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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

MOHAMMAD HOSSEIN SALIMI

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as
Salimi v. National Research Council of Canada

In the matter of an individual grievance referred to adjudication

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Bonnie Pollard, Professional Institute of the Public Service of Canada

For the Employer: Brenden Carruthers and Sasha Willms, counsel

Decided on the basis of written submissions, filed November 1 and December 2 and 14, 2024.

I. Introduction

[1] This decision concerns a motion made by the National Research Council of Canada ("the employer") to dismiss a grievance referred to adjudication by Mohammad Hossein Salimi ("the grievor") on the basis that the Federal Public Sector Labour Relations and Employment Board ("the Board") does not have jurisdiction to hear it.

[2] On September 19, 2023, the employer terminated the grievor's employment as a post-doctoral fellow (research officer) in its Human Health Therapeutics Research Centre. In its termination letter, it informed him that he was being rejected on probation.

[3] After going through the internal grievance process, on June 6, 2024, the grievor referred the grievance to adjudication before the Board under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). The employer subsequently objected to the Board's jurisdiction on the basis that its termination was not a disciplinary act but a rejection on probation.

[4] Following an initial exchange between the parties, the Board invited written submissions from them on the question of whether it had the jurisdiction to hear this grievance.

[5] For the reasons that follow, I have determined that the Board does not have jurisdiction to decide this grievance, and I deny it.

II. The legal principles that apply to this motion

[6] The legal principles that apply to rejection-on-probation grievances before the Board were succinctly and clearly laid out by it in *Holowaty v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 44 at paras. 6 to 15.

[7] To be clear, the Board's analysis in *Holowaty* was applied to a rejection on probation that took place in the core public administration. Such rejections on probation are made under s. 62 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 13; *PSEA*). By virtue of s. 211 of the *Act*, a termination of employment made under the *PSEA* is not referrable to adjudication.

[8] The Board's decision in *Holowaty* set out the principles to be used when determining whether a rejection on probation was properly made under the *PSEA*, and therefore is not adjudicable, or whether it was made in a manner that was arbitrary,

discriminatory, or in bad faith, in which case it would **not** be considered a termination under the *PSEA* and therefore would be adjudicable; see *Holowaty*, at para. 9.

[9] In this case, the grievor's rejection on probation did not take place under s. 62 of the *PSEA*. The National Research Council is not a part of the core public administration, it is a separate agency, and one not subject to the *PSEA*. Therefore, s. 211 of the *Act* does not oust the Board's jurisdiction.

[10] Therefore, the analysis of this grievance must follow a slightly different path than the one laid out in *Holowaty*. The question that must be addressed is whether this grievance is about a **disciplinary action**, because it was referred to the Board under s. 209(1)(b) of the *Act*. Section 209(1) sets out what grievances may be referred to adjudication and reads 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 :*
(a) *the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;*	***a)*** *soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale;*
(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, or*	***(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)** deployment under the* Public Service Employment Act *without the employee's consent where consent is required; or*	***(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)** 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.*	***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).*

[Emphasis added]

[11] The employer took the position that its termination of the grievor's employment was not a disciplinary action and that the grievance against it could not have been referred to the Board under s. 209(1)(b) of the *Act*. It also noted that he did not have the ability to refer the grievance to the Board under s. 209(1)(d) because although the employer is a separate agency, it is not one designated under s. 209(3).

[12] As the grievance was referred to adjudication under s. 209(1)(b) of the *Act*, the parties agreed that the question that the Board must answer is whether the termination was a valid rejection on probation or whether it resulted from disguised discipline; see *Ebada v. Canada Revenue Agency*, 2021 FPSLREB 94 at paras. 151 and 152.

[13] Despite this somewhat different question, much of the process of analysis that the Board used in *Holowaty* applies in this case. Relying in part on *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, and *Canada (Attorney General) v. Alexis*, 2021 FCA 216, the Board said the following in *Holowaty*, at paras. 11 to 14:

> *[11] A rejection on probation is characterized by the following four elements:*
>
> - *the employee was placed on probation;*
> - *the employee's probationary period was still in effect as of the termination;*
> - *notice or pay in lieu was provided; and*
> - *employment-related concerns about the employee's suitability were the reason for the termination.*
>
> *[12] The employment-related reasons for the termination are typically in the probationary employee's letter of termination of employment (*see Canada (Attorney General) v. Leonarduzzi*, 2001*

> *FCT 529 at paras. 12 and 46, and* Tello, *at para.* 111*). When the four elements detailed in the last paragraph are present, there is a presumption that the termination was in fact a rejection on probation, and therefore, the Board has no jurisdiction to deal with the matter.*
>
> *[13] For the Board to take jurisdiction over a rejection on probation in such circumstances, the employee must present factually supported allegations that if proven, would establish that the termination was arbitrary, discriminatory, or in bad faith (including a camouflage or a sham, as per* Alexis*, at para. 9, and* Tello*, at paras. 109 and 111). If the grievor presents allegations that if proven, would show that the purported employment-related reasons were not those underlying the termination, then the grievor will meet their burden of demonstrating an arguable case. The Board may assume jurisdiction over the matter and consider the grievor's allegations.*
>
> *[14] As the Court points out in* Alexis*, at para. 10, this approach is similar to that applied by labour arbitrators in the private sector. In both the federal public sector and the private sector, employers are afforded considerable discretion to assess the suitability of probationary employees, and there is minimal scope for reviewing their decisions.*

[14] This approach is consistent with other cases cited by the employer; see *Tello*, at para. 111; *Dargis v. Canada Revenue Agency*, 2022 FPSLREB 20 at para. 225; and *Rukavina v. Treasury Board (Department of Western Economic Diversification)*, 2023 FPSLREB 4 at para. 57.

[15] It is also consistent with the approach taken in the many cases cited by the grievor; by way of example, see *Jacmain v. Attorney General (Can.)* [1978] 2 SCR 15 at page 37; *Monette v. Parks Canada Agency*, 2010 PSLRB 89 at paras. 37 to 41; *Dyson v. Deputy Head (Department of Fisheries and Oceans*, 2015 PSLREB 58) at paras. 126 and 138; *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*; 2004 PSSRB 109 at paras. 76 and 79; *Ebada*, at para. 158; and *Alexis*.

[16] In other words, where s. 211 of the *Act* may bar the referral to adjudication, the case law is that the Board applies a two-step analysis to determine whether it has jurisdiction over a rejection-on-probation grievance. Step one is to determine whether the employer has met the four conditions set out in *Holowaty*, at para. 11. At step two, the burden shifts to the grievor to demonstrate that the termination was arbitrary, discriminatory, or done in bad faith, which includes a sham or a camouflage. If the grievor can do that, the Board may assume jurisdiction and consider their allegations.

[17] On the question before me, the grievor must demonstrate that his rejection on probation was in fact disciplinary action; see *Hamel v. Parks Canada Agency*, 2022 FPSLREB 61 at para. 144. In this case, the grievor must show that his termination was done in bad faith, which includes a sham or a camouflage, amounting to disguised discipline. If he fails, the Board does not have the jurisdiction to hear his grievance under s. 209 and must dismiss it.

[18] To be clear, I have not found in the case law a clear definition of "sham" or "camouflage" that is applicable to this situation. The terms are defined several ways in standard dictionaries. For example, in the *Merriam-Webster Collegiate Dictionary, Eleventh Edition, (2003)*, one can find "sham" defined as "a trick that deludes" or "an imitation or counterfeit purporting to be genuine" and "camouflage" defined as "concealment by means of disguise." In the *Canadian Oxford Dictionary, Second Edition, (2004)*, "sham" is defined as "a person or thing pretending or pretended to be what he or she is not" and "camouflage" as "a misleading or evasive precaution or expedient." Taken together, I believe that a sham should be understood as something that is not what it is purported to be and that a camouflage is a course of action designed to deceive or hide its true nature.

[19] Having said all that, in this case, I find that the appropriate approach is not the arguable-case analysis outlined in *Holowaty*, at para. 13, but the Board's approach in *Rukavina*, at paras. 58 to 64.

[20] In *Rukavina*, the Board also faced a jurisdictional objection to a rejection-on-probation grievance. It invited the parties to make submissions on whether the grievor made out an arguable case for it to take jurisdiction. The parties provided will-say statements from the grievor and proposed employer witnesses, supplemented by documents such as email correspondence and submissions.

[21] In *Rukavina*, the Board found it appropriate to use its powers under s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; "the *Board Act*") to decide the grievance without holding an oral hearing. It also used its powers at s. 20(e) of the *Board Act* to "… accept any evidence, whether admissible in a court of law or not …". Those provisions allowed the Board to "… accept, weigh and act upon such evidence as emails, texts, written statements of parties and witnesses (whether given under oath or not) …"; see paragraph 64. It went on to say the following at paragraph 66:

> *[66] Reformulating the analysis in this way recognizes that many of the grievances and complaints that end up before the Board do not involve disputes over material facts. Rather, most turn on the inferences to be drawn from such facts, or the legal consequences of such facts. They depend too upon a contemporaneous record, created by the parties and composed of correspondence, emails, texts, and social media postings. It is a record of what the parties said or did before the dispute or as it arose. Such evidence might not have been made under oath, but there is little reason in most cases to doubt its authenticity. Credibility is rarely a central issue in the face of such a record. Indeed, that record often forms the body of the documentary evidence that is put before the Board in a full hearing. And in such a case the Board clearly has the jurisdiction to decide those inferences and those consequences without the need for a full hearing.*

[22] In this case, after the initial submissions were made on the employer's jurisdictional objection, I informed the parties that I was considering rendering a decision based on the submissions that they had made to date, as well as any additional submissions that they wished to make. I told them that those submissions could be supplemented by will-say statements and any documents that they wished to rely on. I indicated that once the submissions were received, I might decide to render a decision based on them, seek further particulars, or direct that the matter be set down for a hearing.

[23] I am satisfied that I can render a decision on the motion to dismiss based on the parties' submissions and without an oral hearing, under s. 22 of the *Board Act*.

III. Analysis

[24] On the basis of the facts and documents submitted by the parties, I have been able to conclude the following:

- the grievor was hired by the employer as a post-doctoral research officer, and he began working on September 12, 2022;
- when he was hired, he was informed that he was subject to a probationary period of two years;
- the termination letter was dated September 19, 2023, and took effect that day;
- the letter stated that the termination of his employment was a rejection on probation due to poor performance and his inability to meet the position's requirements, despite coaching and support and despite having been given opportunities to make necessary adjustments; and
- he was provided with four weeks of pay in lieu of notice.

[25] These facts meet the four necessary elements set out in *Holowaty*, at paras. 11 and 12, for concluding that the termination was in fact a rejection on probation. The grievor was subject to a probationary period, the period was still in effect as of the date of termination, notice or pay in lieu of notice was provided, and employment-related reasons were provided in the termination letter.

[26] Following *Holowaty*, *Rukavina*, *Hamel*, and *Ebada*, the burden now shifts to the grievor to demonstrate that the termination was in bad faith, which includes the concept that the termination was a sham or a camouflage, and amounts to disguised discipline.

[27] The grievor has not been able to do that in this case.

[28] To be sure, the grievor had a much more positive view of his work than did his employer. He submitted his résumé, demonstrating that he came to the NRC with a PhD in biomedical engineering from York University in Toronto, Ontario, supported by master of engineering and bachelor of science degrees from universities in Iran and with more than a dozen journal references to his name in the field of photo-thermal imaging. In his will-say statement, he said that after four months of employment at the NRC, he was publicly recognized for his work on "Image-Based PK Modeling" at a section meeting.

[29] The grievor also asserted that he was able to resolve technical issues with a shortwave infrared camera system used in conducting experiments with mice. He submitted that he was invited to present the results of his work at the June 2023 "Photonics North" conference in Montréal, Quebec, on behalf of the NRC. His presentation was titled, "Theoretical Model to Derive Fluorophore Concentrations in Biological Tissues from Short-Wave Infrared Fluorescence Images". The grievor also stated in his will-say statement that he was involved in collaborative efforts with researchers at several universities in the areas of biophotons and pharmacological studies.

[30] Those assertions are beside the point. Evidence of the grievor's competence in certain areas is not evidence that the rejection on probation was a sham, a camouflage, or done in bad faith.

[31] The grievor's core argument was that the employer did not provide evidence substantiating an employment-related reason for his dismissal and that he was not

given adequate coaching or remedial training. In his will-say statement, he said that he was told that his performance was lacking only on September 12, 2023, and that his rejection on probation took place only five business days later, on September 19, 2023. He argued that that demonstrated bad faith and that the termination did not flow from a *bona fide* dissatisfaction with his ability to perform the duties of his position.

[32] The employer provided will-say statements from Dr. Binbing (Erica) Ling, Dr. Maria Moreno, and Dr. Susan Twine.

[33] Overall, Dr. Ling's statement indicated that she worked closely with the grievor in a laboratory setting guiding his day-to-day work and that she brought concerns about his work performance to his attention on a regular basis. She stated that he failed to meet the performance standards of a post-doctoral fellow. Her statement was that the grievor's experiment data could often not be used, due to poor quality and inconsistency. She also stated that he demonstrated uncooperative behaviour and that he was unwilling to take constructive feedback.

[34] Dr. Moreno's will-say statement made many of the same points. She stated that from May 2023 onward, she had several meetings with the grievor and warned him that he was on probation and that should his performance not improve, he could be rejected on probation. She stated that there were problems with absenteeism. Dr. Ling and Dr. Moreno also provided will-say statements backed by emails and other documentary evidence with respect to several specific issues with the grievor's performance, which I will return to shortly.

[35] Dr. Twine was the Director General who signed the grievor's letter of termination. In her will-say statement she explains that the decision to end his employment was made for reasons of rejection on probation due to poor performance.

[36] In his reply will-say statement, the grievor disputed the amount of coaching and training that he was provided. He also disputed some of what was said in Dr. Ling and Dr. Moreno's will-say statements and provided documentary evidence to back up his arguments.

[37] I will explore six specific issues that arose from the parties' submissions in detail and explain why I find that none of them, reviewed either individually or as a whole, establish that the rejection on probation was a sham, a camouflage, or done in bad faith.

A. The January 2023 abstract

[38] In his submissions, the grievor referenced an abstract of a paper that he completed only four months into his employment and defended it as high-quality and impactful work. The abstract was submitted for the paper he was to present at the June 2023 Photonics North conference. In Dr. Ling's will-say statement, she said that there were a number of deficiencies with the abstract that resulted in her and Dr. Moreno retracting and revising it and that those deficiencies were part of the employer's assessment that the grievor was not performing to expectations. In his reply, he acknowledged that edits were done consistent with his supervisor's role and that Dr. Moreno had praised his work as having been well done.

[39] The grievor provided both tracked-changes and final versions of the abstract. The covering email with the final version did state that the work was well done. At the same time, numerous edits were made to the draft of the abstract.

[40] It is not the Board's role to assess the significance of the editorial changes that were made to the abstract. The Board's issue is to determine whether this incident helps demonstrate that the rejection on probation was made in bad faith or that it was a sham or a camouflage. It does not. The employer was entitled to assess the grievor's performance of his work duties. Its assessment fell squarely into the category of an employment-related concern.

B. The health-and-safety issue

[41] The grievor submitted that in May of 2023, he contacted his health-and-safety team with concerns about his workstation and chair and that it took months to resolve them.

[42] However, at no time did he actually argue that his complaint about his workstation was a factor in his termination. There are no statements from the grievor or any documents submitted by the parties that suggest that that was the case.

[43] Therefore, the grievor's mention of this issue is irrelevant to the issue that I must determine.

C. The supervision of a summer student

[44] The grievor noted that Dr. Ling appointed him as the project lead for a summer student program and that he was involved in the interview and selection process, in the supervision of one student, and in tracking the program's progress.

[45] Dr. Moreno's will-say statement indicated that in July of 2023, the grievor was advised of issues with his communication style with the summer student whom he was assigned to supervise. She stated that he was asked to improve his communication with the student but that ultimately, the student asked to no longer work with the grievor, so he was relieved of his supervisory role. The employer cited this incident as an example of its concerns with his work performance.

[46] In his reply will-say statement, the grievor said that he found the summer student's tasks ambiguous and that he had flagged that issue with Dr. Ling, indicating that that was the source of the miscommunication. He attached his email correspondence with Drs. Ling and Moreno on the issue.

[47] The employer's concerns about the grievor's performance when he supervised the summer student fall squarely into the category of an employment-related concern. This incident did not help the grievor demonstrate that his termination was done in bad faith or that it was a sham or a camouflage.

D. Absences from the workplace

[48] Dr. Moreno's will-say statement indicated that the grievor was frequently absent from the workplace and chose to telework for periods or full days without notifying her or his supervisor. She said that she raised the issue of absenteeism with him in July of 2023 and again via email on September 5, 2023, when she informed him that he was not entitled to telework. The employer also made submissions with respect to the content of an email, which indicate that after he was told that he was not entitled to telework, he submitted a request directly to the employer's telework coordinator, without first discussing the terms with his supervisor, even though he attested on the form that he had discussed the details with Dr. Ling. By email dated September 15, 2023, Dr. Moreno advised him that those actions were misleading and concerning.

[49] The grievor stated that the requirement to work in person was not clearly communicated and that it was not applied well. In his reply will-say statement, he said that he was informed that he was not permitted to telework and that on September 5,

2023, he did not attempt to work from home. He did not respond to the allegation that his completion of the telework form was misleading.

[50] I will note that the issue of the grievor's alleged absence from work or requests to telework were not mentioned in the termination letter of September 19, 2023. Therefore, it does not appear that the employer relied heavily on this issue in its decision to reject him on probation. In any case, his submissions on this issue did not help him demonstrate that his rejection on probation was done in bad faith or that it was a sham or a camouflage.

E. The design of an advanced instrument

[51] The grievor submitted that he "… took the initiative to propose and design an advanced instrument, aimed at supporting the cutting-edge pharmacological studies" and that he worked to secure outside collaboration with a professor from York University, to develop the scope of the project and make a proposal for its funding.

[52] In her will-say statement, Dr. Ling said that the grievor's proposal was not submitted because the method was not properly developed or designed; nor was it feasible. In his reply will-say statement, he disputed this and claimed that Dr. Moreno had commended him for doing a great job to try to connect the two teams and to produce a potential project.

[53] Neither party relied significantly on this incident in its arguments. The documentary evidence makes it clear that the project did not go ahead, and that Dr. Moreno did commend the grievor for his work in trying to connect the two teams. Nevertheless, the incident does nothing to demonstrate that the rejection on probation was done in bad faith.

F. Issues raised during the final three weeks of the grievor's employment

[54] I will conclude with a review of several issues that were raised during the final three weeks of the grievor's employment and that were related to both the communication issues between him and Dr. Ling and the completion of a spreadsheet to analyze data from an experiment that the grievor was conducting ("the dataset").

[55] As the emails provided by the parties address both of these issues, I will describe the events chronologically before analyzing their significance.

[56] On August 28, 2023, the grievor emailed Dr. Ling, expressing concerns about the way they had communicated. He requested that they work as a team, that they not "overwhelm each other with questions", and that they alter their weekly meetings to biweekly.

[57] In a reply that same day, Dr. Ling explained that recent presentations made by the grievor were not clear and that the datasets supporting his work were confusing. She requested a meeting the next day. He replied later that day, refuting her email point by point, and he declined the meeting.

[58] A further exchange of emails took place on August 30, 2023, in which the grievor and Dr. Ling discussed their communication style and technical issues with respect to the dataset.

[59] On September 1, 2023, the grievor wrote to Dr. Moreno and said that his communication difficulties with Dr. Ling were causing him stress and affecting his mental health.

[60] On September 6, 2023, Dr. Moreno emailed the grievor, to put in writing several expectations that she had provided to him in a meeting that took place that day. The expectations included being present onsite at the office during his hours of work, attending all meetings for which his presence was required, adhering to his supervisor's instructions about his work, and conducting all his communications in a professional, courteous, and respectful manner. She warned him that "[f]ailure to adhere to these directives could result in administrative and/or disciplinary action and impact your employment with the Council by being rejected on probation."

[61] On September 7, 2023, Dr. Moreno requested that the grievor provide his dataset analysis. In further correspondence that day, he said that he would send the dataset the following week. Dr. Moreno reiterated that it should have already been sent. He said that he would send it the following week, and Dr. Moreno instructed him to send it the next day. On September 8, 2023, he complied by sending the dataset.

[62] On September 12, 2023, Dr. Ling provided the grievor with a review of the dataset, laying out a total of seven specific concerns and requested corrections. She informed him of this: "… [your] work is not at the level expected for a post-doc and I will continue to assist you to help you improve." She also warned him that as a

probationary employee, a failure to improve could affect his employment with the NRC.

[63] A final email in this exchange was provided by the grievor. Dated September 15, 2023, from Dr. Ling to him, it consists of Dr. Ling's seven points from September 12, the grievor's reply to those comments (in red), and Dr. Ling's response to the grievor's comments (in blue). The email consists of three pages of dialogue about extremely specific aspects of the scientific processes, techniques, and analysis of the dataset and the grievor's ability to communicate them.

[64] In an email dated September 18, 2023, Dr. Ling communicated with Dr. Moreno and two other individuals as follows:

> …
>
> *Please see below the response from Moe. As you can see from excel file, not much has been done in the document and the critical information we requested were* [*sic*] *not provided. At this point, I don't know what to do anymore. Please advise the next steps.*
>
> …

[65] The rejection on probation took place the next day, September 19, 2023.

[66] I recognize that will-say statements and email documentation are not the same as sworn affidavits or testimony under oath. However, I have been given no reason to doubt the authenticity of the emails nor the contents of the will-say statements of the grievor and Drs. Ling and Moreno, which are consistent with the emails. I accept the summary of events in this section as an accurate reflection of what took place during the grievor's final three weeks of employment.

[67] The grievor's submissions related to this period fail to establish that his termination was done not for employment-related reasons. The exchange of emails that took place between August 28 and September 15, 2023, is infused with information demonstrating that the employer had legitimate employment-related concerns with his performance. The email exchange set out issues, such as how he communicated with his supervisor, whether he attended meetings when requested, whether he met the deadlines that he had been given, and whether he understood very specific scientific aspects of the dataset for which he was responsible. He was informed that a failure to address those issues could result in a rejection on probation. Yet, he debated and questioned what his supervisors said, and he openly disagreed

with their instructions. As noted earlier, during this same time frame, he sought to request a telework arrangement and misrepresented that his request was supported by his supervisor.

[68] It is evident that between September 15 and 18, Drs. Ling and Moreno reached the conclusion that the grievor should be rejected on probation, which led to the letter of termination being signed by their director general on September 19, 2023.

[69] I do acknowledge the argument made by the grievor that only a short time elapsed between the written warnings that he might be terminated (the warning from Dr. Moreno dated September 6, 2023, and the warning from Dr. Ling dated September 12, 2023) and his date of termination, which was September 19, 2023. There was little time in that period for him to demonstrate that he was learning from the warnings.

[70] As argued by the grievor, in *Alexis*, at para. 9 (and in the case below, *Alexis v. Deputy Head (Royal Canadian Mounted Police)*, 2020 FPSLREB 9 at para. 229, which is the case referred to in the rest of this paragraph), the short period between the letter requiring performance to be improved and the termination was a factor that led to the conclusion in *Alexis* that the rejection on probation was made in bad faith. That said, in *Alexis*, the grievor was terminated after just five months of work in a probationary period of one year, and the conclusion of bad faith was reached based on the consideration of a large number of elements not found in this case. Furthermore, the conclusion in *Alexis* was not that the termination amounted to disguised discipline but that it was a termination for poor performance under s. 209(1)(c)(i) of the *Act*. The grievance in *Alexis* had also been referred under that provision of the *Act*, which relates only to employees in the core public administration. This grievor is not one of them.

[71] I also note the grievor's argument that bad faith should be found where good faith is absent, citing *Dyson*, at paras. 126 and 138; and *Dhaliwal*, at para. 79. He argued that the employer's decision to terminate him did not meet the requirements of the employer's *Human Resources Manual* at section 5.7, "Termination of Employment", specifically section 5.7.13.4. Among other things, the standard set in that policy is that the employee be given "… a reasonable opportunity to meet the acceptable standards of performance" (see s. 5.7.10.9). The tight timeline between the written warnings and the termination appears, on its face, to fall short of that standard.

[72] However, despite the short time between the written notices of September 5 and 12 and the termination letter of September 19, 2023, I conclude that the grievor did not demonstrate efforts to improve his performance. The evidence showed that during that time, he continued to question the directions that he was given, resisted meeting the deadlines that were set to submit the dataset, and questioned the directions that he was being provided by his supervisors. His performance in relation to the directions he had been given deteriorated and did not improve.

IV. Conclusion

[73] None of the issues or incidents reviewed earlier in this decision, taken either individually or as a whole, demonstrate that the rejection on probation was done in bad faith. The decision was not a sham; the termination was exactly what it was purported to be, a rejection on probation, rooted in the employer's assessment of the grievor's work. The termination was not a camouflage, disguised as a rejection on probation. The termination was not for disciplinary reasons. There is a clear link between the reasons for the termination and the events that proceeded it. The termination was what the employer represented it to be: a rejection on probation.

[74] I rely again on *Rukavina*, which recognizes that bad faith must be proven and that it is not an easy burden to meet; see paragraph 57. As stated by the Board, it is not "… enough to show that the employer made mistakes in its evaluation of the grievor's performance or that it did not give the grievor a chance to improve their performance or to respond to allegations of shortcomings in that performance." To prove bad faith, the grievor must show that there were no legitimate employment-related reasons for the termination; see paragraphs 73 and 74. The grievor in this case did not meet that requirement.

[75] I will note that when the employer objected to the Board's adjudication, it also stated that the grievor's reference under s. 209(1)(b) of the *Act* was a violation of the principle outlined in *Burchill v. Attorney General of Canada*, 1980 CanLII 4207 (FCA), which states that a grievor may not refer a new or different grievance to adjudication than the one they presented to the employer. As the parties did not address this argument at any length in their arguments, and as I have already allowed the employer's objection for the reasons outlined earlier in this decision, I have decided not to address this aspect of the employer's objection in these reasons for decision.

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

(The Order appears on the next page)

V. Order

[77] The employer's objection to the Board's jurisdiction is allowed.

[78] The grievance is denied.

June 17, 2025.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board