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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

MOHAMED EBADA

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as

Ebada v. Canada Revenue Agency

In the matter of an individual grievance referred to adjudication

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Sarah Godwin and Lucy Chislett, Professional Institute of the Public Service of Canada

For the Employer: Caroline Engmann, counsel

Heard at Ottawa, Ontario,
November 1, 2016, December 18 to 20, 2017, and January 25, 2018.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Mohamed Ebada (“the grievor”) was rejected on probation on April 15, 2014 from his position of IT Developer, classified at the CS-01 group and level, in the Business and Enterprise Solutions Directorate, Information Technology Branch, at the Canada Revenue Agency (“the Agency”). The letter of rejection on probation (“the letter of rejection”), reads as follows:

...

Your appointment to the position of IT Developer (30269453) was in accordance with a probationary period for the duration of 12 months with the Canada Revenue Agency ([Agency]).

A review of your performance since your start date indicates that the performance gaps identified in your performance improvement plan have not improved by an acceptable margin. In addition, you will not have obtained the required level for one of the [Agency] core competencies, Effective Interactive Communication, by the end of your probationary period. Steps taken by management to help you improve your performance include the implementation of a Performance Improvement Plan, additional training, coaching, mentoring as well as many meetings with you to discuss your tasks and performance.

By the powers delegated to me by the Commissioner, under article 51(1)(g) of the Canada Revenue Agency Act, I hereby advise you that you are rejected on probation effective end of business on April 15, 2014. You will receive a lump sum payment equivalent to two (2) weeks’ pay in replacement of the period of notice.

...

May I take this opportunity to thank you for your services to the Canada Revenue Agency and wish you every success with your future endeavours.

...

[2] The grievor filed a grievance on May 2, 2014, against the rejection on probation, in which he alleges this:

1) Only one performance improvement plan was performed at the four-month mark. No performance improvement plan was performed at the eight-month mark.

2) I did not finish my first year of probation.

3) The result for the effective interactive communication competency was due one day after I was rejected on probation.

4) My performance report dated Nov 25th, 2013 shows the overall assessment as “Results Mostly Meet Expectations”.

[Sic throughout]

[3] As the corrective measure, the grievance states: “to [be] reinstated in whole”.

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 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 section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[5] The grievor referred his grievance to adjudication on April 17, 2015, under s. 209(1)(b) and 209(1)(c)(i) of the *Public Service Labour Relations Act*. At all material times, those sections read as follows:

209 (1) An employee ... may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee’s satisfaction if the grievance is related to

...

(b) a disciplinary action resulting in termination, demotion, suspension, or financial penalty;

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the *Financial Administration Act* for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

[6] At the outset of the hearing, the Agency raised an objection that the Public Service Labour Relations and Employment Board, as it was then known, was without jurisdiction in this matter. The Agency is a separate agency under the *Financial Administration Act* (R.S.C., 1985, c. F-11, *FAA*) and is not subject to the *Public Service*

Employment Act (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). The Agency argued that the letter of offer clearly stated that the grievor's determinate appointment was from April 22, 2013, to April 21, 2015, and that that period could be lengthened or shortened, depending on operational requirements and the grievor's work performance. The decision to reject the grievor on probation was communicated to him during the probationary period and was for employment-related reasons. In its final-level decision on the grievance, the Agency stated, "as an employee appointed under the IT Apprenticeship Program, your probationary period shall be for the duration of the training program, i.e. up to a maximum of 18 months".

[7] The Agency maintained that management met with the grievor on a number of occasions to discuss concerns with his performance and took steps to help him improve by providing him with additional training, coaching, access to resources, and weekly meetings and by ensuring that he understood what was being asked of him. Despite these efforts, checkpoints, and a performance improvement plan, the Agency assessed that the improvement in the grievor's performance was not sufficient to meet the requirements of his position. As such, the Agency decided that he was not suitable for continued employment.

[8] 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 Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* 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* (*FPSLRA*; for clarity, *FPSLRA* is used in this decision to refer to the current and all previous versions of that Act).

[9] For the reasons that follow, the Agency's objection to jurisdiction is dismissed. I find that the Agency had no *bona fide* dissatisfaction with the grievor's ability to discharge the duties of his CS-01 position. I find that the Agency's decision to reject the grievor on probation was a disguised disciplinary action on the grounds that it was a contrived reliance on the *CRAA*, a sham or a camouflage. The grievor was not provided with a fair opportunity to demonstrate that he was able to discharge the

duties of his position. He was denied technical training, which impacted his work performance, and he was not told what he needed to do to improve the Agency's core competency of effective interactive communication; nor was he provided with the training to be able to meet the Agency's core competency.

II. Preliminary issue: document disclosure and the *Privacy Act*

[10] The grievor referred to the *Privacy Act* (R.S.C., 1985, c. P-21) and questioned the Agency's witnesses with respect to documentation that was not disclosed to him before the hearing. Both witnesses advised that they had disclosed all the documentation that was in their possession that pertained to the grievance.

[11] The Agency's witnesses were put on notice that the grievor would testify that his work was not governed by s. 22(1)(b) of the *Privacy Act*, which provides that the head of a government institution may refuse to disclose any personal information requested under s. 12(1)(b) if the disclosure could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information i) relating to the existence or nature of a particular investigation, ii) that would reveal the identity of a confidential source of information, or iii) that was obtained or prepared in the course of an investigation.

[12] I asked the grievor if he had challenged the results of his access-to-information request pursuant to the *Privacy Act*. He informed me that he had not. I informed the grievor that the Board had not received any disclosure request from him and that if he wished to have the information disclosed that he should make a disclosure request pursuant to the *FPSLRA*. The grievor did not make a request to obtain the disclosure of any such information. Consequently, I informed the parties that I would not deal with this matter in the context of this decision.

III. Summary of the evidence

A. Context

[13] The Agency called Robert Spirito, Technical Specialist at the Agency. He was the information technology (IT) team leader for Business and Enterprise Solutions Directorate, Information Technology Branch, from July 2010 to February 2014. In that role, he was responsible to monitor the team's activities, which supported an Internet application used by taxpayers to submit their tax returns. He was responsible for all

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human resources matters and the performance management of employees who reported directly to him. The team was composed of a lead developer, a technical writer, and an IT tester developer. The grievor was responsible for developing and maintaining the code and to add additional features to the application. All of them reported to Mr. Spirito and he reported to Christine Castleman, Manager, Infodec Processing Section/PIECE Division, Business and Enterprise Solutions Directorate, Information Technology Branch.

[14] Ms. Castleman testified that there were approximately 35 to 40 employees who reported to her. Out of these, 4 of them were team leaders who reported directly to her. As a manager, she was responsible for the financial envelope delegated to her, human resources for employees, and managing the Infodec project. She had no role in hiring the grievor. She began working in the section in August 2013, 4 months after the grievor was hired. The grievor was the only Information Technology Apprenticeship Program (ITAP) employee in the section.

[15] The grievor was in a pool of qualified candidates as part of the ITAP. Mr. Spirito reviewed the grievor's résumé and determined that he wanted to pursue the possibility of hiring the grievor. Mr. Spirito was looking for a developer and an analyst with skills in computer coding. The grievor appeared to have the required skills beneficial to the work accomplished by the team. Mr. Spirito and his colleague interviewed the grievor and concluded that the grievor was a good candidate.

[16] The grievor possesses a Master of Science degree in systems science and a Bachelor of Applied Science in computer engineering from the University of Ottawa. His experience is mostly in programming using several different programming languages, and in software development. There is no mention in his résumé about web development or Internet applications. The grievor recalled his discussion with Mr. Spirito and another manager during the interview. The grievor mentioned to them that he had experience using Java but no experience in web development. The grievor recalled that Mr. Spirito and the other manager stated that he would be provided with training as part of the ITAP. Because it was an apprenticeship program, the grievor was agreeable to that.

[17] In cross-examination, the grievor was asked about the projects listed in his résumé. He explained that he had experience working with a Java simulator, a

computer program in which instructions are given. Through inputs in the code, it creates outputs. It also creates a simulated time lapses in the network. He did this in the Java programming language. This is different from JSP, which stands for “JavaServer Pages” or “JavaScript programming”, and HTML or “Hypertext Markup Language”, which is used to develop websites. He insisted that he informed Mr. Spirito and the other manager during the interview that he did not have this experience. Mr. Spirito and the other manager assured him that he would get the required training.

B. The letter of offer

[18] On April 16, 2013, the grievor was offered a determinate appointment as an IT developer at the CS-01 group and level at the Agency from April 22, 2013, to April 21, 2015. The letter of offer indicated that the period could be lengthened or shortened, depending on operational requirements and the grievor’s work performance. It stated that the offer should not be construed as an offer of permanent employment; nor should it be considered a promise of continued employment.

[19] The letter of offer specified that as an employee appointed under the ITAP, the grievor’s probationary period would be for the duration of the training program, i.e., up to a maximum of 18 months. It directed the grievor to refer to the applicable apprenticeship program for more information on the probationary period. The letter was signed by Richard Boulet, Director, Payments, Infodec, Enterprise Correspondence and E-service Division and overarching chair of the ITAP.

C. The “IT Apprenticeship Program Summary Document” and the “ITAP Information Guide 2015”

[20] The “IT Apprenticeship Program Summary Document” was signed by the grievor on April 22, 2013. It provides that “the objective of the ITAP program is to bring leading-edge technology expertise into the IT Branch and offer effective and meaningful training and career development opportunities to these valuable resources.” Apprentices are hired by the Agency as CS-01s but, while in the ITAP, they are assessed for promotion against a “CS-02 standard of competence”. That standard includes “... work-specific experience and competencies/qualifications that are assessed through standardized and locally developed tools.” The document mentions that an apprentice will normally need at least 12 months to get familiar with the operations of the Agency and that the probation period should be for a maximum of 18 months.

[21] The ITAP selection board, in consultation with the hiring manager, determines if apprentices meet the CS-02 standard of competence. All apprentices who successfully meet the CS-02 standard of competence are eligible for promotion and are appointed without process to a position at the CS-02 group and level.

[22] Apprentices in this program are subject to the probationary period in accordance with the staffing program and Annex K of the “Directive on Apprenticeship Programs”. They generally require a minimum of 12 months to familiarize themselves with the CRA’s operations. While promotions may occur at the 12-month mark, there may be exceptional situations where a lengthier period is required to enable them to meet the required standard of competence. It was therefore proposed that the probationary period should be for the duration of the training program, i.e., a maximum of 18 months.

[23] In cross-examination, Mr. Spirito acknowledged that an apprentice’s probationary period may be extended to 18 months in exceptional circumstances. It was his understanding of the program that it was meant to offer meaningful training and career development opportunities. He agreed that probation of an apprentice was for a minimum of 12 months.

[24] The “IT Apprenticeship Program Summary Document” provides that an apprentice who does not satisfy the “CS-02 standard of competence” may:

- remain in the current CS-01 position;
- be laterally moved to that another CS-01 position in the Information Technology Branch and remain a CS-01; or
- be rejected on probation pursuant to the *Canada Revenue Agency Act* (S.C. 1999, c. 17; *CRAA*).

[25] The document stated that the standard of competence used is the statement of staffing requirements for the CS-02 level of competence. The standardized and non-standardized (locally developed) tools are the method of assessment used to determine if apprentices have developed sufficiently to warrant promotion to the CS-02 group and level. Apprentices who achieve a “meet” result are deemed to possess the required degree of competence and are eligible for promotion to CS-02.

[26] In cross-examination, the grievor was referred to an “ITAP InfoZone” document printed on December 20, 2017, and entitled, “Job aid: How to apply the core performance scale”, which describes the different levels of performance. According to

the Agency, that document was in force while the grievor was employed. A level two signifies a “mostly meets” result but at times it means “below expectations”. According to the document, the grievor met some but not all requirements for promotion as a CS-02. The grievor stated that he was not familiar with this document. I note that this document was not introduced through the Agency’s witnesses.

[27] The “ITAP Information Guide 2015”, which was similar to a document that was in force at the time of the grievor’s employment, provides that the hiring manager should discuss with the apprentice the “Statement of Staffing Requirements” for CS-02s and should explain how those staffing requirements relate to the duties of a CS-02 within the Information Technology Branch. No evidence was presented to indicate that Mr. Spirito had such a discussion with the grievor.

D. The “ITAP Overview for Apprentices” document

[28] The “ITAP Overview for Apprentices” document states that should an apprentice not be promoted as a CS-02 at 12 months, the apprentice continues to be on probation while in the program, up to a maximum of 18 months. The grievor confirmed at the hearing that this was his understanding of the program.

[29] The “ITAP Overview for Apprentices” document described the objective of the program this way:

...to bring leading-edge technology expertise into the [Agency] and offer effective and meaningful training and career development opportunities to university and college students who have graduated with a degree or diploma in computer sciences, information technology, information management or other relevant speciality and who meet the [Information Technology Branch] CS Education Standard.

[30] The grievor was made aware of the “ITAP Overview for Apprentices” document at the beginning of his placement in the ITAP. He was required to familiarize himself with all the ITAP documents and the details of the program.

[31] Mr. Spirito testified that the purpose of the ITAP was to allow graduated students a probationary period to acclimatize from the school environment to work and to transition to become an employee of the Agency. As the team leader, he supervised the grievor directly.

[32] The “ITAP Overview for Apprentices” document indicates that the managers of an apprentice are responsible for clarifying the position duties and setting performance objectives. Specific training and learning requirements may be identified to assist the apprentice in meeting the statement of staffing requirements for CS-02s. These training and learning needs are outlined in the Agency’s individual learning plan that forms part of the apprentice’s training and development plan. The grievor confirmed that this was his understanding and that it was communicated to him during the hiring interview with Mr. Spirito and another manager. Mr. Spirito agreed that he was responsible as the grievor’s team leader to ensure to clarify the position’s duties, set performance objectives and identify training and learning requirements. This was also confirmed by Ms. Castleman. The Agency’s individual learning plan for the grievor was not introduced into evidence.

[33] In cross-examination, Ms. Castleman confirmed that she indirectly managed the grievor starting in the fall of 2013 and that she was familiar with the “IT Apprenticeship Program Summary Document” that was signed by the grievor on April 22, 2013. Mr. Spirito was the team leader, and he was the first point of contact for the grievor. She was not familiar with the “ITAP Overview for Apprentices” document. She was familiar with the “ITAP Information Guide 2015”, which was similar to a document that was in force at the time of the grievor’s employment. She understood that the duration of the program was 18 months. She specified that the probationary period was 12 months but that in exceptional circumstances, it could be extended to 18 months. She did not explain what could be considered exceptional circumstances.

[34] In further cross-examination, Ms. Castleman was referred to an “InfoZone [Information Technology Branch] FAQ’s” document about the ITAP dated 2017, which states that the ITAP is an IT apprenticeship program that recruits recent IT graduates. They are hired as CS-01s and promoted as CS-02s after successfully completing a 12- to 18-month developmental training period. Ms. Castleman stated that in 2013, the developmental training period was mostly focused on 12 months. She did not know that in recent years, the Agency changed the developmental period to 18 months because of a low success rate. No evidence was introduced by the grievor to establish that the Agency had changed the developmental period to 18 months.

E. The developmental period and the grievor's performance

[35] The "ITAP Overview for Apprentices" document describes the developmental period in which apprentices acquire a working knowledge of the business and the diverse technological operations of the Agency. Apprentices receive hands-on training and exposure to the Agency's software and hardware training that can be acquired only at the Agency.

[36] Mr. Spirito explained that there were 3 checkpoints assessments in the developmental period: one at 4 months, one at 8 months, and one at 12 months. He did the 4-month checkpoint assessment, which was signed by the grievor. He did the 8-month checkpoint assessment, but it was not signed by the grievor. He was not sure who did the 12-month checkpoint assessments for the grievor.

[37] The "ITAP Overview for Apprentices" document describes a timeline for the development period. At one to three months, the purpose is to provide the apprentice with a program overview, to discuss roles and responsibilities, and to introduce the statement of staffing requirements for CS-02s. Recently hired apprentices are encouraged to learn more about the program and familiarize themselves with the staffing requirements for CS-02s.

[38] In cross-examination, Mr. Spirito recognized that the ITAP requires managers to identify learning requirements and include formal training so that apprentices can meet the statement of staffing requirements for CS-02s. He stated that this would be part of the individual knowledge and training plan. The individual knowledge and training plan that was prepared for the grievor were not introduced into evidence.

[39] The grievor understood that he was hired for a determinate 2-year period with a minimum of a 1-year probation, up to a maximum of 18 months' probation. If he successfully met all staffing requirements for CS-02s, then he would be promoted as a CS-02. He understood that if he did not meet all the statement of staffing requirements for CS-02s within 12 months that he would have an additional 6 months to meet them. The grievor was aware that he had to meet all 5 of the Agency's core competencies to be eligible for promotion. He knew that he would also have to meet the staffing requirements for CS-02s to be eligible for promotion.

[40] Upon starting as an apprentice, the grievor testified that he met one of the five Agency's core competencies in addition to English writing. The employee performance report ("the grievor's midyear performance assessment report"), which will be discussed later, referred to the five following Agency's core competencies: adaptability, analytical thinking, client service orientation, effective interactive communication, and teamwork and cooperation.

[41] In cross-examination, the grievor confirmed that there were three ways in which the Agency's core competencies could be assessed: observe and attest, third-party validation, and multiple-choice assessment. The observe-and-attest assessment is performed by the supervisor who has supervised the employee for at least six months. The grievor stated that this did not happen with Mr. Spirito. Mr. Spirito told him to write up his accomplishments and that Mr. Spirito would attest to it. As will be discussed later in the decision, Mr. Spirito left before he was able to finalize his assessment of the Agency's core competencies regarding the grievor. Mr. Spirito was supposed to assess those competencies as part of the performance improvement plan ("the grievor's performance improvement plan"), but he did not.

1. The four-month checkpoint assessment

[42] At the four-month mark, there is an apprenticeship assessment, where the ITAP chair or representative meets with the hiring manager or the team leader and with the apprentice individually. The purpose is to discuss the progress made by the apprentice and arising issues and to discuss strategies and the progress on meeting the requirements for promotion as a CS-02.

[43] Mr. Spirito testified that the grievor was set up to make sure that he had everything he needed to do his work. The grievor shadowed the lead developer, and the analyst provided the grievor with mentoring. Mr. Spirito assigned the grievor work and monitored his performance and timelines. At this time, the grievor was involved in testing the product and had to review over 100 cases and examine the application to ensure that the application was correct. The grievor disagreed that he was offered mentoring by his teammates.

[44] As part of the four-month checkpoint assessment, on July 23, 2013, Mr. Spirito wrote to Mr. Boulet, Chair of the ITAP, and stated that the grievor did not have the required knowledge base to be an effective and contributing member of his team for

the CS-01 position. After a few months of observing the grievor learn and work with the team, it came to Mr. Spirito's attention that the knowledge gaps were too great for the grievor to meet the performance objectives. Mr. Spirito indicated that he discussed the performance gaps with the grievor. While the grievor was familiar with Java as a pure application language, he lacked the required knowledge of HTML, JSP, and XML.

[45] Unfortunately, HTML, JSP, and XML form the basis for the Java Struts and Tiles course the grievor took in May 2013 that was deemed a requirement to understand the code used for the development of the application. The only real option to address the grievor's knowledge gap was additional training, which might have been rather extensive and costly. In his email to Mr. Boulet, Mr. Spirito adds that "in fairness to both [the grievor] and the Agency, I fear that the required training or retraining will be rather costly and consume a considerable amount of time that neither party should be expected to do in order to ensure a good fit in the position."

[46] Mr. Spirito denied the grievor's request for JSP training and looked at other options. Mr. Spirito suggested that the grievor look at online resources to fill in the knowledge gaps that the grievor could take on the grievor's own time and that were accessible at home and at work. Mr. Spirito explained his concerns to the grievor and to Mr. Boulet. He was hopeful and optimistic that the grievor would be able to turn things around.

[47] The grievor testified that during the first month of his apprenticeship, there was lots of testing to be done so that the project could proceed. There were not enough people on the team, and it was a very busy environment. He was assigned a load to test, and he was responsible to identify how the systems behaved and if any pieces were missing.

[48] The grievor recalled that he had lots to learn and to get used to when he started as an apprentice. Shortly after his introduction to the team, the grievor was registered to take a programming course, which is a standard course offered to all incoming employees that provides a framework to understand how the application works and is tailored specifically to the Agency's IT environment. The grievor took this five-day course from May 6 to 10, 2013. This course was an all-inclusive basic Java knowledge course, which he would not have learned in university. He stated that this technology was in-house technology at the Agency.

[49] In July 2013, the grievor reached out to the training provider to discuss requirements for developing dynamic websites using the struts framework. The grievor was having problems working with JSP files and using HTML. He stated that his background is in Java programming but that he had not used HTML, developed a website, or written JSP files before. He asked the training provider what course would help him with this specific need and the cost of the training.

[50] The grievor explained that he was working with web Java components and Java Struts, as well as HTML and web development. This is not what he learned in university. He had four components missing. To bridge his knowledge with the course he had taken, he needed to take a JSP course, which was the prerequisite course.

[51] The training provider informed the grievor that the JSP course was Java for web-development training and that the course would cost just over \$2000. It was scheduled for August 26, 2013. Mr. Spirito testified to not having approved this course because it was a basic course. Mr. Spirito was under the impression that the grievor would have learned JSP in university. This was a prerequisite course to the course the grievor had taken in May. Mr. Spirito was concerned that the grievor did not have the necessary qualifications despite what was indicated in his résumé, but he nonetheless refused the training.

[52] In cross-examination, the grievor confirmed that the training providers recommended that he take a JSP and an HTML course to address the knowledge and performance gap. He could not recall other prerequisites he needed to take or other courses that would've assisted him.

[53] At the hearing, the grievor claimed that Mr. Spirito came from a different technical background, and that Mr. Spirito could not provide him with the required technical mentorship in his field of work. The grievor asserted that he was not offered meaningful training and career development opportunities.

[54] The grievor claimed that he was never mentored, contrary to what the Agency indicated in the letter of rejection. He stated that it was monitoring and that he had to send an email when he got to the office in the morning and when he left at the end of the day. The grievor had to provide Mr. Spirito with a daily report of everything he did each day and how long it took him to do it. It was an inefficient use of the grievor's time and of no real value to anyone. It was not mentoring. It was monitoring.

[55] Mr. Spirito disagreed with the grievor's view. Mr. Spirito maintained that the grievor was being mentored to accomplish work to be performed within a normal time frame and to have a better idea of work performed daily. The grievor had requested an accommodation during lunch hour, to attend family obligations. Mr. Spirito had approved that request. Because of this request, Mr. Spirito was concerned that the grievor would have to work later than 6:00 p.m. He wanted to make sure that the grievor was completing his work within a reasonable amount of time. Otherwise, it would show the insufficiency of the grievor's ability to be a programmer.

[56] The grievor stated that he did not receive additional training, contrary to what the Agency claimed in the letter of rejection. He had one week of full-time training that everyone in the team received. It was standard training for new team members. It was not exclusive to him. He searched for courses that were relevant to his work requirements, and he emailed the course provider and requested approval. His request for JSP training was denied by Mr. Spirito. Instead, the grievor took a free online course for all Information Technology Branch employees. The training was offered to all employees to take on their own time and could be accessed from home. This was not training that he was asked to take or that was tailored specifically to him. The JSP training that he requested would have allowed him to perform his job better but was denied by Mr. Spirito on the grounds that it was too costly. However, Mr. Spirito approved that same JSP training for another team member who had been working at the Agency for the last seven years.

[57] Mr. Spirito stated that the JSP training that the grievor requested would not have been beneficial because the grievor lacked the basic knowledge for that course. Alternate training was suggested by the lead programmer of the team because of the grievor's lack of knowledge. The grievor stated that the free online training that was suggested was very basic and not on the same level as the work that was being performed. He took a course in JSP and HTML and self-studied to meet the requirements of his CS-01 position. He passed the course with a high mark and provided the certificate to Mr. Spirito.

[58] In cross-examination, Mr. Spirito referred to the grievor's résumé. Mr. Spirito agreed that the grievor's résumé does not include any reference to JSP or HTML. The grievor's résumé does make significant reference to knowledge and experience using Java. Mr. Spirito did not know the difference between Java and Java Struts, which was a

requirement of the grievor's CS-01 position. Mr. Spirito stated that he is not a coder, but he suspected that both Java and Java Struts had a similar framework. He denied having pulled the grievor's résumé to ask him if he had lied on it.

[59] In cross-examination, Mr. Spirito did not respond when it was suggested to him that he did not want to spend more time and funding to train the grievor. Mr. Spirito was not aware that the grievor felt that the online training that was suggested, instead of the JSP training, was too basic and not sophisticated enough to provide the knowledge needed to perform the duties of the CS-01 position. Mr. Spirito stated that the grievor gave him the JSP training certificate and that the grievor told him that he did not need more training.

[60] The grievor maintained that when he joined the team as an apprentice, he was peered with two team members. Neither of them liked to be asked work-related questions. They made a complaint to management saying that he asked too many questions. The grievor disagreed that he asked too many questions. He kept a notebook at his desk of all the questions he asked to not repeat the questions. He had no issues with his team members. But some team members refused to assist him and to answer questions. That did not change over the course of his probationary period.

[61] In cross-examination, Mr. Spirito agreed that the grievor was not assigned a specific mentor, but that support was provided through his teammates. Mr. Spirito responded that the teammates' frustrations were not about the amount of questions that were being asked of them but the repetitive nature of those questions. The teammates complained that the grievor would not do the basic legwork before asking them questions. That demonstrated that the grievor was not grasping what they were attempting to assist him with. The questions would at times interrupt their personal time. Both teammates informed Mr. Spirito that the grievor lacked basic knowledge and that this was apparent by his questions. They felt that there was no point to assist the grievor further but that they did their best to ensure that the grievor was part of the team.

[62] In cross-examination, Mr. Spirito stated that the grievor's teammates were upset and refused to answer questions because they felt that it was not worth it because the questions were repetitive. The team refused to go over the code with the grievor because of the gap between the grievor's knowledge and his training. At the four-

month checkpoint, Mr. Spirito instructed staff to stop answering the grievor's questions, and at roughly around this time, the grievor stopped asking questions.

[63] In cross-examination, Mr. Spirito acknowledged that the grievor was not hired as a programmer but as an IT developer. Mr. Spirito agreed that the ITAP requires managers to identify learning requirements and include formal training so that the apprentices can meet the needs and requirements of a CS-02 position to which they can be promoted.

[64] In cross-examination, the grievor confirmed that Mr. Spirito was the person responsible for assessing his performance at the four-month checkpoint. Mr. Spirito was not qualified to assess his technical work, and Mr. Spirito never looked at his technical work. Mr. Spirito could not assess his IT-developer skills. He understood that his performance would be assessed as part of the ITAP. He knew that his peers assessed his work as part of the peer review.

[65] In cross-examination, Mr. Spirito's attention was brought to the "InfoZone [Information Technology Branch] FAQ's" document about the ITAP dated 2017, at page four. He recognized that managers must hire an ITAP apprentice with the intention of promoting the apprentice as a CS-02. If all staffing requirements for CS-02s are met, the apprentice will be promoted as a CS-02. Hiring managers must ensure they have a permanent CS-02 position in their areas to which the apprentice can be promoted.

[66] In cross-examination, Ms. Castleman stated that she was aware that the ITAP recommended computer-based training. Although the grievor's individual learning plan provided that he needed training in Java Struts, HTML, and JSP, part of the performance management process provides that training that is required is approved in accordance with what is available and at the lowest possible cost, which is why the grievor was offered the free online training. She did not see the grievor's learning plan because it was developed with his immediate supervisor.

[67] Mr. Spirito completed the grievor's four-month checkpoint assessment through an interview with Greg Crowe, the new ITAP Chair, and discussed the grievor's progress up to that point. Mr. Spirito explained that he had concerns with respect to the grievor's gap in knowledge, which was directly related to the training and the skills required to be able to code. This checkpoint assessment was completed in August 2013.

[68] The four-month checkpoint assessment report indicates that the grievor had discussions with Mr. Spirito on his individual learning plan and that he understood the role of performance objectives. It indicated that he was not provided with an assigned mentor but that the team was providing him with support. The grievor indicated that he felt that he had the necessary tools and guidance to succeed in this program. He indicated that he felt behind in his learning because the area is very busy, which made it difficult to take on new activities when the focus had to be more heavily weighted towards getting things done than learning, that he felt that he could use additional training in some areas, and that he had discussed this with his supervisor.

[69] As a result of the four-month checkpoint assessment, the grievor was rated as having minor issues and as being on track for promotion as a CS-02 within the guidelines. The assessment report also indicates that special care should be taken to ensure that the volume of work in the area did not place the grievor's development at risk. This was to be raised with the team leader-manager at their four-month checkpoint meeting scheduled for August 16, 2013.

[70] The grievor disagreed that there were any performance issues. He was involved with testing and working on the technology, but there were no performance issues that had been identified by Mr. Spirito in August 2013.

[71] The four-month checkpoint assessment report indicates that the grievor was slightly behind schedule in developing his skills; however, Mr. Spirito felt that sufficient time remained to address the situation. Mr. Spirito felt that the timeline was tight but achievable. Mr. Spirito made no recommendations and indicated that he felt that the ITAP is a good program. The assessment report further indicates that the observe-and-attest function cannot be used to assess the grievor regarding the Agency's core competency of client service orientation. Supervisors are encouraged to work with apprentices on identifying an appropriate CS-02 position and submitting to a voluntary assessment. Mr. Spirito was reminded that even though there was a heavy workload, focus must still have been placed on bringing the grievor to the level needed for promotion as a CS-02 by the end of the probationary period. Mr. Spirito did not testify further to this document.

2. The grievor's performance improvement plan and the grievor's midyear performance assessment report

[72] The grievor stated that he reviewed his performance objectives for the CS-01 apprenticeship position and discussed his needs for learning and the requirements of the CS-02 position with Mr. Spirito. Because the grievor started in April 2013, they discussed how things were going and the grievor's interactions with the team. As a result of the grievor's gaps in knowledge, Mr. Spirito prepared the grievor's performance improvement plan and the grievor's midyear performance assessment report to address the performance gaps.

[73] The grievor's midyear performance assessment report indicates that the period appraised was April 22, 2013, to August 31, 2013. It is unclear whether the dates for the period appraised were typos. The report was created on May 6, 2013. The report was signed by Mr. Spirito on November 22, 2013, and the grievor on November 25, 2013. No evidence was presented to explain the lengthy delay between its creation, its implementation, and its signing. The grievor testified that he discussed this document with Mr. Spirito the day it was signed by him.

[74] The grievor's midyear performance assessment report mentioned the staffing requirements of the CS-02 analyst developer position to which the grievor was hoping to be promoted. The report identified the five Agency's core competencies that the grievor needed to achieve, which are: adaptability, analytical thinking, client service orientation, effective interactive communication, and teamwork and cooperation.

[75] The grievor's midyear performance assessment report also described the work objectives that the grievor needed to meet for promotion to the CS-02 analyst developer position: the development, delivery, enhancement, integration, maintenance, and support of IT infrastructure, products, solutions, and services to support client operations and business activities, and communication and reporting for clients, stakeholders, and management. The report listed the five Agency's core competencies that apply to the CS-02 position: adaptability, analytical thinking, client service orientation, effective interactive communication, and teamwork and cooperation. As of November 2013, the grievor's midyear performance assessment report indicated an overall assessment that he mostly met expectations.

[76] In the grievor's midyear performance assessment report, Mr. Spirito indicates that the grievor is familiar with Java but not web Java, which the team requires: "As a result, he has been provided with additional training in HTML and JSP so that he can perform the required coding changes within expected timelines." Mr. Spirito states that the grievor's knowledge and learning are being monitored and tested with practical examples of activities in support of his training; for example, code development and debugging.

[77] In the grievor's midyear performance assessment report, Mr. Spirito indicates that the grievor has assisted in creating and maintaining documentation, including an application process flow guide, a high-performance web Java application coding document, test cases, and a test-case repository to meet business needs. The grievor has concluded and participated in the peer review process to ensure the work complies with IT policies. Mr. Spirito comments that the grievor is flexible to adjust his work schedule to accommodate for problems as they arise. The grievor seeks clarification often, to complement his learning. The grievor provides clear and concise responses but with grammatical errors, a situation he is actively seeking to improve. The grievor does provide accurate status reports, both written and oral, by the requested timelines.

[78] In cross-examination, the grievor was asked about the type of work he did. He stated that he wrote programs and code from beginning to end and would sometimes modify or change the code as needed.

[79] During this same period, Mr. Spirito prepared the grievor's performance improvement plan, which he and the grievor signed on November 22, 2013. Mr. Spirito went through the plan with the grievor to make sure the grievor understood the requirements. The execution period was from September 1, 2013, to August 31, 2014. No explanation was provided as to why the plan was signed almost three months after the implementation period was scheduled to start or why the dates did not concord with the grievor's midyear performance assessment report.

[80] In the grievor's performance improvement plan, Mr. Spirito indicated that the grievor "mostly meets" OR "level 2" the performance level of the coveted CS-02 position. The objectives listed are as follows: develop and provide a quality IT solutions and service for Infotec Internet application suite that meets the client's expectations and according to the approved timelines.

[81] In cross-examination, Mr. Spirito could not confirm that he prepared the grievor's performance improvement plan three days before preparing the grievor's performance report, although that is what the dates seem to indicate.

[82] In the box entitled "required corrective actions" in the grievor's performance improvement plan, Mr. Spirito indicates that the grievor has inadequate knowledge of web Java and that the grievor requires additional training in HTML and JSP. The grievor is required to conduct peer reviews and to ensure the work complies with agency and work-unit IT policies, standards, and procedures and is to gather, analyze, design, coordinate, assess, and implement solutions to meet approved requirements.

[83] The performance indicators identified in the grievor's performance improvement plan mention that the grievor's knowledge of the coding environment will be evaluated, that coding changes need to be completed within established timelines, and that peer review and unit testing will ensure that the code changes made are accurate and meet the business and functional requirements.

[84] The grievor's performance improvement plan prepared by Mr. Spirito also indicated that the grievor was required to provide accurate and clear information in all written and oral communications. As a required corrective action, the plan indicated that the grievor must "seek clarification when his understanding is unclear. ensure communication responses are clear, concise and free of spelling and grammatical errors" [*sic* throughout]. As a performance indicator, the plan indicated the requirement for the grievor to provide clear, concise, logical, and grammatically correct oral and written responses. I note that this is a partly undefined standard of perfection.

[85] The grievor's performance improvement plan listed a requirement to provide accurate status reports, both written and oral, on his work by the requested timelines. As a required corrective action, Mr. Spirito indicated that the grievor "provide detailed work plan to supervisor and provide timely updates before then [*sic*] end of each work week and as work objectives are completed." The performance indicator for this objective is the grievor's ability to provide "a detailed work plan ... and updated as items are completed and communicated to supervisor. Weekly status report is completed before the end of each week. Supervisor is notified of problems as they are realized that may impact requested timelines." The grievor had to meet that requirement by August 31, 2014, and the follow-up date was December 13, 2013.

[86] In cross-examination, Mr. Spirito recognized that on occasion, he made grammatical errors himself in his written communications.

[87] Mr. Spirito explained that initially, he met with the grievor twice per week to discuss the grievor's performance improvement plan. Mr. Spirito then realized that it was sufficient to meet once a week. The objectives contained in the grievor's performance improvement plan needed to be assessed before the 12-month checkpoint assessment. Mr. Spirito explained that he prepared the plan with Ms. Castleman. He never acted alone.

[88] In cross-examination, Mr. Spirito recognized the Agency's document entitled, "A Management Guide for Dealing With Poor Performance". He stated that he may have relied on it but that he was unsure if he did in the grievor's case. He agreed that a number of factors could have impacted the grievor's work performance and that these factors include the degree of support on the part of senior management, a consistent and fair approach, the extent of management's experience and knowledge in identifying and dealing with performance issues, the effectiveness of communication between the manager and the employee, the extent to which performance objectives and measurement criteria have been communicated and discussed to ensure mutual understanding, the availability of qualified resource persons to consult on performance issues, the development of a planned approach for dealing with problems, and the consistency and timeliness of the application of the approach to performance problems. Mr. Spirito agreed that it was possible that other factors or things happening in the office could have impacted the grievor's ability to improve his work performance.

[89] In cross-examination, Ms. Castleman recognized the management guide for dealing with poor performance. She stated that the guide offered support to senior management to assist it with successfully managing poor performance. She agreed with the approach described in the guide and the need to consider anything that might be going on in the workplace that could contribute to the poor performance.

[90] Ms. Castleman testified that when she arrived at the Infodec Processing Section/PIECE Division, Mr. Spirito had already filled out the four-month checkpoint assessment report and that she was aware that there were performance issues concerning the grievor and that gaps had been identified with regard to the grievor.

She was aware that Mr. Spirito needed to work with the grievor to successfully promote him as a CS-02. She would receive weekly status reports on projects assigned to the team. She had biweekly meetings with Mr. Spirito to discuss issues, things happening on the team, and other matters that she would need to be made aware of.

[91] Ms. Castleman understood the grievor's performance gaps to be about a lack of knowledge of the technology, his ability to meet timelines, and his written and oral communication skills. She was aware that Mr. Spirito created a performance improvement plan to address those gaps. To address the technological language barrier, the grievor was enrolled in a course and he was helped improve his written communication. Mr. Spirito would meet with the grievor twice a week. Ms. Castleman's name was not on the grievor's midyear performance assessment report or the grievor's performance improvement plan because the grievor was not her direct employee.

[92] During their meetings, Ms. Castleman and Mr. Spirito discussed the grievor's struggles and how they could assist him to meet the staffing requirements for CS-02s, and they created the grievor's performance improvement plan to address each gap with performance objectives so that the grievor could be promoted as a CS-02. Ms. Castleman reviewed the four-month checkpoint assessment report to ensure that the content was accurate.

[93] The period for the grievor's performance improvement plan was from September 1, 2013, to August 31, 2014. Periodically, Ms. Castleman and Mr. Spirito would look at the grievor's progress in addressing the gaps and see what other actions were required to qualify the grievor for promotion as a CS-02. The plan was prepared between September 2013 and November 2013, and it followed the Agency's management guide for dealing with poor performance. The implementation of the plan was a tripartite responsibility between Ms. Castleman, Mr. Spirito, and the grievor. It was their responsibility to ensure that the gaps identified were addressed and to ensure that the grievor received the necessary support to meet the performance objectives. Ms. Castleman's only direct involvement was with Mr. Spirito, to make sure the plan was actioned. She had no direct meetings with the grievor at that time.

[94] The grievor testified that his midyear performance assessment report appraised the period from April 22, 2013, to August 31, 2013. He recalled signing the document on November 25, 2013, and Mr. Spirito had signed it on November 22, 2013. The report

mentioned no issues with the grievor's performance. The overall assessment stated that he mostly met the goals and objectives as determined in the report. The grievor stated that there was not enough time for him to work on the staffing requirements for CS-02s due to the volume of work in the section. He stated that there were no timelines imposed on him to complete his work. The weekly status reports were filed on Fridays. Mondays came, and the team had to perform something urgent, such as debugging. He would ask questions not because he did not have the knowledge but more to determine Agency policies and regulations. As of November 2013, he was no longer asking questions of his teammates. He was not aware of any issues with his performance or any issues with respect to meeting timelines.

[95] The grievor recalled discussing his performance improvement plan on the same day he and Mr. Spirito signed it, which was November 22, 2013. At that time, the grievor stated that he was carrying a full workload, the same as all the other teammates. He received a "mostly meets" in his mid-year performance assessment report. He had a follow-up with Mr. Spirito in December 2013. He had only three weeks left to meet his performance objectives. He did not receive any other training at that time; he already had training and was doing the work. The peer review mentioned in his performance improvement plan was required of all teammates, and he was not sure why it was mentioned in his performance improvement plan. In terms of his communication and grammatical errors, he had improved by then because he was using the spellcheck function. His teammates, including Mr. Spirito, made the same kinds of mistakes. When the grievor's mistakes were brought to his attention, the grievor was more attentive to avoid making them. He felt as though management was nitpicking on him about the smallest things but not really about anything substantive. Mr. Spirito did not provide him with substantive feedback to improve his work. Mr. Spirito could comment only on how the grievor wrote his status reports, breaking the activities down and not making grammatical errors. The grievor testified that he had to perform daily status reports in addition to his weekly reports. He felt as though he was being monitored, not mentored. There was no rational connection between the daily status reports and the performance of his job.

[96] The grievor testified that at the end of November 2013, Mr. Spirito impressed upon him the need for him to meet the staffing requirements for CS-02s. The grievor stated that there were no performance issues identified in the grievor's performance improvement plan. He signed his performance improvement plan on November 22,

2013. It was on that day, for the first time, that the grievor was made aware of the performance issues that Mr. Spirito and Ms. Castleman had identified.

[97] In cross-examination, the grievor stated that until the point at which Mr. Spirito created the grievor's performance improvement plan and the grievor's midyear performance assessment report, there were no gaps identified by Mr. Spirito regarding the grievor's performance. There were no issues with the grievor's work. The November 2013 meeting and the documents the grievor signed that day were a discussion about the staffing requirements for CS-02s that he was required to meet. The performance assessment report was about his eventual promotion to the CS-02 position. Mr. Spirito and the grievor did not discuss the "mostly meets" assessment. The grievor was not aware of the "ITAP InfoZone" document printed on December 20, 2017, and entitled, "Job aid: How to apply the core performance scale", which describes the different levels of performance.

3. The eight-month checkpoint assessment

[98] On December 20, 2013, Mr. Spirito met with the grievor to review the staffing requirements for CS-02s and the grievor's performance improvement plan. On the same day, Mr. Spirito sent the grievor an email to recap their discussions on what performance improvements had been made thus far and what more was required.

[99] In the December 20, 2013, email, Mr. Spirito refers to a previous meeting, which was held on December 12, 2013. At that meeting, Mr. Spirito and the grievor discussed the grievor's performance objectives for 2013-2014 and the grievor's performance improvement plan with the identified performance gaps. Mr. Spirito notes that the grievor is required to deliver the requested application changes according to the approved timelines, and mentions the grievor's knowledge gap pertaining to JSP and HTML, for which additional training was completed to enable the grievor to develop and implement code changes as per his regular duties, within reasonable deadlines. The email also mentions the need for the grievor to improve his written communication, the need to check for grammar and spelling errors on all written correspondence, and the need for the grievor to communicate and not just ask questions but to convey his understanding as well as the gap in his understanding. In other words, what the grievor did not understand. Mr. Spirito reminds the grievor that the grievor has not yet demonstrated that he has achieved any of the Agency's core competencies needed to be eligible for promotion as a CS-02.

[100] Mr. Spirito testified that on December 17, 2013, he had informed the grievor that if the grievor did not address the performance gaps and apprenticeship objectives, he could be rejected on probation. Mr. Spirito explained that it was the grievor's responsibility to ensure that he met the staffing requirements for CS-02s. Mr. Spirito recognized that the grievor's written communication had improved. There was an issue within the team regarding coding activities, which resulted in a delay or setback. The issue related to the grievor's knowledge of policies. The grievor was beginning to code, and there was improvement in his knowledge and performance gaps. The grievor had taken training on his own time. Mr. Spirito testified that there was nothing to keep track of in terms of the grievor's need for training because he never received any requests for training from the grievor. Mr. Spirito directed the grievor to set up a meeting with the team to align the team's activities and to clarify everyone's vision going forward. Ms. Spirito requested that the grievor create a detailed work plan of activities to send to the group along with a meeting invitation. Unfortunately, none was sent, but the team did meet, and it discussed the status of the application and a shared a vision for the future.

[101] In cross-examination, Mr. Spirito agreed that the error in coding activities and the delay was attributable to the entire team and not only to the grievor.

[102] On December 19, 2013, there had been a meeting to discuss the ICTT application kick-off meeting. At that meeting, roles were established, and it was determined that the grievor would be the lead developer. The team members had assigned roles and knew their priorities. The grievor was responsible for developing the input functionality and creating the detailed work plan of activities. The grievor was informed that the deadline for this task would be December 23, 2013. It was determined that the meetings between Mr. Spirito and the grievor would be held weekly instead of twice per week. Their next meeting was scheduled for December 24, 2013, at which time they would discuss the grievor's work plan for the task assigned to him, the comparison document he was working on, and his overall work plan of his workload, and they would continue to address performance gaps and tweak the grievor's performance toward meeting his performance objectives.

[103] In cross-examination, Mr. Spirito agreed that one of the many things discussed at the December 20, 2013, meeting with the grievor was Mr. Spirito's commitment to provide the grievor with assistance that he needed in order to be able to meet the

staffing requirements for CS-02s. The team leader's role is to review and ensure that the staffing requirements are met.

[104] The grievor testified that only on December 12, 2013, did he start to meet with Mr. Spirito twice a week for the first two weeks and then once a week until February 2014, when Mr. Spirito left the Business and Enterprise Solutions Directorate. As for those meetings, the grievor did not recall any technical discussions; there was no coaching or mentoring on the part of Mr. Spirito. The meetings were about the grievor meeting the staffing requirements for CS-02s and the process to meet those requirements. The matters discussed were focused on team members working together as a team and administrative matters. Mr. Spirito wanted to ensure that a team member's work did not overwrite that of another. They were not to discuss the CS-01 apprenticeship position.

[105] The grievor explained that the December 20, 2013, email from Mr. Spirito summarized the meetings they had together since December 12, 2013 and stated that those meetings were held to discuss the team policy and time management. The meetings were not about how the grievor could better perform his work. There was a new team policy directed not only at the grievor but at the entire team. There were no major issues regarding the grievor's performance except for those mentioned in the performance improvement plan dated November 22, 2013. The meetings were simply about tweaking his performance and writing down his activities to meet the staffing requirements for CS-02s.

[106] In cross-examination, the grievor testified that there were no performance issues as of December 2013. His meetings with Mr. Spirito were to continue, to tweak the grievor's performance objectives to meet the competencies of a CS-02 position. The only feedback the grievor received from Mr. Spirito was with respect to the grievor's status reports. Mr. Spirito would ask him to break down the activities and to watch for spelling mistakes. The grievor stated that this was unfair because he was the only team member required to do this. No other team member had to provide weekly status reports. After Mr. Spirito left, he was told by George Chen, the acting team leader, that there was no need to report on his work.

[107] The "ITAP Overview for Apprentices" document states that at the eight-month checkpoint, there is a second assessment. The manager needs to assess whether the

apprentice is on track for promotion as a CS-02. The team leader will input the four-month checkpoint assessment of the apprentice in the Management Service Support Portal and ensure that training is completed or underway. The document states that the staffing requirements for CS-02s should have been evaluated or be in progress, or a plan should be in place.

[108] Mr. Spirito stated that he prepared the eight-month checkpoint assessment report. Unlike the four-month checkpoint assessment report, it is not dated; nor is it signed by him, the manager, or the grievor. It is only one page long. There is no eight-month checkpoint assessment report with a manager signature. In the eight-month checkpoint assessment report, Mr. Spirito documents that the grievor's knowledge gap has been addressed through the provision of additional training; however, a few performance gaps remain, including performing code changes within established time frames, communication improvements, and accurate reporting of activities within established time frames, which are being addressed through the grievor's performance improvement plan. He indicates that the grievor has not achieved any of the staffing requirements for CS-02s, which are also now being addressed in the grievor's performance improvement plan. There is no reference to workload in the section and no follow up to the four-month checkpoint assessment report, which required Mr. Spirito to identify a potential CS-02 position for the grievor.

[109] The grievor testified that he had never seen the eight-month checkpoint assessment report that had been filled out by Mr. Spirito. The grievor saw that report for the first time at the hearing. He was never made aware of the content of that report. He did not know that there were performance gaps remaining, that he was not performing code changes within the established time frames, and that he needed to improve communications and accurate reporting of activities within established time frames, which needed to be addressed through his performance improvement plan. He understood only that he was not yet assessed for four of the Agency's core competencies needed for promotion as a CS-02. Mr. Spirito's input was mainly administrative.

[110] The grievor was referred to an email sent by Mr. Spirito on December 27, 2013, in which Mr. Spirito asks him for a detailed work plan. Mr. Spirito did not like the structure of the document that had been submitted by the grievor. The grievor redid it, considering Mr. Spirito's comments. There were no other issues afterwards. This was

about a project that was begun by other employees and that had been given to the grievor to finish. There were no documents, including no design document, no work plan, and no document on the project. The only information that had been provided to the grievor was the code.

[111] The grievor was referred to a second email, also dated December 27, 2013, which refers to his comparison document and his ICTT work plan. The grievor explained that he had to send weekly status reports. Mr. Spirito would look at them and wanted to know how much time the grievor was allocating to all his tasks; Mr. Spirito wanted job details.

[112] On January 16, 2014, the grievor requested that Mr. Spirito assess him regarding the Agency's core competency of analytical thinking. Mr. Spirito never responded to that request.

[113] As of February 2014, the grievor's status reports had shown improvement. This was acknowledged in an email dated February 7, 2014, from Mr. Spirito to the grievor. Mr. Spirito states that the previous few meetings were focused on the grievor providing accurate and clear status reports. He notes that the grievor can perform his duties and that further training is not required.

[114] Mr. Spirito explained that he left the team in February 2014. Mr. Spirito stated that he attempted to guide the grievor and to assist him on how to address communication with his teammates, to help him with their reluctance to share information and the importance to clearly identify specifically his needs.

[115] The grievor explained that George Chen became the supervisor on an acting basis when Mr. Spirito left, and then another teammate acted in that capacity for about four weeks until the end of April, when a permanent team leader was appointed to the position. During this time, there were no performance issues that were brought to the grievor's attention, and he was not assessed by any of the two acting team leaders.

[116] In cross-examination, the grievor testified that Mr. Chen told him that it was not a common practice to submit weekly status reports on activities and work to be accomplished.

[117] The grievor stated that he wrote to Mr. Spirito six weeks before Mr. Spirito's departure to have Mr. Spirito look at his work and assess whether he meets the

staffing requirement for CS-02s. Mr. Spirito did not meet with him. The grievor asked to meet with Mr. Spirito after Mr. Spirito started the new job, so that he could be assessed as to whether he met the staffing requirements for CS-02s, but Mr. Spirito was too busy. The grievor was able to get his teammates to attest to two of the Agency's core competencies. He was also able to use the multiple-choice assessment for the other. The only missing agency's core competency to be evaluated was effective interactive communication. He had submitted a status report to Mr. Spirito, which was a point-form document, and asked Mr. Spirito to review it. It was the same document he later used to have that agency's core competency assessed by a third party, for which he received a level three.

[118] On February 20, 2014, the grievor sent an email to Mr. Chen, the team leader on an acting basis who had replaced Mr. Spirito. He asked Mr. Chen to review his status report regarding the Agency's core competency of effective interactive communication. Mr. Spirito had suggested changes to grievor's status report; the grievor had made those changes and then had asked Mr. Spirito to evaluate the status report. Mr. Spirito had responded that he was too busy to look at it. Mr. Chen stated that he could not evaluate the status report and informed the grievor to have it evaluated another way.

[119] The grievor was no longer required to submit weekly status reports after Mr. Spirito left the Business and Enterprise Solutions Directorate. The grievor referred to a status report he had sent Mr. Spirito on December 23, 2013. On page two of that report, Mr. Spirito provides him with his input and asks him to break down the activities and provide more details. The grievor felt that Mr. Spirito was nitpicking, as if Mr. Spirito was trying to find something wrong with his work. Mr. Spirito could not evaluate his work because Mr. Spirito had no technical background. The grievor relied on others to evaluate his work. He referred to multiple weekly status reports for which he never received feedback from Mr. Spirito. He also referenced an email he sent Mr. Spirito dated January 14, 2014, in which he responds to a request from Mr. Spirito to provide another status report. The grievor explained that he had to add as much detail as possible because he was writing for someone with no technical background.

[120] In cross-examination, the grievor disagreed that he was provided with feedback from Mr. Spirito on areas that the grievor needed to improve. No work was ever taken away from the grievor, and the work that he performed received no negative feedback. The only feedback that he received from Mr. Spirito was to break down his activities in

his weekly status reports. There was no feedback through peer review on the quality of his work.

[121] In cross-examination, Ms. Castleman stated that she was aware that the grievor asked a lot of questions of his teammates and that his questions were repetitive. She stated that he did not take notes and that his teammates were tired of having to answer the same questions constantly.

[122] In further cross-examination, Ms. Castleman stated that she was aware that the team was busy. She was aware of the comments on page 2 of the four-month checkpoint assessment report, in which it is indicated that care should be given so that the grievor is not behind in his learning on account of all of the work in the section. She was aware that Mr. Spirito did not begin working on Agency's core competencies until December 2013, which was closer to the eight-month checkpoint.

4. The 12-month checkpoint assessment

[123] At the 12-month checkpoint, the hiring manager must assess a CS-01 apprentice's eligibility for promotion as a CS-02. The manager will determine if the apprentice meets the staffing requirement for CS-02s.

[124] The "ITAP Overview for Apprentices" document states that it takes approximately 12 months for apprentices to acquire a working knowledge of the business and diverse technological operations of the Agency; however, up to 18 months may be required, in exceptional circumstances. The "IT Apprenticeship Program Summary Document" signed by the grievor on April 12, 2013, states that an apprentice will normally need at least 12 months to get familiar with the operations of the Agency and that the probation period should be for a maximum of 18 months. It does not mention in exceptional circumstances.

[125] Apprentices are expected to meet their performance objectives and to demonstrate that they meet the staffing requirements for CS-02s within approximately 12 months. Should an apprentice fail to meet the staffing requirements for CS-02s at the 12-month checkpoint (or up to the 18-month pin), he or she may be rejected on probation pursuant to the *CRAA*; if an appropriate vacancy at the CS-01 group and level exists within the Information Technology Branch, the apprentice may be laterally moved to that position; or the apprentice may remain in his or her current position at

his or her substantive CS-01 group and level. I note that the grievor was never assessed for a CS-01 position and was not evaluated against a CS-02 standard. It was never introduced into evidence by the employer.

[126] There was no 12-month checkpoint assessment report and no performance assessment report after December 2013. The grievor referred to a document that listed the Agency's core competencies and their grading scale. On March 12, 2014, he received a level one for analytical thinking, a level one for effective interactive communication, and a level one for teamwork and cooperation. On March 26, 2014, he received a level two for adaptability, a level two for analytical thinking, a level two for client service orientation, a level one for dealing with difficult situations, and a level two for teamwork and cooperation. On April 2, 2014, he received a level three for analytical thinking and a level three for client service orientation. The only remaining agency's core competency that he needed to improve was effective interactive communication.

F. The letter of rejection

[127] The letter of rejection stated the following:

...

A review of your performance since your start date indicates that the performance gaps identified in your performance improvement plan have not improved by an acceptable margin. In addition, you will not have obtained the required level for one of the [Agency] core competencies, Effective Interactive Communication, by the end of your probationary period. Steps taken by management to help you improve your performance include the implementation of a Performance Improvement Plan, additional training, coaching, mentoring as well as many meetings with you to discuss your tasks and performance.

...

[128] Ms. Castleman met with the grievor on March 14, 2014. She wanted to make sure that he understood clearly that he could still be rejected on probation even if he met the Agency's core competencies as the decision would also be based on his work performance. She testified that he was aware that he was still on probation and that Mr. Spirito had left. On the same day, she sent herself an email to document her meeting with the grievor and his understanding that he could be rejected on probation, based not only on his ability to meet Agency's core competencies but also on his work performance.

[129] On March 26, 2014, Ms. Castleman forwarded to the grievor the email that she had written to document their meeting of March 14, 2014. He did not respond to her email.

[130] The grievor testified that he met with Ms. Castleman on March 14, 2014. Initially, he thought that the meeting was about the five Agency's core competencies that he had to meet. He knew that it was an issue, and he had been trying to involve Mr. Spirito to assess him in that regard. Ms. Castleman stated that she was aware that the grievor was trying to be assessed on those competencies. The grievor testified that Ms. Castleman did not mention anything about his work performance; there was no mention of COBOL or Java. He never claimed to know COBOL; none of the work he did involve COBOL. The grievor was referred to the email that Ms. Castleman sent him on March 26, 2014, about their meeting of March 14, 2014, in which she states that she met with him to inform him that he could be rejected on probation and that although he has a degree in engineering, he is not familiar with COBOL and Java. She informed him that even if he met all of the Agency's core competencies, he could still be rejected on probation, on account of his work performance. The grievor stated that the reference to COBOL and Java did not make any sense because none of his work involved these programming languages. He explained that no tasks were ever taken away from him because he could not do the work.

[131] Mr. Spirito's team-leader position was filled on an acting basis by Mr. Chen from February 24 to March 21, 2014. Mr. Chen was not involved in the management of the grievor's work performance. Annie Marcil was acting team leader from March 22 to April 15, 2014. Ms. Marcil had no direct involvement and was not aware of the issues in this case. A permanent team leader was appointed in April 2014.

[132] The grievor was aware that he had been hired for a determinate period of 2 years, which could end sooner. The grievor knew that the first 12 months of his 2-year appointment were a probation period, which could be extended to 18 months.

[133] Ms. Castleman testified that the grievor has a degree in engineering, which is equivalent to a computer science education, which is a requirement for a CS position at the Agency. The grievor was familiar with Java technology, which was equivalent to the technology used by the team.

[134] In cross-examination, Ms. Castleman testified that she was aware that there was a difference between Java, JSP, and Java Struts, but she did not understand the difference because she is not technical. It was stressed to her that the grievor would testify that he acknowledged those differences during his interview with Mr. Spirito and that Mr. Spirito stated that he would provide the grievor with training.

[135] In further cross-examination, Ms. Castleman confirmed that managers must hire apprentices with the intention of training them to the CS-02 group and level. If all staffing requirements for CS-02s are met, an apprentice will be promoted as a CS-02. Hiring managers must ensure that they have permanent CS-02 positions in their areas to which apprentices can be promoted. She agreed with the information contained in the "ITAP Information Guide 2015", which stated that apprentices are to be offered effective and meaningful training career development opportunities. She was not aware of the fact that the grievor was denied training in JSP. She was not aware of the email exchange between Mr. Spirito and Mr. Boulet about the grievor's needs for JSP training and Mr. Spirito's rejection of it.

[136] On April 15, 2014, Ms. Castleman signed the letter of rejection. The decision was made by her, with the assistance of Labour Relations and the input of Mr. Spirito. The grievor's performance was unsatisfactory, despite him being subject to a performance improvement plan which was still in progress. At the 12-month checkpoint, there was not enough time left for him to improve on his deficiencies. Specifically, Ms. Castleman refers to the Agency's core competency of effective interpersonal interaction. I assumed from her testimony that she meant to say effective interactive communication. To re-evaluate that competency, the Agency had to wait 180 days. Therefore, the grievor did not have enough time to achieve that competency before the end of his probation period. By the 12-month checkpoint, the grievor's work performance had not improved by an acceptable margin. The improvement was too small to justify an extension of the probationary period to 18 months. Ms. Castleman recognized that apprentices hired in the ITAP are new to the Agency and that the process is different than hiring any other new employee. The first few months are used by apprentices to get familiar with the Agency, but toward the end, they should be able to work more independently. She did not observe that with the grievor.

[137] Ms. Castleman referenced the letter of rejection and reiterated that management took steps to assist the grievor with the implementation of the grievor's performance improvement plan, he was offered additional training to address the technology gap, he was assigned a coach, and everyone on the team was available to him to answer his questions, not to mention the multiple meetings between the grievor and Mr. Spirito to ensure that the grievor progressed.

[138] In further cross-examination, Ms. Castleman stated that she relied on the grievor's midyear performance assessment report and the grievor's performance improvement plan in deciding to reject the grievor on probation. She helped Mr. Spirito develop the document. She was put on notice that the grievor would testify that he met all his work objectives, that there were no performance issues, and that he delivered the application suite within the required timelines. She responded that she was informed that he needed to improve on submitting his work in a timely fashion.

[139] In further cross-examination, Ms. Castleman was put on notice that the grievor would testify that he signed his performance improvement plan on November 22, 2013, which is the same day that the plan was discussed with him, and that the plan was not implemented before that. Ms. Castleman was also put on notice that the grievor would testify that he signed his midyear performance assessment report on November 25, 2013, which is the same day that that report was discussed with him. She disagreed with those propositions and stated that both were implemented as of September 2013.

[140] In further cross-examination, Ms. Castleman testified that she was not familiar with a grievor's email to Mr. Spirito dated February 19, 2014, in which he lists his biggest achievements in the previous six months, in response to Mr. Spirito's email to the team pertaining to midyear performance assessments, which had to be completed before Mr. Spirito's departure. She agreed that after Mr. Spirito's departure, there was no team leader to supervise the grievor's work, so she took it upon herself. She met with the grievor in March 2014.

[141] In cross-examination, Ms. Castleman stated that no further training was approved for the grievor. As soon as the permanent team leader was appointed to the team, she assumed that the grievor would get proper mentoring. She was put on notice that the grievor would testify that by February 2014, he was working well with Java,

JSP, and HTML. She responded that she was aware that he was working with these programming languages but did not agree that he was working well with them.

[142] The grievor was asked about the letter of rejection. When he met with Ms. Castleman, she was accompanied by a human resources representative, and she gave him the letter. He asked her why he was being rejected on probation. She said that he asked too many questions. He was working on the Agency's core competency of teamwork and cooperation, and he did not know how he had negatively impacted his colleagues' work. Management never clarified its position in that regard. By the four-month checkpoint, he was no longer asking questions. That issue was never brought up afterwards.

G. The impact of the rejection on probation

[143] The grievor testified that he was not able to find employment until December 2016. He was unemployed from April 2014 to December 2016. In December 2016, he obtained a position with Primerica, a financial services company. In November 2017, he was promoted to senior representative.

[144] During the time that he was not working, the grievor looked for work and cared for members of his family. He suffered mental and physical health issues from the summer of 2014 to early 2016 caused mainly by stress, which he experienced due to the loss of his employment at the Agency. He continued his efforts to find a position with the federal government. He qualified for a hiring pool for a position with the Department of Public Works and Government Services, also known as Public Services and Procurement Canada as a purchasing officer. He kept a partial log of positions he applied for. Some were in IT, but others were not. He explained that his financial losses included missed career opportunities. In his grievance, he requests to be compensated in full for his financial losses and the negative impacts on his mental and physical health.

[145] In cross-examination, the grievor testified that the log that he kept regarding positions on which he applied was a partial list and that he applied for positions in and out of his field of training.

IV. Summary of the arguments

A. For the Agency

[146] The Agency argued that the grievance should be dismissed for lack of jurisdiction. According to the Agency, the grievance was referred to adjudication under s. 209(1)(b) of the *FPSRLA*, but the grievance did not allege disguised discipline. The Agency stressed that Ms. Castleman had the delegated authority to reject the grievor on probation, and she did so on the grounds listed in the letter of rejection. The Agency referred to Ms. Castleman's testimony that even had the probationary period been extended to 18 months, there was insufficient time for the grievor to improve his work performance to meet the Agency's core competency of effective interactive communication. The Agency emphasized that the grievor could not be retested in time before the end of his probation period. The Agency submitted that the rejection on probation was purely based on knowledge and performance gaps. The Agency suggested that it is not the role of the Board to second-guess an employer's judgment about what is relevant to an assessment of an employee's suitability for long-term employment or to decide how much weight should be attached to particular issues. The Agency maintained that there was no bad faith, and that the rejection on probation was not a sham or camouflage to hide disguised discipline. The Agency reminded the Board that good faith is always presumed and that the approach to be followed is the framework developed in *Tello*. The Agency relied on the following case law in support of its position: *Bergeron v. Canadian Security Intelligence Service*, 2014 PSLRB 81; *Fell v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 2; *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 19; *Le Page v. Canada Revenue Agency*, 2015 PSLREB 13; *Monette v. Parks Canada Agency*, 2010 PSLRB 89; *Ricard v. Deputy Head (Canada Border Services Agency)*, 2014 PSLRB 72; and *Salib v. Canadian Food Inspection Agency*, 2010 PSLRB 104.

B. For the grievor

[147] The grievor argued that the Agency did not provide credible evidence to validly terminate his employment. According to the grievor, the Agency is required to provide credible evidence pointing to some cause for the rejection. The grievor suggested that the Agency's right to reject an employee on probation is not entirely unfettered. The grievor contended that the Agency has an obligation to lead evidence on how it came to its decision to reject him on probation. The grievor advanced that, although the

onus is on him to establish bad faith, the Agency must demonstrate what rationale and what building blocks were used to reach its decision to reject him on probation. The grievor claimed that if the Agency does so, then the rejection was done in good faith. The grievor stressed that the Board has been critical of employers failing to provide direct evidence to support contentious allegations of unsuitability and has consistently applied the best-evidence rule. The grievor submitted that the evidence presented by the Agency's witnesses was all based on hearsay. He reminded the Board that Mr. Spirito's evidence was based on that of the grievor's co-workers, and Ms. Castleman based the decision to reject the grievor on probation on Mr. Spirito's evidence. The grievor considered that, not only did the Agency fail to demonstrate a valid *bona fide* dissatisfaction with his ability to discharge the duties of his position to justify rejecting him probation, but that the Agency also failed to act in good faith in its dealings with him. The grievor relied on the following jurisprudence in support of his arguments: *Tello; Dyson v. Deputy Head (Department of Fisheries and Oceans)*, 2015 PSLREB 58; *Raymond v. Treasury Board*, 2010 PSLRB 23; and *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109.

V. Reasons

[148] The Board derives its authority from the *FPSLRA*. Section 209 provides for the type of grievances that can be referred to the Board. At all relevant times, section 209 provided as follows:

- 209 (1)** *An employee ... may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
- (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*
 - (b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
 - (c) in the case of an employee in the core public administration,*
 - (i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or*
 - (ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or*

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

...

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

...

[149] At no time applicable to the matter before the Board was the Agency designated under subsection 209(3) of the *FPSLRA* for the purposes of termination for non-disciplinary reasons. The Agency has been so designated (in SOR/2015-118), but only as of May 28, 2015, which is after the grievor's employment was terminated on April 15, 2014, after he filed his grievance on May 2, 2014, and after he referred his grievance to adjudication on April 17, 2015.

[150] Unlike what Parliament has enacted regarding other separate agencies, s. 53(1) of the *CRAA* does not subject the Agency's right to appoint its own employees to the requirements of the *PSEA*. Subject to the *FPSLRA* and to the *FAA*, the *CRAA* governs the Agency's management of its staff. Contrary to the rules that apply to the core public administration (for example, see s. 211 of the *FPSLRA*), the legislative framework governing the Agency and its staff does not specifically prevent the Board from hearing a termination operated by way of rejection on probation.

[151] However, pursuant to s. 209(1)(b) of the *FPSLRA*, the Board's jurisdiction in this matter depends on whether the grievor's termination by way of rejection on probation results from a disciplinary action. In this case, the Agency maintained that the rejection on probation was for an employment-related reason and was not disciplinary. Therefore, to establish the Board's jurisdiction, the grievor will need to prove, on a balance of probabilities, that the termination of his employment resulted from a disguised disciplinary action.

[152] The Federal Court of Appeal, in *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), determined that a decision maker "... seized of a grievance by an employee rejected on probation is entitled to look into the matter to ascertain whether the case is really what it appears to be." The Court also stated that a decision maker "... is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on

the ground that they were dissatisfied with the suitability of the employee for the position.” The Board, therefore, must examine the circumstances that led to the rejection on probation to ascertain whether the Agency relied on a *bona fide* dissatisfaction with the grievor’s suitability to perform the duties of his position.

[153] The Agency’s burden does not require it to establish just cause in this case. As stated as follows by the Federal Court at paragraph 37 of *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, “... the employer need not establish a *prima facie* case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose.” The concept of “employment-related issues” has since been clarified as a *bona fide* dissatisfaction with an employee’s suitability or ability to perform the duties of the employee’s position: for example, *Ondo-Mvondo v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 52, *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67, *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 19, *Kagimbi v. Canada (Attorney General)*, 2014 FC 400, *Kagimbi v. Canada (Attorney General)*, 2015 FCA 74, *Bell v. Staff of the Non-Public Funds, Canadian Forces*, 2020 FPSLRB 14, *Kot v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLRB 29, *Rouet v. Deputy Head (Department of Justice)*, 2021 FPSLRB 59.

[154] *Leonarduzzi* also applied the finding in *Penner* to the effect that an employer needs to adduce satisfactory evidence that it rejected an employee on probation, in good faith, on the ground that it was dissatisfied with the employee’s suitability for the position. Once the Agency has met its initial burden, then it falls on the grievor to establish, on a balance of probabilities, that the alleged rejection of probation was really a disguised disciplinary action.

[155] Therefore, the issue that the Board must determine is: Was the rejection on probation based on a *bona fide* dissatisfaction with the grievor’s suitability or ability to perform the duties of his position? In this case, the evidence clearly shows that the grievor was hired in an IT Developer CS-01 position with the objective of promoting him to a CS-02, and I find accordingly.

[156] In the letter of rejection, the Agency asserted that the rejection on probation was related to the grievor’s performance gaps and his inability to obtain the required

level for one of the Agency's core competencies, effective interactive communication, by the end of the probationary period. The letter mentioned that steps were taken by management to help improve his performance with the implementation of a performance improvement plan, additional training, coaching and mentoring, as well as many meetings with him to discuss his tasks and his performance. The letter informed the grievor that he would receive two weeks' pay in lieu of the required notice.

[157] Ms. Castleman mentioned in the letter of rejection the reasons for which she made the decision to reject the grievor on probation. The decision to reject the grievor on probation was made during the probationary period, and the Agency has provided evidence that the rejection was related to its dissatisfaction with the grievor's performance and his abilities. That being the case, the Board must determine whether the rejection on probation was really a disciplinary action resulting in the grievor's termination.

[158] The applicable jurisprudence with respect to rejections on probation is consistent. A rejection on probation must be for a *bona fide* dissatisfaction with the grievor's suitability to perform the duties of his position. If this is not the case, the rejection on probation is not in accordance with the statutory and jurisprudential framework and may amount to a contrived reliance on the *CRAA*, a sham or a camouflage (see *Canada v. Rinaldi*, F.C.T.D File No. T-761-96 (19970225), at footnote 15), which would make it tantamount to a disguised disciplinary action.

[159] In *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119), [1993] C.P.S.S.R.B. File No. 192 (QL), an adjudicator noted at page 14 that in his view, "... if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity..." It is trite to say that a determination of whether there is good faith must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith, "... keeping in mind of course that good faith should always be presumed..."

[160] The grievor argued that good faith has been linked to reasonableness, which requires justification, transparency, and intelligibility within the decision-making process. According to the grievor, bad faith includes decisions made without regard to

the facts, evasion of the spirit to bargain, lack of diligence and slacking off, and interference with or failure to cooperate with the other party's performance. The grievor maintained that there must be an opportunity for an employee to discuss, defend, or make the necessary adjustments to meet the requirements of the position. The grievor submitted that the Agency in this case did not follow any of its policies and procedures applicable to the ITAP rendering the rejection on probation in bad faith.

[161] The Agency argued that good faith is always presumed. The Agency added that even if the Board finds that the Agency did not follow its own policies or that it did not provide the grievor with the required training for him to perform the duties of his position at an acceptable performance level, this would not be sufficient to support a finding of bad faith. It maintained that to find bad faith, there must be clear and cogent evidence. It submitted that in the grievor's case, there was no bad faith.

[162] For the reasons that follow, I find that the grievor has established that his rejection on probation was a disguised disciplinary action resulting in termination because it was a contrived reliance on the *CRAA*, a sham or a camouflage, as the Agency did not have a *bona fide* dissatisfaction with his ability to perform the duties of his IT Developer CS-01 position. The finding of a contrived reliance, sham or camouflage relates to all the reasons set forth in the letter of rejection. The evidence showed that those reasons were based on information provided to Ms. Castleman by Mr. Spirito, who himself relied on information provided by the grievor's teammates. At the hearing, both Ms. Castleman and Mr. Spirito were unable to provide an explanation as to why the grievor's performance did not meet the requirements of his IT Developer CS-01 position, the staffing requirements for promotion to a CS-02, or the reasons that he did not meet the Agency's core competency of effective interactive communication. As far as the grievor's IT Developer CS-01 position is concerned, Ms. Castleman did not provide any explanation as to why the probationary period had not been extended to 18 months or why there was insufficient time to meet the Agency's core competency at play. It was the only Agency's core competency that the grievor had not passed. I agree with the grievor that the only direct evidence that was presented pertaining to his performance was presented by the grievor himself.

[163] As mentioned earlier, in this case the Agency is merely required to establish satisfactory evidence that the rejection on probation was related to a dissatisfaction

with the grievor's suitability or his ability to discharge the duties of the IT Developer CS-01 position and not for any other purpose. The Agency has provided evidence that the rejection was related to its dissatisfaction with grievor's performance and abilities. However, if a balance of probabilities supports that there is no substance behind the reasons on which the Agency relied, the Board may find that the Agency did not have a *bona fide* dissatisfaction with the grievor's suitability or ability to perform the duties of his IT Developer CS-01 position, that the rejection on probation was really a contrived reliance on the *CRAA*, a sham or a camouflage, and that the termination is tantamount to a disguised disciplinary action resulting in termination.

[164] The evidence shows that the grievor's performance improvement plan and his mid-year performance assessment reports indicate that he had some difficulties with his work performance during the first few months of his probationary period. I agree with the reasoning in *Dyson* that would not be unusual since the grievor's probationary period is coincidental with his initial orientation. Mr. Spirito testified that the first few months of employment were meant to provide the grievor with an overview of the ITAP and to discuss roles and responsibilities. I expect that individuals hired in the ITAP were not hired in the program with the understanding that they would immediately be working flawlessly as fully trained CS-01s. It would be likely that, as for most newly hired employees, there would be a learning curve. This learning curve, according to the ITAP documentation, would take from 12 to 18 months to progress to a CS-02 and I find that that probationary period applied the grievor in the present case.

[165] The evidence establishes that none of the Agency's witnesses could explain in any detail the grievor's performance gaps or the reasons for his inability to obtain the required level for the Agency's core competency of effective interactive communication. I note with interest that, although there is evidence that meeting that competency was required for promotion as a CS-02, there is no evidence before me that meeting that competency was required for the grievor's IT Developer CS-01 position. There was no evidence to explain how the grievor did not meet the requirements of the CS-01 IT developer position he encumbered. Mr. Spirito's and Ms. Castleman's testimonies were non-specific and mostly hearsay. Mr. Spirito testified that he relied on information provided by the grievor's co-workers to conclude that the grievor had performance issues. Moreover, Ms. Castleman had no direct knowledge of the grievor's work performance; she simply stated that she "recalled that there were performance issues". She testified that she formed her opinion based on Mr. Spirito's

accounts. Mr. Spirito and Ms. Castleman claimed that they had direct knowledge that the grievor failed to meet the objectives contained in the grievor's performance improvement plan. However, they could offer no details about how the grievor failed to provide the requested application changes within the approved timelines, how he failed to conduct peer reviews and ensure that the work complied with all policy standards and procedures, how he failed to provide accurate and clear information in all written and oral communications, or how he failed to provide accurate status reports on his work within the requested timelines. Just before the eight-month checkpoint, the grievor's midyear performance assessment report dated November 2013, states that he mostly met expectations. The evidence demonstrates that there was no formal eight-month checkpoint assessment of the grievor and no formal assessment of the grievor's work performance from September 2013 until his rejection on probation in April 2014. This is contrary to the requirements of the ITAP. The grievor testified that as of December 2013, he continued to perform the duties of his IT Developer CS-01 position until his rejection on probation without being apprised of any issues relating to his performance and his testimony was not contradicted by the Agency.

[166] The Agency was certainly entitled to set rules, policies, and procedures regarding staff management. It was entitled to set out the requirements of the ITAP. However, when the Agency follows only those requirements of the program that may justify rejecting an apprentice on probation and ignores other requirements of that same program that require considering an extension of the probation period or the provision of continuing employment as a CS-01, it puts into question the *bona fides* of the Agency's dissatisfaction with the grievor's ability to perform the duties of his IT Developer CS-01 position and the legitimacy of the Agency's objection to the Board's jurisdiction over his grievance. I agree with the Agency that it is not for the Board to substitute its own assessment of the grievor's ability to perform the duties of his IT Developer CS-01 position for that of the Agency. That being said, the evidence establishes that, in fact, the Agency did not assess the grievor's ability to discharge those duties from September 1, 2013, to the date of his rejection on probation in April 15, 2014.

[167] Moreover, Ms. Castleman testified that she *assumed* that as soon as the permanent team leader was appointed to the team, the grievor would get proper mentoring. Mr. Spirito testified that he left, probably on February 19 or 22, 2014.

Mr. Chen was acting team-leader, starting February 20 or 24, 2014 or immediately after Mr. Spirito left. Ms. Marcil was then acting team-leader from March 31 to April 15, 2014. A permanent team leader was appointed in April 2014. The grievor was terminated on April 15, 2014. According to Ms. Castleman's logic, a permanent team leader would have had approximately two weeks at most to provide the grievor with what she considered "proper mentoring". I find Ms. Castleman's assumption to be unreasonable.

[168] Further, the evidence before me that related to the grievor's ability to discharge the duties of his IT Developer CS-01 position contradicts the evidence put forward by the Agency that the rejection was related to its overall dissatisfaction with grievor's performance and abilities. The evidence establishes that the Agency relied on the grievor's performance improvement plan and the grievor's midyear performance assessment report. However, those documents do not assess the grievor's suitability to discharge the duties of his IT Developer CS-01 position, or even his readiness for promotion as a CS-02. The evidence also shows that, contrary to the ITAP, the Agency did not consider extending the grievor's probation period to 18 months or maintaining his employment as a CS-01, even though the grievor mostly met expectations. In testimony, Ms. Castleman was unable to provide any details to support her assessment that there were no significant improvements in the grievor's performance to justify extending the probationary period. Ms. Castleman did not provide any explanation as to why the grievor could not be re-evaluated with respect to the remaining core competency prior to 180 days.

[169] Based on all the evidence, the circumstances surrounding the rejection on probation demonstrate that Ms. Castleman's effective decision to reject the grievor on probation was based on hearsay. As she had no personal knowledge of the facts on which she based her dissatisfaction as to the grievor's suitability to perform the duties of his IT Developer CS-01 position, her assessment lacks in credibility and suggests serious deficiencies. Even if Ms. Castleman honestly based her decision on Mr. Spirito's accounts, the evidence establishes that her decision was not based on all the relevant facts. For example, the denial of the JSP training requested by the grievor, the lack of support and mentoring, the Agency's failure to consider extending his probation to 18 months and to consider continuing employing him as a CS-01, Mr. Spirito's failure to assess the grievor at the eight-month checkpoint, and Mr. Spirito's further refusal to assess the grievor's remaining core competencies, lead me to conclude that Ms.

Castleman did not make an informed decision based on all of the relevant facts and that her decision to reject the grievor on probation was therefore arbitrary. That being the case, I cannot find that in such circumstances the Agency has a *bone fide* dissatisfaction with the grievor's ability to discharge the duties of his IT Developer CS-01 position. To the contrary, I find that the grievor has established, on a balance of probabilities, that the Agency's decision to reject him on probation was a contrived reliance on the *CRAA*, a sham or a camouflage. As such, it was a disguised disciplinary action resulting in termination. The extent of the grievor's losses that ensued his termination is a further indication that, in the circumstances of this case, the impact of the Agency's decision on the grievor made it a disciplinary action: for example, see *Bergey v. Canada (Attorney General)*, 2017 FCA 30. Therefore, I find that the Board has jurisdiction over the grievance and, in accordance with *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSRLEB 70 (confirmed by *Canada (Attorney General) v. Heyser*, 2017 FCA 113), the grievance is allowed.

[170] I have heard no evidence with respect to what remedy would be appropriate in the circumstances and I direct the parties to meet and discuss the matter with a view to agreeing on an appropriate remedy. Should they be unable to resolve the matter amongst themselves, the parties are directed to call on the Board's Secretariat's Mediation and Dispute Resolution Services to help them in that regard. The Board will remain seized of the issue of an appropriate remedy for a period of 4 months in the event of an unsuccessful mediation.

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

(The Order appears on the next page)

VI. Order

[172] The Agency's objection to jurisdiction is dismissed.

[173] The grievance is allowed.

[174] The parties shall meet forthwith and try to agree on the appropriate remedy, failing which they will contact the Board's Mediation and Dispute Resolution Services within 30 business days of the date of this decision to schedule a mediation date.

[175] In case of an unsuccessful mediation, the Board remains seized of the issue of an appropriate remedy in this matter for a period of four months.

August 12, 2021.

**Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board**