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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

WESLEY WRIGHTSON

Grievor

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Respondent

Indexed as

Wrightson v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Craig Stewart, representative

For the Respondent: Pierre-Marc Champagne, counsel

Heard by videoconference,
October 27 to 30, 2020, and May 18 to 21 and 25 to 27, 2021.

REASONS FOR DECISION

I. Introduction

[1] Wesley Wrightson (“the grievor”) was rejected on probation from his employment with the Canada Border Services Agency (“CBSA” or “the employer”) on July 16, 2015. His grievance was dismissed at the final level of the internal grievance procedure, and he referred it to the Public Service Labour Relations and Employment Board, as it was then known (it is now named the Federal Public Sector Labour Relations and Employment Board; “the Board”), on July 11, 2016.

[2] The hearing of his grievance before the Board began on April 30, 2019, and proceeded throughout the following week before Stephan Bertrand, a panel of the Board. Mr. Bertrand passed away in May 2019, and the matter was later assigned to me. A hearing was scheduled for June 2020. Due to the pandemic, it was postponed to October 2020 and was held by videoconference.

[3] Mr. Bertrand had already heard most of the employer’s witnesses. In the absence of an agreement between the parties on the evidence already presented, I reheard the witnesses’ testimonies. This decision is based on the oral and documentary evidence and the arguments presented at the hearing days in October 2020 and May 2021.

II. Background

[4] The grievance involves a rejection on probation. The employer raised an objection that the Board is without jurisdiction in this matter, as the rejection on probation was a termination of employment under s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”). Under s. 211 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”), a grievance against such a termination cannot be referred to the Board for adjudication.

[5] In essence, in a rejection on probation, the employer has the burden of demonstrating that the rejection was made for an employment-related reason. If so, the burden of proof then shifts to the grievor to demonstrate that the employer’s actions were in fact a sham or a camouflage and thus that the rejection was disguised discipline.

[6] For the reasons that follow, I find that the employer provided evidence of an employment-related reason for the rejection on probation. In turn, the grievor did not

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establish that the rejection on probation was a disguised disciplinary action or a sham or that it was made for any reason other than those specified in his rejection letter.

III. Legislative framework

[7] The employer terminated the grievor's employment pursuant to s. 62 of the *PSEA*, which provides as follows:

62 (1) *While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*

(a) the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the Financial Administration Act, or

(b) the notice period determined by the separate agency in respect of the class of employees of which that employee is a member, in the case of a separate agency to which the Commission has exclusive authority to make appointments,

and the employee ceases to be an employee at the end of that notice period.

Compensation in lieu of notice

(2) *Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*

[Emphasis in the original]

[8] The Act sets out the Board's jurisdiction over a grievance referred to adjudication. Section 211 states that any termination of employment under the *PSEA* cannot be referred to adjudication.

[9] The Board's jurisdiction to hear a rejection-on-probation grievance is limited. In *Chaudhry v. Canada (Attorney General)*, 2007 FC 389, the Federal Court set out the limited basis of that jurisdiction as follows:

...

[51] In these circumstances, the employer satisfied the adjudicator that it had met the burden of proof which required it to show some evidence of an employment-related reason for a rejection on probation. In this regard see Canada (Attorney General) v. Leonarduzzi (2001), 205 F.T.R. 238, at para. 37, where Lemieux J. wrote:

Specifically, 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.

...

[53] Once the employer's onus was met, the burden shifted to the employee to show bad faith. In this regard, the adjudicator concluded that the Applicant had not shown that the Rejection on Probation was a sham or made in bad faith.

...

[10] *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134 at para. 111, sets out the shifting burdens of proof in a rejection-on-probation grievance. The employer must show the following:

- 1) that the grievor was on probation;
- 2) that the probationary period was still in effect as of the termination;
- 3) that the grievor was given notice or compensation in lieu of notice; and
- 4) that the grievor was provided with a letter stating the reason for the rejection on probation.

[11] The burden then shifts to the grievor to demonstrate that the decision to terminate his or her employment by way of a rejection on probation was a sham, camouflage, or contrived reliance on the *PSEA* or that it was done in bad faith.

[12] The parties asked the Board for permission not to address at the hearing the issues of remedy and applying mitigation measures. They requested a continuance to address them, if necessary. I granted the request.

IV. Issues

[13] The issues to be decided in this case are as follows:

- A. Did the employer demonstrate that it relied on employment-related concerns or reasons when it decided to reject the grievor on probation?
- B. Did the grievor establish that the rejection on probation was a disguised disciplinary action or a sham or that it was made for any reason other than those specified in his rejection letter?

V. Summary of the evidence

[14] At the hearing before me, the employer called the following witnesses (they occupied the indicated positions in 2014 and 2015): Sherese Tardif-Cress, Acting

Superintendent; Jana Tisdale, Superintendent; Joann Wanner, Superintendent; Curtis Barry, Border Services Officer (BSO) until November 2014 and Acting Superintendent, Immigration, North Portal, as of November 2014; Scott Kienlen, Chief of Operations, North Portal; Jennifer Richens, Acting Director General, Learning and Development, Human Resources; and David Akerley, Manager, Officer Induction Development Program (OIDP).

[15] The grievor testified on his behalf.

A. For the employer

[16] The following is the evidence that the employer submitted to demonstrate that it relied on employment-related concerns or reasons when it decided to reject the grievor on probation.

1. The BSO training program

[17] Ms. Tardif-Cress explained that the grievor was a probationary BSO trainee. He first completed 18 weeks of training in the Officer Induction Training Program (OITP) at the CBSA College in Rigaud, Quebec. He then had to participate in, and complete, the OIDP.

[18] The grievor signed his letter of offer for the OIDP on December 17, 2013. It had an effective date of January 13, 2014. The letter confirmed that the probationary period was the duration of the OIDP or 12 months, whichever was longer. In the OIDP, he was a trainee classified at the FB-02 group and level.

[19] The grievor was assigned to complete his OIDP at the North Portal Port of Entry, located at Highway 39, North Portal, Saskatchewan. Ms. Tardif-Cress was the supervisor to whom he reported when he first arrived on January 13, 2014. It was a medium port of entry with traffic and commercial operations and immigration services. The grievor was first assigned to the Traffic Section.

[20] Ms. Tardif-Cress explained that the OIDP, which is a workplace development program, was a new program for trainees. She and others in North Portal received training in December 2013 and January 2014 before the OIDP was rolled out. She added that in January 2014, she had five to six years of experience as a BSO, and that she was in a superintendent position on an acting basis from January to July 2014.

[21] She clarified that the OIDP is an on-the-job development program. If the trainees acquire and demonstrate the necessary knowledge, skills, and competencies over a 12- to 18-month assessment period, they are appointed to FB-03 BSO positions. Otherwise, they are released from the OIDP.

[22] Ms. Tardif-Cress explained that upon his arrival, the grievor was enthusiastic. He was very eager and very hard-working. He carried out his work with the help of a mentor. However, from the very beginning of the probationary period, issues arose.

[23] A working document was used to record the trainees' ability to perform tasks during a quarter. Different supervisors could record their observations of the trainees.

[24] Regular performance assessments were made of the grievor at three-month intervals while he participated in the OIDP. The local management team noted performance and behavioural deficiencies in every assessment period.

2. The three-month assessment

[25] On April 15, 2014, using the working document and her observations, Ms. Tardif-Cress assessed the grievor for the zero-to-three-month period of the OIDP. She noted that during that time, he had difficulties translating theoretical knowledge into practice. He understood desired outcomes but failed to take the appropriate steps to reach them. He struggled with BSO roles and responsibilities at the port of entry, client needs, and administrative tasks, such as form completion. He frequently made the same mistakes, which negatively affected the employer's operations and client service. She noted this, among other things:

... It is clear that Wes is motivated and determined to excel in this program. My recommendation is that he slow his pace and avoid unnecessary multi-tasking to focus on fully completing each tasks [sic] correctly and to continue working with his mentors to understand the sequence of steps needed to successfully complete the different tasks.

...

[26] Ms. Tardif-Cress rated him as unsatisfactory or needing improvement in 14 of the 43 tasks and experiences under review (32.5%).

[27] Ms. Tardif-Cress explained that the November 2013 version of the "CBSA Officer Induction Development (OID) Program: Program Guide" ("the Program Guide") was in

effect during the grievor's time in the OIDP. She explained that success in the OIDP depends on trainees being personally accountable for their actions, maintaining a positive attitude, being engaged at work, owning their learning process, and maintaining good working relationships. They are expected to conduct themselves in accordance with all CBSA and public service policies.

[28] Given the grievor's difficulties in the OIDP, Ms. Tardif-Cress approached two senior BSOs, who agreed to mentor him. Thus, he was provided with coaching and counselling to correct the identified areas of deficiencies.

3. The six-month assessment

[29] The grievor's six-month assessment was completed on July 9, 2014, for which both Ms. Tardif-Cress and Ms. Tisdale assessed him. Ms. Tardif-Cress's acting position ended on July 14, 2014. She then returned to her position as a senior BSO in the Immigration Section.

[30] Ms. Tisdale explained that she started working as a superintendent in North Portal in May 2014. She had been a BSO since 2008. She had met the grievor when he arrived in Saskatchewan on January 10, 2014, as he resided for one month in a secondary suite of the house she shared with her husband in North Portal until he secured housing for himself and his newly arrived family.

[31] Ms. Tisdale was in the Immigration Section before May 2014 and had not worked with the grievor before. Ms. Tardif-Cress communicated to Ms. Tisdale when she arrived that the grievor had received help from two mentors, that he worked very hard, but that he had to slow down, to make fewer mistakes. She observed that he was very enthusiastic. He wanted to be involved in several activities. However, she reminded him that he had to focus on his tasks and that he had to concentrate so that he would not make mistakes, for example, in completing the forms he had to fill out.

[32] The second assessment, dated July 9, 2014, rated him as unsatisfactory or needing improvement in 19 of the 43 tasks and experiences under review (44%). Comments in the assessment include, for example, the following: "founded complaint in regards to exemptions incorrectly being allocated", "gets flustered in difficult situations but as he is gaining more work based knowledge there is definitely improvement", and "needs to slow down and take his time to come to the correct

decision”. Overall, it was noted that he would become overwhelmed when things became busy or if he encountered a situation that he did not understand. Specific areas of concern were his interactions with clients, his questioning in primary, the accuracy of his document verification, and his release-or-refer decisions.

[33] Ms. Tisdale explained that a traveller made a complaint against the grievor during this period, which was investigated and deemed founded. It concerned a misapplication of the 24-hour exemption, and it resulted in additional and unnecessary charges to the traveller. At that time, Ms. Tisdale spent 1 hour each week on the floor with the grievor and considered her counterparts’ comments about him. He always worked as part of a team with more senior employees. She was not concerned about the progress he had to make since he had several months left to improve his performance. She believed that he was capable of improvement. He still received support from two mentors, in addition to advice from the senior employees he worked with.

[34] Ms. Wanner explained that she had exchanges with the grievor during this period. Between March 2014 and May 2015, she was a superintendent. The employer introduced as evidence an email exchange she had with him. On May 23, 2014, she first sent him a message of encouragement, which was entitled, “Meeting”. She reminded him to stay focused on his work and to take his time and stated that everything would be fine.

[35] The next day, the grievor responded in an email. He compared his situation to that of other trainees. He alleged he felt he faced more scrutiny than others.

[36] In another email, on May 30, Ms. Wanner asked the grievor to pay attention to detail as many errors had been noted in his work in the “Across” section, which refers to “commercial program”.

[37] In emails dated July 7 and 8, Ms. Wanner informed the grievor that he had repeatedly used the wrong code in examining travellers. On July 8, she finally specified, “This error should not keep occurring.” She also brought to his attention other anomalies in his exams and asked him to take his time to do the job properly.

[38] Another email, dated July 14, 2014, reported a similar situation.

4. The nine-month assessment

[39] The nine-month assessment was completed on November 6, 2014. It covered the seven-to-nine-month period. Ms. Tisdale noticed that the grievor demonstrated vast improvement. She also noted, “He still needs to spend time working on slowing down, focusing on what he is working on and ensure he follow [sic] all legislation set out for what he is working with,” and mentioned that he was working very hard.

[40] His assessment rated him as unsatisfactory or as needing improvement in 12 of the 43 tasks and experiences under review (28%). The deficiencies still remained in many of the same areas, including client service, program and service delivery, and enforcement-related activities. It was noted that he had to work on his demeanour with clients (i.e., he had to remain calm, respectful, and courteous) and slow down when completing tasks to ensure that his decisions were correct (e.g., document verification, primary questioning, and enforcement decisions).

[41] Specifically, to consider the progress he had made since the last assessment, Ms. Tisdale took the initiative to assign him a mark of 2.5 rather than 2 for 10 tasks and experiences out of the 43 that were assessed. The results initially suggested in the form were 4 - “Exceeds Expectations”, 3 - “Meets Expectations”, 2 - “Improvement Needed”, and 1 - “Unsatisfactory”. The form did not suggest the option of assigning a mark of 2.5. However, Ms. Tisdale took the initiative to assign the grievor that mark for some of the tasks and experiences, to encourage him. However, for 2 out of the 43, she marked him at 2.

[42] Ms. Tisdale explained that the grievor wanted to do different tasks; i.e., he wanted to work in the Immigration Section. On the other hand, his performance was not yet sufficient in the Traffic Section. So, initially, the management team was reluctant to transfer him to another section and to teach him new tasks given that he had not yet mastered his initial tasks. However, given his wishes, the management team agreed to transfer him to the Immigration Section to give him a chance to demonstrate his abilities there. He was very happy with the transfer. Thus, in October, the grievor started working in Immigration Section.

[43] In November 2014, Mr. Barry began his position as the acting superintendent of Immigration Section. He explained that before his appointment, he was a senior BSO,

and he mentored the grievor. He observed that the grievor was very motivated. On the other hand, he had difficulty during exams.

[44] Thus, when Mr. Barry started in his acting position, the grievor was in the middle of a 56-day cycle there.

5. The 12-month assessment

[45] The 12-month assessment was completed on December 31, 2014.

[46] Mr. Barry was in charge of the Immigration Section. He emailed Ms. Tisdale about the grievor's difficulties there. She then prepared the assessment dated December 31, 2014. In particular, she explained that his level of performance had deteriorated. The comments she noted for some of the tasks evaluated included the following: "needs to slow down and take his time to come to the correct decision, and ask for assistance when unsure", "needs to ensure he is asking mandatory questions [to confirm citizenship and place of residence] and not making assumptions based on indicators", "needs to listen to his fellow officers and ask questions when unsure. Needs to spend time taking all information into consideration."

[47] Deficiencies remained in the same key areas; i.e., client service, enforcement activities, and knowledge of legislation, policies, procedures, and guidelines. It was again noted that the grievor was working too quickly and that he had to focus on the tasks at hand. It was further observed that he would attempt to "work ... through" situations he did not understand rather than seek assistance from a colleague or manager, which would create errors.

[48] The grievor was deeply upset to learn that he was rated as unsatisfactory or as needing improvement in 11 of the 43 tasks and experiences reviewed (25.5%).

[49] Mr. Barry explained that administrative tasks being accomplished by the Immigration Section included, for example, issuing work permits. Mr. Barry observed that the grievor made frequent mistakes and that he was reluctant to ask for help. So, the management team decided that after the December holiday season, he would be sent back to the Traffic Section since the tasks to be performed there were considered simpler. At that location, he would have a better chance to demonstrate his skills.

[50] As a result, the grievor completed only one 56-day immigration cycle. All the other cycles he completed were in the Traffic Section.

6. The Readiness Report and the first enhanced performance development plan

[51] On December 31, 2014, Ms. Tisdale completed an additional document, entitled “OID Program – Superintendent Report on Officer Trainee Readiness for FB-03 Appointment” (“the Readiness Report”). This additional review, conducted during this assessment period, determined that the grievor could not graduate to the FB-03 group and level. His time in the OIDP was extended past the standard 12-month mark. He was informed that improvement was needed in two categories: (1) “Program and Service Delivery”, and (2) “Legislation, Policies, Procedures and Guidelines”.

[52] On his return to work on January 2, 2015, the grievor signed the first enhanced performance development plan dated December 31, 2014.

7. The second enhanced performance development plan

[53] On February 4, 2015, the director of the National Recruitment and Professional Development section prepared a second enhanced performance development plan to help the grievor with his client service activities, interview skills, secondary processing activities, and enforcement activities. The grievor and Ms. Tisdale signed it on March 13, 2015.

[54] The plan covered the period from February 4 to March 6, 2015. Its purpose was to take into account the grievor’s input as to what he felt he had to improve and his improvement in the areas noted.

[55] To help the grievor, Ms. Tisdale made herself more available to assist with, discuss, and document the situation. However, he perceived it as a bad signal, as if he was being micromanaged. She remained hopeful then that he would pass the OIDP.

[56] Mr. Kienlen supervised operations at North Portal. He was also in contact with the managers of the OITP at the CBSA College in Rigaud. Mr. Kienlen became more involved in the management of the grievor’s file when it was decided that an action plan was required in his case. He met with the grievor about this matter on March 11, 2015.

[57] On that date, the grievor met with Mr. Kienlen, Ms. Tisdale, Mr. Akerley, and the ODP Manager to discuss the lack of sustainable progress during the most recent evaluation period and to deliver the message that improvement had to be seen, or he would be in jeopardy of not successfully completing the ODP. He was told that he had to take responsibility for his skills and behavioural development.

[58] The employer had prepared a document containing a summary of the situations observed and addressed and involving the grievor from January 2 to March 11, 2015. It specified the date on which each situation or incident occurred, where it was observed (the commercial booth, the highway, at immigration, or at the cashier), the problem noted on each date, any positive aspect, who observed each situation, and the dates on which each situation was addressed.

[59] The incidents noted included, among others, a package being removed from the bond room without a signature and multiple situations in which the grievor did not follow procedure.

8. The 15-month assessment

[60] On April 14, 2015, for the evaluation covering months 13 to 15, the grievor was again rated as unsatisfactory or needing improvement in 21 of the 43 tasks and experiences under review (48.8%). His performance deteriorated during the assessment period. The deficiencies noted were in the same areas as had been noted in earlier evaluations.

[61] Ms. Tisdale explained that at that point, the grievor began to struggle to take responsibility for his mistakes. He began to blame others for his difficulties. For example, during this period, the management team noticed that a package for him had disappeared from the bond room. Ms. Tisdale was given the mandate to locate it. She questioned him. At first, he said that another BSO probably took it. Once she determined that that was not the case, he then suggested that yet another BSO had taken it. Once she determined that that was also not so, he eventually admitted that he had taken the package without declaring it according to procedure.

[62] Ms. Tisdale stated that it was an unfortunate incident since it raised a question about the trust that could be placed in him. It was a matter of integrity and honesty.

Some of his errors were described as follows in a document appended to the evaluation:

... -Wes destroyed abandoned goods without a witness - contrary to policy.

-Wes removed his own package from the bond room did not sign it out of the bond room. He attempted to conceal this action by giving an explanation that another officer removed it for him, further explaining that a transferred officer removed it. This item was also held on K24 which was not signed off by another officer.

-Wes returned good held on a K24 for export and did not complete the K24 to show the goods were exported.

...

[63] Thus, the evaluation noted that he had provided false information when questioned about a situation and that he deflected blame to others. For example, for the task and experience numbered 43 and titled, "Acts in accordance with and upholds the Codes of Conduct of the Public Service and the CBSA", he received a mark of 1 (Unsatisfactory). In a similar way, for the task and experience numbered 42 and titled, "Holds himself [sic] personally accountable for decisions and actions", he received a mark of 1.

[64] The grievor offered written comments in response to this negative assessment. He wrote that he had struggled with nerves, anxiety, and self-doubt in the first few weeks of January. He explained that he made inattention errors on three K24 forms and that he did not admit responsibility for administrative errors. He felt that the management team demanded a higher standard from him. He stated that in the future, he hoped for more frequent feedback. In addition, he added the following (see Exhibit E-11):

...

... It devastatingly difficult to progress in a system that is very subjective and there has been no real training by OI DP on the part of management across the country on the differences between a 4-3-2-1 ratings because it can be definitely argued: frequency for exceeding expectations, frequency for meeting expectations, defining adapting approach, defining courteous and respectful, defining remaining calm and calming others etc....can these all be qualified and, if so, how many times (frequency) could determine a 2 becoming a 3? I realize "it is what it is" but when I am on hold and my life in a holding pattern I have to ask myself these questions.

...

[Sic throughout]

[65] Given his request for more frequent evaluations, Ms. Tisdale agreed to evaluate him every two weeks. She also noted that in general, the OIDP was working well for the trainees. It was helping them progress in learning the job functions. However, again, the grievor had difficulty accepting that his performance was not adequate; he blamed the OIDP.

[66] The employer also submitted in evidence Ms. Tisdale's April 26, 2015, email to the grievor. In it, she corrected a draft letter that he had prepared for a traveller who had imported a vehicle from the United States into Canada. The email demonstrates the multiple corrections required before the letter was sent to the traveller.

9. The 30-days' notice

[67] On May 6, 2015, Mr. Kienlen prepared a letter for the grievor that informed him that he had 30 days, commencing May 13, to demonstrate the identified skills. Ms. Tisdale gave him the letter on that date. It specifically advised him that he had 30 days to demonstrate that he could consistently perform the job independently and that if he failed to, he would be terminated.

[68] The letter noted that despite the help he had been provided (one-on-one pairing with BSOs, coaching, time to observe, specific task tutoring, operational guidance, and the development plan), many of the deficiencies in skills and behaviours targeted by the plan had continued. In the next 30 days, he had to demonstrate the identified skills. The employer also committed to meeting with him every week, to discuss his progress.

[69] In cross-examination, the grievor recognized that Ms. Tisdale reviewed his mistakes with him.

[70] During the 30-day period, local management performed multiple "mini-assessments". They are dated May 15, May 24, and July 2, 2015. Several members of the management team, Ms. Tisdale, Mike Gillies, Mr. Barry, Ms. Wanner, and Dean Zalisko, noted observations in the mini-assessments. Once again, the mini-assessments demonstrated that the grievor could not meet expectations with respect to client service, program delivery, enforcement activities, and certain behavioural norms.

[71] At that time, Ms. Tisdale was eight months pregnant. She carried out more administrative work in an office, which is why the members of the management team on the floor participated in the mini-assessments. Ms. Wanner was to replace her during her maternity leave. The mini-assessments were all done in the period covering months 16 to 18 of the program.

[72] For the period between May 13 and June 9, 2015, an additional improvement plan was established for the grievor. A superintendent was assigned to supervise him as much as possible during the dates and times of the noted shifts. When the grievor had issues, the superintendent discussed them with him and explained to him the correct procedure. At the end of each week, a wrap-up was done.

[73] On May 20, 2015, Ms. Wanner evaluated the grievor while he performed a task entitled “B4”. In an email entitled “30 day Action Plan”, she then noted a series of his errors, which she corrected. In conclusion, she noted, “It was apparent that Wes does not know how to properly complete a B4 or how to answer questions posed to him regarding it.”

[74] Ms. Tisdale’s June 2, 2015, evaluation was based on the noted observations of Ms. Wanner, Mr. Gillies, and Mr. Barry. The conclusion was that the grievor had to make many improvements in his work.

[75] Mr. Barry was the grievor’s supervisor from the beginning of June to July 16, 2015. On July 4, 2015, Mr. Barry questioned the grievor about some concerns with his conduct (including being rude with a colleague and being confused) that had been brought to Mr. Barry’s attention. The following day, Mr. Barry provided the grievor with a transcript of their discussions at the meeting.

[76] On June 5, 2015, Ms. Tisdale left for a one-year maternity leave. She had supervised the grievor for one year.

[77] On June 9, 2015, after monitoring the grievor for a week, Ms. Wanner recorded her observations on a form. She noted that he did not make any errors on forms that week. But a constant and shared concern at the time was that he was making efforts to work alone, possibly to avoid having his errors revealed.

[78] During the month of June 2015, other problems occurred. A few times, the grievor’s colleagues reported to the management team that after he went to the

washroom, he left it in an unsanitary state. The management team had to intervene. He then committed to being mindful of it in the future.

[79] On July 2, 2015, two persons who worked with the grievor also reported incidents involving him, such as leaving the primary inspection line unattended.

[80] On July 7, 2015, Ms. Wanner, who had set up the supervision schedule for the superintendents who had assisted the grievor between May 13 and June 9, 2015, noted that they had told her that they had regularly advised him to ask a co-worker for assistance when he was hesitant and had questions. However, they had noted that he tended to work alone, which he seemed to prefer, as if he did not want others to see his work. In addition, he had alienated several of his colleagues. Among other things, he had told several of them that were he fired, “he [would] throw everyone under the bus.” His relationships with new trainees were also problematic because of those kinds of statements. The management team reminded him to be courteous and professional.

[81] On July 9, 2015, Mr. Barry provided Thomas Zimmer, Senior Program Advisor, OIDP, with a detailed report on the grievor. As the superintendent of the Immigration Section, Mr. Barry noted that the grievor worked there primarily for a 56-day cycle from approximately early November through December. Interpreting, applying, and practising the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) proved difficult for the grievor, although not from a lack of effort. He worked very hard.

[82] Mr. Barry noted that many of the grievor’s issues resulted directly from his failure to ask for help when he was uncertain. Mr. Barry found that instead of looking for assistance, the grievor would proceed with making decisions that often turned out to be incorrect. A list of nine errors was noted. According to Mr. Barry, the majority of the errors could have been avoided had the grievor consulted his colleagues. Because of his errors in that section, the decision was made to transfer him to the Traffic Section, to allow him to concentrate on fewer tasks.

[83] At the end of the 30 days, Mr. Kienlen reported to the CBSA College that the grievor’s performance had not improved.

10. The termination

[84] The CBSA College subsequently decided not to appoint the grievor to an FB-03 position. The termination letter was dated July 16, 2015, and was signed by Ms.

Richens. It informed the grievor that his employment had been terminated during the probationary period.

[85] Ms. Richens explained why she signed the letter and how the Program Guide applied in this case. She presented the statement of merit criteria and the core competencies. She explained that a BSO position is demanding and that it includes no room for slacking off or hesitation. BSOs have a duty to understand and regularly apply statutes (among others, the *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.)) and the *Immigration and Refugee Protection Act*) and many regulations.

[86] BSOs facilitate the free flow of legitimate trade and travel but have a duty to provide services that support national security and public-safety priorities. Trainees must successfully achieve a level 2, at a minimum, for 6 of the 15 competencies and a level 3, at a minimum, for 9 of the 15 competencies within 12 months, but it is possible to extend this period by 3 months or more. She decides whether to extend a trainee's probationary period.

[87] Ms. Richens explained that there is a crying need for BSOs and that the employer is doing everything in its power to help people learn the BSOs' work. She explained all the steps that were taken to help the grievor learn the job. As early as the third month of his training, concerns were raised about his performance in the OI DP. He had difficulty applying what he was learning, which was reflected in his evaluation.

[88] Many of his marks were below the 2 or the 3 that was the minimum level required. Ms. Richens named the grievor's difficulties at work, which were the same ones that the others who testified had already mentioned. She authorized extending his probationary period, to give him more time to fully understand his job. However, it was not successful. His performance did not improve.

[89] She received a full report about the situation, which included a recommendation to proceed with the rejection on probation. The termination letter was prepared for her signature. She signed it on July 16, 2015.

[90] Mr. Kienlen was tasked with delivering the termination letter to the grievor.

11. The grievance

[91] The grievor filed his grievance on July 30, 2015. It was dismissed at the final level of the internal grievance procedure and was referred to the Board on July 11, 2016.

B. For the grievor

[92] The following is the evidence that the grievor presented to demonstrate that the rejection on probation was a disguised disciplinary action or a sham or that it was made for any reason other than those specified in his termination letter.

1. The grievor's progression

[93] The grievor gave an overview of his work experience before his probation at the CBSA. He had already accumulated over 10 years of experience managing large, multi-sector development assistance projects for the United States government in west Africa and the surrounding areas. He described the course of his probation at the CBSA in a chronological order of events.

[94] The grievor explained that according to the Program Guide, the OIDP is a "... practical application of knowledge ... designed to ensure the transparency and consistency of developing [BSOs] to the working level within [the CBSA]." It notes that superintendents and supervisors are "... critical to the success of the Program" because their primary role is "... to provide an environment conducive to learning ..." and that "[p]erformance management is a shared responsibility" among trainees and their supervisors.

[95] At the hearing, he explained that the superintendents responsible for assisting him in his training did not do it adequately. Without sufficient assistance from them, eventually, he was unable to demonstrate that he met the requirements for an FB-03 BSO position. Thus, in his view, his rejection during the probationary period amounts to disguised discipline (punishment) or a sham made for any reason other than those specified in his termination letter.

[96] His offer letter of January 13, 2014, stated that the length of the program could be extended on a case-by-case basis at management's discretion, to a maximum of 18 months. At 12, 15, and 18 months, the trainee was to be evaluated based on an evaluation package. To be eligible for promotion, trainees were required to present

evidence supporting their competency development, undergo a performance questionnaire review at the end of each quarter, and present proof of their successful completion of all core training.

[97] The grievor explained that some of his questions about the competencies to demonstrate went unanswered at the beginning of the OIDP. To be appointed to an FB-03-level position, BSOs had to achieve a mark of at least 3 on 8 competencies and at least 2 on 6 other competencies. He found it confusing. At the same time, he had much at stake. His wife joined him from Vancouver, British Columbia. Together, they were building a new life away from their respective families, and their first child was born at that time.

[98] The grievor explained that when he first arrived in Saskatchewan on January 10, 2014, he resided, with a fellow CBSA trainee, for one month in the basement suite of the house of Ms. Tisdale, then an FB-02, and her husband in North Portal, Saskatchewan. He then secured housing for himself and his newly arrived family in nearby Estevan.

[99] From January 13 to approximately June 1, 2014, the grievor's supervisor at North Portal was Acting Superintendent Tardif-Cress.

2. The evaluation process

[100] The grievor explained that he was evaluated every 3 months while he participated in the OIDP. An FB-03's supervising superintendent would complete a "Trainee Performance Questionnaire" from notes made on a "Trainee Performance Questionnaire Working Copy". Both questionnaires listed 43 items on which a trainee was ranked. The rankings were on a scale from 1 to 4, in which 1 meant Unsatisfactory, 2 meant Improvement Needed, 3 meant Meets Expectations, and 4 meant Exceeds Expectations.

[101] On working days between January 30, 2014, and June 1, 2015, the grievor sent his supervisor charts outlining the activities and tasks he had performed during his shifts, which he referred to as his "daily debriefs". They sometimes included comments or questions addressed to his supervisor.

[102] Ms. Tardif-Cress completed two Trainee Performance Questionnaire Working Copy forms with a total of nine observation dates between January 27 and April 29, 2014.

[103] Sometime around April 1, 2014, Ms. Tardif-Cress identified two FB-03s to “coach and mentor” the grievor. The arrangement ended about six weeks later, in mid-May.

3. The three-month assessment

[104] On April 15, 2014, Ms. Tardif-Cress met with the grievor to discuss his first quarter performance evaluation and presented him with his first Trainee Performance Questionnaire evaluation, in which, out of 43 ranked items, the grievor received Meets Expectations or Exceeds Expectations 29 times, Improvement Needed 13 times, and Unsatisfactory 1 time.

[105] In her comments in the evaluation, Ms. Tardif-Cress noted that the grievor maintained high enthusiasm for the work, and she acknowledged his daily debriefs. She noted that he had a good understanding of legislation and policies but that he struggled translating it into practice, and he struggled with form completion. She commented that he reacted positively to being assigned two FB-03s to coach and mentor him and that he seemed to be improving in his weak areas. He did not add any comments to this first Trainee Performance Questionnaire.

[106] Between May 23 and 26, 2014, Ms. Wanner emailed the grievor and told him that she appreciated the effort he was putting in. He responded with appreciation while expressing a concern that his colleagues seemed to face less scrutiny than he did.

[107] As of approximately June 1, 2014, Ms. Tisdale, who had been appointed as a superintendent, took over from Ms. Tardif-Cress as the grievor’s supervisor.

[108] On June 11, 2014, a complaint was submitted that referred to the grievor. On the other hand, on June 29, 2014, a compliment was submitted that referred to the grievor. In addition, on July 6, 2014, a second compliment was submitted that referred to the grievor. More detail on these is provided below.

4. The six-month assessment

[109] On July 9, 2014, Ms. Tisdale presented the grievor with his second Trainee Performance Questionnaire.

[110] On the second questionnaire, out of 43 ranked items, the grievor received Meets Expectations or Exceeds Expectations 24 times (down 5 from his first questionnaire), Improvement Needed 19 times, and Unsatisfactory 0 times. One of the listed options that Ms. Tisdale checked in response to the prompt “barriers” that “... hindered ... the trainee from applying their learning from the OITP ...” was, “Lack of supervision due to operational requirements”.

[111] The grievor explained how he felt that some of the comments in his second assessment were inappropriate. For example, he showed me how sometimes he would be marked 2.5 or below (3 was the passing mark in the scale used in the assessments completed every 3 months) and at the same time receive a positive comment (e.g., his willingness to complete the task in question) or a combination of positive and negative comments. He showed me the criteria numbered 18, 23, 26, and 27 to support his claim, which contain constructive evaluations marked at 2. He also had other concerns. He added that several times, he received negative feedback but no specific guidance to improve. He showed me as an example criterion 21, which pertains to “Makes appropriate selective referrals” (he was marked at 2). The comment was: “Needs to hone skills in evaluation process (quality not quantity)”.

[112] He also showed me how, according to Appendices 3(a) and (b), which discuss the core competencies, the measure of competency necessary for a trainee to be considered ready for an FB-03 position for 6 of the 15 competencies was a mark of 2 and not 3 (see page 5 of Appendix 3(a)). For the other 9 competencies, the measure of competency necessary was a mark of 3. The grievor explained that he was confused. This scale differed from the one used in his evaluations that his supervisor completed for each 3-month period. He told me that he asked about this a few times during his probation but that he never received an acceptable explanation that he understood.

[113] He insisted that obtaining marks of 2 on his 3-month assessments led him to feel that he was meeting the competencies assessed and described in Appendix 3(a), as explained by Mr. Akerley during his training in Rigaud. Therefore, he did not understand in any way that his performance, which varied on certain points, was likely to cause him to fail his probation. He explained that had he known, everything would have been different.

[114] Because he had great respect for his supervisor and the chain of command, he did not question this or the other evaluations. He did not perceive then that his appointment to an FB-03 position could be in any way in danger.

[115] Finally, following his evaluation, he asked his supervisor what he had to do to improve his marks from 2 to 3. His supervisor replied, “you are nearly there, keep moving forward”. As a result, he became even more invested in his work; he arrived early, accepted overtime, and sometimes even brought donuts to the team to share his enthusiasm for being at work.

[116] On July 10, 2014, the grievor received a letter of commendation from Mr. Kienlen with respect to the public compliment he received on June 29, 2014.

[117] The grievor explained that the complaint made against him on June 11 was later evaluated as legitimate (or founded). Thus, on July 15, 2014, Mr. Kienlen emailed Mr. Zimmer and Mr. Akerley. He asked if they wanted to see the public complaint made against the grievor. Mr. Zimmer responded in the affirmative and wondered if the complaint would be related to deficiencies noted by the grievor’s supervisor in his first quarter. The grievor received no official feedback about the complaint other than it being mentioned in the comments of his second Trainee Performance Questionnaire.

[118] On July 15, 2014, the grievor also received a second commendation letter from Mr. Kienlen about the second public compliment he received on July 6, 2014.

[119] Later on, the grievor caught a CBSA employee from a neighbouring port of entry undervaluing a horse importation. On July 20, 2014, after Mr. Kienlen personally congratulated him in private, Mr. Kienlen also acknowledged the awkwardness that it could precipitate between the grievor and other CBSA employees. The grievor explained that he was worried about repercussions or reactions from his colleagues as he was new to the region and had never been in such a situation.

[120] On October 27, 2014, the grievor started in the Immigration Section. A new computer system, the Global Case Management System, was being implemented there.

[121] The grievor explained that upon starting in the new section, he still was not informed that his inconsistent performance could jeopardize his appointment to an FB-03 position.

5. The nine-month assessment

[122] On November 6, 2014, Ms. Tisdale presented the grievor with his third Trainee Performance Questionnaire. It was done 24 days after the official end date of his third quarter, which was October 13.

[123] On the third questionnaire, out of 43 ranked items, 8 were marked as Exceeds Expectations, 23 as Meets Expectations, 10 were marked at 2.5, which was typed into the form (between the values 2 and 3), and 2 items were marked as Improvement Needed.

[124] With respect to this evaluation, the grievor believes that the negative comments he received from his supervisor were a consequence of his supervisor's restrictive interpretation of his performance. On his part, he felt that he was doing very well and that his performance was acceptable and even very good. He felt that his supervisor showed laziness by repeating the same comments that were in the last evaluation without specifying what the grievor could do to improve.

[125] He did not see what he could do to improve his marks from 2.5 to 3. He felt that he was being held hostage by being evaluated with marks of 2.5, which did not appear in the table of marks provided for his evaluation.

[126] The grievor explained that on November 7, 2014, his colleague classified at the FB-03 group and level asked him to take over processing a traveller seeking entry into Canada while the colleague took his lunch break. The grievor remembered that the colleague said, "It's your call." The grievor chose to admit the traveller as he believed that the person posed no threat to Canada.

[127] The grievor explained that in early December 2014, Mr. Barry brought him along to help process the passengers on a plane landing at Estevan Airport. Mr. Barry asked the grievor about the decision he had made on November 7. The grievor's colleague had apparently complained, stating that the grievor had made the wrong decision. Mr. Barry also appeared to be under the impression that the grievor had acted against his colleague's wishes.

[128] On December 17, 2014, Mr. Barry told the grievor informally that he and Ms. Tisdale wanted to see him before he went home after his shift that day. Later the same day, when they met, Ms. Tisdale told the grievor that her decision was that he did not

pass the 12-month probationary period; instead, it was to be extended into 2015 for another 3 months.

[129] The grievor explained that until that meeting, he had not been informed that he was in jeopardy of not successfully completing his 12-month probation. Before the meeting, Ms. Tisdale had informally told him that all he needed to succeed were “just some small nuances here and there”; she told him, “keep your head up ... you’ve got this.” Thus, it was the first time he was told that his future with the CBSA was in jeopardy.

[130] The grievor returned to Vancouver at the end of December, to spend the winter break with his wife, children, and parents. He said that while on vacation, he emailed Mr. Barry with a learning plan he made for himself.

[131] The grievor explained that he did not discuss what was happening at work with his family until late in the winter break. He avoided company. When he finally did discuss his probation extension, the conversation with his family did not make him feel better. He returned to Saskatchewan sometime around New Year’s Day.

6. The 12-month assessment

[132] On the fourth Trainee Performance Questionnaire, finalized on December 31, 2014, out of 43 ranked items, 8 were marked as Exceeds Expectations, 24 as Meets Expectations, 8 were marked at 2.5, which was typed into the form between 2 and 3, and 3 were marked as Improvement Needed.

[133] The grievor explained that he was again confused by the marks of 2.5 that Ms. Tisdale had assigned to him. He felt that the marks used to evaluate him were arbitrary. He also objected to the fact that he was temporarily removed from the Immigration Section due to specific operational needs. He explained that his absence from there hindered his development. From that point on, he felt that his supervisor micromanaged him. He explained that from that moment on, he felt like a wounded animal that hides and dies alone. His social life dried up. He began experiencing anxiety and began vomiting on the way to work. It was a physical reaction triggered every time he went to work.

[134] The grievor made the following handwritten comments on this questionnaire: “This is understood and I created my own Plan [over the winter break] that is being

adhered to. I know how, why, what for my areas of improvement. I will attain this/these [sic].”

[135] On his return to work on January 2, 2015, the grievor was also handed the Readiness Report, which Ms. Tisdale had completed. He noted that according to its instructions, the report would “... assist the Merit Review Board in their assessment of the Officer Trainee against the Statement of Merit Criteria for FB-03 Border Services Officer (BSO).” It directed the superintendent to provide “... a global assessment on the Officer Trainee’s overall ability to perform the tasks assigned over the past twelve months according to the categories listed below. The rating should reflect the Officer Trainee’s performance after one full year”

[136] Out of five categories in the Readiness Report, Ms. Tisdale marked the grievor as meeting expectations in three of them, “Client Service”, “Enforcement Related Activities”, and “OIDP Trainee Behavioural Expectations and Requirements”. She marked him as Improvement Needed in two categories, Program and Service Delivery, and Legislation, Policies, Procedures and Guidelines.

7. The first enhanced performance development plan

[137] On his return to work on January 2, 2015, the grievor signed an “Officer Trainee Enhanced Performance Development Plan” dated December 31, 2014.

[138] The grievor explained that in response to his question of how his development would be measured, Ms. Tisdale wrote this:

...

There will be continued monitoring by coach officers and/or a Superintendent of the skills and behaviours identified above. Officer Trainee Wrightson will be given informal feedback. In addition, notes will be taken of the actions and feedback provided. This will be reflected in the 13-15 month review.

Progress to date does not meet requirements for appointment to the FB-03 level. Significant improvement needs to be demonstrated ... in order to be considered for appointment at the 15 month mark.

...

[139] The grievor explained that it was the first time that the term “significant improvement” appeared on any assessment document connected to him.

8. The 15-month assessment

[140] The grievor explained that he started his fifth quarter at the CBSA's North Portal location in January 2015 with Ms. Tisdale intending to work closely with and monitor him while he was on shift, except for the second week of January, during which he worked a number of midnight shifts. He explained that before his first midnight shift, he suffered an anxiety attack and vomited. For one of his midnight shifts that week, he called in sick. As mentioned, he vomited a number of times as he drove into work during this period.

[141] The grievor explained that he started tracking his CBSA paperwork for mistakes in January 2015. At the time, if trainees submitted forms with errors, the forms would be handed back to them for amending or discussion with their supervisors.

[142] On January 7, 2015, the grievor contacted the CBSA's Employment Assistance Program. He stated that the December 17, 2014, meeting had left him feeling humiliated and that he had been "very, very depressed" since then. He also mentioned that he had been anxious and that he had vomited while commuting to work.

[143] On January 20, 2015, the grievor had an informal conversation with Mr. Barry about his concerns. Mr. Barry did not believe that the grievor should email Mr. Kienlen about them but that he should instead try to solve them internally, at the superintendent level.

9. The second enhanced performance development plan

[144] On February 4, 2015, a second development plan was developed for the grievor. The grievor and Ms. Tisdale signed this plan on March 13, 2015. Under the heading "Skill, behaviour or competency that needs developing / correcting / improving", four skills and three behaviours are listed.

[145] On March 2, 2015, the grievor provided Mr. Kienlen with a letter entitled, "Allegations on Inconsistencies in regards to OIAP Assessment by Supt Tisdale and Management by Supt Tisdale since April 13 2014." It contained the following passage:

Since arrival at North Portal POE as a BSO/T 13 January I have noticed the following irregularities and inconsistencies in my assessments (formal). Since 17 December 2014 (my last day in Immigration) I have felt uncomfortable, uneasy, anxious, nervous, and generally 'not myself' when on shift with my Supt. This is due

to two points: the first point being a meeting that took place between A/Supt Barry, Supt Tisdale, and myself under the auspices of discussing my decision to issue a VR to a traveller whom BSO [name redacted] had an issue with (thought of being a non-genuine visitor) in November. They wanted to discuss me not taking the advice and listening to a senior officer on the issue and wanted to know what my thought process was to issuing a VR and not interviewing and ATL-ing the client.

The second point that I believe is afoot is that I believe that my Supt had had a personal (either) vendetta or against me in succeeding since I have started at North Portal. I believe this is due in part to my past history (or perceived track record; or even reputation) coming from Rigaud, living with my Supt and her husband for a month in searching for a residence in Estevan when in starting, being originally from the US and dual citizen, living in Vancouver, or even my employment history of working overseas and management experience overseas. This perception and allegation that I am claiming by is one that has been brought up to me by two separate people (other colleagues).

...

[Sic throughout]

[146] The grievor explained that on March 12, 2015, he spoke with Mr. Kienlen about his issues with Ms. Tisdale. The grievor brought up what he perceived was confusing, inconsistent, or unfair in terms of how she had been assessing him. The grievor remembers that at the meeting, Mr. Kienlen began by telling him the following: “If you think you’re improving, you’re not.”

[147] The grievor’s wish was to be assigned a new supervisor. His view was that a new pair of eyes would generate a significant new opportunity. But he feels that he was not heard. He considers that he received zero guidance and direction. He was just regularly told, “Do your best.”

[148] Similarly, the grievor felt that Mr. Akerley did not give him clear direction when the grievor opened up to him that month. He too was vague. For example, he used metaphors, such as “the ball is in your court”.

[149] On March 13, 2015, Ms. Tisdale sent Mr. Akerley, Mr. Kienlen, and another person an Excel spreadsheet that included notes following observations of the grievor on shifts between January 2 and March 13, 2015. It listed 11 observations of the grievor’s daily work, where each supervisor noted the grievor’s good practices and those practices that required improvement.

[150] Also on March 13, 2015, the grievor participated in a conference call to discuss his progress in the OI DP. He could invite a bargaining agent representative. His supervisor, Ms. Tisdale, also was present.

[151] On April 5, 2015, the grievor emailed Mr. Akerley. Among other things, he mentioned the marks of 2.5 on the Trainee Performance Questionnaires as not being clear and said that had he had raised his concerns directly with Mr. Kienlen before the meeting in March. He continued with, “After we had our teleconference I did take the time to air out my issues and differences with my Supt and we have turned a page ... we are on positive terms.”

10. The 15-month assessment

[152] On April 14, 2015, Ms. Tisdale and the grievor signed his fifth Trainee Performance Questionnaire. Out of the 43 ranked items, she marked 3 as Exceeds Expectations, 19 as Meets Expectations, 5 at 2.5, 14 as Improvement Needed, and 2 as Unsatisfactory.

[153] The grievor testified that once again, the comments were incomprehensible to him. He still felt held hostage by the situation. He again asked for help. However, it resulted again in a lack of guidance and directions, which hurt him greatly.

[154] The grievor also offered his perspective on an incident in which he seized a switchblade. The other BSO complained about it, and the grievor explained that they simply had different views on how best to proceed. He explained that Ms. Tisdale did not consider his side of the story. He felt that he had been micromanaged, that his input had never meaningfully been solicited for his Trainee Performance Questionnaires, and that his assessments were very subjective.

[155] At the hearing, he admitted that he lied to Mrs. Tisdale about a package being removed from the bond room without a signature. He said that it was a package of little value, only \$28. He admitted that he should not have lied, and he felt bad for doing it. He explained that at the time, he was anxious, depressed, and in a terrible state.

11. The 30-days’ notice letter

[156] On May 6, 2015, the grievor received a letter signed by Mr. Kienlen. It stipulated a 30-day period starting on May 13, 2015, in which the grievor was to “... demonstrate

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Federal Public Sector Labour Relations Act*

the necessary behaviours, actions and decisions required to accomplish and complete your duties without close guidance.” It noted the efforts expended by management and stated that if he failed to demonstrate the level required, it would result in him being released on probation.

[157] On May 12, 2015, Ms. Tisdale emailed the 30-day action plan to all concerned superintendents. She attached a chart to complete and explained that at the end of each set of shifts, they were required to complete a wrap-up meeting. The email specified as follows: “This will be the time where we highlight the Good and area in which need improvement [sic].”

[158] On May 13, 2015, one superintendent emailed Ms. Tisdale to say that he had watched the grievor work and that he observed that the grievor was “... methodical, progressive, and thoughtful of indicators... He is focused on asking all the mandatory questions ... I think that he has been coached so much at this point that I’m not going to try to change anything because it is quite adequate.” The same superintendent provided positive comments again on May 16 and 21.

[159] On June 9, 2015, Ms. Wanner recorded her observations of the grievor.

[160] On June 9, 2015, the grievor typed a note announcing his resignation as a BSO in training effective 13 June 2015. However, he showed the employer the letter only later, when he received his termination letter from Mr. Kienlen.

[161] Around June 16, 2015, Mr. Barry took over as the grievor’s supervisor.

[162] On June 17, 2015, Mr. Kienlen informed the grievor of the end of the 30-day period and said that since management was reviewing his performance, the “conditions” of those 30 days continued to apply.

[163] From mid-June 2015, a number of emails were forwarded to Mr. Kienlen about the grievor’s work and habits.

[164] On June 30, 2015, Mr. Zimmer informed Mr. Kienlen of the following:

...

We are getting some feedback from corporate Labour Relations ... we have done a good job of documenting how Wesley has failed to demonstrate [competencies] but we are weak on showing what has

been done to support and develop the skills that are identified as needing improvement.

Specifically we need more on file on what steps were taken to support him....

...

[165] On July 5, 2015, Mr. Barry emailed Mr. Zimmer and all the superintendents in the area. He stated that the previous day, he met with the grievor to address concerns that had been brought to his attention (his irregular and confusing conduct). Mr. Barry also emailed the grievor an outline of what they discussed at their meeting, which he forwarded to Mr. Zimmer and Mr. Akerley.

[166] On July 10, 2015, Mr. Zimmer emailed Mr. Barry, thanking him for the detailed report and stating that the issues raised in essence were an "... ongoing concern that [the grievor] appears either unable or unwilling to address."

[167] On July 10, 2015, Ms. Richens reviewed and affixed her signature to the briefing note. It contained a summary that the employer prepared of the grievor's work experience at the CBSA. It noted that the CBSA's Corporate Labour Relations branch had approved the attached termination letter. It was suggested that he be given 30 days' salary in lieu of notice, given that the BSO position is armed and involves the public.

[168] The grievor explained that on July 13, 2015, he knew that he was being terminated. And then, on July 16, 2015, he was given the letter signed by Ms. Richens. It informed him of the termination of his employment during his probation because, "No sustainable improvements have been noted which does not allow me to expect that your suitability for the position will improve." When he received it from Mr. Kienlen, he asked to present the resignation letter that he had prepared, which he did. But later, he decided not to pursue that path but instead to file a grievance challenging his rejection on probation.

[169] On July 28, 2015, the grievor filed his grievance.

C. The employer's reply

[170] Mr. Akerley, the ODP manager, explained his involvement in the case. As of the time at issue, the ODP program had just been created. The grievor was part of the first cohort for which the ODP was used as a formal tool to train new BSOs. The purpose

was to ensure that all new BSOs would receive the same training, no matter the port of entry they were assigned to.

[171] Thus, in Rigaud, he hosted the BSOs in training. He explained the OIDP to them and the skills required for promotion to the FB-03 level. The trainees had to demonstrate their aptitude within the time frame explained to them. Precisely, the trainees were required to meet 15 competencies. The pass mark for each one was described in Appendix 3(a) of the Program Guide, entitled in part, “Core Competencies”. The trainees were provided with very detailed information on this subject. Throughout the process, he ensured that they received all the assistance they required to complete their training program.

[172] Mr. Akerley received regular reports about the grievor’s performance. The OIDP management team made the decision to not promote the grievor to an FB-03 position after the 12-month period, based on the reports about him. At that point, Mr. Akerley and his colleagues leading the OIDP believed that the grievor was not ready to be appointed to the FB-03 level, and enhanced performance development plans were adopted.

[173] Mr. Akerley confirmed that despite the assistance provided to the grievor, they noted no sustainable improvements in his work. They concluded that he was not suited for an FB-03 position. Mr. Akerley was involved in the process until the decision was made at the end to not appoint the grievor to a FB-03 position.

VI. Summary of the arguments

A. For the employer

[174] The employer referred me to paragraph 111 of *Tello* and argued that it met the criteria in that case and that it met its burden of proving that the rejection on probation was made for employment-related reasons. As a reminder, *Tello*, at para. 111, sets out the shifting burdens of proof in a rejection-on-probation grievance. The employer must first show four factors related to the probation agreement. The burden then shifts to the grievor to demonstrate that the decision to terminate his or her employment by way of a rejection on probation was a sham, camouflage, or contrived reliance on the *PSEA* or that it was done in bad faith.

[175] The employer noted that s. 62 of the *PSEA* provides that the deputy head of an organization may terminate the employment of an employee on probation by giving notice to the employee. The *PSEA* does not require any justification from the deputy head.

[176] It noted that s. 211 of the *Act* provides that the Board has no jurisdiction over terminations under the *PSEA*. However, according to the jurisprudence of the Board and the federal courts, a termination on probation cannot be made in bad faith or for reasons not employment related, such as discrimination (see *Wrobel v. Deputy Head (Canada Border Services Agency)*, 2021 FPSLRB 14 at para. 75).

[177] According to the employer, the evidence demonstrated that the grievor was shown his shortcomings and that he failed to correct them. The evidence also demonstrated the following:

- 1) that the grievor was on probation;
- 2) that the probationary period was still in effect as of the termination;
- 3) that he was given notice or compensation in lieu of notice; and
- 4) that he was provided with a letter stating why he was rejected on probation.

[178] The employer asserted that since in this case, there were employment-related reasons for the rejection, s. 211 of the *Act* applies, and the Board has no jurisdiction, unless the grievor met his burden of proof of showing that the rejection on probation was in fact a sham, camouflage, or contrived reliance on the *PSEA* or that it was done in bad faith. The employer argued that he did not meet his burden.

[179] The employer noted that in each quarterly evaluation, the relevant superintendent requested that the grievor slow his pace and avoid unnecessary multitasking to focus on fully completing each task correctly and to understand the sequence of steps to follow to successfully complete each one. Despite his dedication and attempts, the grievor was not able to significantly reduce his number of errors. It submitted that thus, it is clear that the rejection was due to employment issues.

[180] The employer added that throughout the evaluation period, the grievor received formal reviews in writing. The results of his evaluations are documented on file. Some of the comments collected in the periodic evaluations include the following:

- *Difficulty translating theoretical knowledge (LPP) into proper task completion. Struggles with the steps.*

- *Unable to adapt and understand different officer roles or adapt to client's needs.*
- *Struggles with form completion and often repeats mistakes.*
- *Advised to continue to seek advice of senior officers and to slow down pace to complete tasks correctly.*
- ...
- *Needs to work on making accurate decisions. Appears to be able to articulate policy but still cannot apply it in the correct context.*
- *Continues to have problems with document completion and verification.*
- *Needs to work on interview skills. Will confuse line of questioning from PIL to Secondary.*
- *Advised to slow down and focus on accuracy of decisions and task completion.*
- ...
- *Needs to remain calm and watch his tone and language.*
- *Needs to slow down and take time to come to a correct decision and when reviewing and completing forms.*
- *Needs to ensure additional questions are relevant and appropriate.*
- *Needs to focus on interview skills. Unable to obtain information leading to intent.*
- ...
- *Still needs to ask for help to explain things to clients that he is unsure of.*
- *Still struggles at asking appropriate questions based on the circumstances of the traveller.*
- *Needs to slow down when processing, review what is in front of him and make decisions based on the whole picture.*
- *Needs to ask for help when he is unsure instead of trying to work his way through things. (leading to errors)*
- *Needs to stick to the mandatory questions and then add appropriate additional questions based on the circumstances.*
- ...

[181] The employer argued that the grievor knew very well from his time at Rigaud that his appointment to an FB-03 position was conditional on his success in the OIDP and on him meeting the 15 competencies. It added that the requirements to successfully complete the OIDP, described in the relevant appendices of the Program Guide submitted as evidence, were clearly explained to all trainees, including the

grievor. During the training sessions, as did all other trainees, he had the opportunity to ask questions. If he did not ask any because he was reluctant, it is not the employer's fault.

[182] According to the employer, over time, the grievor developed the habit of blaming others for his mistakes or claiming that he had been micromanaged. However, all the superintendents shared the opinion that he had difficulty performing his duties properly.

[183] In addition, contrary to the grievor's assertion, he was not kept in the dark; he was informed quarterly of his progress and the difficulties. He also received additional help in the form of mentoring and coaching. So he could not say that he was surprised at how things evolved. By the end of the probation period, he was very aware of what was happening and had even prepared a resignation letter that he had planned to submit to the employer.

[184] The employer brought four cases to my attention: *Tello*, at paras. 96 and following; *Malik v. Deputy Head (Canada Border Services Agency)*, 2020 FPSLRB 64 at paras. 119, 131, and 139; *Boiko v. National Research Council of Canada*, 2018 FPSLRB 11 at paras. 709, 726 to 728, and 863 to 868; and *Bell v. Staff of the Non-Public Funds, Canadian Forces*, 2020 FPSLRB 14 at paras. 121 and 122. I reviewed them all.

B. For the grievor

[185] The grievor recognized that the Board's jurisdiction to hear a rejection-on-probation grievance is limited. He brought to my attention paragraphs 17 and 18 of *Malik*. In particular, paragraph 18 reads as follows:

[18] Tello v. Deputy Head (Correctional Service of Canada), 2010 PSLRB 134, at paragraph 111, sets out the shifting burdens of proof in a rejection on probation grievance. The employer must show [four factors related to the probation agreement]. The burden then shifts to the grievor to demonstrate that the decision to terminate her employment by way of a rejection on probation was a sham, camouflage, or contrived reliance on the PSEA or that it was done in bad faith.

[186] The grievor's position is that the termination of his employment was excessive and that the employer acted in bad faith. According to him, the decision to terminate

his employment was an artificial recourse to s. 62 of the *PSEA*. Therefore, the grievance should be allowed.

[187] He brought to my attention paragraph 126 of *Yeo v. Deputy Head (Department of Employment and Social Development)*, 2019 FPSLREB 119, which reads as follows:

[126] According to Hamilton Public Library, bad faith must be established on the facts of the case. The onus is on the grievor to show that the employer was motivated by hostility, malice, ill will, or dishonesty or that it had an improper motivation. In this case, while I cannot conclude that the employer's representatives were motivated by hostility, malice, ill will, or dishonesty, they were [sic] most certainly had an improper motivation. The grievor demonstrated to my satisfaction that the employer's sole purpose in pursuing the assessment process was that it was required to terminate her employment. At no time did the employer intend that it be part of a retention strategy.

[188] He also brought to my attention paragraph 211 of *Alexis v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 9. In that case, the grievor filed a grievance alleging bad faith in the employer's decision to terminate her employment due to poor performance while on probation. The Board determined that it had jurisdiction over the rejection on probation as the grievor's termination was a sham and a camouflage and was done in bad faith. At paragraph 211, the Board noted that the jurisprudence dictates that "good faith shall be assumed". However, the next paragraphs in that decision provide an example of what is considered acting in a manner that can be described only as bad faith. I reviewed those paragraphs.

[189] The grievor submitted that the employer's representatives were motivated by bad faith, at least in the form of dishonesty and improper motivation.

[190] To establish his submission, he stated the following. He noted that he was very enthusiastic about his work and that he worked very hard. However, he was assessed in a way that impeded his improvement. He was asked to do better in some tasks, but he did not understand exactly how. He was ignored when he expressed concerns about his assessment. Instead of being provided with specific help, he was just asked to do better. In the same continuity, his probation was extended twice, and he was still found to not meet the necessary competencies. He does not know what he could have done better. The employer did not ensure that he understood that he had to improve certain things and that his job was at stake.

[191] Specifically, during his assessments, he asked what he could do to obtain a higher mark on certain tasks. His superintendent told him to improve and to make fewer mistakes, which he did, according to him. However, his evaluation remained the same. It did not reflect his improvements and was subjective and questionable. For example, his superintendent continually marked him at 2.5 on certain tasks, despite the fact that that mark did not appear in the legend of possible marks. According to the grievor, the mark of 2.5, rounded up to the next whole number, in this case 3, indicated to him that he was demonstrating the skills at issue. He did not understand in any way that his appointment to an FB-03 position was at stake.

[192] Similarly, the grievor reminded me that the Program Guide notes that superintendents are seen as "... critical to the success of the Program" because their primary role is "... to provide an environment conducive to learning ..." and that "[p]erformance management is a shared responsibility" among trainees and their supervisors.

[193] He further explained that some of his questions about the competencies went unanswered at the beginning of the OIDP. To be appointed to an FB-03-level position, the trainees had to achieve a mark of at least 3 on 9 competencies and 2 on 6 competencies, for a total of 15 competencies. He found it confusing.

[194] He submitted that in July of 2014, by obtaining marks of 2 on his assessments every three months, he felt that he met the competencies assessed and described in Appendix 3(a) as Mr. Akerley explained to him during his training in Rigaud. Therefore, he did not understand in any way that his performance, which varied on certain points, was likely to cause him to fail to be appointed to an FB-03 position. Had he known and been told how to improve, everything would have been different.

[195] In October of 2014, the grievor started in the Immigration Section. He still was not informed that his inconsistent performance could jeopardize his appointment to an FB-03 position. He blames the employer for not being transparent with him and thus not providing him with an appropriate opportunity to improve his work.

[196] In November of 2014, he did not see what he could do to improve his marks from 2.5 to 3. He felt that the method of evaluating him with marks of 2.5 was holding him hostage as that mark that did not appear in the table of marks provided for his evaluation.

[197] Until the December 17, 2014, meeting, the grievor was not informed that he was in jeopardy of not successfully completing his 12-month probation.

[198] Because he had great respect for his supervisor and the chain of command, he did not question the evaluations. Again, he did not perceive that his position could be in danger in any way. He considers that the employer fooled him through a misinformation campaign. The unfair situation arose from the bad faith of the actors involved at the local level and from the process. Even had their intention not been to harm him, he received inappropriate evaluations and inappropriate assistance from them, and eventually, he lost his job.

[199] In April of 2015, he also felt that he was being micromanaged and that his input was never meaningfully solicited with respect to his Trainee Performance Questionnaires. His assessments felt very subjective to him.

[200] The grievor also submitted that the employer's representatives were improperly motivated. To support his argument, he argued that his superintendent, Ms. Tisdale, either had a personal vendetta against him or was against him succeeding. He believed that it was due to different reasons, possibly in part to his employment history of managing overseas, in part to coming from Rigaud and living with his superintendent and her husband for a month while searching for a residence, in part to being originally from the United States and being a dual citizen, and in part to living in Vancouver. In one document, he wrote that two different colleagues had brought those perceptions up to him.

[201] The grievor submitted that thus, the rejection on probation was done in bad faith, and that it was a sham. In essence, in his view, the evidence demonstrated that the employer's representatives were motivated by dishonesty or that they had an improper motivation for not appointing him to an FB-03 position.

[202] The grievor also suggested that his termination was completed three days after the end of his 18-month probation period but that it had more to do with an administrative delay than with any lack of intention to terminate his position during the period.

C. The employer's reply

[203] The employer submitted that it was not established that the decision to end the grievor's probation was an artificial recourse to s. 62 of the *PSEA*. It was not established that that decision and the decision not to appoint him to an FB-03 position were excessive and that the employer acted in bad faith.

[204] In addition, the employer highlighted that the grievor noted that his termination was completed three days after the end of his probation period but stated that this is not accurate. The appointment letter clearly stated that in accordance with s. 61 of the *PSEA*, the grievor was subjected to a probationary period for the duration of the OIDP.

[205] In addition, section 4.11.3 of the Program Guide, entitled "Removal of an Employee from the Program", states the following:

Failure to meet the Program requirements within the provided 18 consecutive month period will result in [sic] removal of the Officer Trainee from the Program. Officer Trainees recruited from outside the public service would be subject to a rejection on probation and Officer Trainees recruited from within the public service would be subject to a termination of employment for unsatisfactory performance.

...

If the Merit Review Board determines the Officer Trainee has been unsuccessful in meeting the Program requirements and recommends termination of employment or rejection on probation, the MRB is to prepare a justification with supporting documentation of unsatisfactory performance or insufficient progress. The justification and supporting documents will be provided to the Director, NRPD and District Director of the host district for fulsome review with a recommendation for further development or termination. The Director General, Training and Development Directorate and the Regional Director General of the host region will determine whether they support the justification or if they feel further development is warranted. For either decision, the results are to be documented. In all cases, the employee will be informed in writing of the decision and will be provided feedback to explain the decision and the next steps. Exceptional circumstances may exist, however, they will be considered on a case-by-case basis.

[206] While the grievor's perspective is that he was not properly evaluated, significant amounts of information and documentation demonstrate that he was properly evaluated, helped, guided, and coached. In the end, the percentage of mistakes found

in his work was too high. While he believes that it was not a concern, it was one for the employer.

VII. Reasons

A. Did the employer demonstrate that it relied on employment-related concerns or reasons when it decided to reject the grievor on probation?

[207] The test for a rejection on probation is not whether the employer had sufficient cause but whether it had a work-related reason (see *Malik*, at para. 112).

[208] As noted, the employer relied on s. 62 of the *PSEA* to terminate the grievor's employment. The application of this provision is commonly referred to as a rejection on probation. Section 211 of the *Act* states that any termination of employment under the *PSEA* cannot be referred to adjudication. However, if the reason for termination can be shown to amount to bad faith, then the Board has jurisdiction under s. 209(1)(c).

[209] For the following reasons, I recognize that the employer established the following four factors related to the probation agreement.

[210] Firstly, between January 13, 2014, and July 16, 2015, the grievor was on probation as a trainee and was classified at the FB-02 group and level in the OIDP.

[211] Secondly, the probationary period was still in effect when the grievor was terminated. As stated in his letter of offer, he was subjected to a probationary period for the duration of the OIDP, in accordance with s. 61 of the *PSEA*. The letter confirmed that the probationary period was for the duration of the OIDP or 12 months, whichever was longer.

[212] In addition, the July 16, 2015, letter informed the grievor that his employment was terminated during the probationary period. The following was specified: "... you are hereby terminated during the probationary period from your position of CBSA Officer Trainee."

[213] Thirdly, the grievor was compensated in lieu of notice. The July 16, 2015, letter informed him that he was being paid for 30 days in lieu of the applicable notice period.

[214] Finally, and fourthly, the July 16, 2015, letter provided to him stated why he was rejected on probation. It included the following:

...

Despite being counselled by your management team on numerous occasions, receiving regular performance reviews and having been placed on a number of enhanced development plans you have shown continuing performance problems with the same skills and behaviours initially identified in your first quarterly review. After providing you with a final period of evaluation on May 6, 2015 you are still struggling and have not achieved the minimum rating of "Meets Expectations" in the areas of Client Service, Program and Service Delivery, Enforcement Related Activities and Legislation, Policies, Procedures and Guidelines.

...

[215] Therefore, the employer established the four factors related to the probation agreement and that the rejection on probation was related to the grievor's performance and behaviour. It met its initial burden before the Board.

[216] The burden then shifted to the grievor to demonstrate that the decision to terminate his employment by way of a rejection on probation was a sham, camouflage, or contrived reliance on the PSEA or that it was done in bad faith.

B. Did the grievor establish that the rejection on probation was a disguised disciplinary action or a sham or that it was done for any reason other than those specified in his rejection letter?

[217] The grievor submitted that the rejection on probation was a sham and that the employer's representatives were in fact motivated by bad faith, at least in the form of dishonesty and improper motivation. That is why he was declared unsuccessful in the training program and was not appointed into an FB-03 position.

[218] I note that the following was explained in *Premakanthan v. Deputy Head (Treasury Board)*, 2012 PSLRB 67 at paras. 44 and 45:

[44] ... an adjudicator has jurisdiction over a rejection on probation that has not been made under the PSEA but that is a contrived reliance on the PSEA, a sham or a camouflage... the purpose of a probationary period is to allow a deputy head to evaluate an employee's suitability to perform the duties of his or her position. Therefore, where an employee establishes that the rejection on probation is not based on a bona fide dissatisfaction with his or her suitability to perform the duties of his or her position, an adjudicator has jurisdiction over the employee' [sic] termination.

[45] In light of those principles, a high threshold must be met by the rejected employee. He or she must demonstrate that, on a

balance of probabilities, the deputy head did not possess a bona fide dissatisfaction with his or her suitability to perform the duties of his or her position and that the termination was a contrived reliance on the PSEA, a sham or a camouflage. After all, a deputy head should not be allowed to use the rejection-on-probation process set out in the PSEA to camouflage real but illegitimate reasons for termination that are unrelated to a bona fide dissatisfaction with an employee's suitability to perform the duties of his or her position.

[219] In this case, the grievor submitted that the employer was dishonest and that it was not in any way transparent with him. Therefore, it did not give him an appropriate opportunity to improve his work. He submitted that his unfair rejection arose from the fact that he did not receive the necessary assistance at the local level and in the ODP. He added that even if the employer's representatives did not intend to harm him, he received inappropriate evaluations and assistance, and eventually, he lost his job. He believes that the employer fooled him through a misinformation campaign.

[220] For example, on his second questionnaire, in July of 2014, out of 43 ranked items, he received 24 Meets Expectations or Exceeds Expectations ratings, but it was down 5 from his first questionnaire. In addition, 19 items were ranked as Improvement Needed. Yet, he did not receive assistance, and one of the listed options that Ms. Tisdale checked in response to the prompt "barriers" that "... hindered ... [him] from applying [his] learning from the OITP ..." was, "Lack of supervision due to operational requirements".

[221] Furthermore, after his evaluations, he regularly asked his different supervisors what he had to do to improve his marks from 2 to 3. Yet, his supervisors, including Ms. Tisdale, continuously replied with responses such as the following: "you are nearly there, keep moving forward".

[222] Then, on his third Trainee Performance Questionnaire, which was finalized on November 6, 2014, out of 43 ranked items, he received 31 rankings of Meets Expectations or Exceeds Expectations and only 2 of Improvement Needed. But for the first time, Ms. Tisdale also ranked 10 items at 2.5, which was typed on the form between 2 and 3 (2 was Improvement Needed, and 3 was Meets Expectations).

[223] Thus far, he felt that he was doing very well and that his performance was acceptable and even very good. But he felt that his supervisor showed laziness by

repeating the same comments that were in the last evaluation without specifying what he could do to improve. He believed that the negative comments he received from his supervisor were a consequence of that person's restrictive interpretation of his performance.

[224] When he received the fourth Trainee Performance Questionnaire, which was finalized on December 31, 2014, he was again confused by the marks of 2.5 that Ms. Tisdale had assigned, which he felt were arbitrary.

[225] The grievor explained that until the December 17, 2014, meeting, he was not informed that he was in jeopardy of not successfully completing his 12-month probation. Until then, Ms. Tisdale had informed him informally that all he had to do to succeed was just improve small things here and there; she added comments like, "keep your head up ... you've got this". Thus, it was the first time he was told his future at the CBSA was in jeopardy.

[226] From that moment until at least March of 2015, the grievor's wish was to be assigned a new supervisor. His view was that a new pair of eyes would generate a significant new opportunity. But his request was not heard. He considers that he received zero guidance and direction. He was just regularly told, "Do your best."

[227] In April of 2015, he also felt that he was being micromanaged and that his input was never meaningfully solicited with respect to his Trainee Performance Questionnaires.

[228] The grievor also brought to my attention that the scale used in the evaluations that his supervisor completed for each 3-month period differed from the scale in Appendices 3(a) and (b), which discussed core competencies. This document indicated that the measure of competency necessary for a trainee to be considered ready for an FB-03 position for 6 of the 15 competencies was a mark of 2 and not 3 (see page 5 of Appendix 3(a)). Therefore, he was confused and did not understand or perceive then that his appointment to an FB-03 position could be in danger on the grounds that he had received marks of 2 on his Trainee Performance Questionnaires. He insisted that he asked about it a few times during his probation but that he never received an acceptable explanation.

[229] I do not agree with the grievor's argument that the employer's actions are indicative of bad faith or of an arbitrary decision. He sought to convince me that his job performance was acceptable and that any deficiencies on his part were due to circumstances beyond his control. In his view, since he could not be blamed for every mistake he made or for his sometimes questionable work, I should assume that the employer acted in bad faith or that his rejection on probation was a subterfuge or cover-up.

[230] However, bad faith cannot be presumed in law; it must be proven. The evidence does not support concluding that the errors noted in his work were unrealistic or that the employer had unreasonably disregarded extraordinary circumstances that might have arisen, beyond those that could normally have been expected in the course of performing his duties.

[231] On the contrary, according to the employer's evidence, the grievor had access to sufficient tools, instructions, and assistance from his co-workers to be able to perform his duties properly. In addition, it extensively documented its concerns about his performance.

[232] He had persistent difficulties, such as difficulty translating theoretical knowledge into proper task completion, making mistakes completing forms, and not ensuring that the proper procedure for completing certain tasks was followed. Those errors are documented in several emails as well as in the quarterly evaluations prepared by several superintendents. I also accept the testimonies of Ms. Tardif-Cress, Ms. Tisdale, Ms. Wanner, Mr. Barry, and Mr. Kienlen, who all testified that they saw numerous irregularities in the grievor's work.

[233] It is also difficult for me to reconcile the grievor's claim that he did not have sufficient guidance or training. I am of the opinion that he received in-depth basic training in Rigaud, ongoing assistance from his colleagues, and, at times, coaching. However, the evidence supports the conclusion that he did not provide a service that consistently met the employer's expectations. I have no reason to believe that those expectations were not justified.

[234] The documentation and testimony of the employer's representatives indicate that they met with the grievor several times during his probationary period to review his work and performance. He did not really dispute that evidence. Although he did

not realize until December 2014 that his work deficiencies might jeopardize his appointment to an FB-03 position, he admitted that from then on, he realized that he had to improve his performance.

[235] The employer's viewpoint was that the quality of the grievor's work often left something to be desired. The evidence he presented does not allow me to conclude that that viewpoint or perspective was fabricated. Rather, as mentioned, he sought to justify his deviations with explanations that he believed were valid. Yet, in a case involving a rejection on probation, it is not for the Board to assess the grievor's performance during the course of his or her duties or the validity of the explanations to justify them. The Board's role is to ensure that the rejection on probation is what it appears to be and that the employer's decision to reject the probationary employee was not a sham or a cover-up under the *PSEA*.

[236] I also note that the fact that Ms. Tisdale did not continually supervise the grievor personally is not indicative of any bad faith or arbitrary decision on her part. I note that she and the grievor's other superintendents sought recommendations from those who had supervised him.

[237] I also note that at the hearing, Mr. Akerley described how at the outset of the OI DP, he explained to the trainees the competencies they had to meet to succeed and the required pass marks of either 2 or 3 identified in Appendix 3(a) of the Program Guide. I can understand that the question of the marks required to pass the OI DP is in part confusing. Generally speaking, a mark of 2 out of 5 suggests that a pass was not achieved, but based on the employer's evidence, 2 out of 5 was a pass in some cases but not in others. Despite this, by December 2014, the grievor knew that he had job-performance issues regardless of the marks, which meant that he had 7 months to improve, or he would be released from the program. So even though initially, there was confusion about the marks required to pass the program, ultimately, it did not impact his opportunity to make efforts to improve. After that period, the grievor could no longer assume that he could be satisfied with his results.

[238] The grievor also alleged that the employer's bad faith arose from the fact that Ms. Tisdale had an improper motivation to evaluate him negatively. He alleged that the real reason for his termination was that she did not want him to succeed. But there is

no evidence of such an allegation. In the circumstances, I cannot give this argument any weight.

[239] I cannot conclude, either, that he has demonstrated that he faced more scrutiny than others. He felt that. However, he did not present any evidence to support this. On the whole, the evidence does not show that this was the case.

[240] Thus, in my view, it was established in the evidence that the grievor performed work of unsatisfactory quality and that several times, he was called in to discuss problems related to his performance. At the December 17 meeting, the employer's representatives made known to him their dissatisfaction in this respect.

[241] I am satisfied that this case is different from *Yeo*. In that case, on looking at the totality of the evidence, the Board found that the employer's sole purpose in pursuing the assessment process was that it was required to terminate Ms. Yeo's employment and that at no time did it intend that it be part of a retention strategy.

[242] However, in the present case, the evidence demonstrated that from the beginning of the OI DP in January 2014 to approximately June 30, 2015 — when Mr. Zimmer identified as a weakness the fact that the record was not showing sufficiently what had been done to support and develop the grievor's skills identified as requiring improvement — the employer intended that its assessment be part of a retention strategy.

[243] However, at the end of June 2015, the employer began assessing its file to ensure that it had met all program objectives and that it could formally terminate the grievor's probation, if necessary. In my opinion, it is understandable that a party would review the extent to which it has complied with the obligations of a program and whether there are deficiencies that need improvement.

[244] Having analyzed all the evidence, I find that the grievor's perspective that his job performance was acceptable and that any deficiencies on his part were due to circumstances beyond his control is not consistent with the preponderance of the evidence.

[245] Therefore, on the balance of probabilities, I find that the employer met its burden of proof and that the grievor did not meet his burden of proof of establishing that the employer's decision to reject him on probation was a sham, subterfuge, or

cover-up. His evidence did not show that the employer's decision to dismiss him was not motivated by a bona fide dissatisfaction with his ability to perform the duties of the position assigned to him or that its decision was a sham invocation of the *PSEA*, a subterfuge, or a cover-up.

[246] As a final comment, I would like to emphasize that I carefully read the grievor's comments in his feedback to his April 14, 2015, evaluation. He summarized his misunderstanding of the situation and his discouragement. He also asked how to improve his marks from 2 to 3. I am sympathetic to what he experienced then. I am also sensitive to the importance of addressing, thoughtfully and honestly, issues that prevent an employee from adequately deploying in a workplace.

[247] However, in this case, I am of the opinion that the methods of training and evaluating the trainees were adequate on the whole. In the grievor's case, despite the training, he did not develop fluidly, and although he was surrounded by experienced co-workers who could answer his questions, he was not able to develop sufficiently in the employer's eyes to achieve the autonomy necessary to perform his duties. The employer had the discretion to decide whether he was suited to the work.

[248] It is unfortunate that he was not successful. It would have been ideal, of course, had he been able to deploy himself with ease in the work. But that did not occur. Sometimes, a failure is a necessary setback that leads to a change of course. I have no doubt that the grievor, with all his qualities, has reliably and successfully reoriented himself toward another activity.

[249] For all these reasons, I find that the grievor did not meet his burden of showing that the rejection on probation was a sham or camouflage. He did not establish that the rejection was not based on a bona fide dissatisfaction with his suitability to perform the duties of his position.

[250] Accordingly, I find that the Board does not have jurisdiction to hear this grievance.

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

(The Order appears on the next page)

VIII. Order

[252] I order the file closed.

December 2, 2021.

**Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board**