Date: 20070705

Files: 166-32-37165 and 37166

Citation: 2007 PSLRB 67

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

GRAHAM EDWARD HICKLING

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as
Hickling v. Canadian Food Inspection Agency

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

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Evan M. Heidinger, Professional Institute of the Public Service of Canada

For the Employer: Simon Kamel, counsel

Heard at Victoria, British Columbia,
December 5 and 6, 2006.

I. Grievances referred to adjudication

[1] Graham Edward Hickling ("the grievor") is employed at the Canadian Food Inspection Agency ("the Agency") as a District Veterinarian Officer, VM-02, in Victoria, British Columbia. He was given a 15-day suspension without pay for accessing the Internet and cutting and pasting information into his answers during a closed-book examination as part of a competition for a Regional Veterinarian Officer position. He grieves the suspension in PSLRB File No. 166-32-37165 in the terms following:

. . .

> *On 18 March 2005, I was given a letter signed by my Regional Director, V. McEachern, advising me that I was being suspended without pay for 15 days, beginning 11 April 2005, for alleged misconduct. This disciplinary sanction is unreasonable and without foundation.*
>
> *I therefore grieve.*

. . .

[2] In PSLRB File No. 166-32-37166 the grievor grieves the Agency's process for investigating the suspension and claims a breach of his representational rights set out in Article D8 of the collective agreement signed by the Agency and the Professional Institute of the Public Service of Canada on May 27, 2002, for the Veterinary Medicine Group bargaining unit ("the collective agreement"):

. . .

> *On 18 March 2005, I was advised by letter signed by my Regional Manager, V. McEachern, that I was being suspended without pay for 15 days. This disciplinary sanction was imposed contrary to the provisions of my collective agreement in general, and specifically, contrary to D 8.02 which requires that employees are entitled to be accompanied by a PIPSC representative when they are called to meetings to discuss matters which may have disciplinary consequences. Mr. McEachern convened a meeting with me to discuss my alleged misconduct, without ever advising me that I was being investigated for alleged wrongdoing or that I was entitled to have a PIPSC representative present. I met with him alone and participated in the discussion, contrary to the provisions of my collective agreement and contrary to the very basic principles of Natural Justice. I therefore grieve.*

. . .

[3] 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.

[4] As the burden of proof is different for each of these grievances, the parties agreed that the Agency would proceed with its opening statement, followed by an opening statement made by the grievor, and the Agency would call its evidence first, followed by the evidence of the grievor. The parties agreed that the Agency would argue first on the discipline issue, with the response from the grievor and reply by the Agency. The grievor would proceed and argue the breach of representational rights issue, with argument by the Agency and reply argument by the grievor.

II. Summary of the evidence

[5] The grievor is employed as District Veterinarian Officer, VM-02 in Victoria, British Columbia. Victoria is in the B.C. Coastal Region of the Agency. He is a long-term employee, and will be completing his 25th year of combined service with the Agency and the Department of Agriculture and Agri-Food.

[6] The grievor applied for a position as Regional Veterinary Officer (VM-03) in a competition that closed on October 21, 2004. He was successfully screened into the competition and was offered an opportunity to write an examination in Burnaby on November 15, 2004, and attend an oral examination in Edmonton on November 17, 2004.

[7] Kae Andreas, Human Resources Advisor, Western Area, was responsible for preparing the competition poster. The competition for Regional Veterinary Officer positions was being run in the B.C. Coastal Region and also in the Alberta North Region in a parallel fashion. Ms. Andreas worked closely with Bob Hollowaychuk, Inspection Manager for Alberta North, in developing the selection factors and the tools to assess those factors.

[8] Ms. Andreas testified that the examination in Burnaby for the B.C. Coastal Region position and in Edmonton for the Alberta North position was designed to test the knowledge of the candidates. Ms. Andreas testified that it was a closed-book examination and that this is typical for Agency examinations.

[9] During her direct examination, Ms. Andreas testified that a closed-book examination (or not an open-book examination) means that a candidate is not allowed to bring any external sources of information or reference material of any kind. The purpose of the examination is to test the knowledge the candidate carries with him or her and nothing is needed from other available resources. Ms. Andreas saw no difference between the use of the Internet or any other external source. She said that the Internet was like a book or reference material. Further, she said that by using the Internet a person could access procedural manuals and more information than could be contained in a personal library. In her years as working as a human resources advisor she has participated in other closed-book examinations. She has never had a situation where an employee did not understand the meaning of a closed-book examination. She said that employees understand this as a matter of common knowledge.

[10] Ms. Andreas received an email from Holly Fung, a human resources assistant on November 12, 2004. The email indicated that the grievor had made an inquiry about the content and the format of the exam (whether it was multiple choice or written answers). From the email it is apparent that Ms. Fung was unable to answer the grievor's inquiries, and she asked Ms. Andreas to give the grievor a call, as he was unable to reach Vance McEachern, Regional Director, B.C. Coastal Region, who was listed as the contact person on the competition poster.

[11] Ms. Andreas responded that she spoke with the grievor on the telephone on Friday, November 12, 2004. The call was brief. The grievor asked her about the content of the exam, and she advised that she could not tell him the content and that he should review the competition poster. He asked whether it was open-book, and she said that it was closed-book. He asked whether the format of the examination would be multiple choice, short answer, or essay, and she advised him that it could be any or all of these forms.

[12] Ms. Andreas said that the grievor's questions were straightforward and there was no ambiguity. She felt that the questions were unusual because, without exception, knowledge examinations are closed-book, which means that the applicants cannot bring any reference material into the examination room.

[13] The grievor attended the examination on Monday, November 15, 2004. He left his briefcase containing reference material, pamphlets and legislation outside the examination room.

[14] The examination was invigilated by Glenda Bunyan, Executive Assistant to Mr. McEachern. Ms. Bunyan was not called as a witness by the Agency. There were four candidates. When the candidates entered the room they were given a diskette which contained the examination questions, and a hard copy of the examination questions. Each candidate had the use of a laptop computer and had to sign in using their account information. The candidates had four questions to answer and one letter to compose in a two-hour time period. The answers to the questions were to be saved onto the disk, as was the letter. At the completion of the examination the candidates were to email their answers to a person in Edmonton. The disk and a hard copy of the answers were to be placed into an envelope. From the evidence of both Mr. McEachern and the grievor it is clear that Ms. Bunyan walked around the examination room as she invigilated.

[15] Ms. Andreas knows that she told the invigilators in both Burnaby and Edmonton that the examination was to be a closed-book examination. Ms. Andreas was not present when the examination was invigilated. She could not say what each invigilator told the candidates. She did say, however, that it would be an exception to tell the candidates that it was not a closed-book examination. The grievor indicated in his oral testimony that he was told nothing by the invigilator about whether the exam was a closed- or open-book examination. However, he did not need any further information from Ms. Bunyan on this point as he had been directed by Ms. Andreas on the Friday before the exam, that the examination was not open book.

[16] During the examination, the grievor discovered that he could access the Internet through the laptop computer. He accessed the Internet and cut and pasted materials into his answers from the Agency internal Website containing policy manuals and legislation. At the conclusion of the examination, he tried to save, print and email his answers. He was able to print and email the file containing the letter that he had composed. The file containing his answers to four questions could not be printed or emailed and the file indicated that it was zero in size.

[17] Ms. Bunyan did not observe the grievor accessing the Internet. I take notice that Internet access can be easily obtained and can also be quickly concealed by simply pushing the close file (x) button at the top of the screen.

[18] The grievor reported the problem to Ms. Bunyan. Ms. Bunyan called a computer specialist, Cherry Lee, to attempt to recover the information on the disk. Ms. Lee spent about 20 minutes attempting to recover the information without any success. Ms. Andreas spoke to Ms. Lee, and as a result wrote an email (Exhibit E-4) to Ms. Bunyan on November 16, 2004, asking her to contact Ms. Lee with all the instructions given. Ms. Bunyan responded by an email later on in the day (Exhibit E-4) indicating that all the candidates were given the same log-on instructions, and that no one had a problem signing on. Ms. Bunyan indicated that the problem came in saving the work, and "for some reason, it was lost."

[19] The grievor believed that the competition was over for him, but Ms. Bunyan advised him that attending the oral interview in Edmonton was not contingent on the results of the written examination.

[20] As the competitive process was continued in Edmonton the diskette was sent to Dr. Hollowaychuk, in Edmonton, who was marking the exam. Mr. McEachern arranged for the disk to be examined in Edmonton by another computer specialist, Dan Fournel, Informatics Support Specialist. The electronic markings on the diskette contents indicated links to Internet sites. The grievor's examination results could not be recovered from the diskette, even with recovery software.

[21] The grievor attended the oral interview in Edmonton on November 17, 2004. The panel members for the examination included Stuart Wilson, Regional Director, B.C. Interior, Bonnie Jensen, Regional Director, Alberta North, and Dr. Hollowaychuk. At the conclusion of the interview, Mr. Wilson offered the grievor an opportunity to re-write the written portion of the examination. The grievor accepted Mr. Wilson's offer.

[22] Lee Hewitt, Executive Assistant to Ms. Jensen, was the invigilator in Edmonton. She was not called as a witness by the Agency. She set the grievor up in a room with a computer to write the examination. The grievor asked her if there was going to be Internet access like there had been in Burnaby. As a result, Ms. Hewitt disconnected the local area network (LAN) cable from the computer. The grievor's answers were recorded on a diskette.

[23] Later in November 2004, the grievor received a letter indicating that he was not successful in the competition.

[24] Mr. McEachern gave evidence at the hearing. At the relevant time, Mr. McEachern was the regional director with the B.C. Coastal Region. Part of his job was to manage staff and he had the delegated responsibility to discipline staff members. He supervised 189 staff members and was responsible for the administration of Agency programs involving food inspection, animal health, plant health, human resources, budget, staff recruitment, and working with industry and other government departments. Mr. McEachern was involved in the recruitment process for the Regional Veterinarian Officer position. The successful candidate would report to him.

[25] Mr. McEachern said that he learned about the Internet access problem shortly after Mr. Wilson returned from Edmonton. Mr. McEachern learned that there was a problem that occurred with the grievor's original written examination. Mr. Wilson told Mr. McEachern that there was evidence that the grievor had accessed the Internet during the exam, and that he had admitted accessing the Internet to Ms. Hewitt.

[26] As a result of this information, Mr. McEachern obtained advice from the Human Resources office in Calgary. He was advised to conduct an investigation and collect the facts. Mr. McEachern commenced an investigation. During the course of the investigation, he talked to Ms. Andreas, Ms. Lee, Ms. Hewitt, Ms. Jensen, Mr. Wilson, Mr. Fournel and the grievor.

[27] Mr. McEachern also reviewed the examination papers of all of the other candidates. Mr. McEachern compared the answers in the examinations to standard questions in the Agency's manual and saw no evidence of cutting and pasting from the Internet. None of the other candidates had a perfect score. As a result, Mr. McEachern concluded that there was no evidence that other candidates had accessed the Internet during the examination. He did not interview the other candidates. If he had found that other candidates had cheated, he would have followed the same steps as he did with the grievor. In cross-examination, Mr. McEachern indicated that it was possible that other candidates had used the Internet and had rephrased answers in their own words. The grievor stated that he was busy during the examination and was not watching the screens of the other candidates, and therefore did not know whether other candidates

used the Internet. On a balance of probabilities, I conclude that the other candidates did not access the Internet, as there is no evidence of access.

[28] Mr. McEachern also made notes, and sent emails to Ms. Jensen. A report summarizing the matter was prepared by someone in the Calgary Human Resources office. Some of the investigative material was not shared with the grievor or his bargaining agent; however, it is unclear when some of the material was produced and what documents had been created prior to a meeting held in January 2005.

[29] As part of his investigation, Mr. McEachern spoke to Mr. Fournel, the informatics specialist in Edmonton. He was advised that the examination answers could not be recovered with recovery software, but Mr. Fournel discovered Internet links on the diskette that indicated that material from the Internet had been downloaded.

[30] Mr. McEachern contacted the grievor by telephone in December 2004 to set up a meeting. The contents of the telephone conversation are confirmed in an email of December 16, 2004 (Exhibit E-5). The email describes the meeting as follows:

. . .

> *This is just to confirm our agreement to meet in the New Year to get feedback from you and review the some* [*sic*] *issues identified during the written portion of the recent RVO competitive process. I will contact you in January to set-up* [*sic*] *a date.*

. . .

[31] Mr. McEachern followed up with an email to the grievor in January 2005, and set up a meeting that took place on January 20, 2005. In his examination-in-chief, Mr. McEachern said that "the essential purpose of the meeting was to ask the grievor what happened on November 15, when he was unable to save his test answers during the RVO written exam." Mr. McEachern was vigorously cross-examined about this meeting. He said that he was investigating. His evidence had a ring of truth.

[32] During the meeting, the grievor confirmed that he had accessed the Internet, and that he interpreted a closed-book exam as, literally one involving "books". He disclosed that he had not brought reference material into the examination room. At the end of the meeting Mr. McEachern told the grievor about the next steps, which involved taking the information back and talking to other individuals in Human Resources, and that he would get back to him on the next steps in the decision-making process.

During the course of the interview, Mr. McEachern expressed a concern that the grievor was up for an award.

[33] Mr. McEachern indicated that the grievor did not ask for a bargaining agent's representative. Had the grievor asked for a bargaining agent's representative, Mr. McEachern would have allowed it.

[34] Mr. McEachern described the January 2005 meeting as an investigatory meeting. He said that it was a fact-finding exercise focussing on what actually happened. He wanted to get the perspectives of the different parties involved to try to understand the circumstances as to what happened. He distinguished an investigatory meeting from a disciplinary meeting. He said that a disciplinary meeting would be a meeting to communicate disciplinary measures and to give the individual an opportunity to provide more information, if available, and if no information was given to inform the employee of the disciplinary action the Agency was going to hand out.

[35] Mr. McEachern interviewed Ms. Hewitt by telephone. He confirmed his notes of the conversation with Ms. Hewitt by email of February 25, 2005 (Exhibit E-6). Ms. Hewitt confirmed that the grievor advised her that he had accessed the Internet during the Burnaby examination to get information and stated that:

. . .

> *In the day-to-day job he would research information to questions by using the Internet and felt that he should have the right to do so during the exam. He told Lee Hewitt that he disagreed with the decision to prohibit the use of the Internet during the exam.*

. . .

Ms. Hewitt noted in her email that the grievor appeared to be nervous during the conversation. Ms. Hewitt was not called as a witness.

[36] On March 8, 2005, Mr. McEachern wrote the following email (Exhibit E-7) to the grievor:

> *This is further to our meeting of January 20, 2005 in which you provided feedback in regards to issues identified during the written portion of the RVO competitive process.*

> *I have now concluded my investigation and would like to meet with you Friday, March 18 2005 @1:30 pm* [*sic*] *at the Victoria Office. As discipline may be involved, you are entitled to have a representative of the Institute attend the meeting.*

[37] Mr. McEachern indicated that the purpose of the meeting was to discuss the conclusions that he had reached, and to obtain any further information from the grievor. Before attending the meeting, Mr. McEachern had drafted a disciplinary letter dated March 18, 2005 (Exhibit E-8).

[38] Mr. McEachern attended the March 18, 2005, meeting supported by Susan Sundquist, a human resources team leader. The grievor attended the meeting with his bargaining agent's representative. During the course of that meeting, Mr. McEachern asked the grievor if he had any further information, and the grievor offered none. Mr. McEachern handed the grievor a letter of discipline and asked the grievor to sign acknowledging receipt of the letter. The grievor refused to acknowledge his acceptance of the letter, and Mr. McEachern endorsed the grievor's refusal on the letter.

[39] The letter imposed a 15-day suspension without pay on the grievor. The salient part of the letter (Exhibit E-8) reads as follows:

. . .

> *This is further to our meeting held on January 20, 2005 in which you provided information relating to the written portion of the Regional Veterinary* [*sic*] *Office competitive process. During the exam held on November 15, 2004, you accessed the internet to copy and paste your answers, after being informed that it was not an open book* [*sic*] *exam.*
>
> *I have completed my investigation and I am satisfied that there is sufficient substantiation that by your actions you have demonstrated a lack of honesty and integrity. In your role as a Veterinarian with the C.F.I.A., your actions must be above reproach and must demonstrate values and ethics reflective of the C.F.I.A. values. This behaviour will not be tolerated. As a result, you behaviour has damaged the relationship of trust which must exist between you and the Canadian Food Inspection Agency. I consider this to be a very serious breach of conduct on your part.*
>
> *In view of the above, by the authority delegated to me, I am suspending you from your duties without pay for a period of 15 working days. This suspension will be served from*

> *April 11 – April 29, 2005 inclusive. Normally this type of infraction would attract more severe disciplinary action. However, in awarding this suspension, I have taken into consideration the following mitigating factors:*
>
> *a) that during our meeting on January 20, 2005, you did not deny the fact that you had accessed the Internet to copy the material.*
>
> *b) Your long service with the Federal Public Service*
>
> . . .

[40] The grievor stated that his mother died in January 2005. He had been involved in making decisions concerning her medical care and had elected conservative treatment that "did not work." He took bereavement leave following his mother's death.

[41] Before attending the March 2005 meeting the grievor had become aware that he was going to be suspended for three weeks. A colleague was asked to relieve him and the colleague phoned the grievor to inquire about his holiday. After receiving the March 18, 2005, disciplinary letter the grievor went off on sick leave from March 18 to June 10, 2005. He served his suspension after returning from sick leave.

[42] Mr. McEachern described the professional characteristics of a district veterinarian working for the Agency as including a high level of education, knowledge and intelligence. District veterinarians are analytical and do not accept the obvious. They do not make decisions on assumptions; rather, they analyze, investigate and then make their decisions. In cross-examination, the grievor agreed that he possessed those characteristics.

[43] Mr. McEachern was questioned about his understanding of the meaning of a closed-book examination. He said that a closed-book examination is one where the candidate brings in no additional tools or references as an aid to writing the examination. The candidate uses his or her knowledge and experience to answer the questions. Mr. McEachern did not consider the Internet any different from a book. He said that it was a reference tool and in many cases contains identical information. He said that the Agency's manuals can be accessed using the Internet. He said that the Internet was just another method of accessing information.

[44] Mr. McEachern indicated that the grievor's use of the Internet was a serious matter, and made reference to the fact that the Agency's employees must act in an honest manner in the performance of their duties. He characterized the grievor's conduct as a breach of the Agency's values. He referred to a document entitled "Our Vision Our Mission" (Exhibit E-9), which indicates:

. . .

> *The reputation and credibility of the Agency are vital to our ability to deliver our mandate. As such, we behave, internally and externally in a way that trust is preserved.*

. . .

[45] In cross-examination, Mr. McEachern admitted that he agreed with the screening factors and selection criteria for the Regional Veterinarian Officer position's competition. He confirmed that he had made some notes and that the Human Resources office had prepared an investigation report that has not been shared with the grievor. Mr. McEachern confirmed that he was not present at the examinations. Mr. McEachern admitted that he probably had not used the words "fact finding" at the January 2005 meeting. He did convey that he wanted to understand what happened from the grievor's point of view. Mr. McEachern admitted that he was not a veterinarian. He also admitted that simply looking at Internet materials, without background and experience, would not be sufficient to pass an examination.

[46] Mr. McEachern agreed in cross-examination that the meeting that he had with the grievor in January 2005 did lead to disciplinary action. Mr. McEachern said that, at the time of the January meeting, he was not convinced one way or the other that there was any need for discipline. Mr. McEachern said that if the grievor had asked for a bargaining agent representative, he would have permitted it at the January meeting, but he did not suggest to the grievor that he should have a bargaining agent representative present.

[47] In cross-examination, Mr. McEachern confirmed that he did not interview the other candidates who wrote the examination in Burnaby to confirm whether they had accessed the Internet during the examination. He said that it was possible that a candidate could view information and record it in his own words. Mr. McEachern reviewed the examination papers of other candidates. He determined that none of the

other candidates had a perfect score, and stated that the answers looked like original answers and did not look as though they were cut and pasted from the Internet. If Mr. McEachern had found out that another candidate had cheated on the examination, he would have treated the other candidate in the same way as he treated the grievor.

[48] The grievor gave evidence in this case. He is a Doctor of Veterinary Medicine; he also has a Bachelor of Science in Agriculture. He went to school in the 1970's before the advent of the desktop computer, at a time when a deck of punched cards was handed to a mainframe computer operator to run a program. He worked as a veterinarian in private practice before joining Agriculture Canada and being deployed to Victoria. His initial posting was as a VM-01 at Lily Dale Poultry Farm in Langford. Within a couple of years he won a VM-02 competition. In 1989 the Lily Dale Poultry Farm closed and he was posted to the Agency's office in Victoria. His duties included animal health, district veterinarian, and Veterinarian-in-Charge duties for provincially regulated plants on Vancouver Island (a provincially regulated plant is a plant that does not engage in the inter-provincial or international export of products). He was confirmed as the District Veterinarian in 2002.

[49] The grievor has received two awards within the Agency for service. In 2002 he won the President's Award for his earlier dealings with a bovine spongiform encephalopathy concern with a buffalo herd in the Duncan area. He also won a Leadership Award in 2005 for his actions during the avian influenza epidemic in the Fraser Valley. His retirement date was to be February 27, 2007, "depending on the outcome of things." I took this as an oblique reference to the outcome of this grievance. The grievor advised that he was an employee without a disciplinary record.

[50] The grievor uses computers and the Internet extensively in his job to ensure that he has up-to-date information when dealing with the public and performing his other duties. The Agency has an internal Website containing legislation, manuals and other useful information.

[51] In 2004, the grievor applied for the Regional Veterinarian Officer position located in Abbottsford. At the time of the application the grievor was working principally in the animal health area. While he had past experience in meat hygiene, it had been some years since he had engaged fully in this area. He engaged in extensive study which he described as "a little extra work" to prepare for the examination. One

of his reasons for phoning Ms. Andreas was to find out the proportion of meat hygiene and animal health questions on the examination.

[52] There is no substantial disagreement between the evidence of the grievor and Ms. Andreas concerning the telephone call of November 12, 2004. Dr. Hickling said that there was no mention of computer or Internet use during the telephone call.

[53] The grievor admitted that he used the Internet during the examination. He said that Ms. Bunyan did not mention whether the examination was open book or closed book, and that she never mentioned the Internet connection. He said that the Agency provided Internet access at the examination in Burnaby, and did not tell him that he could not use the Internet.

[54] After scanning the test, the grievor testified that he noted that some of the answers were amenable to going to the Internet. He said that because he had studied using the Internet he knew exactly where to go to find the information with a minimum of key strokes.

[55] In his direct examination, the grievor described the material that he obtained from the Internet and cut and pasted into the answer portion on his diskette as specified risk material from the animal health regulations and Annex N from the Meat Hygiene Manual of Procedures.

[56] The grievor said that he spent about 10 minutes on the Internet, and he spent the balance of the time answering the questions on the examination.

[57] It is clear that Ms. Bunyan did not see the grievor using the Internet. After he had difficulty in printing and emailing his examination answers he did not disclose to Ms. Bunyan that he had been using the Internet during the test.

[58] The grievor was asked in his direct examination about his reaction to the fact that his examination answers had not been saved, could not be printed, and could not be emailed, and that a technician had been called to try to regenerate his answers. He indicated that he had spent two weeks studying for the exam, was quite shaken by what had happened and was concerned whether he could still go to the interview in Edmonton. Ms. Bunyan told him that the results of the exam did not have an impact on attending the interview.

[59] The grievor went to the interview. After the interview, Mr. Wilson brought up the issue of the grievor having had problems saving his answers to the questions. To keep matters fair, the grievor was offered an opportunity to rewrite the examination, which he accepted. He did not disclose to Mr. Wilson that he had used the Internet during the examination, before Mr. Wilson made the offer to allow him to rewrite the test.

[60] Ms. Hewitt set up the grievor in a small room with a laptop and a diskette to save his answers. As Ms. Hewitt was setting up the laptop he asked if the setup was going to be the same as in Burnaby, where the candidates had Internet access. She acted surprised and pulled out the LAN connection from the machine. He asked about emailing and printing the document and she replied that that was not necessary.

[61] The grievor received a letter on November 26, 2004, notifying him that he was unsuccessful in the competition. The letter did not mention the difficulties with saving the answers or the attempts made by the Agency to recover the material on his diskette.

[62] There is no substantial difference between the evidence of the grievor and the evidence of Mr. McEachern concerning the January or March 2005 meetings. The grievor confirmed that in the January meeting Mr. McEachern did not give any indication that his concerns would lead to discipline. The meeting ended with Mr. McEachern mentioning that the grievor was up for an award and that he would get back to the grievor with his thoughts on the investigation. The grievor was not worried and had no concerns following the January meeting with Mr. McEachern.

[63] In cross-examination the grievor admitted that he was a well-educated, inquisitive person who was used to analyzing and dealing with complex issues. He admitted that he did not use the books in his briefcase because the examination was intended to be a closed-book examination, and that would have given him an unfair advantage. For the same reasons he would not have used anything that he wrote on a paper and brought into an examination.

[64] The grievor admitted in cross-examination that he could have asked the invigilator or passed the invigilator a note with a question asking whether he could use the Internet. He said that he did not do so because he thought that part of the examination was to test the computer software skills of the candidates and to test the ingenuity of the candidates since these were screening factors. He also did not ask

because he did not wish to alert the other candidates to his use of the Internet by asking questions. He agreed that using the Internet was an advantage. He contended that a book is completely different than the Internet in the context of a closed-book exam.

[65] The grievor was asked a series of hypothetical questions, and he admitted that if a person was found to be cheating on an examination, it could be a serious matter meriting some discipline. It was also a violation of professional ethics. He contended that it was not cheating unless it was "done with malice." He blamed the Agency for making the Internet blatantly available and not providing written or oral instructions prohibiting use of the Internet in answering the examination questions.

[66] The grievor responded to questions in cross-examination suggesting that it was okay to use an electronic version of the information rather than the paper in his briefcase because the Agency made it available. He claimed that it was not necessarily everyone else's fault. Everyone else in the room had the same opportunity to use the Internet as he did. The candidates were not told that they could not use the Internet, and in the Agency's legislation anything that is not forbidden is allowed. He said that there was no instruction concerning use of the Internet. When asked whether he asked himself the question whether he could use it or not, he responded by referring to the portion of the competition poster that refers to using initiative and demonstrating proficiency in the use of software.

[67] In his re-examination the grievor said that he felt that what he did was not cheating and that at the very worst it was a lapse of good judgement. He said that it was not cheating like someone padding their expense account.

[68] In his re-examination the grievor expressed a sense of frustration that he faces significant day-to-day problems in the workplace because the Agency has not given him the "tools" to do his job.

III. Summary of the arguments

[69] As this hearing dealt with two grievances with different burdens of proof, first I have set out the arguments with regard to the representational rights and second the disciplinary decision. This is the order in which it makes sense to decide the issues. At the hearing, however, the misconduct issue was argued first.

A. Representational rights

[70] The grievor says that in January 2005, he was required to attend a meeting on a disciplinary matter. Applying the definitions of "matter" in *Blacks Law Dictionary*, 7th ed. (1999), and the *Concise Oxford English Dictionary*, 11th ed., revised (2006), the meeting in January 2005, was clearly a disciplinary matter. The language of the collective agreement in clause D8.02 is broad and refers to an employee being ". . . required to attend a meeting on disciplinary matters . . . ." In the context of this collective agreement, any meeting that confirms or refute conclusions regarding discipline are disciplinary matters.

[71] The right to representation extends beyond a meeting in which discipline is imposed by an employer. An investigation of misconduct is part of a discipline continuum: *Riverdale Hospital v. Canadian Union of Public Employees, Local 79* (2000), 93 L.A.C. (4th) 195. A disciplinary meeting includes a meeting with the employee to hear what an employee has to say about an allegation of misconduct: *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133.

[72] Mr. McEachern was not a neutral investigator and he was the person who imposed the discipline. There were procedural flaws in the investigation. The Agency did not share all its information with the grievor.

[73] The disciplinary nature of the January 2005 meeting engaged the grievor's right to have a representative present. The fact that he did not ask for a representative to be present is not germane. The grievor says that the right of an employee to have a bargaining agent's representative present during a disciplinary meeting is fundamental and it is at the heart of representational rights: *Evans v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25641 (19941021). The failure to provide a bargaining agent's representative makes the discipline *void ab initio*: *Evans*; *Shneidman*. The breach of the representational right is so fundamental that it cannot be cured by a hearing *de novo* or an adjudication hearing: *Evans*. The Agency's disciplinary decision should be declared a nullity.

[74] The Agency says that the burden rests with the grievor to show that he has the right to a representative and that the right was violated during the January 2005 meeting. The grievor must show that this meeting was of a disciplinary nature. The

grievor's rights rest on the stipulation of the collective agreement and not on any rights in the *Canadian Charter of Rights and Freedoms*.

[75] The Agency says that the grievor was afforded his rights at the March 2005 meeting when the discipline was imposed. The Agency asks how can the January 2005 meeting be viewed as disciplinary when it was not seen as such by the grievor? He was not worried about that meeting and discipline was not discussed.

[76] There is nothing complicated about the January 2005 meeting. It was an investigatory meeting. The grievor confirmed that he did not access the Internet mistakenly, and he knew full well that the examination was a closed-book examination. The grievor could have provided further information at the January or March meeting, but chose not to.

[77] The *void ab initio* argument has been tried over and over again by grievors and has failed. *Shneidman* was quashed by the Federal Court: *Canada (Attorney General) v. Shneidman*, 2006 FC 381. The comments about the investigatory process in *Shneidman*, 2004 PSSRB 133, referred to by the grievor, do not survive that decision, which has been quashed and sent back for a new hearing.

[78] The other authorities provided by the grievor deal with other collective agreements. It is important to construe the grievor's rights under the applicable collective agreement, as the scope of collective bargaining rights vary from agreement to agreement.

[79] The grievor's continuum argument was considered in *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124. *Naidu* distinguished *Evans* on the basis that, in the meeting in *Evans*, the employee was given a choice of being fired or resigning. The meeting was disciplinary and the employer had discouraged or denied the employee's request to have a bargaining agent's representative present.

[80] *Naidu* stated:

. . .

> *[82] . . . There was no specific language in the collective bargaining agreement or the applicable legislation granting employees the right to representation when the employer calls an employee to a meeting to answer questions*

> *regarding that employees' conduct in the course of his employment.*
>
> *[83] This conclusion is consistent with the duty an employee owes to an employer. Unless otherwise stipulated, the employer has the right to direct its workforce. That right must necessarily include the right to review the performance and behaviour of its employees. If such a review disclosed improper or unacceptable behaviour, the collective process and the legislation envisage a process of correcting behaviour, which includes discipline.*
>
> *[84] The principle that an employee is not required to provide an explanation to his employer or acknowledge any wrongdoing is not one that is enshrined in the collective bargaining regime. The principle is one that is enshrined in our criminal law. The collective bargaining regime has developed from employment law, which historically has upheld, and continues to uphold the employer's right of entitlement to good faith from its employees. Accordingly, the approach is very different. Whether an employee has been candid with the employer, acknowledged the inappropriateness of the conduct in question, apologized and demonstrated remorse and a willingness to correct the behaviour or refrain from it in the future, are primary considerations in addressing the issue of mitigation of the discipline imposed.*
>
> . . .

[81] Not every interview is disciplinary merely because something is discussed at the interview and this discussion eventually leads to some discipline being taken by the employer: *Arctander v. Treasury Board (Canada Post)*, PSSRB File No. 166-02-10565 (19820223). *Arctander* stated:

> . . .
>
> *21. Whilst I share the view of adjudicator Smith, in Bronson, Cassidy and Legere (supra), that an interview for the purpose of investigation can also be a disciplinary interview, depending on the circumstances, it does not follow that every interview is disciplinary or becomes, retroactively, disciplinary in nature merely because something discussed at an interview eventually leads to disciplinary action being taken.*
>
> *22. Moreover, I do not find the provisions of the collective agreement prevent the employer from looking into an employee's irregularity in performance or comportment without 24–hours notice first being afforded to the employee.*

> *It would scarcely be good labour relations for the employer always to have discipline uppermost in his mind when it has no idea how real, or inconsequential, an irregularity might prove to be.*
>
> . . .

[82] The Agency relies heavily on *Arena v. Treasury Board (Department of Finance)*, 2006 PSLRB 105. *Arena* interpreted a representational rights clause virtually identical to the clause at issue in this case, with the exception that, in that case, the rights also included a right to a minimum of two working days' notice, when practicable.

[83] In reply argument, the grievor says that the cases cited by the Agency are distinguishable. The grievor says that the adjudicator's reasoning concerning the meeting in *Shneidman*, 2004 PSSRB 133, was not disturbed by the Federal Court, as the judge quashed that decision based on the adjudicator incorrectly deciding that she had jurisdiction to consider the disciplinary process, when the grievance filed related only to the disciplinary decision. The grievor refers to 2006 FC 381, ¶23, where the Court finds that the adjudicator acted without jurisdiction, and submits that it is not necessary to address other aspects of that decision.

[84] In *Naidu*, the investigator had no power to impose discipline, unlike in this case where Mr McEachern was "the prosecutor, the judge, the jury and the executioner." *Arctander* is an old decision and nobody disputes that not every single meeting is a disciplinary meeting, but here the meeting was disciplinary. *Arena* is distinguishable because, in this case, Mr. McEachern had some evidence of wrongdoing before he conducted the investigation.

[85] Further, the grievor says that what is at issue is the Agency's conduct during the investigation. He is not necessarily a practitioner of labour relations, and the fact that he did not ask for representation at the January 2005 meeting cannot be determinative of whether the Agency breached his representational rights.

[86] It might have been helpful to the grievor to have had a bargaining agent's representative at the January 2005 meeting who could have assisted in the Agency's inquiry by ensuring that all the facts were available to Mr. McEachern. By the time of the March 2005 meeting the investigation had concluded, the employer had made up its mind, and there was no point in providing further information.

B. Disciplinary decision

[87] The Agency suggests that the adjudicator consider whether the grievor engaged in misconduct, whether the penalty imposed was appropriate and within an acceptable range, and whether there were mitigative circumstances to justify a reduction in the penalty.

[88] The grievor engaged in serious misconduct and a 15-day suspension without pay was appropriate discipline in the circumstances of the case. The Agency says that there is no ambiguity in the concept of a closed-book (or "not–an-open-book") examination, which means that candidates cannot use any external aids to assist them in writing a test. The grievor's decision to use the Internet was deliberate, and at the time of using it he knew that it was a closed-book examination. It was not an error of interpretation on his part, and this should not mitigate the suspension imposed: *Emery v. Treasury Board (Canada Employment & Immigration Commission)*, PSSRB File Nos. 166-02-14440 and 14441 (19841016).

[89] The grievor ignored a clear directive given by the Agency concerning the closed-book nature of the examination. The Agency says that use of the Internet during a closed-book examination is akin to cheating on an examination. It also violates ethical standards of conduct for professional veterinarians and Agency employees.

[90] The Agency submits that the 15-day suspension without pay was a fitting penalty for the grievor's serious misconduct. In the past, adjudicators have sanctioned termination of employees, or alternatively, lengthy suspensions of employees who cheated on examinations: *Thomas v. House of Commons*, PSSRB File No. 466-HC-155 (19910415); *Hampton v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-28445 (19981123); *Rivard v. Treasury Board (Solicitor General of Canada – Correctional Service)*, 2002 PSSRB 75.

[91] The Agency submits that the purpose of the 15-day suspension was to send a clear message to the grievor that the misconduct could not be tolerated. The grievance should be dismissed.

[92] The grievor argued that there was no misconduct in this case; at worst his conduct could be viewed as arising from an error in judgement, or negligence, and it was not an event meriting discipline. In the alternative the grievor argues that the disciplinary action was too harsh and a letter of reprimand should be substituted. The

grievor asks to be made whole, and that any records relating to the discipline be removed from his file.

[93] At the time when the grievor was in university there were no computers. A closed-book exam meant just that: "no printed reference materials are allowed in the examination room." As a trained veterinarian the grievor is required to use computers and the Internet in the course of his work. However, without his training and experience he would be unable to use only the Internet material to answer examination questions. The Internet tool was there, and the candidates were not instructed not to use it. The grievor assumed that it was part of the testing process, as certain of the selection criteria related to the use of software and to initiative and the grievor did not know which portion of the statement of qualifications were being tested.

[94] The Agency did not show that other candidates had not used the Internet; they could have used it to answer the questions, without cutting and pasting. The grievor spent only 10 minutes of the 120-minute examination on the Internet. The invigilator must have seen him using the Internet as she was walking around the room. It was him who first made the Agency aware that he used the Internet during the examination.

[95] There was no misconduct because the grievor had no intention to cheat. His conduct may have been naïve. The worst that can be said is that he made a mistake. The adjudicator should place no reliance on the fact that the grievor did not ask questions of the invigilator. This is entirely understandable if one of the aspects of the examination was to test the candidates' ability to use the software. Asking the question would have alerted other candidates.

[96] The grievor says that if discipline was warranted, the penalty imposed was too harsh and "the punishment does not fit the crime". If this is misconduct, it has to go down in the annals of stupid crime, and a fit rehabilitative penalty is a written warning. The punishment heightened the grievor's stress level and, combined with the death of his mother, resulted in a lengthy absence from work that the adjudicator should take into account in assessing the suitability of the discipline. The grievor has been an outstanding employee, has won awards and this should mitigate the penalty imposed.

[97] In reply, the Agency stated that the witnesses did not agree on the meaning of a closed-book exam, but the meaning should be clear: one cannot have access to any supplementary materials. It should not be hard to understand this concept. It is one

thing to follow the instructions and use a blank word-processing document to prepare an answer, to print the answers from the network printer, and to use the email facility to transfer the answers to the person marking the examination in Edmonton. It is quite a different thing to use the Internet to cut and paste answers in an examination. If one knows what one is doing, as the grievor did, a substantial amount of material can be lifted into an examination answer in 10 minutes, and this can be done without alerting the invigilator.

[98] Misconduct means improper behaviour, it does not have to be intentional or with malice, contrary to what is suggested by the grievor. What he did was intentional because he was instructed that it was a closed-book examination. It should be kept in mind that the grievor had an interest in cheating as he was applying for a promotion to a VM-03 position. The grievor appears to have taken sick leave in part as a result of the death of his mother, and therefore this is a factor that should not be taken into account as mitigation of the suspension.

IV. Reasons

A. Representational rights

[99] The first issue that I wish to consider is whether the grievor had a right to bargaining agent representation at the January 20, 2005, meeting. The grievor has argued that this meeting was disciplinary, and that the failure to advise the grievor of his representational rights at this stage renders the discipline imposed at the March 18, 2005, meeting *void ab initio*: *Shneidman,* 2004 PSSRB 133.

[100] Clause D8.02 of the collective agreement provides as follows:

> . . .
>
> ***ARTICLE D8 – STANDARDS OF DISCIPLINE***
>
> . . .
>
> ***D8.02*** *Where an employee is required to attend a meeting on disciplinary matters the employee is entitled to have a representative of the* [bargaining agent] *attend the meeting when the representative is readily available.*
>
> . . .

[101] A similarly worded clause and similar argument were at play in *Arena*. In that case, the clause read as follows:

. . .

> ***36.03*** *Where an employee is required to attend a meeting on disciplinary matters the employee is entitled to have a representative of the Institute attend the meeting when the representative is readily available. Where practicable, the employee shall receive in writing a minimum of two (2) working days notice of such meeting.*

. . .

[102] *Arena* found as follows:

. . .

> *[91] The words used in this clause must be understood in their ordinary meaning. The collective agreement does not contain a definition of the meaning of the words "on disciplinary matters". The word "on" means "in relation to" or "in respect of" in its ordinary meaning. It must, therefore, be understood that the meeting during which the right to representation is granted is "in relation to disciplinary matters" or "in respect of disciplinary matters".*
>
> *[92] This wording is broader than the wording of some of the collective agreements brought to my attention and that deal with a meeting at which a disciplinary decision will be rendered. Clause 36.03 stipulates, however, that a disciplinary measure must be discussed at the meeting. Discussing a disciplinary measure necessarily implies that the employee has been accused of misconduct, which could result in a sanction against him.*
>
> *[93] Based on this reasoning, a meeting at which the employer is seeking facts about events, normally considered an "administrative investigation", is not a meeting in relation to a disciplinary measure. At such an investigatory meeting, the employer's purpose is to gather all of the facts and to verify their accuracy. A disciplinary process may follow this administrative action, if the facts show, in the employer's assessment, that an employee acted improperly, and if that action warrants a sanction.*
>
> *[94] I can conceive that, in certain circumstances, it may be difficult to determine at what point the administrative action ends and the disciplinary process begins. This issue must be assessed in light of the specific facts in each case. It cannot be concluded* a priori *that the imposition of a penalty on the employee retroactively confers a disciplinary nature on each of the steps taken by the employer to allow it to reach its decision.*

> *[95] The theory of a disciplinary continuum that would necessarily stem from the imposition* a posteriori *of a disciplinary measure would be contrary to the principle that an adjudicator cannot alter or add to the wording of a collective agreement. According to the grievor's arguments, I should find that there was a disciplinary continuum in this case, and, thus, attribute a disciplinary nature to the December 7, 2004, meeting, thereby giving entitlement to the right to representation. I do not believe that the adjudicators in* Riverdale Hospital, Brink's Canada *and* Evans v. Treasury Board *wanted to extend the right of representation to administrative meetings in contradiction of the wording of the collective agreements.*
>
> *[96] In the case before us, it is clear that the right to representation is limited to meetings on disciplinary matters, and the wording of clause 36.03 of the collective agreement does not include fact-finding meetings of an administrative nature. To conclude otherwise would be to go against the well-established principle that an adjudicator does not have the authority to alter or add to the wording of the collective agreement (Brown and Beatty,* Canadian Labour Arbitration, *3rd ed., at para 2:1202).*
>
> . . .
>
> *[109] I must point out that extending the right to representation to all "administrative" investigations that the employer must conduct would have a significant negative impact on the climate of labour relations by creating paranoia that would hinder open and sincere communication between the parties.*
>
> . . .

[103] I am not bound by *Arena;* however, its reasoning is persuasive and I agree with its approach. The January 2005 meeting was an administrative meeting to obtain information from the grievor. Mr. McEachern was at least able to confirm at this meeting that the Internet access during the examination was deliberate, in comparison to mistaken or inadvertent use, that the grievor used information from the Internet in answering questions, and that he cut and pasted information into his answers. It was also open for the grievor to provide any information to Mr. McEachern that may have shed more light on this. Mr. McEachern had an open mind when he was trying to obtain the grievor's side of the story, and he continued to investigate by talking to others, including Ms. Hewitt, in late February.

[104] If the Agency had not questioned the grievor, and had proceeded to a discipline meeting without any input from him, it may have acted in a procedurally unfair manner, and may also have imposed discipline on a mistaken or unnecessary basis. Any discipline has the potential to cause an employee a serious loss of self-esteem, loss of confidence, and emotional upset, and therefore an employer should proceed carefully, as the Agency did in this case, before imposing discipline. Unnecessary discipline or mistaken discipline can severely fracture or impair an employment relationship. In this case, even carefully considered discipline had some impact on the grievor, as he went on a lengthy stress leave.

[105] In my view, if the collective agreement intended that an employee has a right to have a bargaining agent's representative present during an investigation, this would be a substantial departure from the Agency's right to manage and direct its workforce, which includes the right to investigate or question an employee's performance. Such a right would have to be clearly spelled out in the collective agreement as it is an aberration and derogation from an employer's right to manage the workforce. Such a right is something that could have been bargained collectively and could be reflected in a collective agreement. I find that there is no such right in the collective agreement at hand.

[106] The fact that discipline was imposed in March 2005 does not render the January 2005 meeting disciplinary. I dismiss the grievance relating to the breach of representational rights under clause D8.02 of the collective agreement.

B. <u>Disciplinary decision</u>

[107] Many of the facts in this case are non-controversial. The grievor was told prior to the examination that it was a closed-book or not an open-book examination. This is not a difficult concept, and it means that candidates must rely on their own knowledge or experience when writing an examination and cannot rely on external aids.

[108] It is clear that the Internet was an external aid, and is no different than a briefcase full of books, or a cheat sheet brought by candidates into an examination room. The Internet contains many more sources than the candidates would be capable of carrying into and concealing in a briefcase or on their persons, for a closed-book examination.

[109] The first question that I must ask myself is whether this is misconduct. In answering this question I have considered whether accessing the Internet by the grievor could be considered an honest mistake. I have considered whether the grievor was naïve in concluding that he could use the Internet.

[110] I have reluctantly come to the conclusion that the grievor's evidence cannot be accepted. In considering his evidence, I have considered the test in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357:

. . .

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.*
>
> *The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.*

. . .

[111] The grievor knew that the exam was a closed-book examination. Any reasonable person would know that a closed-book examination meant that the candidates could not rely on any external aids other than their own memory or experience. His suggestion that he took the words literally seems implausible given that he is an articulate, intelligent man, with at least two university degrees and substantial work experience. In his work experience, he does not accept things at face value or on assumptions, he investigates. I find it implausible that he would not have thought seriously about what a closed-book exam meant. The issue was of some importance to him as he was interested in competing and doing well in the VM-03 competition.

[112] The grievor also knew that use of the Internet would be an advantage during the examination. His evidence was that he felt that he was at a disadvantage coming from an animal health background in competing for a position that also involved meat hygiene inspection duties, which he had not done recently. He did not disclose any questions that he had about use of the Internet to the invigilator in part because he did not want the other candidates alerted to that advantage.

[113] The grievor's position that he could use the Internet because he did not receive any specific oral or written directions from the invigilator on the day of the examination is offensive to the purposes of the examination which is to test the knowledge of the candidates on a level playing field. This was not a test of the candidates' abilities to retrieve and regurgitate online information, however helpful that online information would be in the performance of day-to-day duties. The grievor was not applying for a position as a computer specialist.

[114] In my view, the grievor's explanations for using the Internet were contrived, and he has had many months to contrive his explanation. He was a combative and argumentative witness. His evidence did not have a ring of truth. In my view, the use of the Internet during the examination was misconduct.

[115] The second question that arises is whether the Agency's decision to suspend the grievor for 15 days without pay was excessive in the circumstances of the case. In a number of the precedents provided by the Agency where an employee has cheated in an examination in a premeditated way, discharge has been upheld at adjudication as an appropriate form of discipline. The distinction in this case is that the grievor's misconduct was opportunistic rather than premeditated. It shows, however, a very

serious lack of judgement, and is a serious breach of ethics and of the values of the Agency.

[116] Here, the Agency took a rehabilitative approach to deter the grievor from engaging in this conduct in the future. The Agency considered mitigative facts, including the grievor's length of the service, and the fact that the grievor did not lie about the use of the Internet.

[117] There were two additional mitigative factors that the Agency does not appear to have considered. The conduct was not premeditated in that the grievor did not take external aids into the examination room but rather opportunistically used the Internet. Further, the grievor appears to have a past history of superior work performance as indicated by the awards he has won.

[118] In general, the appropriate factors to consider in determining whether discipline should be mitigated were described in *Naidu*. I am not convinced that the grievor appreciates that he has engaged in wrongdoing, or the seriousness of his wrongdoing. There has clearly been no exhibition of remorse for the wrongdoing either in meetings with Mr. McEachern or in this adjudication hearing. I am not satisfied that he would not under similar circumstances engage in similar conduct. It is, however, unlikely that he will be presented with the opportunity to participate in further competitions as the grievor stated that he was considering retiring in February 2007. At one point in his evidence he expressed a sense of frustration that he faces significant day-to-day problems in the workplace because the Agency has not given him the "tools" to do his job. In my view, his conduct is "way over the line" in this case. It is troubling that he appears to see nothing wrong with cheating on an examination, and seeks to justify his conduct by blaming the Agency. As pointed out in *Naidu*, employers are entitled to good faith from employees.

[119] In my view, the Agency's decision was reasonable, and could have attracted a lengthier suspension than that imposed, given the range of precedents presented to me. The disciplinary penalty imposed was not excessive in the circumstances, there are few mitigating factors and therefore I am not prepared to reduce the suspension.

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

(The Order appears on the next page)

V. Order

[121] The grievances are dismissed.

July 5, 2007

Paul Love,
adjudicator