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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

JESUS GUILLERMO ORDORICA GARCIA

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as

Garcia v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

Before: Brian Russell, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Grievor: John Yach, counsel

For the Employer: Jean-Michel Bachand

Decided on the basis of written submissions,
filed February 9, March 14, and December 13, 2024, and February 10, 2025.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Jesus Guillermo Ordorica Garcia (“the grievor”) filed a grievance contesting the National Research Council of Canada’s (“the employer”) decision to terminate his employment for unsatisfactory performance, in accordance with s. 12(2)(d) of the *Financial Administration Act* (R.S.C., 1985, c. F-11).

II. Background

[2] The grievor was a director general, nanotechnology, classified at the EX-04 group and level. His employment was terminated on September 18, 2023. He filed his grievance on November 9, 2023, contesting the employer’s decision. The grievance was heard and responded to at the final level of the employer’s grievance process.

[3] He referred his grievance to adjudication under s. 209(1)(b), about a disciplinary action resulting in termination, of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”) on January 18, 2024.

[4] On February 16, 2024, the grievor sent an amended reference to adjudication and added s. 209(1)(d), about the termination of an employee of a separate agency designated under s. 209(3) of the Act for any reason that does not relate to a breach of discipline or misconduct.

III. Objection to the grievance referred to adjudication

[5] The employer filed an objection with the Federal Public Sector Labour Relations and Employment Board (“the Board”), contesting its jurisdiction to hear this grievance because the grievor’s employment was terminated for unsatisfactory performance, and the employer is a separate agency that is not designated per the Act.

[6] The employer also objected to the grievor amending the reference to adjudication to include termination from disciplinary action.

[7] I invited the parties to make additional written submissions concerning the employer’s objection. The grievor provided additional submissions.

[8] Per s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), the Board may decide any matter before it without holding an oral hearing.

[9] This decision deals with the employer's preliminary objection to the Board's jurisdiction to hear this grievance.

[10] For the reasons that follow, the employer's objection is allowed.

IV. Summary of the arguments

A. For the employer

[11] The employer argues that the Board does not have jurisdiction to hear this grievance and that it should be dismissed. Sections 209(1)(d) and (3) of the *Act* provide that an employee of a separate agency may refer their grievance to adjudication concerning a termination for a reason that does not relate to a breach of discipline or misconduct, provided that the employer has been designated under s. 209(3). The employer contends that it has not been designated under s. 209(3), and therefore, the Board does not have jurisdiction to hear this grievance.

[12] The employer also argues that the grievor referred the grievance under s. 209(1)(b) of the *Act*. The termination letter indicates that he was terminated for unsatisfactory performance. At no point during the grievance process did he submit arguments that his termination was a result of disciplinary action, and the grievance does not refer to disciplinary action.

[13] According to the employer, the grievor could not alter his grievance and raise the argument of discipline or disguised discipline at adjudication. The grievance referred to adjudication must be substantially the same grievance that was presented during the grievance process. The employer cites *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109, to support its position.

B. For the grievor

[14] The grievor acknowledges that he was terminated for unsatisfactory performance. He recognizes that s. 209(1)(d) of the *Act* restricts the right to adjudication for grievances concerning terminations for reasons that do not relate to a breach of discipline or misconduct, including unsatisfactory performance, of

employees of designated separate agencies. He also indicated that he intended to challenge his termination before the courts. He argued that s. 236(3) of the *Act* preserves a common law right of action for employees of non-designated separate agencies with respect to performance-based terminations.

[15] When the grievor recognized that s. 209(1)(d) of the *Act* restricts the right to adjudication for grievances concerning terminations for reasons that do not relate to a breach of discipline or misconduct, including unsatisfactory performance of employees of designated separate agencies, I asked him whether he would withdraw his grievance, so that the matter before the Board could be considered closed. He indicated that he seeks to clarify with the employer the position that it will take on the issue of the courts' jurisdiction to hear this matter. Until that issue is resolved, he will not withdraw the grievance. He indicated that it might prove necessary for the Board to issue a decision on the employer's objection based on the parties' submissions.

V. Reasons

[16] The issue before me is whether the Board has jurisdiction to hear the grievor's grievance against his termination for reasons that do not relate to a breach of discipline or misconduct, in this case unsatisfactory performance, while working for a separate agency, the National Research Council of Canada.

[17] While the grievor initially indicated that the grievance was referred under s. 209(1)(b) of the *Act*, for disciplinary action resulting in termination, he later indicated in his written submissions that he was terminated for unsatisfactory performance.

[18] I agree with the employer that the grievor cannot alter his grievance and raise the argument of discipline or disguised discipline at adjudication. The grievance referred to adjudication is about the grievor's termination of employment for unsatisfactory performance. I invited the grievor to make additional submissions about the employer's objection. The grievor responded that the employer's letter of termination asserts a performance-based termination. The grievance referred to adjudication must be substantially the same as the grievance that was presented during the grievance process. The grievor did not provide any information indicating that he raised the issue of termination for reasons related to discipline or misconduct during the grievance process. Therefore, the Board does not have jurisdiction to hear the grievance that was referred under s. 209(1)(b) of the *Act*.

[19] Section 209 of the Act states in part 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*

(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*

(b) *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*

(c) *in the case of an employee in the core public administration,*

(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, or*

(ii) *deployment under the Public Service Employment Act without the employee's consent where consent is required; or*

(d) *in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.*

...

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 :*

a) *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*

b) *soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire;*

c) *soit, s'il est un fonctionnaire de l'administration publique centrale :*

(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,*

(ii) *la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;*

d) *soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3).*

[...]

(3) The Governor in Council may, by order, designate any separate agency for the purposes of paragraph (1)(d).

(3) Le gouverneur en conseil peut par décret désigner, pour l'application de l'alinéa (1)d), tout organisme distinct.

[20] The *Federal Public Sector Labour Relations Act Separate Agency Designation Order* (SOR/2005-59) indicates that any separate agency set out in the schedule is designated for the purposes of s. 209(1)(d) of the *Act*. The order lists two separate agencies: the Canada Revenue Agency, and the Canadian Food Inspection Agency. The National Research Council of Canada is not listed as a designated separate agency. As such, the grievance falls outside the scope of s. 209(1)(d) of the *Act*.

[21] Given that the grievor's termination was for reasons that do not relate to a breach of discipline or misconduct, in this case unsatisfactory performance, and that the employer is not listed as a designated separate agency, the Board does not have jurisdiction to adjudicate the grievance.

[22] Accordingly, I allow the employer's objection.

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

(The Order appears on the next page)

VI. Order

[24] The employer's objection is allowed.

[25] The grievance is dismissed.

May 7, 2025.

**Brian Russell,
a panel of the Federal Public Sector
Labour Relations and Employment Board**