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Citation: 2006 PSLRB 64



*Public Service  
Staff Relations Act*

Before an adjudicator

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BETWEEN

NOEL AYANGMA

Grievor

and

TREASURY BOARD  
(Department of Health)

Employer

Indexed as  
*Ayangma v. Treasury Board of Canada (Department of Health)*

In the matter of a grievance referred to adjudication pursuant to section 92 of the  
*Public Service Staff Relations Act*

**REASONS FOR DECISION**

***Before:*** John Steeves, adjudicator

***For the Grievor:*** Douglas Hill, Noel Ayangma

***For the Employer:*** Richard Fader, counsel

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Heard at Charlottetown, Prince Edward Island,  
September 13 to 16, 2005; January 16 to 20, 2006.

## REASONS FOR DECISION

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### A. GRIEVANCE REFERRED TO ADJUDICATION

[1] This is a decision on whether the employer had just cause to suspend and then terminate the grievor, Dr. Noel Ayangma, for abuse of travel claims and being absent from work without permission.

[2] The employer is the Treasury Board (Department of Health), Government of Canada. The employer submits that the grievor was suspended and then terminated for just cause because he abused travel claims and he was absent from work without permission. The employer states that on twenty occasions, the grievor claimed travel expenses but he did not make the trips. Travel and cell phone records were the subject of a professional audit and then they were entered into evidence, through the auditor. The general pattern, according to the employer, is that the grievor claimed expenses for trips but he never left his home in Charlottetown or he claimed to be in one location for work but was actually in another location for personal reasons.

[3] The grievor submits that there has been a long-standing conspiracy against him at work by a number of people and these people fabricated false travel expenses to get rid of him. This conspiracy started when he was hired and it went on until the appointment of a person to a position he was occupying in an acting capacity. This person was appointed on an interchange agreement with a provincial agency and the grievor then reported to her. He says that she was appointed to keep him from the position. According to the grievor, these events establish a conspiracy against him, and it ultimately lead to the fabrication of travel claims to get rid of him.

[4] The issues in this case are primarily factual. The evidence is very detailed as it includes twenty travel claims, related forms and expenses, and records of hundreds of cell phone calls. Witnesses for the employer provided the bulk of this evidence. The grievor called witnesses to give evidence about his allegation of a conspiracy against him and some evidence about his cell phone use. However, he decided not to give evidence himself.

[5] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former Act").

**B. SUMMARY OF THE EVIDENCE**

[6] The employer, the Department of Health, provides various health services across Canada. One of these services is the First Nations and Inuit Indian Health Branch (FNIHB) and it has offices in various regions. The Atlantic Region is where the events related to this grievance took place. The headquarters for the FNIHB in the Atlantic Region is Halifax, Nova Scotia, and it services First Nation and Inuit communities in Nova Scotia, Prince Edward Island, New Brunswick and Newfoundland and Labrador.

[7] The grievor, Dr. Noel Ayangma, started to work for the employer in January 1999 and when he was terminated in May 2004 he was an indeterminate employee working as a Regional Health Systems Coordinator. His duties included developing a FNIHB information system and assisting First Nations and Inuit communities with this system. Frequent travel was required and he had a blanket authorization for travel within the region, which meant that he did not need to obtain authorization for each trip.

[8] The grievor reported to the Manager, Health Information & Analysis and E-Health Solutions of FNIHB, Atlantic Region, who was located in Halifax, however, the grievor lived in Charlottetown, Prince Edward Island, and travelled from there for his work.

[9] For a period prior to August 2003, the grievor performed the duties of the Manager, Health Information & Analysis and E-Health Solutions of FNIHB in the Atlantic Region, in an acting capacity. He reported to Mr. Peter MacGregor while in this acting position. On August 18, 2003, as a result of an interchange agreement from her “home” employer, the Cape Breton Health Authority (part of the Government of Nova Scotia), Ms. Agatha Hopkins filled the position. The interchange agreement was entered in evidence and it provided for a term assignment of twenty-four months, from August 18, 2003 to August 18, 2005.

[10] Ms. Hopkins testified that among other duties she was responsible for signing off travel claims pursuant to section 34 of the *Financial Administration Act*, R.S., 1985, c. F-11, for certain staff, including the grievor. According to her, she first became involved with the grievor’s travel claims in mid-September 2003 when she was given some to sign. She signed some claims. She “felt there were inconsistencies” with

others for August and September 2003 and she requested that her assistant obtain additional information from the grievor.

[11] According to Ms. Hopkins, the grievor said that she did not require the information that she was requesting and that she was taking too long to authorize the claims. He refused to provide the information requested. There were a “couple of follow-ups” with the grievor by Ms. Hopkins’ assistant and he asked that someone else review the claims. Ms. Hopkins described one conversation she had with her assistant while “on the road” in which she directed her assistant not to send the claims to Finance for payment until the information requested was provided.

[12] Ms. Hopkins then met with the Director of Human Resources, Ms. Robin Kitson. They discussed the grievor’s travel claims and Ms. Hopkins asked that other claims be reviewed to see if there was a pattern. Following this meeting, Ms. Hopkins learned that other travel claims from the grievor were being audited at the Department of Health headquarters in Ottawa. She understood that this was a result of a routine audit of travel claims at headquarters and she testified that they appeared to be different claims than the ones she was concerned about.

[13] Ms. Hopkins and Ms. Kitson met with the grievor about his travel claims on October 6, 2003, in Halifax. Ms. Hopkins testified that this meeting was “not very long” and that she and Ms. Kitson went over the travel claims that they were concerned about. Ms. Hopkins told the grievor about the information she required to process the claims and she advised him that they would not be processed until the information was received. Ms. Hopkins also told the grievor that she had requested a review of past claims going back to January 1999 to see if there was a pattern in those claims. The grievor was given a letter from Ms. Hopkins, dated October 6, 2003, setting out the employer’s concerns and requests. This letter also advised the grievor that his blanket travel authorization ended, effective immediately, and that all future travel would have to be pre-authorized by Ms. Hopkins.

[14] Ms. Hopkins testified that the grievor was “quiet while I talked”. Then he turned to Ms. Kitson and said to her that Ms. Hopkins did not have the authority and that she “had another game plan”. His demeanour was “loud and firm”, according to Ms. Hopkins. She asked the grievor if he understood and whether he had any questions. The grievor replied that he did not have any questions, but he repeated that

Ms. Hopkins did not have the authority to do what she was doing. He made no admissions of wrongdoing, according to Ms. Hopkins.

[15] Apparently further meetings were planned with the grievor but he had to return to Charlottetown because he could not find accommodation in Halifax. He did not attend work and Ms. Hopkins learned that the grievor was away on sick leave. He was asked to provide a note from a doctor and fax it to the employer. The grievor provided a fax dated October 22, 2003, that was his “application for work related stress/sick leave”. He also included a copy of a doctor’s note dated October 21, 2003, that stated, “Examined today. Recommended six weeks of stress leave”.

[16] On November 21, 2003, Ms. Hopkins wrote to the grievor:

*This letter is a follow-up to our meeting of October 6, 2003, at which time you were advised both orally and in writing, that a review of your travel claims dated August 11<sup>th</sup>, September 2<sup>nd</sup>, and September 7<sup>h</sup>, 2003 would be conducted. You were also informed that a review of your travel claims back to January 1999 would be conducted to ensure that the travel claims submitted conformed to the Treasury Board Travel Directive.*

*As a result of this review, a number of irregularities have been identified in your travel claims, as well as your use of the government cell phone, use of government credit cards, and your leave and attendance records. As a result, I have requested that a more in-depth investigation be conducted. This investigation will be conducted by Health Canada’s Audit and Accountability Bureau, (AAB), Ottawa. Representatives from AAB will be reviewing all available records pertaining to your:*

- Travel Claims back to January 1999*
- Use of your Government cell phone and calling card*
- Use of your Government credit cards*
- Leave and Attendance Records*

*As part of the investigative process you will be interviewed by representatives from the AAB and will be given the opportunity to provide information and clarification regarding areas of concern arising from the documentation that has been examined.*

*The result of this investigation may lead to disciplinary action, up to and including termination of your employment with Health Canada.*

*As a result of the nature of the irregularities that have been identified I have decided that your access to the Health Canada electronic network, cell phone and credit cards will be temporarily suspended. This decision will be reviewed at the time you indicate that you are returning to work following your sick leave.*

*Representatives from the AAB will contact you to schedule an interview date. You may, if you wish, be accompanied by a representative of your choosing during interviews related to the matters under review.*

[17] The grievor faxed a letter to Ms. Hopkins on December 2, 2003 stating, "Subject to a reassessment from my doctor, I wish to return to work today December 2, 2003". Ms. Hopkins testified that she telephoned the grievor the same day to discuss his letter because she knew that if he returned to work, the process was to proceed with a suspension. She advised the grievor of this and he stated that he was going to his doctor about an extension of his sick leave. Ms. Hopkins recorded notes about this conversation on the grievor's letter of December 2, 2003 as follows:

*No - Does not have extended sick note.*

*Yes well enough to return to work*

*Yes both he and his doctor believe he is well enough & he can continue [illegible] sick leave [illegible].*

*Noel then said I will see my doctor today & get an extension of my sick leave.*

*I advised Noel that the AAB will be in touch to (illegible) review*

*I advised Noel if this is a return to work I will have to proceed with a letter to suspend without pay pending results of the investigation.*

*Noel advised me that his doctor is proceeding with his disability forms.*

[18] In a letter dated December 3, 2003 Ms. Sarah Archer, Regional Director of FNIHB, Atlantic Region, advised the grievor that he was suspended without pay, pending the outcome of the investigation by Audit and Accountability Bureau (AAB) from Ottawa. The letter then stated that the investigation was to review a number of

irregularities that had been identified in the grievor's travel claims. It also advised the grievor that he "may wish to be accompanied by a union representative" during interviews "related to the matters under review".

[19] The AAB met with the grievor in January 2004 for two days. Ms. Archer and Ms. Kitson then reviewed a report from AAB, dated April 28, 2004, titled "Investigation report on a Health Canada Atlantic Region employee's travel claims and work availability" (as will be seen there was more than one version of this report). The "Overall Conclusion" included statements that: concerns about the grievor's travel claims were valid; he billed Health Canada for travel expenses that he did not incur (for an amount of \$28,978.07 representing seventy-five travel claims); the grievor had not been available for work and he failed to report his absences; and the grievor used his computer and cell phone for non-government purposes.

[20] On April 28, 2004 Robin Kitson, the Regional Director, Human Resources for the employer, wrote to the grievor to provide him with a copy of the AAB report of April 28, 2004. She also stated:

*A meeting is scheduled for 1:00 p.m. Monday, May 3, 2004, at the DVA Boardroom #102, 97 Queen Street, Charlottetown, P.E.I. to discuss these findings and allow you to provide comments regarding the facts contained in the report. Present at this meeting will be Sarah Archer, Acting Regional Director, First Nations and Inuit Health Branch and Robin Kitson, Regional Director, Human Resources Atlantic Region.*

*If you wish, you may have union representation present.*

*Please bring your photo I.D., as it will be required for admittance into the government building.*

[21] A letter dated May 5, 2004 changed the date of the meeting to May 7, 2004.

[22] Ms. Kitson testified that the reason for the meeting was to review the AAB report and get any rebuttal from the grievor. In attendance were Ms. Archer, the grievor, Ms. Kitson and Ms. Jacqueline Edwards, President of the National Council of Visible Minorities. Ms. Edwards was accompanying the grievor; she stated at one point in the meeting that she was advising the grievor and she asked questions on his behalf. The meeting was recorded by a court reporter at the request of the grievor and a

transcript of the meeting was entered as evidence. In addition, Ms. Kitson's notes from the meeting, which she made the next day, were entered in evidence.

[23] At the May 7, 2004 meeting the grievor was presented with a letter of the same date, from Ms. Archer. The letter noted the AAB report "into irregularities regarding your travel claims and work availability"; this was described as a "Final Report received by you April 29, 2004". The letter also stated:

*I agree with the conclusions contained in the report which have lead me to conclude that you:*

- *submitted and received payment for travel expenses that you were not entitled to, were excessive and involving a large sum of money;*
- *failed to report absences to Health Canada officials so that appropriate entries could be made in the Health Canada ILAM system used for monitoring leave taken by employees.*

*I provided you with a copy of the Report and requested that you provide me with a response to the allegations and conclusions contained therein.*

*I have carefully reviewed your response and the evidence in relation to these matters and have determined that your conduct is totally inconsistent with the high level of trust, honesty and integrity required of your position as Regional Health Information System Coordinator. As a result, you have irreparably damaged the bond of trust that is essential to the continuation of your employment as a member of the Public Service of Canada. You have engaged in conduct that is totally irreconcilable with your duties and responsibilities as a Public Servant, and I can find no mitigating reasons why your employment should not be terminated for cause.*

*Consequently, in light of the seriousness of your misconduct and based on the information available to me at this time, I have decided to terminate your employment for cause pursuant to the authority delegated to me by the Deputy Head and in accordance with the Financial Administration Act Section 11(2)(f). The termination of your employment will take effect at close of business, May 7, 2004.*

*You have the right to grieve this decision within 25 days of the receipt of this letter.*

*Health Canada management is presently reviewing the facts of this case to determine whether there is a basis to recover any or all of the public monies which were inappropriately*



*spent and for which you are accountable. A decision on this matter will be provided at a later date.*

[24] Ms. Archer summarized this letter to the grievor at the meeting on May 7, 2004. The transcript of the meeting records the grievor as stating:

*I have reads this and what I can tell you is that your decision is unacceptable. Your decision is flawed. The process is flawed.*

*The department has wanted to terminate me since day one. That I joined the Department, the Regional Director here before Robin Kitson, has gone many times and tried to (have?) my appointment since day one. There are witnesses that will come and testify to that.*

*This is not the first time that this has happened, but the person here before me is also biased. The report is biased. [Reproduced as written].*

...

[25] At the end of the transcript, the following statement from Ms. Kitson is recorded:

*This is a comment further to our - the ending of the meeting that happened with Noel Ayangma. Once the tape recorder was off Noel had made comments, threatening comments to myself, looking directly at me, Robin Kitson, and stating that, "This is not the end of this for you. I have plans for you and you will see me in the future".*

Ms. Kitson's evidence and her notes from the meeting included the statement that she was "visibly shaken" and she felt threatened by the grievor's comments. Ms. Archer testified that the grievor was "extremely angry" but he did not disagree with anything they were saying to him.

[26] Dr. Ayangma now grieves the employer's decisions to suspend and then terminate him from his employment.

### **C. ISSUES DURING THE HEARING**

[27] The hearing into the suspension and termination of the grievor occurred over a number of days and it was closely fought. From time to time, I urged both parties to move on in their evidence. As well, a number of issues arose during the hearing and some of these are recorded here.

(a) Representation

[28] At the beginning of the hearing the grievor was represented by a person from the bargaining agent. The grievor also participated in the hearing, including cross-examination of some witnesses. For the hearing dates in January 2006, the grievor represented himself and there was no representative of the bargaining agent. A colleague of the grievor attended and she assisted him for some days by taking notes. No explanation for the change in representation was given.

(b) Admissibility of income tax evidence

[29] At the beginning of the hearing, the issue of Ms. Hopkins' income tax records arose because the grievor had obtained a summons from the Public Service Labour Relations Board (the "Board") requiring her to attend the hearing with her income tax records. The employer applied to set aside this summons. After some discussion, I set aside the summons with the consent of the parties on the basis of the employer's commitment to call Ms. Hopkins as a witness.

[30] On September 15, 2005, Ms. Agatha Hopkins was cross-examined by the grievor. Ms. Hopkins was the grievor's immediate supervisor and she was the person who got her position through an interchange agreement with the Cape Breton District Health Authority.

[31] The grievor attempted to question Ms. Hopkins about her income tax returns. The employer objected to this question on the grounds of relevancy and privacy. I sustained the employer's objection and directed that the relevance of Ms. Hopkins' income tax records had not been established. In discussions following this ruling, it transpired that the grievor's objective was to obtain evidence about Ms. Hopkins' salary as part of his allegation of conspiracy (see below). At first the employer objected to the admissibility of this information but then counsel for the employer stipulated her salary for the record. The salary was described in various exhibits including the interchange agreement itself.

[32] I was also urged by the grievor to admit income tax information from Ms. Hopkins because it was relevant to two other matters concerning the grievor, namely another grievance (not before me) and a human rights complaint. According to the grievor's submission (there was no evidence on this point), I could decide those issues because the Human Rights Commission said that the human rights complaint

could be decided by other proceedings. I decided that this was not the case and evidence that related solely to the issues in the grievance and the human rights complaint would not be admissible. Specifically, elements of the grievor's conspiracy allegation that were properly part of the other matters were not admissible in these proceedings. However, I also acknowledged that there may be some overlap between the evidence of the various proceedings and I would permit evidence, including evidence about the allegation of conspiracy, as long as it was relevant to the issue of the suspension and termination of the grievor. As will be seen, the grievor questioned a number of witnesses at considerable length about the conspiracy issue.

(c) Application of bias made by grievor

[33] Another matter arose during the evidence of Ms. Hopkins.

[34] The grievor attempted to put to Ms. Hopkins a copy of the interchange agreement involving her, Health Canada and the Cape Breton Health Authority. The employer strenuously objected to this document being put to Ms. Hopkins on the basis that counsel for the employer had not seen it before and it was not a document that appeared to have been disclosed through a freedom of information request by the grievor. More than one exchange took place between counsel for the employer and the grievor, with the latter insisting that he had obtained the document in appropriate circumstances. Counsel for the employer continued to insist that the document was unknown to him and questioned how it had been obtained. I concluded that some plain speaking was required and I asked counsel for the employer if he thought the document had been stolen. He immediately replied that he did not believe it had been stolen. In the end, the document was entered into evidence and I suggested to counsel for the employer that if he had any concerns about the document, he should make his own inquiries.

[35] The next day the grievor made an application that I recuse myself because I was biased and "exhibited a lack of fairness". The grievor submitted that the comments of counsel for the employer were "extremely offensive" to the grievor because he had obtained the document legitimately and counsel had "raised serious doubts about whether access to information had produced" it. The employer "clearly suggested that [the grievor] was in possession of stolen property". An unqualified apology was demanded. The grievor also stated that I, as the adjudicator, "was already siding with" the employer and "not allowing the grievor equal credibility". My comments to counsel

for the employer were cited as the basis for this submission. He stated that I must decide if I am objective and that, if I decided I was objective, the hearing should proceed. In reply, the employer submitted that there was no bias and, among other things, counsel refused to apologize for the remarks.

[36] I considered the grievor's application and then advised the parties that it was denied. I explained that the issue in my mind was not the *bona fide* of the grievor. Instead, I was attempting to clarify the position of the employer with regards to the document. I decided that there had been no bias or reasonable apprehension of bias in these circumstances.

(d) Recording of proceedings

[37] After the hearing dates in September 2005 and before the hearing dates in January 2006, the grievor requested that the proceedings be recorded. This request was dealt with in a letter dated January 10, 2006 from the Board:

*The grievor, in his e-mail of December 20, 2005, applied to the Board to record the continuation of the hearing. The employer, in its letter of January 3, 2006, indicated that it did not oppose the grievor's application but set conditions.*

*The parties should be aware that the Board's long standing practice has been not to permit the recording of its proceedings. There have been very few exceptions - the most recent of which is a case that will be taking place over multiple hearing dates, covering several months. In that exceptional case, the adjudicator had permitted formal court reporting to take place, at no cost to the Board, among other conditions. The application for recording was also made at the beginning.*

*In this case, the application to record is made in the middle of the hearing so if it was allowed, only part of the evidence would be recorded. As it happens, it would primarily be the evidence of the grievor that would be recorded since the employer is nearing the end of its evidence. Nonetheless, the grievor makes the application and it is not opposed by the employer.*

*I have been advised by the adjudicator that, under these circumstances, he will allow the recording of the proceedings on the following basis:*

- 1. Any recording will be done by a professional court reporter, as approved by the Board,*

2. *Any transcripts of the hearing will be made available to all parties and the panel,*
3. *Any transcripts will not be used during the evidence portion of the hearing, and*
4. *Any cost will be borne by the parties.*

[38] In the end, the proceedings were not recorded.

(e) Grievor's application to dismiss the employer's case

[39] After the September 2005 hearing dates and before the January 2006 hearing dates, the grievor made an application seeking dismissal of the employer's case. He filed a lengthy "Motion Record for the Determination of Questions of Law and for an Order allowing the Grievances and/or for an Order Staying and for an Order for the Production of Documents in the Possession and control of the Employer", dated October 11, 2005. This included a lengthy affidavit sworn the same date. At first the grievor's application was framed and considered as a motion for non-suit or an application of insufficient evidence. However, the grievor advised that he was not making those applications.

[40] After submissions were completed on the grievor's application the Board wrote to the parties on December 16, 2005 as follows:

*The grievor confirms that he is not making a motion for non-suit or making a motion based on insufficient evidence at this time. I am directed to inform the parties that the submissions received to date will be considered as part of the final deliberations of the panel. The parties may want to make submissions in their final argument about the admissibility and weight to be given to the affidavit evidence received.*

*The employer has not completed its evidence and the hearing scheduled for January 16 to 20, 2006, will continue. After the employer has completed its evidence, the bargaining agent will have the opportunity to present evidence and/or make other motions. Final argument in the usual manner will follow the evidence. A decision will be issued on a date after January 26, 2006.*

(f) Admissibility of Affidavit

[41] As part of his application described in (e), above ("Grievor's application to dismiss the employer's case") the grievor submitted a lengthy affidavit with

seventy-five exhibits, sworn by him on October 6, 2005. The Board advised the parties in the letter dated December 16, 2004 that they “may want to make submissions in their final argument about the admissibility and weight to be given to the affidavit evidence received”. In final argument, I was urged by the grievor to admit the affidavit and the employer urged me not to.

[42] I have concluded that the affidavit should not be admitted. It is a document generated in the middle of this proceeding and it is intended to persuade me to the grievor’s cause. The obvious intention is to put evidence before me without being examined about it. The best evidence would be direct evidence from the grievor and evidence by affidavit would be an inadequate substitute. All of the employer’s evidence was given through witnesses and that evidence was tested by cross-examination. For these reasons, it would be inappropriate and unfair to permit the grievor to enter his version of the events by way of affidavit evidence. For the same reasons, it would not be appropriate to admit the affidavit and then determine the weight it should be given.

(g) Issue of denial of union representation

[43] As part of his motion, dated October 11, 2005, the grievor raised the issue of a denial of union representation. That is, he alleged that he was not given the opportunity to have a union representative and this made the discipline against him void. The employer opposed consideration of this issue because it had not been raised as part of the original grievance or during the previous hearing dates in September 2005. The Board advised the parties as follows on December 23, 2005:

*With regard to the grievor’s allegation of a denial of union representation, the panel reserves its decision. The employer may recall witnesses and all evidence on this issue will be subject to the panel’s final decision.*

[44] It is not disputed that the first time this issue was raised was in the grievor’s written submission of October 11, 2005. The employer submits that the issue was not grieved or dealt with by the grievance procedure and it cannot be considered now. There are authorities supporting the employer’s position, *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (F.C.A.), at paragraph 5; *Schofield v. Canada (Attorney General)*, 2004 F.C. 622, at paragraph 10. The general principle in these cases is that, pursuant to the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, an adjudicator’s authority is limited to considering a grievance that formed part of the internal

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grievance procedure. These cases were decided under the previous *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35, but the principles are still applicable.

[45] The grievor relies on *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133. In that case, the adjudicator permitted a grievor to raise an issue of union representation even though it was raised during the hearing before the Public Service Staff Relations Board for the first time. The adjudicator held that the grievance was worded broadly enough to encompass any argument that challenges the validity of the termination of employment, including a claim that the termination was *void ad initio* because of a violation of contractual due process (such as union representation).

[46] At the time of the hearing the *Shneidman* case was awaiting judgement on judicial review. After the hearing, on March 24, 2006, the Federal Court allowed the application for judicial review and set aside the Board's decision (*Shneidman v. Canada (Customs and Revenue Agency)* 2006 FC 381). The parties were given an opportunity to make submissions on the court's decision and the employer requested that it be brought to my attention. The grievor provided a lengthy submission opposing the employer's request. He submitted that the facts in *Shneidman* were different from his case and that I was also deciding his human rights' complaint. I cannot find that there are any differences in facts or circumstances that affect the issue of whether the grievor can pursue his complaint of denial of union representation at this time. With regards to the human rights complaint this is a new issue and not one that I have any evidence about, except for the fact that a complaint was filed.

[47] It is now well established that an adjudicator appointed under the *Public Service Staff Relations Act* "does not have jurisdiction to hear a complaint that is not included in a grievance" (*Shneidman*, paragraph 19). It also follows that this applies to an adjudicator appointed under the *Public Service Labour Relations Act*. Therefore I am not authorized to review the grievor's complaint of a denial of union representation because it was not included in the original grievance.

[48] I also conclude that the grievor's application would fail in any event.

[49] The relevant clause in the collective agreement is as follows:

*17.02 When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.*

[50] The evidence about this issue begins with the meeting of October 6, 2003, between Ms. Kitson, Ms. Hopkins and the grievor. Prior to this meeting, Ms. Hopkins had identified what she considered as problems with some travel claims and she learned that separate concerns were coming from Ottawa. She testified that the grievor was not complying with the request to provide more information and she met with Ms. Kitson. They then met with the grievor on October 6, 2003 when they advised the grievor about the review of his travel claims and outlined the information they required. According to Ms. Kitson, the meeting was "not long". A letter was given to the grievor, also dated October 6, 2003, that confirmed the content of the meeting and it advised the grievor that his blanket travel authority had been withdrawn, effective immediately, and all future travel would have to be pre-authorized. The letter also stated that:

*When the review is completed, you will have an opportunity to present your views. A meeting for this purpose will be arranged in the near future, you may be accompanied by a union representative should you choose.*

[51] The grievor submits that he was denied union representation for the meeting of October 6, 2003. Specifically, he submits that the meeting was disciplinary in nature and that the removal of his blanket travel authority was a disciplinary decision by the employer.

[52] I do not agree.

[53] Based on the evidence, the purpose of the meeting was to advise the grievor of information required by the employer about the travel claims in question. It was, therefore, an investigatory meeting. It was not a disciplinary hearing to render a disciplinary decision against the grievor, to paraphrase clause 17.02. It is true that the end result of the process that was started by the October 6 meeting was discipline against the grievor, but that does not mean that the beginning of the process was disciplinary. It is well established that the right to representation does not extend to the investigatory process and this is consistent with the language of clause 17.02. To



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hold otherwise would be to conclude that an employee is entitled to representation before there has been a finding of wrongdoing. An employee has an obligation to cooperate in a *bona fide* investigation by the employer and there is no legal protection for such an employee to remain silent during the investigation, as there is in criminal law: *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, at paragraphs 71 to 79.

[54] Advising the grievor of the review of his travel claims was similarly not disciplinary. As for the decision to end the blanket travel authority, I also cannot find that was disciplinary. Travel authority is a delegated responsibility that can be revoked when, as in this case, it is prudent to do so.

[55] While it was not specifically raised, I also conclude that there was no denial of union representation within the meaning of clause 17.02 in any of the subsequent meetings. The grievor was given the opportunity to have representation present, as evidenced by the correspondence related to those meetings. At one meeting on May 7, 2004, the grievor brought a representative who participated in the meeting. The meetings with Mr. Cuthbert in January 2004 to review the travel claims at issue was an investigatory meeting and, in any event, the employer's letter of November 21, 2003 advised the grievor he could bring a representative.

[56] I deny the grievor's application on the issue of a denial of union representation.

(h) Disclosure of documents

[57] Before and throughout the hearing, there were requests from the grievor for disclosure of documents from the employer. He also obtained a number of documents through more than one application pursuant to freedom of information legislation. The employer provided many of the documents requested by the grievor and he had many documents that he had obtained on his own.

[58] At one point, the grievor requested all e-mails sent and received by a number of employees from 2001 to 2003. I denied the request stated in those broad terms and there was eventually agreement on disclosure of a more limited scope. It then came to light that the grievor's request for disclosure of documents pursuant to freedom of information legislation was incomplete. At first, I was told that in excess of 9,000 pages had been disclosed and about 480 pages were still being reviewed prior to a decision to disclose. I was then advised that the situation was the reverse, that in

excess of 9,000 pages were under review. Counsel for the employer agreed with me that disclosure pursuant to a proceeding under the *Public Service Labour Relations Act* was a separate matter from disclosure pursuant to freedom of information legislation and that I was not bound by the latter.

[59] I advised the parties that these circumstances lead me to conclude that the proceedings should be adjourned so that full disclosure could be obtained by the grievor. The grievor then stated that he had sufficient information to proceed and that he wanted to proceed. He withdrew his application for disclosure.

#### **D. EVIDENCE AND PROOF**

[60] The termination letter of May 7, 2004 describes the grievor's conduct as being "totally inconsistent with the high level of trust, honesty and integrity" required of a civil servant. I agree with the grievor that the allegation of serious misconduct by the employer against him requires a different approach to the evidence than the simple application of the balance of probabilities test. In cases of serious alleged misconduct, particularly when a person's employment and reputation are at stake the employer must demonstrate by clear, convincing and cogent evidence that the misconduct occurred; "The standard is not one of beyond a reasonable doubt but it is something more than a mere preponderance of proof" (*Gale v. Treasury Board (Solicitor General Canada - Correctional Service*, 2001 PSSRB 85, paragraphs 129 - 131, citing *Samra* (PSSRB File No. 166-02-26543, 1996) at page 21).

[61] Near the end of the employer's case the grievor advised that he would not be giving evidence. He explained that his grievance had taken a long time to be heard and that he wanted to avoid any more delays. He also submitted that he was tired from the hearing and he was not well. No medical evidence or any evidence was submitted or relied on. I suggested that he seek advice on this issue. At the end of the employer's case, the grievor advised that he decided not to give evidence.

[62] In light of this the following applies:

*Arbitrators generally have adopted the same view as the civil courts with regard to the conclusions to be drawn from the failure of a person to be called as a witness who could have been called and who could have given evidence of matters within his knowledge. Thus, where a party can, by his own testimony, throw light on a matter and fails to do so, an arbitrator is entitled to infer that such evidence would not*

*have supported his position. As well, failure to call a witness who is available to be called, where the evidence is material, can lead to the same inference being drawn and the uncontradicted evidence by the other party accepted. Moreover, where a witness's testimony is only rebutted by hearsay evidence when it could have been directly met, the arbitrator may accept the less-than-satisfactory direct evidence.*

*Donald Brown and David Beatty, Labour Arbitration in Canada (Canada Law Book: August 2005), Paragraph 3:5120*

[63] Another aspect of the evidence in this case relates to evidence obtained through examination-in-chief of the grievor's witnesses and cross-examination of the employer's witnesses.

[64] With regards to the grievor's examination of his witnesses, leading questions were often asked on critical issues; hypothetical situations and various documents were put to the witnesses. Reasonable latitude was given as the grievor was representing himself (*Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27). For example, the employer consented to a number of exhibits being entered that would not, strictly speaking, be admissible because the witness had not seen them. But when objections arose about the manner of the grievor's questioning his own witnesses, he often suggested that the witness should be declared hostile. I pointed out on more than one occasion that a witness is not hostile in a legal sense simply because he/she did not give the answer that was expected by, in this case, the grievor. In the end no witnesses were declared hostile. With regards to cross-examination of the employer's witnesses, considerable latitude was also given to the grievor.

#### **E. THE GRIEVOR'S ALLEGATION OF CONSPIRACY**

[65] In his questioning of the employer's and his own witnesses the grievor challenged some of the details of his travel claims. However, the main thrust of his case was that the allegation of abuse of travel claims was a fabrication by various people who were involved in a conspiracy against him. There are three broad elements to the grievor's theory of a conspiracy: he was dealt with improperly when he was hired by Health Canada in January 1999; another person, Ms. Hopkins, was given a job that should have been given to him; and these two events were symptomatic of a conspiracy that ultimately operated to fabricate travel claims in order to get rid of him.

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(a) Appointment to Health Canada in 1999

[66] The grievor was employed by the Department of Veterans' Affairs, Government of Canada, before he was employed by Health Canada. The evidence included letters of apology from the Public Service Commission and from Veterans' Affairs. A letter dated July 8, 1997 apologizes for "negative experiences you encountered while working as an employee with the Department of Veterans' Affairs and for the way in which your employment equity agreement was managed". However, this document was entered by consent and there was no direct evidence about the matters in the letter. The letter from the Public Service Commission was more general.

[67] The grievor cross-examined Ms. Robin Kitson, Human Resources Director of the employer. He asked her if she had told a Ms. Carolyn Fowler, in January 1999, that the letter of offer of employment from Health Canada should be withheld because of his settlement with Veterans' Affairs. Ms. Kitson denied this. An affidavit was then put to Ms. Kitson, sworn by Ms. Fowler on September 8, 2005, in which Ms. Fowler deposed that she worked as the Coordinator for Diversity and Employment Equity for Health Canada from 1997 to 2001. Further, Ms. Fowler became aware in December 1998 that Health Canada was considering hiring a member of a visible minority for a position in FNIHB and she spoke to Ms. Kitson about this.

[68] Ms. Fowler also deposed (reproduced as written):

*[6] THAT Mrs. Robin asked me if I knew "him". When I said "no" she continued to inform me that she had a Letter of Offer prepared for him however, she shared with me that there appeared to be some concern over his hiring.*

*[7] THAT Mrs. Robin Kitson continued to share information with me about what she learned from a source(s), that this same person (later known as Dr. Ayangma) had filed a complaint with/against the Public Service Commission and the Department of Veterans Affairs, had won a financial settlement. She also added that the person was directed not to apply for other Federal government jobs.*

*[8] THAT Mrs. Robin Fowler then asked what I thought about proceeding with the hiring process and I confirmed that if the candidate was screened in on the competition and found to be qualified for the job by the Interview Board, then he should be hired. This conversation ended with a statement from Robin stating that she was going to call her contacts in PEI to "... find out about him" (now known as Dr. Noel Ayangma).*

[9] *THAT subsequent to my conversation with Mrs. Robin Kitson, I then approached the late Mr. Chester Parsons who I knew was a member of the Interview Board and asked him what he could share with me about the outcome of the interview and he stated "this person (now know as Dr. Ayangma) appears to walk on water ... he is very impressive, comes well qualified for the job, has experience ... has a Ph.D. and has defended himself in Court.*

[10] *THAT Mr. Ayangma was eventually hired by Health Canada as Regional Project Coordinator in January of 1999.*

[11] *THAT I make this Affidavit in support of Dr. Ayangma's grievance against Health Canada as I believe that the actions of Mrs. Robin Kitson then and after I left the Department in 2001 may have had a negative impact leading to (1) his replacement as a fully qualified visible minority and permanent employee by an individual coming outside the public service, (2) the investigation itself and (3) Dr. Ayangma (sic) termination of employment in 2004.*

[69] Ms. Fowler also gave evidence and she confirmed the information in her affidavit.

[70] With regards to paragraph 7 of Ms. Fowler's affidavit, Ms Kitson testified that she knew those facts but she did not remember saying them to Ms. Fowler. She also said that Mr. John Montague, a Regional Director with Veterans' Affairs, approached her. He asked about the grievor and he said the grievor "should not be working because there was a settlement with Veterans' Affairs and [the grievor] should not have been referred by the Public Service Commission". Ms. Kitson told Mr. Montague that the Public Service Commission had referred the grievor to Health Canada. She also testified that she did not verify the information she received from Mr. Montague, "it was something he told me".

[71] With regards to paragraph 8 of the affidavit Ms. Kitson testified that she could not remember anything about the first sentence. She denied saying the second sentence. She explained that she did not have "contacts" in Prince Edward Island. As well, her staff does recruitment and she would not see the files that go to Interview Boards.

[72] Ms. Kitson had no knowledge of paragraph 9 and 10 of Ms. Fowler's affidavit.

[73] She agreed she spoke to Mr. Al Gorman, the then Regional Director, about reference checks for the grievor. She explained that she had a conversation with a

human resources person, Ms. Beverly Cameron, from Veterans' Affairs who advised her there had been "issues with recruitment" there. Ms. Cameron advised Ms. Kitson to do reference checks.

[74] The grievor called Ms. Cameron as a witness. She denied that she was the person who gave Ms. Kitson information about the grievor's case with Veterans' Affairs. She testified that she was at a meeting of human resource staff and, during a break among a small group, Ms. Kitson asked if anyone knew the grievor. In reply, Ms. Cameron told Ms. Kitson there might have been a settlement between the grievor and Veterans' Affairs at one time.

[75] According to the grievor this evidence supports a conclusion that the conspiracy against him started with his employment with Health Canada. He submits that Ms. Kitson in particular set about to discredit him by asking questions that were damaging to him, by passing on information that was damaging to him and by trying to sabotage his appointment to Health Canada.

[76] Taken as a whole, the evidence is that Ms. Kitson made some inquiries about the grievor's history. She had been given some general reason to check references of former staff with Veterans' Affairs in her conversation with Mr. Montague. It appears to have been widely known that there was litigation between the grievor and Veterans' Affairs and Ms. Cameron told Ms. Kitson that there "may have been" a settlement. (It was not clear on the evidence but there may have been some idea that the grievor was banned from working for the Government of Canada as a result of his settlement with Veterans' Affairs. If this was the case, it apparently was not true).

[77] I do not find any of this objectionable, especially from Ms. Kitson, a person who is responsible for the human resources activities of her department. Nor do I find it objectionable for the Director of Human Resources to ask her human resources colleagues if anyone had some information about a candidate for a position. With the knowledge that there was settlement, it was prudent to make inquiries about it.

[78] The grievor submits that the evidence demonstrates there were deliberate attempts to breach the confidentiality provisions of the agreement from his litigation with Veterans' Affairs but there was no evidence before me to support this conclusion. Finally, assuming that Ms. Kitson said to Ms. Fowler something like she understood that the grievor was directed not to apply for other federal government positions

(which was not true), this by itself does not support the grievor's assertion of a wide spread conspiracy against him. At worst, Ms. Kitson was tracking down rumours. There is no evidence that Ms. Kitson advised anyone to withhold an offer of appointment or otherwise interfered in the appointment of the grievor to Health Canada. Indeed, if the hearsay evidence from Mr. Gorman is correct, the grievor was "very impressive" to the Interview Board. Even Ms. Fowler could only speculate that what Ms. Kitson did "may have" had a negative impact on the grievor. Ms. Kitson denied that she told "someone" that the offer of employment to the grievor should be withdrawn and Ms. Fowler did not say Ms. Kitson said this.

[79] Simply put, there is no evidence that anyone sabotaged or tried to sabotage the grievor's appointment to Health Canada. I hasten to add that it is not difficult to think of examples of inquiries about candidates for employment that are inappropriate or even illegal, but the evidence in this case falls well short of those situations.

(c) Appointment of Ms. Angela Hopkins

[80] The next event in the grievor's allegation of a conspiracy against him is the appointment of Ms. Hopkins to the position of Manager, Health Information and Analysis and E-Health Solutions. This was pursuant to an interchange agreement with the Cape Breton District Health Authority.

[81] I begin by pointing out that there is no evidence of any connection between the hiring of the grievor by Health Canada and the appointment of Ms. Hopkins pursuant to the interchange agreement.

[82] It is also important to bear in mind that I am not deciding whether the grievor should have been given the position that was given to Ms. Hopkins; that was a matter decided against the grievor, by the Public Service Commission of Canada. I specifically decline to review various documents that relate to whether the grievor should have been given the position. My role is limited to a review of the evidence as it relates to the grievor's allegation of a conspiracy against him that might relate to his suspension and then termination of his employment.

[83] There is no dispute that Ms. Hopkins came to Health Canada by way of an interchange agreement with the Cape Breton District Health Authority for the period from August 2003 to August 2005. The interchange agreement was entered in

evidence and various witnesses testified that it is in the usual form. Among other things, it sets out the compensation that was paid to Ms. Hopkins as follows:

*It is agreed that Agatha Hopkins will continue to receive her salary and employee benefits from **the Cape Breton District Health Authority**. First Nations and Inuit Health Branch, Health Canada undertakes to reimburse the Cape Breton District Health Authority the sum of **\$94,276.15 per annum which includes 20% for benefits (\$78,563.46 + 20% = \$94,276.15)**, and to increase this amount by any increase that may have become due to Agatha Hopkins, during the period of assignment, under the Cape Breton District Health Authority salary system.*

[Emphasis in original]

The grievor also entered into evidence information he obtained from the Cape Breton District Health Authority about Ms. Hopkins' salary.

[84] The grievor takes exception to the salary paid to Ms. Hopkins. He submits that she was given an increase in salary to bring her to Health Canada. The evidence is that the grievor performed the duties of the manager position on an acting basis, prior to the arrival of Ms. Hopkins. The grievor submits that he should have been confirmed in the position on a permanent basis although the evidence is that he was asked to apply for the position but withdrew his application. Nonetheless, the fact that he was not confirmed and the fact that Ms. Hopkins was appointed to the position from outside Health Canada, with an increase of salary (according to the grievor's submission), means that the employer deliberately kept the grievor from the position. All of this was part of a conspiracy to keep him from the position and, in turn, was part of the larger conspiracy that led to the fabricated travel claims.

[85] Ms. Debora Keays-Whyte was a witness for the grievor, appearing pursuant to a summons. She has been Regional Director for the Atlantic Region of FNIHB since October 2003. She testified that she was reasonably familiar with interchange agreements and the processes related to them because she first came to Health Canada through such an agreement with Nova Scotia. She agreed that these agreements do not represent a promotion for the person being transferred, and she denied that an increase in salary is always a promotion; a promotion is a change in responsibility rather than a change in pay, according to her.



[86] Ms. Keays-Whyte is identified as a signatory to the interchange agreement involving Ms. Hopkins. However, Ms. Keays-Whyte testified that someone else signed on her behalf and that she had not seen the agreement until she gave evidence in these proceedings. She had no knowledge of the salary paid to Ms. Hopkins; she did not check it and she would have expected her human resources' staff to look after that. All she could say was that "if the figures are not accurate then someone made a mistake" and she understood that Health Canada would pay a salary that fell within "the range for the position". Further, she had no knowledge about who actually paid Ms. Hopkins, the Cape Breton District Health Authority or Health Canada.

[87] Ms. Keays-Whyte was shown several e-mail messages, but she could not confirm that she had read them before giving evidence. She explained that she receives 150 messages a day and that her assistant screens them for her. Further, she advised all of her managers that, if they wanted her to read a specific e-mail, they should telephone her with that message. Despite this, she agreed that she was familiar with the contents of some of the e-mails. One of these messages stated that the grievor "would win a grievance for acting pay ... dependant on the version of the work description he is working under". This referred to the grievor acting in the position that Ms. Hopkins eventually filled. Another e-mail set out the grievor's concerns about his acting capacity extending for a long time. Ms. Keays-Whyte testified she was briefed on these issues but she could not recall what, if anything, she did about them. I note that the issue of entitlement to any back pay is not before me.

[88] Ms. Keays-Whyte was asked about whether the position that Ms. Hopkins filled was the same as the position that the grievor filled on an acting basis. She denied they were the same position. She had the "discretion" to change the position and she explained that she identified a need in the department for an expanded role for the manager position as a result of discussions with colleagues and others across the country to move more towards a public health role. This changed the position so that it required knowledge of epidemiological issues (including "actual gathering of medical information") and an expanded management role. The epidemiological role for the position was referred to in the announcement to staff of the appointment of Ms. Hopkins.

[89] This position was advertised with these changes. She also explained that the grievor wanted the Atlantic Region to fill the position without a competition. This was

done for a similar position in Alberta. However, Ms. Keays-Whyte spoke to a colleague in Alberta who told her that he thought that the position in the Atlantic Region was different. She wanted the best person for the position and she decided to have a competition. Other evidence suggested that there were differences between the situation in Alberta and the Atlantic Region, including a higher percentage of communities in Alberta who had health services transferred to them.

[90] According to Ms. Keays-Whyte, the grievor was invited to fill the position on an acting basis while the position was advertised, but he withdrew from the competition because he believed the process was flawed. The changes to the position were made after he withdrew and they were substantial. She could not recall if the timing of the changes to the position related to a decision by the Public Service Commission to dismiss a complaint by the grievor about the appointment of Ms. Hopkins. About the same time, Ms. Keays-Whyte discussed the grievor's performance with his manager and observed the grievor at a meeting in a First Nation community. In her words, the meeting "did not go well".

[91] Ms. Keays-Whyte denied that the position was reconfigured so that Ms. Hopkins would get it although she acknowledged that she had Ms. Hopkins in mind because she had management experience and she was completing a Masters' degree in epidemiology. She also acknowledged that she knew Ms. Hopkins by reputation and that she was "highly recommended". The evidence is that Ms. Hopkins and Ms. Keays-Whyte knew each other professionally but they were not good friends or even friends, barely acquaintances it seems. This was also the conclusion of the Executive Director, Human Resources Services Directorate, Health Canada, in a letter dated December 8, 2003. She investigated and denied a complaint from the grievor that there was a conflict of interest between Ms. Keays-Whyte and Ms. Hopkins because they were long time, personal friends. In any event, Ms. Keays-Whyte testified that she was not part of the selection process or any other process to screen the candidates, "The decision was made by the Interview Board, not me".

[92] Ms. Hopkins was also a witness in these proceedings, called by the employer. The grievor reported to her and she reported to Ms. Keays-Whyte. When Ms. Hopkins started the position in August 2003 she was told to start a "new unit" which meant the evolution of the old unit and an expanded role for it. She testified that her salary did

not increase when she came to Health Canada from the Cape Breton District Health Authority.

[93] There is no direct evidence contradicting the evidence of Ms. Keays-Whyte or Ms. Hopkins with regards to the issue before me: whether there was a conspiracy against the grievor involving the appointment of Ms. Hopkins. The grievor attempted to prove the existence of a conspiracy by asking leading questions but his questions are not evidence and the answers he received do not support his allegation. The evidence does not support the suggestion that Ms. Hopkins was given an increase in salary as part of her interchange agreement; she denied it and other witnesses had no knowledge of the salary issue.

[94] I cannot find anything objectionable in the evidence of Ms. Keays-Whyte and Ms. Hopkins as it describes what can only be described as the normal management and operations of any modern organization. Ms. Keays-Whyte identified a need to change the position that the grievor was filling on an acting basis. He was given the opportunity to fill the altered position on an acting basis but he declined and he withdrew from the competition for this position. Ms. Hopkins was known only by reputation by Ms. Keays-Whyte and the decision to appoint her to the position was made by somebody else. Significantly, Ms. Keays-Whyte did not sign the interchange agreement that brought Ms. Hopkins to Health Canada and she could not recall seeing it before she gave evidence. The evidence falls well short of demonstrating a conspiracy against the grievor.

[95] Finally, I note that, in a letter dated July 18, 2003, the Public Service Commission declined to investigate the grievor's complaint that the process leading to the appointment was flawed. The complaint alleged that the position should have been awarded to the grievor without a competition, as had been done in Alberta. The basis for the Commission's denial was that the "decision to initiate or to cancel a competitive process and to appoint pursuant to [legislation] falls within the discretionary powers of a delegated manager and the Public Service Commission has no authority to intervene in this regard". This is consistent with the testimony of Ms. Keays-Whyte, the delegated manager.

(c) Travel Claims

[96] The final element in the grievor's allegation of a conspiracy is that Ms. Hopkins, Ms. Kitson and about seven other employees within Health Canada conspired to get rid of him by means of the fabrication of the false travel claims.

[97] This allegation can be dispensed with summarily.

[98] The thrust of the allegation is that the improprieties with the appointment of the grievor in January 1999 and the appointment of Ms. Hopkins in August 2003 amounted to a conspiracy to keep the grievor out of the position that Ms. Hopkins filled. The conspiracy continued to the point of fabricating travel claims in order to finally get rid of him. Logically, I am urged by the grievor to decide that the claims were fabricated because there was a previous conspiracy against him. As I do not accept that there was anything approaching a conspiracy prior to the employer raising the issue of abuse of travel claims, the grievor's submission must fail.

[99] The other problem with this submission is that there is no evidence that the employer fabricated the travel claims. Mr. Cuthbert, who audited the claims and gave lengthy evidence about them, was challenged in cross-examination about his objectivity on more than one occasion but his evidence was professional and impartial. It is also significant that concerns about the grievor's travel claims came from two sources, Ms. Hopkins as well as a routine audit done in Ottawa. It stretches credulity to the breaking point to suggest that the conspiracy to get rid of the grievor extended to those in Ottawa responsible for routine audits of travel claims. Finally, with regards to the claims themselves, as will be seen, the employer's evidence stands on its own.

[100] For these reasons, I find that the evidence does not support a conclusion that the grievor was terminated from his employment as a result of a conspiracy against him.

**F. THE GRIEVOR'S TRAVEL CLAIMS**

[101] The employer primarily relied on evidence from Mr. John Cuthbert with regards to twenty of the grievor's travel claims. Mr. Cuthbert is a Senior Auditor with the Audit and Accountability Bureau, Health Canada. Among other qualifications, he is a Certified General Accountant and a Certified Fraud Examiner.

[102] Mr. Cuthbert testified that he received a request from his manager to review the grievor's travel claims. He travelled to Halifax and did an initial review of a small number of claims and some irregularities were identified. He then looked at a larger group of claims and then he looked at all travel claims because the irregularities continued. As he put it, he "had to go back to day 1".

[103] Mr. Cuthbert met with the grievor in Charlottetown on January 19 and 20, 2004 "to clear up any misunderstandings I may have had". They went through each of the travel claims identified by Mr. Cuthbert as problematic. The grievor saw all the claims and answered Mr. Cuthbert's questions.

[104] Mr. Cuthbert prepared a "Draft" report and this was dated February 2, 2004. He testified that he did not complete a final report with final conclusions. In fact, there are two other reports with the same title, dated April 28, 2004 and May 5, 2005; neither has "Draft" on it. Mr. Cuthbert was not aware of the April and May versions of the report as he left the AAB in late February 2004 and he had "no input after" the February version of the report. The evidence did not describe how the April and May versions of the report were prepared. Ms. Kitson and Ms. Archer testified that they only used the report dated April 28, 2004 and they did not recall seeing the other versions. The employer entered the February report in evidence and the April and May versions of the report were entered in evidence by the grievor. A complicating factor is that there are two versions of the April report, one with "Draft" on it and another without "Draft" on it. They appear to be the same except for this.

[105] There are differences between the three versions of the report. The February version is obviously incomplete because, under the heading of "Resources", it states "The work started in October 2003 and was completed ...", without finishing the sentence. The April version is a complete version as it completes that sentence, adds a number of appendices, it has more detailed "Results" and it includes an "Overall Conclusion", among other changes. The April version also has a more detailed description of the grievor's responses to the travel claims at issue.

[106] The May version of the report has some differences in the amounts of travel claims in 2001/2002, compared with the April version. The narrative of the two versions appears to be the same except for two matters. The April version states that the grievor appeared in front of a Parliamentary Committee on February 13, 2003 in Ottawa and it stated "this was business not related to [Health Canada] business nor

authorized by [Health Canada] ... 1 day should have been recorded as leave". The May version of the report states that the grievor appeared before the committee in Charlottetown and one-half day leave should have been recorded. It also includes details about the grievor's status during the day of the committee hearing.

[107] The grievor takes great offence to the reference to his attendance in Ottawa for the committee hearing. He submits that was an error. I accept that it was an error in the April version of the report but I am not persuaded that it is of great significance. I note that, in these proceedings, the employer did not rely on February 12, 2003 as a day when the grievor made a false travel claim. Indeed, it was the grievor rather than the employer who identified this error. It follows that I do not agree with the grievor that the error of identifying Ottawa rather than Charlottetown as the location of the Parliamentary committee hearing was a deliberate calculation by the employer.

[108] It is true that the April version of the report contained the error that the grievor was in Ottawa for the hearing and the same report was the basis for the employer's decision to terminate the grievor. However, I cannot conclude that this error invalidates the entire report. In any case, this is a *de novo* hearing of the grievances and, I am adjudicating whether the employer had just cause to terminate the employee. The three reports are evidence that I am considering in that adjudication and, as will be seen below, I have relied on Mr. Cuthbert's evidence rather than his draft report (or any report) in my deliberations (*Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (F.C.A.)).

[109] Another matter raises with the April report that has "Draft" on it. According to the grievor, this is very significant to my deliberations because a witness for the employer agreed with him that she would not terminate an employee on the basis of a draft report. And the May 7, 2004 letter, terminating the grievor from his employment, referred to the April version of the report as a "Final" one. It is not clear which April report was used by the employer when it said "Final"; it could well have been the version that did not have "Draft" on it. In any case, again, I have reviewed all the evidence available to me and made my own findings and conclusions about whether the employer had just cause to suspend and terminate the grievor.

[110] Mr. Cuthbert was cross-examined at some length on behalf of the grievor about his review of the grievor's travel claims. The employer also relied on witnesses who

testified about their telephone numbers and some specific calls with the grievor. This evidence is discussed below.

[111] It is useful to review some general information about how Mr. Cuthbert proceeded in his investigations and then evidence.

[112] The approach used by Mr. Cuthbert was to review each of the grievor's travel claims and compare the itineraries described in the claims with the grievor's cell phone records. The grievor's cell phone record describes each call made from the cell phone by date, time, "originating location" (calls made from the phone by location) and "Incoming" calls, "called number" and "called location" (the location called or the location of incoming calls). The billed time of each call, whether the call was long distance and the cost are also recorded.

[113] The employer owned the grievor's cell phone, it was provided to the grievor and no other person had use of it, according to Mr. Cuthbert. Mr. Cuthbert testified that he found a number of "inconsistencies" where the telephone was in one place and the travel itinerary had the grievor in another place. For example, on some occasions the travel itinerary showed the grievor was travelling to First Nations communities but the cell phone record showed the grievor's cell phone was being used in his hometown of Charlottetown.

[114] In general, I have used the record of the grievor's cell phone as being evidence of where the cell phone was used. That is, the record of the cell phone does not necessarily prove that the grievor was in the same place as the telephone, although something of an inference may arise, especially without the grievor's evidence to explain the use of his telephone. Where other evidence corroborates the cell phone record then a conclusion may be appropriate that there is clear and convincing proof that the telephone and the grievor were in the same place. For example, where there is clear evidence of specific calls from the grievor that confirm the cell phone record, an inference can be made that the telephone and the grievor were in the same place. It follows that, generally, I have looked for other evidence that is corroborative of the cell phone record to determine where the grievor was at the material times. For example, the grievor made some admissions in conversations with Mr. Cuthbert that assist in identifying where he was at the material times.

[115] The grievor cross-examined the employer's witnesses about their evidence on cell phone calls they received from him. He also called Ms. Jennifer Dobbelsteyn as a witness. She testified that she had previously been a colleague of the grievor and she answered his cell phone when he was not available. It also "happened quite a bit" that the grievor's cell phone was not charged up and he lost it more than once. From this I conclude that, if the phone was not charged up, it would not be able to make or receive calls at all and no calls would be recorded on the cell phone record. I also note the extensive cell phone records of calls from the grievor's phone. From this, I conclude that he had a general facility with the technology as demonstrated by his frequent use of it.

[116] Ms. Dobbelsteyn also testified that she frequently talked to the grievor's wife and family when they called to ask where he was. I take it this evidence was presented to support the grievor's submission that other people used his cell phone so the employer could not rely on the cell phone records to indicate where he was located. Some witnesses acknowledged it was "possible" that some calls could have been made from a telephone other than the grievor's. Other than this evidence, the idea that someone other than the grievor made the calls at issue was primarily made in argument only or as part of leading questions in cross-examination. There was no evidence from the grievor or anyone else (such as the grievor's family) to the effect that others used the grievor's phone. And, in cross-examination, Ms. Dobbelsteyn was asked if she ever made any outgoing calls with the grievor's phone and she replied that she could not remember making outgoing calls because she always had her phone with her.

[117] Mr. Cuthbert also reviewed receipts for expenses such as hotels, car rentals and toll bridges. In some cases, receipts were lost and a form required a declaration to that effect. "Personal accommodation" was also claimed by the grievor on a number of occasions. This is available to an employee if he stays, for example, with a friend rather than in a hotel. A payment of \$50.00 is permitted but it is not permitted when an employee stays at home; travel status ends when the travel ceases. Finally, there were a number of changes to meal allowances on the travel claims, but the employer made these and they reflect regular changes in the amount of these allowances. These changes are not controversial and they are not an issue before me. When I have referred to the amounts of money claimed by the grievor for his travel expenses I have



used the actual amount he claimed, not the amount that resulted from the changes made by the employer.

[118] A travel claim typically includes two forms to be filled out by the employee who is travelling.

[119] The first is called a Travel Expense Form (TEF) that itemizes things such as meal allowances and it has total amounts for things such as vehicle use, public transportation and accommodation. The TEF is signed by the employee to certify that the “amounts included in this claim were incurred on authorized government travel”. And the TEF is also signed by another person (sometimes the supervisor of the travelling employee) who is authorized, under section 34 of the *Financial Administration Act*, to certify a travel claim under that legislation.

[120] The second document is called a Record of Travel Expenses (RTE). It requires the employee to record, on a daily basis, an itinerary of the trip being claimed, including times, dates and some details of his activities. Details in this case typically include mileage for use of a personal vehicle, toll bridge cost (Confederation Bridge, between Prince Edward Island and New Brunswick), personal accommodation (as above), car rental, fuel, hotel, meals and incidentals. Meals and incidentals are set amounts pursuant to policy of the employer.

[121] With the above in mind, I have considered evidence of the following travel claims:

(a) July 27 - August 1, 2003

[122] The RTE submitted by the grievor shows that he left Charlottetown at 3:30 p.m. on July 27, 2003 for a trip by car to Halifax and then Eel River Band, New Brunswick. He remained in Halifax until July 30 when he drove to Eel River, New Brunswick. He stayed at Eel River on July 31 and he went back to Charlottetown on August 1, 2003. Expenses charged included mileage for his car, toll bridge cost (the receipt was declared by the grievor to be “lost or misplaced”), hotel, meals and incidentals. The total claim was \$1,350.93. The grievor’s signature on the TEC certified this amount was incurred on authorized government business travel.

[123] The record for the grievor’s cell phone shows a call from Toronto at 3:27 p.m. on July 27 that is not consistent with the RTE. Five other calls were made from

Toronto on the same date, the last being at 4:22 p.m. Then calls were made to Charlottetown, Regina (Saskatchewan, where the phone had been on July 26, 2003) and to an “800 service”. The phone was then (still July 27) used in Halifax starting at 8:12 p.m. (there is a one hour time difference between Toronto and Halifax) for calls to Charlottetown and Regina. The phone remained in Halifax on July 28 and 29. On July 30, it was in Halifax at 11:47 a.m. and then in Charlottetown at 12:41 p.m. There is no record that the grievor’s phone was in the Eel River area. Other witnesses who were colleagues of the grievor at Health Canada testified about their exclusive telephone numbers and some of these were called from the grievor’s cell phone when it was in Charlottetown.

[124] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, “dates could be off one day/confused in answer?”. This was confirmed in Mr. Cuthbert’s testimony. He also explained in his evidence that the reference to the grievor being confused meant, “I did not believe he believed his answer”.

[125] The evidence also included an electronic airplane ticket that shows the grievor was in Toronto on July 27. He left Halifax for Toronto on July 19, travelled to Regina on July 19 and then returned to Toronto on July 27. On July 28, he travelled from Toronto to Ottawa and then to Halifax. This airplane ticket is consistent with the cell phone record to the extent that the airplane ticket and the cell phone record both indicate that the grievor was in Toronto on July 27. The cell phone was in Halifax from July 27 to July 30 when it returned to Charlottetown. The airplane ticket suggests the grievor did not arrive in Halifax until July 28 and this is consistent with the grievor’s statement that the dates “could be off one day”. I also note the “lost or misplaced” toll bridge receipt.

[126] The evidence supports the grievor being in Halifax for part of July 27 until July 30, consistent with his travel claim. However, the airplane ticket corroborates the cell phone record that the grievor was in Toronto on July 27 and his travel claim says he was in Charlottetown, the departure point for the trip he claimed. I conclude that the grievor travelled from Toronto to Halifax, not from Charlottetown to Halifax. The “lost or misplaced” toll bridge to Prince Edward Island receipt was declared by the grievor to be for July 30, 2003. This is consistent with the cell phone record that has

his phone in Charlottetown that day. It is not consistent with the RTE that claimed he was in Eel River from July 30 until August 1.

[127] Overall, I find that the grievor's travel claim for his expenses from Charlottetown to Halifax on July 27, 2003 was false. I also find that he returned to Charlottetown on July 30, 2003 and his claim for expenses for July 31 and August 1, 2003 was false.

(b) July 15 - 18, 2003

[128] The grievor's RTE shows that he left Charlottetown at 5:40 a.m. on July 15, 2003 for "Travel to Halifax Office" for a regional management meeting. According to the RTE he drove to Eel Ground, New Brunswick, on July 16, leaving Halifax at 3:30 p.m. He was at Eel Ground the nights of July 16 and 17 and then he drove back home to Charlottetown on July 18. The grievor claimed expenses for mileage for his car, toll bridge cost (with receipt), personal accommodation for three nights, meals and incidentals. The total claim was for \$843.41. The grievor's signature on the TEC certified this amount was incurred on authorized government business travel.

[129] The record for the grievor's cell phone shows that the grievor's cell phone was in Charlottetown on July 15 and then it moved to Halifax (for a call at 7:41 p.m.). This, and the toll bridge receipt, are consistent with the RTE. However, the cell phone returned to Prince Edward Island on July 16 (a call was made from Borden, the entry point at the north end of Confederation Bridge, at 3:45 p.m.). Then the phone was used to make sixteen calls from Charlottetown and there were four incoming calls to Charlottetown on July 17. Similarly, there were a number of calls from Charlottetown on July 18. Other witnesses who were colleagues of the grievor at Health Canada testified about their exclusive telephone numbers and some of these were called from the grievor's cell phone when it was in Charlottetown. For example, there were three calls from Charlottetown to the office number of Mr. Peter MacGregor, the grievor's supervisor, late on the morning of July 17.

[130] In his interview with the grievor Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, "went early to Eel Ground and came back/PA [personal accommodation] = stay at home". Mr. Cuthbert confirmed these comments in his testimony and he explained that the latter comment meant that the grievor said he stayed at his residence in Charlottetown

but charged the employer for personal accommodation. The issue of personal accommodation arises with some frequency below. Mr. Cuthbert estimated that returning home every night to Charlottetown would cost \$38 for the toll bridge cost for a \$50 benefit to the grievor for personal accommodation. He was sceptical about the feasibility of this from a cost point of view.

[131] I conclude there was a valid claim for travel expenses for July 15 (including personal accommodation that night) and part of July 16. The cell phone record and the RTE are consistent for those dates.

[132] With regards to the period of July 16 to 18, the grievor's admission that he stayed at home, while claiming for personal accommodation expenses, supports a conclusion that the claim for personal accommodation for two nights, July 16 and 17, was false. This admission also supports an inference that the grievor was in Charlottetown during the day on July 16 and 17 as well. This is consistent with the cell phone record. On the basis of the cell phone record and the grievor's admission, I conclude that he travelled directly from Halifax to Charlottetown on July 16. Then he did not leave Charlottetown and his travel claim for July 16 (portion of), 17 and 18, 2003 was false.

(c) June 23 - 26, 2003

[133] The grievor's RTE shows that he left Charlottetown by car at 10:20 a.m. on June 23, 2003 for a trip to Halifax. According to the RTE he was in Halifax until June 25 when he travelled to Buctouche, New Brunswick. Then he travelled to Moncton and Indian Island (also in New Brunswick) on June 26, he returned home to Charlottetown on the same day. The grievor charged for mileage for his car, personal accommodation at Eel Ground, toll bridge cost (with receipt), hotel, meals and incidentals for a total of \$971.57. The grievor's signature on the TEC certified this amount was incurred on authorized government business travel.

[134] The record for the grievor's cell phone indicates that the phone was in Halifax on June 23 and 24, consistent with the RTE. Then the cell phone was in Charlottetown on June 24 for a call made at 8:35 p.m. The phone remained on Prince Edward Island for twelve calls made from Charlottetown on June 25. Then, on the same day, three calls were made from Moncton, New Brunswick, at 5:23 p.m., 5:24 p.m. and 5:25 p.m. The same day there were calls made from Toronto and Hamilton, Ontario, and the

phone remained in Hamilton for several calls until June 28, when it made calls from other locations in Ontario. The phone then moved east as indicated by several calls made from Ontario and New Brunswick. It returned to Charlottetown on June 29 for a call made at 9:27 p.m.

[135] In his interview with the grievor Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "PA [personal accommodation] = stay at home/took vacation to go to Hamilton (flew to Hamilton) 25/26 June. - had trip going. - claime (sic) 26<sup>th</sup> back". This was confirmed in Mr. Cuthbert's testimony and he also testified that the grievor "clearly stated that he took vacation days".

[136] The grievor's admission that he took vacation in Hamilton, his admission that he stayed at home while claiming for personal accommodation and his cell phone record support a conclusion that the grievor was not where he claimed to be in his travel claims.

[137] I find that the grievor's claim for expenses for the period June 24 - 26, 2003 was false.

(d) June 2 - 5, 2003

[138] The grievor's RTE shows that he left Charlottetown by car at 5:30 a.m. on June 2, 2003 for "Travel to Madawaska", New Brunswick, for a "site visit". According to the RTE he drove to Moncton on June 3 where he stayed using personal accommodation. Then he travelled to Halifax on June 4 where he stayed until he returned to Charlottetown on June 6. He claimed for mileage, personal accommodation, toll bridge cost (a "misplaced" receipt was declared), hotel, meals and incidentals. The total claimed was \$1,458.57. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[139] The cell phone records indicate that the grievor was in Charlottetown on June 2 and 3. This is not consistent with the RTE. Then, on June 4, there are calls made from Nova Scotia, apparently en route to Halifax. The phone was in Halifax from 8:34 a.m. on June 4 until June 6 when there were a number of calls made from other locations in Nova Scotia. The phone entered Prince Edward Island at 7:08 p.m. on June 6 and it was in Charlottetown for a call at 10:12 a.m. that day.

[140] In his interview with the grievor Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, “may have left cell phone @ home/PA [personal accommodation] = stay at home”. This was confirmed in Mr. Cuthbert’s testimony. He also was sceptical that the telephone calls were accurate for one day but they were not for the day that the grievor claims that he left the telephone at home.

[141] The employer also relied on two other documents with regards to this claim. A Judgement from the Prince Edward Island Supreme Court - Trial Division, dated November 18, 2003 (2003 P.E.I.J. No. 109), relates to litigation between the grievor and the Prince Edward Island Human Rights Commission. The judgement records that the grievor appeared on “his own behalf” at a hearing on June 3 and June 13, 2003.

[142] Another document is an “Applicant Moving Party Motion Record” filed by the grievor in litigation that he was a party to in the Federal Court of Canada, Trial Division (File No. T-900-03). The Notice of Motion included in this document is signed by the grievor and beside the signature is the statement, “DATED at Charlottetown, this 3<sup>rd</sup> day of June 2003”. The address, telephone number and fax number of the grievor are also listed. Also, Ms. Sandra Doucette, a lawyer with the Civil Litigation Section, Department of Justice, testified that she was in court with the grievor, in Halifax, June 5, in the morning, for this litigation.

[143] Finally, Mr. Peter MacGregor testified and produced a diary entry for June 2, 2003. This records a telephone call from the grievor as follows: “Noel @ 4:30 cell”. The cell phone record lists a call from the grievor’s cell phone in Charlottetown on that day at 4:30 p.m. to Mr. MacGregor’s exclusive phone number.

[144] I can only conclude that the grievor was in Charlottetown on June 2 and 3 when he claimed travel in New Brunswick. The evidence is strong from the cell phone records, the two court documents, the court appearance, the telephone call to Mr. MacGregor and the grievor’s admission that he was at home and claimed personal accommodation expenses. I have considered the grievor’s statement to Mr. Cuthbert that he left his phone at home but this is contradictory to his other statement that he stayed at home and charged for personal accommodation. It is also contradictory to the strong evidence placing the grievor in Charlottetown. Finally, the grievor was in court on the morning of June 5, when he should have been on leave or working.

[145] It follows that the grievor made false travel claims for June 2, 3 and the morning of June 5, 2003.

(e) May 13 - 17, 2003

[146] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 6:30 a.m. on May 13, 2003 for travel to Halifax for a "site visit". Later the same day, according to the RTE, he was in Moncton, Fredericton, and Mawiw. He then travelled to the Halifax airport to rent a car and was at "Mawiw Mtg" on May 14. On May 15 he was at "River Valley Mtg" then on May 16 he travelled to Halifax, returning to Charlottetown on May 17. He claimed for mileage, car rental, fuel, personal accommodation, hotel, toll bridge cost (with receipt), meals and incidentals. The total claim was \$346.58. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[147] The cell phone record indicates that the grievor's phone was in New Brunswick at 7:32 a.m. on May 13, and then it was in Halifax for most of that day, ending up in Moncton that evening. On May 14 and 15 the phone was in various places in New Brunswick. At 11:36 a.m. on May 16 the phone was in Charlottetown. The inconsistency here is that the RTE states that the grievor was in Halifax on July 16 but the cell phone record suggests that the grievor was in Charlottetown that day.

[148] Car rental documents for this trip indicate that a car was rented on May 13 at the Halifax airport but returned to a Halifax hotel on May 20. This is not consistent with the RTE because that document states that the grievor returned to Charlottetown on May 17. It is also not consistent with the cell phone record that suggests that the grievor was in Charlottetown on May 16.

[149] In his interview with the grievor Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, "Private Accom/Stayed the night @ home". This was confirmed in Mr. Cuthbert's testimony.

[150] The evidence for this travel claim only supports a conclusion that the grievor falsely claimed for personal accommodation for May 15 and 16. That was his admission to Mr. Cuthbert. As Mr. Cuthbert put it, the evidence about the other expenses was "odd", but this is not clear and convincing proof.

(f) April 13 - 16, 2003

[151] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 7:40 a.m. on April 13, 2003 for "Travel to Halifax and Annapolis Valley". The RTE indicates that he was in the Annapolis Valley on April 14 and then in Halifax on April 15. On April 16, he travelled to Fredericton for a "Tele-Health meeting" on that day and also on April 17. He returned to Charlottetown at 9:00 p.m. on April 17. Expenses claimed included mileage, toll bridge cost (with receipt), personal accommodation, hotel, meals and incidentals totalling \$1,252.74. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[152] The cell phone records are consistent with the first part of the RTE, since they indicate that the phone was in Halifax on April 13. But then the phone returned to Charlottetown late on April 14 and was there until it entered New Brunswick early on April 15. The cell phone records are consistent with the RTE for April 16 and 17.

[153] In his interview with the grievor Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "14 left cell at home/private accom came home". This was confirmed in Mr. Cuthbert's testimony and he explained that this meant that the grievor said that his phone was at home on April 14 and that he claimed for private accommodation when he stayed at home.

[154] I conclude that there was a valid travel claim for April 13 (portion of), 15 (portion of), 16 and 17, 2003. A hotel receipt confirms that the grievor stayed in Halifax the night of April 15.

[155] The grievor's admission that he stayed at home, while claiming for personal accommodation expenses, supports a conclusion that the claim for personal accommodation for April 13, 14 and 16 was false. I also conclude that the grievor was in Charlottetown on April 14 when he claimed to be travelling. This can be inferred from the admission that he stayed in Charlottetown the nights of 13 and 14 and it is consistent with the cell phone record. The travel claim for April 14, therefore, was false. The cell phone record also suggests that the grievor was in Charlottetown all day on April 17 when he claimed to be travelling. This is consistent with him staying in Charlottetown the night of April 16. I conclude that the travel claim for April 16 was false.



[156] With regards to the grievor's statement to Mr. Cuthbert that he left his cell phone at home on April 14 this does not, first of all, explain April 16. Also, on April 14, seventeen calls were made from the phone from Charlottetown. There was no evidence that these calls were made by other people. As well, this number of calls suggests that no one else used the phone because it was left at home.

(g) March 15 - 21, 2003

[157] The grievor's itinerary on the RTE shows that he left Charlottetown by car on the morning of March 15, 2003 for "Travel to Halifax". The RTE indicates that he was in Halifax on March 16 and 17 and then he travelled to Moncton on March 18. On March 19, he was in "Moncton - Big Cove", on March 20, he was in "Big Cove - Eel Ground" and then he returned to Charlottetown on March 21. He claimed mileage, personal accommodation, hotel, toll bridge cost (with receipt), meals and incidentals for this trip. The total claim was \$1406.50. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[158] The cell phone record indicates that the grievor's phone left Prince Edward Island about 10:30 a.m. on March 15 and, consistent with the RTE, it travelled to Halifax where it stayed on March 16 and 17. But the phone was back in Charlottetown at 8:19 p.m. on March 17, where it stayed for March 18 - 21.

[159] In his interview with the grievor Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "Private accommodation - stayed at home/when leave early in the morning forget phone/did not have cell with him/does not recall some of the telephone #'s called". This was confirmed in Mr. Cuthbert's testimony.

[160] The employer also relied on the evidence of Mr. Peter MacGregor, the grievor's supervisor at one point. Mr. MacGregor testified and produced notes of telephone calls he had with the grievor on March 18 and 21. In both cases, the grievor initiated the calls from Charlottetown. The note of March 12 includes the grievor's cell phone number under the grievor's name. Mr. MacGregor also identified his exclusive telephone number and the cell phone record lists this number as being called by the grievor on March 17 and 21. The call on March 21 was recorded in the cell phone record as occurring at 3:32 p.m. and Mr. MacGregor's notes of that call record it happening at 3:30 p.m..

[161] In cross-examination Mr. McGregor testified that these calls could have been made from a phone other than the grievor's cell phone. This is unlikely for the March 21 call as the note includes the grievor's cell phone number and the time of the call on the cell phone record and the time in Mr. MacGregor's note are essentially the same. It is true that Mr. Macgregor's recollection of the length of the calls did not correspond with the length of the calls as noted on the cell phone record. However, since more than two years has passed between Mr. MacGregor's evidence and the calls in dispute, I do not think his estimate of the length of the calls should be given undue weight. Finally, at some point an explanation from the grievor is needed to explain the evidence that is against him; the evidence has developed well past that point.

[162] I find there was a valid travel claim for March 15, 16, 17 (portion of), 2003. A hotel receipt confirms the grievor stayed in Halifax the nights of March 15 and 16.

[163] The grievor has admitted staying in Charlottetown and claiming personal accommodation expenses and this is consistent with the cell phone records. I find the travel claims for personal accommodation expenses on March 17, 18, 19 and 20 were false. At least some of the meal and incidental expenses claimed on the RTE would, therefore, also be false.

[164] The cell phone record suggests that the grievor was in Charlottetown from late March 17 until March 21, when he declared he was travelling on government business. The grievor has admitted that he stayed at home on the night of March 17, 18, 19 and 20 and this supports an inference that he stayed in Charlottetown during those days. Finally, the records of the grievor's calls to Mr. MacGregor clearly place the grievor in Charlottetown on March 18 and 21.

[165] I find that the grievor's travel claim for March 17 - 21, 2003 was false.

(h) January 12 - 17, 2003

[166] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 9:00 a.m. on January 12, 2003 for "Travel to Oromocto", New Brunswick. He was in Oromocto on January 13, travelled to Moncton on January 14 and travelled to Big Cove on January 15. On January 16, he travelled to Red Bank and then returned to Charlottetown on January 17. The grievor claimed personal accommodation expenses (January 12, 14, 15, 16), car rental, fuel, meals and incidentals. Total expenses were

\$1,185.49. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[167] The cell phone record indicates that the grievor's phone travelled to Moncton and other locations in New Brunswick on January 12. However, the phone was in Charlottetown for a call at 8:39 a.m. on January 13 and it stayed in Charlottetown all of January 13 and 14. It then travelled to Nova Scotia and New Brunswick on January 15 before returning to Charlottetown the same day. A call was made from Charlottetown at 8:30 p.m. on January 15 and the phone made numerous calls from Charlottetown on January 16 and 17.

[168] The grievor also claimed expenses for the rental of a car on two occasions, from January 11, 2003 and returning on January 13 and from January 13 to January 18. The cars were returned to Charlottetown in each case. The mileage for the first rental was 105 kilometres and 90 kilometres for the second rental. Mr. Cuthbert testified that the total kilometres were much lower than he would have expected for a trip as described in the RTE.

[169] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "private accommodation - stayed at home". This was confirmed in Mr. Cuthbert's testimony.

[170] I conclude there was a valid claim for travel on January 12 and during the day of January 15, 2003.

[171] However, I also conclude that the grievor was in Charlottetown on January 13, 14, and on the nights of January 15 and January 16. This is supported by the grievor's admission to Mr. Cuthbert that he stayed at home while claiming expenses for personal accommodation, the car rental receipt has the grievor in Charlottetown on January 13 and it is also supported by the cell phone records.

[172] It follows that the grievor's claim for travel expenses for January 13, 14, and the night of January 15 and January 16, 2003 was false.

(i) January 6 - 9, 2003

[173] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 7 a.m. on January 6, 2003 for "Travel to Eel River Band", New Brunswick. He was in Eel

River Band on January 7 and in Pabineau, also in New Brunswick, on January 8. He returned to Charlottetown the morning of January 9. He claimed expenses for car rental, fuel (he declared a receipt for \$52 lost, “did not ask for receipt for gas”), toll bridge cost (declared “lost” receipt), personal accommodation (January 6, 7, 8) meals and incidentals. The total claim was \$802.78. The grievor’s signature on the TEC certified these expenses were incurred on authorized government business travel.

[174] The cell phone record indicates that the grievor’s phone did not leave Charlottetown on January 6, 7, 8, and 9, making or receiving about sixty calls in those four days.

[175] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert’s recorded the grievor as saying, “came home for night → private accomm/left cell phone at home others used it”. This was confirmed in Mr. Cuthbert’s testimony.

[176] Mr. Peter MacGregor also gave evidence related to the period of this travel claim. He provided an entry from his notebook dated January 7, 2003. He explained that he usually records, in writing, voice messages that he receives. In this case, the entry of January 7 was of a message received from the grievor on Mr. MacGregor’s voice mail. No time was recorded. The cell phone record lists seven calls from the grievor’s phone in Charlottetown to Mr. MacGregor’s exclusive telephone number at work on January 7.

[177] In cross-examination Mr. MacGregor acknowledged that he could not say if the message that he received came from a cell phone. I take this as self-evident. He also acknowledged that he could not say if it was the grievor’s wife who had called him from the cell phone. This is also self-evident and, in my view, not of great importance. I conclude that Mr. MacGregor’s evidence, on its own, is no more than a record of a telephone message from the grievor on January 7. There is an inference that the call came from Charlottetown, based on the number of calls from Charlottetown and the date. However, it is not a strong inference. On the other hand, it seems quite unlikely that anyone other than the grievor would be calling Mr. MacGregor, from the grievor’s phone and seven times in one day.

[178] Overall, I conclude that the grievor never left Charlottetown on January 7, 8 and 9. The cell phone records, and the grievor’s admission to Mr. Cuthbert support this conclusion. Mr. MacGregor’s record of a voice message from

the grievor in Charlottetown on January 7 is not strong on its own as an indication that the grievor was in Charlottetown on January 7 but it is corroborative of the other evidence. I note the grievor's statement to Mr. Cuthbert that he left his cell phone at home and others used it. There is no evidence of this other than the statement from the grievor to Mr. Cuthbert.

[179] It follows that the entire travel claim for January 7, 8, and 9, 2003 was false.

(j) December 9 - 12, 2002

[180] The grievor's RTE shows that he left Charlottetown by car at 6 a.m. on December 9, 2002 for "Travel to Millbrook", Nova Scotia. He travelled to Pictou Landing on December 10, to Indian Brook on December 11, to Halifax on December 12 and then returned to Charlottetown the morning of December 12. He claimed mileage and stayed in personal accommodation for December 9, 10, 11 and 12. He also claimed expenses for a car rental, fuel, meals and incidentals for a total of \$923.21. His signature on the TEC certified these expenses were incurred on authorized government business travel.

[181] The cell phone record indicates that the grievor's phone did not leave Charlottetown on December 9, 10, 11 and 12, making fifty-seven calls and receiving twenty-one calls, in those four days.

[182] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "Millbrook meeting may have been in evening/private accom → stayed @ home". This was confirmed in Mr. Cuthbert's testimony who also questioned the mileage of a rented car.

[183] I conclude that the grievor never left Charlottetown on December 9, 10, 11 and 12. The cell phone records and the grievor's admission that he stayed at home and claimed for personal accommodation support this conclusion. The car rental receipt describes mileage of 295 kilometres and that is well short of the mileage expected for the trip listed on the RTE, from Charlottetown to Halifax and return with some business stops along the way. The grievor's suggestion that the Millbrook meeting may have been in the evening is not a credible response to the facts that were presented by Mr. Cuthbert to the grievor.

[184] It follows that the entire travel claim for December 9, 10, 11, and 12, 2002 was false.

(k) November 5 - 8, 2002

[185] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 6 a.m. on November 5, 2002 for a visit to Pictou Landing and other bands in Nova Scotia on November 6 and 7. He returned to Charlottetown on November 8. He claimed for personal accommodation, meals, car rental, fuel, ferry and incidentals for a total claim of \$852.30. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[186] The cell phone record indicates that the grievor's phone made thirty-two calls from various communities in Nova Scotia on November 5, consistent with the RTE. But the phone was back in Charlottetown the same afternoon (2:33 p.m.) and it remained there on November 6, 7 and 8. Twenty-three calls were made from Charlottetown and eleven were received over those days.

[187] A car was rented in Charlottetown on November 4 and returned there on November 9. This expense in the amount of \$319.40 was claimed by the grievor and the receipt shows that fifty kilometres were driven. Mr. Cuthbert testified that the mileage required to be in all of the communities where the calls were made from was "significantly" in excess of fifty kilometres.

[188] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, "private accommodation = went home to Charlottetown/not always met person from Avis → sometimes parked car at NA's house and sometimes parked at Avis lot". This was confirmed in Mr. Cuthbert's testimony and he explained that "NA" referred to the grievor.

[189] I conclude that the grievor travelled until about 2 p.m. on November 5 and was legitimately entitled to expenses for that travel. The low kilometres on the car rental are troubling as it appears that the car did not go far, but I find that is inconclusive. I also find that the grievor returned to Charlottetown on the afternoon of November 5 and remained there until November 8, when he claimed to be travelling in Nova Scotia. The grievor's admission that he stayed at home but claimed for personal accommodation corroborates the cell phone records. Finally, the grievor's reference to

where he parked the rented car is not responsive to the information provided to him by Mr. Cuthbert.

[190] It follows that I find that the grievor's claim for travel expenses from late in the day on November 5, 2002 to November 8, 2002 were false.

(l) October 25 - November 1, 2002

[191] The grievor's itinerary on the RTE shows that he left Charlottetown by rental car at 8:30 a.m. on October 25, 2002 for "Travel to Oromocto - Moncton - Big Cove, NB - and Bear River, NS". He claimed he was in the Moncton area on October 25, 26, 27, 28 and 29 and then travelled to Bear River on October 31. On November 1, he returned to Charlottetown. Expenses claimed included car rental, toll bridge cost (with receipt), fuel, personal accommodation (October 25, 26, 27, 31), hotel, meals and incidentals. The total claim was \$1,618.73. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[192] The cell phone record indicates that the grievor's phone was in Prince Edward Island, primarily Charlottetown, on October 25 and 26. Seventeen calls were made from the phone. Early on October 27, a large number of calls were made from the phone from New Brunswick that are consistent with the RTE. More calls were made from New Brunswick on October 28 which are also consistent, but the phone was then in Charlottetown at 2:30 p.m. on October 28 for the first of a number of calls made from there. The phone remained in Charlottetown for October 29, 30, 31 and November 1; forty-eight calls were made from the phone in Charlottetown between October 29 and 31 and eleven were received, also in Charlottetown.

[193] The grievor claimed for accommodation at a hotel in Moncton, checking in on October 28. He provided a document for an expense of \$307.95 but Mr. Cuthbert questioned whether this was a receipt for money paid for accommodation. It states that cash was paid, but the charges were "0.00" and the amount claimed by the grievor is listed as a "credit". According to Mr. Cuthbert, the document indicates that the grievor gave the hotel \$307.95, but it does not indicate that he stayed in the hotel. As well, he testified that the document indicates that a reservation was made for October 28, 2002 with an expected departure of October 31. Again, the document does not indicate that the grievor stayed at the hotel, according to Mr. Cuthbert.

[194] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "private accommodation → went to Charlottetown/may not have put all gas receipts if lost/not claim two tolls/claimed only what he had". This was confirmed in Mr. Cuthbert's testimony.

[195] The employer also relied on a telephone conversation between the grievor and Mr. James Klaassen. Mr. Klaassen is legal counsel with the Department of Justice, Government of Canada. His testimony included identification of his telephone number at work and he explained that has been his exclusive number since March 2001. The records of the grievor's cell phone indicate that the grievor called that number from Charlottetown on October 30, 2002 at 9:33 a.m. Mr. Klaassen provided a "Telephone Call Record" dated October 30, 2002 that records a conversation he had with the grievor that day at 9:30 a.m. In his testimony, Mr. Klaassen was clear that he talked to the grievor and not the grievor's family or anyone else.

[196] The employer also relied on a note of a telephone conversation taken by Mr. MacGregor and the grievor on October 28, 2002. I accept that the call took place but I cannot find that this evidence supports a conclusion that the grievor was in Charlottetown when the call was made.

[197] I conclude that the grievor legitimately travelled on government business on October 27 and part of October 28. I also conclude that the grievor was in Charlottetown on October 25, 26, late in the day on October 28, October 29, 30, 31 and November 1. He admitted to Mr. Cuthbert being there and claiming for personal accommodation expenses. I note that the toll bridge receipt submitted by the grievor was dated October 25 and this appears to be inconsistent with the cell phone records. However, a closer look at the latter indicates that the grievor's phone was at Borden, Prince Edward Island, near the tollbooth for the Confederation Bridge, at 9:37 a.m. on October 25. The tollbooth receipt was obtained at 9:21:21 on that date. These events suggest that too much weight should not be given to the date of the receipt and it may not be inconsistent with the cell phone records. While Mr. Klaassen did not testify that the grievor called from Charlottetown, I find that the detail of his testimony confirms the veracity of the cell phone records for October 30.



[198] It follows that I find that the grievor's claim for travel expenses for October 25, 26, 2002, part of October 28, October 29, 30, 31 and November 1, 2002 were false.

(m) September 25 - 27, 2002

[199] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 10:30 a.m. on September 25, 2002 for a trip to Buctouche and Moncton, both in New Brunswick. He was in Moncton and Millbrook on September 26 and then returned to Charlottetown on September 27. He claimed for expenses for mileage, personal accommodation, meals and incidentals. The total claimed was \$555.11. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[200] The cell phone record indicates that the grievor's phone was in Charlottetown on September 25, 26 and 27, the days listed on the RTE. Twenty-two calls were made from the phone and eleven were incoming in this period.

[201] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "believes he left his phone at home as it appears the phone never left the island/left for meetings - not always with band sometimes with people of community". This was confirmed in Mr. Cuthbert's testimony.

[202] In this case the grievor did not admit to Mr. Cuthbert that he claimed for personal accommodation while staying at home. The result is that the only evidence that contradicts the RTE is the cell phone record and, again, that record may only be evidence of the location of the phone. For the reasons discussed above, the fact that the grievor chose not to give evidence can lead to acceptance of uncontradicted evidence. On the other hand, I would give more weight to the grievor's explanation that he left his cell phone at home if I heard evidence from him on that point. I also note the large number of calls from his phone during the material times and this suggests something more than casual use by someone other than the grievor.

[203] Overall, I conclude that the evidence for the travel claim for September 25 - 27, 2002 does not meet the clear and convincing standard and I cannot find that the grievor's travel claim was false.

(n) September 17 - 18, 2002

[204] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 6 a.m. on September 17, 2002 for Burnt Church, New Brunswick. He used personal accommodation that night and he returned to Charlottetown the next day, September 18. He claimed expenses for meals, personal accommodation, mileage, toll bridge cost and incidentals. The toll bridge receipt was "misplaced". The total claim was \$465.90. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[205] The cell phone record indicates that the grievor's phone was in Charlottetown for the days he claimed travel expenses, which were September 17 and 18. Thirty-two calls were made from the phone and four were incoming.

[206] The Employer also relies on another legal proceeding involving the grievor. A decision of the Prince Edward Island Human Rights Panel, titled *Ayangma v. French Language School Board of Prince Edward Island*, [2003] P.E.I.H.R.P.D. No. 2, describes the grievor as the complainant. The decision is dated February 28, 2003 and it also states that the hearing into the grievor's complaint took place "September 16 - 18" 2002, as well as other dates.

[207] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, "private accommodation = home to Charlottetown/filled by memory/may not have gone back/court appearance around 10 - 12 ". Mr. Cuthbert testified that "back" meant back to Burnt Church and the court appearance was a reference to the human rights hearing in Charlottetown described in paragraph 206, which took place between 10 and 12 in the morning.

[208] In this claim, there the cell phone record is inconsistent with the RTE as it suggests that the grievor never left Charlottetown. There is also the grievor's admission to Mr. Cuthbert that he stayed at home while charging for personal accommodation. There is also the decision of the Prince Edward Island Human Rights Panel that places the grievor in Charlottetown at the material times. Finally, he acknowledged his attendance before the panel in his comments to Mr. Cuthbert.

[209] I conclude that the grievor did not travel on September 17 and 18, 2002 on government business and his travel claim for that period was false.

(o) July 18 - 20, 2002

[210] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 4:30 p.m. on July 18, 2002 for "Travel to Fredericton (Oromocto)". He used personal accommodation that night, stayed in a hotel the night of July 19 and then travelled back to Charlottetown on July 20. He claimed expenses for personal accommodation, hotel, mileage, toll bridge, meals and incidentals. The total claim was \$631.16. The toll bridge receipt was "lost" and the "Declaration of Lost Receipts", completed and certified by the grievor, stated that the receipt was for July 22. Someone wrote "date incorrect" on the form. His signature on the TEC certified these expenses were incurred on authorized government business travel.

[211] The cell phone record indicates that the grievor's phone was in Charlottetown on July 18 from where numerous calls were made and received. On July 19, the phone was still in Charlottetown until a phone call was made from Nova Scotia at 3:38 p.m. It moved into New Brunswick the evening of July 19 and numerous calls were made from Fredericton on July 20. A call was recorded entering Prince Edward Island at 9:45 p.m. on July 20.

[212] The grievor claimed an amount of \$102.35 for hotel accommodation on July 19 and provided a document that included this amount and the name of the hotel. Mr. Cuthbert questioned whether this document was a receipt. He testified that the document did not indicate that the money was spent. Rather, all it described was that the hotel was holding an amount of \$102.35.

[213] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "back in Charlottetown for private accom/when go to community when son' play soccer/basketball/does not recall circumstances @ for this". This was confirmed in Mr. Cuthbert's testimony.

[214] The Employer also relies on another legal proceeding involving the grievor. A decision of the Prince Edward Island Human Rights Panel, titled *Ayangma v. French Language School Board of Prince Edward Island*, [2003] P.E.I.H.R.P.D. No. 2, describes the grievor as the complainant. The decision is dated February 28, 2003 and it also states that the hearing into the grievor's complaint took place "July 17 - 18" 2002, as well as other dates.

[215] The RTE is not consistent with the cell phone records and the grievor's admission to Mr. Cuthbert places him in Charlottetown on July 18 and 19, when he claimed to be away on government business. The decision of the Human Rights Panel places the grievor in Charlottetown on July 18. In his discussions with Mr. Cuthbert with regards to the travel claim for September 17 - 18, the grievor acknowledged being at the hearing before the Panel. Mr. Cuthbert has questioned the veracity of the hotel receipt for July 19 and there is a lost toll bridge receipt claimed for a day that the grievor was not travelling. However, the RTE states that the grievor was in Fredericton on July 19 and the cell phone record generally confirms this.

[216] Overall, I conclude that the grievor did not travel on July 18 or most of July 19, 2002 and his claim for travel expenses for those days was false.

(p) July 9 - 12, 2002

[217] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 7:30 a.m. on July 9, 2002 for "Travel to Big Cove [New Brunswick] to train FN [First Nations] coordinator. He went to Moncton the same day. On July 10, he travelled to Big Cove again and returned to Moncton again. On July 11, he travelled to Pabineau, from Moncton. Then on July 12, he travelled back home to Charlottetown. He claimed personal accommodation for three nights, meals, toll bridge cost, mileage and incidentals. The total claimed was \$829.05. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[218] The cell phone record indicates that the grievor's phone was in New Brunswick on July 9, but that it was back in Charlottetown that evening. The phone then remained in Charlottetown for July 10, 11 and 12. Thirty-one calls were made from the phone and nineteen were incoming for July 10, 11 and 12 while the phone was in Charlottetown.

[219] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert recorded the grievor as saying, "came back to Charlottetown claim accommodation/did not write the explanation on front i.e. cheaper accommodation in Moncton". This was confirmed in Mr. Cuthbert's testimony. He explained that during his conversation with the grievor they discussed a statement on the TEC that "\*It is cheaper to travel to Moncton and stay @ private accom. than a hotel this time of year\*". According to Mr. Cuthbert, he asked the grievor who had

written that statement and he said that it was another employee who got the information from him.

[220] In this claim, the RTE is consistent with the cell phone with regards to travel in the daytime on July 9. Then the cell phone was in Charlottetown the night of July 19 and from July 10 to 12. The grievor's admission to Mr. Cuthbert that he stayed at home while charging for personal accommodation confirms the cell phone record.

[221] I conclude that the grievor was not travelling the night of July 9 or from July 10 to 12, 2002. His claim for travel expenses for those times was false.

(q) June 24 - 30, 2002

[222] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 12:30 p.m. for a trip to Madawaska Maliseet First Nation and Tobique Band in New Brunswick, on June 24, 2002. The RTE indicates that he travelled to Ottawa at 5 p.m. on June 25, also by car, and attended a "Redeployment Meeting FNIHS ... (26 to 28)". Return to Charlottetown was on June 30, with an overnight stop in Edmunston, New Brunswick, on June 29. Expenses claimed included mileage (2,370 kilometres), toll bridge cost ("lost" receipt declared), personal accommodation for two nights (June 24, 29), hotel for three nights (for a hotel in Hamilton, Ontario, June 26, 27, 28), meals and incidentals. The total claim was \$1,919.29. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[223] The cell phone record indicates that the grievor's phone was in Charlottetown all day on June 24 and all day on June 25. On June 26, a call was made from Quebec at 11:40 a.m. and then there were a series of calls from various places including Montreal, Kingston, Toronto and then finally from Hamilton at 11:14 p.m. on June 26. On June 27, calls were made from various places in Ontario and the phone was in Ottawa for several calls from 7:50 a.m. and 4:16 p.m. that day (twenty-three received and three incoming). On the morning of June 28, the phone was back in Hamilton where it stayed for several calls including a number the next day, June 29. Late on that day, the phone started to move east and was in Montreal at 10:08 p.m. It remained in Montreal (where forty-one calls were made and nine were incoming) until July 2 when it made some calls from Edmunston, New Brunswick. The phone was back in Charlottetown on the evening of July 2.

[224] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "Drove Hamilton/arrive in night/drove family to Hamilton/drove to Ottawa early next morning/supposed to be in Ottawa for 2 days [illegible] meeting on 1 day other day cancelled/went back to Hamilton to stay/had interview in Hamilton". This was confirmed in Mr. Cuthbert's testimony. He also explained that the blanket travel authority given to the grievor ended at the Quebec border and there was no work in Hamilton involving the employer.

[225] The employer also relies on another legal proceeding involving the grievor. A decision of the Public Service Commission of Canada (File Number 02-SHC-00331) involved "the appeal of Dr. Noel Ayangma against the proposed appointment" of another employee to an Executive Director position. The grievor was the appellant and "the appellant represented himself" at a hearing on June 25, 2002 in Charlottetown.

[226] The cell phone record is consistent with the conversation that the grievor had with Mr. Cuthbert and I find those two sources are to be preferred over the RTE. Specifically, the grievor admitted that he drove his family to Hamilton when he was claiming travel expenses for government related work. The hotel receipt submitted with the claim also confirms that the grievor was in Hamilton from June 26 to June 29. The decision of the Public Service Commission confirms that the cell phone record that the grievor was in Charlottetown on June 25 when he claimed to be travelling on government business. In addition, the grievor violated the blanket travel authority given to him by travelling beyond the Atlantic Region. Finally, there is no evidence of a meeting in Ottawa and no evidence of it being cancelled, as suggested by the grievor to Mr. Cuthbert.

[227] I find that the grievor was not travelling for government business on June 24 - 30, 2002 and his travel claim for that period was false.

(r) June 12 - 13, 2002

[228] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 10 a.m. on June 12, 2002 for a trip to Afton and Wagmatcook Band in Nova Scotia. He "stayed with a friend" the night of June 12 and then returned to Charlottetown on June 13. He claimed for mileage (1,663 kilometres), toll bridge cost (a "misplaced" receipt was declared), meals, personal accommodation and incidentals, totalling \$862.30. The

grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[229] The cell phone record available indicates calls were made from Charlottetown starting at 3:42 p.m. on June 12. The phone remained in Charlottetown the rest of June 12 and all of June 13. Mr. Cuthbert testified that the kilometres driven were consistent with the trip that was claimed. However, according to Mr. Cuthbert, if the grievor left at 10 a.m. on June 12, as described in the RTE, there was not enough time to make the trip and return to Charlottetown by 3:42 p.m. on the same day.

[230] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "went home at night then back out/ferry not always at appropriate time so have to do cost benefit analysis mileage versus time". This was confirmed in Mr. Cuthbert's testimony.

[231] The employer also relied on a document from another legal proceeding. In litigation involving the grievor as appellant and Health Canada and the Public Service of Canada as respondents, the grievor filed an affidavit. This was sworn before a Commissioner for Taking Affidavits and "Notary Public for PEI" in "Charlottetown, Queens County, in the Province of Prince Edward Island this 12<sup>th</sup> day of June, A.D. 2002". "Noel Ayangma" swore the affidavit and the grievor's address is given.

[232] The sworn affidavit confirms the cell phone record that the grievor was in Charlottetown on June 12 when he declared he was travelling to Nova Scotia on government business. Similarly, the grievor's admission to Mr. Cuthbert that he went home at night places him in Charlottetown.

[233] I find that the grievor was not travelling on government business on June 12 and 13, 2002 and that his claim for travel expenses for these days was false.

(s) April 12 - 15, 2002

[234] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 6:15 a.m. on April 12, 2002 (Friday) for travel to the Fort Folly Band in New Brunswick. The RTE indicates that he stayed there until April 15 (Monday) when he returned to Charlottetown. He claimed for mileage, meals, personal accommodation ("stayed with a friend"), toll bridge cost and incidentals. The total claim was \$924.56. The grievor's

signature on the TEC certified these expenses were incurred on authorized government business travel.

[235] The cell phone record indicates that the grievor's phone was in Edmundston, in New Brunswick near the Quebec border, making five calls about midday on April 12. Twenty calls were then made from locations in Quebec and there were two incoming calls, from 3 p.m. to 9:24 p.m. on April 12. On April 13 and 14 (Saturday and Sunday), several calls were made from the cell phone from Montreal. Then, on April 15, the phone travelled east, making calls from eastern Quebec and New Brunswick (including four calls from Edmundston) and ending up in Charlottetown for a call at 7:41 p.m. that day.

[236] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "Went to Montreal on weekend/excessive mileage 1296 vs. 1062 = 234 km/Montreal → Edmundston = 533 x 2 = 1066/no difference to send home/save costs/quick meeting/weekend his to go to Montreal/stopped at Edmundston on Monday to talk to people missed on Friday". This was confirmed in Mr. Cuthbert's testimony. He also testified that he asked the grievor about the calls from his phone in Montreal, but there was no response.

[237] The cell phone record is consistent with the grievor's conversation with Mr. Cuthbert that the grievor was in Montreal on July 13 and 14. The weekend may have belonged to the grievor, but it is false to certify that the trip was for government business travel and then claim expenses for it. I also conclude that July 12 and 15 were travel days for the trip and unrelated to government business. Finally, the grievor's blanket travel authority did not extend beyond the Atlantic Region to Quebec.

[238] I find that the grievor did not travel to New Brunswick or Quebec for government business for the period from July 12 to 15, 2002 and his travel claims for that period were false.

(t) April 5 - 7, 2002

[239] The grievor's itinerary on the RTE shows that he left Charlottetown by car at 12:10 p.m. on April 5, 2002 for travel to Fort Folly Band in New Brunswick. He stayed there for two nights, April 5 and 6, and then he returned to Charlottetown on April 7. He claimed expenses for mileage (290 kilometres), toll bridge cost, hotel, meals, and



incidentals for a total of \$404.30. The grievor's signature on the TEC certified these expenses were incurred on authorized government business travel.

[240] The cell phone record indicates that the grievor's phone was in communities in New Brunswick that are consistent with the itinerary in the RTE for April 5, 6 and 7 except for three calls from Amherst, Nova Scotia, on April 5. Amherst is not far from Fort Folly.

[241] The hotel document submitted by the grievor to support his claim for hotel expenses was for one night only, April 5. As with other similar documents described above, Mr. Cuthbert questioned whether this document was in fact a receipt. According to him, it did not indicate that the grievor stayed in the hotel. As well, he questioned the "Group" listed on the document which was "Charlottetown Hornets". And Mr. Cuthbert testified that this was not part of Health Canada.

[242] In his interview with the grievor, Mr. Cuthbert asked the grievor about these inconsistencies and Mr. Cuthbert's recorded the grievor as saying, "Stayed Saturday not feeling well/(cutt (sic) back to 1 night)/\*night meetings with Fort Foley/meeting council to discuss issue of funding/had many night meetings". This was confirmed in Mr. Cuthbert's testimony.

[243] I conclude that the inconsistencies between the cell phone record and the RTE are not significant with this claim. The reference to the "Charlottetown Hornets" on the hotel receipt is odd but it is capable of more than one meaning. Overall, I find that the evidence does not support the allegation that the grievor's travel claims for April 5 - 7, 2002 were false.

**F. CONCLUSION: ARE THERE GROUNDS FOR SUSPENSION AND TERMINATION OF THE GRIEVOR?**

[244] There are two grievances before me; one challenges the employer's decision to suspend the grievor in December 2003 and the other challenges the employer's decision of May 7, 2004 to terminate his employment.

(a) Suspension

[245] With regards to the suspension, the grievor submitted that he was improperly suspended without pay.

[246] The facts are that the grievor was suspended by means of the letter dated December 3, 2003, with someone else's signature over Ms. Archer's name (the signature was not identified). It stated:

*Pursuant to the letter of November 21, 2003, sent to you, I am writing to inform you that effective immediately you are suspended without pay pending the outcome of the investigation being conducted by Audit & Accountability Bureau (AAB), Ottawa.*

*The investigation is being conducted to review a number of irregularities which have been identified in your Travel Claims.*

*AAB investigators will be contacting you to schedule an interview. You may wish to be accompanied by a union representative of your choosing during the interviews related to the matters under review.*

[Emphasis in original]

[247] Ms. Archer testified that she viewed the investigation of the grievor's travel claims as a very serious matter. She was concerned about the potential of putting the employer at risk if the grievor was not suspended and she was not prepared to risk continuation of activities such as misuse of travel claims, credit cards, leave and cell phone. It was necessary to "show due diligence". It was her decision, as the Acting Regional Director, to suspend him. She also testified that the grievor would have been reinstated with full back pay if the investigation had not found any misconduct. In cross-examination, Ms. Archer agreed that the decision to suspend the grievor was made before the AAB report was received; this is self-evident from the December 3 letter.

[248] The evidence also included a telephone conversation between Ms. Archer and the grievor on December 2. At the time, the grievor was on sick leave and he had called Ms. Archer to advise her that he was ready to return to work. He also faxed her a letter of December 2 stating his "wish to return to work" but "Subject to a reassessment from my doctor". During the conversation of December 3, Ms. Archer advised the grievor that if he returned to work he would be sent a letter suspending him. The grievor recorded this conversation in a letter of December 3 and he also requested that Ms. Archer send the letter of suspension. Hence the letter of December 3, quoted above, from her. Ms. Archer recorded the telephone conversation with notes she made on the margins of the grievor's faxed letter of December 2. The result of the

conversation of December 2, apart from the suspension letter of December 3, was that the grievor was going to seek an extension of his sick leave from his doctor. He then received sick pay.

[249] During the hearing, the grievor questioned a number of witnesses about Treasury Board policy on discipline. This policy defines a suspension as “the temporary removal of the employee from the place of work without pay” and it “may be applied” for two reasons. The first is to protect persons or property “pending investigation of certain suspected misconduct when the presence of the employee cannot be tolerated or could undermine or impede the investigation”. The second is “to impose a definitive disciplinary measure for an act of misconduct”. A suspension (“or financial penalty”) is the third step of increasingly severe discipline, after an oral reprimand and a written reprimand and before termination of employment. At one point in cross-examination, Ms. Archer testified that the suspension without pay in this case was a non-disciplinary suspension.

[250] In any event, I am not persuaded that Treasury Board policy, that is not included in the collective agreement, is binding on my deliberations (*Buchmann v. Treasury Board (Canada Customs and Revenue Agency)*, 2002 PSSRB 14, paragraph 43). Whether the employer followed or did not follow particular procedures, is a matter that is superseded by the full hearing of the grievance before me (*McIntyre v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-25417 (1994)).

[251] In summary the evidence before me is that Ms. Hopkins identified irregularities in the grievor’s travel claims and he was refusing to cooperate in resolving those irregularities. As well, independent of Ms. Hopkins’ concerns, a routine audit in Ottawa revealed other irregularities. It appears from the evidence that the employer was content with the grievor being on sick leave and it was the grievor’s phone call of December 2 that crystallized the decision to suspend. I do not agree that the employer “threatened” to suspend the grievor if he returned to work from sick leave. Further, his letter of December 3 specifically requested a letter of suspension from the employer. And, as Ms. Keays-Whyte testified, if the investigation demonstrated no problems, the suspension would have been withdrawn and the grievor would have been given full back pay. The grievor submits that a suspension with pay would have been appropriate and, in effect, the suspension without pay was premature. I do not agree that the circumstances support a suspension with pay.

[252] I conclude that the suspension without pay of the grievor on December 3 was an appropriate response to the circumstances of the situation, as they were known at that time.

(b) Termination

[253] It is clear from the above analysis of the grievor's travel claims that the grievor made false travel claims on a number of occasions. I estimate that the total of the above false travel claims is \$19,586.26. As above, I have found that a small number of the employer's allegations have not been proven. For this reason, the total amount is something less than the estimated amount, but it is still substantial.

[254] The positive mitigating circumstances in favour of the grievor include about five years of discipline-free service. The grievor also received at least one award for his work (Award for Team Excellence, June 2002) and he was active in minority and equity issues within the public service. He neither charged for nor took time off in lieu of overtime. His supervisor, while the grievor worked in an acting capacity, testified that he trusted the grievor "completely" and he had no reason to doubt him.

[255] There are aggravating factors as well. The most significant is the lack of remorse and lack of any acceptance of wrongdoing. When he spoke with Mr. Cuthbert, the grievor acknowledged that he stayed at home while claiming for personal accommodation expenses. Apart from this, he has never admitted that his travel claims were false. Indeed, his response to being confronted with them was, first of all, to refuse to cooperate by providing information as requested by his supervisor. He then asked for another person to review his claims. Then, when he was confronted with the result of the audit of his claim, he could only get visibly angry and make intimidating statements at the meeting in December 2003. But, significantly, while getting agitated, the grievor never denied the employer's allegations.

[256] I also note that this is not a case of an honest mistake. Nor is it a matter of claiming inflated amounts; that would be serious enough misconduct. Rather, the grievor in this case claimed expenses for travel that never took place, or for personal travel such as taking his family on a holiday or spending a weekend in Montreal or appearing in court for personal litigation. The grievor certified with his signature that his travel was for the purposes of government business and he must have known when

he signed his name that the claims were false. I can only conclude that there is a strong element of premeditation in this case.

[257] Instead of taking responsibility for his false travel claims the grievor has an acute sense of being the victim of a conspiracy, or vendetta, against him and this has coloured virtually every aspect of his grievances. The allegation about the beginnings of the conspiracy - the allegation that the appointment of the grievor in 1999 was sabotaged - amounts to a suggestion that he was hired to be fired. Apart from the logical problems with this assertion, it is not supported in the evidence. The other elements of the grievor's theory of a conspiracy are also unsupported, especially the assertion that the false travel claims were fabricated, somehow through collusion between people in Halifax and Ottawa. No evidence of fabrication was presented. I reject the grievor's submission that the employer fabricated the evidence in this case to reach a pre-determined result, the termination of his employment.

[258] A related matter is that, in the numerous skirmishes over evidentiary and procedural issues that arose over the course of the hearing of his grievances, the grievor submitted that certain witnesses for the employer "lied under oath". That assertion is not based on any facts. It is also inflammatory and grossly unfair to the people who gave evidence. While the grievor's belief in the righteousness of his cause is obvious, I can only conclude that it is not founded on any evidentiary basis.

[259] In summary, the grievor had about five years discipline free service. His work was the subject of an award for excellence but this cannot offset all misconduct (*Zakoor v. Treasury Board (Revenue Canada - Customs & Excise)*, PSSRB File No. 166-02-25882 (1994)). The misconduct in this case was premeditated, frequent, and very serious; instead of remorse there were aggressive challenges to reasonable requests by the employer for information about the misconduct. The unfounded allegation of a conspiracy, including the inflammatory language used in pursuing that allegation, is an aggravating factor (*Bristow v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB File No. 166-2-14868 (1985) at paragraph 87). It is also clear that he was away from work without permission on a number of occasions. For example, he attended court proceedings when he should have been working or should have requested leave.

[260] Finally, I note decisions of adjudicators in other decisions. In *Juneau v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-2-13118

(1982), termination was upheld when an employee falsely claimed travel expenses for five days. He also claimed for more than the actual cost for a hotel room on two other days. In *Pinto v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-2-16802 (1988), the termination of an accountant with nine and one half years of service was upheld because of a fraudulent claim for \$68.35 for mileage and parking tickets. In *Zakoor*, termination was upheld for an employee who claimed false travel expenses totalling \$452 over a long period of time. In *King v. Treasury Board (Citizenship and Immigration)*, PSSRB File No. 166-2-25956 (1995) (QL), termination was upheld where an employee with about six years service falsely claimed expenses. In that case, the adjudicator concluded that the inconsistencies in a travel claim “could arguably be attributed to an honest mistake, albeit a suspicious one” (page 19 QL). Other decisions are to the same effect.

[261] The cases establish, and I agree, that making false travel claims is a very significant employment offence and it amounts to a fraud on the public treasury (*Juneau*). It must be likened to theft which is “one of the gravest if not the gravest, charges of misconduct in an employment relationship” (*Pinto*, citing *Bristow*, and *Brown and Beatty*, *Canadian Labour Arbitration*, First Edition, paragraph 7:3310). Again, this is not a case of an honest mistake or inflated claims; there were a number of false claims, over a period of sixteen months, adding up to a substantial amount of money. And there was a strong element of premeditation.

[262] The cases also suggest that proven fraud requires the extreme penalty of termination from employment, unless termination, viewed objectively, would be manifestly unjust or unreasonable in the circumstances (*Juneau*). Fraud usually leads to discharge, unless there are extenuating or mitigating circumstances (*Pinto*). Unfortunately, I cannot find extenuating circumstances in this case.

[263] Finally, Ms. Archer explained in her evidence the factors that the employer considered when it decided to terminate the grievor. It considered the absence of any previous discipline and the negative impact on the grievor’s reputation as well as the financial impact on his family. However, the fact that there had been no remorse, “no reflection of any kind”, was important to the employer. It noted that the grievor had been “constantly challenging” the various attempts of the employer to investigate the irregularities. In the end, the employer decided that the grievor had received travel money he was not entitled to and he had failed to report his true location to the

employer. This was very serious and the decision was that termination was an appropriate penalty. I can find no fault in this reasoning.

[264] In these circumstances I can only conclude that the employer had just cause to suspend and then terminate the grievor from his employment.

[265] For all of the above reasons, I make the following order:

*(The Order appears on the next page)*

Order

[266] The grievor's grievances relating to his suspension and then termination from employment are dismissed.

May 29, 2006.

**John Steeves,  
adjudicator**