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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JOHN KING

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
King v. Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Andrew Raven, counsel

For the Respondent: Richard Fader, counsel

Heard at Toronto, Ontario,
May 11 to 14 and June 7 and 8, 2010;
written submissions filed September 16, October 4, November 3 and 16, 2010.

I. Individual grievances referred to adjudication

[1] John King ("the grievor") was a border services officer for the Canada Border Services Agency (CBSA or "the deputy head") at Pearson International Airport (PIA) and also a local president of the Customs Excise Union Douanes Accise (CEUDA), a component of the Public Service Alliance of Canada (PSAC).

[2] He filed a grievance against a 30-day suspension issued on November 2, 2007 and his subsequent termination of employment on November 20, 2007. In the grievance against the 30-day suspension, the grievor also alleged a breach of the no-discrimination article of the collective agreement (the agreement between the Treasury Board and the PSAC for the Program and Administrative Services Group, expiry date June 20, 2007, Exhibit G-2) ("the collective agreement"). Because other proceedings were underway involving the grievor (a complaint and other grievances), the suspension and termination grievances were held in abeyance pending the completion of the other proceedings.

[3] The deputy head's position was that, if the termination grievance was allowed, the appropriate remedy would not be reinstatement but payment in lieu of reinstatement. The parties agreed that the evidence on this aspect of remedy would be heard at the same time as the evidence on the merits of the grievances. The parties also provided written submissions on payment in lieu of reinstatement in light of the Federal Court of Appeal's decision in *Lam v. Attorney General of Canada*, 2010 FCA 222. In light of my conclusions on the merits of the grievance against the termination of the grievor's employment, I do not need to consider this evidence or the submissions of the parties on the authority of an adjudicator to order compensation in lieu of reinstatement.

[4] Counsel for the grievor introduced a legal opinion as an exhibit after confirming that the recipient had waived the privilege attached to the document (Exhibit G-6S). A condition of the waiver was that the disclosure of the document would be limited to the adjudicator, counsel for the deputy head and one deputy head representative. The deputy head did not object to those conditions. Therefore, I ordered the document sealed. Testimony and submissions on the legal opinion were conducted *in camera* (in private).

[5] The deputy head objected to the introduction of a document prepared by Human Resources and Skills Development Canada (HRSDC) about the grievor's application for employment insurance benefits. It objected on the basis that the document was not relevant, as it was a finding that was not binding on me. Counsel for the grievor submitted that it was admissible and that it should be given the weight that I considered appropriate. I allowed the document to be introduced, and I reserved on both the relevance and the weight to be given to the document. Having reviewed the document, I conclude that the finding of the HRSDC of no cause for termination of his employment was a determination made for the purposes of determining employment insurance benefits. Consequently, it is not relevant to this hearing *de novo* of his termination of employment.

[6] The grievor objected to the introduction of documents relating to internal union disciplinary action against him. The deputy head stated that the purpose of introducing the documents was to demonstrate that reinstatement was not appropriate. Counsel for the grievor stated that the fact that the grievor would not return to his union position but would be required to return to his substantive position would be part of the evidence tendered. On that basis, I allowed the objection. In my view, internal union matters are not relevant to the employment relationship in the circumstances of this case.

[7] An order excluding witnesses was granted. Five witnesses testified for the deputy head. Three witnesses testified for the grievor and the grievor also testified.

II. Summary of the evidence

[8] The grievor was a customs inspector in Passenger Operations at the PIA. He was also president of the District Branch of CEUDA Local 24 ("CEUDA Local 24") at the time of his suspension and termination.

[9] The grievor commenced employment as a customs inspector in 1989. The position is now called border services officer (BSO). In summer 1990, he became a steward for CEUDA Local 24. In 1993, he was elected as a vice-president of CEUDA Local 24 and served for three years in that position. In 1996, he was elected as president of the CEUDA Local 24. Commencing in 1996, the grievor began working full-time at his union responsibilities. He worked a small number of statutory holidays as a customs inspector from 1996 to 1999.

[10] In 1999, the grievor was elected to the National Executive of the CEUDA National organization ("CEUDA National") and remained on the National Executive until March 2005. In that year, he decided to run for election to his previous position as president of CEUDA Local 24 and was successful. While a full-time union representative, the grievor was paid by the CBSA (up to the date of his termination). The grievor provided time sheets to the CBSA on a regular basis (Exhibit E-2). The deputy head also provided a workstation for CEUDA Local 24 within the PIA, and the grievor was located there the entire time. The grievor served as president of CEUDA Local 24 until June 2008.

A. Previous disciplinary record

[11] The grievor had discipline imposed on him on three occasions in the years preceding the discipline in the grievances before me. The previous discipline is relevant because the deputy head relies, in part, on progressive discipline principles to support its determination of the appropriate discipline in these grievances.

[12] The grievor was suspended for 30 days on July 26, 2004, as a result of a letter he had written to Tom Ridge, the Secretary of the United States Department of Homeland Security. At adjudication, the discipline was overturned (*King v. Treasury Board (Canada Border Services Agency),* 2008 PSLRB 64, "*King no. 1*"). The decision was issued on August 8, 2008, after the grievor's termination.

[13] A second 30-day suspension imposed on June 19, 2006 was reduced to 5 days as part of a memorandum of settlement of a complaint filed by the grievor (Exhibit G-3). The settlement was reached on April 23, 2009.

[14] The grievor received a further 20-day suspension on November 2, 2006 for sending an email to the Minister of Public Safety and copied to the media that contained allegations against the deputy head. At adjudication, the 20-day suspension was reduced to 10 days (*King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 31, "*King no. 2*"). The decision was issued on February 23, 2010.

B. Discipline imposed

[15] A 30-day suspension was imposed on the grievor as a result of a statement he made on a posting to the CEUDA Local 24 website. The termination of employment was imposed as a result of the reposting of the statement on the same website after the

imposition of the 30-day suspension. I have set out the details of the discipline in the following paragraphs. I have then summarized the evidence that led to the statement made by the grievor, which is common to both grievances.

[16] The grievor received a 30-day suspension on November 2, 2007 (Exhibit E-1, tab 21). He was disciplined for posting an email on the CEUDA Local 24 website on September 11, 2007 that included the following two paragraphs (Exhibit E-1, tab 13):

. . .

> *In the meantime, I have been pressing the bargaining agent and CEUDA National for support to walk off the job now. . . .*
>
> *If management meets and proposes nothing more than what they proposed last February, be prepared to support future union activities.*

[17] In imposing the 30-day suspension, the deputy head concluded that, through his statement, the grievor was counselling or procuring an illegal work stoppage. The deputy head viewed the statement as ". . . a serious act of misconduct and a contravention of the *PSLRA*." The provision of the *Public Service Labour Relations Act* (*PSLRA*) relied on by the deputy head was subsection 194(1). It reads in part as follows:

> ***194.*** *(1) No employee organization shall declare or authorize a strike in respect of a bargaining unit, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike in respect of a bargaining unit or the participation of employees in such a strike, if*
>
> . . .
>
> *(*b*) a collective agreement applying to the bargaining unit is in force;*
>
> . . .

[18] The deputy head stated in the disciplinary letter that it took into account the grievor's past disciplinary record ". . . which demonstrates a clear pattern of misconduct that has as a common thread, a disregard for the interests of the CBSA and a failure to respect its authority." He was warned that any further misconduct could result in more severe disciplinary action, up to and including termination of employment.

[19] The grievor's employment was terminated on November 20, 2007 (Exhibit E-1, tab 32) as a result of reposting on the CEUDA Local 24 website the statements for which he had been disciplined. The letter of termination stated the reposting of the two sentences for which he had already been disciplined was a "serious act of misconduct" that was viewed as the culminating incident leading to a termination of employment.

C. Events that led to disciplinary action

[20] During the grievor's time as a union officer, the workplace at the PIA went through some organizational changes. Until November 1999, customs inspectors were employed with Revenue Canada, a department of the public service. In November 1999, customs inspectors came under a newly created organization, the Canada Customs and Revenue Agency. In December 2003, customs inspectors were moved to a new agency, the CBSA. Also included in this new organization were agriculture inspectors formerly from the Canadian Food Inspection Agency and officers from the former Immigration Department. These three groups of employees were often referred to by management and the union as "legacy groups."

[21] Each legacy group had different work schedules, called Variable Shift Schedule Agreements (VSSA), which were the subject of discussions and negotiations between management at the PIA and CEUDA Local 24 for a number of years. The immigration group of employees was on a "continental" shift schedule of two days on, two days off and then three days on, three days off ("the 2/2 schedule"). The agriculture group of employees had a schedule of four days on, four days off ("the 4/4 schedule"). The customs inspectors group of employees had a schedule of five days on, three days off ("the 5/3 schedule"). The 2/2 schedule and the 4/4 schedule resulted in more days off for employees, and customs inspectors wanted a more favourable schedule than the 5/3 schedule.

[22] In February 2006, the grievor put forward the PSAC's position on the VSSA negotiations with respect to Passenger Operations in an email to the Regional Director General for the Greater Toronto Area (Exhibit G-1, tab 1). He stated the PSAC's preference for the status quo for the pre-existing VSSAs as well as the PSAC's proposal for a 5/4 shift schedule.

[23] In November 2006, the PSAC again proposed a 5/4 schedule, which was rejected by management.

[24] CEUDA Local 24 conducted a vote of its members on the existing VSSAs in late November or early December 2006. In an email to Barbara Hébert dated December 6, 2006, the grievor provided the results of that vote (Exhibit E-1, tab 1). All the employees, except for those border service officers in Passenger Operations, voted to maintain their existing VSSAs. The grievor gave notice that the VSSA for employees in Passenger Operations was cancelled.

[25] At a consultation meeting on January 12, 2007, Norm Sheridan, District Director of Operations, PIA put forward a proposed "6/2" schedule (6 days on, 2 days off) with 10 starting times. The grievor provided CEUDA Local 24's position on the proposed VSSA to Mr. Sheridan on January 18, 2007 (Exhibit G-1, tab 2). It was CEUDA Local 24's position that, in the absence of an agreement on a new VSSA (clause 25.23 of the collective agreement), the deputy head was obligated to follow the hours of work set out as follows in clauses 25.13 and 25.17 of the collective agreement:

> ***25.13*** *When, because of operational requirements, hours of work are scheduled for employees on a rotating or irregular basis, they shall be scheduled so that employees, over a period of not more than fifty-six (56) calendar days:*
>
> *(a) on a weekly basis, work an average of thirty-seven decimal five (37.5) hours and an average of five (5) days;*
>
> *(b) work seven decimal five (7.5) consecutive hours per day, exclusive of a one-half (1/2) hour meal period;*
>
> *(c) obtain an average of two (2) days of rest per week;*
>
> *(d) obtain at least two (2) consecutive days of rest at any one time except when days of rest are separated by a designated paid holiday which is not worked; the consecutive days of rest may be in separate calendar weeks.*
>
> . . .
>
> ***25.17*** *Except as provided for in clauses 25.22 and 25.23, the standard shift schedule is:*
>
> *(a) 12 midnight to 8 a.m., 8 a.m. to 4 p.m., and 4 p.m. to 12 midnight*
>
> *or, alternatively,*

(b) 11 p.m. to 7 a.m., 7 a.m. to 3 p.m., and 3 p.m. to 11 p.m.

[26] In his message, the grievor stated that, without a valid VSSA, employees would not accept new start times, "outside of 25.17." He also stated that CEUDA Local 24 was "ready and willing" to consult on a new VSSA for "Customs Legacy" employees of the CEUDA bargaining unit in Passenger Operations that did not contain a 5/3 provision.

[27] The grievor testified that it was CEUDA Local 24's understanding that the deputy head could not implement new non-standard shifts, based upon discussions at the health and safety committee and on CEUDA Local 24's interpretation of the collective agreement. Its interpretation was that the deputy head could only implement non-standard shifts if the deputy head could prove that operational requirements were required. CEUDA Local 24 was of the view that the deputy head had not done so.

[28] Mr. Sheridan testified that after the cancellation of the VSSA, management was required to discuss additional standard-hour shifts under clause 25.22(b) of the collective agreement. This required consultation with the PSAC, not an agreement. He testified that additional shifts were needed to meet requirements for the start and finish times of shifts. He testified that, although management did not want a 6/2 schedule, in the absence of a VSSA, one was required.

[29] On January 25, 2007, Mr. Sheridan sent an email, distributed to all employees, advising them of the change to a standard shift schedule also known as a "6 and 2" (6/2) (Exhibit E-1, tab 4). He stated that it was not management's preferred schedule but that:

> *. . . Given that all three legacy VSSA's have been cancelled . . . management is required to either revert to scheduling employees on standard length shifts , or seek – together with the union – to reach a mutually agreed upon VSSA proposal which could be submitted to the membership for ratification.*

He stated that he was hopeful that an agreement could be reached on a new VSSA but that, in the meantime, a new 6/2 schedule would be posted, with an effective date of February 12, 2007.

[30] The PSAC filed a policy grievance on February 27, 2007 against the implementation of the new schedule (Exhibit E-1, tab 5). Ultimately, the grievance was referred to adjudication (on June 13, 2007) and was heard, commencing in

February 2008. A decision was issued on May 29, 2009: *Public Service Alliance of Canada v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 66.

[31] The grievor described the mood of the employees when the deputy head imposed the new standard shifts as "very upset." The effect on the quality of life of the employees was drastic. He testified that it was the view of the majority that it was a punishment and a union-breaking method to get the CEUDA Local 24 to concede to the deputy head's VSSA proposal. Mr. Sheridan testified that the employees hated the new schedule. He stated that in the first few months of the new schedule there were some work disruptions, such as flooding the secondary areas with referrals from the front line, calling in sick and working to rule. It resulted in a few employees being counselled or being reprimanded orally. He testified that things calmed down within a few months, although the amount of claimed sick leave still increased.

[32] Brian O'Farrell, an official with CEUDA Local 24, wrote an email to the grievor and Ron Moran, National President, CEUDA, on June 22, 2007 (Exhibit G-1, tab 8) about being approached by six individual members ". . . enquiring into the propriety of withdrawing services." He also wrote that the implementation of the *Public Service Modernization Act*, S.C. 2003, c. 22 had "muddied the waters profoundly." He concluded as follows:

> *Can you please . . . articulate at what point precisely would members be able to withdraw services without fear of recrimination? I would consider this matter urgent, as more strong headed members may not be willing to calmly wait for verification.*

[33] Mr. Moran replied on June 24, 2007 (and copied the grievor) that essential service agreements needed to be in place before a bargaining unit could be in a legal strike position (Exhibit G-1, tab 8). He wrote the following:

> *. . . As is always the case, members who withdraw their services when their bargaining unit isn't in a legal strike position expose themselves to the applicable discipline which includes escalating fines to both the members withdrawing and to the regional and national Union representatives. The union is in no way recommending illegal withdrawal of services at this time.*
>
> *Brian I have no doubt Brother King knew the answer to this question. In order not to undermine the Union's established structure, I would ask that you stop raising your questions*

> *and/or points of view directly to the national level and that you raise them with Brother King who is very capable of deciding what needs to be raised to the next level.*

[34] The grievor wrote the following reply to Mr. Moran and copied John Gordon, President of the PSAC, on June 25, 2007:

> *What Bro. Gordon and you refuse to provide is clarification on what legal recourse our members currently have to counter our employer's ongoing unfettered right to abuse and/or contravene legislation, until such a time that our union complaints are heard by an independent third party.*
>
> *We are not suggesting illegal work stoppages but seeking clarification and national support as only your offices can provide, on what LEGAL options WE DO HAVE to counter employer abuse and to protect our members' contractual and legal rights.*
>
> *I remind you of my previous email requesting that Bro. Gordon provide this local with a written commitment as to what, if any support, the PSAC is willing to provide our members affected by the current imposition of the 6 & 2 shift schedule. . . . Unfortunately we never received such a commitment or response. . . .*
>
> *As you know we volunteer Local/Branch representatives are in no position to make such a commitment or decision of this magnitude. Unlike you and Bro. Gordon, Local representatives such as me are vulnerable to discipline up to and including termination, for what will surely be considered by the CBSA as inciting illegal strike action. This is one of the primary reasons that our members seek AND REQUIRE such direction/leadership from your offices.*

[35] In an email sent the same day, Mr. Moran wrote that he would obtain a legal opinion on available legal recourses. In a reply dated June 27, 2007 (Exhibit G-1, tab 8), the grievor wrote that he would like the question answered as to whether employees could report to work according to the standard shifts identified in clause 25.17 of the collective agreement. He continued,

> *I don't believe this course of action should be considered as illegal strike action as we are simply following the Agreement as we understand it, which is no different than the employer's justification for unilaterally scheduling our members to report for work as* [they] *are currently scheduled.*

> *Obviously we are not equal partners to this agreement and should be. Further, as the PSAC is in agreement that the employer is not applying the contract correctly, this should give us some latitude/justification to follow the Agreement as the PSAC deems is appropriate.*
>
> *As for the other withdrawal of service, please pursue this issue as well.*
>
> . . .

[36] The grievor testified that it was always his intention to safeguard the union membership from possible discipline. He stated that this was a *bona fide* request for advice from the national office. He wanted a legal opinion as to whether employees were required to report for the new shifts. He testified that none of the leadership of CEUDA Local 24 "really understood" the operation of the new *PSLRA*.

[37] On July 11, 2007, Mr. Moran provided an update to the grievor (Exhibit E-1, tab 8), and the grievor replied, asking what the PSAC's next steps would be to put an end to the breach of the collective agreement. Mr. Moran replied as follows:

> . . .
>
> *As for the next steps, as you know I have now made the formal request for a legal opinion . . . For its part the bargaining agent is representing on the policy grievance which is working its way through the system. While I totally agree that these courses of action do not represent the rapid fix the affected members would like to see, they nonetheless represent the only established avenues currently at our disposal. . . .*
>
> *In my view, the next step should clearly be letting the affected members know that unless they individually act, we are not at the* [level] *of seeing this resolved in short order. Reminding them that assisting the employer in making the 6-2 work by doing such things as accepting overtime is undoubtedly an excellent place to start (though it should in no way end there). Knowing full well how the Minister's Office and the media work, I can assure you that unless worksite disruptions are in play, neither will give the matter a second* [thought].

[38] The grievor replied on July 13, 2007, as follows:

> . . .
>
> *Our members need to receive direction from a National President telling us to report for work on no shift other than*

> *what is stipulated in Article 25.17 unless the CBSA provides operational requirements as it is supposed to and as we interpret the Master Agreement to mean.*
>
> *Once John or you give direction to follow the letter of the Agreement, we will do the rest. Such action will surely result in a speedy resolution.*
>
> . . .
>
> *All we need is the support and blessing from this union to follow our Agreement as we understand it. If our union can't even do this, it's time for change.*

[39] The above correspondence was forwarded to Minister of Public Safety, Stockwell Day, Prime Minister Stephen Harper, Vic Toews, President of the Treasury Board, and Stephen Rigby, Deputy Head of the CBSA, by Mr. O'Farrell on July 14, 2007 (Exhibit E-1, tab 8).

[40] On July 20, 2007, the grievor wrote the following email to Steve Pellerin-Fowlie and Gerry Halabecki (union representatives) and copied Mr. Moran and Mr. Gordon and other CEUDA representatives (Exhibit G-1, tab 10):

> *Many CEUDA members of the Toronto District Branch are now raising the issue of conducting rotating wildcat strikes within our Branch.*
>
> *As such I committed to inquiring about the legalities of wildcat or rotating strikes with you, seeking an opinion of what would/may constitute illegal strike action.*
>
> *Considering our Master Agreement has expired and considering the employer has not proceeded as required to negotiate essential service agreements . . . and in light of the fact that the CBSA is not adhering to the expired Master Agreement as we interpret it . . . could we reasonably argue that this justifies union members exercising their rights to strike as we deem the employer is negotiating in bad faith regardless of whether the PSAC and Treasury Board has* [*sic*] *exchanged bargaining demands?*
>
> *We are looking for legal redress other than the traditional non-effective avenues currently available. We must find an alternative process. . . .*
>
> *If the bargaining agent is not willing to assist our members to the extent of directing us to work to the letter of the Agreement, specifically Article 25.17, we are willing to*

> *conduct wildcat strikes to protect what little contractual rights the employer may still be willing to allow.*
>
> . . .
>
> *We seek your immediate support in finding the legal means of initiating strike action now.*
>
> *In closing, please explain what constitutes illegal strike action and whether any of the opening comments have merit to justify strike activity today, now that the Agreement has expired and in light of the fact that the employer is refusing to negotiate essential service agreements, etc.*

[41] On July 26, 2007, the grievor wrote an email to a number of the CBSA management representatives (including Mr. Gillan) and CEUDA representatives (Exhibit E-1, tab 9). He stated that, in light of the expiration of the collective agreement, the fact that the employer refused to honour the expired agreement and refused to meet to negotiate essential service agreements, "[it] is believed that we are in a legal position to walk off the job." In addition, he stated the following:

> *In light of the above, I request that regional management provide tentative dates at which time union and management can formally consult on any employer concerns or legal arguments pertaining to rotating strike action within the GTA.*
>
> . . .

[42] Mr. Gillan replied on the same day (Exhibit E-1, tab 9), stating that the collective agreement remained in effect and that ". . . you are not in a legal strike position." The grievor replied on the same day that the refusal of the CBSA to ". . . honour and adhere to the former Agreement in its entirety, in turn relieves employees of any such obligation." Mr. Gillan replied on July 27, 2007 and stated that the collective agreement remained in effect and that the bargaining unit was not in a legal strike position. He concluded that "[m]anagement fully adheres to the provisions of the Collective Agreement and expects the same of all employees."

[43] On August 9, 2007, the grievor wrote another email to Mr. Gillan, repeating his assertion about the collective agreement and stating that it was his opinion that ". . . the employer's refusal to fully adhere to the provisions of the collective agreement relieves employees of the same or greater obligation, as previously stated" (Exhibit E-1, tab 10). Mr. Gillan replied to the email on August 23, 2007, reminding the grievor that

the collective agreement remained in effect and that the bargaining unit was not in a legal strike position.

[44] On August 15, 2007, the grievor wrote to Mr. Gordon and Mr. Moran (Exhibit G-1, tab 27), asking about the earliest date on which the CEUDA would be in a legal strike position. With respect to the legal opinion received by the bargaining agent on or about August 2, 2007 (Exhibit G-6S), the grievor wrote that it stated that there was an exception to the "obey now, grieve later" rule when the breach of the collective agreement by the employer was "patently obvious." The grievor wrote as follows that he believed that such was the case:

. . .

> *Why must we obey the collective agreement in its entirety if the employer is not?*
>
> *. . . our members' rights to consult on VSSA grievances (for example) were unilaterally suspended by this employer. This is just one more example that this employer is not adhering to all the provisions of the collective agreement yet you expect our members to put up with this nonsense and in contrast follow all the provisions of the agreement like good little employees. Why won't you direct our members to report for work as required as per the standard shifts under Article 25.17 as the PSAC interprets the collective agreement or inform the CBSA that you will be directing us to follow the agreement as we interpret it unless this matter is resolved?*

[45] He concluded his email as follows:

> *If the extent of your assistance or the bargaining agent is restricted to letting the policy grievance run its course, then please state so.* ***Our members deserve at least this clarification from their hired representatives.***
>
> [Emphasis in the original]

[46] The grievor testified that he found the legal opinion inconclusive and that the CEUDA Local 24 did not have all the information that it needed to understand the rights of its members.

[47] Mr. Gordon replied to the grievor's email on August 24, 2007 as follows:

> *. . . I will not speculate about when the Union might be in a legal strike position for the FB unit.*

> *With respect to the VSSA issues, the information provided to you by the PSAC, as well as by Mr. Raven, confirms that the core principle of labour relations is to "obey now, grieve later." I see nothing in your email, or Mr. Raven's opinion, that would suggest that this principle would not apply here. As a result, the policy grievance is the mechanism to deal with this issue. I reject the implication that following this core principle by pursuing this grievance is tantamount to failing to protect our members' rights or to acquiescence in the face of the employer's actions.*
>
> *We are aware of the importance of this issue and intend to stand together with our members in this fight.*

[48] The grievor replied to Mr. Gordon on the same day as follows (Exhibit G-1, tab 27):

. . .

> *If the PSAC believe [*sic*] that the employer is bargaining in bad faith, believes that the employer is not adhering to the collective agreement as per our policy grievance on the VSSA issues in Toronto, and the employer is ignoring their obligations to negotiate essential service agreements, as we are not designated and without a contract, etc…, we must be in a legal position to strike.*
>
> *Once again, we are requesting that the PSAC support what we believe is our legal right to walk off the job. We in Toronto have had enough and are ready and willing.*
>
> *The time is now and all the membership requires is your support and direction.*

. . .

[49] The grievor's response to an email from a member was posted on the CEUDA Local 24 website on September 11, 2007 (Exhibit E-1, tab 13). The email was an update on some of the activities of the local on the VSSA negotiations. The grievor testified that he had the answer posted to the website because he was being inundated with similar questions from members who were angry and frustrated. The last two paragraphs of the message read as follows:

> *In the meantime I have been pressing the bargaining agent and CEUDA National for support to walk off the job now. We have been applying pressure to encourage management to return to the table and bargain in good faith. Hopefully we have achieved this via Gillan's invitation to meet next*

> *Monday. I hope this will prove to be more than just a meeting to see whether we are willing to concede.*
>
> *If management meets and proposes nothing more than what they proposed last February, be prepared to support future union activities.*

[50] Julie Burke, a labour relations officer with the CBSA was tasked with monitoring the CEUDA Local 24 website. Ms. Burke testified that management became aware of the posted email on September 14, 2007.

[51] On September 17, 2007, CEUDA Local 24 and CBSA management at the PIA had a meeting about the VSSA (Exhibit E-1, tab 12). On September 22, 2007, the grievor posted a message on the CEUDA Local 24 website about the meeting (Exhibit G-1, tab 17). Mr. Gillan sent an email to the grievor complaining about the content of the message (Exhibit G-1, tab 17).

[52] On October 29, 2007, the chief negotiator for the Treasury Board wrote to the chief negotiator for the PSAC, drawing his attention to the September 11, 2007 notice and requesting that the grievor remove before October 31, 2007 the portion of the message that referred to walking off the job (Exhibit E-1, tab 15). The letter also noted that the employer would file a complaint under the *PSLRA* unless the message was removed.

[53] On the same day, Mr. Gillan wrote to the grievor, advising him that, if the posting were not removed by October 31, 2007, he would be subject to disciplinary action, up to and including termination of employment (Exhibit E-1, tab 16). He also stated that he had scheduled a disciplinary hearing for October 31, 2007. Mr. Gillan referred to the following statement contained in the posting: "In the meantime I have been pressing the bargaining agent and CEUDA National for support to walk off the job now." He continued as follows:

> *The content of your message causes me great concern, given that you are not in a legal strike position and have been reminded of this on several occasions. You should be aware that Section 194.(1) . . . of the* Public Service Labour Relations Act *prohibits you, as a representative of an employee organization, from counselling or procuring the declaration or authorization of a strike in respect of a bargaining unit or the participation of employees in such a strike.*

. . .

[54] The grievor emailed the webmaster on October 30, 2007, asking that the email be removed from the website (Exhibit G-1, tab 25). The posting was removed from the CEUDA Local 24 website before the deadline set by the employer.

[55] Before the disciplinary hearing (on October 31, 2007), the grievor sent an email to Mr. Gillan and others, stating that he did not issue a direction to CEUDA members to participate in any activity or refrain from performing any of their duties (Exhibit E-1, tab 17). He also stated that there was no intent to counsel or procure illegal activity. He noted that he had been requesting a legal opinion on the matter since the imposition of the 6/2 shift schedule.

[56] Mr. Moran represented the grievor at the disciplinary hearing. Ms. Burke took notes of the meeting (Exhibit E-1, tab 18). She testified that they were an accurate summary. Mr. Gillan stated that the two sentences of concern to CBSA were those contained in the last two paragraphs of the September 11, 2007 posting. The grievor said that he did not post anything personally but that the update was passed on to the webmaster who posted it automatically. He said that it was a regular update that was posted automatically and that "things happen, things slip through." The grievor stated that the message was taken down as soon as management's concern was brought to his attention. He testified that it was not taken down because it was wrong but as a "peace offering." He testified that the information had become old and he did not want to engage in a "pissing match."

[57] At the disciplinary hearing, the grievor was asked what the phrase "walk off the job now" meant. Mr. Moran stated that the words chosen in the email were not the "right" words. The grievor testified that he did not remember Mr. Moran saying those words, but he did not dispute that he said them. He testified that he believed that he did use the right words and that the words were "carefully tailored." At the disciplinary hearing, the grievor said that he was still waiting for direction from the PSAC. Mr. Gillan asked if he was suggesting that it was an open question as to whether CEUDA was in a legal strike position. The grievor replied in the affirmative and stated that CEUDA Local 24 was seeking guidance from the PSAC. He said that ". . . we have every reason to believe . . ." that the imposed shift schedule was illegal, "we are not designated" and the collective agreement had expired. He said that Mr. Gordon "will give the direction." He stated that he was not "inciting."

[58] The grievor testified that he was not asked about the second sentence (the reference to "future union activities") during the disciplinary hearing. He testified that the kind of union activities that were contemplated included letter-writing campaigns, information pickets and getting the families of bargaining unit members involved.

[59] After the disciplinary hearing the grievor wrote an email to Mr. Gillan, other CBSA management representatives, and the Minister of Public Safety on November 2, 2007 (Exhibit E-1, tab 22). He stated that he viewed CBSA's actions as a violation of his rights under the *Canadian Charter of Rights and Freedoms* (*Charter*). He also stated that it was a ". . . perceived attack on our fundamental right to communicate with our members by what can only be described as illegal government censorship." Mr. Gillan replied, setting out the parts of the grievor's message posted on the website that caused concern. The grievor replied as follows:

> *It is well within the union's rights to mobilize members for future activities.*
>
> *The CBSA cannot interfere with how a union prepares for such future activities that the union has the right to decide and manage. It is our right to maintain control on the administration of our union.*
>
> . . .
>
> *I made it clear that we had no intent of proceeding until such a time that we did receive a legal opinion or requested support from the Bargaining Agent.*
>
> *You and your superiors are clearly obsessed with targeting me, shutting down this Local and interfering with this union's ability to communicate effectively with our members . . . .*
>
> *Your actions will only escalate current labour conflict within this region.*
>
> *As long as we don't issue direction, which we clearly have not, we are well within our right to advise our members whether we are seeking support, who we are seeking support from and on which subject we are seeking said support.*
>
> . . .

[60] The letter of suspension was issued later that day (November 2, 2007). In it (Exhibit E-1, tab 21), Mr. Gillan acknowledged that the grievor complied with the order to remove the message from the website. He also stated that the content of the

message caused him great concern. He noted that the PSAC was not in a legal strike position and that he had been advised by the deputy head on three occasions that the collective agreement remained in effect and that the bargaining unit was not in a legal strike position. Mr. Gillan also noted that the grievor continued to maintain that the message was appropriate. The letter continued as follows:

> *. . . Despite your role as a union official in furthering the interests of employees you represent, your improper and reckless statements go well beyond the appropriate scope of responsibilities envisioned by that role and constitute a violation of the prohibition(s) identified in paragraph 194.(1) of the* PSLRA.
>
> *Consequently, I find your counselling or procuring an illegal work stoppage a serious act of misconduct and a contravention of the* PSLRA. *In determining the disciplinary measure, I took into consideration your disciplinary record which demonstrates a clear patter of misconduct that has as a common thread, a disregard for the interests of the CBSA and a failure to respect its authority.*
>
> . . .
>
> *In future your communications and actions are expected to be in accordance with the provisions of the Values and Ethics Code for the Public Service, the CBSA's Code of Conduct as well as the legislation, policies and directives underlying them. You should be aware that failure to adhere to this expectation may result in more severe disciplinary action being taken, up to and including termination of your employment.*

[61] Mr. Gillan testified that in imposing the discipline he relied on the posted message, the disciplinary hearing, input from labour relations professionals on section 194 of the *PSLRA* and previous discipline. He testified that the aggravating factors that he took into consideration in imposing a 30-day suspension were the past history of discipline, the fact that the parties were then negotiating a new contract, the seriousness of the misconduct and the fact that the grievor was counseling an illegal strike. He testified that the grievor showed no remorse and no understanding of management's perspective. In terms of mitigating factors, he testified that the seriousness of disciplining a union official, especially during bargaining, was at the front of his mind. He testified that he considered a suspension of 30 days appropriate given past misconduct and the seriousness of the misconduct. He also testified that he

did not consider termination of employment to be an appropriate disciplinary measure in the circumstances.

[62] The grievor testified that in his message he was only interested in legal avenues and that he never intended to procure or counsel an illegal strike. He testified that he had a limited understanding of the strike process at that time. There was new legislation, and the provisions for essential service agreements were new. With all the issues facing employees, he wanted the legal options to "catapult" them into a legal strike position. He testified that everyone interpreted his message as seeking guidance and direction and not as a call for an illegal strike.

[63] Ms. Burke and Mr. Gillan testified that the delay in imposing discipline (from September 14 to October 29, 2007) was due to the extensive consultations that the CBSA undertook within headquarters and with the Treasury Board.

[64] On November 3, 2007, the grievor wrote a message to CEUDA Local 24 members that was posted on the CEUDA Local 24 website (Exhibit E-1, tab 23). He attached to his message the email exchanges with Mr. Gillan from November 2, 2007 and from October 30, 2007 (Exhibit E-1, tab 22 and tab 17; both discussed earlier in this decision). In his message, the grievor wrote as follows:

. . .

> *By now many of you may have heard that I just received another thirty day suspension without pay. As such, my access to CBSA premises has been restricted until December 14, 2007.*
>
> *What is significant about this discipline is the timing of this suspension, the grounds on which I have been suspended and the fact that this is the third discipline I've received since John Gillan became the Regional Director for the GTA in the spring of 2006.*
>
> *On the bright side, over the course of regional VSSA negotiations, senior officials (not all) within this region and Ottawa have finally been exposed.*
>
> *Each of you has now witnessed the management deception, lies and abuse that continue to plague this organization, impede VSSA negotiations and the resolution of so many other regional labour issues.*

> *It is the truth that binds us in a common cause to be treated with dignity, respect and not to allow this employer to violate any of our contractual and/or legal rights.*
>
> *I hope you take comfort in knowing that I am well, focused and more determined in protecting our rights than ever before.*
>
> . . .
>
> *The attached correspondence explains the latest discipline which is based on two sentences written in a VSSA update that was posted on our local website. The sentences are* ***"In the meantime I have been pressing the bargaining agent and CEUDA National for support to walk off the job now."*** *&* ***"If management meets and proposes nothing more than what they proposed last February, be prepared to support future union activities."***
>
> . . .
>
> [Emphasis in the original]

[65] The grievor testified that he had an obligation to tell the members of CEUDA Local 24 about the discipline imposed on him. He had to serve notice to the members that he would not be available to them as their representative for 30 days because he would not have access to his work email or the workplace. He stated that, since he was an elected official, members had a right to know. He also posted the notice to address rumours and speculation that ". . . could lead people to think that I deserved the discipline." He also testified that the notice served as an advisory to union stewards to be careful of what they would say so that it would not be interpreted by management as calling for an illegal strike. He stated that he was ". . . just being transparent. I'm the president." He testified that his intent was to advise the members and not to incite any illegal action. He also testified that he had a right to freedom of speech under the C*harter*.

[66] On November 5, 2007, the grievor wrote to Mr. Moran and included the correspondence that he had sent to Mr. Moran and Mr. Gordon in August 2007 about his members' legal right to walk off the job (Exhibit G-1, tab 27). In his email, he stated that the legal opinion was not conclusive and continued as follows:

> *Ron, you simply quit after receiving the first legal opinion which was not definitive. I even raised this issue at the NBOD* [National Board of Directors] *and you gave no reason why you wouldn't further investigate the matter. Further and*

> *even if we weren't able to walk off the job, neither you nor the PSAC would even give direction to follow the contract as we interpret it. On these points, we have had no assistance from either of the national union offices.*
>
> *Where is the official and/or final PSAC position in regard to us being able to walk off the job based on the points I raised in the August 24th email? We have not received one. …*

[67] On November 13, 2007, Mr. Gillan called the grievor to a disciplinary hearing about the posting of November 3, 2007 (Exhibit E-1, tab 24). In the email, Mr. Gillan stated that the reposting of the statements for which the grievor had already received discipline was of "continuing concern." In his email reply (Exhibit E-1, tab 25), the grievor stated that the two sentences were included ". . . only to help explain the discipline I am currently serving." The grievor stated that he was not available for the disciplinary hearing as he was then serving a suspension. In reply to a subsequent attempt to schedule a disciplinary hearing, he wrote an email to the Minister of Public Safety, senior management of the CBSA, Mr. Gillan and a number of CEUDA representatives (Exhibit E-1, tab 27) on November 14, 2007. He stated the following:

. . .

> *Be advised that you have wrongfully and without lawful authority compelled me to abstain from communicating with CEUDA members as I have a lawful right to do. Your intimidation by continued threats and punishment has now entered my place of residence during a period of time which I have no obligation to report to my employer. I deem John Gillan's actions which you continue to allow, as an abuse of his position and an offence against both myself and my family.*
>
> *John Gillan has been allowed to discipline me as an employee for an alleged misconduct that does not exist in either the P.S.L.R.A. or the Collective Agreement. I should never have been disciplined as an employee for a perceived offence that occurred outside the workplace and of which can only be committed by a representative of the union. Now John Gillan is being allowed to continue his attack against me of which is a blatant violation of my rights as an employee under the Collective Agreement.*
>
> *If you believe I have committed an offence as a union representative, you are obligated to pursue the applicable redress as per the P.S.L.R.A. under which Act said contravention exists. John Gillan should have submitted a complaint to the P.S.L.R.B. as the Treasury Board threatened to do, for any contravention he perceived was committed by*

> *me while acting in my official capacity as a union representative.*
>
> . . .
>
> [*Sic* throughout]

[68] On November 16, 2007, the grievor wrote an email to Mr. Gillan, the Minister of Public Safety and others (Exhibit G-1, tab 28). In the email, he asks Mr. Gillan "[w]ho told you I directed anything to be posted?" He also asks why the deputy head was not using the process available under the *PSLRA* ". . . since your complaint is against a union representative and not an employee."

[69] The grievor did not attend the disciplinary hearing. His employment was terminated for cause on November 20, 2007 (Exhibit E-1, tab 32). Mr. Gillan stated in the termination letter that he considered the grievor's reposting of the sentences that were the subject of the previous discipline a "serious act of misconduct." In determining the disciplinary measure, he stated that he took into account the disciplinary record of the grievor, which he stated demonstrated the grievor's ". . . disregard for the interests of the CBSA . . ." and his "failure to respect its authority." He regarded this act of misconduct as a culminating incident justifying the termination of the grievor's employment.

[70] Mr. Gillan testified that he felt that the grievor posting the message was "rubbing it in our faces." At the hearing, he was asked in examination-in-chief about his reaction to the posting. He testified that the grievor's actions were in keeping with his long pattern of "doing what he wants and then explaining it away." He felt that the grievor could have explained his discipline in more general language. Mr. Gillan testified that one of the aggravating factors that he considered in imposing termination was the fact that this misconduct was exactly the same misconduct that the grievor had already been disciplined for. Mr. Gillan stated that the deputy head's expectations were certainly clear to the grievor. The grievor had had enough opportunity to correct his behaviour. Mr. Gillan regarded the reposting as the culminating incident. Mr. Gillan testified that he believed that reposting the message was an attempt by the grievor to build up support within the membership and to pressure the national union leadership to take illegal action. Mr. Gillan also testified that he took into account the fact that the grievor showed no remorse or understanding of management's concerns. In terms of mitigating factors, Mr. Gillan

testified that he took into account the serious nature of a termination of a union official, which was unprecedented at the CBSA. He testified that he did not regard the prompt removal of the posting as a mitigating factor.

D. Grievances filed

[71] In his grievance against the 30-day suspension, the grievor stated the following:

. . .

> *Not only do I refute Mr. Gillan's allegation that I was counselling or procuring the declaration or authorization of a strike, I remind CBSA management that there is no language within the Agreement or P.S.L.R.A. that prohibits an employee from counselling or procuring an illegal work stoppage.*
>
> ***The Agreement prohibits employees from participation in an illegal strike only.*** *For this reason I believe the employer lacks the authority to discipline employees in the absence of any identifiable employee misconduct and as such, I should* ***not*** *have been disciplined as an employee for an alleged prohibition under the P.S.L.R.A. that is only applicable to employee representatives.*
>
> . . .
>
> *Section 194 . . . does not allow an employer to determine whether or not such an offence has been committed, does not authorize the employer to establish penalties beyond what has been established in the legislation or allow an employer to proceed and administer discipline against an employee representative for* ***perceived*** *contravention under the P.S.L.R.A.*
>
> . . .
>
> *I maintain that the comments in my reply to a CEUDA member that* ***was posted on the CEUDA website*** *outside of work cannot be considered as procuring illegal strike activity as it is clear and without question that I was doing nothing more than informing CEUDA members what the union was doing on their behalf when I stated that* ***I was pressing the bargaining agent*** *to support a work refusal. At no time did I request, encourage or pressure CEUDA members to support any specific activity on any given day. In fact, I mentioned future activities which cover all lawful union activities.*
>
> . . .

> *In closing, I perceive this latest discipline by the CBSA as just one more blatant act of abuse, harassment, intimidation and interference of the administration of the union and in particular the union's right to communicate with its membership.*
>
> . . .
>
> [Emphasis in the original]
> [*Sic* throughout]

[72] The grievor grieved his termination of employment on December 14, 2007. He provided details of his grievance and the corrective action requested on December 20, 2007. In the details of his grievance, the grievor explained the purpose of his posting on November 3, 2007 as follows:

> . . .
>
> *. . . I was simply clarifying the reason for my thirty (30) days suspension as rumours and false accusations were being spread about me in the workplace.*

III. Summary of the arguments

[73] The parties provided written submissions and also made oral submissions. I have provided a summary of the submissions as follows.

A. For the deputy head

[74] A finding that the grievor's conduct does not warrant termination would be entirely inconsistent with the prohibition in section 194 of the *PSLRA*. As noted in Peter Engelmann et al., *Trade Union Law in Canada* (Canada Law Book, Toronto, 2009.) at page 6-31: "Arbitrators, labour boards and the courts have all reasoned that because union officers occupy positions of leadership and influence, their active participation in an illegal strike increases the seriousness of the offence." The same principle has been applied in the federal public service in cases where there was no illegal strike but a violation of section 103 of the *Public Service Staff Relations Act* ("*PSSRA*") now section 194 of the *PSLRA*: see *King v. Treasury Board*, 2003 PSSRB 48 at paragraphs 125 to 127.

[75] The grievor has a 5-day and a 10-day discipline on file, which support the 30-day discipline and the ultimate termination. In fact, on the 10-day discipline (*King no. 2*) the adjudicator stated the following :

> ***[273]*** *I find it hard to imagine that a reasonable person would not seriously question the grievor's ability to perform his duties as a public servant in view of the nature of his allegations and the way in which they were expressed.*

The grievor did not seek judicial review of the decision.

[76] The burden of proof is on the deputy head to establish its allegations and to establish that these allegations warrant the discipline awarded. The best articulation of the standard of proof required to meet this burden is in *Faryna v. Chorny*, [1951] 2 D.L.R. 354 (B.C.C.A.), para. 11:

> *. . . 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.*
>
> *. . .*

[77] More recently it has been confirmed that the balance of probabilities is the only standard of proof in civil cases (*F.H. v. McDougall*, 2008 SCC 53, at para. 46): ". . . evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency."

1. <u>30-day discipline</u>

a. <u>Has the deputy head proven its allegations?</u>

[78] The grievor admitted during the disciplinary investigation that he authored the email of September 11, 2007, that was subsequently posted on the website. It was clearly a communication to bargaining agent membership. Despite the fact that the grievor denied having the email posted on the website during the disciplinary investigation meeting, he now admits that the material was posted at his request. The grievor's initial denial should reflect on his credibility generally.

[79] The email violates subsection 194(1) of the *PSLRA* in two ways. First, it is clear from the content of the grievor's September 11, 2007 email that he was counselling and procuring the declaration and authorization of a strike. The grievor states specifically that: "I have been pressing the bargaining agent and CEUDA National for support to walk off the job now." The evidence is uncontradicted that the bargaining

unit was not in a legal strike position; the grievor was an officer and representative of an employee organization; and the email uses the phrase "walk off the job right now," for which the only reasonable interpretation is a "strike" as the term is defined in the *PSLRA*. By his own admission the grievor was seeking "support" from CEUDA and the PSAC to "walk off the job right now." Clearly the grievor was counselling and procuring the declaration and authorization of a strike by CEUDA and the PSAC.

[80] In directing the email to members of the bargaining unit and having the email posted on the CEUDA 24 website, the grievor was also counselling and procuring employees to engage in an illegal strike in that he was instigating, contriving and inducing employees to engage in strike activity as that term is defined in the *PSLRA*. While it is important to review the evidence to place the September 11, 2007 email in context, a starting point for this analysis is to define the terms "counsel" and "procure."

> ***Counsel*** *1. a: advice given. . . b: a policy or plan of action or behaviour.*
>
> ***Procure*** *To initiate a proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect, or cause. To persuade, induce, prevail upon, or cause a person to do something [emphasis added].*
>
> [Emphasis in the original, no source provided]

[81] It is a well established principle of statutory interpretation that Parliament can be assumed to have chosen its words carefully (*Pelletier v. Canada (A.G.)*, 2008 FCA 1, at paragraphs 27 to 29). By including the term "procure" Parliament intended to embrace actions that attempt to do indirectly what is prohibited directly. That is, concepts like "instigating," "contriving" and "inducing" invite a common sense approach and a more robust look at the actions of a grievor in their full context. It is not enough for a grievor to say that he did not directly tell employees to strike, what is required is an objective assessment of the evidence to conclude whether this was in fact what the communication was aimed at. To borrow the words of the adjudicator in the earlier *King* case *(*2003 PSSRB 48 at para. 126*)*, the grievor: "knew or ought to have known."

[82] The allegation contained in the letter of discipline is established on the face of the email alone. Additionally, however, the context leading up to this email is telling and further supports the allegations in the letter of discipline. In his email to the

grievor (Exhibit E-1, tab 8), Mr. Moran is clearly telling the grievor that the bargaining unit is not in a legal strike position but that the grievor should encourage individual members to engage in illegal job action, that simple threats are no longer enough and that more concrete action is needed. The grievor responds by pushing Mr. Moran and seeking support from CEUDA National for strike activity. He does this by seeking authorization for employees not to report for any shift not provided for in clause 25.17 of the collective agreement. What was being advocated by the grievor was a boycott of the majority of shifts that had been implemented by the employer for which the union had a policy grievance working its way through the system. What was being pursued was illegal strike activity on a massive scale.

[83] It is important to review the decision in *Public Service Alliance of Canada v. Treasury Board (Canada Boarder Services Agency)*, 2009 PSLRB 66. The bargaining agent's request to have these shifts declared null and void was dismissed and, as a result, the additional standard length shifts were legal shifts that employees were required to work. The grievor's attempt to get permission for employees to boycott these shifts is therefore tantamount to procuring an illegal strike.

[84] Clearly the grievor was counselling and procuring the authorization of an illegal strike. The message was aimed at the entire membership. The grievor isn't merely saying he is seeking support, he says he is seeking support "to walk off the job now." It is clear that he is talking about an illegal strike and telling the membership that it is urgent. The grievor also says "If management meets and proposes nothing more [the following Monday] than what they proposed last February, be prepared to support future union activities." Clearly the grievor is instigating, contriving and inducing the membership to participate in a strike. Just four days prior to this he sent an email to the membership indicating: ". . . we must proceed with no expectation that the employer is sincere about resolving this issue and that this could be nothing more than an employer attempt to . . . buy time to prevent future union activity."(Exhibit G-1, tab 12)

[85] In a self-serving email sent after discipline was imposed and attempting to distance himself from his actions, the grievor admits that he was counselling the authorization of an illegal strike (Exhibit E-1, tab 22): ". . . I made it clear that we had no intent of proceeding until such a time that we did receive a legal opinion or requested support from the Bargaining Agent." His requested support was obviously

distinct from his request for a legal opinion. His attempt at this hearing to suggest that all he was doing was to seek clarification is at odds with: (a) the September 11, 2007 posting, (b) the emails and (c) this latest email where he distinguishes between his request for a legal opinion and his request for support from the bargaining agent to walk off the job.

b. Does the grievor's conduct warrant discipline?

[86] It is well established that a violation of section 194 of the *PSLRA* is a serious matter that warrants a serious disciplinary response. In *Parashchyniak v. Treasury Board (Post Office Department)*, PSSRB File No. 166-02-1184 (19740723), the adjudicator noted that a union steward had a special duty to refrain from participating in an illegal strike and also a special duty to refrain from inciting or encouraging such a strike. In *King no. 1* (at paragraph 174), the adjudicator stated: "I note that the case law is essentially uniform in finding that union representatives enjoy no enhanced immunity from discipline where illegal acts are proven." It is established law that violating section 194 of the *PSLRA* warrants a disciplinary response (see also: *Latouf et al. v. Treasury Board (Post Office Department)*, PSSRB Files Nos. 166-02-3500 to 3504 (19780620) at pages 40 and 45, and *Goyette v. Treasury Board (Unemployment Insurance Commission)*, PSSRB File No. 166-02-3057 (19771027) at page 27). As a result, the grievor's conduct in this case warranted a disciplinary response.

c. Does the grievor's conduct warrant the discipline imposed?

[87] The purpose of discipline, short of termination, is to correct behaviour with the corollary being that the quantum has to be sufficient to send the appropriate message to the employee that his or her actions are inappropriate. In assessing the reasonableness of the penalty it is important to highlight the seriousness of the grievor's actions. It is the position of the deputy head that any violation of section 194 of the *PSLRA* warrants a serious disciplinary response. This is particularly true, however, in the context of Border Services Officers who are the front line in the customs, immigration and food inspection functions at PIA. The grievor's behaviour had the potential of causing great disruption to operations at the nation's largest airport. For the grievor to seek support to "walk off the job right now" and to bring this to the attention of employees not in a legal strike position is behaviour which, on its own should warrant a 30-day discipline, given the complete lack of remorse or

understanding on behalf of the grievor. As noted in *Petersen et al. v. Treasury Board (Post Office Department)*, PSSRB File Nos. 166-02-3482 to 3486 (19781102) at page 61:

> *In the Board's view participation in an unlawful strike (let alone the incitement and encouragement thereof) by employees who are integrally involved in the providing of a critical service to the public must be treated with added emphasis.*

[88] The *Parashchyniak* case deals with an employee who received a first offence termination for engaging in a work stoppage and for encouraging other employees to do the same. The adjudicator noted that such behaviour: ". . . was so serious that it invited severe disciplinary action, and I do not think any arbitrator or adjudicator could hold otherwise." Having characterized this two hour work stoppage as "grave misconduct" the adjudicator went on to find that, as a first offence, a nine-month suspension was appropriate. Consistent with this, in this case the deputy head was entitled to send the appropriate message to the grievor to ensure that he understood that such behaviour was not acceptable. While, as it turned out, this message did not have the desired effect and the grievor was ultimately terminated, the question at this stage focuses on the reasonableness of the penalty at the time it was awarded. Splitting discipline "down the middle" will send a mixed message that there was a partial victory and undo the desired result of discipline short of discharge, i.e. to correct behaviour.

[89] It is well established the grievor has the burden of establishing mitigating factors (see *Wilson v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-02-25841 (19950301), page 4). It is also well established that the most important factor in mitigation is whether an employee expressed understanding and remorse when the concerns over his or her behaviour were first brought to their attention (see *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, at paragraph 93; also see *Brazeau v. Deputy Head (Department of Public Works and Government Services*), 2008 PSLRB 62, at paragraphs 180, 184 and 191 and *Way v. Canada Revenue Agency*, 2008 PSLRB 39, at paragraphs 102 and 109). The grievor completely failed to show any understanding or remorse throughout the entire process. In fact, shortly after the discipline was imposed, the grievor characterized the discipline as (Exhibit E-1, tab 22): ". . . nothing more than continued harassment and interference of which multiple complaints against you and your colleagues have already been submitted."

[90] Given the fact that the grievor has a 5-day and a 10-day discipline on his file, this case engages the principle of progressive discipline. Furthermore, the deputy head is not precluded from considering an employee's prior discipline record even where the further acts of misconduct are arguably different in nature (see *Northwest Territories Power Corp. and Union of Northern Workers (Melanson)* (2004), 132 L.A.C. (4th) 275, at paragraph 25 and *Weyerhaeuser Co. (Drayton Valley Operations) v. United Steelworks Local 1-207 (Greaves Grievance)* (2007), 159 L.A.C. (4th) 56).

[91] Furthermore, the events at issue in the case at hand are not completely isolated from the earlier discipline on file. The acts for which discipline was imposed reflect a pattern of disregard for the interests of the CBSA and a failure to respect its authority.

[92] While a rigid application of the principle of progressive discipline, without consideration of aggravating factors and a lack of mitigating factors, would suggest that the appropriate discipline be set at 20 days, such is not appropriate in this case. Given the seriousness of the misconduct and the failure of the grievor to show any remorse, a suspension of 30 days is appropriate and, furthermore, the principle discussed in *Wilson* at page 5 should be applied:

. . .

> *Absent a sufficient weight of mitigating factors, I do not believe that an adjudicator should "tinker" with a disciplinary penalty that is otherwise within the parameters available to the employer to impose. The mere fact that an adjudicator acting as a manager in that situation might have imposed a lesser penalty is not, by itself, reason enough to mitigate the penalty.*

. . .

[93] It is also important to recall the testimony of Mr. Gillan that the grievor's conduct on its own justified a 30-day discipline given its seriousness and the complete lack of understanding and remorse of the grievor. However, the grievor has a 5-day and a 10-day suspensions on file. This supports the 30-day suspension. The discipline imposed by the deputy head falls within the range of reasonable sanctions for the behaviour in question.

2. Termination of employment

[94] It is clear that the termination letter built on the allegations in the 30-day discipline and this is why the 30-day discipline was specifically mentioned in the letter of termination. Once again the grievor was counselling and procuring his membership to engage in illegal strike activity as well as counselling and procuring CEUDA and the PSAC National for authorization to engage in an illegal strike.

[95] The November 3, 2007 grievor's email (Exhibit E-1, tab 23) is addressed to the membership of CEUDA Local 24 and was posted on its website the day after the grievor received the 30-day discipline. The grievor reveals to the membership that he has just received the 30-day discipline and also states: ". . . Each of you has now witnessed the management deception, lies, and abuse that continue to plague this organization, impede VSSA negotiations and the resolution of so many other regional labour issues." Clearly the grievor is setting a very confrontational tone in the context of a workplace that was a tinderbox ready to explode. The grievor reposted the part of the email that resulted in his 30-day suspension and bolded and italicized the text. In the disciplinary investigative meeting for the 30-day discipline, the grievor suggested that all he was trying to say was that he was seeking clarification on whether they were in a legal strike position and that, according to his representative who was speaking on his behalf ". . . the words chosen in the email were not the 'right' words." However, the grievor was on notice that the deputy head considered this to be a violation of section 194 of the *PSLRA* and in reposting the impugned comments was clearly not taking the opportunity to clarify his communiqué to employees. In fact, the grievor continued to use the same words; words that he earlier agreed (through his representative) were not the right words. As noted in *Beaupré and Oldale v. Treasury Board (Post Office Department)*, PSSRB Files Nos. 166-02-9606 and 9607 (19810703), at pages 20 and 24:

> . . .
>
> *. . . The grievors' defence, that they merely passed on information and did not encourage or lead, must be rejected.*
>
> . . .
>
> *. . . As I must emphasize, the transmission of selected information must be seen to be as much an effective influence on conduct as outright active exhortation or threats. In their positions as Presidents, the grievors could, and did, influence the conduct of the LCUC members to respect the CUPW picket lines. . . .*

[96] The grievor's suggestion that he was not sure if they were in a legal strike position because he felt the employer was violating the collective agreement is simply absurd. The grievor is the local union president. As noted in *Allard et al. v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB Files Nos. 166-02-6012 to 6039 (19791115) at page 86, ignorance of the law is no excuse.

[97] The grievor's email is a thinly veiled "call to arms" where the grievor is counselling and procuring illegal strike activity. The Public Service Labour Relations Board ("the Board") has said that anyone who instructs, directs, incites, advises, recommends, encourages, or induces may be said to "counsel or procure" (J. Finkelman and S. Goldenberg, *Collective Bargaining in the Public Service (Volume 2)*, The Institute for Research on Public Policy (Montréal: 1983) at page 638, citing *Canada (Treasury Board) v. International Brotherhood of Electrical Workers, Local 2228*, PSSRB Files Nos. 194-02-15 and 16 (19720914) at paragraph 24). Clearly the grievor is laying out a plan of action. He is saying he is seeking support to "walk off the job now" and is telling the membership to "be prepared to support future union activity." This is counselling and procuring an illegal strike; he is instigating, contriving and inducing the membership. It is thinly veiled because the grievor knew (having been disciplined for this before) that he could not be explicit. The grievor was the principle spokesperson for the union at the work place.

[98] The *PSLRA* does not say "shall not declare or authorize" or "shall not direct the participation of employees in such a strike." The legislation uses the terms "counsel" and "procure." The scope of the prohibition is wide and is aimed at preventing what the grievor has done in this case. Had Parliament intended this prohibition to have been read narrowly it would not have included the terms "counsel" or "procure." What the grievor is suggesting is for this tribunal to apply a narrow and restrictive interpretation to the prohibition in section 194 of the *PSLRA*. It is important to recall, however, that this prohibition deals with the "capital offense" of labour law. The principle has been to regulate work stoppages and slow downs. All legislative bodies have adopted this approach with the balance being struck between: (a) a binding and enforceable contract and (b) no illegal job activity. This principle is a building block of all labour legislation, including the *PSLRA*. The importance of this principle underlies the intent of Parliament in choosing the words it did in section 194 of the *PSLRA*. Parliament has made it a violation of the *Act* to counsel or procure: (a) the declaration or authorization of an illegal strike, and (b) the participation of employees in an illegal

strike. Had Parliament intended this only to embrace the kind of explicit declaration the grievor suggests, the *PSLRA* would use the same language as section 89 of the *Canada Labour Code* R.S.C., c. L-2 (*CLC*): ". . . no trade union shall declare or authorize a strike unless . . . ."

[99] In the grievor's email of November 2, 2007 to Mr. Gillan and others, including Mr. Moran and Mr. Gordon (Exhibit E-1, tab 23) the grievor states:

> . . .
>
> *It is well within the union's rights to mobilize members for future activities.*
>
> . . .
>
> *I made it clear that we had no intent of proceeding until such a time that we did receive a legal opinion or requested support from the Bargaining Agent.*
>
> . . .
>
> *As long as we don't issue direction, which we clearly have not, we are well within out right to advise our members whether we are seeking support, who we are seeking support from and on which subject we are seeking support*
>
> [Emphasis added]

[100] The grievor was trying to cover his tracks by suggesting that his September 11, 2007 email was not a direction or authorization to the membership. However, it reflects the fact that he remains of the view that he is entitled to counsel and procure the authorization of an illegal strike so long as he does not declare such a strike. This email is copied to the president of CEUDA and the president of the PSAC and reflects the fact that this was still a live issue with the grievor and that he was continuing to counsel and procure such authorization. The grievor once again posts the fact: "In the meantime I have been pressing the bargaining agent and CEUDA National for support to walk off the job right now."

[101] The exchange of the grievor with Mr. Moran on November 5, 2007 is dispositive of the fact that the grievor continued to counsel and procure the authorization or declaration of an illegal strike (Exhibit G-1, tab 27; excerpted at paragraph 66 of this decision). The grievor attached the August 24, 2007 email (Exhibit G-1, tab 27) in a clear attempt to once again get the CEUDA National to declare or authorize illegal job

action (excerpted at paragraph 48 of this decision). The grievor continued to counsel and procure the bargaining agent to authorize an illegal strike. The grievor is an officer and representative of an employee organization and the bargaining unit was not in a legal strike position, as a result his actions are a violation of section 194 of the *PSLRA*.

[102] The grievor's conduct in re-posting this material in question warrants termination as a stand alone disciplinary action. Unlike "garden variety" culminating incident cases, the facts of this case reveal one of the most serious infractions in labour law and one for which the grievor had just received a very serious disciplinary response.

[103] However, and in the alternative, as stated in the letter of termination, the deputy head also relies on the principle of the culminating incident. The doctrine of the culminating incident enables it to rely on an employee's poor employment record in order to justify taking more serious action than might otherwise be warranted (see *Brown & Beatty Labour Arbitration* at para. 7:4310). The grievor's reposting of the impugned notice was a serious act of misconduct. Unlike many of the cases dealing with the doctrine of the culminating incident, this act on its own warrants termination. In the context of the grievor's disciplinary record, particularly the fact that he received a 30-day discipline for the same misconduct, this is an appropriate case for termination. Furthermore, the record reveals that the grievor has no remorse for his actions.

B. <u>Submissions for the grievor</u>

[104] The grievor made the following précis of his argument:

. . .

- *First, the grievor maintains that his conduct did not come within the meaning of "counselling or procuring" an illegal strike for purposes of the* PSLRA*;*

- *Second, it is not the business of the employer to regulate the activities of union officers, save to the extent that they engage in any employee misconduct. The powers of the employer in respect of alleged violations of subsection 194(1) of the* PSLRA *are either to initiate prosecution against a "union officer" pursuant to sections 198, 203, and 205 of the* PSLRA*, or to impose discipline upon "employees" for engaging in disciplinable employee misconduct. In imposing*

> *discipline against "employees," the provisions of the collective agreement are relevant. In the present case, the collective agreement only sanctions participation in illegal strike activity, and affords protection against union officers against discrimination under Article 19 of the collective agreement; and*
>
> - *Third, the imposition of discipline against a union officer for engaging in internal discussions concerning legal options for union activity and reporting on matters of direct interest to the union's members amounts to an unjustifiable interference with the rights of both Mr King and the union more broadly, and engages both the unfair labour practices provisions of the* PSLRA *and the* Charter *rights of union members and officers to freedom of association and expression.*
>
> *With respect to the termination of Mr King's employment for his second posting to the CEUDA Local 24 website, the grievor additionally submits that there is no basis for regarding a notification to members of the local president's suspension and management's alleged reason for imposing this discipline as misconduct. Moreover, any such statements come squarely within the well-established realm of protected expression by union officers.*
>
> *5. Even if there is a finding of misconduct in respect of one or both of these incidents, the grievor submits that the quantum of the penalty imposed by the employer is not appropriate given the significant reduction of Mr King's disciplinary record (from 80 days to 15 days) through settlements and as a result of prior proceedings before this Board. . . .*

[105] The evidence makes clear that, throughout – and even after – the period leading up to his suspension, the grievor was actively seeking clarification and guidance from CEUDA National and the PSAC as to what options were legally available to members of CEUDA Local 24. Specifically, the grievor had been seeking – and continued to seek – a legal opinion as to whether CEUDA Local 24 was able to walk off the job in all the circumstances of the VSSA dispute. The grievor was adamant in his testimony that at no time was he interested in seeking direction from the bargaining agent to engage in illegal strike activity. Indeed, the evidence confirms that the grievor was not procuring the authorization of an illegal strike, but rather seeking clarification as to whether strike action would in fact be legal in these circumstances.

[106] The evidence strongly suggests that the deputy head did not at the time consider the grievor's website posting sufficiently problematic as to warrant urgent attention. Indeed, it did not even take the initial step of requesting that the message be removed from the CEUDA Local 24 website for a period of six weeks after management first became aware of the posting. Moreover, and in contrast to its treatment of the September 11, 2007 posting, the deputy head had promptly notified the grievor about management's objections to other website postings during this period (Exhibit G-1, tab 17).

[107] Mr. Gillan confirmed in cross-examination that, in imposing the 30-day suspension, he relied only on the website posting itself, and that he had reference only to input from the labour relations section of the CBSA, Ms. Burke's notes from the fact-finding meeting, and the grievor's prior disciplinary record. Notably, Mr. Gillan's evidence confirmed that he had not relied on any of the related emails which were entered into evidence in this hearing.

[108] Mr. Gillan was very clear in his testimony that the deputy head had given no thought to terminating the grievor for this initial website posting, notwithstanding the fact that at this point, he already had suspensions totalling 80 days on his record. When asked how he determined a 30-day suspension to be appropriate discipline for this incident, Mr. Gillan indicated that a 30-day suspension was appropriate progressive discipline, given the prior 20-day suspension. Mr. Gillan identified as aggravating factors the past disciplinary record, the fact that the parties were in the middle of negotiations for a new collective agreement, and the seriousness of the issue itself. In cross-examination, Mr. Gillan stated that he did not consider the fact that the grievor had immediately removed the posting from the website upon request to be a mitigating factor in imposing discipline.

[109] No illegal strike action occurred at PIA during the period of September 11, 2007 to the date of the grievor's termination or at any time thereafter. It was the grievor's testimony that, even from the date of his dismissal to the date he relinquished the presidency of CEUDA Local 24 in June 2008, he did nothing to orchestrate or attempt to orchestrate an illegal strike or work stoppage at PIA.

[110] The deputy head had no basis for imposing a 30-day suspension for his September 11, 2007 posting to the CEUDA Local 24 website. First, the grievor maintains that his conduct did not come within the meaning of "counselling or

procuring" an illegal strike for the purposes of the *PSLRA*. Second, the deputy head cannot impose discipline for conduct by a union officer in contravention of subsection 194(1) of the *PSLRA* where a) it has failed to engage the quasi-criminal mechanism set out in the *Act* for dealing with offences under the *PSLRA*; b) the collective agreement provides for discipline only in respect of participation in an illegal strike, and c) to impose a different standard for union officers would contravene the collective agreement's "no discrimination" provisions. Finally, the imposition of discipline against a union officer for engaging in internal discussions concerning legal options for union activity and reporting on matters of direct interest to the union's members amounts to an unjustifiable interference with the rights of both the grievor and the bargaining agent and engages both the unfair labour practices provisions of the *PSLRA* and the *Charter* rights of union members and officers to freedom of association and expression.

[111] By posting a response to a member's question on the website, the grievor was not announcing or inciting local members to engage in an illegal strike, nor was he seeking authorization to call an illegal strike either from local members or from the PSAC or CEUDA National. Rather, the evidence is clear that the grievor had been engaged in ongoing discussions with CEUDA and the PSAC executives (and with the deputy head) as to whether the union was in a legal strike position due to the expiry of the VSSA agreement, and what action could legally be taken to advance the interests of members in the VSSA dispute. The grievor had sought a legal opinion from the PSAC on this issue, and the question of what action the union could take remained the subject of ongoing debate among union executives. It is in these circumstances that the grievor instructed the webmaster to post his response to a member's inquiry. The message posted to the website neither counselled an illegal strike nor did it procure the authorization of such action. Rather, the grievor maintains that the message sought only to keep CEUDA Local 24 members apprised of the grievor's ongoing discussions with CEUDA and the PSAC executives regarding how the union should respond to the VSSA situation, and to assure members that the union's efforts were ongoing.

[112] The letter of suspension and evidence of the deputy head's witnesses make clear that the grievor was disciplined for his alleged contravention of subsection 194(1) of the *PSLRA*. Subsection 194(1) of the *PSLRA* provides:

> *No employee organization shall declare or authorize a strike in respect of a bargaining unit, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike in respect of a bargaining unit or the participation of employees in such a strike…*
>
> [Emphasis added]

[113] The deputy head asserts that, by using the terms "counsel or procure," Parliament has cast the prohibition concerning illegal strikes much more broadly in the *PSLRA* than in the *CLC*, which uses the terms "declare or authorize." It is the grievor's submission that the language of the *PSLRA* does not, in fact, call for such a broad interpretation. First, the use of "counsel or procure" has analogues in other labour relations regimes, where these terms have not been interpreted as broadly as the deputy head proposes. Second, the framework of the *PSLRA* makes contravening subsection 194(1) a quasi-criminal offence, and the jurisprudence is clear that these terms must be interpreted more restrictively in this context. While the deputy head relies on the *CLC's* use of the terms "declare or authorize" rather than "counsel or procure" to suggest that Parliament intended to create a particularly broad prohibition in respect of illegal strikes under the *PSLRA*, it is noteworthy that the language used in the *PSLRA* is not unlike the language used in other labour relations regimes. For example, section 81 (formerly section 74) of the *Ontario Labour Relations Act* (*OLRA*) provides that:

> *81. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.*

[114] The language in the *OLRA* appears broader than that of the *PSLRA*, as it expressly includes "threaten" in addition to "counsel, procure, support or encourage." In *Plaza Fiber Glas Ltd. and U.S.W.* (1988), 33 L.A.C. (3d) 193 an arbitrator considered what it means to threaten an unlawful strike in a situation where a union officer had told management that members "were going to walk out" within earshot of other union members in the context of a contentious dispute between the union and the employer. The arbitrator clearly held that a union officer must have done more than merely speak about an illegal strike for a violation of the *OLRA* to be made out (at paragraph 79):

> *. . . I cannot imagine that the legislature by the provision of section 74 has intended to prohibit the employees from uttering the word "strike" during the life of the collective agreement. If the union officers are prohibited from communicating with their employers, the frustration of the employees which may lead to work stoppage, it would be a great disservice to the employer, as well as to the labour-management relations in general. In my opinion, the union officers not only have a right but an obligation to discuss such issues with the employer openly and frankly, and to make him aware of this situation and help him in diffusing the issue.*

[115] Moreover, the arbitrator recognized the high objective standard required in establishing that a union officer's comments and actions contravene the unlawful strike prohibitions in the *OLRA*, at paragraph 80:

> *. . . The term "threat" means an avowed present determination or intent to injure presently or in the future. A statement may constitute a threat even though it is subject to a possible contingency in the future. A statement may constitute a threat even though it is subject to a possible contingency in the maker's control. The prosecution must establish a "true threat" which means a serious threat as distinguished from words uttered as mere political argument, idle talk or jest.*

[116] The *Plaza Fiber Glas* case demonstrates that, while there is no requirement that a union officer's actions or comments must result in a work stoppage to engage statutory illegal strike prohibitions, provisions like section 81 of the *OLRA* and subsection 194(1) of the *PSLRA* clearly require the deputy head to adduce compelling objective evidence that the union officer, by words or actions, in fact intended his or her actions to result in illegal strike activity. Such provisions are intended to prevent and discourage illegal job action without going so far as to limit the range of dialogue between union representatives and the deputy head or employer, or to limit the internal debate within the union as to what constitutes legal or illegal strike action in the context of a specific dispute with the employer over the terms of their collective agreement. In the present case there is no evidence to suggest that the grievor intended his September 11, 2007 website posting to result in illegal strike activity. Rather, the evidence as well as the grievor's testimony makes clear that his intention was to identify and pursue legal means of bringing pressure on the employer to resolve the VSSA dispute.

[117] While synonyms for "counsel" and "procure" may well be legion, the quasi-criminal nature of the statutory provisions at issue call for a more restrictive interpretation of this language. By operation of section 203 of the *PSLRA*, contravening subsection 194(1) is a quasi-criminal summary conviction offence that can result in a fine of not more than $10,000. Accordingly, it is the grievor's submission that for purposes of subsection 194(1), "counsel or procure" must be interpreted in a manner that is consistent with the interpretation given to these terms in the criminal context. In the criminal context, "counsel" must mean more than simply suggesting, insinuating, opining, or describing. Rather, the Supreme Court has adopted a more restrictive meaning of the term "counsel" in the context of counselling an offence under the *Criminal Code*. In *R. v. Sharpe,* [2001] 1 S.C.R. 45 at paragraph 56 the court noted that while "counsel" can mean simply to advise in ordinary contexts, in criminal law it has been given the stronger meaning of actively inducing. As with other criminal offences, and consistent with *Plaza Fiber Glas*, mere discussion of walking off the job is not meant to be captured by the statutory prohibition. Rather, the prohibition is against material that, viewed objectively, directs or incites employees to engage in illegal strike activity. The evidence, when viewed objectively, simply does not meet this standard. Indeed, the lack of clear and compelling evidence of actively inducing illegal activity may explain why it took the deputy head six weeks to decide how it was going to respond to the September 11, 2007 website posting.

[118] In order to establish that a union officer has counselled or procured the authorization of an illegal strike in contravention of subsection 194(1) of the *PSLRA*, the employer must demonstrate that the union officer did not merely advise illegal strike activity, but that he or she actively induced the prohibited activity with a clear intent that it be committed, and that there would be some loss or harm to the employer as a result of the union officer's actions. The statements contained in the September 11, 2007 website posting simply do not amount to actively inducing illegal activity as contemplated by the quasi-criminal prohibition against "counselling or procuring" an unlawful strike under the *PSLRA*. Rather, the evidence is clear that the grievor was engaged only in vigorous internal debate with other union officials concerning the union's next steps in dealing with the VSSA dispute, including discussion as to whether the union was in fact in a legal strike position and relaying and discussing the views expressed by some members of CEUDA Local concerning a "wildcat strike." Given the foregoing, it cannot be said that such conduct constituted

"counselling or procuring" an illegal strike within the meaning of subsection 194(1) of the *PSLRA*.

[119] Finally, it is noteworthy that while there is arbitral jurisprudence upholding discipline of union officers for participating in or counselling illegal strike activity, the vast majority of the cases involve conduct which led to actual work stoppages, not merely discussions of work stoppages that never actually occur. The grievor maintains that there is no statutory prohibition on union officers merely discussing the possibility of, or the basis for, future legal strike action – an activity which falls squarely within their legitimate role as elected union representatives. In any event, the very fact that no illegal strike activity took place supports the conclusion that the grievor's September 11, 2007 website posting did not amount to actively inciting or inducing illegal strike activity.

[120] The disciplinary letter of November 2, 2007 makes clear that the grievor was suspended for his alleged violation of subsection 194(1) of the *PSLRA*, which prohibits "counselling or procuring" a strike. Importantly, subsection 194(1) is drafted so as to apply to union officers or representatives regardless of whether they are members of the bargaining unit or other individuals employed or retained by the union as officers or representatives. It is for this reason that sections 198, 203, and 205 of the *PSLRA* establish a mechanism for addressing alleged contraventions of subsection 194(1) that is outside the employment relationship. Specifically, sections 198, 203, and 205 of the *PSLRA* make violating subsection 194(1) a quasi-criminal summary conviction offence that is applicable to anyone who is a union officer, regardless of whether or not they are an employee who is a member of the bargaining unit. The *PSLRA* provides the only appropriate mechanism for dealing with alleged contraventions of subsection 194(1) by union officials.

[121] The Board has long recognized that there is a statutory distinction between union officers and rank-and-file bargaining unit members in provisions concerning illegal strike activity under the *PSLRA* and its predecessor legislation, the *PSSRA*. The Public Service Staff Relations Board (PSSRB) held in *Treasury Board v. International Brotherhood of Electrical Workers, Local 2228,* at paragraph 3:

> *. . . An employee is forbidden to participate in a strike, either at certain times or at all times if he is a designated employee. He is guilty of an offence only if a strike does occur and he participates in the strike. The fact that he advocates a strike*

> *which does not take place or, if it takes place, in which he does not participate may make him subject to other consequences, but he is not thereby guilty of an offence under the Act. An employee organization, however, is forbidden to declare or authorize a strike of employees the effect of which is or would be to involve the participation of employees in a strike in contravention of section 101 of the Act. And an officer or representative of an employee organization is prohibited from counselling or procuring the declaration or authorization of a strike of employees or the participation of employees in a strike, the effect of which is or would be to involve the participation of employees in a strike in contravention of section 101.*

[122] The PSSRB's finding clearly demonstrates that while rank-and-file employees may be prosecuted under the *Act* for participating in an illegal strike, the *Act* treats union officers differently, by expressly prohibiting them from counselling or procuring illegal strike activity. Accordingly, it is the grievor's submission that prosecuting the grievor was the only appropriate mechanism for dealing with his alleged contravention of subsection 194(1) by union officials. While rank-and-file members may be subject to other consequences for such conduct, it is the *Act* that provides the mechanism for dealing with such conduct by union officers.

[123] In *King* (2003 PSSRB 48), the adjudicator was never asked to consider whether it was appropriate to impose discipline for violating a provision of the *Act* in the face of an established statutory mechanism for dealing with contraventions. In these circumstances, the decision is not helpful in assessing whether discipline was appropriate in the present case, where these questions have been placed squarely before an adjudicator.

[124] In the present case, the evidence is clear that the deputy head took no steps whatsoever to prosecute what it alleges to have been a violation of subsection 194(1) of the *PSLRA*. Having failed to engage the procedures set out in sections 198, 203, and 205 of the *PSLRA*, the deputy head cannot attempt to address the alleged contravention of subsection 194(1) by imposing discipline.

[125] The collective agreement specifies the conduct surrounding illegal strikes for which discipline may be imposed. Clause 16.01(Exhibit G-2) states:

> *The* Public Service Labour Relations Act *provides penalties for engaging in illegal strikes. Disciplinary action may also be taken, which will include penalties up to and including*

> *termination of employment pursuant to paragraph 12(1)(c) of the* Financial Administration Act *for participation in an illegal strike as defined in the* Public Service Labour Relations Act.

[126] The Board has distinguished between the terms "participate" and "counsel and procure" in the context of the *PSSRA* in *Canada (Treasury Board) v. Clark*, PSSRB File No. 194-02-13 (19711103) at paragraph 5:

> *. . . [T]he word "participate" in section 101 and the [word] "participation" in sections 102 and 103 must be read in light of the fact that a distinction is drawn between the prohibitions as they relate to an officer or representative of an employee organization in section 102 and the prohibitions as they relate to an employee under section 101. Participation must be something different from counselling or procuring.*

[127] Article 16 of the collective agreement clearly establishes the standard of discipline related to illegal strike activity, and employees may only face discipline for "participation" in, or for "engaging in," illegal strike activity. The parties turned their minds to the issue of illegal strike activity, and established a standard of discipline to which the deputy head must adhere. In interpreting the express language of collective agreements, arbitrators have adopted the principle of *expressio unius est exclusio alterius*, or the express mention of one matter implies the exclusion of related matters: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at pages 243 to 252.

[128] However, even though the collective agreement expressly refers to the illegal strike provisions of the *PSLRA*, it does not make any reference to counselling or procuring the declaration or authorization of an illegal strike. In these circumstances, by operation of the *expressio unius* rule, the deputy head cannot impose discipline against any employee – including one who happens to be a union representative – for proposing or discussing the possibility of an illegal strike. Rather, discipline may only be imposed where employees participate in an illegal strike – an event which did not occur in the present case.

[129] The present circumstances are clearly distinct from those in cases like *Heffernan and White v. Treasury Board (Post Office Department)*, (1981) 3 L.A.C. (3d) 125 at paragraphs 39 to 42, where the PSSRB upheld suspensions of two union officers who were found to have counselled members to engage in a sympathy strike. In that

case, the union officers' actions not only contravened section 102 of the *PSSRA* (the predecessor to subsection 194(1) of the *PSLRA*), but they were also in direct violation of provisions in the collective agreement which prohibited the distribution of union literature in the workplace without prior permission of the deputy head. By contrast, the collective agreement in the present case not only does not contain any provisions that are engaged by the grievor's conduct, it addresses matters related to illegal strike activity (in article 16) without making any reference to counselling or procuring the declaration or authorization of an illegal strike. Because the parties turned their minds to the issue of discipline related to illegal strike activity in drafting the collective agreement, it is clear from the language of the agreement that employees cannot face discipline under the collective agreement for any union activity other than for participating in an illegal strike. Accordingly, the only recourse open to the deputy head in respect of union officers alleged to have counselled or procured an illegal strike is by operation of sections 198, 203, and 205 of the *PSLRA*.

[130] Additionally, it bears noting that the language of article 16 of the collective agreement reflects the labour relations reality surrounding an employer's rights to discipline employees for misconduct. As noted by Brown and Beatty, an employer "must establish that the employee has acted in a way . . . that is incompatible with or prejudices some legitimate interest of the employer" in order to impose discipline on an employee (at 7:3000). In the present case, it cannot be said that any legitimate interest of the deputy head was prejudiced. It this regard, it is significant that no illegal strike activity took place as a result of the grievor's website posting. Moreover, the fact that management waited six weeks to take any action whatsoever in respect of the website posting does not support the proposition that the deputy head's interests were prejudiced by the September 11, 2007 website posting.

[131] In addition, by going beyond the provisions of article 16 of the collective agreement in respect of conduct by a union official, the deputy head violated article 19 of the collective agreement by discriminating against the grievor on the basis of his status as a union representative. Clause 19.01 expressly prohibits discrimination on the basis of an employee's union membership. Clause 16.01 makes clear that the deputy head cannot impose discipline against an employee for any conduct related to an illegal strike short of participation in an illegal strike. By operation of article 19, the same must be true of employees who are elected union representatives. In these circumstances, the only punitive action the deputy head could properly have taken in

response to the website posting was to allege a violation of subsection 194(1) of the *PSLRA* in accordance with sections 198, 203, and 205 of the *Act*. Given the language of the collective agreement, the deputy head cannot impose discipline against a union official instead of exercising its rights under the *PSLRA*.

[132] Unions and union officials enjoy protection from employer interference in union activities by operation of the unfair labour practices provisions of the *PSLRA*, which must be interpreted and applied in light of the protected freedoms of expression and association under the *Charter*. If subsection 194(1) of the *PSLRA* is a legitimate factor for consideration in imposing discipline, other provisions of the *PSLRA* must also be taken into account. In particular, the following provisions are relevant: 186(1)(*a*) (prohibition against employers or persons in managerial positions from interfering with the formation or administration of employee organizations or the representation of employees by an employee organization); and 186(2)(*a*)(i) (prohibition against employers disciplining any person because they are an officer or representative of an employee organization).

[133] Imposing discipline for posting information to the CEUDA Local 24 website concerning matters of direct interest to Local 24's members amounts to an unjustifiable interference with the rights of both the grievor and of the bargaining agent more broadly. Indeed, the deputy head's decision to take disciplinary action seriously undermines the activities of bargaining agent members in their efforts to negotiate terms and conditions of employment with their employer in accordance with the collective bargaining regime established by the *PSLRA*.

[134] In addition, by imposing discipline for activities he engaged in during the course of his activities as a union representative, the deputy head has violated the grievor's rights under subsection 2(d) of the *Charter*. Freedom of association must include protections for bargaining agent officials to carry out union business, including the internal discussion and debate of options for collective action against the employer (and the legality of such actions), as well as keeping bargaining unit members apprised of steps proposed, discussed, or undertaken to resolve disputes with the employer. The Supreme Court of Canada has held that freedom of association includes the associational right of employees to engage in collective bargaining free from employer interference (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391). The court held (at paragraph 96) that, "actions

that prevent or deny meaningful discussion and consultation about working conditions between employees and the employer may substantially interfere with the activity of collective bargaining." In the present case, the grievor maintains that his engagement with other bargaining agent officials in discussions as to whether the bargaining unit was in a legal strike position given the circumstances, as well as possible action that may be taken against the employer, was protected both as part of the administration of an employee organization under the *PSLRA* and as part of the right to freedom of association. Similarly, responding to inquiries from bargaining unit members and keeping them apprised of discussions concerning possible future collective action is also a crucial aspect of the associational rights – and representational obligations – of elected bargaining agent leaders. By imposing discipline against the grievor for posting a message to the website in response to inquiries from members regarding what steps it was taking in relation to matters of great concern to the membership, the deputy head unjustifiably interfered with the rights of the grievor – and of all bargaining unit members – to associate freely for purposes of labour relations and was in direct contravention of subparagraph 186(2)(*a*)(i) of the *PSLRA*.

[135] The deputy head's disciplinary actions seriously undermine the administration of the bargaining agent, namely the activity of members joining together in pursuit of their common goal of negotiating workplace terms and conditions of employment with their employer under the collective bargaining process. It is of central importance to the collective bargaining process that union representatives be able to communicate freely with union members, without fear of reprisal, and for union members to communicate freely with, and receive information from, their representatives, without interference from the government employer: *Shaw v. Deputy Head (Department of Human Resources and Skills Development)*, 2006 PSLRB 125, at paragraph 50.

[136] For all the reasons identified, the deputy head had no basis to impose discipline against the grievor for his September 11, 2007 website posting, and the 30-day suspension should be set aside. In addition, the grievor relies on these submissions in respect of his termination of employment.

[137] The grievor testified that he felt it was necessary to post a message concerning his suspension to the CEUDA Local 24's website for the following reasons:

- to notify the membership that he would not be available to provide union service/representation;

- to advise the membership that he would have no access to his work email;
- because CEUDA Local 24 members had a right to know what had happened; and
- because union stewards should be made aware of what the employer regarded as grounds for discipline.

[138] Significantly, when asked in cross-examination whether the grievor would have been terminated had he simply posted the deputy head's letter of discipline, Mr. Gillan initially appeared to be answering in the affirmative but, after a lengthy silence, indicated he would have sought advice from labour relations advisors. Mr. Gillan's response to this question confirms in stark terms the inappropriateness of the deputy head's decision to terminate the grievor. The fact that the deputy head would even consider terminating a union officer for posting a letter from management to the local president on a matter of interest to the membership on the union's website is plainly offensive of labour relations principles. This is precisely what the November 3, 2007 web posting amounted to, and the grievor was terminated for simply posting statements quoted in the deputy head's own letter of discipline.

[139] There is no basis for treating a factual notification to members of the Local president's suspension, including management's alleged reason for imposing that discipline, as misconduct. Any such statements clearly fall within the well-established realm of protected union expression. The grievor's emphatic testimony about his right as local president to communicate with members about events and incidents in the workplace, and his strong feelings that the deputy head had no business preventing him from notifying members of his suspension and reporting management's reasons makes clear that the November 3, 2007 website update was not posted for purposes of inciting an illegal work stoppage. All employees have a right to state the facts and speak candidly about the reasons for which they have been disciplined and/or removed from their job. Accordingly, the deputy head had no basis to impose any discipline on the grievor for his website posting of November 3, 2007.

[140] While it is the grievor's position that the November 3, 2007 website posting could not properly be construed as misconduct under any circumstances, the grievor's status as a union officer and the additional significance of, and interest in, his suspension to members of CEUDA Local 24 engages additional protections for the

grievor's actions. Specifically, the grievor's status as a union officer engages the well-established exception for union expression. This Board has recently affirmed that union officers are immune from deputy head discipline so long as their alleged misconduct falls within their legitimate representational role. In *King no. 2*, the adjudicator expressly noted that the jurisprudence supports a "liberal approach" to the scope of legitimate representational activities. In this capacity, union officers may engage in conduct during the course of their union duties that might otherwise attract discipline. In addition to his obligation of loyalty to his employer, it must be acknowledged that the grievor's role as a union representative carries with it a duty of representation owed to the members of CEUDA Local 24 that is integral to the labour relations regime established by the *PSLRA*. The law is clear that, in order to fulfil their role, union officers must be able to candidly and openly discuss matters affecting the employees they represent and to vigorously defend the interests of their members. Indeed, as noted in *Metropolitan Toronto (Municipality) v. C.U.P.E., Local 79 (Dalton)* (1998), 70 L.A.C. (4th) 110 at paragraph 15: "it has been found that the integrity of the collective bargaining process demands that employee representatives be free to speak without fear of reprisal." To do this effectively, union officials are accorded significant protection from retribution for raising concerns or speaking out publicly against an employer. A union officer may be subject to discipline only for engaging in conduct that falls outside of a union officer's legitimate representational role. However, where the union officer's conduct falls within their legitimate representational role, the employer must acknowledge the union officer's duty to advance union interests and also the adversarial nature of the collective bargaining process (*ISM Information Systems Management Corp.*, [1998] S.L.R.B.D. No. 30 at paragraph 28).

[141] In the present case, there is no evidence that the grievor's November 3, 2007 website posting was motivated by anything other than his legitimate representational activities and his obligation to keep union members apprised of the latest developments in their relationship with the employer. Updating members both in respect of the union's efforts to resolve an ongoing workplace dispute and in regard to the basis for the disciplinary suspension of an elected union representative falls squarely within this role of protected union activity. Accordingly, the grievor is immune from discipline in respect of his September 11 and November 3, 2007 website postings.

[142] As stated in *Canada Post Corp. v. C.U.P.W. (Van Donk)* (1990), 12 L.A.C. (4th) 336 (Burkett) at paragraph 15: "it is inconceivable that a trade union official could ever be disciplined for just cause for exercising his/her right to represent employees as this right has been defined." In light of this basic principle, the test for balancing the duty of loyalty with the right of free expression in the context of conduct by union officials, acting in their capacity as representatives of bargaining unit members under a statutory labour relations regime must be examined. As noted in *Shaw*, union officers who are acting within their legitimate representational role "should not be subject to discipline unless they make statements that are malicious or knowingly or recklessly false." This established two-part analysis requires a determination of 1) whether the grievor was acting in his or her capacity as a union official; and 2) whether his or her actions are within the bounds of protected activity.

[143] The standard set out in *Shaw* was recently applied by this Board (and subsequently affirmed by the Federal Court) in *King no. 1*. The adjudicator held that the deputy head had failed to prove that the grievor's behaviour fell outside the legitimate scope of union activity, even though the letter contained politically sensitive criticisms of the employer. The adjudicator concluded that a union representative cannot be disciplined while functioning as a union representative unless the behaviour is malicious or unless the statements made are knowingly or recklessly false (paragraph 152). According to the adjudicator, malice requires more than establishing a degree of ill will on the union officer's part: the union officer's intent must have been to exhibit malice in the ordinary and normal sense of the word, which includes the intent to cause injury to the employer. At the same time, the definition of "recklessness" excludes statements that are merely offensive to the employer: "Comments that are critical, but not knowingly or recklessly false, normally do not violate the 'bright line test' summarized by *Shaw*" (paragraph 217).

[144] The adjudicator affirmed the principles enunciated in *Shaw* and *King no. 1*. In *King no. 2*, the adjudicator rejected the employer's argument that the duty of loyalty owed by a public service employee to the employer circumscribes the legitimate scope of a union officer's expression. According to the adjudicator, a union officer's role in the public or private sectors is essentially the same. He added, however, that freedom of expression is arguably "even more important to a union representative facing a government employer that enjoys privileged access to public communications strategies" (paragraph 234).

[145] In light of all the foregoing, the law is clear: union officers may speak on a broad range of labour relations matters of interest to the union and its members without fear of reprisal from the employer, so long as their comments do not exceed their legitimate representational role and are not malicious or knowingly or recklessly false.

[146] The grievor was clearly carrying out his legitimate representational duties when he posted both the September 11 and November 3, 2007 updates to the CEUDA Local 24 website. The first posting dealt directly with the ongoing VSSA issue, a contentious dispute between the bargaining agent and management that was of great concern to union members. The second posting notified Local 24 members that management had suspended the grievor (president of Local 24) for a period of 30 days, and accurately described the employer's rationale for doing so. Given the grievor's intention was to inform members of an important development in union-management relations, and as his posting contained nothing more than a factually accurate report of the deputy head's action, it cannot be said that his conduct was intended to inflict harm on the deputy head or that his statements were knowingly or recklessly false. Significantly, the deputy head provided no evidence of any harm or loss it suffered as a result of either of the postings. Indeed, the deputy head waited six weeks before taking any action in relation to the first posting. In this regard, the present situation is quite unlike the situation in *King no. 2*, where the adjudicator found as a fact that in making certain public statements, the grievor had acted on his personal initiative on issues outside the scope of his representation role as a union officer. By contrast, the grievor had been CEUDA Local 24's representative on the VSSA issue for some time, and this was clearly a matter of ongoing discussion between union and management, between union members and elected officers (including the grievor), and internally among bargaining agent representatives at the local and national levels.

[147] The grievances should be allowed in full, including reinstatement, compensation for lost income, benefits and interest.

[148] The grievor made the following submissions in the alternative.

[149] In the event the adjudicator finds some misconduct, the disposition of the grievor's earlier grievances must necessarily be taken into account in assessing the legitimacy of both the 30-day suspension and subsequent termination of the grievor. Progressive discipline requires that, even if the grievances are denied, the 30-day

suspension and subsequent termination must be set aside in favour of lesser penalties that reflect the reduction of his prior disciplinary record from 80 days (as it stood in September 2007) to 15 days, as it now stands as a result of a settlement and determination of two matters before this Board quashing or reducing earlier discipline imposed against the grievor. The reduction of prior discipline by a factor of over 80% is significant in two important respects. First, it suggests that any discipline imposed in respect of the September 11, 2007 website posting must be reduced so as to take this significant reduction into account. More generally, it is noteworthy that each instance of discipline imposed by the deputy head against the grievor has subsequently been quashed or substantially reduced. This pattern is demonstrative of the respondent's consistent failure to recognize and take into account the grievor's status as a union officer and to apply appropriate labour relations principles more broadly.

[150] The adjudicator must also consider as a mitigating factor the grievor's immediate compliance with Mr. Gillan's direction to remove the September 11, 2007 posting from the website. Particularly in light of the fact that the deputy head took no steps whatsoever for six weeks following the September 11, 2007 website posting, the prompt removal of the message was a gesture of good faith and clear indication that his intentions were neither malicious nor insubordinate. This action of the grievor was summarily rejected by the deputy head. In these circumstances, any discipline imposed in respect of the September 11, 2007 website posting ought to reflect the grievor's full compliance with the deputy head's directions concerning the website posting.

[151] Given all the circumstances, the 30-day suspension should be reduced to a letter of reprimand, which both properly reflects the grievor's reduced disciplinary record of 15 days and takes into account legitimate mitigating factors such as his immediate cooperation with the direction to remove the posting.

[152] In the event the adjudicator finds there was misconduct for the second posting on the CEUDA website, the grievor made the following submissions.

[153] First, the appropriate discipline imposed for the grievor's November 3, 2007 website posting cannot be assessed with a backdrop of 110 days of prior suspensions. Indeed, even if the full 30-day suspension is upheld in respect of the September 11, 2007 website posting, his disciplinary record at the time of his termination would stand at 45 days. If the grievance concerning the 30-day suspension is upheld, his disciplinary record at the time of his termination would stand at only 15

days. Regardless of whether the disciplinary record stands at 15 or 45 days, the testimony is clear that the deputy head would not have been prepared to terminate the grievor for his website posting under these circumstances. The deputy head regarded the second posting as nothing more than a reiteration of that first message. Given that the respondent was not prepared to discharge the grievor for his initial posting when he had a total of 80 days on his disciplinary record, it would be inappropriate, even by the employer's standards, to uphold a termination in circumstances where his disciplinary record stands between 15 and 45 days.

[154] In any event, if any misconduct is found in respect of the November 3, 2007 website posting, the discipline imposed must be of a minimal nature, as the grievor's second message was in substance nothing more than a notification that he had been suspended for his earlier posting. It is clear that this second posting, written in response to the 30-day suspension, was different in context from the September 11, 2007 website posting, which was intended to update members as to the union's progress on the VSSA issue.

[155] The grievor also made the following oral submissions in reply to the employer's argument at the hearing. I was referred to section 5 of the *PSLRA,* which states that every employee is free to participate in the lawful activities of an employee organization. If the grievor is guilty of anything, it is of vigorously defending the rights of his members.

[156] The respondent urged the adjudicator to draw a negative inference from the failure of Mr. Moran to testify. However, his evidence was not relevant to the grievor's intentions, and therefore, no negative inference can be drawn.

[157] In the *Latouf* and *Goyette* decisions, actual work stoppages had occurred, which is not the case here.

C. <u>The respondent's reply submissions</u>

[158] The burden of proof in this case is simply the balance of probabilities; there is no higher standard.

[159] The length of time that the respondent took to make a determination on discipline (six weeks) was not a long time for thoughtful analysis. In addition, a significant amount of consultation was required.

[160] With respect to the emails that the respondent did not have before imposing discipline, this is a *de novo* hearing, and the respondent is allowed to rely on other evidence obtained post-discharge.

[161] The grievor suggested that section 194 of the *PSLRA* be read restrictively because there are *Charter* rights at issue. However, the grievor has not attacked the constitutionality of the provisions. As was recently held in *Association of Justice Counsel v. Treasury Board*, 2009 PSLRB 20, at paragraphs 26 to 28, when parliamentary intent is clear from the statutory language, an adjudicator cannot ignore that intent. The terms contained in the section have been interpreted for many years and have not been found to be ambiguous. The terms "counsel" and "procure" are wide in their scope and are clear.

[162] Furthermore, had Parliament intended the prohibition in the *PSLRA* to embrace the explicit declaration that the grievor suggests, it would have used the same language as contained in section 89 of the *CLC*.

[163] The grievor's argument that an employee who is also a union representative cannot be disciplined by the employer for breaching section 194 of the *PSLRA* contradicts *King*, 2003 PSSRB 48, which was not judicially reviewed. In addition, the same argument as that of the grievor was explicitly considered and rejected in *Beaupré and Oldale*.

[164] If a union official who is also an employee violates such a key provision of the *PSLRA*, he or she is subject to discipline. The only question is whether there has been a violation of section 194 of the *PSLRA*.

[165] The grievor also suggested that article 16 of the collective agreement was an exhaustive list of discipline that could be imposed on employees. Article 16 of the collective agreement is merely advisory. The collective agreement is not the source of the employer's authority to discipline. The source of authority for discipline is the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*). It is clear that the employer can do anything within its managerial authority under the *FAA* that is not specifically limited by the collective agreement or by statute. Nothing in article 16 of the collective agreement prohibits the employer from disciplining employees who breach section 194 of the *PSLRA*. If the parties had intended such a limitation to the employer's authority, they would have used different language.

[166] With respect to the reduction in the number of days of discipline from 80 to 45, there is no "magic number" of days for progressive discipline.

[167] The reasons given for posting the statements the second time were "trumped up" after the fact, and the grievor could have addressed the concerns he identified without reposting the offending sentences.

[168] The grievor alleges an unfair labour practice, but the PSAC did not file a complaint.

D. Sur-reply of the grievor

[169] I allowed a brief sur-reply for the grievor to address the respondent's submissions on the argument related to the *Charter*. The grievor stated that he was not making a constitutional attack on section 194 of the *PSLRA*. Rather, his argument focused on how section 194 is to be interpreted and applied. Quasi-criminal terminology such as "counsel" should be interpreted narrowly in light of protections under the *Charter*.

IV. Reasons

[170] The grievor was disciplined for making statements that the deputy head viewed as counselling or procuring an illegal work stoppage at the PIA, contrary to the *PSLRA*. The grievor's position is that the deputy head cannot discipline an employee for counselling or procuring an illegal work stoppage and that the only recourse available to the deputy head in this case was prosecution under the *PSLRA*. The grievor also maintains that he was not counselling or procuring an illegal work stoppage. In the alternative, the grievor submits that the discipline imposed was not appropriate.

[171] The following three questions must be addressed in these grievances:

- Did the respondent have the authority to discipline the grievor for allegedly counseling or procuring an illegal work stoppage?
- If it did have the authority, did the respondent prove that there was misconduct by the grievor?
- If the misconduct is proven and the respondent has the authority to discipline, was the discipline imposed appropriate in all the circumstances of the case?

A. Respondent's authority to impose discipline

[172] In this section, I will assess only the authority of the respondent to impose discipline and not whether the respondent had just cause to discipline. I will address the merits of the discipline in the following section.

[173] The grievor submits that prosecution under the *PSLRA* is the only appropriate mechanism for dealing with an alleged contravention of subsection 194(1) of the *PSLRA*. In *King*, 2003 PSSRB 48, the issue of the authority of the employer to discipline was not raised by the grievor. However, the PSSRB did address that issue as follows in *Beaupré and Oldale* at page 15*:*

. . .

> *As to the asserted obligation of the employer to prosecute the grievors under section 104 of the* Public Service Staff Relations Act*, I can find no support for such an obligation in the general law or in the pertinent collective agreement. The provisions of the Act reflect the duty owed by individuals and employee organizations to the state and to the public; the determination of what cases of alleged infractions are to be prosecuted is out of the hands of the employer acting as employer; the same conduct may constitute a breach of the general law and as well may justify a punitive reaction by the employer (theft from the employer is an example). The employer is not bound to pursue one course of action, prosecution, instead of the other. . . .*

. . .

[174] When faced with illegal strikes or threats of illegal strikes, employers have a range of options open to them, as summarized in *Monarch Fine Foods Company Limited v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647*, [1986] OLRB Rep. May 661 at paragraph 5:

> *…there is an absolute guarantee of industrial peace during the life of the collective agreement, and until the parties have gone through the compulsory conciliation process. That is why the definition of "strike" is so broad, and that is why, under the Act, an employer has a broad range of remedies or options when faced with an unlawful strike - just as the employees have a broad range of remedies if they are dealt with improperly. Most employers do not exercise the full range of those rights unless they are forced to do so, but it may be worthwhile to mention what they are:*

> *(1) . . . an employer can seek a cease and desist order enforceable in the Supreme Court of Ontario as an Order of that Court. Disobedience can result in fine or imprisonment.*
>
> *(2) An employer may seek damages at arbitration for any lost profits.*
>
> *(3) An employer can discipline employees who engage in unlawful concerted activity because engaging in a strike is a serious breach of their employment obligations which warrants at least discipline and, in the view of some arbitrators, discharge.*
>
> *(4) The employer may seek consent to prosecute and subsequently prosecute employees or the trade union for their breach of the law. A strike is not just a private protest. It is contrary to the* Labour Relations Act*. . . .*

[175] Although the above options refer to an illegal strike, the idea of multiple options for employers remains true for cases of alleged counselling or procuring of an illegal work stoppage. I find that the reasoning in *Beaupré and Oldale* remains sound.

[176] Part of the grievor's submissions also rest on the "Illegal Strikes" provision in the collective agreement (Exhibit G-2). The illegal strike clause (clause 16.01) states that employees can be disciplined for "participation" in an illegal strike. The grievor submits that this means that employees cannot be disciplined for counselling or procuring an illegal strike. The authority of the employer to discipline for misconduct is not constrained by this clause. I agree that the deputy head's authority to discipline is found in the *FAA* and not the collective agreement. The collective agreement clause simply sets out the consequences of participating in an illegal strike.

[177] The grievor also submits that to discipline him for allegedly counselling an illegal strike is contrary to the no-discrimination clause in the collective agreement (Exhibit G-2). Since there is no prohibition against employees counselling or procuring an illegal strike (subsection 194(1) of the *PSLRA* applies only to officers or representatives of employee organizations), it is argued that it is discriminatory to impose discipline on the grievor because of his status as a representative of the PSAC. Union officials who are also employees have rights and obligations that are different from those of other employees, and they are not treated the same as other employees. As noted in *Natrel Inc. v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647,* (2005) 136 L.A.C. (4th) 284 at paragraph 49: "a relevant circumstance which may justify a differential disciplinary response is the union status

of an employee in the workplace." To discipline an employee who is a union official for conduct that is alleged to be outside the legitimate scope of their union duties and obligations is not discriminatory.

[178] The grievor has submitted that imposing discipline is contrary to both the unfair labour practice provisions of the *PSLRA* (in particular, section 186) and his right to freedom of association under the *Charter*. The grievor has not filed an unfair labour practices complaint. Unfair labour practice provisions do not prevent the employer from disciplining an employee for alleged illegal behaviour. The protection for union officials under the *PSLRA* is for activities conducted in accordance with the statute. It is not the intent of the unfair labour practice provisions to protect activity that is contrary to the *PSLRA*. Similarly, the right to freedom of association governs legitimate activities of union officials and does not apply to activities that are allegedly illegal or contrary to statute. In *Shaw*, the adjudicator noted that the *Charter* protects employees from discipline ". . . which singles out people for having exercised rights under the *Act*. . . ." In this case, the respondent alleges that the grievor was acting contrary to the *PSLRA* and that he was not exercising his rights under it.

[179] Therefore, I have concluded that the deputy head had the authority to impose discipline for the alleged misconduct. I now turn to whether the employer has proven just cause.

B. <u>Was there misconduct by the grievor?</u>

[180] The respondent has the burden of proof and must prove that it had just cause to discipline the grievor. The standard of proof is a balance of probabilities, and the ". . . evidence must always be sufficiently clear, convincing and cogent. . ." to satisfy the balance of probabilities (*F.H. v. McDougall* at paragraph 46).

[181] The grievor received a 30-day suspension, and his employment was terminated because of written statements that the respondent alleges counselled or procured an illegal work stoppage. Although the same words were used in both instances, I must examine each disciplinary action separately.

[182] The words of the grievor must be interpreted in light of all the surrounding circumstances of which the grievor had knowledge at the time the statements were made (*Douglas Aircraft* (1975) 8 L.A.C. (2d) 118 at paragraph 41).

[183] The grievor submitted that I could not rely on evidence adduced from correspondence between himself, the PSAC and the CEUDA National representatives because that evidence was obtained by the deputy head subsequent to the termination of his employment. However, the deputy head is not relying on that correspondence to add further grounds for discipline. The emails simply provide context for the statement made by the grievor as well as demonstrating his knowledge of the issues at the time his statements were made. I find that they are therefore both relevant and admissible.

C. 30-day suspension

[184] The deputy head alleges that the following two sentences in communications from the grievor to the members of CEUDA Local 24 were intended to counsel or procure an illegal work stoppage:

> *In the meantime I have been pressing the bargaining agent and CEUDA National for support to walk off the job now. . . .*
>
> *If management meets and proposes nothing more than what they proposed last February, be prepared to support future union activities.*

[185] It is clear that the CEUDA Local 24 was not in a legal strike position when this statement was made. The grievor made representations to the respondent before issuing his statement that he believed that the CEUDA Local 24 was in a legal strike position. He was advised on three occasions by the respondent that that was not the case. The grievor received the same information from both the PSAC and CEUDA National. The grievor was an experienced union official and the changes to the legislation governing labour relations were not significant in terms of the right to strike. Based on the information available to the grievor at the time, he either knew or ought to have known that CEUDA Local 24 was not in a legal strike position. In any event, ignorance of the law is no excuse and the grievor should have confirmed the status of the collective bargaining process before issuing any statement.

[186] The *PSLRA* prohibits union officials from counselling or procuring an illegal work stoppage:

> ***194****(1) No employee organization shall declare or authorize a strike in respect of a bargaining unit, and no officer or representative of an employee organization shall counsel or procure the declaration or authorization of a strike in*

> *respect of a bargaining unit or the participation of employees in such a strike . . . .*

[187] There are two elements to "counsel or procure" in the provision: 1) counselling or procuring the declaration or authorization of an illegal strike and/or 2) counselling or procuring the participation of employees in an illegal strike. The first element relates to efforts of a union officer to obtain authorization for an illegal strike, likely from a part of the employee organization with the authority to authorize or declare a strike. The second element relates to efforts of a union officer to obtain the participation of employees in an illegal strike.

[188] To "counsel" is to advise or recommend. To "procure" is to bring about; to obtain by care or effort; or to prevail upon, induce, persuade a person to do something (*Shorter Oxford Dictionary*, 3d edition). I do not agree with the grievor that the definition of counselling in the criminal law context should apply to the labour relations context. Labour relations statutes are not criminal law statutes. In any event, there is jurisprudence in the labour relations context that defines these terms. In *Canada (Treasury Board) v. International Brotherhood of Electrical Workers, Local 2228*, the Board stated that the synonyms for counselling and procuring "were legion" and stated that "anyone who instructs, directs, incites, advises, recommends, encourages or induces" can be said to have counselled or procured (paragraph 24). Incitement or counselling must be established objectively and not on the basis of the interpretation of employees (*Goyette*, at pages 20 and 21).

[189] The grievor testified that he was simply asking for a clarification on a legal opinion. However, that is not what he wrote. He wrote that he was ". . . pressing the bargaining agent . . . for support to walk off the job now." This is an explicit statement that he has already come to a conclusion on walking off the job. One does not "pressure" people to support a position if one does not agree with that position. The word "pressing" indicates that he was lobbying the PSAC and CEUDA National to support a view that he already held. The phrase "be prepared to support future union activities" by itself is ambiguous, since it could include activities that were permitted. However, in relation to the earlier statement about walking off the job "now," I have determined that, on the balance of probabilities, it is seeking support for an illegal work stoppage. This interpretation is confirmed by looking at the words in the context of what the grievor knew at the time. He knew that the bargaining unit was not in a legal strike position. He also knew that the PSAC had been crystal clear that it was not

going to support any action other than pursuing the policy grievance on the VSSA issue.

[190] It is also important to note what the grievor thought he was trying to achieve. He stated that Local 24 had no intention of proceeding with a walkout until such time as it received "a legal opinion or the requested support from the Bargaining Agent" (Exhibit E-1, tab 22, emphasis added). It is clear that he was therefore seeking authorization ("the requested support") from the PSAC for an illegal work stoppage. As noted above, the *PSLRA* prohibits the counselling or procuring of authorization for an illegal strike. The grievor was clearly counselling the PSAC to authorize a walkout.

[191] Therefore, I conclude that the statement made by the grievor does constitute procuring or counselling an illegal strike, contrary to subsection 194(1) of the *PSLRA*.

[192] A significant degree of protection is granted to union officials to speak freely on issues of concern to employees. However, as noted in *Metropolitan Toronto (Municipality)* at paragraph 16:

> *. . . if based on falsehoods that are known or ought reasonably to be known, such comment is not protected. The bright line test therefore, consistent with the role of a steward, is that malicious or deliberately false statements are not protected and if made by a steward or other union official may attract a disciplinary response.*

[193] Determining whether a union official is immune from discipline when acting in his or her union role depends on the facts of each case. As stated in *Plaza Fiber Glas* at paragraph 19, union status is not a "carte blanche," and immunity is limited to acts performed in the discharge of duties or functions ". . . which may reasonably be regarded as a legitimate exercise . . ." of those duties or functions. In *Communication, Energy and Paper Workers Union of Canada v. Bell Canada v. C.E.P. (Hofstede)*, (1996) 57 L.A.C. (4th) 289 (cited in *King,* 2003 PSSRB 48, at paragraph 133), the arbitrator held that a union official who is also an employee has a responsibility to "scrupulously" refrain from an abuse of his or her position to ". . . cloak . . . [a] defiant challenge of management's right to manage the workplace and carry on production without disruption" (at paragraph 30). This was expressed even more forcefully in *Burns Meats Ltd. v. Canadian Food and Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379 (at page 387) as follows:

. . .

> *A steward who openly exhorts employees to participate in an unlawful strike obviously cannot expect that his union office will shield him from discipline for his part in engineering the breach of both a collective agreement and the* Labour Relations Act*. . . .*

. . .

[194] The grievor relied on *Plaza Fiber Glas* to support his right to communicate with his fellow members of CEUDA Local 24 about his consultations and representations to the PSAC. However, *Plaza Fiber Glas* is a case about communicating the frustration of employees to the employer and not about communication to employees. The grievor had already communicated the frustration of the employees to the employer on numerous occasions, including advising the employer that he wanted to discuss "rotating strike action" (Exhibit E-1, tab 9). He was not disciplined for raising that proposal with the employer.

[195] Counselling or procuring authorization for an illegal strike and counselling or procuring the participation of employees in an illegal strike has always been regarded as serious misconduct justifying severe discipline. Although in *Manitoba (Department of Justice) v. M.G.E.U.* (2009) 181 L.A.C. (4th) 235, the grievor led a work stoppage, the conclusion of the arbitrator that "this kind of conduct cannot be condoned" (at paragraph 207) is equally applicable here. As noted by the arbitrator, deterrence is also a factor when determining the appropriateness of discipline.

[196] There are some aggravating factors that support a lengthy suspension. The grievor did not recognize that his statement was wrong and did not apologize for it. The PSAC, through Mr. Moran, acknowledged that the words used by the grievor "were not the right words." The grievor disassociated himself from that admission at the adjudication hearing and refused to acknowledge the inappropriateness of his words. Although promptly removing the statement from the website might have been regarded as a mitigating factor, the grievor's testimony that he removed it only because it was old news and because he did not want a "pissing match" demonstrates that he still stood by his statement.

[197] His knowledge of the volatility of the workplace is also an aggravating factor. He knew that some members were pushing for some sort of job action and that his words would only inflame the situation.

[198] As noted in *Manitoba (Department of Justice) v. M.G.E.U.*, the nature of the workplace can also be an aggravating factor. In that case, the trust relationship inherent in the job of a court officer was considered an aggravating factor. A similar level of trust is expected of border service officers.

[199] The grievor submitted that the delay in imposing discipline (six weeks) was an indication that the respondent did not consider the misconduct serious. Although prompt discipline is always preferred, the delay in this case was not excessive. The evidence of the deputy head was that it acted with caution and consulted widely. Its course of action does not amount to condonation.

[200] The grievor has (after a settlement and an adjudication decision) the following discipline on his record: 5 days and 10 days. I cannot accept the grievor's submission that, because the total amount of imposed discipline was reduced to 15 days, the discipline of 30 days was not appropriate. The fact remains that he had two previous disciplinary measures on his record. It is not a requirement that discipline progress by preordained steps. Considering the seriousness of the misconduct, the aggravating factors and the previous disciplinary record, I find that 30 days is within the appropriate range for discipline in the circumstances.

D. Termination of employment

[201] The grievor's employment was terminated for reposting the statement for which he had already received a 30-day suspension. This reposting occurred on November 3, 2007. I must now assess whether the reposting of that statement in all of the circumstances also warrants discipline.

[202] The grievor submitted that Mr. Gillan's slight hesitation in answering a hypothetical question about whether a posting of the letter of discipline for the 30-day suspension would have justified termination demonstrated the inappropriateness of the termination of employment. The grievor stated that Mr. Gillan "appeared to be answering in the affirmative." In fact, Mr. Gillan did not answer in the affirmative. He said he would consult with labour relations advisors. His answer demonstrates nothing, in my view.

[203] In the letter of termination (Exhibit E-1, tab 32), the deputy head noted the previous discipline (30-day suspension) for the two sentences that were posted on the CEUDA Local 24 website and the fact that the message was removed from the website

after the direction from the respondent. The letter then states that "nevertheless, the very next day, you re-posted these statements." The deputy head regarded this reposting as "a serious act of misconduct." In determining the disciplinary measure, the deputy head considered the grievor's disciplinary record which it said continued to demonstrate his "disregard for the interests of the CBSA" and his "failure to respect its authority." It regarded the reposting as a culminating incident justifying termination of employment for cause.

[204] The grievor maintains that his message to the members was intended to advise them that he would not have access to the work site and to explain the reasons for his suspension. He also testified that it was intended to address rumours and speculation and to advise stewards to be careful of what they would say to representatives of the deputy head. He also testified that he had a right to freedom of speech. To assess the intention of the message, it is helpful to read it in its entirety. Again, the context of the words are important. The message reads as follows (Exhibit E-1, tab 23):

. . .

> *By now many of you may have heard that I just received another thirty day suspension without pay. As such, my access to CBSA premises has been restricted until December 14, 2007.*
>
> *What is significant about this discipline is the timing of this suspension, the grounds on which I have been suspended and the fact that this is the third discipline I've received since John Gillan became the Regional Director for the GTA in the spring of 2006.*
>
> *On the bright side, over the course of regional VSSA negotiations, senior officials (**not all**) within this region and Ottawa have finally been exposed.*
>
> *Each of you has now witnessed the management deception, lies and abuse that continue to plague this organization, impede VSSA negotiations and the resolution of so many other regional labour issues.*
>
> *It is the truth that binds us in a common cause to be treated with dignity, respect and not to allow this employer to violate any of our contractual and/or legal rights.*
>
> *I hope you take comfort in knowing that I am well, focused and more determined in protecting our rights than ever before.*

. . .

> *The attached correspondence explains the latest discipline which is based on two sentences written in a VSSA update that was posted on our local website. The sentences are* **"In the meantime I have been pressing the bargaining agent and CEUDA National for support to walk off the job now." & "If management meets and proposes nothing more than what they proposed last February, be prepared to support future union activities."**
>
> [Emphasis in the original]

[205] The first paragraph of the message is a straightforward notification of a disciplinary measure and of the grievor's lack of access to the CBSA premises. The rest does not relate to any of the reasons for posting the message provided by the grievor at the hearing. The grievor had clearly been asked by the respondent to remove the two sentences from the CEUDA Local 24 website. He had initially removed the message that contained the sentences, but in this message he repeats sentences that the respondent clearly regarded as misconduct. The grievor knew that the respondent regarded those sentences as misconduct, yet he repeated them. He obviously disagreed with the respondent's assessment of his conduct (as is his right). However, the "obey now, grieve later" principle requires that he address his disagreement through the grievance process, not through further communications with bargaining unit members. In addition, he already knew that the PSAC regarded his words as inappropriate (as clearly articulated by Mr. Moran at the disciplinary hearing on October 31, 2007).

[206] The message remained defiant and maintained the grievor's position that he was seeking support for an illegal work stoppage relating to the VSSA issue. This is shown by his reference to the ". . . deception, lies and abuse that continue to plague this organization. . ." and the reference to not allowing the employer to violate contractual and/or legal rights. I agree with the respondent that the grievor could have used more neutral language to explain his situation and could have simply noted that he was intending to grieve the suspension for allegedly counselling or procuring an illegal work stoppage.

[207] It is also important to consider the correspondence the grievor attached to his message. In his message, he states that this attached correspondence "explains" the discipline that was imposed. The correspondence attached to the message (and therefore also posted to the CEUDA Local 24 website) puts the repeated sentences in

context. The first attachment was the email of November 2, 2007 (Exhibit E-1, tab 22) to Mr. Gillan and others (summarized at paragraph 59 of this decision). That email reads as follows:

> *It is well within the union's rights to mobilize members for future activities.*
>
> *The CBSA cannot interfere with how a union prepares for such future activities that the union has the right to decide and manage. It is our right to maintain control on the administration of our union.*
>
> *I made it clear that we had no intention of proceeding until such time that we did receive a legal opinion or requested support from the Bargaining Agent.*
>
> . . .
>
> *Your actions will only escalate current labour conflict within this region.*
>
> *As long as we don't issue direction, which we clearly have not, we are well within our right to advise our members whether we are seeking support, who we are seeking support from and on which subject we are seeking said support.*
>
> . . .

[208] This is not simply informing members of the imposed discipline. This is a vociferous defence of his statement and a further incitement to an illegal walkout. Of special note is the reference to an "escalation of labour conflict."

[209] The attached email of October 30, 2007 (Exhibit E-1, tab 17) is also a defence of his initial posting, clearly demonstrating that he does not agree with the deputy head's interpretation of his message and that he stands by his words.

[210] In conclusion, the sentences contained in the November 3, 2007 reposting, read in the context of the entire message and the attachments, are a further counselling or procuring of an illegal strike.

[211] The grievor also submitted that his message was a form of union expression that should be protected. It is clear that statements that are malicious or knowingly or recklessly false are not protected union speech. The words used by the grievor were not part of his legitimate representational duties. In this case, his statements were contrary to the *PSLRA*.

[212] Therefore, I conclude that the employer had just cause to discipline the grievor for reposting his statement. Now I must turn my attention to the quantum of the disciplinary measure.

[213] The grievor submitted that a written reprimand would have been a more appropriate measure, given that the message was nothing more than a notification that he had been suspended. As I have concluded earlier in this decision, I cannot accept that characterization of the message.

[214] The same aggravating factors that applied in the 30-day suspension apply to the termination. The grievor has continued to fail to acknowledge responsibility for his words and does not recognize that he counselled and procured an illegal work stoppage.

[215] The fact that there was no illegal work stoppage is not a mitigating factor. There is no proof of damage required in order to support discipline for counselling or procuring an illegal work stoppage (*Pacific Press and Communications, Energy & Paperworkers' Union Local 115M*, (1997) 69 L.A.C. (4th) 214 at paragraph 53).

[216] The grievor submitted that the fact that previous discipline was either quashed or substantially reduced demonstrates the respondent's continued failure to recognize and to take into account the grievor's union status. I have examined both grievances before me on their merits. Any conclusions about the past behaviour of the deputy head are not relevant to an assessment of the deputy head's behaviours in these grievances.

[217] The amount of the prior discipline now stands at 45 days of suspension. The fact that the amount of discipline was reduced through either settlement or adjudication does not change the fact that the misconduct was serious misconduct. The previous discipline on record is similar in nature to the discipline in this case, and the grievor did not demonstrate any improvement in his behaviour. Termination of employment after 45 days of discipline on an employee's record is well within the acceptable amount of discipline.

[218] The grievor submitted that he would not be returning to a position as a bargaining agent representative. In my view, this is not a relevant consideration. Firstly, the employer cannot enforce this commitment. Secondly, the actions of the

grievor were outside the scope of legitimate union activity. This demonstrates an attitude that is not acceptable for any employee, especially a border services officer who is in a critical position that requires trust.

[219] The bond of trust with the employer has been broken by the actions of the grievor. In view of his attitude and his failure to respond to lesser discipline, reinstatement on any basis "would vindicate his actions and invite a repetition" (*Nanaimo General Hospital and H.E.U. (Bertram)* (1999) 81 L.A.C. (4th) 1 at paragraph 196). This is not the first time that the grievor's ability to perform his duties as a public service employee have been questioned. In *King no. 2* at paragraph 273, the adjudicator stated:

> *. . . I find it hard to imagine that a reasonable person would not seriously question the grievor's ability to perform his duties as a public servant in view of the nature of his allegations and the way in which they were expressed.*

[220] By his most recent actions, the grievor has shown that he is not able to control his strongly held views and keep within the bounds of legality. This demonstrates his lack of ability to perform his duties as a public service employee in a position of trust.

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

(The Order appears on the next page)

V. Order

[222] The grievances are denied.

November 29, 2010.

Ian R. Mackenzie,
adjudicator