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Files: 566-02-47230 to 47239

Citation: 2024 FPSLREB 4

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

HARMIT SINGH

Grievor

and

DEPUTY HEAD
(Department of Employment and Social Development)

Respondent

Indexed as
Singh v. Deputy Head (Department of Employment and Social Development)

In the matter of individual grievances referred to adjudication

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Himself

For the Respondent: Brigitte Labelle, Treasury Board of Canada Secretariat

Decided on the basis of written submissions,
filed May 29, June 15, and September 1 and 21, 2023.

REASONS FOR DECISION

I. Outline

[1] This decision is about two preliminary issues: timeliness and jurisdiction.

[2] Harmit Singh ("the grievor") filed 10 grievances on October 13, 2022 concerning a series of events starting on January 26, 2022 and culminating in the Department of Employment and Social Development ("the respondent") ending the grievor's acting appointment on September 20, 2022 and returning him to his substantive position. The respondent states that 8 of the 10 grievances were filed outside the 25-day period for doing so. It also states that the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision also refers to any of the current Board's predecessors) has no jurisdiction to hear these 10 grievances because they are not related to disciplinary action resulting in a termination, demotion, suspension, or financial penalty. The grievor states that the grievances are timely because he raised the issues (without filing a grievance) within 25 days. The grievor also states that the Board has the jurisdiction to hear these grievances.

[3] I conclude that 8 of these 10 grievances are untimely, as they were filed outside the prescribed 25-day period for filing grievances. I have dismissed those 8 grievances.

[4] I have also concluded that the Board has the jurisdiction to hear only one of the grievances: the one against the early end of the grievor's acting appointment. The issue is whether the early termination of the grievor's acting appointment was a disciplinary action resulting in a termination, demotion, or financial penalty. I have concluded that it was disciplinary and resulted in a financial penalty. Therefore, the Board has the jurisdiction to hear that grievance. The other grievances are outside the Board's jurisdiction, and I have dismissed them.

II. Nature of the grievances

[5] The grievor's substantive position was as a Citizen Services Officer, which was classified at the PM-01 group and level. On August 4, 2020, the respondent offered the grievor an acting appointment to the position of Team Leader, classified at the PM-03 group and level, until November 20, 2020. The grievor accepted that acting appointment. The respondent extended the grievor's acting appointment on seven occasions, as follows:

Date of offer	**Acting period proposed end**
August 4, 2020	November 20, 2020
September 23, 2020	December 3, 2020
November 3, 2020	March 31, 2021
February 4, 2021	August 18, 2021
July 28, 2021	December 31, 2021
February 22, 2022	August 3, 2022
July 28, 2022	March 31, 2023

[6] The grievor received an annual performance management agreement on or about April 27, 2022. The grievor refused to sign it. The grievor then received a "Letter of Expectations" dated May 5, 2022 (he appears to have been told about it on May 4, 2022). This letter of expectations outlined 11 areas that the respondent expected the grievor to improve upon, mainly the grievor's interpersonal relations at work. The grievor disagreed with the letter of expectations.

[7] There then followed a series of discussions and meetings about the letter of expectations, many of which are the subject of these 10 grievances. The grievor states that the letter of expectations was retaliation for refusing to sign the performance management agreement. The grievor also started recording conversations with management, despite being ordered not to. Finally, on September 20, 2022 the respondent gave the grievor an amended letter of expectations. The amended letter of expectations was similar to the original letter — it added a paragraph about recording conversations without consent and took out a paragraph about conducting meetings and discussions in appropriate settings. At the same time, the respondent ended the grievor's acting appointment. The grievor returned to his Citizen Services Officer position.

[8] The grievor went on leave at some point after September 20, 2022, and then resigned on November 2, 2022.

[9] The grievor filed all 10 grievances on October 13, 2022. Each grievance identifies a specific instance in the chain of events that led to the decision to terminate the grievor's acting appointment on September 20, 2022. A summary of each grievance, listed by the date of the event being grieved, follows. I provided a version of this summary to the parties when soliciting written submissions; the respondent agreed that it fairly summarized the 10 grievances, while the grievor did not discuss

this summary at all. This summary is taken from the grievance forms, the reference to adjudication, and the grievor's submissions:

Board file number	Event grieved	Date of event on grievance form
566-02-47238	The grievance states only "discrimination – favouritism", with no further details in the grievance form or the reference to adjudication.	January 26, 2022
566-02-47230	The grievance alleges that the letter of expectations of May 5, 2022 was "Harassment in the workplace by way of retaliation."	May 4, 2022
566-02-47239	This grievance is against the content of the May 5, 2022 letter of expectations.	May 4, 2022
566-02-47235	The signatory of the letter of expectations failed to provide examples of the items listed in the May 5, 2022 letter of expectations in correspondence dated June 2, 2022.	June 2, 2022
566-02-47231	The grievor's Director General supported and/or refused to provide a justification for the May 5, 2022 letter of expectations during a meeting on July 13, 2022.	July 13, 2022
566-02-47234	The grievor's Director supported the letter of expectations.	July 28, 2022
566-02-47232	The grievor's Director General supported and/or refused to provide a justification for the May 5, 2022 letter of expectations during a meeting on August 5, 2022.	August 5, 2022
566-02-47233	The grievor's Director General supported and/or refused to provide a justification for the May 5, 2022 letter of expectations during a meeting on August 26, 2022.	August 26, 2022
566-02-47236	This grievance is against the content of the amended letter of expectations dated September 20, 2022.	September 20, 2022
566-02-47237	The grievor's acting appointment to the position of Team Leader at the PM-03 group and level was ended, and the grievor was ordered to resume the duties of his substantive position as a Citizen Services Officer at the PM-01 group and level on September 20, 2022.	September 20, 2022

III. Procedure followed in this decision

[10] The respondent objected to the timeliness of the eight grievances other than the final two grievances listed in the table (which grieved events that occurred on September 20, 2022). The grievor replied to state that the grievances were not untimely.

[11] When I reviewed this matter, I identified that these grievances raise an issue about the Board's jurisdiction to hear them, in addition to the timeliness issue. I decided that the two preliminary issues raised in this case (which I will refer to as the timeliness and jurisdictional issues) could be decided on the basis of written submissions. The Board is empowered to decide a grievance on the basis of written submissions because of its power to decide "… any matter before it without holding an oral hearing" in accordance with s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365); see also *Andrews v. Public Service Alliance of Canada*, 2021 FPSLREB 141 at para. 3 (upheld in 2022 FCA 159 at para. 10).

[12] Therefore, I invited written submissions from the parties on the timeliness and jurisdictional issues. I specifically instructed them to address the jurisdictional issue by asking for "… written submissions about whether these grievances involve 'disciplinary' measures and whether they are about a 'termination, demotion, suspension or a financial penalty.'"

[13] I also pointed out to the parties that the grievor could apply for an extension of time to file these grievances and directed the parties to the leading decision of *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSSRB 1, as well as a fact sheet published on the Board's website about extensions of time. I included in the timetable for written submissions a deadline for the grievor to apply for this extension of time. The respondent requested a short extension of time for its submissions, and I agreed. The parties filed written submissions in accordance with this revised timetable. The respondent was given an opportunity to file submissions in reply to the grievor's submissions but chose not to.

[14] The grievor did not apply for an extension of time to file these grievances. Instead, in his responding submissions, he stated this: "If an extension of time for these grievances are [*sic*] needed, my presentation to the board during the hearing will provide all necessary documentation to show that I acted in a reasonable time and the steps I took to resolve this issue at every step." I have not considered whether an extension of time would be warranted in this case, as the grievor did not apply for one within the deadline I set for such an application.

[15] Finally, the grievor requested that the 10 grievances be consolidated. The respondent consented to that request. I would have consolidated these grievances;

however, my ultimate disposition (that only one grievance is both timely and within the Board's jurisdiction) makes a consolidation order unnecessary. There is only one grievance left, and, therefore, there is nothing to consolidate it with.

IV. Timeliness: the first eight grievances are untimely

[16] The grievor was a member of the Program and Administrative Services Group bargaining unit, represented by the Public Service Alliance of Canada. The collective agreement for that bargaining unit (that expired on June 20, 2021; "the collective agreement") sets out that the deadline to file a grievance is 25 days after the date the grievor is notified or first becomes aware of the action or circumstance giving rise to the grievance. The collective agreement also states that this 25-day deadline excludes weekends and holidays. The precise wording of that provision in the collective agreement is as follows:

…	[…]
18.15 *A grievor may present a grievance to the first level of the procedure in the manner prescribed in clause 18.08, not later than the twenty-fifth (25th) day after the date on which the grievor is notified or on which the grievor first becomes aware of the action or circumstances giving rise to the grievance.…*	***18.15*** *Un employé-e s'estimant lésé peut présenter un grief au premier palier de la procédure de la manière prescrite par la clause 18.08 au plus tard le vingt-cinquième (25e) jour qui suit la date à laquelle il est informé ou prend connaissance de l'action ou des circonstances donnant lieu au grief* […]
…	[…]

[17] The grievance forms for the first 8 grievances each state that they concern events that occurred between January 26 and August 26, 2022, as described in the chart at paragraph 9 of this decision. The grievor filed the grievances on October 13, 2022, which was more than 25 working days from each of those events.

[18] The grievor alleges that he tried to file the grievances on time but that they were "… rejected due to the interference by the other party…." The grievor does not explain what this means. The grievor's submission cannot succeed without some details about how the respondent "rejected" the grievances, particularly since the grievor managed to file them on October 13, 2022.

[19] The grievor also argues that "The clock stops once I ask for an explanation and try to work with the other party for a resolution." The grievor also points out that the Director General was "… begging [the grievor] for more time every time [they] spoke …."

[20] Contrary to those arguments, the "clock" does not "stop" when there are ongoing discussions about a dispute.

[21] Section 61(a) of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*") states that the time limit to file a grievance may be extended "by agreement between the parties". This requires an actual agreement on the part of both the grievor and respondent to extend the time to file a grievance. There was no agreement in this case — at most, there were ongoing discussions about the issues being raised. In the absence of an agreement to suspend time limits, "[o]ngoing discussions between a bargaining agent and the employer do not suspend the time limit unless the parties have agreed to suspend it" (see *Tuplin v. Canada Revenue Agency*, 2021 FPSLREB 29 at para. 49). This rule applies equally to discussions between an individual grievor and their employer. Similarly, the Board has concluded that "… the time limit to file a grievance is not unilaterally extended by an employee's attempts to convince the employer to reverse or modify its decision" and that "[o]ngoing discussions about the employer's decision …" do not extend the time in which to file a grievance (see *Mark v. Canadian Food Inspection Agency*, 2007 PSLRB 34 at paras. 22 and 27).

[22] Therefore, the first eight grievances were filed late. I dismiss them for that reason. The remaining two grievances are about events that occurred on September 20, 2022, and therefore were filed within 25 working days of those events. There is no dispute that those two grievances were timely.

[23] Nothing in this decision prevents the grievor from leading evidence about the events from January to September 2022 to support the claims set out in the remaining grievance. For example, it remains open to the grievor to dispute what is stated about his behaviour in the May 5, 2022 letter of expectations. In other words, my decision does not mean that the facts that led to the letters of expectation, or the letters themselves, cannot be considered when the Board decides the remaining grievance; it means simply that the late-filed grievances are outside the scope of the Board's

jurisdiction (see *Teti v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 112 at para. 100).

V. Jurisdiction

[24] The grievor referred these grievances to the Board under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). That provision grants the Board the jurisdiction to hear grievances that are related to "… a disciplinary action resulting in termination, demotion, suspension or financial penalty …". As the wording of that provision suggests, there are two issues: whether the matter being grieved was disciplinary, and whether there was a termination, demotion, suspension, or financial penalty.

[25] The respondent submits that 8 of the 10 grievances (the file numbers other than 566-02-47237 and 47238) are about the two letters of expectation. It states that the letters are administrative and not disciplinary in nature. I have accepted the respondent's characterization of those eight grievances and will therefore deal with them together. The respondent also states that letters of expectation are, as a class, not disciplinary, relying upon *Canadian Federal Pilots Association v. Treasury Board*, 2019 FPSLREB 41, which states, at paragraph 35:

> *[35] … Letters of expectation are plainly a means by which the employer appraises an employee against established standards. While employees who receive letters of expectation are likely having performance or behaviour issues, it is in no way certain or even likely that these issues will require disciplinary action. In other words, it cannot be assumed that discipline is a necessary component to correcting performance or behavioural issues.*

[26] The respondent also submits that discontinuing an acting appointment (file 566-02-47237) and a broad allegation of discrimination or favouritism (file 566-02-47238) are not disciplinary matters that fall within s. 209(1)(b) of the *Act*. The respondent makes no submissions about whether any of these actions was a termination, demotion, or financial penalty — despite my directions to both parties instructing them to address that issue.

[27] The grievor states that he was disciplined and that the early termination of his acting appointment was a demotion.

[28] The grievor also states that the Board has jurisdiction over the other grievances because they "… have to do with [h]arassment and discrimination which was a human rights issue." I can reject that submission quickly. The Board has no jurisdiction over human rights issues unless it has jurisdiction over the grievance in the first place; see *Chamberlain v. Canada (Attorney General)*, 2015 FC 50 at paras. 39 to 41; and *Caron v. Canadian Nuclear Safety Commission*, 2021 FPSLREB 74 at para. 85, upheld 2022 FCA 196. Since the grievor is not alleging a breach of a no-discrimination clause in a collective agreement (and cannot do so because the grievor does not have the required support from a bargaining agent), the Board does not have jurisdiction to hear that grievance under s. 209(1)(b) of the *Act*.

[29] I will address the issue of whether the grievances are related to disciplinary action and then turn to whether they are related to a termination, suspension, demotion, or financial penalty. I have done so for all 10 grievances, despite 8 of them being out of time, in case I have erred in my assessment of the timeliness of those grievances.

A. Are the grievances related to disciplinary action? Yes, for 9 of 10 grievances.

[30] The issue of whether an action is disciplinary is a "fact-driven inquiry" that depends upon a myriad of considerations, including the nature of the employee's conduct that gave rise to the action taken by the employer (typically, whether the action was voluntary), the nature of the action taken, the employer's stated intent, the employer's actual intent (if different from what is stated), and the impact of the action on the employee; see *Chamberlain v. Canada (Attorney General)*, 2012 FC 1027 at para. 56 and *Caron v. Canada (Attorney General)*, 2022 FCA 196 at para. 52. These considerations can be boiled down to two questions: (1) what is the purpose, and (2) what is the effect of the employer's actions; see Brown and Beatty, *Canadian Labour Arbitration*, 5th ed., at 7:56. It is useful to remember that the purpose of discipline is not to punish but instead to correct bad behaviour, which means the primary purpose of discipline is remedial and not punitive — to "… 'hammer home' to an employee that what they are doing is improper" (*Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation*, 2022 CanLII 116044 (ON LA) at page 75).

[31] The grievor bears the evidentiary onus to demonstrate that he was subject to disciplinary action under s. 209(1)(b) of the *Act*; see *Alexander v. Deputy Head (Public Health Agency of Canada)*, 2015 PSLREB 64 at paras. 45 and 46.

[32] I cannot agree with the respondent that letters of expectations are, automatically, non-disciplinary in nature. The label or title attached to a document does not determine whether that document was disciplinary in purpose or effect; it is the content of the document, not its name, which is key.

[33] The Board's decision in *Canadian Federal Pilots Association*, relied upon by the respondent, must be read in the context of the issue in that case. That case was about whether a proposed term of a collective agreement that would destroy letters of expectations after two years "… directly or indirectly … relates to standards, procedures or processes governing the … appraisal … of employees …" under s. 150(1)(c) of the *Act*. That paragraph prohibits an arbitration panel from including a proposal in a collective agreement that relates to performance appraisals, "… even if it is only incidentally related to …" a performance appraisal; see *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20 at para. 28. Letters of expectations "relate to" the appraisal of employees, even if incidentally; that does not mean that they cannot also be "disciplinary" in nature.

[34] The letters of expectation in this case included a warning about future discipline, set out in full later. Some arbitrators have concluded that similar warnings about future disciplinary consequences of continuing certain behaviour are considered disciplinary in nature when they are about culpable misconduct and that they are the first step along the path of progressive discipline; see, for example, *Canadian Merchant Service Guild v. Desgagnés Marine Petro Inc.*, 2017 CanLII 59151 at para. 106; and *Rocmaura Inc. v. C.U.P.E., Local 1603* (2016), 268 L.A.C. (4th) 348 at paras. 100 and 101. Other arbitrators have rejected that notion, concluding that a warning that there may be discipline in the future if certain behaviour persists cannot itself be disciplinary as it would mean that any criticism warning an employee of the consequences of persisting with certain behaviour would be characterized as disciplinary; see *District School Board of Niagara v. ETFO* (2016), 127 C.L.A.S. 245 at para. 18.

[35] I do not propose to resolve the dispute over whether mentioning the possibility of discipline in the future by itself makes a letter disciplinary. In my opinion, the question of whether the respondent's actions in this case were disciplinary can be resolved by examining the entire text of the letters of expectations and the letter

informing the grievor of the early end to his acting appointment to determine their purpose and effect.

[36] Both letters of expectations listed 11 actions that the grievor was expected to take. Both letters included this as one of those actions: "You are expected to help to create and maintain a safe and healthy workplace that is free from harassment and discrimination" — certainly implying, if not stating outright, that the grievor was guilty of harassment at some point. Both letters also included this: "You are expected to adhere to the direction of your management team at all times …" — certainly implying, if not stating outright, that the grievor was guilty of insubordination. Both letters conclude with the following:

> …
>
> *Immediate improvements are needed with respect to your professional conduct. We are committed to working with you in order to resolve this and ensure that we can move forward positively. However, if issues do persist, we must advise you that we will be required to take further action, which may include disciplinary action.…*
>
> …

[37] These letters of expectations identify voluntary, culpable misconduct. The letters state specifically that if the behaviour persists the employer **will** take further action that may include discipline, making them the first step on the path of progressive discipline if that misconduct continues.

[38] Turning back to the four factors I identified earlier that typically distinguish between disciplinary and non-disciplinary action:

a) The letters of expectation identify voluntary (instead of involuntary) conduct by the grievor.

b) I will discuss the nature of the actions later; however, the letters of expectation are similar to a written reprimand. The letters of expectation provide a list of 11 behaviours that the grievor is expected to display going forward. As I just said earlier, this implies — if not states outright — that the grievor has not demonstrated these behaviours to date and criticizes the grievor for not doing so.

c) The letters of expectation are silent about the employer's intent. The employer now submits that its intention was to improve the situation and continue the working relationship. That is not inconsistent with a disciplinary

intent; as I stated earlier, the purpose of progressive discipline is to improve the situation and continue the working relationship.

d) The impact on the grievor of the letters of expectation on their own was relatively minor.

[39] Despite the relatively minor impact on the grievor, I have concluded that the letters of expectation were disciplinary in light of the other factors I have considered. The minor impact on the grievor becomes relevant again later when I must determine whether they constitute a termination, demotion, or financial penalty. The letters do more than simply mention the possibility of discipline in the future. They are disciplinary in purpose and effect.

[40] Discontinuing the grievor's acting appointment was also disciplinary in this case. The letter informing the grievor that his acting appointment was ending states the following:

> …
>
> *Despite repeated reminders from management over the past few months as well as a letter of expectations regarding the requirement for professional and respectful communication,* ***you continue to engage with all levels of management in an inappropriate manner*** *that is not in alignment with the essential core competencies of the Team Leader position. More specifically, values and ethics, communication and management excellence. You also continue to disregard clearly defined workplace expectations. I am unable to allow you to continue acting in this position as a result.*
>
> …
>
> [Emphasis added]

[41] The respondent did not end the grievor's acting appointment early solely for non-culpable or involuntary performance reasons: in the respondent's own words, it ended the acting appointment because the grievor was acting in an "inappropriate manner." As I will discuss later, this had a significant financial effect on the grievor as well.

[42] I want to be clear that the Board has no jurisdiction under s. 209(1)(b) of the *Act* if an employer ends an acting appointment because of non-culpable performance deficiencies. However, harassment and insubordination are not non-culpable performance issues — they are disciplinary issues.

[43] On the final Board file (file 566-02-47238), I do not have sufficient information about the nature of the action being grieved to determine whether that action was disciplinary in nature. Since the grievor bears the burden of proof, I must conclude that the grievance in that file does not relate to disciplinary action.

[44] In summary, all the grievances except the one in file 566-02-47238 relate to disciplinary action.

B. Are the grievances related to a termination, demotion, or financial penalty?

[45] The more complicated issue in this case is whether the grievances relate to a termination, demotion, suspension, or financial penalty. For ease of reference, ss. 209(1)(b) and (c)(i) of the *Act* read as follows:

209 (1) *An employee who is not a* member *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*	***209(1)*** *Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire qui n'est pas un* membre*, au sens du paragraphe 2(1) de la* Loi sur la Gendarmerie royale du Canada*, peut renvoyer à l'arbitrage tout grief individuel portant sur :*
…	[…]
(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*	***b)*** *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*
(c) *in the case of an employee in the core public administration,*	***c)*** *soit, s'il est un fonctionnaire de l'administration publique centrale :*
(i) *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct ….*	***(i)*** *la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la* Loi sur la gestion des finances publiques *pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite,*

[46] I have included s. 209(1)(c)(i) of the *Act* even though the grievor cited only s. 209(1)(b) in the references to adjudication of these grievances, as listing the wrong provision of the *Act* as the basis of a reference to adjudication may simply be a "technical irregularity" that I am required to forgive under s. 241(1) of the *Act*.

[47] Additionally, s. 209(1)(c)(i) may render moot any consideration of whether the early end of the acting appointment was disciplinary. If an early end of an acting appointment is a termination or demotion, then the Board has jurisdiction over the appropriateness of that early end, regardless of whether the decision was disciplinary. If a termination or demotion is disciplinary, the Board has jurisdiction under s. 209(1)(b); if it is non-disciplinary, the Board has jurisdiction under s. 209(1)(c)(i).

[48] If an action is a financial penalty but not a termination or demotion, it must be disciplinary for the Board to have jurisdiction as "financial penalty" is not listed in s. 209(1)(c)(i) of the *Act*.

[49] As I will explain later, the grievances do not fall within s. 209(1)(c)(i) of the *Act* in any event. I have ended up referring to s. 209(1)(c)(i) of the *Act* purely out of completeness.

[50] Finally, there is no dispute that the grievor was not suspended, so I do not need to consider that issue.

1. The letters of expectations, and the discussions about them, are not a termination, demotion, or financial penalty

[51] The letters of expectations cannot be characterized as a termination, demotion, or financial penalty. They are most analogous to a letter of reprimand, and "[a] written reprimand, though a disciplinary action, does not result in the consequences listed in paragraph 209(1)(*b*) of the PSLRA and, consequently, a grievance related to a written reprimand cannot be referred to adjudication"; see *Canada (Attorney General) v. Robitaille*, 2011 FC 1218 at para. 28. Therefore, the Board has no jurisdiction to hear the grievances against the letters of expectation. This means the Board has no jurisdiction to hear grievances in file numbers 566-02-47239 and 566-02-47236.

[52] Also, if a letter of expectations is not a termination, demotion, or financial penalty, discussions about the letter cannot be any of those things either. This

conclusion disposes of the remaining grievances, except the one against the early end to the grievor's acting appointment.

2. Whether the early end of an acting appointment is a termination, demotion, or financial penalty

[53] This leaves file 566-02-47237, which is about the early end to the grievor's acting appointment. Is an early end to an acting appointment a termination, demotion, or financial penalty?

a. The case law on this point is inconclusive

[54] The Board has heard five cases about the early end of an acting appointment or assignment that I am aware of. As well, one Federal Court decision briefly touched on a similar issue.

i. Cases in which the Board declined jurisdiction

[55] Three cases in which the Board declined jurisdiction are *Whyte v. Treasury Board (Human Resources Development Canada)*, [1999] C.P.S.S.R.B. No. 27 (QL), *Smith v. Treasury Board (Solicitor General - Correctional Service Canada)*, [1997] C.P.S.S.R.B. No. 89 (QL), and *Stead v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87. In all three cases, the Board decided that it did not have the jurisdiction to hear the grievances against early ends to acting appointments or assignments. But in each of the three cases, the Board reached that result because it concluded that the decision was not disciplinary in nature but, instead, an administrative decision flowing from: (1) the fact that the grievor was no longer actually performing the duties of the higher classification in *Whyte*, (2) a necessary response to death threats against the grievor (a correctional officer) by inmates in *Smith*, and (3) an administrative step taken pending an investigation into a security issue and wrongdoing by two correctional officers in *Stead*.

[56] The Board did not consider whether the early end of an acting appointment was a termination (as argued in *Whyte*) or a financial penalty (as argued in *Smith*). The grievors in *Stead* never stated whether the end of their acting appointment (which they called being "stepped down") was a termination, demotion, or financial penalty.

[57] The Board also declined jurisdiction over a grievance in *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7. The facts of

that case are complicated. In essence, though, the grievor in that case was initially hired in a position classified at the ES-05 group and level in January 2001. She was assigned acting duties of another ES-06 position on November 1, 2001 and was paid acting pay at the ES-06 level until she asked to return to her substantive duties on June 28, 2002. She was never formally appointed on an acting basis. On April 22, 2004 her ES-05 position was reclassified to the ES-06 level, but the employer decided she was unqualified to be an ES-06 and, through a complicated series of staffing actions that are unimportant for the purposes of this case, placed her in an ES-05 position. The grievor alleged that these transactions, among others, were disciplinary. The Board concluded that none of the employer's actions were disciplinary. The Board also concluded that there was no demotion and no financial penalty.

[58] I note two things about *Peters*. First, the Board placed heavy emphasis on the fact that there was no letter of appointment indicating the grievor in that case was promoted to the ES-06 level in finding that there was no demotion or financial penalty; see in particular paragraphs 269, 273, 276, 285, and 291. By contrast, there are several such letters in this case. Second, when addressing the question of whether there was a financial penalty, the Board in *Peters* answered the question in the negative in one sentence at paragraph 291 which reads: "Receiving pay at the normal level established for an employee's position and classification cannot, by definition, be considered a financial penalty." The Board went on to address whether the decision was disciplinary for the next 43 paragraphs. This includes paragraph 311 of that decision where the Board contradicted its earlier conclusion by stating that reverting to the ES-05 rate of pay "… might conceivably be said to involve a financial penalty …." The Board's decision in *Peters* was mainly about whether there was disciplinary action, and I therefore cannot place too much emphasis on a single sentence about whether there was also a financial penalty.

ii. Case in which the Federal Court agreed that the Board did not have jurisdiction

[59] In *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2010 PSLRB 130, the grievor argued that the decision not to extend her acting appointment beyond its end date was a disciplinary decision resulting in a financial penalty. The Board concluded that the decision not to extend her acting appointment was not disciplinary, which was upheld by the Federal Court on judicial review (see 2012 FC 1027, at para. 58). Neither the Board nor the Court turned their

mind explicitly to the question of whether such an action would be adjudicable even if it were disciplinary. However, the Federal Court made the following observation at paragraph 55:

> *[55] Dealing with the first* [argument]*, it will be recalled that paragraph 209(1)(b) of the PSLRA requires that an adjudicable grievance relate to a disciplinary action that results in termination, demotion, suspension or financial penalty. On the facts of Ms. Chamberlain's situation, only demotion or financial penalty could pertain.…*

[60] The Court did not state that the non-renewal of an acting appointment **was** a demotion or financial penalty — only that, if it was any of a termination, demotion, suspension, or financial penalty, it was most likely to be a demotion or financial penalty. However, the Court did not need to decide that issue because it concluded that the decision was not disciplinary. Also, a non-renewal of an acting appointment is not the same as an early end of an acting appointment; nevertheless, the Court's decision is worth noting.

iii. Case in which the Board accepted jurisdiction

[61] The closest that the Board came to deciding this issue was in *Thibault v. Treasury Board (Solicitor General of Canada - Correctional Service)*, [1996] C.P.S.S.R.B. No. 68 (QL). In that case, the employer ended an employee's acting appointment because of allegations that the employee had been drinking alcohol on the job. At the hearing of the grievance, the employer refused to provide any evidence to substantiate this claim because it did not want to identify the other employees who allegedly saw the employee drinking. The Board concluded that the employer's actions were in bad faith because it "… concealed … the true nature of the charges against him, as well as the identity [*sic*] of his accusers." The Board concluded that the employee had been the subject of disciplinary action; therefore, it had the jurisdiction to hear the grievance. Since the employer had not substantiated that it had had cause to end the acting appointment early, the Board ordered that the employee be paid the equivalent of acting pay until his acting appointment had been scheduled to end in any event.

[62] Like the earlier cases I cited, the Board in *Thibault* was focussed on whether the employer's action was disciplinary or administrative. However, the result was that the Board took jurisdiction over the case — implying, but not stating outright, that the

early end of the acting appointment was either a termination, demotion, or financial penalty.

[63] Additionally, the Board's reasons in that case were based in large part on a policy-based interpretation of the *Act* not to deprive employees of the right to grieve disciplinary actions that have a financial consequence. This policy-based interpretation would apply equally to the meaning of "termination", "demotion", or "financial penalty" as well as to the meaning of the term "disciplinary". The Board stated this at pages 16 and 17 of its decision:

> …
>
> *In so doing, the Employer tried to deprive the employee of his right under the* Public Service Staff Relations Act *to file a grievance against disciplinary action and have this grievance referred to adjudication. It is my opinion that the legislator's intention in enacting section 92 of the* Public Service Staff Relations Act [*now s. 209 of the* Act] *was to allow employees to protect themselves against unjustified disciplinary measures, whether taken openly or under the guise of terms such as "administrative measures". In both cases, it falls to the adjudicator to determine the true nature of the decision. It is not unreasonable to think that the protection granted by the legislator extends to cases in which an employer has used subterfuge, or those in which the latter, for reasons known only to itself, is not frank about the disciplinary nature of a decision.*
>
> *It should be noted that grievors who, for a given period of time, occupy an acting position have the same rights concerning disciplinary measures as their co-workers who occupy a substantive position. If the process used by the Employer in this case were legitimized, it would follow that wherever an employer suspected misconduct and wished to deal severely with an employee in the absence of evidence, it could do so with impunity by removing that employee from his acting position, without having to explain its decision before an adjudicator. If that same employee had remained in his or her substantive position, however, the employer would have had to justify any such action with evidence. In short, certain employees would be more vulnerable than others where disciplinary action was concerned, merely by the fact of having agreed to assume acting duties, and their rights to defend themselves against unjustified disciplinary measures would be dependent upon the description chosen by the employer to justify his* [*sic*] *decision.*
>
> …

[64] I have some hesitation about accepting these paragraphs in their entirety for two reasons. First, s. 209 of the *Act* does not "… allow employees to protect

themselves against unjustified disciplinary measures …" — it allows employees to protect themselves against **some** unjustified disciplinary measures. As discussed earlier, for example, s. 209 of the *Act* does not allow an employee to protect themselves against an unjustified reprimand. One of the *Act*'s purposes is to protect employees against disciplinary measures, but another of its purposes is to limit the Board's jurisdiction to meaningful or serious disciplinary measures.

[65] Second, I have concerns about rejecting the respondent's interpretation of s. 209 of the *Act* because that interpretation would mean that "… certain employees would be more vulnerable than others …". Certain employees **are** more vulnerable than others. Probationary employees are one example; it is much easier to terminate a probationary employee than an employee outside their probationary period. Their vulnerability is consistent with the *Act*.

[66] Acting appointments are likewise inherently more precarious than permanent appointments. An acting appointment may be ended suddenly and without notice to the employee. For example, someone acting to cover a medical leave will return to their substantive position immediately if the other employee recovers; similarly, someone acting to cover a parental leave will return to their substantive position immediately if the new parent decides to return to work early. This is reflected in the grievor's first letter appointing them on an acting basis, which said that the acting appointment "may be terminated at any time." Although the letters extending the grievor's acting appointment did not contain that same language, the point remains that not all employment is the same — some employment is, legally, more vulnerable than others. Acting appointments are one example of a more vulnerable state of employment.

[67] For those reasons, I am not persuaded that the purpose of the *Act* is helpful in deciding whether an early end of an acting appointment falls within the meaning of the terms "termination", "demotion", or "financial penalty". The *Act* has competing purposes that could justify either interpretation.

[68] However, even with those caveats in mind, I cannot ignore the cases listed earlier in this decision. The Board has never denied that the early end of an acting appointment was a termination, demotion, or financial penalty, with the possible exception of *Peters* which I have given limited weight for the reasons I have already explained. Even if the Board was not explicit, the result in *Thibault* is at least an

implicit finding that the early end of an acting appointment for disciplinary reasons falls within the scope of s. 209 of the *Act*. To put this another way, these cases are not dispositive, but they certainly tend toward the Board having jurisdiction over the early end of an acting appointment for disciplinary reasons.

[69] With that in mind, I will now turn to the meanings of "termination", "demotion", and "financial penalty" to determine which, if any, fits an early end to an acting appointment.

b. Is an early end to an acting appointment a "termination"? No.

[70] Section 209 of the *Act* uses the word "termination" and not the phrase "termination of employment". Nevertheless, I have concluded that Parliament intended a "termination" to be a "termination of employment" in s. 209 and not a termination of something else.

[71] This conclusion is consistent with this Board's earlier decisions that the term "termination" means a unilateral decision by an employer to terminate an employment contract that would otherwise have continued to exist; see *Monteiro v. Treasury Board (Canadian Space Agency)*, 2005 PSSRB 27 at para. 12. The Board has also found that a termination "presupposes the end of [the employment] relationship"; see *Hassard v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 32 at para. 170.

[72] This interpretation also ensures that s. 209 of the *Act* corresponds with s. 12 of the *Financial Administration Act* (R.S.C., 1985, c. F-11). Section 12(1)(c) of that Act states that a deputy head may set a disciplinary penalty, including "… termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties …". Section 12(1)(c) is meant to line up with s. 209(1)(b) of the *Act*. The *Financial Administration Act* gives the employer the power to discipline in certain ways, and the *Act* gives the Board the power to review that discipline. Therefore, the word "termination" in s. 209 of the *Act* should have the same meaning as the phrase "termination of employment" so that the *Act* and the *Financial Administration Act* line up with each other.

[73] An early end to an acting appointment is not a termination of employment because there is no complete cessation of the employment relationship. Instead, the employee returns to their substantive position when an acting appointment ends. The

Public Service Employment Act (S.C. 2003, c. 22, ss. 12, 13) codifies this rule by stating that an employee whose appointment is for a specified term ceases to be an employee at the expiration of that term (s. 58(1)) — unless the appointment was made on an acting basis (s. 58(3)), in which case employment continues.

[74] For these reasons, an early end of an acting appointment is not a "termination" for the purposes of s. 209 of the *Act*.

c. Is an early end of an acting appointment a "demotion"? No.

[75] A demotion is a negative change in a job or position that presupposes the continuation of the employment relationship; see *Hassard*, at para. 170. This negative change is most commonly an appointment to a position that has a lower maximum rate of pay; see the Treasury Board's *Directive on Terms and Conditions of Employment*, at section 2.2.2.7, incorporated by reference into the collective agreement at clause 66.03(b)(iv). The Board in *Peters* also adopted this meaning of the term demotion at paragraph 265. However, more recent cases mean that the negative change could occur even when an employee retains their classification but is required to perform "demeaning" duties; see *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70 at para. 229 (upheld in 2011 FC 1218 and 2012 FCA 270).

[76] An early end of an acting appointment shares certain characteristics of a demotion, as both involve a negative change in a job or position but a continued employment relationship. Nevertheless, I have concluded that they are not the same thing, for two reasons.

[77] First, a demotion is supposed to be "… temporary in nature, except in the most exceptional of circumstances"; see *MacArthur v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 90 at para. 123. An early end to an acting position, by contrast, returns an employee to their substantive position indefinitely. Demotions are (almost always) temporary; an early end to an acting appointment is indefinite.

[78] Second, a demotion requires that the change be serious enough to constitute a breach of a fundamental term of the employment contract; see *Stewart v. MacMillan Bloedel Ltd.* (1991), 37 C.C.E.L. 292 (BC SC) at para. 44 (upheld in (1992), 42 C.C.E.L. 225 (BC CA)); and *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para. 46. While these cases were also about whether the demotion constituted a constructive dismissal at

civil or common law, the courts in both cases considered a breach of the employment contract to be a necessary condition for a demotion. In the case of an early end of an acting appointment, by contrast, it is an express term of the acting appointment (at least in this case) that it could end early. In other words, there was no breach of a fundamental term of the grievor's acting appointment; rather, the respondent exercised a contractual right.

[79] For these reasons, while an early end of an acting appointment bears a resemblance to a demotion, it does not fall within the meaning of that term in s. 209 of the *Act*.

[80] For clarity, this means that an early end of an acting appointment does not fall within the scope of the Board's jurisdiction under s. 209(1)(c)(i) of the *Act*. In other words, a non-disciplinary early end of an acting appointment falls outside the Board's jurisdiction.

d. Is the early end of an acting appointment a "financial penalty"? Yes, because the acting appointment was to a higher classification

[81] Finally, s. 209 of the *Act* grants the Board jurisdiction over disciplinary actions "resulting in … [a] financial penalty." I appreciate that the grievor did not argue that he was subjected to a financial penalty — instead, he stated that he was terminated or demoted. However, I may still consider this issue because I specifically put both parties on notice that I would consider whether the early end of an acting appointment was a "financial penalty". I also note that the respondent made no submissions at all on whether an early end of an acting appointment is a termination, demotion, or financial penalty. The respondent cannot be prejudiced by me considering this point, considering its refusal to address any of these three possibilities in the face of my clear instruction.

[82] The leading authority on the meaning of the phrase "financial penalty" remains *Rogers v. Canada Revenue Agency*, 2010 FCA 116. In that case, the employer suspended an employee for five days. The employer later replaced that suspension with a reprimand. The employee took three periods of stress-related sick leave: one during the investigation into his wrongdoing, a second after he met with the investigators, and a third after he was suspended. The employee argued that taking sick leave was a foreseeable consequence of the discipline and that, therefore, the loss

of sick leave was a "financial penalty" for the purposes of what was then s. 92 of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35). The Court of Appeal disagreed. The Court of Appeal stated instead that a financial penalty requires a financial loss that flows inevitably from the discipline (whether directly or indirectly). The Court of Appeal used terms such as "immediately and inevitably" (at paragraph 17, citing *Massip v. Canada* (1985), 61 N.R. 114 (CA) at para. 8) and "implicit" (at paragraph 18) to describe the necessary relationship between the discipline and the financial loss.

[83] The Board has also confirmed on a number of occasions that a financial penalty requires more than a financial loss — there must be some relationship between the discipline and the financial loss; see *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17 at paras. 346 to 348. As the Board put it in *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64 at para. 124, the financial loss is a disciplinary financial penalty if it is "… inextricably linked to and motivated by the grievors [*sic*] alleged misconduct …".

[84] In this case, there was a direct relationship between the early end of the acting appointment and the grievor's financial loss (i.e., the reduction in pay from the PM-03 to the PM-01 classification for the balance of the acting appointment). The financial loss was more than a reasonably foreseeable consequence of the decision to end the grievor's acting appointment — the loss was inextricably linked to that disciplinary decision.

[85] I leave for another case the question of whether the early end of an acting appointment "at level" falls within the Board's jurisdiction. In this case, the early end of the grievor's acting appointment was a disciplinary decision that resulted in a financial penalty — namely, the reduction in pay from the PM-03 to the PM-01 classification level.

[86] This decision does not entirely resolve this grievance. The respondent's letter ending the grievor's acting appointment does not state that its action was purely administrative in nature. The grievance responses also do not state that the respondent's actions were administrative. Therefore, this is not a case like *Jassar v. Canada Revenue Agency*, 2019 FPSLREB 54 where an employer was prohibited from arguing that it had cause to impose a disciplinary penalty because the employer had characterized the penalty as a purely administrative action throughout. To borrow the

metaphor used by the Federal Court of Appeal in *Canada (Attorney General) v. Heyser*, 2017 FCA 113 at para. 78, the employer will not be changing tack if it alleges that it had cause to impose a disciplinary penalty. The change of tack, if any, occurred when it made its submissions in response to my directions. The respondent throughout has stated that its decision was appropriate. A hearing is required to determine whether the respondent had cause to discipline the grievor and whether the penalty imposed (an early end to the acting appointment) was justified in the circumstances.

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

(The Order appears on the next page)

VI. Order

[88] The grievances in files 566-02-47230, 566-02-47231, 566-02-47232, 566-02-47233, 566-02-47234, 566-02-47235, 566-02-47236, 566-02-47238, and 566-02-47239 are dismissed.

[89] The grievance in file 566-02-47237 will be returned to the Board's Registry for scheduling in the normal course.

January 10, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board