Date: 20190123

Files: 569-02-160 and 161

Citation: 2019 FPSLREB 7

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Bargaining Agent

and

TREASURY BOARD

Employer

Indexed as
Professional Institute of the Public Service of Canada v. Treasury Board

In the matter of policy grievances referred to adjudication

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

For the Bargaining Agent: Sarah Godwin, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, senior counsel

File:
Heard at Ottawa, Ontario,
November 13, 2015.

REASONS FOR DECISION

I. Policy grievance referred to adjudication

1 On October 17, 2014, the Professional Institute of the Public Service of Canada ("the bargaining agent" or PIPSC) referred to adjudication two policy grievances against the Treasury Board ("the employer" or TB) under s. 220 of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *PSLRA*"), with respect to the TB's "Directive on Performance Management" ("the Directive") dated May 5, 2013, and effective April 1, 2014.

2 In Board File No. 569-02-160, the PIPSC grieved that the Directive contemplates withholding pay increments for poor performance. As relief, it requested that this reference be removed from the Directive and any associated guidelines and tools in relation to its collective agreements with the TB.

3 In Board File No. 569-02-161, the PIPSC grieved the management and assessment of employee behaviours or core competencies as set out in the Directive. As relief, it requested the following:

- that the terms "behaviours" and "core competencies" be removed from the Directive and any associated guidelines and tools;
- that behaviours and core competencies not be subject to performance management; and
- that a declaration be made that any and all performance management of employees in TB bargaining units represented by the PIPSC comply with the provisions in its collective agreements with the TB.

4 On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan*

2013 Act, No. 2 (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

5 On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the tittles of the *PSLREBA* and *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

II. Summary of the evidence

6 The parties submitted an agreed statement of facts ("ASF"). It sets out the Directive, the relevant portions of which read as follows:

> . . .
>
> ***3. Context***
>
> . . .
>
> *3.2 This directive supports the* Workforce Policy *(under development) by setting out the responsibilities of deputy heads, or their delegates, regarding the administration of a consistent, equitable and rigorous approach to performance management in their organizations. For employees, it reinforces the importance of demonstrating the required knowledge, skills, competencies, behaviours (including reliability and respectful behaviour expected in a professional workplace), and engagement required to be productive and perform their duties in the service of Canadians.*
>
> *3.3 This directive should be read in conjunction with the following documents:*
>
> - Directive on Recordkeeping . . .
> - Policy Framework for People Management . . .

- Values and Ethics Code for the Public Sector . . .

3.4 This directive is issued pursuant to sections 7 and 11.1 of the Financial Administration Act*.*

3.5 This directive is to be read in conjunction with the Workforce Policy *(under development)*

3.6 Other mandatory requirements are set out in the following:

- Directive on Performance Management Program (PMP (Performance Management Program)) for Executives . . .

- Guidelines on Performance Management *(under development)*

4. Definitions

For definitions of terms used in this directive, see the Appendix.

5. Directive statement

. . .

5.2 Expected results

. . .

5.2.2 Employees are productive, provide excellent service to Canadians and demonstrate the required knowledge, skills, behaviours, competencies and engagement to perform their duties;

5.2.3 Cases of unsatisfactory performance are addressed expeditiously within organizations;

. . .

5.2.6 Organizational performance review regimes are fair, equitable and consistently applied across the core public administration.

6. Directive requirements

6.1 Deputy heads, or their delegates, are responsible for:

. . .

6.1.3 Establishing an employee performance management program . . . that includes the following minimum requirements:

- *A recognition system that recognizes good performance both formally and informally;*

- *Annual written performance objectives for all employees, including commitments that reflect Government of Canada priorities, expected behaviours and learning or development plans;*

- *A rating scale or scales appropriate to the organization and to employees' duties and levels;*

- *Annual written performance assessments for all employees (with the exception of employees on probation, who must be assessed within the probation period). Such annual assessments shall be conducted at the end of each fiscal year and rate the employee on an appropriate scale taking into account the results achieved and how they were achieved;*

- *Mid-year reviews for each employee (with the exception of employees on probation) in the form of informal conversations to review accomplishments in relation to performance commitments, adjust commitments if necessary, solicit and provide feedback and adjust learning plans if necessary;*

- *Active monitoring of probationary periods, including attestation of whether employees pass the probationary period;*

- *Identifying cases of unsatisfactory performance at the earliest opportunity possible and taking one or more of the following actions as soon as possible under the circumstances:*

    - *Developing, and monitoring at regular intervals, an action plan to improve performance;*

    - *Withholding the employee's next scheduled pay increment;*

    - *Demoting the employee; and*

- *Terminating employment.*

• *Any of these actions may be taken at any time during the performance appraisal cycle if, in the deputy head's opinion, they are warranted by the employee's unsatisfactory performance.*

• *The time between the identification of unsatisfactory performance and termination of employment should not exceed 18 months unless, in the opinion of the deputy head, the circumstances of the case justify a longer period.*

. . .

6.3 Deputy heads, or their delegates, shall ensure that employees:

. . .

6.3.4 Demonstrate the knowledge, skills, competencies, behaviours (including reliability and respectful behaviour expected in a professional workplace) and engagement necessary to perform their duties, and conduct themselves in accordance with the values and ethics of the federal public sector; and

. . .

Appendix: Definitions

. . .

Performance Management (*gestion du rendement*)

Helps employees understand their individual contribution to the business objectives of the government. It is a comprehensive approach that includes setting commitments, performance objectives and expected behaviours, assessing results, and providing continuous feedback and coaching. An effective performance management program aligns individual work with departmental and government-wide strategic and operational goals where strong performance is recognized and unsatisfactory performance is addressed promptly.

. . .

[Emphasis in the original]

7 Performance agreements are maintained on an employee's personnel file

for five years from their last administrative use.

8 Following the online posting of the Directive, but before it came into effect, the TB Secretariat ("TBS") developed a number of tools and guides, including but not limited to one named "Performance Management: A Shared Commitment to Sustaining a Culture of High Performance-Manager's and Supervisor's Guide" ("the Supervisor's Guide"). Also in effect at the time the Directive came into being were the following TBS tools and guides:

- "Dealing with Unsatisfactory Performance for Reasons Other than Breaches of Discipline or Misconduct";
- "Culpable and non-culpable behaviour";
- "Guidelines for Discipline"; and
- "Values and Ethics Code for the Public Sector" ("the V&E Code").

9 The ASF sets out the Supervisor's Guide, the relevant portions of which read as follows:

> ***What is Performance Management?***
>
> *Performance management is for everyone in the workplace because all employees, at every level, need to know how they are doing in order to develop their skills and competencies and reach their full potential. Performance management that successfully encourages the majority of public service employees to develop their skills and competencies, even if only marginally, will significantly improve overall productivity because of the tens of thousands of people involved.*
>
> *Performance management encompasses a set of activities that clarify what employees are expected to achieve at work and how they are expected to achieve it. These activities include defining performance expectations in terms of work objectives and expected behaviours (i.e., competencies), setting goals, providing feedback, supporting employee learning and development, and documenting performance in the employee's performance agreement.*

Performance management is an ongoing process that ensures that employees get the direction, coaching and developmental opportunities they need to continually improve their performance. Because such feedback is conducted on a day-to-day basis, there should be no surprises when an employee's performance is formally assessed.

. . .

What Are My Performance Management Responsibilities as a Manager or Supervisor?

. . .

- ***Competencies***

*Also referred to as expected behaviours, competencies describe how the employee is expected to carry out his or her work. They reflect that **how** the work gets done is just as important as **what** work gets done.*

Four core competencies are set out in the performance agreement for all employees in the federal public service who are subject to the Directive on Performance Management*:*

  - *Demonstrating integrity and respect;*
  - *Thinking things through;*
  - *Working effectively with others; and*
  - *Showing initiative and being action-oriented.*

Space is provided in the performance agreement for your organization to include functional and technical competencies should it wish. Functional competencies are behaviours, actions, skills or abilities expected of specific groups of employees who perform particular functions. Technical competencies are behaviours, actions, skills or abilities expected of employees who hold specific jobs. However, for the first round of performance agreements, any identified functional or technical competencies will not be rated.

Components of the Performance Agreement

. . .

Section C: Competencies (Expected Behaviours)

Competencies reflect the employee's expected behaviours. The performance agreement includes four core competencies, which are the behaviours expected of ***all*** *federal public service employees, regardless of level or occupation. (Space is also provided for departments and agencies to include functional and technical competencies if they so choose. However, for the first round of performance agreements, any identified functional or technical competencies will not be rated.)*

. . .

Competencies

Competencies are the behaviours or actions that a job requires the person holding it to perform successfully. They are organization-specific and have sets of behavioural indicators associated with them. They are categorized into three types:

- ***Core competencies****, which are essential for* ***all*** *employees of an organization such as the federal public service to possess;*

- ***Functional competencies****, which are applicable to a particular employee group, such as client service agents, financial specialists, program analysts or human resources professionals; and*

- ***Technical competencies****, which are applicable to a particular job.*

In performance management, competencies make explicit that how work gets done is just as important as what work gets done. *An employee may meet his or her work objectives, but if in doing so he or she breaches the* Values and Ethics Code for the Public Sector *or professional standards, alienates colleagues, or wastes public resources, problems are likely to arise that can undermine workforce productivity and damage the reputation of the federal public service.*

A performance management process identifies the level of proficiency that an employee demonstrates in achieving his or her job competencies. The performance agreement for employees in the core public administration focuses on four core competencies (behaviours). However, space is provided in the performance agreement for departments and agencies to add functional and technical competencies if they

so choose.

The following table lists effective behavioural indicators for each of the four core competencies. They are intended to help managers/supervisors assess the extent to which and how often employees demonstrate each of the core competencies in carrying out their work. They can also help in determining what coaching, training or other learning opportunities that employees may need to improve.

Core Competencies: Effective Behavioural Characteristics

Public service employees who are working effectively are likely to:

- ***Demonstrating integrity and respect***
    - *Exhibit personal and professional behaviours that reflect the values of respect for democracy, respect for people, integrity, stewardship and excellence, as defined in the* Values and Ethics Code for the Public Sector*.*
    - *Discuss ethical concerns with their supervisor or colleagues and, when necessary, seek out and use appropriate disclosure procedures.*
    - *Conduct their work activities in a manner that reflects a commitment to client service excellence.*
    - *Actively contribute to workplace well-being and a safe, healthy and respectful workplace.*
    - *Support and value diversity and bilingualism.*
    - *Act with transparency and fairness.*
    - *Demonstrate respect for government assets and resources, using them responsibly, including by understanding and applying relevant government policies.*

- ***Thinking things through***
    - *Plan and adjust their work based on a thorough understanding of their unit's business priorities and their own work objectives, seeking clarification and direction when uncertain or confused.*
    - *Consider relevant information from various sources before formulating a view or opinion.*
    - *Exercise sound judgment and obtain relevant facts before making decisions.*
    - *Analyze setbacks and seek feedback to learn*

from mistakes.

- ***Working effectively with others***
    - *Share information broadly while observing relevant policies.*
    - *Listen actively to and respect, consider and incorporate the views of others.*
    - *Recognize the contributions and celebrate the successes of others.*
    - *Work collaboratively and relate effectively to others, embracing and valuing diversity.*
    - *Demonstrate an understanding of their colleagues' roles, responsibilities and workloads, and will be willing to balance their own needs with those of other team members.*
    - *Elicit trust, particularly by following through on commitments.*
    - *Deal proactively with interpersonal or personal matters that could affect their performance.*
    - *Manage their own work-life balance and respect the work-life balance of others.*

- ***Showing initiative and being action-oriented***
    - *Stay up to date on team goals, work processes and performance objectives.*
    - *Translate direction into concrete work activities, making the most of the time and resources at their disposal.*
    - *Maintain a constructive attitude in the face of change, setbacks or stressful situations, and are open to different or new solutions or approaches.*
    - *Communicate ideas, views and concerns effectively and respectfully, actively participating in exchanges of ideas with others.*
    - *Identify early warning signs of potential problems and alert manager/supervisor and others, as needed.*
    - *Embrace change and actively look for opportunities to learn and develop professionally and personally.*
    - *Contribute to and participate in process improvements and new approaches.*
    - *Pursue operational efficiencies, demonstrating an appreciation for the importance of value for money, including by willingly adopting new and more efficient ways of working.*

[Emphasis in the original]

10 The TBS also has a training and performance agreement template that measures behaviours and core competencies for use by departments and agencies and that is mandatory for all employees covered by the Directive. Behaviours and core competencies are evaluated separately and then combined for an overall assessment.

11 Employees are evaluated on the following five-point scale:

- "surpassed expectations";
- "succeeded +";
- "succeeded";
- "succeeded -"; and
- "did not meet".

12 Employees are to have three to six work objectives tailored to the department, division, section, and position listed in their agreement.

13 All employees, regardless of position, are assessed on the following same four core competencies:

- demonstrating integrity and respect;
- thinking things through;
- working effectively with others; and
- showing initiative and being action oriented.

14 Section 12 of the *Financial Administration Act* (R.S.C., 1985, c. F-11; "the *FAA*") provides as follows:

Powers of deputy heads in core public administration

12 (1) *Subject to paragraphs 11.1(1)(f) and (g), every deputy*

head in the core public administration may, with respect to the portion for which he or she is deputy head,

> ***(a)*** *determine the learning, training and development requirements of persons employed in the public service and fix the terms on which the learning, training and development may be carried out;*
>
> ***(b)*** *provide for the awards that may be made to persons employed in the public service for outstanding performance of their duties, for other meritorious achievement in relation to their duties or for inventions or practical suggestions for improvements;*
>
> ***(c)*** *establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;*
>
> ***(d)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service whose performance, in the opinion of the deputy head, is unsatisfactory;*
>
> ***(e)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct; and*
>
> ***(f)*** *provide for the termination of employment of persons to whom an offer of employment is made as the result of the transfer of any work, undertaking or business from the core public administration to any body or corporation that is not part of the core public administration.*

Powers of other deputy heads

(2) *Subject to any terms and conditions that the Governor in Council may direct, every deputy head of a separate agency, and every deputy head designated under paragraph 11(2)(b), may, with respect to the portion of the federal public administration for which he or she is deputy head,*

> ***(a)*** *determine the learning, training and development requirements of persons employed in the public service and fixing the terms on which the learning, training and development may be carried out;*

> ***(b)*** *provide for the awards that may be made to persons employed in the public service for outstanding performance of their duties, for other meritorious achievement in relation to their duties or for inventions or practical suggestions for improvements;*
>
> ***(c)*** *establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties; and*
>
> ***(d)*** *provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct.*
>
> ***For cause***
>
> ***(3)*** *Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*

15 The collective agreements between the PIPSC and TB at issue are the following:

- for the Applied Science and Patent Examination (SP) Group, signed on July 31, 2013, and expired on September 30, 2014;
- for the Architecture, Engineering and Land Survey (AR/EN) Group, signed on January 25, 2012, and expired on September 30, 2014;
- for the Audit, Commerce and Purchasing (AV) Group, signed on December 14, 2012, and expired on June 21, 2014;
- for the Computer Systems (CS) Group, signed on December 14, 2012, and expired on December 21, 2014;
- for the Health Services (SH) Group, signed on June 12, 2012, and expired on September 30, 2014; and
- for the Research (RE) Group, signed on February 12, 2013, and expired on September 30, 2014.

16 Each agreement contains clauses on performance management, discipline, pay, and management rights. Copies of the relevant clauses form part of the ASF.

17 All the performance management clauses in the collective agreements contain the following provisions, the only difference being that they are numbered differently depending on the agreement; otherwise, the text is identical:

> ***Employee Performance Review and Employee Files***
>
> *For the purpose of this article,*
>
> *a) a formal assessment and/or appraisal of an employee's performance means any written assessment and/or appraisal by any supervisor of how well the employee has performed his assigned tasks during a specified period in the past.*
>
> *b) formal assessment and/or appraisals of employee performance shall be recorded on a form prescribed by the Employer for this purpose.*
>
> *When a formal assessment of an employee's performance is made, the employee concerned must be given an opportunity to sign the assessment form in question upon its completion to indicate that its contents have been read. An employee's signature on the assessment form shall be considered to be an indication only that its contents have been read and shall not indicated his concurrence with the statements contained on the form.*
> *A copy of the employee's assessment form shall be provided to the employee at the time the assessment is signed by the employee.*
>
> *The Employer's representative(s) who assesses an employee's performance must have observed or been aware of the employee's performance for at least one-half (1/2) of the period for which the employee's performance is evaluated.*
>
> *When an employee disagrees with the assessment and/or appraisal of his work the employee shall have the right to present written counter arguments to the manager(s) or committee(s) responsible for the assessment and/or appraisal decision.*

> *Upon written request of an employee, all the personnel files of that employee shall be made available once per year for his examination in the presence of an authorized representative of the Employer.*
>
> *When a report pertaining to an employee's performance or conduct is placed on that employee's personnel file, the employee concerned shall be given an opportunity to sign the report in question to indicate that its contents have been read.*
>
> . . .

18 Some of the collective agreements' performance management clauses contain one or more of the following provisions, which are numbered differently depending on the agreement but otherwise have identical text:

> . . .
>
> *An employee is entitled to a performance assessment on an annual basis.*
>
> . . .
>
> *An employee has the right to make written comments to be attached to the performance review form.*
>
> . . .
>
> *… submit such written representations as the employee may deem appropriate concerning the report and to have such written representations attached to the report.*
>
> . . .
>
> *Prior to an employee appraisal the employee shall be given:*
>
> > *i. the evaluation form which will be used for the appraisal;*
> >
> > *ii. any written document which provides instructions to the person conducting the appraisal;*
>
> *If, during the appraisal, either the form or instructions are changed, they shall be given to the employee.*
>
> . . .

19 All the collective agreements' standards-of-discipline clauses contain the following provisions. As with the other noted clauses, they are numbered differently but have the identical text:

> ***Standards of Discipline***
>
> *Where written departmental standards of discipline are developed or amended, the Employer agrees to supply sufficient information on the standards of discipline to each employee and to the Institute.*
>
> *Where an employee is required to attend a meeting on disciplinary matters the employee is entitled to have a representative of the Institute attend the meeting when the representative is readily available. Where practicable, the employee shall receive in writing a minimum of two (2) working days' notice of such meeting as well as its purpose.*
>
> *The Employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document concerning the conduct or performance of an employee the existence of which the employee was not aware at the time of filing or within a reasonable time thereafter.*
>
> *Notice of disciplinary action which may have been placed on the personnel file of an employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken provided that no further disciplinary action has been recorded during this period.*

20 Some of the standards-of-discipline clauses contain one or more of the following provisions, again numbered differently but with the identical text:

> . . .
>
> *The Employer agrees to consult with the Institute when existing written Standards of Discipline are to be amended. The Employer further agrees to carefully consider and, where appropriate, introduce Institute recommendations on the matter.*
>
> . . .
>
> *When an employee is suspended from duty or terminated for disciplinary reason [sic], in accordance with paragraph 12(1)(c) of the* Financial Administration Act*, the Employer undertakes to notify the employee in writing of the reason for*

> *such suspension or termination. The Employer shall endeavor to give such notification at the time of suspension or termination.*
>
> *. . .*
>
> *When an employee is suspended from duty the Employer undertakes to notify the employee in writing of the reason for such suspension. The Employer shall endeavor to give such notification at the time of the suspension.*
>
> *. . .*
>
> *At any administrative inquiry, hearing or investigation conducted by the Employer, where the actions of an employee may have had a bearing on the events or circumstances leading thereto, and the employee is required to appear at the administrative inquiry, hearing or investigation being conducted, he may be accompanied by a representative of the Institute. Where practicable, the employee shall receive a minimum of two (2) days notice of such administrative inquiry, hearing or investigation being conducted as well as its purpose. The unavailability of the representative will not delay the inquiry, hearing or investigation more than forty-eight (48) hours from the time of notification to the employee.*
>
> *. . .*
>
> *Subject to the* Access to Information Act *and* Privacy Act*, the Employer shall provide the employee access to the information used during the disciplinary investigation.*
>
> *. . .*

21 As for the clause that provides for the destruction of a notice of disciplinary action after two years, some of the PIPSC and TB collective agreements contain the following sentence at the end of that clause: “This period will automatically be extended by the length of any single period of leave without pay in excess of six (6) months.”

22 All the collective agreements contain the following management rights clause, clause 5.01:

> ***Article 5***
>
> ***Management Rights***

> ***5.01*** *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*

23 All the collective agreements contain the following pay clauses, again with different numbering but identical text:

> ***Pay***
>
> *An employee is entitled to be paid for services rendered at:*
>
> > *a. the pay specified in Appendix "A" for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment,*
> >
> > *or*
> >
> > *b. the pay specified in Appendix "A" for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.*
>
> *The rates of pay set forth in Appendix "A" shall become effective on the date specified therein.*
>
> . . .
>
> ***Rates of Pay***
>
> > *a. the rates of pay set forth in Appendix "A" shall become effective on the dates specified.*
> >
> > . . .
> >
> > *This article is subject to the Memorandum of Understanding signed by the Employer and the Professional Institute of the Public Service of Canada dated July 21, 1982 in respect of red-circled employees.*
>
> . . .

24 All the collective agreements, save and except the one for the CS group, contain the following clause with respect to pay, again with different numbering but identical text:

. . .

Pay Administration

When two or more of the following actions occur on the same date, namely appointment, pay increment, pay revision, the employee's rate of pay shall be calculated in the following sequence:

a. the employee shall receive the pay increment;

b. the employee's rate of pay shall be revised;

c. the employee's rate of pay on appointment shall be established in accordance with this Agreement.

25 All the PIPSC and TB collective agreements contain grids with annual rates of pay based on years of service and effective dates, found in an Appendix, usually identified as Appendix "A". These appendices also contains pay notes, which apply to each different classification group and level and that set out how employees' rates of pay shall be increased either on a six-month or annual basis, identified as a pay increment. The pay grids set out the amount of pay that any given employee in a given position at a specific classification level receives, based on the level agreed to at the time he or she entered into the position, and on the pay notes, which set out the pay increment periods. An example from the collective agreement for the AV group is as follows:

Pay Notes

Pay Increment

1.

a. The pay increment period is twenty-six (26) weeks for employees at levels PG- TIRL and PG-DEV.

b. Each pay increment period for all employees of levels PG-01 to PG-6 inclusive shall be twelve (12) months.

2.

a. For employees in the Purchasing and Supply – Technological Institute Recruitment range, an increase at the end of an increment period shall be to a rate in the pay range which is one hundred and twenty dollars

> *($120) higher than the rate at which the employee is being paid or, if there is no such rate, to the maximum of the pay range.*
>
> *b. For employees in the Purchasing and Supply – Development range, an increase at the end of an increment period shall be to a rate in the pay range which is two hundred and forty dollars ($240) higher than the rate at which the employee is being paid or, if there is no such rate, to the maximum of the pay range.*
>
> . . .

26 Some of the collective agreements also have an appendix that sets out the weekly, daily, and hourly rates of pay for certain positions, along with effective dates and grid step levels.

27 The RE group collective agreement has a section for the Defence Scientific Service ("DSS"), which contains a separate pay plan that includes a merit review section with the following clause:

> ***Merit review***
>
> *6. The purpose of the DS Merit Review is to assess the state of professional development of individual scientists and to determine promotions and appropriate salary progression.*
>
> *7. Actions resulting from a Merit Review shall be implemented effective April 1 of each year.*
>
> *8. The merit review forms the basis for decisions to promote, withhold a pay increment, grant a single increment, grant multiple increments and grant increments over a single or double barrier on the effective date.*
>
> *9. The Merit Review is a three-stage process. The first stage is the provision of information about the employee, with input from the employee, the immediate supervisor and the accountable manager, including assessment and salary recommendations from the accountable manager. The second stage involves a review of the Performance Evaluation and salary recommendation for each DS by a Reviewing Officer. The following types of cases shall be referred to the Defence Scientist Human Resource Management Committee (DSHRMC):*

> *a. recommendations that an employee or the reviewing officer do not agree to:*
>
> *b. recommendations for the withholding of an increment or the awarding of more than 2 increments;*
>
> *c. recommendations for promotion to DS-03, DS-04, DS-05, DS-06 and DS-07;*
>
> *d. unsatisfactory assessment recommendations;*
>
> *e. cases that, in the view of the Chairperson of the DSHRMC, should be reviewed by the Committee. Employees will be informed if such action has been taken.*
>
> *Review by the DSHRMC is the third stage in the process. The DSHRMC normally consists of senior defence research management and members of the external scientific community. The main responsibility of the DSHRMC is to review the matters referred to it and to make the subsequent final decision on the resulting appointment levels and salary actions. It is also responsible for ensuring that classification actions are administered in conformity with the DS Classification Standard and that assessments, the pay plan and the standard are applied uniformly and equitably throughout the population of employees to which they apply. When the DSHRMC changes a recommendation, an employee shall be provided with a written explanation of such changes.*

. . .

III. Summary of the arguments

A. For the bargaining agent

28 Both grievances concern the employer's policy covered by the Directive and allege that it violates several provisions of different collective agreements entered into between the bargaining agent and TB.

29 In file no. 569-02-160, the bargaining agent seeks to remove from the Directive and its guides and tools the reference to the withholding of pay increments for poor performers and a declaration that doing so is not permissible under the provisions of the relevant collective agreements (except where it was specifically contemplated).

30 In file no. 569-02-161, the bargaining agent seeks that from the Directive and its guides and tools, the reference to behaviours and core competencies be removed, that those terms not be subject to performance management, and that all performance management of TB employees represented by the PIPSC comply with the provisions of the relevant collective agreements.

31 Section 221 of the *Act* permits referring a policy grievance to adjudication.

32 Collective agreement provisions supersede employer policies. Management's discretionary rights are fettered by other related rights in collective agreements. In this respect, the bargaining agent referred me to *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2008 PSLRB 84 ("*PSAC v. Treasury Board*"), *KVP Co. Ltd. v. Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73, and *P.S.A.C. v. Canada (Canadian Grain Commission)*, [1986] F.C.J. No. 498 (QL) ("*Canadian Grain Commission*").

33 Consistency and compliance with an employer policy should be dealt with via a policy grievance.

1. <u>Collective agreement provisions</u>

34 All the PIPSC and TB collective agreements have either exactly or similarly worded provisions with respect to performance management, standards of discipline, pay management, and management rights.

35 The collective agreement provisions dealing with standards of discipline cover the following:

- when an employee is required to attend a disciplinary meeting, he or she is entitled to be accompanied by a PIPSC representative; and
- when a notice of disciplinary action has been placed on an employee's personnel file, it shall be destroyed after two years, provided no further disciplinary actions have been taken in the interim.

36 With respect to the provisions dealing with pay increments, the clause

entitled “Pay Administration” uses the word “shall” in conjunction with calculating a pay increase, as follows:

- *the employee shall receive the pay increment;*
- *the employee’s rate of pay shall be revised;*
- *the employee’s rate of pay on appointment shall be established in accordance with this Agreement.*

37 “Shall” means “mandatory”.

38 While all the PIPSC and TB collective agreements contain an identical management rights clause, those rights are fettered by collective agreement clauses. This is set out in *Canadian Grain Commission*, at the bottom of page 10, where it states: “It is common ground that the general management rights conferred on the Treasury Board may be substantially circumscribed by negotiated terms and conditions of employment embodied in a collective agreement.”

39 When trying to understand a collective agreement, its wording must be examined. Intention must be ascertained from the parties’ words.

40 It must be presumed that all words used are intended and that they are not meant to be in conflict. If more than one permissible interpretation appears, then an adjudicator should look to the purpose of the particular provision, the reasonableness of each possible interpretation, the administrative feasibility, and whether one of the possible interpretations would give rise to an anomaly. In this respect, the bargaining agent referred me to Brown & Beatty, *Canadian Labour Arbitration* (4th Ed.) (“*Brown and Beatty*”), Chapter 4, “The Collective Agreement”, section 4:2100, “The Object of Construction: Intention of the Parties”.

41 In a collective agreement in which the parties have placed restrictions on several entitlements and rights, if there is no stated restriction to an entitlement, then none should be implied. Adjudicators may not add new language to a collective agreement. In this respect, the bargaining agent referred me to s. 220 of the *Act*, *Delios v. Canada (Attorney General)*, 2015 FCA 117, and *Delios v. Canada Revenue Agency*, 2013 PSLRB 133.

2. Pay increments

42 *Association of Justice Counsel v. Treasury Board*, 2012 PSLRB 32 (*AJC No. 1*), provides that a pay increment is a quasi-automatic progression that occurs at a set date and by a preset amount, while an in-range performance increase and performance awards are compensation used to reward performance.

3. Discipline and performance

43 *Brown and Beatty* states that discipline applies to culpable behaviour, which means deliberate, intentional, or deviant behaviour, including refusing to follow instructions or rules, being rude, taking unauthorized absences, showing tardiness, thieving property, or wilfully not meeting job requirements. Disciplinary behaviour is distinguishable from performance-related incompetence or behaviour that is not blameworthy. The employer must demonstrate just cause for discipline. The same standard does not apply to performance. In this respect, the PIPSC referred me to *Brown and Beatty*, at paragraphs 7:3520, 7:3530, 7:3610, and 7:600, the TB's definitions of culpable and non-culpable behaviour, *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94, and the TB's flowchart for dealing with unsatisfactory performance for reasons other than breaches of discipline or misconduct.

44 Section 230 of the *Act* provides that an employee may refer a grievance against an unsatisfactory performance evaluation only if the evaluation resulted in a demotion or termination. The Board has confirmed that its jurisdiction in performance cases is limited to considering the reasonableness of the employer's assessment of the employee's performance. (see *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6).

45 The TB's Guidelines for Discipline provide that the employer must conduct an appropriate and fair process (including an investigation with the right for the person being investigated to respond) before applying disciplinary measures. Progressive discipline principles apply, and mitigating factors are to be considered. The employer bears the burden of proof in demonstrating cause and the appropriateness of the disciplinary measure imposed.

46 *Babineau v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 145, held that an employee cannot have imposed upon him or her more than one penalty for the same offence; there can be no double jeopardy.

47 In cases of performance, the employee bears the burden of proof.

4. <u>Behaviours may not be evaluated via performance management</u>

48 The bargaining agent submitted that performance assessments may appraise only the performance of assigned tasks. The PIPSC and TB collective agreements describe a formal performance appraisal as ". . . any written assessment and/or appraisal by any supervisor of how well the employee has performed assigned tasks during a specified period in the past."

49 Adding behaviours to performance assessments, which is done by the tools and guides associated with the Directive, effectively adds language to the collective agreement without the required negotiation. In addition, adding behaviours to performance assessments would deny meaning to the performance articles in the collective agreement. It would allow more than one performance assessment on an employee

50 The bargaining agent pointed me to *Ahad v. Treasury Board (Department of National Defence)*, PSSRB File Nos. 166-02-15840, 16038, and 16233 (19870126), [1987] C.P.S.S.R.B. No. 9 (QL), for the proposition that the employer is to assess an employee's assigned tasks. The bargaining agent stated that the employer can look at what is to be assessed and determine how to assess it.

51 The bargaining agent stated that there is a distinct difference between discipline issues and performance issues and that there is a reason for it. The behaviours referenced in the Directive do not describe the expected behaviours beyond linking them to the V & E Code or to state that they include behaviours, such as reliability and respectful behaviour, expected in a professional workplace. The Directive does not indicate how behaviours are to be evaluated; this information is set out in the tools and guides.

52 While the behaviours are linked by the Directive to the V & E Code, a breach of that code is a disciplinary matter. Adding behaviours to performance assessment circumvents the protections set out in the discipline route and in the discipline provisions of the collective agreement, which include the important two-year sunset clause.

53 The bargaining agent also referred me to *Duval v. Treasury Board (Statistics Canada)*, 2004 PSSRB 175, *Leclaire v. Treasury Board (Department of National Defence)*, 2010 PSLRB 82, *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, and *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (QL).

B. <u>For the employer</u>

54 The sole issue to be decided is whether the bargaining agent can establish that on its face, the Directive violated a specific or express provision or provisions in the collective agreements.

55 As set out in *PSAC v. Treasury Board*, a policy grievance must relate to the interpretation or application of the collective agreement. *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, provides that an adjudicator's authority is defined by legislation and that to have jurisdiction, there must be an allegation falling within the existing statutory limitations. This is known as the "essential character" test; the dispute must be inextricably linked to the original grievance, and the grievance must fall within s. 209(1) of the *Act*.

56 *PSAC v. Treasury Board* also sets out that it is within the employer's general rights to manage by adopting and implementing policies unilaterally; however, it is limited by the provisions of the collective agreement. There is no freestanding authority to adjudicate matters independent of a specific allegation of a collective agreement breach.

57 The employer's authority does not stem simply from the management rights clause in the collective agreements. It also stems from a wide grant of authority,

as set out in ss. 7(1)(e) and 11.1(1)(a), (c), and (j) of the *FAA*.

58 *Canadian Grain Commission* held that in its management functions, the employer may do anything that is not specifically, or by inference, prohibited by statute. The Court noted the provisions of the collective agreement at issue in that decision as being far from clear and that in the absence of any prohibitory provision in the collective agreement, the employer's action was not by necessary implication contrary to the terms and conditions of the collective agreement. *Brecia v. Canada (Treasury Board)*, 2005 FCA 236, following *Canadian Grain Commission*, stated that ". . . under the collective agreement, the managerial responsibilities remain unrestricted, unless provided to the contrary." *Peck v. Canada (Parks Canada)*, 2009 FC 686, endorsed the earlier reasoning of the Court in the *Canadian Grain Commission* and *Brecia* decisions.

59 *Tuckett-Reddy v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 125, held that s. 11.1 of the *FAA* and the management rights clause of the collective agreement were such that any restriction to the employer's right to assign work must be provided for in the collective agreement or statute. *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 138, citing *Canadian Grain Commission*, held that only a clear indication in legislation or other contractual authorities can set aside the employer's rights.

60 *Public Service Alliance of Canada v. Treasury Board (Department of Veterans Affairs)*, 2013 PSLRB 165, held that in exercising its functions, the employer can do anything that is not specifically or by inference prohibited by statute or collective agreement. *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28, held that ss. 7 and 11.1 of the *FAA* grant the TB a broad unlimited power to set general administrative policy for the federal public service, to organize it, and to determine and control its personnel management. This includes the power to determine the terms and conditions of employment not otherwise specified in those sections, to ensure effective human resources management. This catch-all authority is unfettered unless otherwise limited by statute or a collective agreement.

61 *Federal Government Dockyard Trades and Labour Council (East) v.*

Treasury Board (Department of National Defence), 2014 PSLRB 51, held that ss. 7 and 11.1 of the *FAA* and s. 7 of the *Act* grant the employer the right to organize the public service, allocate resources, and assign duties. The management rights clause in the collective agreement recognizes the employer's exclusive right and responsibility to manage its operation in all respects and acknowledges that it retains all rights and responsibilities not specifically covered or modified by the collective agreement. The Adjudicator's opinion was that in the face of such clear management rights, an express prohibition in the collective agreement would be required to limit the employer's right to assign work to employees who are not part of the bargaining unit.

62 The bargaining agent based its position on these three allegations:

i. performance assessments may appraise only the performance of assigned tasks;

ii. discipline must be distinguished from performance, and the Directive violates the disciplinary provisions of the PIPSC and TB collective agreements; and

iii. salary increments are mandatory under those collective agreements.

1. <u>Performance assessments may appraise only the performance of assigned tasks</u>

63 The bargaining agent alleged that the assessment of employees' behaviours and competencies as set out in the Guidelines for Discipline violates the PIPSC and TB collective agreements. It pointed to the definition of "performance appraisal" in those agreements, which states that ". . . any written assessment and/or appraisal by any supervisor of how well the employee has performed assigned tasks during a specified period in the past." The PIPSC took the position that the wording limits the employer to reviewing performance only for assigned tasks.

64 The employer submitted that the intent of this clause could not have been to limit its ability under the *FAA* to establish terms and conditions of employment, to communicate these expectations to employees, and to manage their performance against these expectations.

65 The employer submitted that the performance review provisions of the collective agreements do not create substantive but rather procedural rights. In this respect, it referred me to *Ahad*.

66 The employer also submitted that assessing performance is a management right; paragraph 77 of *Olson v. Canadian Food Inspection Agency*, 2007 PSLRB 24, provides as much. The suggestion that the definition of performance appraisal has the effect of creating substantive rights and thus limiting the employer's ability to performance manage employees against terms and conditions of employment was put to rest in *Ball v. Canada Revenue Agency*, 2007 PSLRB 12, where in dealing with identical language in the collective agreement, the Adjudicator stated at paragraph 20 as follows:

> *[20] . . . I am not persuaded by the grievor's contention that they support the proposition that a definition clause of the collective agreement can, in and of itself, found adjudicatory review of a performance evaluation in the name of flawed process (see* Denike *for a ruling that a definition article can only serve as an aid in the interpretation of a substantive provision of a collective agreement;* Raymond *subsequently makes plain a similar view by endorsing the doctrine set out in* Canada Post Corporation *that a definition clause in a collective agreement should not (absent bad faith) form the basis of substantive rights).*
>
> [Emphasis added]

67 The employer's position is that the performance review provisions of the PIPSC and TB collective agreements are procedural in nature and do not provide sweeping substantive limitations. On their face, the performance review provisions merely require these three procedural steps:

i. a written assessment;

ii. which the employee's supervisor carries out; and

iii. which covers the employee's performance for a specified period.

68 Had the parties wished to limit the employer's authority to determine terms

and conditions of employment and to evaluate employee performance against these terms and conditions, they would have used much more specific language than a mere reference to assigned tasks in the definition section of "performance appraisal".

69 *Spacek v. Canada Revenue Agency*, 2007 PSLRB 115, was a decision on a grievance that arose from a PIPSC collective agreement with the same language at issue in this case. In *Spacek*, the Canada Revenue Agency introduced a 32-page document entitled "Employment Performance Management Guidelines". The guidelines were tied to competencies and included a guide to ethics and conduct. In rejecting the grievance, the Adjudicator noted that the collective agreement provided procedural and not substantive rights. The Adjudicator noted that the guidelines were not incorporated into the collective agreement and dismissed the grievance, stating that it raised substantive rather than process issues, that "[t]he exclusive right to organize the public service rests with the employer . . .", and that performance assessment is ". . . entirely a management prerogative or management right . . .".

70 The PIPSC and TB collective agreements set out a number of procedural steps in the performance review process, none of which are at issue.

71 The bargaining agent's suggestion that the employer's ability to performance manage employees is limited to the narrow characterization of assigned tasks and could lead to absurd results. In effect, it would leave it open to the employer to terminate or demote an employee for unsatisfactory performance without the benefit of an established performance management regime.

72 If one accepts the bargaining agent's interpretation, it would not allow the employer to address deficiencies in employee performance unless they fall under the narrowly defined assigned tasks. The impact on employees is that they would lose the procedural protections provided by those processes and could face demotion or termination for unsatisfactory performance without procedural protections.

73 In the alternative, the bargaining agent's interpretation of the term "assigned tasks" is far too narrow. While identifying a task is relatively straightforward, how it is completed is more open-ended. When an employer deals with behavioural or

competency issues in the context of the performance of assigned tasks, it is still dealing with performance related to assigned tasks. The performance of assigned tasks requires attention to behaviours and competencies. They are not mutually exclusive concepts.

2. Discipline must be distinguished from performance, and the current guideline violates the disciplinary provisions of the collective agreements

74 The bargaining agent suggested that by treating discipline matters as performance matters, the employer deprives employees of the protections under the collective agreement when they face discipline.

75 The employer did not dispute that the collective agreements contain provisions that protect employees facing discipline. The bargaining agent is using a "watertight compartments approach" with respect to employee behaviour that could be both disciplinary or performance managed. There is an overlap between what is disciplinable and what can be addressed through non-disciplinary means. In this respect, the employer referred me to *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.). While the behaviour at issue in *Penner* was clearly disciplinary, the Court held that it could also be non-disciplinary. Dissatisfaction with suitability for employment can arise from misconduct, but that does not make the dissatisfaction any less real or necessarily make it discipline. In concurring reasons, the Court said that an employer has a choice to make either a disciplinary or a non-disciplinary response.

76 *Canada (Attorney General) v. Frazee*, 2007 FC 1176, held that not every negative impact on an employee flowing from an employer decision is disciplinary in nature. The decision as to whether something is or is not disciplinary in nature is a question of mixed fact and law, and the key issue is to determine the employer's intent. The Court noted as follows at paragraph 20:

> *[20] The authorities confirm that not every action taken by an employer that adversely affects an employee amounts to discipline. While an employee may well feel aggrieved by decisions that negatively impact on the terms of employment, the vast majority of such workplace adjustments are purely administrative in nature and are not intended to be a form of punishment. This point is made in* William Porter v. Treasury

Board (Department of Energy Mines and Resources) *(1973) 166-2-752 (PSLRB) in the following passage at page 13:*

> *The concept of "disciplinary action" is not sufficiently wide to include any or every action taken by the employer which may be harmful or prejudicial to the interests of the employee. Certainly, every unfavourable assessment of performance or efficiency is harmful both to the immediate interests of the employee and his prospects for advancement. In such cases, it cannot be assumed that the employee is being disciplined. Discipline in the public service must be understood in the context of the statutory provisions relating to discipline.*

[Emphasis added]

77 The bargaining agent submitted that every unfavourable performance assessment on an arguably disciplinable subject is, in fact, discipline. However, the Court was clear that this is not in fact the case. This was also so in *Lindsay v. Canada (Attorney General)*, 2010 FC 389, in which an employee was terminated for non-disciplinary reasons but alleged that the termination was disciplinary, and it was addressed in *Forner v. Deputy Head (Department of the Environment)*, 2014 PSLRB 95.

78 In addition, the employer argued that the bargaining agent's position would produce an absurd result. If the employer were not permitted to performance manage employees for poor performance for matters that could also be dealt with via the discipline process, the only option would be the discipline process. It could not have been the intent of the parties to the collective agreements that management would have to discipline employees for matters that it would prefer to deal with through performance management.

3. Salary increments are mandatory under PIPSC collective agreements

79 The employer has the authority under the *FAA* to withhold salary increments for unsatisfactory performance. The Directive states that it was passed pursuant to ss. 7 and 11.1 of the *FAA*. The only issue is whether the bargaining agent has established that this authority is specifically or expressly limited by the collective agreements.

80 The authority to withhold a salary increment for poor performance is not new. It has rested with the employer for decades, even before collective bargaining came to the public service. It has moved from statutory instruments to employer policy pursuant to statutory authority, but the authority has always been there. It goes back to the *Civil Service Act 1918*, s. 20, under the margin note, which provides that increases may be withheld. The *Civil Service Regulations*, passed pursuant to the *Civil Service Act* (effective December 22, 1923), s. 80, read as follows:

> ***80*** *An employee whose salary increase is not recommended by the deputy head on the date on which it would ordinarily fall due owing to the fact that the employee has not rendered meritorious service and is not considered to be deserving of increase may, if his services improve sufficiently, be recommended for salary increase at some succeeding quarterly date instead of having his increase withheld for a whole year, but the quarterly date of future increases shall be thereby changed so that it will fall due in each succeeding year on the quarterly date from which it was last granted.*

81 The *Civil Service Act Regulations* effective in 1949 had similar wording in s. 81, which stated as follows:

> ***81*** *An employee whose salary increase is not granted by the deputy head on the date on which is would ordinarily fall due owing to the fact that the employee has been absent, or has not rendered meritorious service and is not considered to be deserving of an increase, may, after sufficient service, or if his services improve sufficiently, be granted salary increase at some succeeding quarterly date . . . .*

82 The same language is found in the *Civil Service Regulations 1957* and at s.67(4) of the *Civil Service Act*, Chapter 57 (1960-61), where it states, " An increase shall not be granted to an employee if the deputy head, before the due date, certifies to the Commission that the employee is not performing the duties of his position satisfactorily."

83 Section 78(1) of the *Public Service Terms and Conditions of Employment Regulations* (SOR/67-118), effective in 1967, states, "Subject to subsection (2), a deputy head may withhold a pay increment from an employee if he is satisfied that the employee is not performing the duties of his position satisfactorily." A similar provision is

found at s. 40(1) of the *Terms and Conditions of Employment Policy* and remained in effect until 2009. The *Directive on Terms and Conditions of Employment* came into effect in 2009 with the following wording at s. 2.5.6:

> *Denial of pay increment*
>
> *a. Subject to paragraph (b) below, a person with the delegated authority may withhold a pay increment from a person if he or she is not satisfied that the person is performing the duties of the position satisfactorily.*
>
> *b. When a person with the delegated authority intends to withhold a pay increment from a person, he or she, at least two weeks and not more than six weeks before the scheduled date of the pay increment, must give the person notice in writing of his or her intention to do so.*

84 The Directive came into effect on April 1, 2014, and its s. 6.1 states that deputy heads or their delegates are responsible as follows:

> *. . . Identifying cases of unsatisfactory performance at the earliest opportunity possible and taking one or more of the following actions as soon as possible under the circumstances:*
>
> . . .
>
> *Withholding the employee's next scheduled pay increment . . .*
>
> . . .

85 The concept of withholding an employee's pay increment is a long-established authority that existed before collective bargaining. The pay administration provisions in the collective agreements deal only with when a pay increment becomes payable (the anniversary date) and the amount of it; they do not address eligibility for it. An example is the Pay Notes for the SE group, which state, "The pay increment period for all employees is twelve (12) months and the pay increment date is April 1. A pay increment shall be to the next higher rate in the scale of rates." Had the parties intended to restrict the employer's authority, they would have stated that an employee is entitled to an increment and to not having it buried in a clause establishing the timing and amount of the increment, to be interpreted by inference.

86 *Sheikh v. Treasury Board (Statistics Canada)*, PSSRB File No. 166-02-13529 (19830303), [1983] C.P.S.S.R.B. No. 35 (QL), stands for the proposition that the collective agreement recognizes terms and conditions outside it that govern the application of pay. An example is clause 45.01 of the RE collective agreement, which states, "Except as provided in clauses 45.01 to 45.07 inclusive, and the Notes to Appendix A of this Agreement, the terms and conditions governing the application of pay to employees are not affected by this Agreement."

87 *Eveleigh v. Treasury Board (Department of Environment)*, PSSRB File No. 166-02-13674 (19830512), [1983] C.P.S.S.R.B. No. 46 (QL), held that the collective agreement is to be read in conjunction with the *Public Service Terms and Conditions of Employment Regulations*, and the employee was not entitled to a pay increment.

88 *Enns v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 171, dealt with when a part-time employee was entitled to a pay increment and the collective agreement was silent. The collective agreement contained language stating that it did not affect the terms and conditions of employment governing pay, except as expressly provided. The adjudicator turned to the *Terms and Conditions of Employment* and determined that the employer should have relied on that policy to address the silence in the collective agreement.

89 *Laurin v. Treasury Board (National Defence)*, PSSRB File No. 166-02-15100 (19860610), [1986] C.P.S.S.R.B. No. 145 (QL), involved discipline. An employee received a letter of reprimand and a three-day suspension, and his pay increment was withheld.

IV. Reasons

90 For the reasons that follow, the grievance in Board File No. 569-02-160 is allowed, and the grievance in Board File No. 569-02-161 allowed in part.

91 The employer argued that the bargaining agent cannot rely on s. 220(1) of the *Act* to challenge a policy it introduced that will affect all employees in the bargaining units represented by the bargaining agent, on the basis that the policy is inconsistent with provisions of the collective agreements.

92 I agree with the reasoning set out in *PSAC v. Treasury Board*. Policy grievances and individual grievances are not mutually exclusive. At paragraph 51, it states that policy grievances are not restricted by s. 220(1) of the *Act* to be used as an exception. It goes on to state that the formulation of the *Act* in general and the language of the provisions pertaining to the three types of grievances do not suggest any hierarchy or level of importance among those types. It states that s. 232 contemplates the possibility of a policy grievance and an individual grievance being filed on the same matter, with the remedies being specific to each type of grievance.

93 *PSAC v. Treasury Board* held that s. 220 of the *Act* sets out only two conditions that must be satisfied for a policy grievance to be filed: first, it must relate to the interpretation or application of the collective agreement or arbitral award, and second, the issue must relate either to the bargaining agent or to the employer, or to the bargaining unit generally. I find that these policy grievances both satisfy those conditions as they both relate to provisions of the collective agreements and the members of the bargaining units covered by those collective agreements.

94 Terms and conditions ("Ts & Cs") of employment in the federal public service are an amalgam of legislation, regulations, employer policies and rules, and collective agreements. While a large portion of the Ts & Cs are the same for all public servants across the broader federal public service, the specific department or organization a person is employed within may dictate Ts & Cs that are specific to that organization or even a particular job.

95 By virtue of the legislation, the employer manages the workplace. Sections 7(1)(b) and (e) and 11 of the *FAA* grant it broad powers to organize and manage the federal public service and set the Ts & Cs of employment. Simply put, unless it negotiates Ts & Cs of employment with a bargaining agent (like the PIPSC) that apply to bargaining unit employees and are encompassed in a collective agreement, the employer can make the rules.

96 The two grievances before me allege that the Directive breaches the collective agreements entered into between the PIPSC and the TB with respect to a number of different bargaining units, which would apply to thousands of employees. In

essence, the Directive sets out that the employer may do the following:

- assess employees on behaviours and core competencies, which are set out either in the Directive or in other employer rules and tools; and
- if it determines that an employee is performing poorly, it may withhold his or her annual pay increment.

97 The burden was on the bargaining agent to establish on a balance of probabilities that the Directive breaches the collective agreements. To do this, what the collective agreements say must be examined.

98 The law in this area is well settled. It is summarized as follows in *Brown and Beatty* at paragraph 4:2100: ". . . in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions."

99 Section 229 of the *Act* provides that when interpreting a collective agreement, an adjudicator or the Board's decision may not have the effect of requiring the amendment of a collective agreement or arbitral award.

A. <u>Board File No. 567-02-160</u>

100 All the collective agreements have an article (numbered differently) entitled "Pay". They are largely the same and set out as follows:

> *Except as provided in* [the specific clauses dealing with pay], *and the Notes to the Appendix "A"* [in the specific collective agreement]*, the terms and conditions governing the application of pay to employees are not affected by this Agreement.*
>
> *An employee is entitled to be paid for services rendered at:*
>
> *a. the pay specified in Appendix "A" for the classification of the position to which the employee is appointed, if the classification coincides with that prescribed in the employee's certificate of appointment,*

or

b. the pay specified in Appendix "A" for the classification prescribed in the employee's certificate of appointment, if that classification and the classification of the position to which the employee is appointed do not coincide.

The rates of pay set forth in Appendix "A" shall become effective on the date specified therein.

. . .

Rates of Pay

The rates of pay set forth in Appendix "A" shall become effective on the dates specified.

. . .

This article is subject to the Memorandum of Understanding signed by the Employer and the Professional Institute of the Public Service of Canada dated July 21, 1982 in respect of red-circled employees.

101 They also have an appendix, usually Appendix "A", which sets out grids of annual rates of pay based on years of service, and the years covered are set out in each specific collective agreement. The pay grids set out the amount of pay that any given employee in a given position, at a specific classification level, shall receive based on the level agreed to when he or she entered into the position. The Appendix "A"s also contain pay notes that set out the pay increment periods. An example is as follows:

Pay Notes

Pay Increment

1.

a. The pay increment period is twenty-six (26) weeks for employees at levels PG-TIRL and PG-DEV.

b. Each pay increment period for all employees of levels PG-01 to PG-6 inclusive shall be twelve (12) months.

2.

a. For employees in the Purchasing and Supply –

> *Technological Institute Recruitment range, an increase at the end of an increment period shall be to a rate in the pay range which is one hundred and twenty dollars ($120) higher than the rate at which the employee is being paid or, if there is no such rate, to the maximum of the pay range.*
>
> *b. For employees in the Purchasing and Supply – Development range, an increase at the end of an increment period shall be to a rate in the pay range which is two hundred and forty dollars ($240) higher than the rate at which the employee is being paid or, if there is no such rate, to the maximum of the pay range.*
>
> . . .

102 Some of the collective agreements also have in that appendix a provision that sets out the weekly, daily, and hourly rates of pay of certain positions, along with both effective dates and grid step levels.

103 The pay provisions in the TB and PIPSC collective agreements all use the phrase, “An employee is entitled to be paid for services rendered at …”, and then set out the rates of pay for employees.

104 The Canadian Oxford Dictionary defines “entitle” as to “give (a person etc.) a just claim” and “give (a person etc.) a right”. It follows that an employee who is entitled to pay at a certain level has a right to receive that pay for the services he or she is required to carry out for his or her classification level.

105 To discern the pay that an employee is entitled to, the pay grid in Appendix “A” of the relevant collective agreement is referred to. Based on the date and classification level, every employee falls into one of the listed pay amounts on the pay grid. After that, the appendix sets out a pay increment in the pay notes.

106 The pay notes in the collective agreements all use the term “shall” when referring to a pay increment. “Shall” means “mandatory”.

107 Depending on the specific bargaining unit and collective agreement, the pay notes, when read in conjunction with the pay grid, set out when every employee shall receive his or her pay increment and the amount.

108 As set out at paragraph 54 of *PSAC v. Treasury Board*, while unilaterally adopting and implementing policies is within the employer's general right to manage, the discretion afforded it is limited by the provisions of the collective agreement or agreements.

109 *Brown and Beatty*, at paragraph 4:2100, provides that the intention of the parties to a collective agreement must be gathered from the written instrument. The function of the courts or administrative tribunals, such as this one, is to ascertain what the parties meant by the words they used and to declare the meaning of what is written in the instrument, not of what was intended to have been written. Accordingly, in determining the parties' intention, the cardinal presumption is that they are assumed to have intended what they have said and that the meaning of the collective agreement is to be sought in its express provisions.

110 In *Delios* and *PIPSC v. Canada Revenue Agency*, 2016 PSLREB 77, two cases that dealt with leave, it is abundantly clear that when parties wanted to place restrictions or exclusions or exclusions on restrictions on leave, they did so. It is also amply clear that when they wanted to provide transitional provisions to the collective agreement, they did so.

111 *Brown and Beatty*, at paragraph 4:2120, provides that it should be presumed that all the words used were intended to have some meaning.

112 When the parties wanted words or phrases to mean something that differed from their ordinary or plain meanings, they did so.

113 At paragraph 37 of *AJC No. 1*, the Board held as follows:

> *[37] . . . A pay increment, as per the collective agreement, is a quasi-automatic progression that occurs at a set date, by a pre-set [sic] amount. Instead, in-range performance increases and performance awards outside that range are compensation to reward performance and not pay increments based on time of service. . . .*

114 In *Association of Justice Council v. Treasury Board*, 2015 PSLREB 78 ("*AJC No. 2*"), the employer in that case (the same as in this case) had set out a policy

under which employees who were on either maternity or parental leave without pay and received an "Unable to assess" assessment on a performance appraisal were ineligible for a pay increment. The collective agreement in question provided for both a lockstep pay increment, similar to the Appendix "A"s in the collective agreements at issue, and a performance pay regime. Before 2013, pay increases for the employees covered by the collective agreement were tied to the performance rating they had received in the prior fiscal year. In rendering the decision in *AJC No. 2*, I stated as follows at paragraph 110:

> *[110] The wording found at clauses (10) and (11) of Appendix A of the current collective agreement under the subheading of "Lock Step Pay Range for LA-DEV, LA-1, LA-2A and LA-2B" state that effective May 10, 2013, pay increments for lawyers at the LA-DEV, LA-1, LA-2A and LA-2B levels will be to the next higher rate on the applicable lock step pay range that comes into effect on May 10, 2013. Clause (11) then places the only restriction on that move to the next higher rate by stating that a lawyer whose performance is assessed as "Unsatisfactory" is not eligible for a pay increment. Simply put, once the conversion to lock step has taken place, effective May 10, 2013, all lawyers are entitled to their pay increment, on an annual basis, to the next higher rate in the lock step pay range unless they have received an "Unsatisfactory" performance assessment. . . If the employer wanted to restrict the lock step pay progression, they certainly could have by being more explicit. They did not; only one restriction was agreed to and set out, being "Unsatisfactory".*
>
> [*Sic* throughout]

115 In reviewing the collective agreements at issue, I found that they were all very similar when it came to the pay increments set out in the Appendix "A"s, except for the RE group agreement. It has a section for the DSS, which contains a separate pay plan that includes a merit review section, with the following clauses:

> ***Merit review***
>
> *6. The purpose of the DS Merit Review is to assess the state of professional development of individual scientists and to determine promotions and appropriate salary progression.*
>
> *7. Actions resulting from a Merit Review shall be implemented effective April 1 of each year.*

> *8. The merit review forms the basis for decisions to promote,* ***withhold a pay increment, grant a single increment, grant multiple increments and grant increments over a single or double barrier on the effective date****.*
>
> . . .
>
> [Emphasis added]

It is clear that when they contemplated pay increments, the bargaining agent and the employer did in fact contemplate restricting them because they specifically turned their minds to it and included as much in the RE collective agreement for the DSS under the merit review section. The employer could have negotiated further restrictions on pay increments tied to performance in all the collective agreements it entered into with the PIPSC; it did not. As such, the employer did not retain the right to do so and is restricted from implementing it by way of the Directive.

B. Board File No. 569-02-161

116 The bargaining agent's position is that by including behaviours and core competencies in the employee assessment or appraisal process, the Directive has breached the collective agreements it entered into with the employer. All the collective agreements have an article (albeit numbered differently) entitled, "Employee Performance Review and Employee Files." For the purpose of that article, "formal assessment" or "appraisal" is defined as a written assessment (or appraisal) by any supervisor of how well the employee performed assigned tasks during a specified period in the past. It goes on to state that the assessment (or appraisal) shall be done on a form prescribed by the employer, and it sets out other process-related provisions.

117 The Employee Performance Review and Employee Files articles do not in any manner specify against what criteria the employee shall be assessed or how the criteria shall be rated.

118 The bargaining agent has also suggested that by virtue of including behaviours and core competencies, the Directive has breached the collective agreements' articles that deal with discipline. All the collective agreements have an article (again, numbered differently) entitled, "Standards of Discipline." The title is

somewhat of a misnomer because the article does not in any manner set out standards of discipline; it sets out as follows:

- when written departmental standards of discipline are developed or amended, the employer will supply sufficient information on them to each employee and the PIPSC;

- when an employee is required to attend a disciplinary meeting, he or she is entitled to have a PIPSC representative attend with him or her (if one is available);

- when an employee is required to attend a disciplinary meeting, he or she shall be given (where practicable) two working days' notice of the meeting and its purpose;

- the employer will not introduce as evidence in a hearing relating to a disciplinary action any document on the conduct or performance of an employee the existence of which the employee was not aware at the time of filing or within a reasonable time after that; and

- a notice of disciplinary action that has been placed on an employee's personnel file shall be destroyed after two years have elapsed since the disciplinary action took place unless within that two-year period, further disciplinary action has taken place.

119 In addition, some of the collective agreements also contain provisions, under the article dealing with discipline, with the following:

- the employer agreed to consult the PIPSC when existing written standards of discipline are to be amended, and it agreed to carefully consider and if appropriate introduce related PIPSC recommendations;

- when an employee is suspended from duty or terminated for disciplinary reasons in accordance with s. 12(1)(c) of the *FAA*, the employer will notify the employee in writing of the reason and shall try to do so at the

time of the suspension or termination; and

- the employer shall provide the employee with access to the information used during the disciplinary investigation.

120 The collective agreements' articles on discipline, like those on performance assessments (appraisals), address process matters, which set out the limited protections agreed to that are provided to employees when their conduct may lead to discipline. It does not set out the following:

- the matters (misconduct) that could subject an employee to discipline;
- how to investigate alleged misconduct;
- how to assess the penalties; and
- the penalties to assess.

121 The bargaining agent suggested that including behaviours and core competencies as part of the performance management of employees somehow breaches the collective agreements' discipline articles. As part of its argument, the bargaining agent alluded to how adding assessing behaviours to performance management (assessment or appraisals) usurps the protections afforded in the collective agreement with respect to discipline. I agree to a certain extent.

122 "Behave" is defined by the Canadian Oxford Dictionary, 2nd Edition, as "act or react (in a specified way)", "conduct oneself properly", "work well", and "show good manners". "Behaviour" is defined as "the way one conducts oneself; manners", "the treatment of others; moral conduct", "an observable pattern of actions (of a person . . .) . . . in response to a stimulus", "an instance of behaving in a specific way", and "behave well when being observed".

123 It defines "perform" as "carry out, execute, or do (something)", "fulfill or carry into effect", "act in an official way; conduct (a ceremony etc.)", "act or stage (a play, role, etc.)", "play or sing (a piece of music etc.) for an audience", "accomplish (a feat, act of skill, etc.)", and "function . . . in a specified way". "Performance" is defined as

"the act or process of performing or carrying out", "the execution or fulfillment (of a duty etc.)", "a staging or production (of a drama, piece of music, etc.)", "the action of performing a part, a piece of music, etc.", and "a person's achievement".

124 "Competent" is defined as "adequately qualified or capable" and "effective". "Competence" is defined as "ability; the state of being competent" and "an area in which a person is competent; a skill".

125 The collective agreements at issue in these grievances cover thousands of employees working in many different jobs across an array of diverse work organizations, environments, and sectors.

126 In his or her position, an employee may be required to interact in some capacity with the public or with members of different industries (depending on his or her position and the related organization and sector). If for example that employee is dealing with the public and acts in a manner that is inappropriate, say by using offensive or derisive language, he or she could be subject to discipline. If so, then he or she is afforded the protections set out in the collective agreements with respect to disciplinary matters.

127 At the same time, using inappropriate, offensive, or derisive language is likely an indicator that the employee is not performing up to a standard that is well within the employer's purview to set. Again, the employee will likely have a performance assessment (appraisal) and is entitled to certain rights of process as set out in the performance appraisal provisions of the relative collective agreement.

128 Employees can have the ability to do the tasks assigned to them in their positions. An employee may have difficulty doing those tasks. The employee may not be doing the tasks up to the standard that is required because of problems outside his or her control; perhaps he or she is overwhelmed because colleagues are away or other more pressing or urgent tasks need doing. At the same time, the employee could have the skill, ability, and competence to complete the tasks assigned to him or her but could choose not to or to carry them out carelessly or negligently.

129 Nothing in the collective agreements in any way states or even suggests

that an action by an employee cannot be subject to both discipline and an assessment of his or her assigned tasks (see *Penner*, *Frazee*, *Lindsay*, and *Forner*).

130 The difficulty is that the Directive does not distinguish between conduct that is considered culpable behaviour and warrants a disciplinary approach and non-culpable behaviour. It has long been accepted that non-culpable behaviour, is usually behaviour that is outside of an employee's control, and warrants a non-disciplinary approach.

131 If the Directive is allowed to stand as currently written, an employee who is alleged to have acted in a manner that would, if found to be true, be considered misconduct, could be dealt with in a manner that could deprive that employee of the protections negotiated in the collective agreement that fall under the article dealing with discipline.

132 An example could include the right of an employee to bargaining agent representation. Under the collective agreements, if behaviour is considered culpable and warranting discipline, employees are entitled to be represented, and have with them, at certain stages, a bargaining agent representative. If this behaviour is dealt with in a performance appraisal as opposed to the discipline process, the employee has lost that protection.

133 The discipline provisions of the collective agreements also contain what is colloquially referred to as a sunset clause; meaning that when an employee has been disciplined, the record of that discipline is removed from the employee's personnel file after two years if the employee maintains a discipline free record for that two year period. This protection is lost if culpable behaviour is dealt with in a performance appraisal as there is no sunset clause with respect to performance appraisals.

134 The bargaining agent has asked for all references to behaviour and core competencies to be struck from the Directive. The employer has argued that to accept the bargaining agent's position would lead to an absurd result, leaving open to the employer to terminate or demote an employee for unsatisfactory performance without the benefit of an established performance management regime. While I agree that the

employer is not to be precluded from managing unsatisfactory performance, which is non-culpable behaviour, issues that result from culpable behaviour are to be dealt with in the discipline process.

135 I find that to the extent that the Directive and corresponding guidelines and tools on performance purport to address culpable behaviour, i.e. deliberate or intentional, the Directive, guidelines and tools contravene the collective agreement.

136 For all of the above reasons, the Board makes the following order:

137 **V. Order**

138 The grievance in Board File No. 569-02-160 is allowed.

139 I declare that the reference to the withholding of pay increments for poor performance be removed from the Directive and associated guides and tools in relation to the PIPSC's collective agreements with the TB.

140 I declare that the withholding of pay increments for poor performance is not permissible under the provisions of the collective agreements entered into between the PIPSC and TB except where specifically contemplated.

141 The grievance in Board File No. 569-02-161 is allowed in part.

142 I order the employer to stop applying the Directive in so far as it may relate to culpable behaviour.

January 23, 2019.

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