store "Protected B" documents on the network, as long as those documents were encrypted. He also testified that the notice was designed to alert people to the fact that they could be monitored.

[16] Mr. Boyce testified that he did not access anything on the network that would have advanced his career. He testified in examination-in-chief that he did access the accounts of other people. He testified that the files that he looked at were unclassified and not security protected or encrypted. In cross-examination, Mr. Boyce testified that he was allowed to browse through saved e-mails (".pst" files) of other users. He also testified that he accessed the "Q" drive of Ms. Fortin, of DND Human Resources, and downloaded the results of a CS-2 competition after someone told him that the results were available there. He also testified that he looked at the "Q" drives of at least three individuals. Mr. Boyce stated that he would locate documents by performing a "wild card" search of files on an individual's "Q" drive. He testified that it seemed to be the attitude at the help desk that officers could browse through network drives.

[17] Mr. Boyce testified that he never deleted files on the network. He attributed this allegation of the employer to some personal e-mails he wrote called "Bastard Operator from Hell" (Exhibit G-11), which were intended to be humorous. He testified that these e-mails were adapted from a website of the same name (Exhibit G-12). He adapted these texts during downtime between calls to the help desk. He sent them to

approximately three other people. He testified that help deskwork is considered by those in the information technology field to be high stress and that he needed something to do in between calls. Other personal e-mails were to his girlfriend who also worked at DND. Mr. Boyce testified that the results of appeals of competitions found on his computer were, in fact, publicly available documents posted on the *Publiservice* website.

[18] The investigation report referred to a password used by Mr. Boyce to protect certain files that he had downloaded from other accounts. Lt.-Col. Schildknecht testified that the password that Mr. Boyce had initially hesitated to provide to the investigators was "Fuchu2" and that he considered it to be inappropriate. Mr. Boyce testified that he was not reluctant to give the password but when the investigators called him at home, he simply paused for a few moments before spelling it out. Mr. Boyce stated that it was an alphanumeric password based on the name of an instructor at the Royal Military College.

[19] Lt.-Col. Schildknecht testified that once he learned that Mr. Boyce had obtained the results of a competition, he concluded that breach of trust concerns were raised, and it became a criminal matter no longer within his jurisdiction. He therefore referred the matter to the Military Police, and they commenced an investigation. Lt.-Col. Schildknecht testified that he felt that he could not discuss the administrative investigation results with Mr. Boyce once the matter had been referred to the Military Police. He also testified in cross-examination that he was aware of the principles in the DND Staffing Directive (Exhibit G-2), the departmental discipline policy (Exhibit G-3) and the Treasury Board Guidelines for Discipline (Exhibit G-5). He stated that once he became aware of the breach of trust, the matter became a criminal matter and not disciplinary.

[20] Mr. Deschamps sent an e-mail to Major Lamontagne, Captain Hanrahan and the Military Police on March 20, 2003 (Exhibit G-6), that stated that he had spoken to Mr. Boyce and told him that after the criminal investigation was completed, "depending on the results", an administrative investigation would be done to reinstate him in the workplace.

[21] Mr. Boyce was contacted by the Military Police to set up an interview in June 2003, sometime prior to June 20. Mr. Boyce advised them that they should contact his lawyer to set up a time for an interview. The Military Police did not follow up on this request and Mr. Boyce was never interviewed.

[22] The Military Police contacted Lt.-Col. Schildknecht on June 19, 2003, to advise him that they had sufficient information in order to proceed with criminal charges of breach of trust. He testified that he received confirmation from the Military Police that Mr. Boyce had accessed files that he should not have accessed and that he was abusing his administrative privileges in order to access the accounts of others. After this notification, Lt.-Col. Schildknecht rejected Mr. Boyce on probation. The criminal charges against Mr. Boyce were withdrawn on February 25, 2004 (Exhibit G-13).

[23] Mr. Boyce testified that after his initial interview with Messrs. Deschamps and Legault on March 14, 2003, he was not involved in the investigation and was not given an opportunity to provide information or clarification. He did not see the administrative investigation report (Exhibit E-6) until February 10, 2004.

[24] Mr. Boyce testified that he received positive feedback from clients on his work (Exhibits G-9 and G-10). He also testified that his performance on help desk calls was higher than average, based on weekly reports of calls answered and calls resolved (Exhibit G-8). He also testified that he did not receive any counselling from his supervisor on his performance, as required by the DND Staffing Directive (Exhibit G-2). Lt.-Col. Schildknecht testified that up until March 10 or 11, 2003, he had no indication that there were any problems with Mr. Boyce.

[25] Cory Dodds was a probationary CS-1 help desk analyst in March of 2003; he is now an indeterminate employee. He testified that in March 2003, he had downloaded competition results from someone else's personal network directory and that Mr. Boyce had shown him where to obtain the results. He stated that he went looking for the results because he was "too curious for his own good." He testified that he knew it was not departmental policy to access other individuals "Q" drives without authorization. Mr. Dodds was escorted out of the building after his meeting with his supervisor on March 14, 2003. He was called back to work on the following Tuesday (March 18, 2003). Mr. Dodds was denied administrative privileges for a week and required to read departmental security policies before having his administrative



privileges restored. He received a verbal warning or oral reprimand. He was interviewed by the Military Police on June 24, 2003 (Exhibit G-14).

[26] Lt.-Col. Schildknecht stated at the hearing that the primary reason for rejecting Mr. Boyce on probation was the breach of trust in accessing accounts for non-work-related purposes. It was his opinion that the Department could not have people on its computer networks that were not trustworthy.

### Arguments

#### For Employer

[27] Mr. Jaworski submitted that there was no dispute that Mr. Boyce was a probationary employee. The Federal Court decision in *Canada (Attorney General) v. Leonarduzzi*, [2001] F.C.J. No. 802 (T.D.), holds that the employer must demonstrate a valid employment-related reason for rejecting an employee on probation. In *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), the Federal Court held that misconduct in the workplace can be dealt with in two ways - either by way of discipline or by rejection on probation. An adjudicator can look at the evidence to determine if the rejection on probation was a "camouflage". An adjudicator is not concerned with a rejection on probation as soon as there is satisfactory evidence that the employer, in good faith, rejected an employee on probation because of its dissatisfaction with the suitability of the employee for the position.

[28] Mr. Jaworski argued that Mr. Boyce's actions went to the heart of integrity, trustfulness and truthfulness and that the decision to reject on probation was clearly based on suitability. Mr. Boyce went into other people's computer accounts. Although Mr. Boyce had administrative rights or privileges as part of the responsibilities of a Help Desk Officer, he did not have the right to go looking wherever he wanted on the network. Both Lt.-Col. Schildknecht and Mr. Dodds recognized that employees were not supposed to do this. Mr. Dodds testified that he knew what he did was wrong. There is an element of trust when you give people broad access rights that they will use that access solely for the purpose of doing their job. Mr. Boyce's evidence confirmed that he accessed the account of Ms. Fortin to obtain the results of a CS-2 competition. He also admitted that he had accessed the accounts of three others and had saved a significant number of their documents into a ".pst" file that was password protected. The password that Mr. Boyce used to protect this information was perhaps a little bit embarrassing, but in and of itself is not an issue here.

[29] Mr. Jaworski submitted that the e-mails sent by Mr. Boyce under the heading "Bastard Operator from Hell" (Exhibit G-11) showed a certain disregard for the employer, and for his position as Help Desk Officer. It also showed poor judgement on his part in downloading and keeping this material on his computer.

[30] Mr. Jaworski noted that Mr. Dodds was not disciplined for what he had done. However, Mr. Dodds realized that it was wrong at the time that he downloaded the competition results and this was the only document that he had downloaded.

[31] Mr. Jaworski submitted that Lt.-Col. Schildknecht made his determination on the basis of material provided to him by the investigators. Once he received the call from the Military Police about having sufficient evidence to commence a criminal proceeding, he determined that Mr. Boyce was unsuitable for the job of Junior Help Desk Officer. This is a valid employment-related reason. It is true that Mr. Boyce was not convicted for breach of trust, and the employer does not question the principle of innocent until proven guilty. However, this is not the issue here, as Lt.-Col. Schildknecht came to the determination that Mr. Boyce's actions made him unsuitable for the position.

[32] Mr. Jaworski concluded that there was no evidence that what Lt.-Col. Schildknecht did was either a sham or a camouflage, and he did not act in bad faith. He had the option of rejection on probation and he chose that option for the valid employment-related reason that Mr. Boyce was not suitable for the job.

[33] Mr. Jaworski also referred me to *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33; *Archambault v. Canada Customs and Revenue Agency*, 2003 PSSRB 28; *Spurrell v. Office of the Superintendent of Financial Institutions*, 2003 PSSRB 15; and *Ross v. Treasury Board (Correctional Services Canada)*, 2003 PSSRB 97.

#### For the Grievor

[34] Mr. Rochon submitted that the employer failed to meet the burden of showing that the rejection on probation was for an employment-related reason. The employer acted in bad faith and in violation of the basic principles of natural justice, making the rejection on probation a sham. In *Penner (supra)*, the court stated that an adjudicator is entitled to look into the matter to ascertain whether the case is really what it appears to be. As soon as there is evidence that the employer acted in bad faith, an

adjudicator has jurisdiction. In *Leonarduzzi (supra)*, the court stated that the employer must provide some evidence that shows a real employment-related reason for rejection. The employer's reason for rejecting Mr. Boyce on probation was based on truncated and distorted facts and does not meet the standard of legitimacy.

[35] Mr. Rochon referred me to the Federal Court, Trial Division, decision in *Canada (Attorney General) v. Matthews* (1997), 139 F.T.R. 287, where the court concluded that an employee who had been laid off under the Workforce Adjustment Directive was terminated for disciplinary reasons. The court concluded that the established policies for lay-off had been contravened and that such policies should be applied uniformly and not selectively. In Mr. Boyce's case, the evidence shows that the employer violated its staffing and discipline policies.

[36] Mr. Rochon also referred me to a decision of the Quebec Labour Relations Board: *Blais c. Société des Loteries Vidéo du Québec Inc.*, [2003] D.C.R.T.Q. No. 14. This decision holds that there is a requirement to forewarn an employee that he is doing something wrong before resorting to termination. It also stands for the proposition that an employee can use e-mail for personal use. Mr. Rochon stated that if the employer prohibited the use of e-mail for personal matters, there would be quite a few discipline cases in the federal public service.

[37] Mr. Rochon submitted that the basic principle of natural justice has not been respected in Mr. Boyce's case. The departmental policy on probationary employees requires that the Department provide reasonable guidance or assistance to the employee (Exhibit G-2). Up until March 14, 2003, there was no indication that Mr. Boyce's performance was putting his job in jeopardy. In fact, Mr. Boyce had received positive feedback from clients on the quality of his work. The employer violated its own standards of discipline (Exhibit G-3), as Mr. Boyce was not offered union representation and was not allowed to provide his input. He was not provided with a copy of the investigation report, nor was he given a chance to provide his side of the story.

[38] Mr. Rochon argued that the rejection on probation letter (Exhibit E-5) was biased, erroneous and truncated. The material in Mr. Boyce's possession was not for his own career advancement. The employer could not demonstrate how his career was advanced. Mr. Boyce consulted this material after the competition had taken place. The employer could not confirm that Mr. Boyce deleted files, as alleged, and Mr. Boyce

denied this. If he had been given an opportunity to explain himself, Mr. Boyce would have told the employer that the e-mails sent to his girlfriend were meant as jokes and were written in between service calls. Mr. Boyce testified that the position of Help Desk Officer is a high-stress position. Humour is a good way of coping with that level of stress. Mr. Boyce would also have explained that the e-mails were inspired by a website.

[39] Mr. Rochon submitted that the documents that were in Mr. Boyce's possession were not "Protected A or B", nor were they encrypted. If the files were sensitive, steps should have been taken to ensure that the documents were not so readily accessible to those with administrative privileges.

[40] Mr. Rochon argued that the investigation report (Exhibit E-6) was no more than hearsay, as it did not include the documents referred to in the report, and the author of the report did not testify. The report is filled with inaccuracies. The reference in the report to "rumours" being started should not be held against Mr. Boyce. Furthermore, there was no evidence before the hearing about these rumours. Many of the facts contained in the report should not be considered detrimental, such as the presence of documents from the *Publiservice* website, which are publicly available documents. Also, the report suggests a reluctance to provide a password, when Mr. Boyce testified that there was no such reluctance. The distortion of the password is another example of bias against Mr. Boyce. As Mr. Boyce testified, the password was not intended to be rude.

[41] Mr. Rochon argued that Lt.-Col. Schildknecht made up his mind early on in the investigation. He decided that he did not need to hear from Mr. Boyce to hear his perspective. Lt.-Col. Schildknecht's accusations that Mr. Boyce was disloyal and self-interested were out of proportion to the fact that the documents at issue were unclassified and on a shared network. This is an indication of his bias against Mr. Boyce. He did not wait for the outcome of the criminal process. The criminal investigation was still underway when Mr. Boyce was rejected on probation. The Military Police took the statement of Mr. Dodds on June 24, 2003, four days after the letter of rejection. The criminal charges were eventually dropped and Mr. Boyce is not guilty of any criminal offence. Lt.-Col. Schildknecht stated that competitions might have been compromised as a result of Mr. Boyce's actions. However, no evidence was provided to confirm that suspicion.

[42] Mr. Rochon submitted that Mr. Boyce's suspension with pay should still be considered as a disciplinary action pursuant to the *Financial Administration Act*. Mr. Boyce was never permitted to provide his side of the story and was never allowed to provide a response to the Military Police report. He was treated contrary to the administrative procedures for probationary employees established by the Department. Specifically, in CPAO 7.06 (Exhibit G-3), there is a provision requiring that performance factors be assessed (paragraph 20). The Policy also requires that employees be given an opportunity to respond to the results of an investigation (paragraph 22). Mr. Boyce was deprived of his fundamental right to respond to the accusations against him. Lt.-Col. Schildknecht was both judge and jury and did not give any weight to the evidence that Mr. Boyce could have brought to his attention.

[43] The process was also an inequitable one, Mr. Rochon submitted. Mr. Dodds was treated differently, even though his circumstances were similar to Mr. Boyce's.

[44] Mr. Rochon concluded that the employer did not follow due process in coming to its decision to reject Mr. Boyce on probation. The process was biased and unfair and the reason for rejection was unfounded. The rejection on probation was therefore a sham and a camouflage. This was the action of a heartless and vengeful employer. If it is allowed to go unchecked, there will be more cases of abuse of authority that will undermine the credibility of public service employees.

[45] Mr. Rochon also referred me to *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225.

### Reply

[46] Mr. Jaworski submitted that, of course, Mr. Boyce's career was not advanced by his obtaining information on competitions, but that was solely because he was caught. Since it was unclear from the investigation whom the information had been forwarded to, Lt.-Col. Schildknecht testified that they took no chances and changed the tests.

[47] Mr. Jaworski argued that just because a document is not protected or encrypted does not mean that you can download it or copy it. Mr. Jaworski wondered how stressful Mr. Boyce's job was, as he seemed to have a lot of time to create and send e-mails. Just because he had time on his hands does not mean he was free to do whatever he wanted.

[48] Mr. Jaworksi submitted that Mr. Boyce was not rejected on probation because of the e-mails he had sent. Rather, he was rejected because of snooping in other employees' "Q" drives. The e-mails showed a general overall attitude that goes to the issue of suitability and were taken into consideration as a whole.

[49] Mr. Boyce had been contacted by the Military Police before his rejection on probation and, on his lawyer's advice, refused to speak to them.

#### Reasons for Decision

[50] The jurisdiction of this Board on cases of rejection on probation is significantly circumscribed by legislation and the decisions of the Federal Court. The end result is that employees rejected on probation have a very high threshold to meet in order to overturn the employer's decision. Conversely, the employer's threshold is relatively low to justify a rejection on probation.

[51] A determination of the jurisdiction of the Board requires an examination of both the *Public Service Staff Relations Act (PSSRA)* and the *Public Service Employment Act (PSEA)*. The relevant sections 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.*

....

(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.*

[52] The *PSSRA*, in subsection 92(3), states that nothing in subsection 92(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*."

[53] There is no dispute that Mr. Boyce was on probation and that the letter rejecting him on probation was received during his probationary period.

[54] The Federal Court, in *Leonarduzzi (supra)*, has determined that the employer is not required to establish just cause, but is only required to establish, through some evidence, that the rejection was related to employment and "not for any other purpose". In *Penner (supra)*, the Federal Court of Appeal adopted the test articulated by this Board in *Smith* (PSSRB File No. 166-2-3017):

...

*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 shuddering to a halt....*

[55] Once the employer has discharged its burden of demonstrating that the rejection was for an employment-related reason, the burden of proof then shifts to the grievor to demonstrate that the employer's actions are in fact "a sham or a camouflage" or in bad faith and therefore not in accordance with subsection 28(2) of the PSEA: *Leonarduzzi (supra)* and *Penner (supra)*.

Was there an Employment-Related Reason?

[56] At the hearing, counsel for the employer relied primarily on Mr. Boyce's use of administrative privileges to access other employees' computer files and copy them to his network drive as the "employment-related" reason for rejection on probation. Personal e-mails and the use of what Lt.-Col. Schildknecht considered to be a rude password were considered by the employer to be of secondary importance. In order to justify a rejection on probation, the employer needs only to demonstrate that it had an employment-related reason for its decision, not that all of its reasons were well founded. It is clear that accessing documents of other computer users, when not required for work purposes, constitutes misconduct. Whether or not Mr. Boyce knew it was wrong at the time is irrelevant; he should have known that it was not reasonable to believe that accessing the accounts of other users for non-work-related purposes was condoned in the workplace. I conclude, therefore, that the employer had an employment-related reason for rejection on probation.

Was the Rejection a "Sham" or in Bad Faith?

[57] The burden now shifts to the grievor to demonstrate that the rejection on probation is a "sham" or in bad faith. The grievor relies on the allegation that the employer did not treat him fairly in the investigation and that he was treated differently from a probationary employee in the same situation.

[58] In *McMorrow* (PSSRB File No. 166-2-23967 (1993) (QL)), the adjudicator noted that, in his view:

*..if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. In these circumstances, where the result of management's actions is to terminate the employment of the grievor based on alleged acts of misconduct, the grievor has a remedy pursuant to paragraph 92(1)(b) of the Act. ...*

*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.*

[59] The employer has demonstrated legitimate concerns about Mr. Boyce's actions in the workplace. Unless those reasons can be characterized as trivial, in my view, the employer's decision cannot be said to be a sham or a camouflage. The reasons relied on by the employer in this case are not trivial, but are significant concerns about his suitability for employment.

[60] In reviewing the Department's administrative procedures that lead to the decision to reject an employee on probation, it is important to note that the adjudicator's role is not to determine the adequacy of those procedures. The role of the adjudicator is to assess whether the actions of the employer showed such a "blatant disregard for elementary notions of fairness as to show bad faith": *McMorrow* (*supra*).

[61] In *McMorrow*, the adjudicator found that the supervisor had reached a firm conclusion to reject on probation prior to the end of the investigation and without the benefit of any input from the grievor. In this case, Lt.-Col. Schildknecht reviewed the results of an administrative investigation, as well as the documentation retrieved from Mr. Boyce's account, prior to coming to a decision. Mr. Boyce did present his views on



the basic allegations at the beginning of the investigation in his meeting with Mr. Deschamps and Warrant Officer Legault. I find that the actions of Lt.-Col. Schildknecht in the investigation and in coming to his decision to reject Mr. Boyce on probation do not show a "blatant disregard for elementary notions of fairness" and, therefore, do not constitute bad faith.

[62] The grievor's representative relied on *Matthews (supra)* in his argument. In that case, the adjudicator determined that in a lay-off on a reverse order of merit, it had been pre-determined by the decision-maker that the grievor was the least meritorious and that the Workforce Adjustment Directive was being used to get rid of the grievor. There is no evidence of such a scheme in this case. As noted above, Mr. Boyce's rejection on probation was not pre-determined prior to the investigation.

[63] Another aspect of "bad faith" is discriminatory or differential treatment of employees in similar situations. Mr. Dodds was also a probationary employee. Mr. Rochon argued that the fact that Mr. Dodds was not rejected on probation showed discriminatory treatment. The evidence shows that Mr. Dodds was treated differently from Mr. Boyce. His network privileges were briefly suspended and he was required to review departmental security policies. Although the evidence was not clear on this point, he may also have received discipline in the form of an oral reprimand (Mr. Jaworski argued that he had not been disciplined). In any event, the evidence given by Mr. Dodds shows that he had possession of only one set of examination results. His evidence was also that he recognized that copying the results from someone else's personal drive was "an error in judgement". Mr. Boyce did not acknowledge that browsing through the files of other users was wrong. The situations of Messrs. Dodds and Boyce are significantly different, and therefore it was not discriminatory to reject Mr. Boyce on probation while deciding to continue Mr. Dodds' employment.

[64] The concerns raised by Mr. Boyce about the fairness of the process used to reject him on probation, including allegations of bias of the decision-maker are not within my jurisdiction, except for the limited extent of assessing whether there was bad faith (see above, paragraph 60). This has been recently confirmed by the Federal Court of Appeal in *Fortin v. Canada* (A.G.), [2003] F.C.J. 1490, which concluded that the fairness of a reverse order of merit exercise was a matter for the Public Service Commission. Renée Caron, in her text, *Employment Law in the Federal Public Service*,

(Canada Law Book, loose leaf) notes that although there is no administrative recourse mechanism available to an employee rejected on probation, an employee may be entitled to procedural protections such as the provision of reasons and a reasonable opportunity to respond. However, the proper forum for raising such issues is the Federal Court and not this Board.

[65] Mr. Rochon also raised, at the hearing, the fact that Mr. Boyce was not given an opportunity to have union representation. There was no grievance filed alleging a breach of the union representation article of the collective agreement. Therefore, I am without jurisdiction to rule on this allegation. I note, however, that since there was no evidence that the meeting related to disciplinary matters, the article would not have been applicable in any event.

[66] In conclusion, I do not have the jurisdiction to hear the merits of this grievance and it is, therefore, dismissed.

**Ian R. Mackenzie,  
Board Member**

OTTAWA, May 17, 2004.