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*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

CAROL YATES

Grievor

and

**DEPUTY HEAD
(Department of Citizenship and Immigration)**

Employer

Indexed as
Yates v. Deputy Head (Department of Citizenship and Immigration)

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Pamela Sihota, Public Service Alliance of Canada

For the Employer: Richard Fader, Treasury Board

Heard at Edmonton, Alberta,
May 29 to June 1, 2018.
(Written submissions filed August 27, 2018.)

REASONS FOR DECISION

I. Summary

[1] Carol Yates (“the grievor”) had nearly 20 years of service (from February 23, 1995, to July 3, 2014) with the Department of Citizenship and Immigration (“the employer”) at its case processing centre in Vegreville, Alberta. As the office workload began to increase dramatically, new work processes and computer programs were introduced, along with productivity quotas.

[2] The grievor struggled to adjust to the “new world”, which Garrett Cuzner, her director general, called the evolution of office functioning. She met and exceeded productivity targets at times, but her successes could not be sustained. Her work fell below productivity targets sometimes and far below them at other times. She did not contest the appropriateness of the productivity targets. She received training and mentoring as a part of a performance management plan that she endured for most of three years. The employer also concluded that her files contained an unacceptably high error rate.

[3] In a weekly performance review meeting, the grievor’s supervisor warned her that her employment would be terminated if her performance did not improve. After she received written notice that she had one last chance to show improvement, which did not happen, her employment was terminated. She filed a grievance contesting the employer’s decision on the grounds that the assessment of her performance was not reasonable.

[4] The grievor stated that a concern with her error rate was never communicated to her and that if it was, it was unclear. She also alleged that the employer showed bad faith in how it failed to provide her with proper mentoring and how it assigned her more difficult work than it did to others in her office. As corrective action, she requests to be reinstated retroactive to July 3, 2014, with full pay and benefits.

[5] I conclude that the employer failed to discharge its burden of proof of establishing that the deputy head’s opinion was reasonable as it related to the grievor’s unsatisfactory performance. Accordingly, I allow the termination grievance.

II. Background

[6] The grievor's employment was terminated for non-disciplinary reasons on July 3, 2014. Her termination letter, from Assistant Deputy Minister Robert Orr, states in part as follows:

...
*...[Y]ou have failed to consistently meet the required level of performance and perform [sic] all aspects of the position....
I have reached the conclusion that you are not able to perform the full range of duties of your position as a Case Processing Agent....*

...

[7] The employer's counsel adduced evidence and made arguments on the grievor's unacceptably high error rates and her inconsistent and poor productivity, which often failed to meet the required standards.

[8] The grievor filed a grievance on that same date alleging that her human rights had been violated. The termination grievance (file number 566-02-10563) was referred to adjudication on December 18, 2014, under s. 209(1)(c)(i) of the *Public Service Labour Relations Act*, which deals with terminations for unsatisfactory performance. The grievor's human-rights grievance (file no. 566-02-10564) was not pursued at the hearing and will not be addressed further in this decision.

[9] It is well established, and the parties jointly submitted that in my considering s. 230 of the *Act*, I must determine if it was reasonable, based on the evidence, for the deputy head to deem the performance of the employee in question unsatisfactory.

[10] In doing so, I must consider the following criteria established in *Raymond v. Treasury Board*, 2010 PSLRB 23 at para. 131 (see also *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade)*, 2011 PSLRB 90 and *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6):

131... I do not see how it would be possible to find that it was reasonable for a deputy head to consider the performance of one of his or her employees unsatisfactory if the evidence showed the following:

- *the deputy head or the supervisors who assessed the employee's performance were involved in a bad faith exercise;*

- *the employee was not subject to appropriate standards of performance;*
- *the employer did not clearly communicate the standards of performance to the employee that he or she was required to meet; or*
- *the employee did not receive the tools, training and mentoring required to meet the standards of performance in a reasonable period.*

[11] The employer noted that s. 230 of the *Act* directs me to consider only whether the deputy head's opinion was reasonable that the grievor's performance was unsatisfactory, given the evidence available at that time.

[12] My assessment must focus not on the reasonableness of the employer's decision to terminate the grievor but rather on the reasonableness of the employer's assessment of the grievor's performance. Section 230 states as follows:

230 In the case of an employee in the core public administration or an employee of a separate agency designated under subsection 209(3), in making a decision in respect of an employee's individual grievance relating to a termination of employment or demotion for unsatisfactory performance, an adjudicator or the Board, as the case may be, must determine the termination or demotion to have been for cause if the opinion of the deputy head that the employee's performance was unsatisfactory is determined by the adjudicator or the Board to have been reasonable.

[13] Counsel for the employer noted the Federal Court of Appeal's direction to adjudicators on s. 230 of the *Act*; namely, they should not make independent analyses of performance (see *Forner v. Attorney General of Canada*, 2016 FCA 136 at para. 18).

[14] Counsel for the employer also noted that Adjudicator Katkin found that even when "management could have better handled" a termination, it might not necessarily impact the finding that the performance assessment was reasonable (at paragraph 209 of *Kalonji v. Deputy Head (Immigration and Refugee Board of Canada)*, 2016 PSLREB 31 (upheld in 2018 FCA 8)).

[15] Mr. Cuzner provided the relevant background to the events leading to this grievance. At the relevant times, he was the director general responsible for the case processing centres, including the grievor's in Vegreville. He had also served as the director for those centres, which on occasion took him into the Vegreville workplace.

[16] Mr. Cuzner testified that the volume of immigration and refugee files had increased significantly in the years preceding this grievance being filed. He explained that the number of permanent residency applications being processed had nearly doubled and that part of the strategy to handle the increase in workload was to convert the process from paper applications to a Windows-based computer process (called "GCMS"). This involved a complete update of the former templates, in which employees simply used the tab function on their desk computers to work through applications.

[17] Mr. Cuzner also testified to the fact that the immigration and refugee system often screens overseas several of the types of applications being processed, which allows for a very high approval rate at the Vegreville case processing centre of files deemed low risk and of low complexity. The employer referred to this as a "risk-management" approach to application approvals, in which only a small portion of the overall caseload is identified as presenting some risk, which is then given more detailed scrutiny.

[18] I note the grievor's annual performance evaluation report dated April 25, 2013, which states under the heading, "Judgement/Analytical Thinking", "Met all - Carol's decisions are sound and her referrals to SDS and team leader are appropriate. Carol should try to incorporate more risk management into her processing ...".

[19] Mr. Cuzner testified that the grievor was hired at the CR-05 group and level. Later, she was reclassified to PM-01, which required her to conduct more complex tasks, including knowing rules, legislation, and court decisions and applying that knowledge to assessing case files.

[20] While the employer referenced the new era of increases in immigration and a related increase in workload for the case processing centre, the grievor's testimony clearly indicated that her approach to files remained rooted in a different era.

[21] She testified that she preferred to take time to read a file and that if a problem arose, her practice was to take time to write a letter to or phone the applicant, to attempt to resolve it. She testified that this approach would more often help people correct problems with their immigration applications, and it provided them with better service. Mr. Cuzner testified that departmental budgets and a lengthy file backlog that

required that decisions be made demanded that work processes and efficiency be improved.

[22] The grievor's preference of taking a more personalized approach to her files was not consistent with the new era of a much higher volume of files and increased productivity in her office. Her annual performance evaluation dated April 26, 2012, states under the section "Effective Interpersonal Skills", "Carol deals with clients in a polite and courteous way. It has been discussed with Carol to not over extend her customer service."

[23] And in an email dated September 11, 2013, the grievor was reminded that she should not give her phone number to clients or their representatives but instead that she should refer everyone to the toll-free call centre. By March 14, 2014, her performance management action plan was revised to state, "Maintain professional distance and to [sic] follow established procedures in handling cases."

[24] Management's view that the grievor was taking an anachronistic approach to her work was summed up as follows in an email about her situation from Mr. Cuzner, dated March 24, 2014:

CY asked to meet with me. She was emotional/upset... she felt that she was being made an example of and that no matter what she did she would be fired. I told Carol that that is not the case ... [it was about her performance.] ... Also told her that I had ... obligations to follow through with as the Employers representative and no matter how difficult it was or how I personally felt about it that I would discharge my duties even if it meant dismissing someone. Told her that I had the impression (having sat with her) that she was well versed in the Act/Regs but that I felt she was being stubborn with regards to adjusting from the old client service model (hand holding applicants through a process) and that this was impacting on her productivity. The goal of the plan was to get her productivity up to where the majority of the office was at... Discussed focus of client service now---i.e. processing times = client service.

...

[Sic throughout]

III. Issues and Analysis

A. Did the employer set appropriate performance standards and communicate them clearly to the grievor?

[25] The employer's closing submissions relied upon the grievor's inability to meet productivity standards and her failure to meet an error rate standard as justification for terminating her employment.

[26] The uncontradicted evidence established that after consulting with the bargaining agent and employees, the employer began to phase in productivity standards. The evidence included many examples of uncontradicted written communications to the grievor, including action plans, all of which were confirmed by oral testimony that clearly established that she was well aware of the productivity standards that she was required to meet.

[27] The grievor did not challenge the appropriateness of the productivity standards or whether they had been clearly communicated to her. However, she denied that a clear and objective standard for error rates was established or clearly communicated to her.

[28] The significance of the grievor's error rate to her management was evident in Mr. Cuzner's testimony. It was why he decided that she could not be demoted instead of terminated. Mr. Orr concurred and testified that the matter of the errors in her work was very important. He added that the case processing centre's (CPC) work is "... critical for people, so the work must be done without error".

[29] The earliest indication of an error rate standard being given to the grievor arose in the evidence in the "Personal Performance Management Action Plan" (PPMAP) that her previous manager signed on February 24, 2010. It includes the following under "Performance Objectives": "... ensure that the work is of high quality and reliable with an error rate of less than 5%." That passage was also included in an unsigned PPMAP that had been dated to commence on November 21, 2011.

[30] This statement that there was an error rate standard of less than 5% is, on the surface, clear. Counsel for the employer stated in closing that the matter of error rates was discussed at almost every weekly performance management meeting with the grievor. However, the grievor argued that the vast majority of the evidence betrayed a far less certain quality to the error rate standard.

1. Risk Management

[31] When she was asked about her error rate, the grievor testified that she understood that the risk-management approach that her office was being told to use meant that she should work faster and process more files and that management understood that doing so would cause more errors.

[32] The grievor pointed to her performance evaluation report, which Fiona Smythe Wilson, her supervisor, signed on April 25, 2013. It stated, “Carol’s work is a [sic] high quality ... Carol’s decisions are sound ... Carol should try to incorporate more risk management into her processing ...” as evidence of how she came to her view of management’s approach to errors. When she was asked to define “risk management”, she testified that she understood it to mean to work faster, with more errors.

[33] Counsel for the employer pursued the matter of risk management in his cross-examination of the grievor. She testified that she did not believe that risk management should be used in processing permanent resident applications as these approvals allow people to stay permanently in Canada. She thought rushing such important reviews was reckless. She explained that she refused to rush her reviews of spousal permanent resident applications as she said there was a risk of some applicants using fraudulent marriages to get people into Canada. She testified that it was important to her to defend Canada’s security against fraudulent applicants.

[34] The grievor provided an example of her work, which she suggested showed that she was careful to review all aspects of files and that at times, she required more information, as she said it was her job to protect Canada. She said that a file she reviewed requested an extension to a work permit. She said that in her investigation, she discovered that the applicant really wanted the permit to stay in Canada simply to obtain a hair plug procedure. She stated that this reason was not valid, so she denied the request. She added that under the new risk-management approach in her office, she might have simply given that file a very quick look and approved it.

[35] The grievor said that more than once, managers whom she did not specify had told her to increase her production and that an increase in her errors would be acceptable as long as her production increased. She also testified that in files assigned to her, she found many errors caused by other offices that she had to correct. They were then counted against her in her performance measurement.

[36] Colleen Wheatley had over 20 years of experience at the Vegreville CPC and worked as a PM-03 at the material times. Ms. Smythe Wilson assigned her to perform quality monitoring of the grievor's work. Ms. Wheatley testified that she was a subject-matter expert and that she was assigned the most complex cases. She added that she was regularly asked to help team leaders with certain projects or tasks.

[37] When she was asked about an error rate standard in the office, Ms. Wheatley testified that the staff was aware that management had very high expectations for their productions levels, to make progress in processing the large backlog of applications as well as to keep up with the rapidly increasing volume of new applications. She testified that management's expectations were high in terms of large amounts of file approvals and that the staff knew that the high production of approvals was more important than taking extra time to avoid errors.

[38] She described this situation by saying that the staff understood that managers would rather have 125 temporary residence permits approved in a given amount of time with errors than only 75 permits approved but with no errors. She clarified that this was only her impression but that other staff shared it.

[39] When she was asked if she had ever heard of other CPC staff being monitored for error rates or even having error rates established as part of their performance expectations, Ms. Wheatley replied that she was not aware of any.

[40] After reviewing the exhibits, I note the fact that Mr. Cuzner published staff newsletters dated as follows:

- November 2013 (no mention of errors);
- December 2013 (no mention of errors); and
- February - March 2014.

[41] Each newsletter contained a section with the heading "Production Expectations", which noted that new expectations were being developed and would be implemented shortly. The December edition included an annual production quota for the Vegreville office for one particular type of permit. It noted that the 2014 office quota for processing that permit would increase approximately 350% from 2013.

[42] The February - March edition included details of the new and more challenging productivity standards for time spent reviewing and approving applications and noted an increase in performance over the past few months but that the office had to be more efficient with its processing.

[43] This edition contained the only reference, albeit indirect, to errors that I could find in the newsletters, as follows: “Management is cognizant of the number of changes going on at the same time and knows there will be growing pains and missteps and that there will be things that we have to revisit if we get it wrong.”

[44] I note that the euphemisms “growing pains” and “missteps” refer to errors and make the obvious conclusion that management understood that with the many process changes being implemented and the increasing demands for higher productivity, some errors would inevitably be incurred.

[45] There is no other reference to errors in the newsletters tendered as exhibits.

[46] While on their own, the newsletters do not prove anything, they corroborate Ms. Wheatley’s testimony that the employees were aware of management being focused upon increasing production.

[47] In a detailed memo dated January 17, 2014, and sent to his managers, Mr. Cuzner explained the many new performance expectations that were to take effect in the next month. I note that his memo does not mention the matter of errors.

[48] Mr. Cuzner also authored an email on February 14, 2014, in which he directed his management team on “Performance Expectations” and set a “target date” of April 1 for employees to meet the more stringent “new expectations” that were then being implemented. He also wrote as follows:

...
As Team Leaders I expect you to manage. This includes recognizing that everyone – including ourselves – has good and bad days. Our approach should not be one of managing performance on a daily or even weekly basis. We need to set the standards and engage with all of our staff and explain clearly what the expectations are....
...

[49] I note that his email does not reference error rates.

2. What constitutes an error?

[50] In an unsigned memo to file dated December 18, 2013, and titled “Performance Action Plan”, Ms. Smythe Wilson noted that she had just met with the grievor and had told her the following:

...
... You continue to receive errors each week. The [sic] range from minor issues such as not completing file jacket [sic] to more serious errors in the content of letters and inputs into GCMS. I have discussed the errors with you in regards to what the issues were and how they should have been handled. I recognize that people make mistakes, however it is important to be diligent in the accuracy of your work.

...
Although there has been a decrease in errors, I am not satisfied because the errors that are brought to my attention show a continued lack of attention to detail.

[51] Contrast the last line of that memo to the one of March 21, 2014, in which Ms. Smythe Wilson also writes that the grievor’s errors decreased in that evaluation period, but she does not add the concern about lack of detail.

[52] As was taken up by the grievor’s representative in argument, the issues of “minor” and “serious” errors were thus introduced into the lexicon of the grievor’s performance reviews. Additionally, the matter of “legislative” errors was recognized during Ms. Wheatley’s testimony.

[53] Ms. Wheatley composed a memo dated June 16, 2014, which reported on her scrutiny of the grievor’s files over the preceding two weeks. At this juncture, I wish to note that it includes the following passages, dealing with her quality review and search for errors in the grievor’s files:

...
The following [errors were] noted:

...
All minor and no consequence to the client.
52 TRs were dealt with correctly according to policy/procedures
The following are not errors, but require clarification from an Operations point of view:

...

Legislative Errors (6)

...

[Emphasis in the original]

[54] In the conclusion to her memo, Ms. Wheatley stated that the grievor “used her delegated authority properly” but that “... she seems to rely on the previous officer coding and in most cases, is correct, however, the few data entry errors that are listed above are sometimes a result of following what was issued prior.”

[55] Ms. Wheatley explained that some types of files processed at the Vegreville office had already been processed by other staff, usually at overseas embassies or consulates. She testified that the Vegreville staff had been trained to rely upon a file’s previous processing and, to decrease processing time, not review it for errors.

[56] She stated that if her work on a file was acceptable but that the file contained an embedded error from work that a different office had already done, the error would be identified and returned to her to fix. Thus, her performance metrics would be reduced in terms of how many minutes she spent on the file due to the time needed to fix the error that arose in a different office.

[57] In her testimony on her evaluation memo, Ms. Wheatley explained several of the errors or issues she had identified and said that many of them had had no impact on the client and that only some might have had a minimal impact. And that in some of these cases other immigration approvals underway for the same person would have rendered the error moot; for example, an approval might have been issued before an erroneous date took effect on the permit the grievor worked on.

[58] In a summary comment on the highly detailed memo she produced to monitor the quality of the grievor’s work, Ms. Wheatley testified that in her view, their office had no clear definition of what constituted an error. She said that her many detailed explanations of the grievor’s work and things requiring clarification were written to illustrate that lack of a clear definition.

3. The Grievor’s Team Leader

[59] Ms. Smythe Wilson was a team leader classified PM-05. She directly supervised 20 employees at the relevant times. In her examination-in-chief, Ms. Smythe Wilson

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testified about the grievor's errors. In reviewing her many notes to file confirming weekly discussions with the grievor, she noted that on December 3, 2013, the grievor had shown an incremental improvement in both her stats and the quality of her work and that there had been no files to review, which meant there had been no errors. However, in her discussion of the grievor's time tracking for that week of December 2, 2013 (in Exhibit E-2), she explained that on the Wednesday of that week, the grievor had logged 4.5 hours of work making corrections, which she testified showed the grievor made many errors.

[60] Ms. Smythe Wilson then commented on her memo of December 18, 2013, in which she wrote the following: "Although there has been a decrease in errors, I am not satisfied because the errors that are brought to my attention show a continued lack of attention to detail." In her attempt to further elucidate this paradoxical and opaque comment, she testified that the grievor was making "somewhat random errors that were often different."

[61] In an email dated January 20, 2014 (Exhibit E-1, Tab 27), Ms. Smythe Wilson confirmed the details of a performance management discussion that she had just held with the grievor. It included a PPMAP signed on January 16, 2014. The PPMAP included the following:

...

Carol's productivity has improved and for the last month was within expectations. As Carol's performance has previously fluctuated once a performance action plan was completed and she has only met [sic] for the last month, this plan is being implemented to allow Carol to demonstrate that she can maintain productivity.

Carol continues to make errors in inputting information and in some cases in decision making. One area of concern is errors that appear to be due to a lack of attention to changes in procedures. The procedures and methods of processing within Immigration and in particular GCMS are constantly changing, it is essential to keep up to date on changes.

During the past week, a number of errors have been returned from OSU and IQM for Carol. Due to the continued errors found in quality review and the errors being returned from other units, monitoring will return to 100%.

...

... Management will provide a magnifying sheet as per Carol's request.

[62] In her February 14, 2014, memo, Ms. Smythe Wilson wrote, “I have seen improvement in your organization of files and in your productivity,” and, “At our meeting, I discussed the areas of concern I have such as the continued errors. The goal of this plan is to ensure you are meeting productivity [sic] and that the quality of your work remains high.” When I asked her if she could help me understand the grievor’s error rate at that time, she replied that indeed the errors were still a problem and that the rate was maybe.

[63] In her testimony about the February 14, 2014, PPMAP, Ms. Smythe Wilson explained that the grievor’s productivity had improved but that there were “continuing concerns with the quality of Carol’s work.” The document states that from January 20 to February 7, she had “... returned 12, 10, and 9 errors each week ...” to the grievor.

[64] The next weekly meeting after the PPMAP that was documented in the exhibits was held on March 21, 2014. In that meeting, the grievor was told her “... errors have been decreasing, and for the last week you were able to improve your productivity.” Ms. Smythe Wilson confirmed the accuracy of that quotation but added that after further detail was examined (as provided in Exhibit E-3), the apparently positive results arose from a very small sample size of work.

[65] On March 25, 2014, Ms. Smythe Wilson was more succinct in her feedback on the matter of errors, simply writing that “... you have not yet demonstrated that you are able to meet and consistently maintain performance expectations.”

[66] By April 2014, a two-month gap had arisen in the notes to file of the weekly performance review meetings. However, in a written submission, the parties confirmed that Ms. Smythe Wilson’s weekly discussions continued with the grievor.

[67] The grievor testified that in many of her weekly performance review meetings with Ms. Smythe Wilson, the issue of errors was not mentioned. She added that she was left with the impression that her error rate was not a problem.

[68] In review of a performance improvement plan (PIP) dated April 8, 2014, Ms. Smythe Wilson said that the error rate had been improving. This document repeats the 2011 assertion that an error rate of 5% or less had to be maintained.

[69] Then on April 7, 2014, Mr. Cuzner signed a “last chance” letter to the grievor. The letter begins by stating, “Since February 2011, your supervisors have identified

concerns with your performance and your ability to consistently meet and maintain the expected level of performance for your position ...”.

[70] In the letter, he set out the specific “graduated targets” that had been set for all PM-01 staff performing her duties. The actual numerical values of the performance targets are not at issue. He went on to state as follows in the letter:

...

A final performance evaluation will be completed on July 3, 2014. If you have consistently met all of your objectives and production standards, you will be taken off the performance improvement plan and will be expected to maintain the level of performance that is required of all PM-01 Case Processing Agents/Level One Decision Makers. Please note, if you fail to fully meet all of your objectives and production standards, you will be terminated for unsatisfactory performance.

Over the next few months, I recommend that you take advantage of all learning opportunities and that you ask for help when you need it. There is no other training to offer to you as you have received all of the required training for your position. I would strongly encourage you to make every effort during this period to make the necessary improvements to further develop and demonstrate the required competencies.

...

[71] I note that the grievor’s error rate is not mentioned in her last-chance letter.

[72] The grievor received a revised PPMAP that she signed on April 8, 2014. It stated that if she failed to participate in the plan or to consistently meet and maintain the objectives and production standards by June 30, 2014, her employment would be terminated for unsatisfactory performance.

[73] On May 16, 2014, Ms. Smythe Wilson forwarded a memo and update on the grievor’s PIP to senior management that stated as follows:

...

Carol continues to make errors when processing. For the month of April 120 files and applications were reviewed and she made 33 errors. The majority of errors related to internal procedures such as GCMS BF dates or not changing correspondence to “sent”. However, there were errors related to policy such as issuing documents when not warranted, not considering an OB, and sending additional correspondence instead of refusing....

[74] Precise performance metrics were provided in the PPMAP. Then, a performance standard for error rates appeared. An error rate of 5% or less was set as an achievement-indicator objective. The grievor's signature appeared at the bottom of the PIP, confirming that she had read and understood the terms and conditions.

[75] The grievor's representative stated in closing that these matters show how the definition of an error was never communicated to the grievor. Furthermore, the employer was not even able to clarify it at the hearing.

[76] I find that this one quote from Ms. Smythe Wilson in her December 18, 2013, meeting notes with the grievor best captures the opacity of the employer's error standard: "Although there has been a decrease in errors, I'm not satisfied because the errors that are brought to my attention show a continued lack of attention to detail."

[77] I am most persuaded by Ms. Wheatley's testimony as she was at arm's length from the grievor's relationship with Ms. Smythe Wilson and was handpicked by management to carry out a quality assessment just before the grievor was told that she had failed to meet the required standards.

[78] Ms. Wheatley provided the clearest detail of the different errors that arose in processing the files on the grievor's desk. Her conclusion that the errors were relatively minor and of little or no consequence was corroborated in the penultimate assessment of the grievor that was sent to senior management in May, which seemed to anticipate the grievor's submission as it stated that "[t]he majority of errors related to internal procedures ...". Thus acknowledging the lack of gravity in many errors.

[79] I also accept the uncontradicted testimony of Ms. Wheatley and the grievor that all the staff understood very well that they were under pressure to increase production and that it was tacitly understood that errors would increase. This is confirmed by the complete omission of any reference to error rates in Mr. Cuzner's newsletters and his memo to managers.

[80] And finally, Ms. Smythe Wilson's weekly memos to file established that the matter of error rates and what qualified as an error to be counted against the standard was addressed inconsistently, if at all.

4. Communication to the Grievor

[81] The grievor also alleges that she was not given proper notice of a problem with her error rate. The employer replied that the evidence showed that she was put on notice at every performance assessment meeting that errors were a problem and that she was told in the final few months that it would lead to the termination of her employment were it not rectified.

[82] In her October 28, 2013, email to the grievor, Ms. Smythe Wilson states that she would like to add to their discussion of “failing to meet performance expectations”, which “may result in termination of employment”. Her email does not cite any specific performance expectations or refer to errors.

[83] A meeting note titled “Performance meeting - Carol Yates” and dated a week later, November 5, 2013, states “no issues this week” under the heading “Perform at level of competency expected”. It states that the grievor processed “LCP C10” groups, completed them all, and only missed the LCP code on one in 64 applications.

[84] At her performance management meeting one week later, on November 12, 2013, it was noted that the monitoring of the grievor’s files would be cut from 100% to 50%, as Ms. Smythe Wilson stated that she had “... seen an improvement in the quality of [the grievor’s] work.”

[85] In a January 20, 2014, email, Ms. Smythe Wilson stated that the consequences of failing to meet the expectations in the grievor’s performance action plan might include termination. The plan was attached. It included the following references to errors:

...

Current Performance Issues:

...

Carol continues to make errors inputting information and in some cases in decision making. One area of concern is errors that appear to be due to a lack of attention to changes in procedures....

During the past week, a number of errors have been returned from OSU and IQM... Due to the continued errors found in quality review and the errors being returned from other units, monitoring will return to 100%.

Performance objectives

...

- *Perform at a level of competency expected in accordance with the PM01 ... expectations.*
- ...
- *Display file and time management skills and ensure that the work is of high quality and reliable.*
- ...

Action Plan

- 3. *Files are to be tracked properly....*
- ...

7. *She will check her mailbox daily for work items and action them the day they are received. If she disagrees with the error, she is to bring it to the team leader to discuss. Once she has corrected the errors received, she is to return the error sheet to her team leader....*

...

[86] In her notes summarizing their February 14, 2014, meeting, Ms. Smythe Wilson writes that she told the grievor that she had expressed concern over the “continued errors” and that the “... goal of this plan is to ensure you are meeting productivity [sic] and that the quality of your work remains high.”

[87] A PPMAP signed on that date notes that recently, “... Carol has improved in her organization of files and file management ...”. However, it then states that there “... are continuing concerns with the quality of Carol’s work... During the weeks of January 20 to February 7, I returned 12, 10, and 9 errors each week to Carol.”

[88] Ms. Smythe Wilson’s meeting notes from the March 21, 2014, meeting with the grievor state that the “... errors have been decreasing, and for the last week you were able to improve your productivity.”

[89] On March 25, 2014, Ms. Smythe Wilson emailed the grievor and confirmed their discussion of the most recent PPMAP. She wrote that the grievor had “... not yet demonstrated that [she was] able to meet and consistently maintain performance expectations.” No details were provided as to which aspects of performance declined since the memo of four days earlier, but nevertheless, the grievor was reminded that “[w]e discussed the consequences of not meeting the expectations -demotion or termination of employment.” A PPMAP dated March 24, 2014, was appended. It contained no quantified reference to errors.

[90] Her last-chance letter, dated April 7, 2014, and signed by Mr. Cuzner, contains highly detailed information about precise production targets but does not reference any errors. The letter does reference the fact that the grievor must consistently meet "... all of [her] objectives and production standards". She was then given a PIP in a different format from all the PPMAPs noted earlier. It contains the following indicators of objectives related to errors:

- ...
- *Makes reasoned decisions ...*

...

 - *Double checks [sic] the accuracy of work;*

...

 - *Achieve error rate of 5% or less [on temporary resident and permanent resident applications]*

...

[91] In argument on this point, counsel for the employer pointed to the fact that a clear standard was established and communicated to the grievor in her PPMAP in November 2011 and again when she received her last-chance letter.

[92] The grievor's representative argued that despite the reference to a 5% or less error standard early and very late in the performance improvement process, the bulk of the evidence showed that the standard was not communicated to the grievor in a meaningful manner.

[93] I find it troubling that the evidence for most of the grievor's performance management period was that her supervisor rarely discussed errors and that when she did, she rarely provided a quantifiable report on progress against the target.

[94] For the reasons I have noted, I conclude that no intelligible and objective error rate existed and that if it did, it was not clearly communicated to the grievor.

B. Was the grievor given the necessary tools, training and mentoring to achieve the set standards in a reasonable period of time?

[95] The grievor argued that she was not given effective mentoring and that the help she received was not enough and was not tailored to her specific needs. Her representative argued that the employer made no effort to discern those days or weeks in which the targets fluctuated drastically between meeting or exceeding production

quotas or failing to meet them by a significant margin. She made the same argument for fluctuations in reported error rates.

[96] Ms. Smythe Wilson, the grievor's direct supervisor for most of the period at issue, testified that the grievor was provided many mentors between 2011 and 2014. Her annual performance evaluation dated April 26, 2012, states that as early as October 2011, she had been assigned a mentor to help her learn processing efficiencies. I note that the unsigned PPMAP dated to commence on November 21, 2011, includes specific dates that were assigned for the grievor to work with her mentor that month.

[97] I also note that her performance improvement plan dated April 26, 2012, states that "... she was assigned a mentor in October to assist her to learn some processing efficiencies." Her mid-year review, dated September 18, 2012, states, "Carol was assigned a mentor, Marcia ... to show her how to use GCMS and improve her speed. Since meeting with Marcia, Carol's numbers have shown improvement."

[98] The grievor's annual performance evaluation dated April 25, 2013, states that she was reluctant to meet with a mentor to show her how to use GCMS but that she agreed to in the end. It notes that she received GCMS training.

[99] Ms. Smyth Wilson's July 2, 2013, meeting notes stated that the grievor was asked if her team had continued mentoring her. She replied in the affirmative. She was reminded that she could ask for help anytime. She replied that she had indeed asked for it from someone named Tracy, who always helped.

[100] The notes from their November 26, 2013, meeting stated that Ms. Smythe Wilson told the grievor that she would spend an afternoon that week sitting with her and observing her, to offer ideas to improve her productivity.

[101] In cross-examination, Mr. Cuzner confirmed that in fact the grievor had many different trainers and mentors and that he was aware that at times, she would sit with a mentor and observe work being done on files. In fact, Mr. Cuzner testified that he spent an afternoon sitting beside the grievor at her desk to observe her work, to gain a better understanding of her abilities and needs for improvement. His note to file of January 30, 2014, states that he was left with the impression that she was well versed in the department's statutory authorities but that she was being stubborn and slow to

adjust to the new service model as she continued to try “hand holding” clients through the process as opposed to focusing on her productivity. The note states that he told her to focus simply on the information required to make a decision and not to review every page of an application, for example.

[102] Several times in her testimony, the grievor referred to mentors being assigned to help her. She testified that at one point, she had three mentors taking turns observing her work and offering ideas on how she could improve her efficiency. She added that sometimes, she felt as though her mentors did not want to help her and that they would have rather not been assigned this task. She also stated that she felt that her mentors did not give her the help she needed or accept her feedback to suggest other means by which she could be better given assistance. She added that she did not raise with her supervisor her concerns about her impression that her mentors were not being effective.

[103] Given the many instances of testimonial and documentary evidence stating that the grievor received training and mentoring throughout the approximately three-year period at issue, I conclude that she received the tools, training and mentoring required to meet the standards of performance in a reasonable period.

C. Did bad faith taint the assessment of the grievor's performance?

[104] When considering matters related to the grievor's allegation of bad faith, the parties both cited *Raymond*. That decision found that a decision made in bad faith or that is arbitrary or discriminatory cannot be reasonable (see paragraph 129). It also noted that if an assessment of an employee's performance was made in bad faith, it cannot be reasonable (see paragraph 131). And finally, it noted that an assessment does not have to be perfect to be found reasonable (see paragraphs 140 and 141).

[105] I note that “bad faith” is defined in *Black's Law Dictionary*, 6th ed.:

...not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity... it contemplates a state of mind affirmatively operating with furtive design or ill will.

[106] The grievor relied upon *Raymond* to argue that Ms. Smythe Wilson had taken a negative tone with her, which was established in the testimony through the discussion of Ms. Smythe Wilson's seemingly obstinate refusal to deal in a timely and

compassionate way with the grievor's requests to commence her workday earlier, to work a compressed workweek, and to obtain a document viewer for paper files, to accommodate her eyesight.

[107] The grievor also noted that despite the many examples of her improving performance, as noted earlier, Ms. Smyth Wilson offered her no words of encouragement in their weekly performance review meetings.

[108] In particular, the grievor testified that she was a morning person. She felt that she had more energy and could get more work done in the morning. She stated that for several years, she had a flexible workday arrangement in which she began work at 7:00 a.m. but that Ms. Smyth Wilson ended it so that their workdays would coincide. She did so to ensure that the grievor could be watched at all times.

[109] The grievor testified that she asked a second time to be allowed to continue her early start time, which Ms. Smyth Wilson again denied. The grievor then asked Mr. Cuzner, who testified that he spoke to Ms. Smyth Wilson and made the eminently reasonable suggestion that if the grievor thought it would help her productivity, it should be allowed.

[110] The grievor also testified that Ms. Smyth Wilson began bringing work files to her. The grievor explained that other staff were allowed to select their own files and would normally seek out the less detailed types of files so as to be able to process them in less time than the other files thus improving their productivity statistics.

[111] The grievor opined that most of the files given to her were more complex and thus required more time to process, which made it more difficult for her to meet the productivity standards. Testimony provided details of the various files processed at the office and the various levels of complexity of each to support the grievor's assertion of her being unfairly given the most complex and time consuming files.

[112] The grievor described reviewing a file and identifying a problem in it. She began a search and was able to locate a document that had been deemed missing that would have otherwise caused the applicant potentially significant delays in receiving a permit. Despite providing invaluable service to the client and allowing the file error to be fixed and advanced to another stage of file processing, her considerable time on the

file was not counted as being productively spent as her work did not result in a permit being issued, which is how the performance metric was measured.

[113] The notes taken by a management team member at the November 12, 2013, performance management meeting with the grievor indicated that in response to being asked what could be done to improve her productivity, the grievor stated that she had an eyesight problem such that she could not properly see and read documents at her desk and that a doctor's note had been provided. Despite that fact that she had already provided such a note about her eyesight, a week later on November 18, 2013, her supervisor, Ms. Smythe Wilson, recorded the following in her meeting notes:

...

We then discussed the letter you provided from your medical doctor which stated that you [the grievor] "require an accommodation to better see the print application." As being able to see refers to your vision, I asked if you had seen your optometrist lately. You indicated you had when you had provided a doctor [sic] note regarding the light above your work station [sic].

In our meeting you stated that you find the application hard to read and that you are often holding the application close to your face to read it. I will draft a letter to your doctor to request an assessment of your vision. At our meeting, I said I was not sure if I could specify the type of doctor that the medical assessment should be performed by, I have received clarification and I will be asking that you be assessed by an optometrist as the difficulty you have identified is with your vision.

A document holder has been found that you could use in the interim. If any further equipment is recommended, we may need to organize an ergonomic assessment to ensure that is properly set up....

...

[114] After two months, the management team considered the grievor's request for something to help her see the small print on the work she processed. The performance management action plan was revised to state, "... her team leader will provide support by doing the following: ... Management will provide a magnifying sheet as per Carol's request."

[115] The employer cited Adjudicator Katkin's decision in *Kalonji* as an example of a recent Board case in which a grievor claimed to have been treated badly and differentially in terms of how management applied rules and discipline. Despite this,

the adjudicator noted his duty to focus his review upon the reasonableness of the employer's assessment in addition to the *Raymond* criteria cited earlier.

[116] Counsel for the employer also cited my decision in *Williams*, which in turn, cites *Grant*, as follows:

...

[306] ... I wish to emphasize the fact that Parliament has directed my review of these matters and the consideration of whether bad faith existed to be strictly limited to the assessment of the grievor's performance and not to his relationships with his supervisors. As I found in my recent decision, Grant v. Deputy Head (Correctional Service of Canada), 2017 PSLREB 59 at paras. 108 and 109:

[108] What Parliament has directed me to do in s. 230 is to explore whether the employer's assessment of the grievor's performance as unsatisfactory was reasonable. It strikes me that many grievors will have experienced bad feelings in their relationship with those supervisors who struggle day to day with the difficulties being experienced by their staff who feel challenged to meet performance standards. I read s. 230 as being an acknowledgement by Parliament that such difficulties and even hard feelings may arise but that the assessment of performance must be looked at separately and on its own merits.

[109] Bad faith, if it is proven to have tainted the assessment of performance, can lead to a finding of unreasonableness under s. 230. I accept that for a grievor who has experienced many difficult experiences with a manager, this separation may be difficult, if not impossible for him or her to make.

...

[117] The following passage from my decision in *Grant*, cited by the employer, applies equally to the evidence before me in this case:

...

[108] ... It strikes me that many grievors will have experienced bad feelings in their relationship with those supervisors who struggle day to day with the difficulties being experienced by their staff who feel challenged to meet performance standards. I read s. 230 as being an acknowledgement by Parliament that such difficulties and even hard feelings may arise but that the assessment of performance must be looked at separately and on its own merits.

...

[118] While undoubtedly, some of Ms. Smythe Wilson's actions led the grievor to quite reasonably perceive her workplace atmosphere as cold, I do not find it sufficient for

me to find bad faith on the part of the employer as the poor treatment cited by the grievor did not bring into question the reasonableness of the employer's assessment of her performance beyond what I have already noted.

IV. Conclusion and remedy

[119] I might have been persuaded by the employer counsel's submissions and the evidence regarding the grievor failing to consistently meet productivity standards had this factor alone been relied upon in the decision to terminate her employment.

[120] However the evidence does not persuade me on a balance of probabilities that an error rate standard had been created or effectively communicated to the grievor.

[121] Since the employer relied upon both the grievor's productivity and her error rate, I must allow the grievance, as I cannot conclude that the deputy head's opinion was reasonable that her performance was unsatisfactory.

[122] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[123] The grievance 566-02-10563 is allowed.

[124] The grievance 566-02-10564 is rejected.

[125] The parties are directed to seek agreement on an appropriate remedy.

[126] I shall remain seized for 90 days of this decision being issued with respect to all matters related to remedy.

February 25, 2020.

**Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board**