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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

PARVIZ KAZEMI

Grievor

and

**TREASURY BOARD
(Veterans Affairs Canada)**

Employer

Indexed as

Kazemi v. Treasury Board (Veterans Affairs Canada)

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Kourosch Farrokhzad, Public Service Alliance of Canada

For the Employer: Larissa Volinets Schieven, counsel

Decided on the basis of written submissions,
filed May 3, July 14, and August 14, 2023.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] On March 21, 2018, and at least since January 12, 2018, Parviz Kazemi (“the grievor”) was employed by the Treasury Board (TB or “the employer”) and was working for Veterans Affairs Canada (VAC) as a veterans service agent in the Field Operation Branch, classified at the Welfare Program (WP)-2 group and level, in Vancouver, British Columbia.

[2] At the relevant time, his terms and conditions of employment were partially governed by a collective agreement between the TB and the Public Service Alliance of Canada (“the Alliance”) for the Program and Administrative Services group, signed on June 14, 2017, and expired on June 20, 2018 (“the PA collective agreement”).

[3] Between approximately 2014 and January of 2016, the grievor was working at the Canada Border Services Agency (CBSA) and then left that government agency. It is not clear from the material submitted where the grievor was working between January of 2016 and January of 2018.

[4] On March 21, 2018, the Alliance, on behalf of the grievor, transmitted a grievance to the CBSA’s generic labour relations (LR) redress email inbox and to the acting manager of the CBSA’s Personnel Security Screening Section. This grievance states as follows:

Grievance details ...

I grieve that the CBSA has denied me a Reliability Status and Secret Security Clearance without sufficient cause, based on erroneous assumptions, false and arbitrary or discriminatory information. This denial also has greater negative impact on my potential income earning for myself or my family. It also has negative impact on my potential employment or promotions in Public or private sector I feel that the information obtained to assess my ability and reliability to obtain the security clearance is arbitrary and discriminatory in nature. This misleading information has caused or will cause me to not be able to become a Border Service Officer (BSO) or obtain any other position with CBSA or any other public or private sector.

Corrective Action Requested ...

I request that the CBSA decision to deny my Reliability Status and my Secret Security Clearance be rescinded, that I be reassessed by another investigator to accurately assess my reliability and

integrity and any other corrective action appropriate in the circumstances. I also request exclusion of all these false, arbitrary or discriminatory information in new assessment. I also request To Be Made Whole.

[5] The grievance was not responded to by the CBSA at any level of the grievance procedure, and on June 4, 2018, it was sent to the Federal Public Sector Labour Relations and Employment Board (“the Board”) for adjudication under both ss. 209(1)(a) and (b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”). The cover letter, dated June 4, 2018, from the Alliance also identified the information relevant to the grievance as follows:

...

The information relevant to the grievance is:

Classification: WP 02

Agency/Department: Department of Veterans Affairs

Collective agreement: Program and Administrative Services

Expiry date: June 20, 2018

Subject: Disguised Discipline and No Discrimination

...

[6] On June 21, 2018, the Alliance forwarded to the Board an amended reference to adjudication. The covering letter in that reference was the same covering letter sent on June 4, 2018, but with the following addition immediately after the reference line of the letter: “***This reference to adjudication is resubmitted to identify the correct employer, CBSA***” [emphasis in the original]. The amended reference to adjudication identified the information relevant to the grievance as follows:

...

The information relevant to the grievance is:

Classification: WP 02

Agency/Department: Canada Border Services Agency

Collective agreement: Program and Administrative Services

Expiry date: June 20, 2018

Subject: Disguised Discipline and No Discrimination

...

[7] The June 4, 2018, letter and reference to adjudication documents identified the name of the deputy head as the TB and the department, branch, or division that the grievor worked within as VAC, while the June 21, 2018, letter and accompanying forms still identified the deputy head as the TB but identified the department, branch, or division that the grievor worked within as the CBSA.

[8] The employer objects to the Board's jurisdiction to hear this grievance, for the following reasons:

- a) The grievance was not properly referred to adjudication under s. 225 of the *Act* since the grievor did not present it at all required levels of the grievance procedure, as set out in clauses 18.08 and 18.11 of the PA collective agreement.
- b) The grievance does not raise any matter that is adjudicable under s. 209 of the *Act*, and the grievor's attempt to now raise matters that were not pursued in the grievance violates the principle set out in *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).
- c) The Board does not have freestanding jurisdiction over allegations of discrimination in the absence of a connection to an otherwise adjudicable matter.

[9] This decision addresses only the employer's objection to the Board's jurisdiction.

[10] Both the employer and the grievor each filed a brief of documents that accompanied their submissions.

II. Summary of the evidence

[11] At some time in 2015, the particulars of which were not provided, the grievor applied to an external staffing process for a position in the CBSA's Officer Induction Training Program (OITP), to become a border services officer (BSO).

[12] In an external staffing process, anyone can apply, whether they are employees and working at the CBSA or other government department or they are from outside the TB and the federal public sector. A copy of the job posting was provided and disclosed that the closing date to apply for the job was June 25, 2015. Other relevant portions of the job posting stated as follows:

...

When you apply to the CBSA officer trainee (developmental) selection process, you need to be aware that you are volunteering for, and committing to, service anywhere in Canada that the CBSA

needs you, including rural and remote areas. You need to fully understand and embrace the commitment you are making. The CBSA is very serious about mobility as a condition of employment. A variety of ports of entry will be available and a process is in place to allow you to indicate some preference; however, it is likely you will be assigned to an area of Canada that is totally new to you. Please consult the Directory of CBSA Offices for information regarding potential postings.

1. The CBSA may assign you to any port of entry (POE) across Canada.

2. Should you choose to leave during the Officer Induction Training Program and/or the Officer Induction Development Program, be advised that the costs associated with the training and/or development may be recovered from you.

When you submit an application for this selection process, you are not applying for any specific position, but to an inventory in anticipation of future vacancies. Applicants who meet the essential qualifications will have their application included in the inventory for this ongoing selection process. As positions become available, the applicants meeting the initial screening requirements identified by the hiring manager may be contacted and referred for consideration. Please ensure that your information is updated and remains current in your GC (Gouvernement of Canada) Jobs Applicant Account.

Your application in this inventory will be active for 90 days. A notice that your application is about to expire will be posted to the My jobs menu of your account 14 days before the end of your active period. If you do not take action, your application will no longer be active and therefore no longer considered for this inventory. Should your application become inactive while the process is still open, a notice will be posted to your account indicating that your application has expired; you may select the link Update my Inventory Status to reaffirm your interest.

...

Statement of Merit Criteria and Conditions of Employment

*Applicants who meet the following criteria will also be assessed against the **Statement of Merit Criteria and Conditions of Employment** for this position.*

...

Conditions of Employment

Requirements that a person must meet or comply with for as long as they occupy the position.

Other Conditions of Employment

...

. Obtain and maintain a secret security clearance as per CBSA Security Standards.

...

Other Information (Notes)

...

Candidates who are selected for the CBSA Officer Induction Training Program and become recruits are trained through an online phase and then attend an 18-week in residence phase at the CBSA College in Rigaud, Quebec, for training and further assessment. During the in-residence training at the CBSA College, recruits will receive a weekly allowance plus accommodations, meals, and travel as authorized by the CBSA. There will be NO salary paid until the recruit successfully completes all the required evaluations and accepts an offer of employment....

...

[Emphasis in the original]

[13] Submitted were copies of the *Policy on Government Security* and the federal government's *Standard on Security Screening* in effect at the times relevant to the issues in the grievance.

[14] In assessing the grievor's application for enhanced reliability status, an investigator from the CBSA's Personnel Security Screening Section team conducted an interview with the grievor. Documents submitted show that this occurred on October 4, 2016. By then, the grievor was no longer working for the CBSA.

[15] Documents submitted disclose that on July 14, 2017, the investigator recommended that the CBSA deny the grievor's application for enhanced reliability status and that a CBSA manager upheld this recommendation on October 18, 2017, as did a CBSA director on January 22, 2018.

[16] On January 12, 2018, the grievor wrote to the CBSA and advised it that he was employed at VAC in an indeterminate position.

[17] On January 26, 2018, the CBSA advised the grievor by letter that it had denied his application for enhanced reliability status. The letter stated that the decision could be challenged by an application for judicial review to the Federal Court or by way of a complaint to the Canadian Human Rights Commission (CHRC).

[18] By email dated February 6, 2018, the CBSA advised the grievor that it had authority only over its own security statuses and clearances.

[19] On March 21, 2018, the Alliance, on behalf of the grievor, transmitted a grievance to the CBSA's generic LR redress email inbox and to the acting manager of the CBSA's Personnel Security Screening Section.

[20] There is no evidence that the grievance was provided to a manager or the grievor's supervisor at VAC. On the bottom of the Alliance grievance form is a box marked "Section 3", which is to be completed by a grievor's immediate supervisor or other management representative who confirms the receipt of the grievance. The box has identified spaces for the name of the management representative or supervisor, their title in the organization, and their signature and the date on which they received the grievance. The grievance, as forwarded to the Board, has no acknowledgement that it was received by any management representative on any date.

[21] Documents submitted disclose that at the material times, Laurel Randle was a LR officer (LRO) with the Customs and Immigration Union (CIU).

[22] The Alliance is, for want of a better word, an alliance of several different unions. The CIU is one of the member unions of the Alliance. The CIU is the bargaining agent that represents the employees in the BSO bargaining unit.

[23] Documents submitted disclose that at the material times, Andrea Chase was an LRO with the CBSA.

[24] An email exchange took place between March 21 and 27, 2018, between Ms. Randle and Ms. Chase after the grievance was emailed to the CBSA's generic LR redress email inbox. The exchange is as follows:

[From Ms. Chase to Ms. Randle, March 21, at 12:58:]

...

I have reviewed the attachment and noted that it was not signed as acknowledged by regional management. The LR Redress mailbox cannot sign on management's behalf.

Accordingly, please have the grievor or the local union representative present the grievance form to management and have it signed. They should request a signed copy for their records. Management will then forward the grievance to regional labour relations who will open a file, assign a file number and send to Corporate Labour Relations (if applicable).

...

[From Ms. Chase to Ms. Randle, March 21, at 13:04:]

...

On second reading of the grievance, I realized that the individual is not a CBSA employee.

As this pertains to a security clearance, Security would have provided him with his recourse rights if he disagreed with the results. I don't believe a grievance would have been that avenue.

Let me research further and I will get back to you.

...

[From Ms. Chase to Ms. Randle, March 21, at 13:48:]

...

I learned from Personnel Security that Mr. Kazemi would have received a decision letter, on or about January 26, 2018 which provided the following information about his recourse rights:

“Appendix E, Section 3 of the Treasury Board of Canada Secretariat’s Standard on Security Screening stipulates that you may challenge a decision to deny a Reliability Status though [sic] a complaint to the Canadian Human Rights Commission or through an application for judicial review with the Federal Court.”

Here is the link to the Standard: [link removed]

Accordingly, a grievance is not the appropriate avenue of redress for Mr. Kazemi.

Could you please confirm receipt of this email?

...

[From Ms. Randle to Ms. Chase, March 21, at 15:28:]

...

I've received this email.

...

[From Ms. Chase to Ms. Randle, March 21, at 15:36:]

...

No further action will be taken on our end with respect to the grievance form.

...

[From Ms. Randle to Ms. Chase, March 21, at 15:54:]

...

While I understand that the letter provided that the redress was limited to a Federal Court Challenge or to a Human Rights Complaint, Mr. Kazemi is a federal public service employee working for a department of the Treasury Board and a member of the PA bargaining unit.

From the link that you have sent to me, the Standard provides that a grievance is in fact a method to challenge.

I have sent the grievance to Melanie Bussiere, A/Manager and contact name given to Mr. Kazemi in the letter, with the request that it be signed, I have yet to hear back from her.

...

[From Ms. Chase to Ms. Randle, March 21, at 16:23:]

...

Mr. Kazemi applied on an external process that was open to the general public. He applied as a member of the public and not as a Government of Canada employee. This was not a competition internal to Government of Canada employees. Therefore, the decision relating to his reliability status was not made in the context of his current employment, i.e. does not impact the security status or clearance status he may hold at Veterans Affairs.

As such, his recourse rights would be the same as any other member of the public who applied on that external process — judicial review or complaint to the CHRC.

...

[From Ms. Randle to Ms. Chase, March 22, at 09:06:]

...

*We respectfully disagree with this position. I understand that the competition was open to the public however, at the time he applied, Mr. Kazemi was an employee of the federal public service and his employer was the TB. One cannot be an employee and non-employee at the same time. As it was previously indicated, a distinction must be drawn between individuals from **outside** the public service and **employees** of the federal public service. Those from the inside or employees of the public service have access to the grievance process to challenge negative decisions on reliability checks, which is not the case for non - employee or individuals from outside the public service.*

...

[Emphasis in the original]

[25] On March 27, 2018, Mélanie Carbonneau, the CBSA LR manager, wrote to Ms. Randle, responding to her March 22 email timestamped at 09:06 and stating that the CBSA could not accept the grievance. She added that she supported Ms. Chase's analysis that Mr. Kazemi was not a CBSA employee and as such could not submit a grievance to the CBSA.

[26] On April 6, 2018, Ms. Randle emailed the CBSA's generic LR redress email inbox and asked that the grievance be transmitted to the second level of the grievance procedure. She stated that the transmittal was in accordance with clause 18.16(b) of the PA collective agreement.

[27] On April 9, 2018, Ms. Chase responded to Ms. Randle's April 6 email, stating that the grievance form had not been acknowledged by the CBSA; nor had any management representative signed it to confirm receipt. She further stated that no grievance file number was assigned and that as such, the CBSA's internal grievance procedure had not been initiated, and the grievance could not be transmitted to the next levels of the grievance procedure. She went on to state that the grievor's rights of recourse remained either with the CHRC or by way of judicial review.

III. The PA collective agreement

[28] The portions of the PA collective agreement that are relevant for this decision are as follows:

...	[...]
Article 2: Interpretation and definitions	Article 2: interprétation et définitions
...	[...]
2.01 For the purpose of this agreement:	2.01 Aux fins de l'application de la présente convention :
...	[...]
"bargaining unit"	« unité de négociation »
<i>means the employees of the Employer in the group described in Article 9.</i>	<i>désigne le personnel de l'Employeur faisant partie du groupe décrit à l'article 9.</i>
...	[...]
"employee"	« employé-e »
<i>means a person so defined in the Federal Public Sector Labour Relations Act, and who is a member of the bargaining unit specified in Article 9.</i>	<i>désigne toute personne définie comme fonctionnaire en vertu de la Loi sur les relations de travail dans la fonction publique et qui fait partie de l'unité de négociation indiquée à l'article 9.</i>
"Employer"	« Employeur »
<i>means Her Majesty in right of Canada, as represented by the Treasury Board, and includes any</i>	<i>désigne Sa Majesté du chef du Canada représentée par le Conseil du Trésor, ainsi que toute personne</i>

person authorized to exercise the authority of the Treasury Board.

autorisée à exercer les pouvoirs du Conseil du Trésor.

...

[...]

2.02 Except as otherwise provided in this agreement, expressions used in this agreement:

2.02 Sauf indication contraire dans la présente convention, les expressions qui y sont employées :

a. if defined in the Public Service Labour Relations Act, have the same meaning as given to them in the Public Service Labour Relations Act;

a. si elles sont définies dans la Loi sur les relations de travail dans la fonction publique, ont le même sens que celui qui leur est donné dans ladite loi;

and

et

b. if defined in the Interpretation Act, but not defined in the Public Service Labour Relations Act, have the same meaning as given to them in the Interpretation Act.

b. si elles sont définies dans la Loi d'interprétation, mais non dans la Loi sur les relations de travail dans la fonction publique, ont le même sens que celui qui leur est donné dans la Loi d'interprétation.

...

[...]

Article 9: recognition

Article 9: reconnaissance syndicale

9.01 The Employer recognizes the Alliance as the exclusive bargaining agent for all employees described in the certificate issued by the Public Service Labour Relations Board on February 21, 2007, covering employees in the Program and Administrative Services Group.

9.01 L'Employeur reconnaît l'Alliance comme agent négociateur exclusif de tous les employé-e-s visés dans le certificat délivré par la Commission des relations de travail dans la fonction publique le 21 février 2007, à l'égard des employé-e-s du groupe Services des programmes et de l'administration.

...

[...]

Article 17: discipline

Article 17: mesures disciplinaires

17.01 When an employee is suspended from duty or terminated in accordance with paragraph 12(1)(c) of the Financial Administration Act, the Employer undertakes to notify the employee in writing of the reason for such suspension or termination. The Employer shall endeavour to give

17.01 Lorsque l'employé-e est suspendu de ses fonctions ou est licencié aux termes de l'alinéa 12(1)c) de la Loi sur la gestion des finances publiques, l'Employeur s'engage à lui indiquer, par écrit, la raison de cette suspension ou de ce licenciement. L'Employeur s'efforce de signifier cette notification au

such notification at the time of suspension or termination.

...

17.03 The Employer shall notify the local representative of the Alliance as soon as possible that such suspension or termination has occurred.

...

Article 18: grievance procedure

18.01 ...

Individual grievances

18.02 Subject to and as provided in section 208 of the Public Service Labour Relations Act, an employee may present an individual grievance to the Employer if he or she feels aggrieved:

a. by the interpretation or application, in respect of the employee, of:

i. a provision of a statute or regulation, or of a direction or other instrument made or issued by the Employer, that deals with terms and conditions of employment;

or

ii. a provision of the collective agreement or an arbitral award;

or

b. as a result of any occurrence or matter affecting his or her terms and conditions of employment.

...

moment de la suspension ou du licenciement.

[...]

17.03 L'Employeur informe le plus tôt possible le représentant local de l'Alliance qu'une telle suspension ou qu'un tel licenciement a été infligé.

[...]

Article 18: procédure de règlement des griefs

18.01 [...]

Griefs individuels

18.02 Sous réserve de l'article 208 de la Loi sur les relations de travail dans la fonction publique et conformément aux dispositions dudit article, l'employé-e peut présenter un grief contre l'Employeur lorsqu'il ou elle s'estime lésé :

a. par l'interprétation ou l'application à son égard :

i. soit de toute disposition d'une loi ou d'un règlement, ou de toute directive ou de tout autre document de l'Employeur concernant les conditions d'emploi;

ou

ii. soit de toute disposition d'une convention collective ou d'une décision arbitrale;

ou

b. par suite de tout fait portant atteinte à ses conditions d'emploi.

[...]

Grievance procedure

18.05 For the purposes of this article, a grievor is an employee or, in the case of a group or policy grievance, the Alliance.

...

18.08 A grievor wishing to present a grievance at any prescribed level in the grievance procedure, shall transmit this grievance to the employee's immediate supervisor or local officer-in-charge who shall forthwith:

a. forward the grievance to the representative of the Employer authorized to deal with grievances at the appropriate level,

and

b. provide the grievor with a receipt stating the date on which the grievance was received.

18.09 A grievance shall not be deemed to be invalid by reason only of the fact that it is not in accordance with the form supplied by the Employer.

18.10 Subject to and as provided for in the Public Service Labour Relations Act, a grievor who feels treated unjustly or aggrieved by an action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 18.08, except that:

a. where there is another administrative procedure provide

Procédure de règlement des griefs

18.05 Pour l'application du présent article, l'auteur du grief est un employé-e ou, dans le cas d'un grief collectif ou de principe, l'Alliance est l'auteur du grief.

[...]

18.08 L'employé-e s'estimant lésé qui désire présenter un grief, à l'un des paliers prescrits par la procédure de règlement des griefs, le remet à son superviseur immédiat ou son responsable local qui, immédiatement :

a. l'adresse au représentant de l'Employeur autorisé à traiter des griefs au palier approprié,

et

b. remet à l'employé-e s'estimant lésé un reçu indiquant la date à laquelle le grief lui est parvenu.

18.09 Le grief n'est pas réputé invalide du seul fait qu'il n'est pas conforme à la formule fournie par l'Employeur.

18.10 Sous réserve de la Loi sur les relations de travail dans la fonction publique et conformément à ses dispositions, l'employé-e s'estimant lésé qui estime avoir été traité de façon injuste ou qui se considère lésé par une action quelconque ou une absence d'action de la part de l'Employeur au sujet de questions autres que celles qui résultent du processus de classification, a le droit de présenter un grief de la façon prescrite par la clause 18.08, sauf que :

a. dans les cas où il existe une autre procédure administrative prévue

by or under any act of Parliament to deal with the grievor's specific complaint such procedure must be followed,

par une loi du Parlement ou établie aux termes de cette loi pour traiter sa plainte, cette procédure doit être suivie,

and

et

b. where the grievance relates to the interpretation or application of this collective agreement or an Arbitral Award, an employee is not entitled to present the grievance unless he has the approval of and is represented by the Alliance.

b. dans les cas où le grief se rattache à l'interprétation ou à l'application de la présente convention collective ou d'une décision arbitrale, il n'a pas le droit de présenter un grief à moins d'avoir obtenu l'approbation de l'Alliance et de se faire représenter par lui.

...

[...]

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 [...]

18.16 A grievor may present a grievance at each succeeding level in the grievance procedure beyond the first level either:

18.16 Un employé-e s'estimant lésé peut présenter un grief à chacun des paliers de la procédure de règlement des griefs qui suit le premier :

a. where the decision or settlement is not satisfactory to the grievor, within ten (10) days after that decision or settlement has been conveyed in writing to the grievor by the Employer,

a. lorsque la décision ou la solution ne lui donne pas satisfaction, dans les dix (10) jours qui suivent la date à laquelle la décision ou la solution lui a été communiquée par écrit par l'Employeur,

or

ou

b. where the Employer has not conveyed a decision to the grievor within the time prescribed in clause 18.17, within fifteen (15) days after presentation by the grievor of the grievance at the previous level.

b. lorsque l'Employeur ne lui a pas communiqué de décision au cours du délai prescrit dans la clause 18.17, dans les quinze (15) jours qui suivent la présentation de son grief au palier précédent.

18.17 The Employer shall normally reply to a grievance at any level of the grievance procedure, except the final level, within ten (10) days after the grievance is presented, and within twenty (20) days where the grievance is presented at the final level except in the case of a policy grievance, to which the Employer shall normally respond within thirty (30) days....

...

18.19 The decision given by the Employer at the Final Level in the grievance procedure shall be final and binding upon the employee unless the grievance is a class of grievance that may be referred to adjudication.

...

18.22 The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the grievor and, where appropriate the Alliance representative.

...

18.26 Any grievor who fails to present a grievance to the next higher level within the prescribed time limits shall be deemed to have abandoned the grievance unless, due to circumstances beyond the grievor's control, the grievor was unable to comply with the prescribed time limits.

18.27 Where a grievance has been presented up to and including the final level in the grievance procedure with respect to:

a. the interpretation or application of a provision of this collective agreement or related Arbitral Award,

18.17 À tous les paliers de la procédure de règlement des griefs sauf le dernier, l'Employeur répond normalement à un grief dans les dix (10) jours qui suivent la date de présentation du grief, et dans les vingt (20) jours si le grief est présenté au dernier palier, sauf s'il s'agit d'un grief de principe, auquel l'Employeur répond normalement dans les trente (30) jours [...]

[...]

18.19 La décision rendue par l'Employeur au dernier palier de la procédure de règlement des griefs est définitive et exécutoire pour l'employé-e, à moins qu'il ne s'agisse d'un type de grief qui peut être renvoyé à l'arbitrage.

[...]

18.22 Les délais stipulés dans la présente procédure peuvent être prolongés par accord mutuel entre l'Employeur et l'employé-e s'estimant lésé et le représentant de l'Alliance dans les cas appropriés.

[...]

18.26 L'employé-e s'estimant lésé qui ne présente pas son grief au palier suivant dans les délais prescrits est jugé avoir abandonné le grief à moins que, en raison de circonstances indépendantes de sa volonté, il ait été incapable de respecter les délais prescrits.

18.27 Lorsqu'un grief a été présenté jusqu'au dernier palier inclusivement de la procédure de règlement des griefs au sujet :

a. de l'interprétation ou de l'application d'une disposition de la présente convention ou d'une décision arbitrale s'y rattachant,

or

b. termination of employment or demotion pursuant to paragraph 12(1)(c), (d) or (e) of the Financial Administration Act,

or

c. disciplinary action resulting in suspension or financial penalty, and the grievance has not been dealt with to the grievor's satisfaction, it may be referred to adjudication in accordance with the provisions of the Public Service Labour Relations Act and Regulations.

...

Article 19: no discrimination

19.01 *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, gender identity and expression, family status, marital status, mental or physical disability, membership or activity in the Alliance or a conviction for which a pardon has been granted.*

...

[Emphasis in the original]

ou

b. d'un licenciement ou une rétrogradation aux termes des alinéas 12(1)c), d) ou e) de la Loi sur la gestion des finances publiques,

ou

c. d'une mesure disciplinaire entraînant une suspension ou une sanction pécuniaire, et que le grief n'a pas été réglé à sa satisfaction, ce dernier peut être référé à l'arbitrage aux termes des dispositions de la Loi sur les relations de travail dans la fonction publique et de ses règlements d'application.

[...]

Article 19: élimination de la discrimination

19.01 *Il n'y aura aucune discrimination, ingérence, restriction, coercition, harcèlement, intimidation, ni aucune mesure disciplinaire exercée ou appliquée à l'égard d'un employé-e du fait de son âge, sa race, ses croyances, sa couleur, son origine nationale ou ethnique, sa confession religieuse, son sexe, son orientation sexuelle, son identité sexuelle et l'expression de celle-ci, sa situation familiale, son état matrimonial, son incapacité mentale ou physique, son adhésion à l'Alliance ou son activité dans celle-ci ou une condamnation pour laquelle l'employé-e a été gracié.*

[...]

[29] The Alliance is also the bargaining agent for the Border Services (FB) group. At the time relevant to the issues in this decision, the Alliance and the TB were parties to a collective agreement signed on July 3, 2018, and that expired on June 30, 2018 (“the *Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*”).

FB collective agreement”). Much of the wording in that collective agreement mirrors wording in other collective agreements entered between the Alliance and the TB, including that of the PA collective agreement. In fact, the sections set out earlier as referenced in the PA collective agreement are clause-for-clause and word-for-word the same except clause 9.01, in which the reference in the PA collective agreement states “Program and Administrative Services Group”, while in the FB collective agreement, it states “Border Services Group”.

[30] Both parties set out information with respect to the information that led the CBSA’s Personnel Security Screening Section team investigator to recommend that the grievor not be granted enhanced reliability status and the CBSA’s decision to uphold the investigator’s decision. None of this is relevant to the decision that I must make, and as such, it has not been set out. In addition, the factors set out in the *Policy on Government Security* and the *Standard on Security Screening* have no relevance to the decision that I have to make, and as such, they have not been set out.

IV. Summary of the arguments

A. For the employer

[31] The employer submits that the Board is without jurisdiction. It states that the grievor failed to present the grievance at all the levels of the grievance procedure and that as such, under s. 225 of the *Act*, it could not be referred to the Board for adjudication.

[32] The employer submits that the failure to present a grievance at all the levels of the grievance procedure is not a mere defect in form or technicality and that the Board has routinely applied s. 225 of the *Act* to find that the failure to present the grievance at all levels of the grievance procedure vitiates the referral to adjudication and deprives the Board of jurisdiction. Further, the Board has held that it does not have the authority or discretion to allow a grievor to circumvent s. 225 of the *Act*.

[33] The employer submits that the grievance is not adjudicable under s. 209 of the *Act*, and even if the grievance had been properly transmitted to every level in the grievance procedure, it is not about a disciplinary action that resulted in termination, demotion, suspension, or a financial penalty; nor is it in any way connected to the PA collective agreement.

[34] The Board can adjudicate the grievor's claims only if it has inherent jurisdiction, which is determined based on an essential-character test. The essential character or pith and substance of the grievance is whether the CBSA ought to have denied the grievor's application for enhanced reliability status in the course of the OITP staffing process. The CBSA neither applied nor interpreted the PA collective agreement when it undertook this analysis; nor was the administrative process in any way disciplinary. The grievance does not allege a breach of the PA collective agreement or that disciplinary action was taken against the grievor.

[35] It is clear that the grievor is unhappy that the enhanced reliability status was denied. That is evident in both the wording of the grievance details and requested corrective action, which is to rescind the denial decision and reassess his application.

[36] The Board is not cloaked with jurisdiction simply because the grievor happened to be employed at VAC when the denial decision was made. Simply being employed in the core public administration did not change the essential nature of the dispute, which is neither disciplinary nor related to the interpretation or application of the PA collective agreement and thus is neither grievable nor adjudicable before the Board.

[37] As an applicant to an external staffing process, the grievor's recourse was by way of an application for judicial review to the Federal Court or a complaint to the CHRC. The grievor and the Alliance was advised of these options on at least four separate occasions. The grievor was represented by the Alliance throughout this process and so presumably received its advice and expertise.

[38] Absent an employment relationship between the CBSA and the grievor, the CBSA's decision to deny the grievor enhanced reliability status in the course of the OITP application process could not, in any reasonable interpretation, amount to a breach of the PA collective agreement that governs his employment relationship with VAC.

[39] The definition of "employee" in the PA collective agreement means a person so defined in the *Act* who is a member of the bargaining unit specified in article 9 of the PA collective agreement. Articles 17 and 19 of the PA collective agreement both refer to employer actions taken against an employee. In this context, the CBSA is not the grievor's employer, and so its actions were not those of an employer against an employee.

[40] Even if the PA collective agreement could somehow apply to the CBSA's decision, the Board is still without jurisdiction, as the grievance does not allege that the CBSA violated the PA collective agreement; nor did its action otherwise engage the interpretation or application of it, as required by s. 209(1)(a) of the *Act*.

[41] The grievance does not allege that the grievor was subject to disciplinary action resulting in termination, demotion, suspension, or a financial penalty, as required in s. 209(1)(b) of the *Act*; rather, it merely challenges the denial decision. There is no dispute that the CBSA did not terminate, demote, or suspend the grievor.

[42] Disciplinary action is distinguished from non-disciplinary action by the reasons for and purpose of the action. The grievor's feelings about being unfairly treated do not convert an administrative action into discipline. The denial of an external candidate's application for enhanced reliability status is an administrative decision. The denial decision is unrelated to any employment-related misconduct that the CBSA sought to punish or correct.

[43] The grievance's reference to a "negative impact on my potential income" is not an allegation of a financial penalty. When a grievance does not specifically use the phrase "financial penalty", the Board does not have jurisdiction, regardless of whether or not there was a financial penalty, and in this case, there was none. Moreover, the fact that there was or is a financial consequence does not equate to a financial penalty.

[44] The employer submits that since the grievance neither raises a disciplinary issue nor an alleged breach of the PA collective agreement, raising both of these in the reference to adjudication violated the well-established principle set out in *Burchill*.

[45] With respect to the allegations of discrimination, the employer states that the Board has no freestanding jurisdiction to adjudicate allegations of discrimination in the absence of a properly referred and adjudicable grievance under s. 209(1) of the *Act*. The grievance does not identify any article of the PA collective agreement, any alleged grounds of discrimination, or that the CBSA discriminated against the grievor. Further, the requested corrective action indicates the true nature of the grievance, as the remedy does not seek any accommodation or damages under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). Further, s. 226(2)(a) of the *Act* is not a means by which any allegation of discrimination may otherwise come before the Board.

B. For the grievor

[46] The bargaining agent submits that the grievance was filed in a timely manner, although there was a delay of approximately 25 days from the date on which the grievor signed the grievance to the date on which the Alliance transmitted it to the CBSA's generic LR redress inbox. The grievor submits that the brief delay does not prejudice the employer in any substantive manner and that his rights should not be extinguished due to a mere technicality. The Board has jurisdiction to provide an extension of time pursuant to s. 61 of the *Federal Public Sector Labour Relations Regulations* (SOR/2005-79; "the *Regulations*").

[47] The bargaining agent submits that the grievance was properly referred to adjudication under the *Act* and that it presented the grievance at all required levels of the grievance procedure, as set out in clauses 18.08 and 18.11 of the PA collective agreement. The grievor submits that the grievance procedure was carefully followed but that the CBSA refused to acknowledge the grievance at each and every step of the referral process.

[48] The bargaining agent submits that the CBSA refused to respect the integrity of article 18 (note that the submissions do not specify which collective agreement) and relies on its own violation of article 18's requirements to argue that the bargaining agent has failed to follow the requirements of the collective agreement (again failing to specify which collective agreement).

[49] It is the bargaining agent's position that the grievance does raise matters that are adjudicable under s. 209 of the *Act*. It states that the grievance raises the allegation of the CBSA's discriminatory conduct and serious concerns of procedural fairness. The allegations of discrimination are clearly set out in the grievance form.

[50] For the reasons that follow, the submissions made by the bargaining agent in the balance of its submissions are not relevant, as they address issues that are only applicable if the grievor had met the threshold issue of whether or not a grievance had actually been filed.

V. Reasons

[51] The grievance procedure in the federal public service is governed by the *Act*, the *Regulations*, and any group-specific collective agreement that may be entered into

between an authorized bargaining agent and the employer with respect to employees in a particular bargaining unit.

[52] The Alliance and the TB agreed, in the PA collective agreement, to certain terms and conditions governing the grievance procedure for employees in the PA bargaining unit, while they also agreed in the FB collective agreement to certain terms and conditions governing the grievance procedure for employees in the FB collective agreement. These two collective agreements govern different employees in different bargaining units, albeit that the employees in both of these units are employed by the TB.

[53] Both the PA and FB collective agreements are worded similarly in many respects, and article 18 of both collective agreements, which sets out the grievance procedure, dictates how an employee of a bargaining unit governed by the group-specific collective agreement may file a grievance.

[54] The *Act* defines “employee”. It sets out that an employee is “... a person employed in the public service, other than ...” and then sets out nine exclusions. It defines “public service” as follows:

... the several positions in or under

(a) the departments named in Schedule I to the Financial Administration Act;

(b) the other portions of the federal public administration named in Schedule IV to that Act; and

(c) the separate agencies named in Schedule V to that Act...

[55] Article 2 of the PA collective agreement is the interpretation and definition section for that agreement, and clause 2.01 defines “employee” as “... a person so defined in the Public Service Labour Relations Act and who is a member of the bargaining unit specified in Article 9.” Article 9 identifies only the PA group.

[56] Article 2 of the FB collective agreement is the interpretation and definition section for that agreement, and clause 2.01 defines “employee” as “... a person so defined in the Public Service Labour Relations Act and who is a member of the bargaining unit specified in Article 9.” Article 9 identifies only the FB group.

[57] The evidence disclosed that at the time he was denied enhanced reliability status and was advised of this denial, the grievor was employed by the TB, working at VAC, and was a member of the PA bargaining unit. Based on the simple and straightforward reading and interpretation of the two collective agreements, it is clear that the grievor's terms and conditions of employment were covered by the PA collective agreement and not the FB collective agreement.

[58] Clause 18.02 of each of the PA and FB collective agreements states that an employee may present a grievance in particular circumstances. "Employee" is defined specifically in each of those collective agreements. In the PA collective agreement, an employee is a member of the bargaining unit as defined in article 9 of that agreement.

[59] Based on this, the grievor may only present a grievance alleging a breach of the PA collective agreement and must follow the procedure set out in article 18 of that agreement to do so. As such, if the grievor wanted to present a grievance, he was required, under clause 18.08 of the PA collective agreement, to transmit it to his "... immediate supervisor or local officer-in-charge who shall forthwith ... forward the grievance to the representative of the Employer authorized to deal with grievances at the appropriate level ...". The grievor did not do this. According to the submissions of both parties and the documents submitted, the Alliance transmitted a grievance to the CBSA's generic LR redress email inbox and the CBSA's acting manager of its Personnel Security Screening Section.

[60] As the grievor was not working at the CBSA, and specifically, he was neither working for its LR unit nor its Personnel Security Screening Section, neither he nor his bargaining agent, the Alliance on his behalf, could have presented a grievance to those places.

[61] To have presented a grievance, the grievor or his bargaining agent representative was required to present it to his immediate supervisor or local officer-in-charge, who in turn would have forwarded it to the employer representative authorized to deal with grievances at the appropriate level. The grievor did not present a grievance to his immediate supervisor or local officer-in-charge. As he did not, no grievance was presented. If no grievance is presented, it follows that none can be moved through the grievance procedure and referred to the Board for adjudication, as set out in ss. 209, 225, and 241 of the *Act*.

[62] I addressed this issue in *El-Menini v. Canadian Food Inspection Agency*, 2018 FPSLARB 40. That matter dealt with two grievances filed by Mr. El Menini, of which the first was filed against a suspension from employment that the grievor alleged was a constructive dismissal. As the grievor took the position that his suspension was a constructive dismissal, he presented it at the final level of the grievance procedure, which was an exception to the grievance procedure that required presenting a grievance at the first level. In assessing the evidence in that matter, I determined in fact that it was just what it appeared to be, which was not a constructive dismissal but a suspension, and as such, the grievance had to be presented through the normal grievance procedure, starting at the first level. At paragraphs 433 through 437, I stated as follows:

433 As I have found as a fact that the CFIA's action in April of 2014 was a suspension and not a termination, the grievor's recourse process required him to refer a grievance on that action to the first level of the grievance process. He stated that he referred his grievance to the final level; however, he could not have done so because it was not against a termination. Therefore, while he did deliver a grievance, he was required to deliver it at the first level.

434 When time ran out for a response at that level, he should have referred his grievance to the next level in the process. Eventually, he would have either received satisfaction or eventually exhausted the process and would have been in a position to refer it to the Board for adjudication. He did not, instead remaining steadfast in his position that he had been terminated and that his grievance had been delivered at the final level, which allowed him to refer it to the Board for adjudication when he did not receive a response from the CFIA within the timelines he believed were applicable. He did so at his own peril.

435 Failing to act within the timelines set by the Regulations has consequences, one of which is set out in s. 225 of the Act, which states, "No grievance may be referred to adjudication until the grievance has been presented at all required levels in accordance with the applicable grievance process." This means that if a grievance is not moved to the appropriate next level within the set time, the grievance cannot move any further without either the consent of the other party (in this case, the CFIA) or by order of the Board.

436 As I have found that the CFIA's action on April 17, 2014, was in fact to suspend the grievor and not terminate his employment, the grievance against this suspension was required, by s. 225 of the Act, to be presented at every level of the grievance process before it could be referred to the Board for adjudication. If it was not, it could not have been referred to the Board for adjudication.

437 The evidence disclosed that the employer did not consent to any change to the grievance process. As the grievor did not comply with the grievance process, the grievance in file 566-32-9869 has not been properly referred to adjudication under the Act, and as such, I have no jurisdiction.

[63] The requirement for a grievor to follow the grievance procedure set out in the relevant collective agreement or the *Act* and *Regulations*, when there is no collective agreement, was recently again addressed in *Fauteux v. Deputy Head (Canadian Food Inspection Agency)*, 2022 FPSLREB 84. In that case, the Board stated as follows:

...

[37] The grievance process exists for a reason. With some exceptions, it should not be circumvented before referring a matter to adjudication. The purpose of such a process was described as follows in Laferrière v. Deputy Head (Canadian Space Agency), 2008 PSLRB 53 at para. 28:

...

[28] The internal grievance resolution procedure exists to provide the parties with the possibility of finding solutions to their disputes themselves. The various levels of the procedure provide an equivalent number of opportunities for dialogue and discussion, with the goal of reaching a solution. If no agreement is achieved, the parties may then turn to a third party who has the authority to impose a solution. This constitutes the foundation of the grievance systems of Canadian labour relations regimes, and the *Act* is no different in that regard.

...

[38] The purpose of the levels of the grievance process is to create opportunities for dialogue and discussion, thus promoting the fair and effective resolution of disputes between an employee and his or her employer. For that reason, the Act, the Regulations, and the collective agreement insist on compliance with the grievance process before making a referral to adjudication, and they recognize very few exceptions.

[39] Section 225 of the Act, a legislative provision with respect to the Board's jurisdiction, states that a grievance cannot be referred to adjudication until it has been presented at all the levels required by the collective agreement. In addition, the section of the Act that lists the types of grievances that may be referred to adjudication states that a grievance may be so referred only after it has been presented at up to and including the final level of the applicable process (see s. 209(1) of the Act).

[40] The legislator also stressed the importance of the grievance process by including s. 241(2) of the Act, which provides that

failing to present a grievance at all levels required under the collective agreement is excluded from the defects in form or technical irregularities that the Board can tolerate. The referral of a grievance to adjudication can be invalidated due to the failure to comply with the grievance process.

[41] The Board has repeatedly found that it does not have jurisdiction over grievances when the grievors did not meet the conditions set out in the Act for referrals to adjudication, including complying with the grievance process (see, among others, Brown, at para. 29, Laferrière, and El-Menini v. Canadian Food Inspection Agency, 2018 FPSLRB 40).

...

[64] It matters not that the grievor was entitled to file a grievance or that the grievance is against discipline or alleges a breach of a collective agreement. Without a grievance having been presented, the Board has nothing to deal with as it has no jurisdiction if no grievance was filed. This holds true for the grievor's submission that the grievance form was filled in in a timely manner. If no grievance was ever filed, there is no question of whether it was timely, or not, as no grievance exists.

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

(The Order appears on the next page)

VI. Order

[66] The objection to jurisdiction is allowed.

[67] The grievance is denied.

March 25, 2024.

**John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board**