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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

LAURA HIGUERA

Grievor

and

**TREASURY BOARD
(Correctional Service of Canada)**

Employer

Indexed as

Higuera v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: Joanne Archibald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Raphaelle Laframboise-Carignan and Amarkai Laryea, counsel

For the Employer: Chris Hutchison, counsel

Heard via videoconference,
June 21 to 23 and December 19 and 20, 2022, and February 13, 14, and 16, 2023.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievor, Laura Higuera, formerly a parole officer (WP-04; “the PO position”) with the Correctional Service of Canada (“CSC” or “the employer”) in Kingston, Ontario, filed two grievances in March 2015 alleging that the employer failed its duty to accommodate her on the ground of disability when it offered her a CR-04 position and placed her on leave without pay (“LWOP”) when she refused it.

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) and the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*. In this decision, the Board and its predecessors are all referred to as “the Board”.

II. Background

[3] In 2008, the grievor was assaulted by an inmate at the CSC’s Regional Treatment Centre (“RTC”) in Kingston. For the three years following the incident, she reported to an assignment at another institution, which had been arranged before the incident occurred.

[4] In October 2011, the grievor prepared to return to the PO position at the RTC. On October 17, 2011, her physician provided medical information stating that the grievor could have no interpersonal contact with inmates and that she could not review inmate case information.

[5] The grievor received an initial work assignment at the CSC’s Regional Staff College (“RSC”). Her work history from that point is complex. The summary that follows is drawn from the chronology provided jointly by the parties.

[6] On December 11, 2012, the grievor's physician confirmed that the limitations and restrictions were permanent and that they necessitated a workplace accommodation for her. She was never again able to return to the PO position.

[7] In May 2012, the grievor returned to the RTC and commenced a temporary assignment focused on accreditation.

[8] In September 2012, the grievor assumed an assignment as the accreditation-quality assurance coordinator (AS-04).

[9] On December 19, 2012, the grievor's name was placed in the employer's permanent accommodation database, and she was referred to the employer's internal priority referral committee for consideration for suitable positions.

[10] On January 8, 2013, the grievor signed an accommodation plan with the employer. The stated goal was to secure a suitable permanent position that accommodated her limitations and restrictions.

[11] On April 1, 2013, the grievor's placement in the accreditation-quality assurance coordinator position ended when the incumbent returned to the position. The grievor then moved to a project focussing on decommissioning activities at the RTC.

[12] In May 2013, the RTC considered referring the grievor temporarily to a graffiti project. She stated that the referral did not respect her limitations and restrictions, and it was not pursued.

[13] On June 4, 2013, the RTC discussed two possible placements with the grievor, a short-term placement as a classification assistant (CR-05) at the CSC's regional headquarters ("RHQ") and a transfer coordinator (AS-02) position at the CSC's Joyceville Institution, also in Kingston. She expressed interest in the CR-05 position but not the AS-02 position.

[14] From June 7 to July 19, 2013, the grievor was on leave with income averaging.

[15] On June 11, 2013, the RTC began searching for AS-05 positions for the grievor, as they were a level equivalent to the PO position.

[16] On July 4, 2013, Kristi Reilly, the regional duty to accommodate advisor ("DTA advisor") contacted RTC concerning a potential permanent placement for the grievor

as an AS-05 regional Offender Management System (“OMS”) data quality and training officer (“the OMS position”). Two concerns were noted, whether the grievor met the position requirements and the requirement to review offender information.

[17] On July 22, 2013, the grievor began a temporary assignment assisting a classification advisor with a backlog of administrative tasks that were considered to be at the level of a CR-05.

[18] On September 6, 2013, the grievor met the hiring manager for the OMS position. On September 12, 2013, she submitted her résumé and indicated her willingness to attempt the position even though she did not meet all the essential qualifications defined in the position’s statement of merit criteria.

[19] On September 16, 2013, the employer referred the grievor to a two-month assignment.

[20] On September 20, 2013, the DTA advisor wrote to the RTC to inquire about any AS-05 positions either occupied by an employee in an acting capacity or vacant. The RTC provided details of the following positions:

- Two project officer positions were unfunded or eliminated based on the federal-government-mandated “Debt Reduction Action Plan” (“DRAP”).
- An AS-05 regional manager, administration and information management position (“the AIM position”) was occupied on an acting basis and was likely to be indeterminately staffed in 2015.
- Two vacant regional safety officer positions were identified, but at the time, their funding was uncertain. Later, a priority candidate filled one.
- Two lower-level positions were identified. The first, a regional transfer coordinator (AS-02) position, did not meet the grievor’s limitations and restrictions due to occasional contact with an inmate cleaner. The second, a grievance analyst (AS-04) position, was eliminated due to the DRAP.

[21] On September 24, 2013, the DTA advisor asked the grievor about a special assignment at the Kingston Penitentiary in Kingston from October 2 to 22, 2013. It entailed working with volunteers, tour guides, and the public during United Way tours. She accepted the assignment.

[22] On October 18, 2013, the hiring manager for the OMS position provided a training plan for the grievor to become fully qualified. It stated that training would occur over 1.5 years. The RTC considered that time excessive and asked that the grievor be assessed for personal suitability and abilities.

[23] On October 23, 2013, the grievor returned to the RTC and assisted with accreditation and other projects.

[24] On December 17, 2013, the grievor and the employer met. They discussed the OMS position, but the length of the required training made it unsuitable. She asked about the AIM position, and the employer explained that it would be staffed by an employee affected by DRAP.

[25] The employer also spoke to the grievor of an indeterminate victim services officer position (WP-03). She agreed to consider it if her physician deemed it suitable. On January 3, 2014, she told the employer that she believed that the position's requirements contravened her limitations and restrictions.

[26] On January 8, 2014, the DTA advisor provided a job posting for an information management project officer position to the grievor. This was not a formal referral.

[27] On January 16, 2014, the AIM position, earlier identified for an affected employee, again became available, to the end of 2015. The grievor provided a résumé and references. On January 23, 2014, she was assessed and found not to meet the requirements for the position.

[28] On January 27, 2014, the grievor reported to an assignment as the accreditation coordinator (AS-03) in Health Services at the Joyceville Institution. Upon her arrival, she reported that she could not work in an institution in which inmates were present, and the assignment ceased.

[29] On January 28, 2014, the grievor received an assignment to special projects and accreditation duties at the RTC. Although the RTC was temporarily located at the Collins Bay Institution, she worked in the Frontenac Boardroom, which was located outside the institution's walls.

[30] On January 29, 2014, the DTA advisor provided the grievor with a job advertisement for a position at the Department of National Defence. While the CSC had no mechanism to refer the grievor to a position outside itself, she could self-refer. There is no evidence indicating whether the grievor did self-refer to the position.

[31] On February 10, 2014, the employer received medical information concerning the grievor's limitations and restrictions. It stated this:

- Her interpersonal contact should be defined as no contact with inmates, including by telephone, file, or close proximity.
- She should not review inmate files as it caused her undue stress.
- She became quite agitated and stressed, unable to sleep, and irritable in settings that did not provide these accommodations.
- The victim services officer position was not appropriate.

[32] As a result, the RTC reached the determination that only positions at RHQ, the RSC, and the CSC's national headquarters ("NHQ") would be pursued.

[33] On March 5, 2014, the DTA advisor initiated inquiries to identify AS-05 job vacancies at NHQ.

[34] On March 20, 2014, a meeting was held with the grievor. The outcomes were the following:

- As a result of the updated medical documentation, it was found that the OMS and victim services officer positions did not respect the grievor's limitations and restrictions and would not be pursued.
- All options for permanent positions equivalent to WP-04 in the Kingston area had been explored. As a result, lower-level positions would be considered as placement options.
- A review of WP-04-equivalent positions at NHQ was underway.

[35] On April 8, 2014, the DTA advisor provided the grievor with a job advertisement for an AS-05 position with the Treasury Board. This was not a formal referral as it was outside the CSC, and the grievor was not a priority candidate with the Public Service Commission ("PSC"), which otherwise might have referred her. However, the grievor could self-refer to the position. There is no evidence indicating whether the grievor did self-refer to the position.

[36] On April 29, 2014, the DTA advisor provided the grievor with a list of NHQ positions classified at the AS-05 group and level. The DTA advisor emailed 39 managers, looking for an available indeterminate position. By June 6, 2014, the replies indicated that there were no vacant or soon-to-be-staffed AS-05 positions.

[37] On May 12, 2014, the grievor received an assignment to assist in recruitment until September 2014. This followed confirmation from her that the presence of inmate groundskeepers would not violate her limitations and restrictions.

[38] On July 10, 2014, the employer formally referred the grievor to a course manager (AS-05) position located at NHQ. After clarification that she was a priority candidate within the CSC, she was screened into the process.

[39] On July 16, 2014, the DTA advisor contacted the CSC's Greater Ontario and Nunavut District Office about a potential AS-03 vacancy.

[40] On July 16, 2014, the DTA advisor also received advice that the recruitment assignment would end earlier than planned due to funding and a decreased workload. The information was shared with the grievor on July 24, 2014. However, the employer secured an eight-week assignment in its Human Resources area for the grievor, which she commenced on August 5, 2014.

[41] On August 19, 2014, the regional deputy commissioner ("RDC") approved a plan for the grievor's placement in a permanent position. It included presenting the option of the district manager of administration and infrastructure (AS-03) position ("the district manager position") to her. If she felt that it could be suitable, the employer would then ask that her medical practitioner review her limitations and restrictions. If it respected her limitations and restrictions, the employer would explore the option of a short-term assignment. If the grievor successfully completed the assignment, the employer would pursue a formal assessment and an indeterminate deployment into the position. The employer advised her that if she were deployed, there would be no further salary protection at the WP-04 level.

[42] Alternatively, if the district manager position did not respect the grievor's limitations and restrictions, or she was unsuccessful in the assignment, then she would be offered an indeterminate CR-04 position, which was an indeterminate administrative assistant position located in the CSC's Technical Services area at RHQ ("the CR-04 position"). There would be no further salary protection at the WP-04 level. If she did not accept the CR-04 position, the employer would place her on LWOP on the basis that all options had been exhausted, and there were no further vacant positions to offer.

[43] On August 21, 2014, the parties met again. The employer advised the grievor that it had searched for WP-04 equivalent positions and AS-05 positions at NHQ, to no avail. Her salary would remain at the WP-04 level until the end of September 2014.

[44] The parties discussed the district manager position. The employer explained to the grievor that if it did not meet her limitations and restrictions, the only remaining option was the CR-04 position. If she were deployed into it, she would receive the CR-04 salary. If her limitations and restrictions excluded the district manager position and she did not accept the CR-04 position, the employer would place her on LWOP until another option was found.

[45] On August 25, 2014, the hiring manager for the district manager position advised the grievor that she met the essential qualifications for the position. She required only a second language evaluation ("SLE") to demonstrate that she met the position's language requirements.

[46] The parties held a follow-up meeting on August 26, 2014, at which the grievor stated that she did not believe that the district manager position was suitable due to her hip and knee issues. The employer noted that it had not previously known of physical disabilities limiting the options for placing her in a suitable position.

[47] When the grievor inquired anew about the OMS position and asked about potentially modifying it to suit her limitations and restrictions, the employer advised her that information from her treating practitioner would be required to consider it further.

[48] On September 2, 2014, the grievor was referred to a process for a temporary placement as a human resources analyst (AS-03).

[49] On September 5, 2014, the grievor received a special project assignment. It comprised decommissioning duties and filing at the RTC and the Kingston Penitentiary, which by then had been closed.

[50] On September 18, 2014, updated medical information confirmed that the district manager position was unsuitable due to direct inmate contact. Additionally, the medical information indicated that the grievor had a fragile back and that the lifting associated with the position made it incompatible with her limitations and restrictions. However, the OMS position would be more suited to her because it did not require her to review specific cases.

[51] The employer agreed to reconsider the OMS position. However, by October 2, 2014, it determined that the position was no longer available as the OMS was

undergoing a functional review. As the position would likely be eliminated, it would not be filled on any basis, temporary or permanent. The employer considered a short-term placement for the grievor at the RSC as a staff training officer (AS-05) but decided that it would not be pursued as it did not offer a permanent position.

[52] On October 17, 2014, the DTA coordinator advised the RDC that all permanent placement options at the WP-04 or equivalent level had been exhausted. The available lower-level positions were two CR-05s in the CSC's Finance area, which required training in general accounting. However, there were fully qualified priority candidates who could be immediately placed in them. The CR-04 position remained available for an immediate deployment. The RDC approved the grievor's deployment into it.

[53] During a meeting held on October 29, 2014, the letter of offer was presented to the grievor. It provided five working days to consider it. She was advised that if she declined the offer, she would be placed on LWOP.

[54] The grievor then wrote to the CSC's commissioner and attended a meeting on November 3, 2014, with the Acting Director of Workplace Wellness and Employee Wellbeing ("the director WREW"). She stated that she wanted to work until August 2016, when she would have 25 years of service. She was unwilling to accept a demotion but could continue temporary assignments until then. Even if the CSC's region had exhausted all options, she was prepared to consider positions at NHQ. The parties agreed that she would receive a 1-week extension to make her decision on the CR-04 position.

[55] On November 13, 2014, the grievor withdrew from the human resources analyst process and expressed her belief that the position was beyond her capability.

[56] On November 24, 2014, the director WREW wrote to all NHQ sector heads, inquiring about any vacant and available indeterminate positions equivalent to the WP-04 group and level.

[57] In early December 2014, the possibility of being assessed for a position classified in the Personnel Administration (PE) group in Human Resources was discussed with the grievor. She declined to proceed; she did not wish to join the PE group as it was not represented by a union.

[58] On December 15, 2014, the grievor applied for a short-term opportunity as a harassment coordinator (AS-05). There was no evidence to indicate whether she was successful.

[59] The employer completed a further review of funded, indeterminate positions in December 2014. The language requirement of each vacant position was bilingual imperative. The grievor did not have current SLE results to meet the required level. She had been unsuccessful in four attempts.

[60] The grievor challenged the SLE written examination on January 9, 2015, and again was unsuccessful.

[61] On February 10, 2015, the parties met to discuss the outcome of the search for a suitable position. The employer concluded by stating that the CR-04 position remained the only reasonable one. The grievor requested an extension to February 20, 2015, to make a decision. A follow-up meeting was held on February 13, 2015.

[62] On February 18 and March 3, 2015, the grievor filed substantially similar grievances. The grievance of February 18, 2015 stated as follows:

I grieve that I am not being appropriately accommodated. The Correctional Service of Canada has not followed the proper steps when seeking an accommodation in my case. Specifically, on Tuesday February 10th, 2015 I was given the option of accepting a position as a CR4 which is a significant demotion from my substantive WP4 position. I was told by management that if I did not accept this demotion I would be sent home without pay on Friday February 20th 2015.

The above is not consistent with the Duty to Accommodate Policy, nor is it in line with a recent decision by Public Service Labour Relations Board on the Duty to Accommodate within the Federal Public Service.

[63] On February 27, 2015, the grievor formally declined the offer of the CR-04 position. She was struck off strength and was placed on LWOP effective March 2, 2015.

[64] The grievor then filed the following grievance on March 3, 2015:

I grieve that I am not being appropriately accommodated. The Correctional Service of Canada has not followed the proper steps when seeking an accommodation in my case. Specifically, on Tuesday February 10th, 2015 I was given the option of accepting a position as a CR-04 which is a significant demotion from my substantive WP-04 position. I was told by management that if I did not accept this demotion I would be sent home without pay on

Friday February 20th, 2015. I was formally advised through a Memorandum written by A/Executive Director, Angie Legacy, that I was Temporarily Struck Off Strength effective Monday March 2, 2015.

The above is not consistent with the Duty to Accommodate Policy, nor is it in line with a recent decision by Public Service Labour Relations Board on the Duty to Accommodate within the Federal Public Service.

[Emphasis added]

[65] The grievances were substantially similar with the addition of the underlined portion to the grievance of March 3, 2015.

[66] The grievor advised the employer that she would seek to go on disability insurance. On May 28, 2015, the employer received information that the claim was denied.

[67] On April 20, 2015, the DTA advisor provided the grievor with AS-04 and AS-05 job advertisements in Human Resources at NHQ, indicating that she was being formally referred. She responded and indicated that she would apply for them. On April 22, 2015, she clarified that she would apply only for the AS-05 position.

[68] On April 23, 2015, the employer confirmed that it would continue to explore indeterminate vacancies at RHQ and NHQ.

[69] On May 28, 2015, the DTA advisor asked the grievor whether she would like to take the SLE once more, with the potential of opening doors to more positions. The grievor agreed and successfully completed the written portion. The oral test was scheduled for July 27, 2015, and she was not successful.

[70] On May 29, 2015, the DTA advisor learned that Staffing Operations at NHQ had referred the grievor to a number of AS-05 positions without consulting her manager. Several of them did not meet her limitations and restrictions.

[71] On June 10, 2015, a position in the CSC's Aboriginal Initiatives Directorate was identified.

[72] On June 16, 2015, the grievor asked the employer to refer her to positions outside CSC. In response, the DTA advisor stated that for her to be referred as a priority to departments outside the CSC, she would have to register as a disability

priority with the PSC. To become a disability priority under s. 7 of the *Public Service Employment Regulations* (SOR/2005-334; “PSE”), a disability compensation provider would have to declare her disabled.

[73] On July 20, 2015, the DTA advisor received information that a harassment prevention coordinator (AS-05) position would soon become permanently vacant and advised the grievor to submit a résumé as a priority and that vulnerable employees would be considered first. She was formally referred to the position on July 31, 2015. When the hiring manager responded that the grievor did not meet the essential requirements, she was extended a further opportunity to provide an updated résumé, which she did. However, she remained unsuccessful, and another priority candidate was then considered. The grievor was advised of the result on October 1, 2015.

[74] On August 24, 2015, the DTA advisor provided the grievor with a job advertisement for a media outreach advisor position with another federal government department. This was not a formal referral as the position was located outside the CSC.

[75] On November 20, 2015, the employer advised the grievor of a human resources management systems business analyst (AS-05) position located at NHQ. She felt that she did not meet the experience criteria but asked to be referred to it.

[76] On November 26, 2015, the hiring manager for the position determined that three years would be required for the grievor to become qualified for the position. She was notified of this result on December 9, 2015.

[77] On December 11, 2015, the grievor was notified of an indeterminate research officer (EC-04) position. She stated that she was not interested as it paid a lower salary.

[78] On January 8, 2016, the grievor advised the employer that Veterans Affairs Canada (“VA”) had offered her a one-year secondment. On January 26, 2016, she notified the employer that the VA had deferred its consideration of the secondment due to an internal financial review.

[79] On February 3, 2016, the DTA advisor contacted the grievor concerning a potential placement as the regional coordinator, connectivity and information sharing with external partners (AS-05) (“the regional coordinator position”), which was to become available on an indeterminate basis in June or July 2016.

[80] The employer expressed concern that it might contravene the grievor's limitations and restrictions due to the presence of inmates at community residential facilities. She expressed her interest during a meeting on February 23, 2016, and on March 23, 2016, the employer provided a letter for her physician to complete.

[81] On February 22, 2016, the employer referred the grievor to a human resources advisor (PE-03) position in its Human Resources Planning area. On February 24, 2016, the hiring manager expressed concern that the grievor had not clearly indicated how she met the essential criteria. She was provided with an additional opportunity to fully address them. The hiring manager then determined that the grievor met only one of three criteria and that she would not be further considered.

[82] On April 7, 2016, the employer advised the grievor of an anticipated indeterminate vacancy for a manager of management services (AS-04) position at the RSC. As the position was bilingual imperative, the grievor agreed to undergo an SLE and submitted her résumé on April 14, 2016. On May 17, 2016, she withdrew from consideration for that position.

[83] On April 16, 2016, updated medical information indicated that the grievor could tolerate brief contact with an inmate as long as she could remove herself from the situation.

[84] On May 27, 2016, the grievor was referred to the regional coordinator position.

[85] On May 27 and 31, 2016, the grievor submitted letters of resignation.

III. Summary of the evidence

A. For the grievor

[86] The grievor testified that the duties assigned to her after her return in 2011 accommodated her limitations and restrictions. She recalled ongoing meetings with the DTA advisor and others as she proceeded through a number of assignments. She agreed that the DTA advisor regularly identified positions for her to consider. The employer respected her limitations and restrictions and did not pressure her to accept unsuitable work. It also encouraged her to look for appropriate positions independently.

[87] As for the OMS position, the grievor testified that when she learned that appointing her to it would entail 1.5 years of training, she decided that the appointment would not be suitable for the organization as she knew she would soon retire. She acknowledged that her union representative advised her nonetheless to accept the position and take the training.

[88] The grievor felt that the employer should have sought positions for her outside of CSC. She noted that she had participated from time to time as a joint learning plan (“JLP”) facilitator in a series of workshops offered by the Public Service Alliance of Canada and the Treasury Board of Canada Secretariat. She would have been pleased had there been the means to create a permanent JLP position.

[89] The grievor acknowledged that as early as March 2014, the employer alerted her to the possibility that if accommodation could not be found in a WP-04 equivalent position, then lower-level positions would be considered, and they would not offer salary protection.

[90] The grievor recalled the meeting in October 2014 at which the employer presented the offer of the deployment into the CR-04 position. Although she had been advised of this possibility some months earlier, she was not prepared to take a demotion. She felt that she could have continued with temporary assignments until her retirement. She felt belittled, frustrated, and concerned that a demotion would impact her pension, although she was unable to say to what effect. For those reasons, she pursued contact with the office of the CSC’s commissioner.

[91] The grievor acknowledged that the Commissioner and his subordinates responded in a timely way and that they took her seriously. Her decision on the offer of the CR-04 position was placed in abeyance. She agreed that when the director WREW suggested that she undergo an assessment for PE positions, she declined, as she did not want to take a position that was not represented by a bargaining agent. The reduction in salary for a PE position did not concern her. However, by February 2016, the grievor was prepared to be assessed for the PE human resources advisor position, although she was later found not qualified.

[92] The grievor testified that she contacted the DTA advisor on January 8, 2016, for support after receiving an offer for a one-year assignment in a WP-04 position at VA.

Unfortunately, when the grievor responded to VA, she learned that the position was no longer available.

[93] The grievor agreed that from 2011 and continuing until she retired in 2016, the DTA advisor identified positions inside and outside the CSC that might be suitable for her. The grievor did not suggest that any potentially suitable position was overlooked.

[94] The grievor also testified that she was not willing to accept any position lower than the WP-04 level. When such a position could not be found, she went on LWOP. The DTA advisor continued to contact her about available positions within the CSC and to advise her of advertised vacancies outside the CSC.

[95] The grievor testified that while she was on LWOP, she continued her job search by accessing a computer at the RSC to look for federal government positions. She also liaised with others to find out if they knew of available positions.

[96] In the grievor's opinion, the DTA advisor had been diligent except for not referring her to positions outside the CSC. That failure was her principal complaint. She agreed that the DTA advisor told her that the employer could not refer her to positions in other federal government departments and that this authority rested with the PSC in the administration of priorities, including disability priority candidates. The grievor acknowledged that she never became a regulatory priority within the meaning of s. 7 of the *Public Service Employment Regulations* (SOR/2005-334).

B. For the employer

[97] The DTA advisor testified as to the administration of the grievor's priority. She described her duties as ensuring that an employee who required accommodation was not treated differently or adversely.

[98] Following the grievor's return to the RTC in 2012, she received temporary placements or filled temporary vacancies. She informally completed duties as needed that accommodated her limitations and restrictions.

[99] The result of the physician's conclusion in December 2012 that the grievor's limitations and restrictions were permanent was to remove the core functions of the PO position from consideration. The grievor could not return to the PO position or

work in an institution. Accordingly, her name was added to the internal accommodation database while a permanent, alternative placement was sought.

[100] The DTA advisor explained the employer's internal accommodation database and the support of a committee that acted as a "recruiter" for individuals who could not remain in their substantive positions. The committee met regularly to review the list of individuals requiring accommodation, and it actively worked to secure new, permanent placements for them.

[101] The DTA advisor stated that an internal priority candidate who met the qualifications for a position or who could become qualified within a reasonable time would be considered before any other candidate. When a reasonable position was found and accepted, the employee assumed the salary of that position without salary protection at their former group and level.

[102] The DTA advisor referred to a document entitled "Accommodation Plan", signed on January 8, 2013, by the employer and the grievor. It provided details of her limitations and restrictions and stated the goal to find a permanent, suitable position within the CSC as she was unable to return to the PO position.

[103] While the search continued, the grievor performed tasks as a temporary solution while a permanent position was sought for her.

[104] The DTA advisor testified about the challenges of finding a vacant, funded position without inmate contact or reviewing inmate files. Additionally, the grievor restricted her mobility to the Kingston area. Later, she expanded it to consider positions in Ottawa, Ontario.

[105] Coinciding with these events, the employer was subject to the DRAP and the corresponding reductions to funding and operations. One consequence of the DRAP was that a large number of employees' positions were affected. Those employees, too, required consideration for placement.

[106] In combination, these factors resulted in a shallow pool of vacant and funded positions within the grievor's limitations and restrictions. The RTC continued to pay her WP-04 salary until a suitable permanent placement was found. At that time, she would assume the classification and salary of the new position.

[107] The DTA advisor described her efforts, formal and informal, to secure both short-term and permanent positions equivalent to WP-04. Potential positions were discussed with the grievor to avoid making assumptions or unintentionally putting her in harm's way.

[108] The DTA advisor recalled the OMS position. The grievor met with the manager, and a 1.5-year training plan was developed for her to become fully qualified. Although she had not fixed a retirement date, she referred to it as occurring within a few years. According to the DTA advisor, the parties, including the grievor, agreed that it would not be reasonable to train her for that period.

[109] Evidence showed that the DTA advisor canvassed administrators, department heads, and managers for temporary and permanent AS-05 positions in seven CSC sectors. She succeeded in identifying an AS-05 course manager position at NHQ. She formally referred the grievor to it and resolved confusion about the grievor's status as an internal priority. Ultimately, the assessment board members found that the grievor met the essential education and experience criteria. However, in spite of challenging the SLE, the grievor did not meet the position's language requirements.

[110] The DTA advisor reiterated that the employer had no authority to refer the grievor to positions outside the CSC as she was not a PSC priority candidate. However, the DTA advisor continued to provide the grievor with job advertisements in other federal government departments to which the grievor could self-refer. For example, on April 8, 2014, she provided information on a senior internal auditor (AS-05) position with the Treasury Board of Canada Secretariat. She discussed a Department of National Defence vacancy with the grievor. She explained that she also set her personal "Career Watch", which is a service for federal public sector employees to monitor job opportunities, to search for WP-04 and AS-05 position vacancies for the grievor. This allowed her to identify positions outside the CSC, relay them to the grievor, and encourage her to self-refer.

[111] By July 25, 2014, when the DTA advisor contacted the acting RDC, she felt that she had exhausted all available options, with the exception of the AS-03 district manager position.

[112] The DTA advisor acknowledged that she attended the meeting with the grievor and others on August 21, 2014. The most recent steps to identify positions at the AS-

05 group and level were reviewed. The parties discussed the absence of success in locating a permanent WP-04 or equivalent position. The employer announced that it would look at lower-level positions. The lower-level district manager position was discussed as a permanent placement, with some reservation about whether it respected the grievor's limitations and restrictions. If approved, it offered immediate deployment at the corresponding AS-03 salary.

[113] If the district manager position was not acceptable, the remaining alternative was the CR-04 position with the corresponding CR-04 salary. If the grievor refused the CR-04 position, she would be placed on LWOP pending another placement option. The employer told her that in any event, salary protection at the WP-04 level would end on September 14, 2014.

[114] When the parties reconvened on August 26, 2014, the grievor attended with a union representative. She indicated that the district manager position would not likely be suitable as in addition to her known limitations and restrictions, she also suffered from hip and knee problems. The parties agreed that the grievor and her physician would review the district manager position as well as the OMS position and provide updated medical information.

[115] The grievor's physician later confirmed that the OMS position was not suitable in light of the direct inmate contact. For the first time, the physician also wrote of the grievor's back problems.

[116] The DTA advisor testified about the grievor's interest in a JLP position. The DTA advisor explained that the JLP was an initiative of the Public Service Alliance of Canada and the Treasury Board directed at enhancing labour-management relations within the public service. Although the grievor explained to the employer that she was a program facilitator and that it had supported this activity, it was an "on call" opportunity. No permanent position existed for a JLP facilitator in the CSC or elsewhere. As a result, it was not a placement option.

[117] On October 29, 2014, the parties again met to review the accommodation efforts from 2012 onward. They discussed the remaining option of the CR-04 position, and a letter of offer was presented to the grievor.

[118] The DTA advisor recalled that the grievor felt that accepting the offer would cause her hardship. After the grievor wrote to the CSC's commissioner for assistance, the parties agreed that she would maintain her WP-04 salary pending a further search for a suitable, permanent placement.

[119] On November 24, 2014, the director WVEW initiated email contact with sector heads and directors in 13 sectors to find a funded, indeterminate WP-04 and 1-level-lower equivalent position that respected the grievor's limitations and restrictions.

[120] Only bilingual imperative positions were found. The grievor again took the SLE, but she did not receive a mark that met the position's requirements.

[121] The DTA advisor's note to file of January 21, 2015, indicates that the grievor was presented with a possible opportunity in Human Resources. She declined to be considered as the position was excluded from union representation.

[122] The DTA advisor recalled that the grievor requested consideration for alternation. However, the PO position had been backfilled. As she was no longer the incumbent of a position, alternation was not available to her.

[123] According to the DTA advisor, by February 10, 2015, the employer concluded that the only available option remained the CR-04 position that had been offered to the grievor in November 2014. The grievor asked for and received additional time to consider it.

[124] The DTA advisor recalled that in a meeting held on February 13, 2015, the grievor's union representative indicated that the grievor would likely retire in 15 months. In a telephone conversation on February 19, 2015, the grievor indicated that she would apply for disability insurance. The insurer declined her application.

[125] On February 27, 2015, the grievor formally turned down the CR-04 position and commenced LWOP effective March 2, 2015.

[126] The DTA advisor testified that while the grievor was on LWOP, she continued to seek a permanent, funded position for her as detailed in the background noted earlier in this decision.

[127] On June 16, 2015, the grievor asked the employer to look outside itself for suitable positions. The DTA advisor replied on June 18, 2015, as follows:

...

As you are aware, you are an internal duty to accommodate priority with CSC. In order for you to be referred as a priority to departments outside of CSC, you need to be a registered priority with the Public Service Commission.

There are two types of priority entitlements within the Public Service Employment Act (PSEA) and the Public Service Employment Regulations (statutory priorities and regulatory priorities). Priority entitlements within the PSEA are referred to as statutory priorities (surplus, leave of absence and lay-off priorities). Priorities under the PSER are referred to [as] regulatory priorities (surplus, disability, relocation of spouse, reinstatement, surviving spouse priorities).

*In terms of your case, the only priority entitlement that could be applicable would be a disability priority. In order to be eligible for a disability priority entitlement, you must be declared disabled by a disability compensation provider as defined in **section 7(4)** of the PSER, and the initial request for disability benefits must have been made when the person was still an employee as defined by the **PSEA**, and in accordance with **PSER section 4(2)**. In most cases, the disability compensation benefit period must start during a period when the person was an indeterminate employee.*

Since you do not meet the criteria to be registered as a disability priority (or any other priority) with the Public Service Commission, CSC is unable to refer you as a priority to departments outside CSC. As an internal duty to accommodate priority with CSC, you are referred to all available indeterminate positions that are equivalent to the WP-04 group/level within your area of mobility (which you have identified as Kingston, Ontario and Ottawa, Ontario).

You can certainly self refer to positions outside of CSC. I would encourage you to ensure your Career Watch is up to date so you are advised of any potential opportunities.

...

[Emphasis in the original]

[128] According to the DTA advisor, the grievor remained an internal priority candidate until her resignation. Temporary placements had maintained her in the workplace while the employer attempted to secure a permanent opportunity for her. The CR-04 position represented a permanent placement for her. When she refused it, she was placed on LWOP. The employer sought a permanent placement for her from

the time it received advice that her limitations and restrictions were permanent in December 2011 until she resigned in May 2016.

IV. Summary of the arguments

A. For the grievor

[129] The grievor argued that the test for the duty to accommodate is not effort or intention. Rather, it entails the concept of undue hardship.

[130] The grievor urged that her accommodation must be looked at in terms of two distinct periods: first, from her return to Kingston in 2011, and then for the period after March 2, 2015, when she was placed on LWOP.

[131] A *prima facie* (meaning “at first view”) case of discrimination was established with respect to both periods. She had a disability when she returned to Kingston, she was placed on LWOP when she refused the CR-04 position, and disability was a factor in that event.

[132] From the time of the grievor’s return to Kingston in 2011, the employer sought temporary and permanent placements within itself. Once the grievor refused the CR-04 position and the employer stopped looking for temporary positions for her, she felt that she had no choice other than resignation.

[133] The grievor could not return to the PO position without an accommodation. In her view, there was no evidence that a search was done for a position at her substantive level. She refused the offer of the CR-04 position as it represented a demotion from the PO position and a substantial decrease in salary.

[134] Whether the grievor qualified as a statutory or regulatory priority within the meaning of the *PSEER* was not determinative of the employer’s obligation to conduct a public service wide search for a suitable accommodation.

[135] In support, the grievor noted the Board’s decision in *Fontaine v. Deputy Head (Department of Fisheries and Oceans)*, 2012 PSLRB 91.

B. For the employer

[136] The employer did not dispute the *prima facie* case but offered a reasonable non-discriminatory explanation.

[137] It argued that the duty to accommodate is not absolute or unlimited. It did not dispute the grievor's limitations and restrictions. They prevented her from performing any aspect of the PO position and participating in many jobs and functions with the CSC.

[138] Despite this challenge, the employer fully accommodated the grievor from October 2011 onward, paying her at her substantive WP-04 level while the DTA advisor and others searched for a position at that level within it. The search was complicated by federal government-wide cuts, the DRAP, and the entitlement of affected CSC employees to priority consideration.

[139] The grievor did not qualify for many of the vacant, funded WP-04-equivalent positions. As a result, she performed temporary tasks without occupying a position for 3.5 years. Nonetheless, she continued to be paid as a WP-04 until she left the workplace on LWOP. Yet, the employer continued to search for a suitable accommodation throughout that time, and only days before the grievor's resignation, it referred her to the regional coordinator position.

[140] The employer's efforts were ongoing, substantial, reasonable, and carried out in good faith. The grievor acknowledged in evidence that every accommodation respected her limitations and restrictions and that she was fully accommodated until March 2015. She provided no evidence of an impact on her pension had she accepted the CR-04 position.

[141] An employee is not entitled to their preferred accommodation, and if no accommodation at-level can be found, accommodation in a lower-level position may be reasonable. The question is whether it is reasonable in the circumstances, and the grievor provided no evidence that the CR-04 position was not a suitable accommodation.

[142] As for using the PSC's priority system, the grievor did not meet the requirements to become as a disability priority. If she had, it would have enabled her access to referrals to federal public service positions outside the CSC.

[143] As the DTA advisor testified, repeated searches were conducted within the CSC to ensure that no positions were missed.

V. Reasons

[144] The duty to accommodate a disabled employee and the principle of undue hardship are at the heart of this matter.

[145] In *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, the Supreme Court of Canada recognized that the search for accommodation involves both the employee and the employer. It held as follows:

...

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation....

...

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in O'Malley. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

...

[146] Further, the Supreme Court of Canada's decision in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, 1999 CanLII 646 (SCC) ("*Grismer*") provided substantial guidance toward defining accommodation and undue hardship. At paragraph 22, the Court stated this:

22 "Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided... Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way.

The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship.

[147] The Supreme Court of Canada added clarity in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43, when it held this at paragraph 16:

[16] The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

[148] All this jurisprudence bears on the case before me.

[149] What is beyond question is that the employer invested over four years seeking a permanent placement that respected the grievor's limitations and restrictions. It provided many temporary assignments to maintain her in the workplace while it continued an active dialogue, engaging her in the suitability of positions as they became available for consideration.

[150] The grievor did not suggest that there was an accommodation that would have permitted her to return to the duties of the PO position or to challenge the thoroughness of the search within the CSC. Rather, she argued that the search ought to have extended to the public service as a whole and to WP-04 positions in particular.

[151] The employer, for its part, conducted repeated searches for a WP-04 or equivalent position within CSC. It also looked at lower-level positions without success for the grievor until it found the CR-04 position, which was vacant and funded.

[152] The evidence shows that the employer made concerted efforts to find a suitable position in which to accommodate the grievor. The DTA advisor and others actively canvassed the CSC for an equivalent position for the grievor. This is beyond doubt.

[153] Substantial searches and referrals were made at levels equivalent to the PO position. The search was later expanded to include positions at one level lower. The grievor failed to identify any instance in which an available, funded position was overlooked. While her evidence suggested that the employer failed to search for a

position at her substantive level, this was overridden by documented evidence of a substantial search that expanded when vacant, funded positions were not found.

[154] The employer kept the grievor apprised and never left her without temporary work until she refused the CR-04 position, which was permanent.

[155] I find that the employer undertook and discharged its duty to accommodate. While the grievor suggested in her evidence that she saw no evidence of the employer seeking to accommodate her, the evidence revealed a substantial and concerted effort that focussed on accommodating her. It does not bear out her view.

[156] This is not the situation presented to the Board in *Nicol v. Treasury Board (Service Canada)*, 2014 PSLRB 3, in which the Board held as follows at paragraph 121:

[121] The duty to accommodate requires the employer to first reasonably accommodate the employee at his or her substantive level before considering lower-level positions. The employer should have made other attempts to accommodate the grievor at his own substantive level before offering positions at a lower classification and pay level. However, the employer made no such efforts, despite the requests from the grievor and the bargaining agent. The only step the employer took was to encourage the grievor to make his own efforts to find another position at his substantive level.

[157] After more than three years of temporary assignments, the employer found a vacant, permanent, and funded position, the CR-04 position, and offered it to the grievor. She refused it.

[158] As for the CR-04 position's suitability, the grievor did not address the content of the CR-04 work or suggest that it breached her restrictions and limitations. Rather, she stated that the CR-04 position was unsuitable due to the salary, and she spoke of an unspecified impact on her pension. A failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide an individual assessment, or perhaps in some other way. The ultimate issue is whether the employer demonstrated that it provided accommodation to the point of undue hardship.

[159] The grievor did not demonstrate that the CR-04 position was unsuitable or that it contravened her limitations and restrictions. Indeed, the evidence amply illustrated that after a significant search, only the CR-04 position remained.

[160] In these circumstances, it constituted a reasonable accommodation within the meaning attributed to it in the *Grismer* decision. There was no evidence of arbitrariness or a failure to explore suitable positions that respected the grievor's limitations and restrictions.

[161] The grievor had "... a duty to facilitate the implementation of the proposal", as stated in *Renaud*. By refusing the CR-04 position, she acted to undermine the appointment to a position that accommodated her limitations and restrictions.

[162] The grievor argued that she was entitled to consideration for any position in the federal public service. However, in *Kelly v. Treasury Board (Department of Transport)*, 2010 PSLRB 80, the Board held as follows at paragraph 105:

105 The primary responsibility for accommodating the grievor falls to his home department, the Department of Transport. While the grievor has a role to play in such cases, the primary responsibility falls to the employer. What action did they take in this regard and was it sufficient?...

[163] In *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30, the Supreme Court of Canada, citing its decision in *Renaud*, held that "[t]he employee is not entitled to perfect accommodation, but rather to accommodation that is **reasonable** in the circumstances ..." [emphasis in the original].

[164] Applying the Court's reasoning to the facts of the present case, the employer offered accommodation following an extensive search within itself for a position for the grievor. It appears that the grievor considered that the CR-04 position was unreasonable accommodation due to the salary. However, viewed in the totality of the circumstances, I find that she did not demonstrate that her sole objection to the CR-04 position — that the salary was not commensurate with a WP-04 salary — rendered the accommodation unreasonable. It might not have been her preferred outcome, but that alone did not render it unsuitable (see *Saifuddin v. Deputy Head (Department of Public Works and Government Services)*, 2015 PSLREB 91). The CR-04 offer followed years of temporary accommodation and an unfruitful search for a permanent position to

accommodate the grievor. A position offering a lower salary may indeed constitute reasonable accommodation. In the situation described in the evidence presented in this case, I find that it did.

[165] I am satisfied that the offer of the CR-04 position represented the “necessary level of accommodation” as that phrase is used in the *Grismer* decision. It provided meaningful work and allowed the grievor to continue her public service career when alternatives did not exist.

[166] The grievor refused a suitable offer of accommodation when she declined the CR-04 position. She did not demonstrate that the offer was unreasonable. By refusing it, she discharged the employer from the duty of accommodation (see *Renaud*).

[167] After she refused the CR-04 position, the employer no longer sought temporary work for the grievor. She argued that thus, the employer’s action breached the duty to accommodate. I find no merit in this argument.

[168] Nonetheless, it is of note that the employer continued to search for permanent work and to notify the grievor of vacant positions until she resigned.

[169] Lastly, although the grievor hoped that a JLP position might materialize, there is no evidence that such a position existed within the public service. Rather, it represented a program delivered on demand as a joint undertaking of the federal government and a bargaining agent. To require the employer to create such a position would have represented a fundamental change to the CSC’s business. It would have necessitated adopting an undertaking outside its mandate. This would indeed have represented undue hardship, as described in *Hydro-Québec*.

[170] To conclude, I am satisfied by the evidence that the employer discharged its duty to accommodate the grievor through its substantial efforts when her limitations and restrictions prevented her from returning to the PO position. It accommodated her through temporary assignments, a concerted search for another permanent position, and ultimately, the offer of the CR-04 position.

[171] The grievor did not demonstrate that the CR-04 position constituted unreasonable accommodation. Nor did she demonstrate that the decision to place her on LWOP was unreasonable when no other suitable work was available to

accommodate her limitations and restrictions. Indeed, keeping her in the workplace without suitable, meaningful work would constitute undue hardship.

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

(The Order appears on the next page)

VI. Order

[173] The grievances are denied.

[174] As the parties agreed at the hearing, the question of costs was deferred pending the grievances' outcome. As they have been denied, there will be no cost award.

February 7, 2024.

**Joanne Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**