**Date:** 20220601

**File:** 566-02-42395

**Citation: 2022 FPSLREB 44**

*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

**NATHAN HOLOWATY**

Grievor

and

**DEPUTY HEAD**
**(Correctional Service of Canada)**

Respondent

Indexed as
*Holowaty v. Deputy Head (Correctional Service of Canada)*

In the matter of an individual grievance referred to adjudication

**Before:** Edith Bramwell, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor:** Himself

**For the Respondent:** Zackary Campbell, grievance coordinator

Decided on the basis of written submissions,
filed January 11 and May 19, 2021.

**REASONS FOR DECISION**

## I. Grievance referred to adjudication

[1] The grievor, Nathan Holowaty, was hired as a correctional officer (classified CX-1) with the Correctional Service of Canada (CSC). For the purposes of this decision, the term "employer" designates the CSC, to whom the Treasury Board's authority as employer is delegated.

[2] Before the grievor completed his one-year probationary period, the CSC determined that he was not suited to be employed as a correctional officer, and his employment was terminated.

[3] He grieved his rejection on probation, claiming that it was unfair, unwarranted, and unfounded. He claimed that his manager had not indicated any concerns about his job performance. The employer denied the grievance.

[4] The grievor referred the grievance to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication. The employer raised a preliminary objection to the Board's jurisdiction to hear the grievance because it relates to a rejection on probation. The grievor filed detailed written submissions in response to the employer's objection.

[5] For the following reasons, the employer's objection is granted. I find that even if the facts alleged by the grievor in his grievance and his submissions are accepted as true, he did not present an arguable case that the Board has jurisdiction to hear his grievance.

## II. Legal principles that apply to rejections on probation

[6] Before I address the parties' submissions, I think that it would be helpful to set out the legal principles that apply to rejections on probation in the core public administration.

[7] The Board is often called upon to determine if it has jurisdiction to adjudicate grievances from employees whose employment ended during their probationary periods. Section 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") sets out the types of grievances that can be referred to the Board, which can include certain terminations. However, as the Federal Court of Appeal noted in its

recent decision in *Canada (Attorney General) v. Alexis*, 2021 FCA 216, the Board has no jurisdiction to inquire into terminations of employment made under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) pursuant to s. 211(a) of the *Act*, which states as follows:

> ***211*** *Nothing in section 209 or 209.1 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
>
> > ***(a)*** *any termination of employment under the* Public Service Employment Act *….*
>
> ***211*** *Les articles 209 et 209.1 n'ont pas pour effet de permettre le renvoi à l'arbitrage d'un grief individuel portant sur :*
>
> > ***a)*** *soit tout licenciement prévu sous le régime de la* Loi sur l'emploi dans la fonction publique*;*

[8] The *PSEA* addresses termination of employment through the use of probation. In particular, section 62(1)(a) provides that the deputy head of an organization in the core public administration has the right to terminate an employee at the end of the probationary period, as established by the Treasury Board:

> ***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*
>
> ***62 (1)*** *À tout moment au cours de la période de stage, l'administrateur général peut aviser le fonctionnaire de son intention de mettre fin à son emploi au terme du délai de préavis :*
>
> > ***a)*** *fixé, pour la catégorie de fonctionnaires dont il fait partie, par règlement du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la* Loi sur la gestion des finances publiques*;*
> >
> > ***b)*** *fixé, pour la catégorie de fonctionnaires dont il fait partie, par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations*

> *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.*
>
> *relèvent exclusivement de la Commission.*
>
> *Le fonctionnaire perd sa qualité de fonctionnaire au terme de ce délai.*
>
> ***Indemnité tenant lieu de préavis***
>
> ***(2)*** *Au lieu de donner l'avis prévu au paragraphe (1), l'administrateur général peut aviser le fonctionnaire de la cessation de son emploi et du fait qu'une indemnité équivalant au salaire auquel il aurait eu droit au cours de la période de préavis lui sera versée. Le fonctionnaire perd sa qualité de fonctionnaire à la date fixée par l'administrateur général.*

[9] Despite this apparent bar to the Board's jurisdiction over termination grievances from probationary employees, the case law has long recognized that the Board has jurisdiction to consider allegations that if proven, would demonstrate that the rejection on probation was made in a manner that was arbitrary, discriminatory, or in bad faith (see, for example, *Wrobel v. Deputy Head (Canada Border Services Agency)*, 2021 FPSLREB 14; *Rouet v. Deputy Head (Department of Justice)*, 2021 FPSLREB 59 at para. 305; *Reeves v. Deputy Head (Department of National Defence)*, 2019 FPSLREB 61; *Ontario Northland Transportation Commission v. Teamsters Canada Rail Conference Maintenance of Way Employees Division*, 2020 CanLII 107424 at para. 62; and *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134 at para. 109). As noted, as follows, in *Tello*:

> …
>
> *[109] … In* Penner*, at page 438, the Federal Court of Canada referred to "… a* bona fide *dissatisfaction as to suitability." Arbitrators have generally held that a private sector employer is to be given a great deal of discretion in making this assessment and an arbitrator must not overrule an employer's decision unless the decision is arbitrary, discriminatory or in bad faith ….*

> *[110] If a deputy head terminates the employment of a probationary employee without any regard to the purpose of a probationary period — in other words, if the decision is not based on suitability for continued employment — that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new* PSEA.
>
> …

[10] Any arbitrary, discriminatory, or bad-faith termination cannot properly be characterized as a rejection on probation under s. 62 of the *PSEA* and may be remedied by the Board under s. 209 of the *Act*. It is worth noting that allegations of bad faith are not required to establish an arguable case with respect to a rejection on probation; it is well settled law that both discrimination and arbitrariness can occur in the absence of either intention or bad faith. As the Federal Court of Appeal notes in *Alexis*, at para. 8, the Board also has jurisdiction to hear allegations that a purported rejection on probation was actually a camouflage or sham.

[11] A rejection on probation is characterized by the following four elements:

- the employee was placed on probation;
- the employee's probationary period was still in effect as of the termination;
- notice or pay in lieu was provided; and
- employment-related concerns about the employee's suitability were the reason for the termination.

[12] The employment-related reasons for the termination are typically in the probationary employee's letter of termination of employment (see *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529 at paras. 12 and 46, and *Tello*, at para. 111). When the four elements detailed in the last paragraph are present, there is a presumption that the termination was in fact a rejection on probation, and therefore, the Board has no jurisdiction to deal with the matter.

[13] For the Board to take jurisdiction over a rejection on probation in such circumstances, the employee must present factually supported allegations that if proven, would establish that the termination was arbitrary, discriminatory, or in bad faith (including a camouflage or a sham, as per *Alexis*, at para. 9, and *Tello*, at paras. 109 and 111). If the grievor presents allegations that if proven, would show that the purported employment-related reasons were not those underlying the termination,

then the grievor will meet their burden of demonstrating an arguable case. The Board may assume jurisdiction over the matter and consider the grievor's allegations.

[14] As the Court points out in *Alexis*, at para. 10, this approach is similar to that applied by labour arbitrators in the private sector. In both the federal public sector and the private sector, employers are afforded considerable discretion to assess the suitability of probationary employees, and there is minimal scope for reviewing their decisions.

[15] In this case, the grievor argues that the employer made a contrived reliance on the *PSEA* to terminate him and that in fact, the rejection on probation was a sham or camouflage to hide an otherwise unlawful termination. For the Board to have jurisdiction to hear this termination grievance, the grievor must allege facts that if proven, would show that the employer's reliance on the *PSEA* was contrived or that the rejection on probation was a sham or camouflage. This would establish an arguable case.

## III. Did the employer establish the four elements required to terminate the grievor during the probationary period?

[16] The employer's objection to jurisdiction included a copy of the termination letter from Darcy Emann, Warden, Regional Psychiatric Centre, Prairies, CSC, dated September 16, 2020, which informed the grievor of his rejection on probation. It points out that the grievor was offered an indeterminate CX-1 position at that facility on December 10, 2019, and that the appointment took effect on December 19, 2019. The offer specified that he would be required to complete a one-year probationary period and elaborated that probationary periods are used to assess an employee's performance and conduct after the employee is appointed to a position from outside the public service.

[17] The September 16, 2020, letter confirms that the grievor was a probationary employee who was still on probation as of his termination. The same letter informs him that he would receive two weeks' pay in lieu of notice for the termination. Thus, the first three required elements for a rejection on probation are established. The grievor does not contest these elements.

[18] As for the fourth element, Mr. Emann stated in the letter that the decision to terminate was effective September 16, 2020, and that it was made for the following reasons:

> …
>
> *In making my decision, I have reviewed the essential qualifications for your position, which clearly identify expectations. In making my decision, I have considered the following factors:*
>
> > • *You have not demonstrated the competencies of "thinking things through" and "showing initiative and being action oriented', despite management's efforts to provide you with the requisite training, on-going [sic] counseling and direction. There are concerns with your suitability fulfilling all the requirements as outlined in the work description, your performance agreement and your ability to adhere to policy, procedures, and practices. Specifically, your ability to follow the required Commissioner's Directive (CD) 566-4 Counts and Security Patrols, and Standing Order 567-5 (Use of Firearms at RPC: Changeover Procedures, Control of Firearms and Ammunition, Threat Risk Assessments and Portable Proving Chambers).*
>
> *Having considered all of the above, I have concluded that you are not suited to be employed as a Correctional Officer (CX 1) with the Correctional Service of Canada and consequently have no alternative but to reject you on probation.*
>
> …

[19] The grievor grieved this decision on October 22, 2022. His grievance reads as follows:

> *I grieve the employers decision dated September 16, 2020 to terminate my employment with CSC. I find the decision to be unfair, unwarranted, and unfounded in facts and in law. In meeting with my correctional manager prior to this decision, he indicated he had no concerns with my job performance, which I felt was indicative of the progress I had made. Additionally, despite the employer suggesting I was unsuited and not competent for the job, they allowed me to work until 3:00 PM (almost the end of my shift) before telling me they were terminating me. When I asked for specific examples to understand the reasons listed in the employers decision letter, the employer was either unwilling/unable to provide me with any.*
>
> *CORRECTIVE ACTION REQUIRED:*
>
> *I demand to be brought back to work immediately and that I be reimbursed. I request retroactive payment of all monies including*

> *salary, pension adjustments, CPP, overtime, shift and weekend premiums, CX allowance, lieu hours, sick and annual leave accumulation and all other benefits I have lost in addition to compensation for loss of benefits that I have incurred as a result of the employer's decision, all with legal interest. I request that this termination be removed from my record and that I receive a written apology for the way my case was handled, such as allowing me to work nearly my full shift before terminating me and allowing me to believe there were no concerns with my performance mere weeks leading up to my termination. I request that this grievance be transmitted directly to the third level.*
>
> [*Sic* throughout]

[20] The employer's reply to the grievance was signed by Mr. Emann on November 3, 2020. He noted that a consultation occurred with the grievor and his bargaining agent representative on October 29, 2020. After setting out the grievance in full, Mr. Emann provided the following reasons for denying it:

> …
>
> *It was explained to your union representative prior to the grievance consultation that this grievance would be heard at the second level.*
>
> *At the grievance consultation, you stated that you were told at various points, including recently, that there were no performance issues, and that you feel your performance was improving.*
>
> *I discussed with you that from the beginning of your employment; performance issues were evident, which required management to implement extra sessions of On the Job Coaching (OJC). Your performance was rated as succeed (-) and performance management plan was implemented in April, 2020.*
>
> *Concerns regarding your performance continued to be brought forward to management. Several concerns were raised with you on June 1st and 17, 2020, and emails were sent to you following these meetings. There concerns included tool control, almost locking you and another officer in a cell with an inmate, and opening wrong panel doors. On June 16, 2020, an incident occurred which raised concerns involving your manipulation of firearms. Further concerns were brought to management's attention on July 14, 2020 regarding your supervision of an inmate. These concerns were also raised with you in a meeting and an email dated July 15, 2020.*
>
> *As a result of these ongoing performance issues, in June 2020, you were assigned correctional Officer specific tasks wherein you were not working independently and/or without supervision from others. As explained during the grievance consultation, management then took the steps proceed with a review of your situation for rejection on probation.*

> *You raised concerns about the decision letter indicating concerns with the area of "showing initiative and being action oriented", as you do not believe that is a fair assessment. In the context of this decision, mentoring and discussions through the action plan process have continually occurred with you since your appointment. Unfortunately, there continued to be challenges with retaining and implementing what you had been told, which demonstrates your inability to think things through. Despite significant mentoring and feedback, you did not take the necessary actions or initiative to improve your performance to the extent necessary, which demonstrates you do not meet the competency of showing initiative and being action oriented.*
>
> *It is clear that despite management's attempts at mentoring and counselling you in regard to your performance, concerns continued to be raised to the point that it was necessary to make the decision for rejection on probation. You raised concerns that we waited until the end of your shift on September 16, 2020, to advise you of the decision. This meeting was held based on schedule availability and the decision was provided expeditiously once finalized.*
>
> *Given the above information, I must advise that your grievance and requested corrective action is denied.*
>
> [*Sic* throughout]

[21] As appears from the termination letter and the grievance reply decision, the employer set out a series of serious issues and concerns about the grievor's performance during his probationary period of employment, including the following:

- tool control;
- manipulation of firearms;
- almost locking himself and another officer in a cell with an inmate;
- opening wrong door panels;
- concerns about the supervision of an inmate;
- concerns about his ability to show initiative and be action oriented;
- challenges with respect to his retention and with implementing what he was told;
- inability to think things through; and
- failure to take actions or initiative to improve his performance to the extent necessary.

[22] Some of these concerns were also described as failures by the grievor to follow *Commissioner's Directive (CD) 566-4 Counts and Security Patrols* ("CD-566-4") as well as *Standing Order 567-5 (Use of Firearms at RPC: Changeover Procedures, Control of Firearms and Ammunition, Threat Risk Assessments and Portable Proving Chambers).*

[23] Thus, in relation to the fourth element, I am satisfied that the employer provided a detailed letter to the grievor specifying the employment-related reasons for his probationary termination. These reasons were also elaborated in the employer's grievance reply. The grievor has not denied receiving the termination letter and the grievance reply.

**IV. Do the grievor's allegations, even if believed, present an arguable case that in fact, the rejection on probation was a sham or camouflage to hide an unlawful termination?**

[24] The Board invited the grievor to provide his position in response to the employer's objection to jurisdiction, and he filed written submissions on May 19, 2021. He addressed in detail the concerns that the employer cited about his performance, noting that he considers the complaints against him trivial and easily corrected and that many were taken out of context.

[25] As an example, he wrote about a complaint made concerning his ability to complete a seven-point safety inspection of a pistol. While charging a round in the chamber, he was not certain if it went in, so he thought it safer to eject the ammunition and reload. He acknowledged that if someone had been watching him, the person might have had questions as to what he was doing and possibly would have reported what he was doing, but he maintained that his actions were fully thought through and intentional, to ensure the highest level of public safety. If there were errors, they were trivial and easily correctible.

[26] The grievor stated that he is uncertain as to what specifically constituted a violation of CD-566-4, although he suspects that it may relate to him asking where an inmate was while relieving another officer on a post, when it was obvious that the inmate was present and sleeping. The grievor explained that he did not immediately see her because she was covered up and maintains that in any event, this communication error was very trivial.

[27] With respect to the incident of locking himself and another officer in a cell with an inmate, he pointed out that the door was never even close to locking or being fully shut. As the grievor stated in his May 19, 2021, submission to the Board, as someone new to the job, he did not realize how nervous this made the other officers feel. The grievor feels that this complaint from the fellow officer was trivial and that it constituted a learning experience for him.

[28] The grievor acknowledged that he had to learn other things. He once forgot to lock all the cells when doing a lunchtime count. Again, as the grievor stated in his May 19, 2021, submission to the Board, he "owned up" to the mistake and learned from it. Nothing resulted from his actions.

[29] In the same submission, the grievor states that he also owned up to complaints early in his employment that he had opened the wrong panel doors. He eventually learned how to better operate the doors, and at no time did he open a door in a manner which resulted in a dangerous situation or incident. Eventually, any deficiency he had was corrected.

[30] The grievor noted that after being placed on a performance management plan following the initial review of the work-related complaints against him in his first few months on the job, he had nine items to work on, and that in his last few meetings with his manager, Todd Gaudet, he was told that no issues had been brought forward that Mr. Gaudet had to discuss with him. It was confirmed to the grievor that Mr. Emann reached the decision to reject him on probation alone, without consulting Mr. Gaudet, which the grievor considers unfair, as he felt that he was making good progress under the plan.

[31] The grievor concluded his written submissions by providing a series of examples of some of his good work during his employment, including finding contraband while conducting a search and taking the initiative to provide the inmates their meals and to take them outside for their allotted yard time, which other officers had neglected to do. He gave his best effort at the job, was never late, did not take any leave, and developed an excellent rapport with the inmates. Given his progress, he was shocked at being let go.

[32] In an earlier email to the Board sent on May 10, 2021, in which the grievor mainly expressed dismay that his bargaining agent withdrew its support for his grievance, he similarly maintained that the errors listed in Mr. Emann's decision were minor and that they had been corrected. He submitted that there was no just cause for "firing" him.

[33] From the employer's letter informing the grievor of the rejection on probation and its decision denying the grievance, as well as from the grievor's statements in his submissions, I find it evident that he committed errors during the course of his

employment that at least from the employer's perspective, were never satisfactorily corrected. The management grievance decision dated November 3, 2020, cites multiple instances of the grievor being counselled with respect to his performance. He has not contradicted the content of these documents. The same decision notes that in June 2020, he was assigned tasks such that he was "not working independently and/or without supervision from others", and management then took steps to proceed with a rejection-on-probation review. Again, this information is uncontradicted. The grievor may claim that he was progressing well in terms of improving his performance, but nonetheless, he did not deny that the incidents and errors occurred that gave rise to the employer's *bona fide* dissatisfaction as to his suitability for employment. They constitute employment-related reasons for the rejection on probation.

[34] In an email dated May 10, 2021, the grievor asserts that the employer did not have "just cause" to terminate his employment. However, just cause is not a requirement for terminating a probationary employee. None of his arguments or allegations suggest in any way that the reasons that the employer cited for rejecting him on probation were based on a contrived reliance on the *PSEA* to terminate him or were a sham or camouflage to otherwise hide an unlawful termination.

[35] The grievor's only suggestion to this effect is found in the last paragraph of his written submissions of May 19, 2021, where he states the following:

> …
>
> *I was very motivated to be able to work with offenders and uphold the mission of CSC. I was passionate about my job and feel that the work ethic I brought to the organization should not have been quashed in the way it was.* ***I believe the way I have been treated is unacceptable in the Canadian Federal Public Service and my rejection was a sham.*** *These are the reasons my case must be heard in the adjudication process.*
>
> [Emphasis added]

[36] Aside from the bald assertion in the highlighted sentence that the rejection was a sham, there is no fact alleged in the grievance or any of the grievor's submissions to suggest that the employer's decision was based on anything other than dissatisfaction with respect to his suitability for employment. The grievor may believe that his errors and the complaints made about him were trivial and that he was on track to improve his performance, but the employer clearly thought otherwise. The employer perceived

the errors as serious, and the grievor has not alleged any fact or incident to even imply that the employer's decision to terminate him during the probationary period was related to anything other than employment-related reasons.

[37] In sum, even if all the facts alleged by the grievor are accepted as true, I find that he did not present an arguable case that the rejection on probation was based on a contrived reliance on the *PSEA* or that it was a sham or a camouflage of an otherwise wrongful termination.

[38] Consequently, s. 211 of the *Act* applies, and the grievance cannot be referred to the Board for adjudication.

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

*(The Order appears on the next page)*

## V. Order

[40] The grievance is dismissed.

June 1, 2022.

**Edith Bramwell,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**