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Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

SHIV CHOPRA, MARGARET HAYDON AND GERARD LAMBERT

Grievors

and

TREASURY BOARD
(Department of Health)

Employer

Indexed as
Chopra et al. v. Treasury Board (Department of Health)

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

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievors: David Yazbeck and Bijon Roy, counsels

For the Employer: John Jaworski, Jennifer Lewis and Sean Kelly, counsels

Heard at Ottawa, Ontario.
(See Appendix 1 for hearing dates and Appendix 2 for written submissions dates.)

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Appendix 2 - Dates of written submissions

Appendix 3 - List of Acronyms

I. Grievances referred to adjudication

[1] Dr. Shiv Chopra, Dr. Margaret Haydon and Dr. Gerard Lambert ("the grievors") referred eight grievances to adjudication in 2004. Five grievances related to disciplinary suspensions, and three grievances related to the termination of employment of the three grievors. The hearing of these grievances and the written submissions extended over 4.5 years, with over 150 hearing days (see Appendix 1 for a complete list of hearing dates and Appendix 2 for the dates of written submissions). Moreover, the grievors requested an opportunity to make a sur-reply to the employer's reply submissions. I have determined that there is no requirement for a sur-reply. Sur-reply should only be allowed in the rarest of cases. Sur-reply is not appropriate when a party wishes to clarify the record, respond to attacks on credibility, or respond to the mischaracterization of evidence or submissions. On the issue of condonation, the parties have made submissions on the issue and no purpose would be achieved by seeking further submissions from the grievors.

[2] For the reasons set out in this decision, I have dismissed all of the grievances against the suspensions. I have also dismissed the grievances against the terminations of employment of Dr. Chopra and Dr. Haydon. I have allowed the grievance of Dr. Lambert against his termination of employment.

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

II. Background

[4] In this section, I have summarized the evidence that provides the background for all the grievances.

A. Work environment

[5] The grievors were drug evaluators at the Department of Health ("the employer" or "Health Canada"), evaluating veterinary drug products. The employer is the regulatory authority responsible for approving new veterinary drugs and new uses of existing approved drugs under the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (*FDA*). Drug evaluators in the Veterinary Drug Directorate (VDD), previously the Bureau of

Veterinary Drugs (BVD), are responsible for making scientific assessments and evaluations of veterinary medical and animal production data and for making recommendations as to the safety and efficacy of pharmaceutical products for use in animals and fish. Those recommendations result from evaluating submissions from pharmaceutical companies seeking regulatory approval for their drugs or for new uses of existing drugs. A positive recommendation means that a Notice of Compliance (NOC) is issued for the drug and its intended use.

[6] While carrying out evaluations, evaluators may determine that additional data is required from a drug manufacturer. If so, they issue Additional Data Letters (ADLs).

[7] Evaluators are also responsible for making scientific assessments of the labelling of veterinary drug products, including directions for use, cautions, and warnings for veterinarians and producers. Evaluators also assess applications from investigators for experimental trials of drugs.

[8] A drug evaluator's job description (Exhibit E-1, tab B-1) includes providing advice and recommendations to managers about developing national or international guidelines, standards, or policies that will contribute to the employer's objective of harmonizing its regulatory requirements with those of international veterinary agencies and trade organizations.

[9] The job description includes a number of challenges. Relevant for these grievances are the following:

> *Constant effort is required in conducting intense and detailed product evaluation and assessment activities while working within stringent time deadlines for the completion of the review. . . .*
>
> *When a product receives approval in a foreign jurisdiction, there is an increased pressure from the Canadian sponsor and the public for an accelerated review. Psychological effort to refrain from giving into these pressures is required. There is no control over the timing, frequency or duration.*
>
> *Psychological effort is required to remain calm and objective when meeting with industry scientists and representatives to explain and clarify the need for additional information and data to support proposed claims. Meetings are sometimes confrontational. . . .*

> *With the introduction of Cost Recovery Fees, for the review of veterinary product submissions, there is an expectation from manufacturers to have submission reviews expedited in their favour.*

. . .

[10] In May 2001, the employer established the Science Issues Review Committee (SIRC) (Exhibit E-15, tab B-1). Its mandate was as follows:

> *. . . to ensure sound science-based risk assessments and in instances when scientific consensus has not been reached within BVD (as the program area responsible for assessing the safety and efficacy of veterinary drugs), it is responsible to ensure a forum for discussion aimed at achieving scientific consensus.*

[11] The SIRC consisted of Diane Kirkpatrick, the BVD's director (and later the Director General of the VDD) and program heads, and "as required, other lead persons" from the program areas supporting the BVD (later the VDD). Staff members could be requested to attend committee meetings "as required" to present or discuss particular agenda items.

B. <u>Conflict and pressure</u>

1. <u>Generalities</u>

[12] The grievors testified extensively about their past efforts to raise concerns internally about the pressure put on them and other evaluators to approve drugs, some of which were detailed in other proceedings, such as the Federal Court decision in *Haydon v. Canada,* [2001] 2 F.C. 82 (T.D.) (*Haydon No. 1*) and in a Public Service Staff Relations Board decision about several complaints filed under the *PSSRA* (*Chopra et al. v. Nymark*, PSSRB File Nos. 161-02-858 and 860 (19981221)).

[13] The grievors and other scientists appeared before the Senate Standing Committee on Agriculture and Forestry in 1998 and 1999. The Committee was examining rBST, a growth hormone. Dr. Chopra testified before the Committee about pressure to approve rBST, antibiotics and other drugs. In its interim report, the Committee made the following comments about pressure on scientists (Exhibit G-49, at page 12 of 13 and at pages 8 and 9 of 11):

. . .

> *. . . The Committee believes that Health Canada drug evaluators must be permitted to undertake their task without perceived pressure from industry or from Health Canada management for them to approve drugs of questionable safety. While Health Canada management has an additional responsibility to ensure that drug evaluations are completed in a timely fashion, its first duty must be to ensure safety and to provide an environment in which evaluators can apply due diligence in fulfilling their tasks.*
>
> . . .
>
> *The Committee received evidence that it was through this Advisory Committee* [Joint Program Management Advisory Committee] *that industry representatives gained routine access to the names of the drug evaluators reviewing their products. This came about despite the objections of evaluators who feared pressure from industry. In the area of health and safety, there must be no pressure, bias or conflict of interest. To ensure public confidence in their food and drugs, Canadians must be confident that drug evaluators, food safety inspectors, and others, are not being pressured; Canadians must know that these professionals are permitted to act solely in the best interests of the Canadian public. The Committee believes that efforts must be taken to ensure that the operations of the Bureau of Veterinary Drugs are not being inappropriately influenced by industry concerns expressed through the Joint Program Management Advisory Committee. To this end, the Committee urges the Minister of Health to review the composition and role of the Advisory Committee with a view to eliminating any undue industry influence.*
>
> . . .

[14] Dr. Chopra conducted a review of the submission process of Baytril (an antibiotic) and completed a report entitled, “Baytril: Report On The ‘Roadblocks’ To The Human Safety Review” (“the Baytril Roadblocks report”) in October 2000 (Exhibit G-158A). I heard extensive evidence about the Baytril Roadblocks report and Ms. Kirkpatrick’s response to it. I find that most of this evidence is not relevant to the grievances before me. Thus, I have summarized only the relevant parts.

[15] In his report, Dr. Chopra stated that the pressure to “go soft” on regulatory requirements came from the employer’s managers, who had been pressured by drug companies. The particular pressure that Dr. Chopra referred to in his report was the pressure to “tacitly endorse” the recommendations of foreign bodies, such as the American equivalent of the VDD. In his report, Dr. Chopra reviewed many documents

and concluded that there had been incidents of "harassment, coercion and slander" against three drug evaluators (including himself). He stated that the pressure was intended to make the evaluators either recommend requests for emergency drug releases (EDRs) or recommend an NOC.

[16] In her response to Dr. Chopra's report, Ms. Kirkpatrick stated that the references to pressure should be removed because the comments were not substantiated by the evidence (Exhibit G-60, tab B).

[17] Dr. Manisha Mehrotra and Dr. Lateef Adewoye were assigned the work of preparing a plan for reviewing the Baytril submission. Ms. Kirkpatrick testified that she did not assign that file to Dr. Chopra because she believed that he had already made up his mind about it. Dr. Chopra was provided with a copy of the action plan prepared by Dr. Mehrotra and Dr. Adewoye. Dr. Chopra raised concerns about the suggestion in the action plan that a conditional NOC could be issued within the regulatory framework of the *FDA* (Exhibit G-164). An NOC was issued for Baytril for cattle in February 2004 (Exhibit G-165).

[18] Dr. Chopra testified about the role of the Canadian Animal Health Institute (CAHI), an industry lobbying group. He described the CAHI as instrumental in establishing cost recovery for drug applications. Dr. Chopra testified that cost recovery created a "pressure point" on evaluators because drug companies were then considered clients and stakeholders, and they then demanded "service performance" from the VDD.

[19] Throughout the hearing and in the documentary evidence, it became clear that the grievors and the employer had different views on what constituted pressure. The grievors saw the pressure from industry to process applications in a shorter time as evidence of pressure to approve drugs of questionable safety. The employer recognized that there was pressure from the industry on the timeliness of reviews but did not see it as pressure to approve drugs. Dr. Alexander testified that, when he looked for evidence of pressure, he sought evidence of a request or a specific direction from a manufacturer.

[20] On July 6, 2001, the grievors, Dr. Basudde, Dr. Rajinder Sharma, Dr. Arnost Vilim and Dr. Sudarshan Malik sent a letter to Minister Alan Rock (Exhibit G-117). The letter was copied to the Deputy Minister, the Prime Minister, the President of the

Professional Institute of the Public Service of Canada (PIPSC) and to the following public interest organizations: National Farmers' Union, Council of Canadians, Sierra Club of Canada and Canadian Health Coalition. The letter noted that the scientists had been harassed and pressured to approve drugs of questionable safety for use in food-producing animals. The authors noted that ". . . pressure has been mounting to pass or maintain a series of drugs which are generally reported to produce cancer, antimicrobial resistance and other human health disorders." The letter concluded as follows:

> *We allege that the responsibility for these happenings rests entirely with the current management. What is happening in our midst is wrongful and improper. Consequently, we are not able to apply due diligence to our duties as public service employees. Nor are we able to tolerate this in silence.*
>
> *The reason that we write this letter to you is to urge your immediate intervention as Minister of the Crown to protect the health of Canadians. We hope that you will oblige. Should you wish to discuss any of these matters at a meeting we remain at your disposal.*

2. An example: Tylosin review

[21] Tylosin is an antibiotic drug used to treat respiratory infections. Tylosin has also been used as a feed additive to promote growth in swine, cattle and chickens. The European Union banned the use of Tylosin for non-therapeutic use in swine, chickens and turkeys in 1999. Tylosin was never approved in Europe for non-therapeutic use in cattle.

[22] Tylosin has been approved by Health Canada for several uses since at least 1981 (Exhibit G-102). In 1996, Dr. Lambert reviewed a supplementary new drug submission (SNDS) for a new administration of Tylosin (from an intramuscular injection to subcutaneous), known as a "Tylan 200" injection. In that review, Dr. Lambert concluded that further human safety data was required. Dr. Chopra was the second reviewer, and he agreed. After discussions with the Chief of the Human Safety Division (HSD), a request for additional data from the manufacturer was made. In 1997, an NOC was issued for the therapeutic use of Tylosin in animal feed ("Tylosin feed premix").

[23] In October 1998, the employer received a new drug submission (NDS) for an implant product with Tylosin. The employer had already approved the same product without Tylosin. The new submission was for a series of pellets (also called

"Components") that would be implanted into the ears of cattle. The pellets contained growth promotion hormones, and one pellet contained a subtherapeutic concentration of Tylosin tartrate (the trade name was "Tylan"). The stated purpose of the Tylosin pellet was to prevent infected abscesses in the ears that might result from the implantation.

[24] In March 1998, the manufacturer was advised by the employer that each Component product would have to be processed as an individual NDS. In addition, the manufacturer was advised that the chief of the HSD, Dr. Man Sen Yong, had determined that the amount of Tylosin tartrate used in the product ". . . will not pose any additional health risk to consumers" and that therefore there was no need for a review of the five new products (since they had already been approved without the Tylosin tartrate) (Exhibits G-38 and G-39).

[25] On April 2, 2002, Dr. Lambert was appointed the acting chief of the pharmacology and toxicology team of the HSD for approximately four months. On April 18, 2003, Dr. Vasu Dev Sharma, the director of the HSD, met with Dr. Lambert, Dr. R. Sharma, Dr. Basudde and Dr. Vilim to discuss whether to conduct a human safety review of the Component submissions.

[26] On April 22, 2002, Dr. V. Sharma emailed the submissions control officer, stating that it had been decided that the five submissions were in compliance with human safety (Exhibit G-40). Dr. Vilim became the acting director on the following day and put the matter on hold again (Exhibit G-41). Dr. Vilim then asked Dr. R. Sharma and other members of the HSD to conduct a risk assessment. The review was conducted by Dr. Shabnam and Dr. Mehrotra and was completed on May 6, 2002 (Exhibit G-42). The reviewers relied on data that had already been submitted. They concluded that, since no information about residue data had been obtained using live animals, no definite conclusion could be reached about how long Tylosin remained at the implantation site. The reviewers concluded that, based on efficacy studies provided by the manufacturer, prolonged release of Tylosin in small amounts would not occur.

[27] On May 7, 2002, Dr. Lambert requested a meeting with Dr. R. Sharma and others to discuss his concerns with the report (Exhibit E-28). He stated in his email that "[t]o tolerate an in-vitro test in lieu of an in-vivo test is not acceptable." He also stated that "[w]e are back to the acceptance of testimony in lieu of data for the approval of veterinary drugs." He wrote that a residue depletion study was required and that

Canada had never accepted in-vivo bio-equivalence studies, as the manufacturer proposed in this case. Dr. Lambert noted also that Dr. Basudde had not been copied on a relevant memo. Dr. Basudde wrote in an email reply to Dr. Lambert that he supported Dr. Lambert's comments. He also noted that there appeared to be a deliberate tendency on the part of Health Canada management to ignore crucial issues. He also expressed concern about being excluded within the HSD and described it as "disgusting."

[28] Ms. Kirkpatrick responded on the same day to all the email recipients that she would be meeting with the "concerned individuals" to discuss the issues raised and the approach to raising such issues. She also wrote that, ". . . while there may be disagreements on scientific matters, respect for colleagues is a key operating principle" (Exhibit E-28). In a separate email to Dr. Basudde and Dr. Lambert (Exhibit E-27), she stated that, "[i]rrespective of the scientific issues being raised . . . the tone and aspersions are unacceptable as they are disrespectful to colleagues which is detrimental to the organization as a whole."

[29] At the meeting with Dr. Lambert, Dr. Basudde, Dr. R. Sharma and Dr. Vilim on May 8, 2002, Ms. Kirkpatrick told Dr. Lambert that the tone of his email was unacceptable and inappropriate and that he should send an apology to his colleagues.

[30] On May 10, 2002, Dr. V. Sharma sent an email reply to Dr. Lambert, stating that, based on the review report and his discussions with the Manufacturing and Chemical Evaluation Division, he had concluded that there would not be any undue risk to human health and that he had recommended issuing the NOCs from a human safety perspective (Exhibit E-30).

[31] On May 13, 2002, Dr. Lambert, Dr. Chopra and Dr. Basudde wrote a memo to Ms. Kirkpatrick, expressing their concern about the impending approval of the Component products (Exhibit E-31). They stated that any decision to issue an NOC without the necessary scientific data was contrary to the *FDA* and its regulations. The memo concluded as follows:

> *However, according to the latest email communications, we understand that you have chosen to disregard our collective views on this subject and that a prompt issuance of Notices of Compliance is imminent.*
>
> *We find these actions on your part to be improper. We feel that no Health Canada officials, regardless of their*

> *administrative rank, should by-pass the legislative requirements of the Food and Drugs Act and Regulations.*

[32] Ms. Kirkpatrick met with Dr. Lambert on May 14, 2002. She told him that she was ending his team leader acting appointment. She told him that, since he had sent an ultimatum and had not sought discussion, he was not suitable for the team leader position. Ms. Kirkpatrick told him that she had reached that conclusion before receiving the memo of May 13, 2002. She told him that she found the memo's tone inappropriate.

[33] Ms. Kirkpatrick wrote to Dr. Chopra, Dr. Basudde and Dr. Lambert on May 16, 2002 in reply to their memo of May 13 (Exhibit E-33). She noted that their views had been "fully considered" in reaching the decision to issue the NOCs. She stated that the decision was made in accordance with the *FDA* and its regulations and that it was also consistent with conclusions reached in other countries (specifically mentioning the United States). She stated that their assertion that she and Dr. V. Sharma had made "improper actions" was unfounded. Her memo concluded as follows:

> *In closing, I am disappointed that you would call into question my integrity and that of Dr. Sharma, based on a disagreement respecting the scientific evaluation of these submissions. As I have indicated previously, this stance is detrimental to the organization as a whole.*

[34] Dr. Basudde received a reprimand for his attitude both at the meeting and in his correspondence (Exhibit E-34). The letter of reprimand from Ms. Kirkpatrick stated that he had declined to participate in the scientific discussion. It also stated that he had raised his voice, that his body language had been threatening and that he had accused Ms. Kirkpatrick of "victimizing" him, before walking out of the meeting. The letter also referred to the Employee Assistance Program (EAP), which was available to him. The reprimand concluded by stating that any further similar behaviour ". . . will result in more severe disciplinary action." (Dr. Basudde's reprimand and related issues are not before me. However, the grievors referred to those events in their comments to the media, which is why they are relevant.)

C. Advisory Committee on Animal Uses of Antimicrobials and Impact on Resistance and Health

[35] The Advisory Committee on Animal Uses of Antimicrobials and Impact on Resistance and Health ("the McEwan Advisory Committee ») was established by the

VDD in 1999. The Committee was chaired by Dr. Scott McEwan of the University of Guelph. It was made up of a number of representatives of academia, animal welfare groups, consumer interest groups, the feed industry, the food-animal industry, human medicine, the pharmaceutical industry, public health concerns and veterinary medicine professionals. Its role and mandate, established by the VDD, was to provide advice to the director general of the VDD on the development of policy options related to using antimicrobial agents on animals. A secretariat made up of scientists from the VDD and the Canadian Food Inspection Agency (CFIA), including Dr. Chopra, was set up to assist the Committee.

[36] The McEwan Advisory Committee submitted its report ("the McEwan Report") to the VDD on June 28, 2002. The report contained 38 recommendations, the majority of which related directly to the role of Health Canada. The report made a number of comments about that role and about antimicrobial resistance (AMR). The following excerpts are from the Executive Summary:

> *Resistance to the effects of antimicrobial drugs is a serious problem in Canada and the world. The problem* [antimicrobial resistance] *. . . costs lives and money and threatens our ability to treat infections in humans and animals. Our traditional response to the development of antimicrobial resistance has been to use different, often new, drugs to treat the disease. This approach is no longer tenable because the supply of new, effective, safe and affordable products is expected to diminish in the future.*
>
> . . .
>
> *In general, the committee is concerned that Health Canada lacks specific plans to manage the risks associated with antimicrobial resistance transmitted from food animals and lacks credible, scientifically valid methods and criteria to assess the safety of veterinary drugs with respect to antimicrobial resistance and human health. Canadian regulatory authorities are not as active and effective as they should be in addressing these deficiencies.*
>
> *. . .*
>
> *. . . there are no specific methods and criteria available in Health Canada for human health safety assessment of veterinary drugs with respect to antimicrobial resistance. Without scientifically sound methods for safety assessment, it is impossible for Health Canada to completely and objectively analyze the health risks associated with antimicrobial resistance, and thus, whether any current or*

future use of antimicrobials in animals warrants regulatory action. Without sound methods and criteria, it is impossible for the informed public (including drug sponsors) to know "what the rules are." On the other hand, it is important that Health Canada provide timely approvals of new antimicrobials that can be used legitimately and safely in animals. This is in the public's interest because the lack of safe and effective drugs is a prime motivator for extra-label use, a use pattern where there is much less assurance of safety.

It would be wrong to suggest that these are simple issues to address. There is no international consensus on safety standards for antimicrobial resistant pathogens in foods or in the environment. However, progress is being made internationally, and Canada's participation needs to be more effective.

. . .

The committee is concerned about the lack of a clear and comprehensive policy on extra-label use in Canada, especially as it pertains to antimicrobial resistance. The committee believes that Health Canada should use its authority to define the acceptable limits of this practice with respect to impact on antimicrobial resistance. A sensible approach is to limit extra-label use as much as possible, especially for those drugs considered to be critical for therapy in humans or animals. If appropriate, regulatory authorities should prohibit extra-label use of certain drugs.

. . .

There are, however, several points of concern with regard to resistance. First, most of the classes of drugs used in animals are also used in humans. Second, some of these are registered for use in feed as growth promoters or prophylactics. Third, some antimicrobials used in humans are administered routinely to large numbers of animals for treatment, prophylaxis or growth promotion. Such routine use is of special resistance concern because of the numbers of animals involved. Fourth, modern production methods dictate that even therapeutic treatments in some types of animals necessarily involve treatment of entire groups of animals through feed or water. This effectively increases the potential exposure to resistance selection pressure. Fifth, some drugs are registered for two or more of the following categories: growth promoters/improved feed efficiency; disease control/prophylaxis, or therapy. This could increase resistance selection pressure, eventually compromising efficacy in one or another category.

. . .

Health Canada's mission is to protect the health of Canadians, and this should be reflected in its policy decisions concerning management of resistance risks. These decisions should always be science-based, which entails careful weighing of the available scientific information. Health Canada should consult with Canadians and effectively communicate the resistance risk issues, its process for assessing and exploring risk management options, and the rationale for its decisions. These would be consistent with Canadian regulatory policy.

. . .

Unfortunately, there are resistance risks associated with all uses of antimicrobials, and Health Canada must decide which risks are acceptable for the benefits gained. Health Canada cannot simply arbitrarily stop approving new antimicrobial applications on the grounds that resistance risks exist. Animals will continue to become sick and need treatment to protect animal welfare and the financial investment of producers. The lack of approved, efficacious antimicrobials is a prime motive for extra-label use of drugs. The committee agrees with Australia's Joint Expert Technical Advisory Committee on Antibiotic Resistance (JETACAR), which concluded that antimicrobial uses in animals should be reserved for situations where benefits are clear and substantial.

The committee believes that benefits are most clear and substantial when antimicrobials are used for therapy under the conditions of prudent use and under veterinary prescription. Benefits are less clear and substantial when these drugs are used for prophylaxis (especially when such use becomes routine) or growth promotion, where benefits are almost entirely economic.

. . .

The committee had special concerns about growth promoters. Several growth promoters used in Canada are the same drugs or are related to drugs used in humans, or can select for resistance to drugs used in humans. Growth promoters account for a considerable amount of the total antimicrobial exposure. In addition, they are not used under veterinary prescription, nor to treat infections in animals. Some members believed that growth promoters facilitate animal husbandry practices that are unhealthy and therefore questionable on welfare grounds. Still others were concerned about the economic impact on producers and international trade implications of changes in growth promoter policy. Thus, the committee felt it should consider risks and benefits associated with this practice and make a special recommendation.

. . .

> *The committee believes that antimicrobial resistance is an important problem for both human and animal health. The problem approaches crisis proportions in human medicine, where efforts are being made to curtail unnecessary antimicrobial use in people, and to control infection in hospitals and in the community. In animals, resistance occurs whenever antimicrobials are used, whether for therapy, disease prophylaxis, or growth promotion. This is a problem in veterinary medicine, because it reduces the effectiveness of available antimicrobials in treating infections and leads to use of more expensive drugs of importance to human health. It is also important because resistant bacteria spread from animals to humans. Some of these bacteria make people sick or transfer their resistance genes to human bacteria. While the precise magnitude of the public health impact is unknown, it is known that resistance is a serious problem in bacterial infections of humans that originate in animals.*
>
> *The committee believes that these problems warrant changes to the ways that antimicrobials are regulated, distributed and used in animals. These changes include: consideration of resistance risks as part of the regulatory review process for new and existing antimicrobials, adoption of prescription-only availability, closure of own-use and API loopholes, development of an improved extra-label use policy, rapid phasing out of growth promoters that select for resistance in humans, and development of surveillance systems for antimicrobial use and resistance. Recommendations are listed in full at the end of this summary, and by relevant chapters in the accompanying report.*

. . .

[37] As part of the Government of Canada’s response to the report, the Canadian Integrated Program for Antimicrobial Resistance Surveillance (CIPARS) was established (Exhibit E-268). The CIPARS was a national surveillance system, designed to monitor antimicrobial resistance (AMR) trends. The government considered the information gathered by the surveillance system to be necessary for developing and evaluating policies for the prudent use of antimicrobials and for other risk-management strategies.

D. <u>Bovine spongiform encephalopathy (BSE)</u>

[38] Bovine spongiform encephalopathy (BSE) is a brain disease of cattle (also commonly referred to as mad cow disease). It is characterized by a progressive degeneration of the nervous system. It is transmissible to humans. I heard extensive

evidence about the origins of BSE and about how it is transmissible to humans. A significant contributing factor to the spread of the disease is feeding rendered animals to cattle (World Health Organization (WHO), Exhibits G-121 and E-19, tab E-9). In 2002, the WHO concluded that the most plausible route of human exposure is through the consumption of food contaminated with the BSE agent (Exhibit G-121). Dr. Haydon and Dr. Chopra testified that much is still not known about the health impact of BSE on humans and the mechanisms of transmission. In one study (Exhibit E-188), pigs were infected with BSE by the injection of contaminated material into their brains. However, pigs fed BSE-contaminated feed did not develop BSE. Dr. Chopra testified that the study's sample was too small to safely draw conclusions on whether BSE could cross to pigs through feed.

[39] The responsibility for BSE inspection programs rests with the CFIA. Dr. Brian Evans is an executive vice-president and the chief veterinary officer at the CFIA. At the time of the events that led to these grievances, he was the executive director of the CFIA Animal Products Directorate and had primary responsibility for BSE. Dr. Evans testified that food safety is a shared responsibility between Health Canada and the CFIA. Health Canada is responsible for establishing food safety standards, and the CFIA is responsible for the federal food inspection system. Health Canada has the authority to audit the CFIA's delivery of inspection services against the employer's established standard. The CFIA's inspection role is limited to food products that cross provincial or international borders.

[40] The grievors and others had raised concerns about BSE in Canada. The President of the PIPSC wrote to the Prime Minister on December 16, 1997, raising this issue following a request from the grievors and other scientists (Exhibit G-130). The employer did not respond. The grievors also testified that they had raised this issue again with their union in April 2003 (Exhibit E-198, tab 4), although there was no evidence that that second attempt was brought to the employer's attention.

[41] The scientists wrote to the Minister in September 1999 (Exhibit G-190, tab N), raising concerns about BSE.

[42] In 2001, Dr. Haydon publicly raised issues about the ban of Brazilian beef. She was disciplined for speaking to the media, and the discipline was upheld, in part, at adjudication (the 10-day suspension was reduced to 5 days). In the grievance process

and at adjudication, Dr. Haydon raised concerns about public health and safety caused by BSE, especially for bovine-sourced products, such as gelatins and candies.

[43] In May 2003, the first confirmed domestic case of BSE was identified in Alberta. Previously, BSE had been found in imported cattle. Dr. Evans was responsible for leading the investigation and testified about the efforts made to trace the origins of the infected animal.

[44] On May 27, 2003, the grievors and Dr. Basudde wrote a letter to Ms. Gorman about BSE, which was copied to the Deputy Minister, the Clerk of the Privy Council, the Minister, Ms. Kirkpatrick and the President of the PIPSC (Exhibit E-15, tab B-2). It was written to address the recent incident of "mad cow disease." The authors stated that more needed to be done to address health and safety concerns. They also stated that, in their view, the primary cause for the transmission and spread of the disease was the continued use of animal feeds containing rendered materials of other animals. The letter concluded with the following:

> *We urge that to contain this disease a complete and immediate ban must be placed on the use of all such materials in any kind of food and other products for both people and animals. We should add that this same policy was adopted and is being successfully employed in the United Kingdom and other EU countries.*

. . .

[45] Ms. Gorman replied to the letter on June 4, 2003 (Exhibit E-15, tab B-3). She stated that she had asked her officials to ". . . identify an appropriate opportunity for you and other interested staff to exchange information and discuss BSE-related issues." The letter concluded as follows: "Please be assured that Health Canada is continuing to work in close collaboration with the Canadian Food Inspection Agency to ensure that effective measures are being taken to deal with this issue and to safeguard the health of Canadians."

[46] On June 10, 2003, the grievors wrote to the Minister of Health, Anne McLellan, asking again for an immediate ban on the use of rendered animal material and requested a meeting with the Minister as soon as possible (Exhibit E-18, tab B-4).

[47] The VDD staff was invited to a meeting of the Food Directorate of Health Canada about BSE on June 13, 2003 (Exhibit E-15, tab G-2). The grievors attended. Ms.

Kirkpatrick also attended, but did not speak. Dr. Karen Dodds chaired. Dr. Evans attended by telephone and provided an overview of the CFIA's actions with respect to BSE. He testified that he was asked to outline the status of the investigation, to describe contributing causes that had been discovered, to provide the government's early policy direction considerations and to receive feedback from the participants as to whether they felt that the government was heading in the right direction.

[48] The grievors repeated their position that the only way to stop BSE was to institute a complete ban on the use of rendered materials. Dr. Dodds said that the grievors' advice would be considered.

[49] Dr. Haydon emailed Dr. Dodds on behalf of the grievors on June 16, 2003 (Exhibit E-15, tab B-5). She noted as follows that what the grievors had heard at the meeting did not change their view on the appropriate response to BSE:

> *As we reiterated at the meeting, we again urge Health Canada to completely and immediately ban the use of rendered materials of animals in the food and other products for both people and animals. In our opinion, this is the only decision which will be effective in safeguarding public health, helping the meat industry, and increasing public and international confidence.*

[50] In her email, Dr. Haydon also said that BSE "is here to stay" and that the CFIA and others had admitted as much. The President of the PIPSC was copied on the email.

[51] In her reply (Exhibit E-15, tab B-5), Dr. Dodds stated that she did not agree that BSE was "here to stay." She also stated that the PIPSC president should not have been copied on the email, as it had been an internal meeting.

[52] Dr. Chopra replied to Dr. Dodds' email on July 2, 2003 (Exhibit E-15, tab H-7) and stated that it was likely that there would be additional cases of BSE within the next few years. He also stated that a complete and immediate ban on the use of rendered materials was necessary. In her reply, Dr. Dodds stated that the employer would consider his opinion and that of the other grievors. She also requested supporting documentation from the grievors. In his reply email, Dr. Chopra referred her to the publishing history and control of BSE in the United Kingdom, the European Union and Japan.

[53] On July 26, 2003, the CFIA released a report from a team of international experts (Exhibit G-45). The report noted that the BSE surveillance measures previously in place had achieved the desired outcome by identifying the BSE-infected animal ". . . in a manner which precluded its entry into the human food chain." The report also stated that the risk-management measures implemented in Canada had reduced the risks of the "spread and amplification" of BSE. The report recommended measures additional to a feed ban to reduce or eliminate the future exposure of herds to BSE. It concluded that measures to prevent exposure through contaminated feed should be implemented and controlled on a national level. The report set out a number of measures that were to be given "highest priority." The following are the measures relevant to the comments made by the grievors to the media:

1. The prohibition of Specified Risk Materials (SRM). The SRM are parts of cattle that are known locations of BSE infectivity, such as the brain, spinal cord, ganglia, tonsils and eyes. The report stated that a ban on the SRM was ". . . the most critical and valuable central measure . . ." to protect public health and food safety and that the ban should be implemented, enforced and audited for compliance.

2. Feed restrictions. The report endorsed excluding the SRM from the feed chain as an effective means to reduce infectivity in meat and bone meal (MBM). The report stated the following: "Inclusion of any ruminant-derived MBM in ruminant feed rations should be avoided and opportunities for possible cross contamination eliminated." It stated that avoiding cross-feeding at the farm level requires close audits for compliance, and the resources required for such auditing might make prohibition "a more practicable measure."

3. Surveillance. The report supported the proposal for an increased targeted surveillance program, implemented at the national level and focusing on the highest-risk populations.

[54] Dr. Evans testified about some of the measures taken by the federal government in 2003 after the Canadian BSE case. In July 2003, the federal government adopted the removal of the SRM from the human food chain. The CFIA also obtained additional resources to carry out annual inspections at all rendering plants and commercial feed mills. The CFIA also looked into developing test methods to allow for feed analysis to detect the presence of prohibited material that went beyond the documentation and inspection methods. The CFIA also invited other countries to come to Canada to review feed inspections and feed inspection protocols.

[55] Dr. Haydon and Dr. Chopra were cross-examined extensively on their experience and knowledge of BSE. Both had conducted no BSE research and had not read all the

BSE literature. Dr. Haydon testified about her knowledge of feeding practices that she had gained from her early experience with her family's feedlot.

E. Public Service Integrity Officer (PSIO) process

[56] The PSIO was established by Treasury Board policy to investigate complaints of wrongdoing by federal public service employees. The grievors and Dr. Basudde filed a complaint with the PSIO on June 4, 2002 (Exhibit E-24). The grievors testified that they filed the complaint at the request of the President of the PIPSC. In their complaint, the grievors stated the following:

> *. . . we, the undersigned employees at Health Canada, are being pressured by our supervisors to pass or maintain a series of veterinary drugs without the required proof of human safety. . . .*
>
> *. . .*
>
> *. . . each one of us has been reprimanded with a clear message to convey that we must either tow [sic] the management line to favour the pharmaceutical lobby or face departmental punishment(s).*

[57] The PSIO advised the parties in a letter dated September 19, 2002 that it would not review issues and concerns if alternative recourse existed, such as the grievance procedure.

[58] In its report issued on March 21, 2003, the PSIO rejected the allegations that the grievors had been pressured to approve drugs of questionable safety. However, the PSIO found that the removal of Dr. Lambert from his acting assignment was a reprisal for expressing his concerns about Components with Tylan.

[59] The Federal Court allowed a judicial review application of the PSIO's report; see *Chopra et al. v. Canada (Attorney General)*, 2005 FC 595. The Court's decision was issued on April 29, 2005. The report was set aside, and the complaint was referred back to the PSIO for reconsideration. The basis for setting aside the report was that the PSIO investigated only Components with Tylan and did not address the other drug approval processes identified by the complainants.

[60] The PSIO was replaced by the Public Sector Integrity Commissioner (PSIC) under the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46. As of the date on which this hearing concluded, the PSIC had not issued a new report.

F. Harassment complaints

1. Grievors' complaints

[61] In 2003, the grievors and Dr. Basudde alleged in a harassment grievance that they had been subjected to ". . . intense political influence, pressure and harassment by Health Canada management to pass or maintain a variety of drugs of questionable safety to favour the political lobbying of certain special interest groups and to the detriment of the public interest" (Exhibit G-190, tab U). Dr. Haydon and Dr. Chopra also raised similar concerns to Phil Chodos, who was contracted by the employer in January 2003 to conduct a harassment investigation.

2. Complaint against the grievors

[62] On July 16, 2002, 12 employees of the VDD wrote a letter of complaint to the PIPSC (Exhibit E-209). Dr. Chopra's supervisor at the time, Dr. Mehrotra, was one of the signatories. The employees complained about recent media comments made by the grievors and Dr. Basudde about the pressure to approve drugs. The complainants stated that they had not been put under any pressure to approve or not approve drugs and that they were disassociating themselves from the views of the grievors. In addition, they claimed that, as a result of the media attention, their workloads increased, that they did not wish to "[b]e distracted or dragged into this imbroglio," and that the media reports put their "[j]obs and professional integrity to disrepute."

[63] PIPSC officials interviewed the complainants and the grievors. Dr. Chopra testified that the PIPSC general counsel informed him that the complainants had been advised that the complaint would not be pursued.

[64] On December 12, 2002, 16 VDD employees filed a harassment complaint against the grievors and Dr. Basudde with Health Canada. Included in that group were Dr. R. Sharma, Dr. Vilim and Dr. Mehrotra (supervisors of the grievors). In their complaint, they raised concerns as follows about the public statements made by the grievors and Dr. Basudde from July 3 to November 21, 2002 (Exhibit G-217, tab 2):

. . .

> *These individuals . . . have, through their acts, comments or display, caused us to be demeaned, belittled, personally and publicly humiliated and embarrassed. These individuals have attacked our credibility and professional reputation in the public fora.*

[65] On April 10, 2003, the same group of employees (with some additional complainants) filed another complaint against Dr. Chopra because of his comments to the media about official bilingualism.

[66] Mr. Chodos was contracted by the employer in January 2003 to conduct an investigation of the harassment complaints filed in December 2002 and April 2003.

[67] The grievors and Dr. Basudde were advised of the complaint against them in January 2003. They were interviewed by Mr. Chodos. The grievors and Dr. Basudde were provided with a draft copy of the report for their comments in late January 2003. Because the French version of the draft report that was distributed contained interim analysis and conclusions, all the parties were provided with the same version in English in early February 2003.

[68] The final investigation report was provided to the grievors and Dr. Basudde on March 16, 2004 (Exhibit G-217, tab 2). The report concluded that there had been no harassment but criticized the grievors' behaviour as follows:

. . .

> *84. This is not to say that all of the public pronouncements of the type engaged in by the respondents can be made with impunity. . . The respondents apparently believe they have the right to criticize the department as long as they feel it's in the public interest to do so. I would suggest that this view is a gross misapprehension of their rights and obligations as public servants.*
>
> *85. However, the avenue for remedying this kind of potential misconduct does not, in my view, lie with the Harassment Policy. Rather, it is incumbent upon management to address these problems as a managerial and disciplinary issue, as it has done in the circumstances outlined in the above-noted PSSRB decisions* [Chopra and Haydon]*.*
>
> *86. . . . I do not question in any way the good faith of any of the complainants in pursuing this matter. As I noted above, I have no doubt as to their genuine concerns about the impact of the respondents' conduct on the effective functioning of their workplace. I would add that I do not believe that the complaints were management-driven, nor do I accept the contention of the respondents that management had bought the loyalty of the complainants who have*

> *become Team Leaders. I also reject as completely unfounded, the suggestion by the respondents that the other complainants were browbeaten by the Team Leaders into adding their names to the complaint.*
>
> *87. It may well be argued that by contributing to a climate of hostility and suspicion in their workplace the respondents have in fact harmed the public interest, rather than promoting it. The respondents have to take some responsibility for the climate of suspicion and distrust that has permeated the Directorate for a number of years. . . These suspicions, whether warranted or not, undermine the spirit of collegiality that is necessary in order for VDD scientists to work cooperatively to fulfill their mandate under the* Food and Drug Act*. The fact that the majority of the scientists within the Directorate signed the complaint speaks volumes as to how widespread these concerns are felt by the respondents' colleagues.*
>
> *88. . . . I also believe that the complaints were an understandable response to what was perceived as disruptive and improper conduct on the part of the respondents. . . .*

. . .

[69] In the cover letter to the grievors (Exhibit G-217, tabs 3 to 5), Ms. Gorman wrote that, although the report concluded that there was no harassment, it also concluded that ". . . this behaviour is inconsistent with a healthy and effective work environment and warrants attention." She stated that she would consider the issues raised in the report and that she would decide upon "an appropriate managerial response to them." She stated that she intended to meet with all employees involved in the complaint to address the content and ". . . the next steps to be taken to resolve the outstanding issues."

III. Dr. Chopra's 10-day suspension

A. Evidence

[70] Dr. Chopra was given a 10-day suspension because of an unauthorized absence from the workplace that the employer considered insubordination. In the disciplinary letter of May 30, 2003 (Exhibit G-2, tab A), Ms. Kirkpatrick accepted a medical certificate for the period of absence from February 4 until March 15, 2003. She determined that he had been on unauthorized leave from March 16 to May 30, 2003.

Action was taken to recover salary paid during the unauthorized leave. The basis for the discipline imposed was set out as follows:

> *. . . your continued unauthorized absence from the workplace, your insistence that you remain on telework contrary to repeated management instructions, your failure to provide in a timely manner, notwithstanding repeated requests, a medical certificate or any other justification for your absence and your failure to provide in a timely manner, again despite repeated requests, any information relating to your allegation with respect to safety and security, constitutes, in my view, insubordination and unacceptable conduct on your part.*

[71] Dr. Chopra grieved the 10-day suspension and the recovery of salary (Exhibit G-2, tab A). He alleges that the recovery of salary was disguised discipline. In addition, he grieved the "unfair cancellation" of his telework arrangement through a "coercively generated" performance appraisal. He also grieved that Ms. Kirkpatrick had engaged in abuse of authority and retaliation and that she and others engaged in "persistent" harassment. My jurisdiction is limited to the discipline and a determination of whether the salary recovery was disguised discipline.

[72] Dr. Mehrotra was the team leader of the Microbiological Safety Team in the HSD and was Dr. Chopra's supervisor, commencing in May 2002. She acted in that position until being confirmed in October 2003. Dr. V. Sharma was the director of the HSD.

[73] Dr. Chopra had been working from home since 1997 under a succession of telework agreements (Exhibit E-2, tab B-5). The employer's *Flexible Work Arrangements Guide* (Exhibit E-2, tab B-1) states that each telework arrangement must be approved on a case-by-case basis by the employee's manager and that telework "shall be at the discretion" of the manager. It also states that a telework arrangement is not to be viewed as an employee right. In a memo to all employees about telework arrangements (March 8, 2001), Ms. Kirkpatrick stated that flexible work arrangements were "not an entitlement" (Exhibit E-2, tab B-4).

[74] Dr. Chopra signed a telework agreement on October 25, 2002 for a four-month period commencing September 1, 2002 (Exhibit E-2, tab C-2). The agreement was also signed by Dr. Mehrotra and Dr. V. Sharma. The agreement contained the following provisions:

. . .

> *. . . It is my understanding that after this Four month trial period, and provided my performance is satisfactory, the telework arrangement may be extended for another Four months. . . .*
>
> . . .
>
> *It is my understanding that "With reasonable notice by either party", this telework agreement may be terminated at any time.*
>
> *I understand that teleworking is a privilege and not a right and the continuation of the arrangement if accepted, is based on my productivity and performance. . . .*
>
> . . .

[75] Dr. Chopra had received positive performance evaluations in previous years (Exhibit G-13). However, the performance evaluation process for the period from January to September 2002 is at issue in this grievance.

[76] Dr. V. Sharma and Dr. Mehrotra met with Dr. Chopra on Thursday, January 30, 2003. At the meeting, Dr. Mehrotra read the draft performance evaluation to Dr. Chopra (Exhibit E-3, tab C-3). The evaluation was signed by Dr. V. Sharma. It stated the following:

> *When asked to undertake a duty or assignment, Dr. Chopra . . . almost invariably indicates that he is unable to take on these duties unless he is given firstly the opportunity to meet with the Director General so that he may discuss the nature and the validity of the request/job which he is being asked to take on or indicates that the task is not feasible. Because no meaningful justification is given by Dr. Chopra to warrant such meetings and in light of his position as a Senior Drug Evaluator, it is not unreasonable therefore for management to view this approach at the very least as a delaying tactic and/or lack of interest in doing the assigned task.*
>
> *Other than one ESC* [Experimental Studies Certificate] *submission estimated to require less than one week of review time, there has* [*sic*] *been no other projects completed by Dr. Chopra for the entire period.*
>
> *Therefore for the above mentioned reasons, Dr. Chopra's performance has been found to be unsatisfactory.*
>
> . . .

> *Dr. Chopra's attitude towards work is unacceptable. His approach to work and low productivity undermine management actions implemented regarding the continuing improvement in establishing work goals, work delivery and a healthy workplace which are critical to the organization functioning and employees well-being.*

[77] Dr. V. Sharma told Dr. Chopra that, as a result of the evaluation, his telework agreement would be cancelled. Dr. Chopra was expected to return to the workplace on the following Monday (February 3, 2003). Dr. Chopra was given a copy of the draft evaluation. Dr. V. Sharma asked Dr. Chopra if he had any questions. Dr. Chopra said that he did not and then left the meeting. The meeting lasted between 5 and 10 minutes.

[78] Ms. Kirkpatrick was asked by Ms. Gorman about her involvement in the performance evaluation process when Ms. Gorman was preparing for a hearing of the grievances filed against the performance evaluations of all the grievors, including Dr. Chopra's (Exhibit G-3). In her email, Ms. Kirkpatrick wrote that a "major challenge" for the managers responsible for the performance reviews of the grievors was to distinguish ". . . performance-related aspects . . . from those aspects external to performance (i.e. speaking out)." She described her role and input as ". . . confined to ensuring this distinction and in so doing to ensure that factors external to performance per se did not influence the assessment."

[79] Dr. V. Sharma testified that several factors led to cancelling the telework arrangement, including Dr. Chopra's productivity, other employees complaining about the telework arrangement and the need for Dr. Chopra to be in the workplace to advise about critical situations. Ms. Kirkpatrick was consulted on the performance evaluation and agreed with the decision to terminate the telework agreement. She testified that the final decision to cancel the telework agreement was hers, based on the recommendations of Dr. Mehrotra and Dr. V. Sharma. She testified that the decision could have been revisited based on Dr. Chopra's input into the performance evaluation.

[80] Dr. Mehrotra confirmed the cancellation of the telework agreement in an email sent to Dr. Chopra on January 31, 2003 and copied to a number of people, including Ms. Kirkpatrick (Exhibit E-2, tab C-1). Dr. Mehrotra stated in the email that Dr. Chopra was expected to report to the workplace (at Holland Cross, in Ottawa, Ontario) on February 3, 2003.

[81] Dr. Chopra returned to the workplace on February 3, 2003. He had an interaction with a colleague, Dr. Aspi Maneckjee, in the staff lunchroom, and left the workplace as a result. The employer became aware of the incident in a general sense only on April 4, 2003 and was provided with more details about it on April 17, 2003.

[82] The interaction began with an email that Dr. Maneckjee sent to Dr. Chopra on December 13, 2002, entitled, "Please refrain for making comments without proof" (Exhibit E-2, tab C-14). In the email, Dr. Maneckjee referred to comments made shortly before by Dr. Chopra in the media and stated, "[p]lease be careful and do not make general statements when you have no definite proof, as you are hurting people (me)." Dr. Chopra replied on December 16, 2002 (Exhibit E-2, tab C-14), stating that the accusation was "completely baseless and false." He also stated that he did not wish to have any further exchanges about the matter. Dr. Maneckjee was also one of the complainants in the harassment complaint against the grievors. Dr. Maneckjee spoke to Dr. Chopra in the staff lunchroom on February 3, 2003. Dr. Bassude was also in the room. Dr. Chopra summarized the interaction as follows in an email to his union representative, sent the evening of the same day (Exhibit E-2, tab C-14):

. . .

> *Just as I was sitting down to open my lunch bag Aspi Maneckjee said to me: "Shiv, you don't talk to me". I did not respond. When he once more repeated, "Shiv, you don't talk to me", and I replied with a question, "Do I need to?", he added as follows in a patronizing tone: "You must always talk to people." To this I replied that "because you have filed a harassment complaint against me I do not wish to talk to you." This was because I did not wish to indulge in any kind of argument with him. However, when he then started to say, "as I wrote to you that you are hurting people (me). . ." – see attached* [the earlier email correspondence was appended to the email]*, I quickly cut the conversation short and requested him not to talk to me any further. At this point he left the room.*

[83] Dr. Chopra testified that, instead of arguing with Dr. Maneckjee, whom he described as a "pretty hefty fellow," he just returned to his desk. He then called his doctor and left to see him mid-afternoon.

[84] The next day (February 4, 2003), Dr. Chopra called the division secretary to advise that he was ill and that he would not be coming to work. He called again on

February 7, 2003 to advise that he was still not well and that he would be seeing his doctor.

[85] Dr. V. Sharma asked Dr. Chopra for his comments on the performance evaluation on two separate occasions in February. He declined to provide any comments and indicated that he did not concur with it. He also requested that all communications about the performance evaluation be directed through his legal counsel, Mr. Yazbeck.

[86] Mr. Yazbeck wrote to the deputy minister, Mr. Green, on February 5, 2003 to express concerns on behalf of Dr. Chopra, Dr. Haydon, Dr. Lambert and Dr. Bassude (Exhibit G-2, tab C). In the letter, Mr. Yazbeck identified incidents that, in his clients' view, represented a ". . . clear attempt by Health Canada management to deliberately target these four scientists in order to retaliate against them, to dissuade them from expressing their views in the public interest and to otherwise harm them." The incidents identified were the following:

1. Negative performance appraisals for all four scientists. Each appraisal was, according to Mr. Yazbeck, "inaccurate," "inconsistent" with previous appraisals and ". . . presented in a manner which was totally unfair and inappropriate."

2. The cancellation of Dr. Chopra's telework arrangement. "Lack of transparency and fairness in this process renders the Department's actions to be [*sic*] extremely suspect."

3. The harassment complaint filed against the four scientists by a group of colleagues. ". . . [A] lack of transparency, fairness and good faith is apparent."

[87] Mr. Yazbeck also stated in his letter that he did not understand why Dr. Chopra ". . . would be compelled to return to work," given the harassment complaint and the hostile attitude of his colleagues. He stated that the ". . . potential here for personal, physical and emotional damage is high and serious." He also noted that the same potential also extended to the other three scientists. Dr. Chopra testified that "a dangerous situation" was being created and that the employer was not separating people but forcing him to "stay in that fire." He testified that it caused him emotional and psychological stress, which he described as "a dangerous stress over which I had no control." Dr. Chopra testified that he was concerned with how he was going to cope if he got angry. He also described the workplace as very insecure and unsafe. He testified that incidents similar to the one with Dr. Maneckjee had occurred, involving

body language and gestures from colleagues. He testified that there was always the potential for violence. Dr. Chopra testified that he was concerned that, if he did "what they were ordering me to do, it was going to disrupt my work," because it was a more stressful and, to some extent, dangerous workplace.

[88] In the letter, Mr. Yazbeck stated that the harassment complaint was an attempt to ". . . muzzle these scientists and to usurp proper managerial authority." He continued: "Allowing this type of behaviour to occur, and even flourish, sends a simple but strong message: Health Canada will not tolerate dissent, in whatever form, and however legitimate the criticisms are."

[89] Mr. Yazbeck urged Mr. Green to direct managers to "restore the status quo" until the issues could be addressed. He stated that, at a minimum, Dr. Chopra's telework arrangement should be restored and that the performance appraisals for all four scientists should be rescinded. He stated that the employees who complained against the four scientists should be removed from any role with the performance appraisals and that ". . . strong consideration should be given to separating these complainants from these four scientists."

[90] On the same day (February 5), Mr. Yazbeck wrote to Ms. Gorman about the harassment complaint (Exhibit G-2, tab D). In the letter, he asked for further particulars about the complaint. He also noted that three of the complainants were team leaders with responsibility over three of the four scientists (all except Dr. Haydon). Mr. Yazbeck also stated that his clients were considering whether to file their own harassment complaints, as the complaint against them could be considered an attempt to "harass and muzzle" them. He concluded by inviting Ms. Gorman to contact him to discuss how the employer intended to proceed.

[91] Dr. Mehrotra wrote an email to Dr. Chopra on February 10, 2003 (Exhibit E-2, tab C-6), asking him to advise her of his current situation and of when he would be able to return to work. In the email, she also summarized her understanding that his absence from work had been due to illness. Dr. Chopra replied the same day, confirming that he was not well and that he had been to see his doctor. He told her that he would let her know when he would be well enough to work.

[92] Dr. V. Sharma sent an email to Dr. Chopra on February 13, 2003 (Exhibit G-2, tab G), reminding him of the request for comments or feedback on the performance

appraisal. Dr. Chopra replied on February 15, 2003 that Dr. V. Sharma could sign the appraisal ". . . if you like but it would be in my absence and without concurrence." Dr. Chopra also advised that his lawyer was pursuing ". . . this and other issues as 'Intimidation, Abuse of Authority and Retaliation' toward me by you and other Health Canada managers."

[93] In a letter to Ms. Gorman dated February 19, 2003 (Exhibit G-2, tab F), Mr. Yazbeck reiterated his concerns about the harassment complaint and requested a response to the concerns raised in the letter to the Deputy Minister. In particular, he stated that it was imperative that the status quo be returned "[s]o that all persons involved here can proceed on an even playing field." This included ceasing the existing performance appraisal process and reinstating Dr. Chopra's telework arrangement. He also wrote the following: ". . . as well, strong consideration should be given to separating these complainants from these four scientists."

[94] On February 21, 2003, Dr. V. Sharma wrote that he was finalizing the performance appraisal (Exhibit G-2, tab G). He also stated in the email that, despite Dr. Chopra's views on the evaluation, Dr. Chopra should be aware that he was ". . . required to undertake and complete work that has been assigned to you."

[95] Dr. Chopra filed a grievance against the termination of the telework agreement on February 26, 2003 (Exhibit G-1). In that grievance, he also grieved "[a]buse of authority, retaliation, harassment to suppress my objections to Health Canada's ongoing approval of drugs of questionable safety."

[96] In further correspondence to Ms. Gorman dated February 27, 2003 (Exhibit G-2, tab G), Mr. Yazbeck complained that the performance appraisals had been finalized without any input from the grievors and raised concerns about the conduct of the harassment investigation. Mr. Yazbeck concluded by asking whether Ms. Gorman intended to address any of the concerns, including those about the cancellation of the telework arrangement.

[97] Ms. Gorman replied to Mr. Yazbeck's letters of February 19 and 27 on March 7, 2003 (Exhibit E-2, tab C-5). She stated that the matters of the performance appraisals and the cancellation of the telework agreement were the subject of grievances and that the concerns identified would be addressed through the grievance process.

[98] On March 5, 2003, Dr. Mehrotra wrote an email to Dr. Chopra, requesting a medical certificate from his doctor to justify his sick leave request as well as an expected date of return to work. She asked that the medical certificate be provided by March 12, 2003. Dr. Chopra replied on March 12, 2003 as follows (Exhibit E-2, tab C-6):

> *The information that you demand about my condition cannot be provided to you, particularly since it emanates directly from the ongoing harassment by you and others against me. You should be aware that this matter is the subject of my grievances in the department and that is currently under investigation. Should you wish to press for your demand, regardless, I ask you to contact my legal counsel, Mr. David Yazbeck, through the proper channels. . . .*

[99] Dr. Mehrotra replied by email on March 18, 2003, restating her request for a medical certificate and citing the relevant collective agreement provision. She asked for the medical certificate by March 25, 2003. She also wrote that failing to provide the medical certificate would lead her to conclude that Dr. Chopra was on unauthorized leave, which could result in disciplinary action.

[100] Dr. Chopra responded to the email on the following day (March 19, 2003). He stated that Dr. Mehrotra's request for a medical certificate was contrary to the harassment policy and that she should contact Mr. Yazbeck.

[101] Dr. Chopra also stated that he would continue to work "as best I can" on the evaluation assigned to him. He was assigned an evaluation on January 21, 2003 (Exhibit G-19). He testified that he continued to work during his leave, until his return to the office. Dr. Mehrotra was asked, in cross-examination, if she was aware that Dr. Chopra continued to work from home. She was not aware of that fact until she saw his email. Based on the email, she assumed that he was working. She had no contact with him about work assignments during his absence from the office. Dr. Chopra sent his evaluation report to Dr. V. Sharma on May 28, 2003 (Exhibit G-7).

[102] In correspondence to Ms. Gorman dated March 20, 2003 (Exhibit E-2, tab C-7), Mr. Yazbeck wrote as follows that Dr. Chopra's decision not to provide a medical certificate was directly related to his concern that Dr. Mehrotra had harassed him:

. . .

> *. . . Dr. Chopra believes that the disclosure of this information to her will only be used against him and, in any*

> *event, he is completely uncomfortable in providing such information to a person who has engaged in such harassment.*
>
> . . .
>
> *We therefore have a situation where an employee has raised concerns that a manager is engaged in harassment of him. The manager has requested information from the employee which the employee does not wish to divulge to the manager precisely because of the harassment. In response, the manager ignores the employee's concerns and threatens disciplinary action unless the information is produced. By any standard, this behaviour constitutes harassment of Dr. Chopra and is completely inappropriate.*
>
> . . .

[103] Mr. Yazbeck suggested in his letter that alternate arrangements be made to provide the medical certificate to an employer representative who would not disclose the information to those managers engaged in harassing Dr. Chopra. The letter also noted that Dr. Chopra continued to work from home.

[104] The letter continued as follows:

> . . .
>
> *. . . Dr. Chopra believes that the decision to revoke his telework arrangement is motivated by improper concerns. This context only casts further doubt on the bona fide basis for the request for the medical certificate.*
>
> *You are also aware that it is common and prudent practice for employers to separate employees where there is an allegation of harassment between them. We have specifically indicated to you that Dr. Chopra has been harassed in the workplace and we have requested that the decision to return him to the Health Canada workplace be rescinded until these matters are addressed. You have advised us that that request is under consideration. These circumstances again cast doubt on the basis for the request for a medical certificate and underline the need for immediate action.*

[105] The letter concluded by stating that the employer was to receive a detailed harassment complaint on behalf of Dr. Chopra and the other grievors.

[106] On March 27, 2003, Ms. Kirkpatrick wrote to Mr. Yazbeck (Exhibit E-2, tab C-8) about the separation of the complainants in the harassment complaint from the respondents. The reporting relationship for Dr. Chopra, Dr. Lambert and Dr. Bassude

was changed from their respective team leaders to the head of the HSD, Dr. V. Sharma. She also wrote that, as of March 31, 2003, Dr. Chopra and Dr. Lambert would be moved from their work location in Suite 14 at Holland Cross to an alternate location in the same complex. Alternate locations for Dr. Bassude and Dr. Haydon were being worked out. Ms. Kirkpatrick concluded by stating that the arrangement ". . . should in no way restrict the normal interactions with other staff required on a daily basis in the performance of their duties."

[107] On March 28, 2003, Dr. Lambert and Dr. Chopra were advised in an email that the workstations would not be available on March 31, as originally promised (Exhibit E-2, tab C-26). Ms. Kirkpatrick stated in the email that they would be advised as soon as their availability was confirmed. She also advised that in the meantime they were expected to report for work at their current workstation location (in Suite 14). The new workstations were not available until April 30, 2003 (Exhibit E-2, tab C-27). Dr. Chopra and Dr. Lambert were requested to contact the move coordinator by May 5, 2003 to arrange for their moves. They were also advised that access to the workstations was from 07:00 to 18:00, Monday to Friday.

[108] Mr. Yazbeck wrote to Ms. Kirkpatrick on March 28, 2003 (Exhibit E-2, tab C-10), stating that the work arrangements for his clients (Drs. Chopra, Lambert, Haydon and Bassude) were "completely inappropriate." Mr. Yazbeck wrote that other arrangements could have been made that would have addressed the concerns without physically removing his clients from the workplace. He suggested that the status quo be maintained until the issues were discussed.

[109] On March 28, 2003, Ms. Kirkpatrick sent an email to Dr. Chopra (Exhibit E-2, tab C-9), setting up a meeting for April 4, 2003 to discuss his absence from the workplace. Her email set out the following points for discussion:

- *your response to requests for a medical certificate. . . seeking confirmation from your physician that you are unable to work and the period of absence;*
- *your comment related to working from home, although your telework arrangement was discontinued; and*

- *the tone of your last few emails to Manisha and the fact that you view this management request as harassment.*

[110] Ms. Kirkpatrick, Dr. V. Sharma, Dr. Chopra, Mr. Yazbeck and Kerry Strachan (a human resources advisor) attended the meeting. Dr. Chopra told Ms. Kirkpatrick that an incident on the first day of his return to work (February 3, 2003) had caused his illness. He stated that there was a health and safety issue at the workplace but did not provide any details about the incident. Ms. Kirkpatrick reported in her notes (Exhibit E-2, tab C-12) that Dr. Chopra stated that he had to think about his safety. She also reported in her notes that he said that he had to "disengage" himself "very quickly" because some of the people at work were under the same supervisors who had signed the harassment complaint. Dr. Chopra testified that he could not discuss the incident with Dr. Maneckjee at the meeting "under the pressure of providing a medical certificate."

[111] At the meeting, Ms. Kirkpatrick told Dr. Chopra that he could provide the medical certificate to Dr. V. Sharma or to her. She also asked for details of the incident so that the employer could assess the situation and get back to him.

[112] At the meeting, Ms. Kirkpatrick noted that, in his email of March 19 to Dr. Mehrotra, Dr. Chopra said that he was working from home. She also asked him when he would officially recommence working (after his absence due to illness). She reminded him that the telework arrangement was over and that he was expected to work at the VDD site.

[113] Ms. Gorman wrote to Mr. Yazbeck on April 9, 2003 (Exhibit E-2, tab C-13), stating that Dr. Chopra was not being asked to provide detailed personal medical information. He was being asked to provide a standard medical certificate confirming his absence from work and stating an expected return-to-work date. She also stated that the certificate could be provided to either Ms. Kirkpatrick or Dr. V. Sharma. The letter also confirmed the change in reporting relationships and the relocation of the grievors. The letter concluded by stating that, unless Dr. Chopra was on authorized leave, "[h]e is required to perform his duties at his designated workplace."

[114] On April 17, 2003, through Mr. Yazbeck, Dr. Chopra provided a medical certificate for his absence from the workplace from February 4, 2003 to March 15, 2003 (Exhibit E-2, tab C-14). Ms. Kirkpatrick testified that she had some concerns about

the legitimacy of his illness, but she accepted the certificate at face value. She later approved sick leave for that period (Exhibit E-2, tab A-1).

[115] In the April 17 letter, Mr. Yazbeck stated that Dr. Chopra had been working from home "... due to his concerns regarding his own safety and security and regarding harassment in the workplace." The letter noted that the new location for Dr. Chopra was still being finalized and that, until the arrangements were finalized, Dr. Chopra would work from home. The letter also stated that Dr. Chopra's position was that the cancellation of the telework arrangement was illegal and inappropriate insofar as it was retaliatory and constituted harassment against him. Mr. Yazbeck asked that the decision to cancel the telework arrangement be reconsidered. Enclosed in the letter was email correspondence from Dr. Chopra to his union representative setting out the incident that caused the safety and security concerns (Exhibit E-2, tab C-14, excerpted at para 81 of this decision).

[116] Dr. Chopra testified that he continued to work from home. He stated that work was sent to him and that co-workers continued to correspond with him. He also testified that the work that he did was accepted and recognized.

[117] Ms. Gorman responded to the April 17 letter on April 30, 2003 (Exhibit E-2, tab C-15). She stated that the issues about the medical certificate, reporting relationships and the location of workstations were being addressed by Ms. Kirkpatrick. She also stated that the telework arrangement issue was before her as a grievance and that she had not prejudged it. She also stated that she was not aware of any harassment complaint from Dr. Chopra and that she had not received any specific allegations. She stated that the incident raised in the April 17 letter involving Dr. Maneckjee had been referred to Ms. Kirkpatrick.

[118] Ms. Kirkpatrick testified that she discussed the lunchroom incident with Dr. Maneckjee, who did not testify. Dr. Bassude did not wish to discuss the incident with the employer. In an email to an employer representative, Dr. Bassude stated that the issue should be dealt with through his legal counsel, Mr. Yazbeck (Exhibit G-2, tab A). Dr. Chopra testified that he was not interviewed by Ms. Kirkpatrick or by any other representative of the employer about the incident.

[119] In the letter imposing discipline (May 30, 2003), Ms. Kirkpatrick concluded that the emails provided by Dr. Chopra to support his allegation of a safety and security

concern from his interaction with Dr. Maneckjee did not support the allegation (Exhibit E-2, tab A-1). She stated that she had spoken to Dr. Maneckjee and that she was satisfied that he had been and would continue to be respectful in his dealings with Dr. Chopra. She also admonished Dr. Chopra in the letter for his failure to immediately raise his concern with the employer.

[120] In the discipline letter, Ms. Kirkpatrick concluded that Dr. Chopra had been on unauthorized leave since March 16, 2003 (the day after his approved sick leave ended). She stated that actions would be taken to recover salary paid from March 16, 2003, until he reported to duty at his "designated workplace."

[121] Ms. Kirkpatrick also concluded that Dr. Chopra was insubordinate and that he had engaged in unacceptable conduct for the following reasons:

- his continued unauthorized absence from the workplace;
- his insistence that he remain on telework, contrary to repeated employer instructions;
- his failure to provide justification for his absence from the workplace;
- his failure to provide a medical certificate in a timely manner, despite repeated requests; and
- his failure to provide information about his safety and security allegation, despite repeated requests.

[122] Ms. Kirkpatrick suspended Dr. Chopra for 10 days and advised him that he would be notified of the specific dates of the suspension. She told Dr. Chopra that he was required to report to work immediately and that failing to report could lead to further disciplinary action up to and including termination of employment. In her testimony, Ms. Kirkpatrick described the letter of discipline as a "direct demand that he report to duty." She also testified in cross-examination that "we were finished with the dance."

[123] In a separate letter to Mr. Yazbeck sent on the same day (May 30, 2003), Ms. Kirkpatrick wrote about the work location for Dr. Chopra and Dr. Lambert (Exhibit G-2, tab A). She stated that she had concluded that the grievors and their colleagues who had filed the harassment complaint should be separated.

[124] Ms. Kirkpatrick testified that she considered 10 days as the appropriate period of suspension because Dr. Chopra was an experienced and senior drug evaluator aware of the rules and regulations for absences from the workplace. She also considered his previous five-day suspension.

[125] Ms. Kirkpatrick testified that she ordered the recovery of salary because Dr. Chopra had been on unauthorized leave. She testified that the intention was to make it perfectly clear that his attendance was required at the workplace.

B. Submissions

1. For the employer

[126] Dr. Chopra was disciplined for failing to return to the workplace after his telework agreement was terminated. The signed telework agreement provided for its termination on reasonable notice. It was made clear in the agreement that the continuation of the telework arrangement was conditional on productivity and performance. It was also clear in the agreement and in the employer's policies and communications that telework was a privilege and not a right.

[127] Dr. Chopra grieved the cancellation of the telework agreement, but he never mentioned any health and safety concerns.

[128] Dr. Chopra should have been forthright with the employer as to his reasons for not wanting to attend work, and he was not. He was under an obligation to advise his employer immediately of concerns about his safety; see *Mercury Builder's Supplies v. Teamsters Union, Local 879* (1990), 18 L.A.C. (4th) 168. I was also referred to *Dickins v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2000 PSSRB 67.

[129] The following three essential questions need to be answered to determine if insubordination occurred:

1. Was the order conveyed by a person in authority, and was the instruction clear and concise?
2. Was there a clear understanding of the instruction by Dr. Chopra?
3. Was the instruction disobeyed?

[130] Dr. Mehrotra was Dr. Chopra's supervisor and was in a position of authority. She clearly indicated in her emails to Dr. Chopra that he was expected to return to work.

Ms. Kirkpatrick was also clearly in a position of authority when she told him that the request to return to work was being maintained. Also, in the event of any misunderstanding, Ms. Gorman was also in a position of authority, and she clearly told him to return to work.

[131] There is an obligation on an employee to provide specific details of any safety concerns (*Dickins*). In Mr. Yazbeck's letters, only general statements were made about harassment. Furthermore, in his testimony, Dr. Chopra was ambivalent on the safety issue — if he was not sure whether he was in danger, then there was no valid safety concern.

[132] The endangerment of health and safety is one of the exceptions to the "obey now, grieve later" principle. The onus lies with the grievor to establish that the circumstances fall within the exception to the rule and to demonstrate that the reasons for refusal were communicated to the employer; see *Lewchuk v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 76. In *Lewchuk*, the adjudicator concluded that the ". . . time for communicating the reasons for a refusal to work must have a nexus to the delivery of the order." Dr. Chopra did not provide his reasons for refusing to return to work until April 17, 2003, long after the incident that he has relied on to support his health and safety concern.

[133] In addition, the stated risks to health must be serious. The test for the assessment of danger in the workplace is objective; see *Alexander v. Treasury Board (Department of Health)*, 2007 PSLRB 110. In this case, the workplace was probably unpleasant for Dr. Chopra. However, mere unpleasantness cannot be used to justify a refusal to return to work (*Lewchuk).*

2. <u>For the grievor</u>

[134] The employer has the onus of demonstrating that it had just cause to discipline Dr. Chopra. No clear and concise direction was ever given to him. In addition to the 10-day suspension, his salary was clawed back from March 15, 2003 until he returned to work in June. This clawback was also disciplinary in nature.

[135] Dr. Chopra had more reasons for not returning to work than just the incident with Dr. Maneckjee. Dr. Chopra's concerns about the unhealthy work environment were raised in correspondence from Mr. Yazbeck. In his letter of May 12 (Exhibit E-2, tab C-16) to Ms. Gorman, Mr. Yazbeck asked if the employer would address Dr.

Chopra's (and Dr. Lambert's) concerns that the movement to another work location constituted harassment ". . . and/or represents a threat to their safety and security." Mr. Yazbeck stated in that letter that, if the employer's answer were "no," then Ms. Gorman should ". . . specifically direct Drs. Chopra and Lambert to move to the location by advising the undersigned in writing." The letter also stated that, in the absence of such a direction, Dr. Chopra and Dr. Lambert ". . . will continue to work from their present locations until such time as their concerns are addressed." It was clear from the letter that Dr. Chopra did not think that he was under a direct order to return to work. The failure to directly respond to this request for a specific direction means that the employer waived the right to claim that a direct order was given. The first time the employer told Dr. Chopra to return to work was in the discipline letter of May 30, 2003 (Exhibit E-2, tab A-1). The instruction in that letter was clear and understandable. Dr. Chopra complied with it, and there was no insubordination.

[136] There was an ongoing discussion about what Dr. Chopra was going to do, including to whom he was going to report. In addition, his relocated office was not ready. He was not refusing to go there; he was engaging in good faith discussions to resolve the issues. He and his colleagues raised concerns about what they saw as a toxic work environment. According to Ms. Kirkpatrick, when she issued the disciplinary letter, the "dance was over." In her testimony, Ms. Kirkpatrick referred to the discipline letter as her "direct order." By the employer's admission, one of the necessary requirements for insubordination has not been met.

[137] The employer cannot be critical of Dr. Chopra when it had no interest in the event with Dr. Maneckjee, as demonstrated by the fact that Dr. Chopra was not contacted when Ms. Kirkpatrick investigated the incident. Ms. Kirkpatrick reached conclusions without talking to two of the witnesses to the event (Dr. Chopra and Dr. Bassude). In addition, in its April 30 letter, the employer did not raise any concerns about the delay in raising the issue (Exhibit E-2, tab C-15). The employer comes to this issue with "dirty hands." If the employer had engaged in an inquiry, there might have been a resolution.

[138] The nature of the cancellation of the telework arrangement is important. The agreement made the telework arrangement conditional on productivity and performance. It also stipulated that reasonable notice was required to terminate the agreement. In this case, the decision to cancel the telework agreement was not fair,

equitable or transparent. The cancellation was based on a performance appraisal that Dr. Chopra had not even seen and that he had not been given a chance to respond to. The decision to cancel the arrangement was made before the performance meeting on January 30, 2003. The notice of termination of the agreement was extremely short. The cancellation was clearly inappropriate, as Dr. Mehrotra had signed a harassment complaint against Dr. Chopra and his colleagues in 2002.

[139] The employer had no interest in examining Dr. Chopra's concerns about the performance evaluation or the cancellation of the telework agreement. The employer could not identify any performance standards that had been violated by Dr. Chopra. Extensions of the telework agreements were based on good performance, and an extension was signed in October 2002. How could his performance be fine in October 2002 and then all of a sudden change? The whole starting point is tainted by the bias and closed mind of the employer. No fair assessment was made of the telework arrangement, which coloured all subsequent actions of Dr. V. Sharma and Dr. Mehrotra. In short, there is no reasonable explanation for the cancellation of the telework arrangement.

[140] Dr. R. Sharma and Dr. Maneckjee did not testify. I am entitled to conclude that the evidence would not have assisted the employer, which is why they were not called as witnesses.

[141] At the hearing, the employer appeared to question Dr. Chopra's medical certificate and sick leave. That was not open to the employer, as the sick leave was approved by Ms. Kirkpatrick.

[142] Dr. Chopra never refused to provide a medical certificate in principle, only specifically to Dr. Mehrotra. He was prepared to give the certificate to someone else. That concern was expressed in writing. The employer then told him that he could provide the certificate to someone else, which he did. The employer agreed that it was not legitimate for Dr. Chopra to provide the certificate to Dr. Mehrotra.

[143] Dr. Chopra continued to work from home during the period at issue. He informed the employer through correspondence from his legal counsel that he was working at home. Dr. Chopra testified that he could cope with going to the workplace occasionally, but not on a regular eight-hours per day basis. Dr. Chopra recognized that he could get angry and wondered how he was going to cope. He did not want more

conflict. He testified that he continued to work and that he was given assignments. It was efficient to continue the status quo. Continuing to work from home was the best solution unless and until the other problems were resolved. It is clear that the employer was not interested in having discussions at that time, in spite of a number of letters from the grievors' counsel requesting a meeting.

[144] The grievors had raised concerns about harassment. In her letter of April 30, 2003, Ms. Gorman stated that she was not aware of any harassment complaint (Exhibit E-2, tab C-15). The law is clear that, if the employer becomes aware of harassment, it must deal with it with or without a complaint. Ms. Gorman knew that the grievors believed that they were being harassed. It was both despicable and unacceptable for the employer to do nothing in the face of the allegations of harassment.

[145] The workplace refusal cases cited by the employer do not apply. In those cases, the onus was on the employee, whereas in this case, the onus is on the employer. This is also different from a work-safety issue in which the danger is acute and might affect others in the workplace. The employer never bothered to deal with Dr. Chopra's concerns about health and safety and did not talk to him about the incident.

[146] *Canadian Freightways Ltd. v. Teamsters Union, Loc. 31* (1996), 59 L.A.C. (4th) 246, was fact specific and not relevant. In Dr. Chopra's case, all the letters from counsel set out his concerns and requested discussions of those concerns. In *Canadian Regional Airways Ltd. v. C.U.P.E* (1998), 72 L.A.C. (4th) 167, there was a clear and unequivocal order, which is not so in this case. In addition, Dr. Chopra's medical certificate was approved by the employer.

[147] Referring to *Goyette v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 65, Dr. Chopra had a strong reason for not returning to work. He thought that he was being asked to return to an unhealthy environment. Dr. Chopra honestly believed that his health and well-being were endangered and communicated his belief to the employer. The test is subjective, not objective, and Dr. Chopra's belief was reasonable. In this case, it is not a question of whether the refusal was reasonable, but whether the discipline was appropriate. In *Dickins*, there was no evidence that the grievor told his supervisor of the specific nature of his concerns, which is so in this case. In Dr. Chopra's case, the order was not clear and concise. The parties were

engaged in discussions, and the employer did not make his return to work an absolute requirement.

[148] *Payeur v. Treasury Board (External Affairs)*, PSSRB File No. 166-02-15250 (19860613), is also distinguishable. In that case, the grievor had completely stopped working, while Dr. Chopra continued to work. *Sysco Food Services of Ontario v. C.A.W. - Canada, Loc. 414* (2004), 130 L.A.C. (4th) 273, is also a completely different situation. In Dr. Chopra's case, the employer knew exactly why he was staying at home; it has been told why repeatedly via correspondence. In *Petrovic v. Treasury Board (Natural Resources Canada)*, PSSRB File No. 166-02-28216 (19980729), the adjudicator stated that the grievor could have discussed the matter with his supervisor, which is what Dr. Chopra wanted to do.

[149] To support discipline for insubordination, the employer must prove that an order was given, that it was clearly communicated by someone with the proper authority and that the employee refused to comply. However, there are exceptions to the general "obey now, grieve later" principle. The applicable exceptions in Dr. Chopra's circumstances are the following:

- The grievance and adjudication process cannot provide adequate relief. In this case, redress could not be secured because nothing was done by the employer. When Dr. Chopra challenged its decisions, the employer was not interested in investigating or following up.
- The employer's direction affects the most personal and private parts of an employee's life. In this case, Dr. Chopra was thrown into a firestorm, and he felt personally threatened. The employer was unwilling to listen to his concerns.

[150] Arbitrators and adjudicators have held that there is no insubordination when a refusal to comply does not seriously prejudice the employer's ability to maintain production or when it challenges its symbolic authority. The employer has relied on jurisprudence in which no work was being done. In this case, Dr. Chopra continued to work from home after March 15 (the end of his sick leave) until his return to the workplace. There is no evidence of a negative impact on the employer.

[151] The employer's delay in imposing discipline on Dr. Chopra is also evidence that it condoned his behaviour. If the employer truly believed that a direct order had been made, it would have imposed discipline earlier. Ms. Gorman said that she was willing to talk, and Dr. Chopra was entitled to rely on that.

[152] The recovery of Dr. Chopra's pay was disguised discipline. Pay was deducted to get him to return to the workplace. I was referred to *Grover v. National Research Council of Canada*, 2008 PSLRB 59, and *Synowski v. Treasury Board (Department of Health)*, 2007 PSLRB 6. Dr. Chopra was working during the period for which the clawback occurred. Taking money away from someone performing work is not an administrative action; it is disciplinary. This is also evidence of a financial penalty.

[153] In *Peters v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 7, the adjudicator stated the following (at para 309):

> *. . . a grievor who alleges disguised discipline has an onus to show that the employer identified a culpable deficiency or an act of malfeasance on the part of the grievor and then undertook disguised disciplinary action to address this deficiency or act. Stated in a somewhat different way, a case for disguised discipline depends on the grievor demonstrating that the employer had the intent to discipline the grievor for a specific reason or reasons, but disguised its disciplinary action in a different form which nevertheless had the equivalent effect of correcting or punishing the grievor.*

[154] This is the exact situation faced by Dr. Chopra. I was also referred to *Stevenson v. Canadian Revenue Agency*, 2007 PSLRB 43. Ms. Kirkpatrick thought that all Dr. Chopra's actions were insubordinate, and she responded with the clawback of salary. In addition, the employer's actions were not done in "the normal course" and therefore constitute disguised discipline (*Lo v. Treasury Board (Treasury Board Secretariat)*, PSSRB File No. 166-02-27825 (19980514)). The clawback was intended to be corrective and had an immediate adverse effect on Dr. Chopra. I was also referred to *Canada (Attorney General) v. Frazee*, 2007 FC 1176.

[155] In the disciplinary letter, Ms. Kirkpatrick writes that Dr. Chopra ". . . refused to provide any information or evidence to support [his] allegation" (of the incident with Dr. Maneckjee). This is wrong. Dr. Chopra provided an email exchange, and Ms. Kirkpatrick was not interested in talking to him about the incident. She decided that she did not agree with him. That does not warrant discipline.

[156] In correspondence to Ms. Gorman on April 17, 2003 (Exhibit E-2, tab C-14), Mr. Yazbeck wrote that, "[i]n the event that it is your view that it is still appropriate to order Dr. Chopra to work at another designated location, then please advise as soon as possible." In her reply, dated April 30, 2003, she did not say anything. Therefore, there

was no longer a clear and direct order to return to work. In the April 17, 2003 letter, it was made clear that Dr. Chopra still believed that he was being harassed. The law says that an employee does not have to work if the employer does not provide a workplace free of harassment.

[157] Counsel for the grievors submitted that the grievance should be allowed and that Dr. Chopra should be reimbursed for the suspension and the clawback of salary, with interest and related benefits. Any reference to the discipline should be removed from his record. In the alternative, if there is a finding of insubordination, at best it could be characterized as a "technical" insubordination and does not warrant any discipline. In the further alternative, there are strong mitigating factors that would warrant, at most, a reprimand.

3. Employer's reply

[158] Dr. Chopra was given a final assignment before his sick leave in February 2003 (assigned on January 21, 2003), which was handed in to his supervisor in late May 2003, before his return to the office. No other assignments were given. The urgency of returning to the workplace existed in March, April and May 2003.

[159] The fact that discussions with the employer were ongoing does not negate the fact that Dr. Chopra was required to report to his workplace. The instruction to return to his workplace was made clear at the April 4, 2003 meeting and in subsequent correspondence (April 9, 2003). The requirement to report to the workplace was not held in abeyance. Ongoing discussions did not alleviate the obligation on Dr. Chopra to follow the employer's instructions and to come to work. Dr. Chopra recognized the cancellation of the telework arrangement in the correspondence from Mr. Yazbeck.

[160] Recourse was available to Dr. Chopra. The employer provided responses to the grievances (Exhibit G-4). Because Dr. Chopra disagreed with the results did not mean that he did not have access to recourse.

[161] If his reason for not returning to work was something other than the Dr. Maneckjee incident (or if it was insignificant), why is that three other employees (Dr. Bassude, Dr. Lambert and Dr. Haydon) were able to be in the workplace throughout the relevant period?

[162] While acknowledging that the medical certificate issue could have been handled better, counsel for the employer stated that its resolution was straightforward. Dr. Chopra could have obtained the certificate and given it to someone at a higher level or given it to the employer through his lawyer.

[163] There was no need to call Dr. Maneckjee as a witness. The employer had no quarrel with what Dr. Chopra said about the incident. The employer is not disputing Dr. Chopra's evidence about what happened in the lunchroom. With respect to the failure of the employer to call Dr. R. Sharma as a witness, if counsel for the grievors thought that this testimony was important, he could have been called.

[164] Dr. Chopra may have been staying at home for a variety of reasons, but he did not convey those reasons to the employer. In the correspondence from Mr. Yazbeck, a whole host of issues were conveyed, but none was tied to Dr. Chopra's non-attendance at the workplace.

[165] *Canadian Council for the Arts v. Public Service Alliance of Canada*, [2003] C.L.A.D. No. 409, is not relevant as it was not a clear case of insubordination, as is this case. Similarly, in *Crotty v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-16319 (19870227), the employee followed an instruction when it was clear. In this case, when Dr. Chopra was given an instruction, he did not follow it.

[166] In *Flynn v. Treasury Board (National Defence)*, PSSRB File No. 166-02-29015 (19991123), it is made clear that the onus is on grievors to prove disguised discipline. The *Lo* case clearly turns on the facts, as do *Peters*, *Reid v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-02-19551 and 19552 (19901003), and *Cominco Ltd. v. United Steelworkers of America, Local 480*, [1997] B.C.C.A.A.A. No. 716 (QL).

[167] With respect to the suggestion that the employer condoned Dr. Chopra not returning to work, he was disciplined relatively quickly, and after several instructions were given. The cases about disproportionate harm refer to orders that are of an ephemeral nature, which is clearly not so in this case.

[168] With respect to the recovery of salary, the cases cited by the grievors are all distinguishable. Dr. Chopra was well aware that, when his sick leave ended, he was required to return to work. The employer did not prevent him from returning to work.

He chose not to return, in contrast to *Grover*. Was the employer trying to compel Dr. Chopra to return to work? Of course it was. The 10-day suspension and the warning of possible future discipline was the method used by the employer to get him to return to work.

[169] I was also referred to *Reade v. Treasury Board (National Defence)*, PSSRB File No. 166-02-15557 (19860903), in which a voluntary departure from the office was considered a breach of the "obey now, grieve later" principle.

C. <u>Reasons</u>

[170] There are two issues to address in this grievance: Dr. Chopra's 10-day suspension and the recovery of his salary for the period in which he was absent from the office. I have addressed each issue separately.

[171] In its submissions, the employer appeared to question the legitimacy of Dr. Chopra's approved sick leave. The time has passed for the employer to challenge that legitimacy. It was approved by Ms. Kirkpatrick and was not rescinded or challenged by the employer before it imposed the discipline.

[172] In the same grievance, Dr. Chopra also grieved the termination of his telework arrangement, alleged harassment and abuse of authority. I do not have jurisdiction over these aspects of the grievance and have not addressed them.

1. <u>Disciplinary suspension</u>

[173] Dr. Chopra received a 10-day suspension for insubordination for an unauthorized absence from the workplace. I must determine if the employer had just cause to discipline Dr. Chopra and, if it did, whether the discipline imposed was appropriate. For the reasons that follow, I have concluded that the employer had just cause to impose discipline and that the 10-day suspension was appropriate in the circumstances.

[174] In imposing the discipline for insubordination, the employer relied on the following misconduct by Dr. Chopra:

1. his unauthorized absence from work;
2. his insistence that he remain on telework status, contrary to the employer's instructions;

3. his failure to provide timely justification (e.g., a medical certificate) for his absence from work; and

4. his failure to provide information about his safety concerns in a timely manner.

[175] All those alleged misconducts are part of the alleged insubordination.

[176] The necessary elements for a finding of insubordination are well established: an employee refuses to comply with a clearly communicated order from a person in authority. If insubordination is established, the next determination is whether the failure to obey the order falls under one of the exceptions to the “obey now, grieve later” principle.

[177] The order given by Dr. Chopra’s supervisor, Dr. Mehrotra, was clear. If there had been any confusion on his part, it was eliminated when she restated the order in her email of January 31, 2003. The fact that Dr. Chopra showed up at work on February 3, 2003 is clear evidence that he understood the order to return to work. His failure to return to work the following day was justified by his subsequently approved sick leave. However, his authorized sick leave ended on March 15, 2003, and yet, he did not return to work.

[178] Counsel for the grievors maintained that the failure of Ms. Gorman to respond to Dr. Chopra’s direct request that he be ordered to return to work was a waiver by the employer. Once an employer has given a clear order, it is not required to repeat it just because the employee does not agree or comply with it. Although counsel for the grievors raised issues with the employer during the relevant period in numerous letters, raising issues does not suspend a direct order from the employer.

[179] I must now determine if Dr. Chopra had a legitimate excuse for disobeying the order to return to the workplace. I have already concluded that the employer approved his absence from the workplace until March 15 (the period of his approved sick leave). Did Dr. Chopra have justification for not returning to work after the expiry of his sick leave? In other words, did his refusal to return to work fall under any of the recognized exceptions to the “obey now, grieve later” principle?

[180] Dr. Chopra relied, in part, on the incident in the lunchroom on his initial return to justify his failure to return to work. I agree with the adjudicator in *Lewchuk* that, to rely on a health and safety concern to justify a refusal to follow an order, the employee

must raise the health and safety concern at the earliest possible opportunity. Dr. Chopra did not provide sufficient particulars to the employer for it to investigate until April 17, 2003 – over two months after the incident. That was too late to justify his refusal to return to work after the expiry of his sick leave.

[181] Dr. Chopra also relied on a general concern of harassment. It is important to note that the other grievors also alleged harassment at that time yet were able to continue working at Holland Cross. The fact that the workplace may have been unpleasant does not justify disobeying an order. Dr. Chopra's particular concern about workplace violence was never articulated to the employer and was raised only at this hearing. The evidence did not show that anything existed other than difficult relationships with some of his colleagues.

[182] Dr. Chopra also alleged that the failure of the grievance process to adequately address his concerns was another justification for not obeying the order to return to work. This exception to the "obey now, grieve later" principle is based on the concept of irreparable harm that cannot be cured by the grievance process. In this case, at the time of the order to return to the workplace, Dr. Chopra's concerns could have been addressed by the grievance process. This is not an exercise in hindsight; just because his concerns were eventually not addressed to his satisfaction does not result in a retrospective exception to the "obey now, grieve later" principle.

[183] Dr. Chopra was also disciplined for failing to provide a medical certificate in a timely manner. Given the miscommunication on what was required to prove a medical reason for his absence from the workplace, I am prepared to give Dr. Chopra the benefit of the doubt. It is now clear that the employer did not require Dr. Chopra to provide any medical details to his supervisor. His concern about sharing that information with an individual who had filed a harassment complaint against him was understandable. In any event, the employer subsequently approved sick leave for the period covered by the medical certificate.

[184] The employer has proven that Dr. Chopra was insubordinate by not returning to work, and he has not shown any justification for refusing to return to work. Accordingly, the employer was justified in disciplining him. Given his past disciplinary record, and the seriousness of the insubordination, a 10-day suspension was reasonable.

2. Salary recovery

[185] In addition to imposing discipline, the employer recovered salary paid for the period from the end of Dr. Chopra's sick leave until his return to work on June 3, 2003. The employer's position is that this was an administrative action and that an adjudicator has no jurisdiction over it. Dr. Chopra maintains that it was disguised discipline and consequently that an adjudicator has jurisdiction.

[186] Dr. Chopra was required to be at the workplace by his employer. He refused. Based on the principle of "no work, no pay," the recovery of his pay was appropriate. Dr. Chopra maintained that he worked during the period at issue. Dr. Chopra did continue to work on an assignment given to him before the cancellation of his telework agreement. There was no evidence of any work being assigned to him after February 4, 2003. However, the important point is that he was not performing his duties as requested by the employer. Dr. Chopra was ordered to work at the VDD workplace. Since he did not perform the work as requested by the employer, he is not entitled to be paid for his period of unauthorized absence. The failure to work resulted in the administrative action by the employer of not paying him for the period of unauthorized leave.

[187] Although there is a significant effect on Dr. Chopra, it is not sufficient to make the recovery of salary disciplinary. The incentive to return to work that is engendered by a recovery of salary does not amount to "corrective action" in the disciplinary sense. The fact that Ms. Kirkpatrick testified that recovering the salary paid during the unauthorized absence was intended to make it clear that Dr. Chopra's attendance at the workplace was required does not transform an administrative action into a disciplinary action.

IV. Dr. Lambert's 10-day suspension

A. Evidence

[188] Dr. Lambert received a 10-day suspension for insubordination on May 14, 2004 (Exhibit E-283, tab A-2). He was disciplined for failing to complete assigned work on seven files from June 2002 to February 2004.

[189] Ms. Kirkpatrick wrote as follows in the disciplinary letter:

. . .

> *. . . I have concluded by your actions that you have intentionally misled management regarding the status of these files, deliberately withheld your services when you failed to complete the work as promised and further, were insubordinate by ignoring management's requests and instructions regarding updates and return of the files.*
>
> *You have failed to offer any acceptable reason for the delays in completing and returning these files and for ignoring the repeated requests from your supervisors.*
>
> *. . . your actions constitute serious and deliberate acts of misconduct which cannot and will not be tolerated. After considering your disciplinary record and the repetitive nature of your behaviour, this is to advise you that you will be suspended without pay for a period of ten (10) working the* [*sic*] *days. . . .*
>
> *I would like to take this opportunity to again reinforce the gravity of these matters. The disrespect you have shown for your superiors and our clients is inexcusable. The extensive efforts the department has taken to fulfill our responsibilities in a timely and professional manner are only undermined by behaviour such as this. Submissions must be reviewed and responded to in a timely and professional manner, and failing to do so in this manner brings disrepute upon the whole Department. I must warn you that any further acts of misconduct will lead to further disciplinary action up to and including termination of employment.*

[190] The suspension was served from May 17 to 31, 2004.

1. Assignment of work and workload in the VDD

[191] Evaluators in the VDD were assigned to work on new drug submissions (NDS), supplementary new drug submissions (SNDS) and submissions for experimental studies certificates (ESC). In addition, evaluators were assigned other duties, as required. No time limits are set for reviewing submissions under the *FDA*, or its regulations. The Regulatory Impact Analysis Statement for the *Veterinary Drug Evaluation Fees Regulations*, SOR/96-143, specifies service standards of 60 days for an ESC and 180 days for an NDS (Exhibit E-204). Those time limits are only guidelines.

[192] Evaluators were also assigned the responsibility of preparing responses to risk assessment requests from the CFIA. Dr. Lambert testified that they were high priority assignments.

[193] There was a backlog in reviewing submissions at the BVD and then the VDD. A review by Price Waterhouse, completed in 2002, identified that the backlog had been a concern since 1996 (Exhibit E-202). Status reports for the HSD showed that many reviews were uncompleted, sometimes for years (Exhibits E-292, E-299, E-300, E-304 to 308 and G-258). In early 2002, evaluators were asked if they wanted to work overtime to eliminate some of the backlog (Exhibit E-283, tab B-4).

[194] Ms. Kirkpatrick testified that some of the delays in reviewing submissions were out of the control of evaluators. Sometimes, delays arose in assigning files for review. In addition, a reviewer might have to wait for additional information from the applicant drug company. Ms. Kirkpatrick testified that no good system was in place to track submissions. When she left the VDD, the employer was still developing a system that could accurately track the review process.

[195] Dr. V. Sharma testified that the HSD generally had monthly meetings and that he would meet with team leaders weekly, if possible. The three team leaders in the HSD were expected to meet regularly with evaluators to monitor progress on files and to confirm that work was being completed in a timely fashion.

[196] Dr. Lambert received a positive performance evaluation for the period of June 2001 to December 2001 (Exhibit G-269). Dr. V. Sharma wrote that Dr. Lambert had completed a large number of outstanding submissions and ESCs, ". . . which resulted in improving the backlog situation." He also wrote that Dr. Lambert's contribution on complex submissions "remains outstanding."

[197] The administrative officer of the HSD prepared monthly charts listing the files assigned to each evaluator. Dr. R. Sharma testified that, as a team leader, he regularly reviewed the charts. Dr. Lambert testified that he had never seen them. Ms. Kirkpatrick testified that she did not review them. Charts were located for April and June 2002 (Exhibit E-283, tabs B-2 and B-3). From them, it appears that Dr. Lambert had the most assigned files.

2. Dr. Lambert's work assignments

[198] The seven files at issue were the following:

- SNDS for Regumate
- SNDS for Avatec Premix
- NDS for Ovagen - Second review
- ESC for GRF
- ESC for Estradiol
- ESC for CIDR-B (Second review)
- ESC for Anafen (Second review)

[199] In addition to those files, Dr. Lambert testified that he had other work responsibilities. He responded to risk assessment requests from the CFIA and was also required to respond to requests for information from universities, research institutes and students. He testified that information requests could be time consuming. He prepared briefing notes. He worked on special projects, such as assisting with litigation. Dr. Lambert testified that normally evaluators can spend approximately half their time reviewing submissions. The rest of their time is accounted for by leave, meetings, continuing education and keeping abreast of developments in the scientific literature.

[200] During the period in which he was working on those seven files, Dr. Lambert was also the acting team leader of the pharmacology and toxicology team. His responsibilities included managing and supervising one evaluator. He was removed from the acting assignment on May 14, 2002. He was also asked to prepare for and appear in front of the SIRC.

[201] Dr. Lambert was also involved with the internal discussions on Tylosin during the time that he was working on the seven assignments (summarized earlier at paras 20 to 33 of this decision). He testified that it was time consuming and that it created workplace tension.

[202] Dr. Lambert testified about a number of special projects and assignments that he completed during the time that he was working on the assignments. He testified that, between January and May 2002, special projects took up all his time and that he had no time to work on the submissions assigned to him.

[203] In November 2002, Dr. Lambert was preparing a chronology and summary of matters relevant to the complaint to the Public Service Integrity Office (PSIO) (see paras 55 to 59 of this decision).

[204] The VDD had a backlog of submissions to review in 2002, and Dr. V. Sharma asked for volunteers to do some of them, on overtime. Dr. Lambert volunteered to complete the SNDS on Avatec Premix. The expected date for starting the review was February 28, 2002; the expected completion date was March 28, 2002 (Exhibit E-283, tab B-4).

[205] Dr. Lambert testified that, when Dr. V. Sharma was his supervisor, he was not normally given deadlines to complete his work. However, Dr. V. Sharma emailed Dr. Lambert on May 28, 2002, noting that Dr. Lambert had ". . . a large number of pending submissions" (Exhibit E-283, tab B-1). He asked that Dr. Lambert discuss his outstanding assignments and submissions with Dr. R. Sharma by May 31, 2002. He was also asked to develop a plan to reduce his workload. Dr. V. Sharma asked Dr. Lambert to share the work plan with him. Dr. Lambert testified that he did not respond to the email and that he did not speak with Dr. R. Sharma by May 31, 2002. He stated that there was a breakdown in communication between him, Dr. V. Sharma and Dr. R. Sharma in April and May because of the Tylosin matter. Dr. R. Sharma did not discuss a work plan with Dr. Lambert.

[206] Dr. V. Sharma emailed Dr. Lambert on June 5, 2002 (Exhibit E-283, tab B-5), reminding him that he had not replied to the May 28 email. Dr. V. Sharma arranged a meeting with Dr. R. Sharma and Dr. Lambert to discuss a work plan for completing the outstanding submissions. At the meeting (on June 18, 2002), Dr. Lambert's workload was discussed. Two additional assignments were also discussed (Carbadox and Zeranol). The Zeranol submission was reassigned to a different evaluator. Dr. Lambert stated that he had been asked to devote two hours per week to the Carbadox submission. Dr. Lambert was asked to provide a progress report on it.

[207] At the meeting, progress on assignments and deadlines for completion were discussed. Dr. V. Sharma prepared an email after the meeting (Exhibit E-283, tab B-6) that Dr. R. Sharma testified was an accurate summary of the discussion. On Regumate, Dr. Lambert advised that the delay was caused by a heavy workload and the fact that he had not initially understood that the submission had been assigned to him. He said that he would provide a deadline for completion within two weeks. Dr. Lambert said

that the Avatec Premix submission was complicated. He said that the report was ready and that he would submit it on June 20, 2002. Dr. Lambert said that he agreed with the first reviewer on the Ovagen submission and that his second review would be completed by June 21, 2002. Dr. Lambert said that he would call the investigators who had requested the ESCs for GRF and Estradiol to see if they were still interested in pursuing the ESC and that he would advise Dr. R. Sharma of the status by June 21, 2002. He said that the ESC for CIDR-B would be completed by June 26, 2002 and that the ESC for Anafen would be completed by June 28, 2002 (Exhibit E-283, tab B-6).

[208] Dr. Lambert testified that the possibility of discipline was not raised at that meeting. Ms. Kirkpatrick testified that the employer was not considering discipline at that time.

[209] Dr. Lambert testified that he telephoned the two investigators for the GRF and Estradiol ESCs. However, the investigators were not available, and he did not leave any messages.

[210] On June 18, 2002, Dr. V. Sharma confirmed that two submissions had been reassigned from Dr. Lambert to another evaluator and that Dr. Lambert had had two additional scientific issues assigned to him — the condemnation of carcasses, and Nitrasone (Exhibit E-283, tab B-7).

[211] Dr. Lambert testified that he had been assigned the review of Regumate in January 2000. He testified that all the necessary material to complete the review was in the file and that it had been there since 2000.

[212] In July 2002, Dr. R. Sharma repeatedly asked Dr. Lambert by email for updates on his progress on the Regumate submission. Dr. R. Sharma testified that he did not follow up in person with Dr. Lambert because the tensions in the workplace had made him too uncomfortable.

[213] On August 8, 2002, Dr. R. Sharma and Dr. V. Sharma met with Dr. Lambert to discuss Dr. Lambert's progress on the outstanding submissions. Dr. Lambert testified that Dr. R. Sharma was "obnoxious" and that he almost left the meeting. Dr. R. Sharma was not cross-examined on that point. Dr. Lambert agreed to have the submissions completed on several dates in August 2002, with the exception of Regumate. He agreed to inform Dr. R. Sharma of the start date for his review of Regumate and its

approximate completion date (Exhibit E-283, tab B-12). Dr. Lambert did not meet the deadlines and did not advise Dr. R. Sharma of the start date of the Regumate review. Dr. Lambert testified that the possibility of discipline was not discussed.

[214] In cross-examination, Dr. R. Sharma testified that he did not ask Dr. Lambert how his performance could be improved. He also testified that he did not try to determine if there was a personal, learning, or health or stress-related problem that was interfering with Dr. Lambert's ability to complete his work. He also testified that he did not suggest training for Dr. Lambert at the meeting.

[215] On November 6, 2002, Dr. R. Sharma emailed Dr. Lambert and asked for an update on his outstanding assignments by November 9, 2002 (Exhibit E-283, tab B-17). Dr. Lambert did not respond. In his testimony, Dr. Lambert agreed that he could have responded but that he did not.

[216] As part of the performance evaluation process for January 1 to September 30, 2002, the HSD secretary sent emails to Dr. Lambert, requesting that he provide a list of his completed work and his work plans on September 20, October 1, 3 and 9, and November 22, 2002 (Exhibit E-283, tabs B-13 to B-18). Dr. Lambert did not provide the requested information. Dr. Lambert testified that he did not provide the requested list because all the information was already available to Dr. V. Sharma.

[217] On January 30, 2003, Dr. Lambert met with Dr. R. Sharma and Dr. V. Sharma to discuss his performance evaluation ("Performance Discussion Process" or PDP). At the meeting, Dr. R. Sharma read aloud the supervisor's comments on the evaluation (Exhibit E-283, tab B-23). In his comments, he noted that the evaluation was a "significant departure" from the previous year's appraisal that had rated Dr. Lambert's performance as "good." The comments continued as follows:

. . .

> *Since June 2002, Dr. Lambert . . . has not responded to numerous requests from his Supervisor or Division's Chief to take on work projects or assignments as well as not responded to the follow-ups made by his Supervisor. As a result, little work has been done and deadlines have not been met. This has resulted in his Supervisor having to transfer his work to other staff in the Division and has resulted in placing additional work load on others.*

. . .

> *Dr. Lambert has the technical expertise to do a good job, but in the last year, he has demonstrated much difficulty in completing assigned tasks and working in a team environment.*
>
> *Accordingly, it is concluded that Dr. Lambert is not performing his work assignments in a satisfactory manner.*

[218] Dr. R. Sharma also wrote that Dr. Lambert needed to improve his work habits and work output. He also wrote that, in the coming months, Dr. Lambert would be expected to demonstrate fully satisfactory performance, ". . . including meeting all deliverables in the deadlines agreed upon." He was also expected to attend courses on managing and prioritizing work assignments. Dr. Lambert did not provide any feedback at the meeting.

[219] On February 14, 2003, Dr. Lambert told Dr. V. Sharma that the draft performance evaluation was with his legal counsel (Exhibit E-283, tab B-25). In his email, he also referred to two letters written by his legal counsel to the Deputy Minister and to Ms. Gorman about intimidation and abuse of authority and about the harassment complaint against the grievors. Dr. Lambert provided copies of those letters to Dr. V. Sharma. On February 21, 2003, Dr. V. Sharma told Dr. Lambert that he would sign the evaluation. He also told Dr. Lambert that he was required to undertake and complete work that was assigned to him (Exhibit E-283, tab B-25).

[220] Ms. Kirkpatrick testified that she asked managers to ensure that the VDD made progress on outstanding submissions during her absence from the office in summer 2003. She testified that companies with submissions that were being handled by Dr. Lambert had written letters requesting updates on the statuses of the reviews. The only evidence presented of requests from drug companies was correspondence with the VDD dated December 11, 2003.

[221] On June 6, 2003, Dr. V. Sharma requested an update on outstanding submissions by June 11, 2003 (Exhibit E-283, tab B-26). Dr. V. Sharma set out the dates of the previous requests for updates in his email and noted the lengths of the delays in receiving a response from Dr. Lambert. He requested that the update include the work completed to date, what was still to be done, any difficulties Dr. Lambert was experiencing in completing the tasks, and projected completion dates.

[222] Dr. Lambert replied on June 11, 2003 (Exhibit E-283, tab B-26) that he was "surprised" to receive the request at that time, as he was in the process of packing up his office to move to the new work location (as a result of the harassment complaint, the grievors were being moved). He said that most of the assigned work would be completed by the end of the first week of July and that the Regumate review would be completed by the end of the first week of August if not earlier. Dr. V. Sharma replied on June 19, 2003 that, as his supervisor, he had a responsibility to follow up on work assignments. He confirmed the deadlines as set out in Dr. Lambert's email (Exhibit E-283, tab B-26). Dr. Lambert did not complete the submissions within the time set out in his email.

[223] Dr. Lambert grieved his evaluation on February 25, 2003 (Exhibit G-266). As part of his grievance, he provided a list of 59 accomplishments and supporting documentation for the period of his performance evaluation (Exhibit G-253). Ms. Gorman asked Dr. V. Sharma on June 30, 2003 to review the list (Exhibit G-257). He reviewed it with help from Dr. R. Sharma, Dr. Vilim and Dr. Mehrotra, and provided his comments on July 17, 2003 (Exhibit G-257). The comments on individual accomplishments suggested either that further information was required or that Dr. Lambert's involvement in a given file was "marginal."

[224] Dr. Lambert's grievance against his performance evaluation was denied by Ms. Gorman (at the final level), and an application for judicial review was filed. The judicial review application is being held in abeyance.

[225] Dr. V. Sharma was on extended leave as of July 23, 2003. On August 8, 2003, Ms. Kathy Dobbin (as acting director general) emailed Dr. Lambert, advising him that he would report directly to Ms. Kirkpatrick from then on. She also told him that the agreed-upon deadlines for the submissions had passed. He was asked to have the reviews completed by August 12, 2003 (Exhibit E-283, tab B-28). Dr. Lambert did not respond to the email and did not provide the reviews by the requested date.

[226] On November 3, 2003, Ms. Kirkpatrick requested the immediate return of the Ovagen, Regumate and Avatec files to her office (Exhibit E-283, tab B-29). Dr. Lambert retrieved the Regumate file from the central registry that same day. He did not return the files. On November 4, 2003, Dr. Lambert called in sick. Ms. Kirkpatrick's assistant called him at home on November 5, 2003. He told her that the files were locked in his

cabinet and that he would return to the office the next day. His request for sick leave was approved by Ms. Kirkpatrick.

[227] In the mid-morning of November 6, 2003, Ms. Kirkpatrick's assistant spoke with Dr. Lambert at his office. He promised to bring two files to Ms. Kirkpatrick in the morning and one file in the afternoon. He did not bring the files to the office in the morning. He testified that, had Ms. Kirkpatrick wanted the files, she (or her assistant) could have come to his office to get them.

[228] In the mid-afternoon, Ms. Kirkpatrick's assistant called Dr. Lambert to inform him that Ms. Kirkpatrick wanted to see him in her office in approximately 15 minutes. At that meeting, Dr. Lambert returned two of the files to Ms. Kirkpatrick (Avatec and Ovagen). The Avatec review had been completed on March 26, 2002. The Ovagen submission was also completed. Dr. Lambert asked for additional time to finish the review on Regumate as it was not yet complete. Ms. Kirkpatrick asked Dr. Lambert to return the completed Regumate review to her by no later than November 14, 2003.

[229] Ms. Kirkpatrick asked Dr. Lambert why he was taking so long to complete and return the reviews. Dr. Lambert told her that he and the other grievors were "defending our survival" and he felt that his job was "on the line." Ms. Kirkpatrick testified that he referred to the fact-finding investigations about comments made to the media and the harassment investigation. In his testimony, Dr. Lambert stated that he also referred to several grievances and the PSIO investigation. Ms. Kirkpatrick told him at the meeting that those other activities were not to be conducted on work time, apart from meetings mandated by the relevant collective agreement. She agreed in cross-examination that employees were not expected to take leave to attend meetings for the harassment or the PSIO investigations. She did not ask Dr. Lambert how much time he was spending to prepare for grievances and other related proceedings.

[230] She also asked him why the Avatec review had not been submitted, since it appeared to have been completed on March 26, 2002. Dr. Lambert told her that it should have been done and that the drug company "had a reason to be upset" (Exhibit E-283, tab B-33). In his testimony, Dr. Lambert testified that he meant that the drug company would be upset if the VDD did not accept its submission.

[231] Ms. Kirkpatrick referred Dr. Lambert to his obligations under the *Values and Ethics Code for the Public Service* and told him that he was being paid to complete his

work. Dr. Lambert told her that he would provide the completed Regumate review. Dr. Lambert testified that there was no mention of the possibility of discipline at the meeting.

[232] Ms. Kirkpatrick's assistant phoned Dr. Lambert on November 12, 2003, to remind him that his review of Regumate was due on November 14, 2003. She told Ms. Kirkpatrick that Dr. Lambert said that he would have the documents for Ms. Kirkpatrick by the end of that week (Exhibit E-283, tab B-34). Dr. Lambert did not provide the completed Regumate review to Ms. Kirkpatrick by November 14, 2003. Dr. Lambert was on sick leave on November 13 and 14 (subsequently approved by Ms. Kirkpatrick). Dr. Lambert told Ms. Kirkpatrick's assistant on November 17 that the Regumate review would be completed on November 20, 2003. Dr. Lambert did not provide the Regumate review on that date.

[233] The VDD received a request for an update on the status of the Ovagen submission from the drug manufacturer on December 19, 2003 (Exhibit G-260), after Dr. Lambert submitted the review.

[234] On January 13, 2004, Ms. Kirkpatrick requested the return of the Regumate file (Exhibit E-283, tab B-37). When he returned the file, Dr. Lambert requested another extension to complete the review. Ms. Kirkpatrick told him that was not possible, as she was meeting with the drug company that week. Dr. Lambert testified that it was the first time he had heard about the upcoming meeting. She also told him that he had had the file for a long time and that he had put the VDD "in an unacceptable position." Dr. Lambert told her that the tone of her email "scared" him. Ms. Kirkpatrick testified that she did not recall discussing his comment about the tone of the email. Dr. Lambert testified that his fear arose because it was the first formal request to return all his files. Ms. Kirkpatrick did not raise the possibility of discipline.

[235] In an email sent on January 14, 2004, Dr. Lambert said that it was the first time that Ms. Kirkpatrick had asked for the return of the file (Exhibit E-283, tab B-37). Ms. Kirkpatrick responded that she had requested the file earlier (on November 3, 2003). Dr. Lambert testified that it had been agreed after November 3, 2003 that he would continue to work on the file. She also told him in the email that she would schedule a meeting to discuss the delay in more detail.

[236] Dr. Lambert provided a review of Regumate to the HSD secretary on January 19, 2004. Ms. Kirkpatrick testified that it was her view that the review had been taken away from him at the meeting on January 13, 2004.

[237] The meeting to discuss the Regumate file was originally scheduled for January 20, 2004, but Dr. Lambert called in sick on that day. The meeting was rescheduled for January 27, 2004. At the meeting, Ms. Kirkpatrick noted the delay and asked him why it had taken so long to complete the review. Dr. Lambert agreed that he was capable of completing the evaluation. He estimated that he should have had three to six months to complete it. In his testimony, Dr. Lambert added that that amount of time would have been reasonable had he been able to concentrate on his work. Dr. Lambert also raised the issue of poor communications. Ms. Kirkpatrick disagreed that communications were poor and referred to numerous emails and communiqués. The possibility of discipline was not discussed.

[238] On February 6, 2004, Dr. Lambert submitted the completed reviews on the four ESC submissions (Exhibit E-283, tab E-4). Ms. Kirkpatrick recommended closing the ESC files as no longer active, given the time spent reviewing them (Exhibit E-283, tabs E-1 to E-4). Dr. Lambert testified that, if there is no follow-up from the applicant, VDD evaluators conclude that the ESC request has been abandoned. Ms. Kirkpatrick testified that timing was important for many ESC requests.

[239] Ms. Kirkpatrick sent a request to all employees for documentation for the performance discussion process (PDP) for the period of October 1, 2002 to September 30, 2003 on November 14, 2003 (Exhibit E-283, tab B-35). The documentation was required by December 31, 2003. Ms. Kirkpatrick advised Dr. Lambert that she would meet with him during the week of February 9, 2004 to discuss his PDP, and she required the PDP documentation by January 30, 2004. The following items were to be included in the documentation: a list of all work assigned; any accomplishments; any outstanding work; a work plan with deadlines for upcoming months; and a development and training plan. Dr. Lambert did not provide the PDP documentation by the deadline.

[240] The February 9, 2004 meeting was rescheduled to February 18, 2004 because Dr. Lambert was on sick leave from February 9 to 11. At the meeting, Dr. Lambert and Ms. Kirkpatrick discussed the Avatec submission, his sick leave and the PDP. Dr. Lambert provided Ms. Kirkpatrick with a list of 40 work items that were completed over the

review period (E-283, tab B-32). At the meeting, Ms. Kirkpatrick reviewed the list and concluded that some items were completed outside the review period.

[241] Ms. Kirkpatrick stated at the meeting that, if she considered the Avatec submission as having been completed during the review period in question, it would mean that Dr. Lambert completed the review of only one submission during the period. Ms. Kirkpatrick asked Dr. Lambert about the four outstanding ESCs. She advised him that, based on her initial review of the list of accomplishments, his output had been unacceptable. She told him that "remedial action" was needed to increase his output. In an email sent after the meeting (Exhibit G-268), Dr. Lambert wrote that, when he asked Ms. Kirkpatrick what remedial action she would be considering, she did not provide an answer. She also asked him for "more substantiation" on how he spent his working time by the end of the week. Dr. Lambert did not provide any further information.

[242] Dr. Lambert's sick leave was also discussed at the meeting. Ms. Kirkpatrick advised him that he had used 50 days of sick leave between October 1, 2002 and September 30, 2003. She told him that she had consulted with the Human Resources section of Health Canada and that any further sick leave would require a medical certificate. In an email to Ms. Kirkpatrick sent two days later and copied to his counsel, Dr. Lambert said that he considered the request for medical certificates an abuse of authority and further harassment against him (Exhibit G-268).

[243] Ms. Kirkpatrick gave the letter of suspension to Dr. Lambert on May 14, 2004. She testified that Dr. R. Sharma and Dr. V. Sharma were not consulted about the discipline. She also testified that she considered Dr. Lambert's previous five-day suspension (for comments made to the media: see paras 310 and following) when deciding to impose discipline. She also considered his previous positive performance evaluations and his experience as aggravating factors. She did not consider his use of approved sick leave as a mitigating factor. She also testified that she did not suggest EAP to Dr. Lambert or consider any need accommodate him.

[244] Dr. Lambert testified that, after he spoke to the media in July 2002, he felt that his supervisors were "gunning" for him and that they were creating a "paper trail to build a case" against him.

B. <u>Submissions</u>

1. <u>For the employer</u>

[245] The employer submitted that, despite Dr. Lambert's repeated commitment to finish his assigned work and to provide updates on his progress, he consistently failed to meet deadlines and ignored requests from his supervisor to provide updates. Dr. Lambert's behaviour demonstrated that he deliberately withheld his services and that he was insubordinate by ignoring requests for information on the status of his assigned work.

[246] In Brown and Beatty, *Canadian Labour Arbitration,* 4th Edition (at para 7:3612), the authors outline as follows the essential ingredients necessary to establish insubordination:

> *In the standard case where an employee is disciplined for refusing to do what he or she has been told to do, arbitrators have required the employer to prove that an order was in fact given, that it was clearly communicated to the employee by someone with the proper authority, and that the employee either refused to acknowledge it or actually refused to comply.*
>
> *However, even if no specific order is given, an employee may be found to have been insubordinate if the arbitrator concluded that he or she must have been aware of the duties expected and refused to discharge them. As well, in order to justify disciplining someone for insubordination, it is typically not necessary for an employer to prove that the employee intended to defy management or had a blameworthy state of mind, or that it suffered any financial loss, although the absence of any of these factors will usually serve to lessen the seriousness of the misconduct.*

[247] Dr. Lambert failed to respond to his supervisors' repeated requests for the completed assignments and for updates on their statuses. It is clear that Dr. Lambert was aware of what was expected of him in his role as a drug evaluator. This constitutes a form of insubordination; see *Trilea-Scarborough Shopping Centre Holdings Ltd. v. S.E.I.U., Loc. 204* (1990), 14 L.A.C. (4th) 396, and *Bérard v. Treasury Board (Agriculture Canada)*, PSSRB File Nos. 166-02-22344 and 22914 (19930423).

[248] Dr. Lambert acknowledged that nothing prevented him from meeting the deadlines. He simply chose not to comply. By his actions, Dr. Lambert was insubordinate by failing to do what was expected of him and by failing to do what was

requested. The employer is entitled to receive completed work in exchange for paying its employees.

[249] Dr. Lambert's excuses for not completing work and for not responding to requests for updates did not stand up to scrutiny on cross-examination. Nothing prevented Dr. Lambert from completing his work and communicating with his supervisors other than his own unwillingness. For example, in response to a question in cross-examination about his failure to respond to a request for an update sent by Ms. Kirkpatrick's office on August 8, 2003, Dr. Lambert stated that he was already in trouble with his supervisor and that a "little bit more" would not have changed much. His attitude was, essentially, "in for a penny, in for a pound." In addition, Dr. Lambert suggested that the employer needed to do more to obtain the information it had requested. This shifting of blame to the employer demonstrates insubordination.

[250] Dr. Lambert consistently failed to provide updates as requested, to respond to emails from his supervisors, to complete his work and to meet his own deadlines. The employer submitted that, while in cross-examination, Dr. Lambert acknowledged that he could have responded to his supervisors' requests and that he could have completed his work and met his deadlines, the facts cannot bear any other conclusion than that he simply chose not to comply with his employer's requests. Dr. Lambert chose not to do his work, and by his actions, he was clearly insubordinate.

2. For the grievor

[251] Dr. Lambert submitted that the disciplinary suspension was not justified in the circumstances. A systemic backlog was endemic at his workplace, and he had no intention to withhold services or to mislead the employer. Alternatively, by its conduct of repeatedly ignoring the issue for months at a time, it is clear that the employer condoned any delays or failures to provide status updates. The employer made virtually no attempt to apply appropriate human resources principles to address its concerns over nearly a two-year period for which discipline was imposed. Moreover, the employer ignored any mitigating factors such as sick leave and other workplace issues that affected Dr. Lambert's work output during that period.

[252] There are no timelines established by the *FDA* or in its regulations under which an ESC or an NDS must be processed. The applicable guidelines were not binding and were treated casually. Lengthy delays in processing drug submissions were common

for a number of years. Ms. Kirkpatrick testified that a number of external factors, beyond evaluators' control, could contribute to delays in processing submissions. In addition, in the first part of 2002, Dr. Lambert's workload was substantial. While several drug evaluations were pending, he was also assigned a number of other tasks. The employer had never taken issue with Dr. Lambert's pace of work previously, and in fact, his previous performance evaluation complimented him for his work on reducing the backlog.

[253] The August 8, 2002 meeting was the first discussion of Dr. Lambert's pending submissions since the timeline was agreed to on June 18, 2002. Consistent with standard human resources principles, if the employer considered that disobedience or a refusal to follow directions occurred that could have merited discipline, it was required to advise Dr. Lambert of its intentions. The fact that it chose not to mention discipline at either meeting demonstrates the lack of seriousness with which it held Dr. Lambert's conduct.

[254] Although Dr. Lambert did not complete the assigned work, no one ever asked him why. In addition, no one ever mentioned that discipline might be imposed as a consequence of missing the imposed deadlines.

[255] The employer condoned the delays because it did not consistently follow up with Dr. Lambert. It is inappropriate for the employer to discipline Dr. Lambert for his delays since it abandoned the issue in November 2002.

[256] Dr. Lambert alleged that the timing of the request for an update was harassment. The employer never followed up on that allegation, which is consistent with its pattern of deflecting or ignoring Dr. Lambert's concerns about the workplace, such as repeated requests for a global independent investigation into issues including harassment and pressure.

[257] In Dr. Lambert's grievance against his performance appraisal, he provided a list of accomplishments that was intensely scrutinized by the employer. Most of the accomplishments were marginalized. In his previous performance evaluation, he submitted a similar list of accomplishments, which had been accepted as satisfactory. No explanation has ever been provided as to why his subsequent performance evaluation was treated differently.

[258] Ms. Kirkpatrick justified the employer's delay in requesting updates by stating that petitioners sent letters requesting status updates on Dr. Lambert's files in the period leading up to November 2003. Ms. Kirkpatrick could find no such examples. Only one letter was produced. It postdates that period by over a month and expresses no urgency on the part of the manufacturer.

[259] Ms. Kirkpatrick did not ask Dr. Lambert about how he prioritized his work. She did not ensure that he was aware of the tasks relating to his issues with the employer that could be done on leave and those that could be done on his own time.

[260] In January 2004, Dr. Lambert's work environment was very tense. He was isolated in the Holland Cross building, which he found very difficult, and the harassment investigation was in progress. It is striking that the employer never considered this in its assessment of his actions. Although Ms. Kirkpatrick did mention career development and training, she could not recall making any effort to identify training that Dr. Lambert might have benefitted from at that time.

[261] Insubordination cases require the employer to prove three essential components: 1) there was a clear order, which the grievor understood; 2) the order was given by a person in authority; and 3) the grievor disobeyed the order. Additionally, *Brown and Beatty*, in para 7:3612 at 7-118, identifies a number of factors that mitigate the severity of discipline for insubordination, including the absence of an intention to defy management or a blameworthy state of mind, and the absence of financial loss suffered by the employer. See *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 66, at para 86; *Nanaimo Collating Inc. v. Graphic Communications International Union, Local 525-M* (1998), 74 L.A.C. (4th) 251, at 262; and *Lilly Industries Inc. v. United Steelworkers of America, Local 13292-02* (2000), 86 L.A.C. (4th) 397.

[262] The threshold for a clear order is quite high, given the serious nature of a finding of insubordination. As observed in *Nanaimo Collating Inc.*, (at para 33) absent a military-type work environment, directions must be specific and express to engage insubordination. For example, a disciplinary suspension was rescinded in *Lilly Industries Inc.* because the supervisor's instructions had not been expressly clear as to whether the grievor in that case or a subordinate was being assigned the work. Although the employer in that case argued that the supervisor's true meaning had been implied, the arbitrator found that his instructions lacked sufficient clarity to

justify discipline for insubordination (see *National Harbours Board, Vancouver v. Vancouver Harbour Employees Association, Local 517, I.L.W.U.* (1974), 6 L.A.C. (2d) 5; *Hunter Rose Co. Ltd. v. Graphic Arts International Union, Local 28-B* (1980), 27 L.A.C. (2d) 338; and *Lyons v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-22400 (19931112)).

[263] Repeating an order and underlining the consequences of refusal have been accepted as positive practices by employers in insubordination cases. It is particularly appropriate in workplaces that have experienced interpersonal tensions, harassment complaints and allegations of discrimination. In *Grover*, a case described as ". . . but a chapter in the ongoing saga of a difficult employment relationship," Dr. Grover was disciplined for insubordination for refusing an order to carry out an employment competition. The employer repeated the order twice in writing, followed by a clear warning. Only after those steps did the employer impose discipline.

[264] A technical violation of even a clearly articulated order does not necessarily amount to insubordination if no harm resulted or if it occurred in a condoned context. As observed as follows in *Myler v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-22912 and 22913 (19930903), at 11, quoting *Collective Agreement Arbitration in Canada* (Second Edition), insubordination is ultimately about an attitude of defiance towards authority:

. . .

> *. . . a mere failure to carry out orders is not equivalent to insubordination unless the delay in obeying is excessive. If one considers the order not to be a firm one, a similar result occurs. What is important is the "attitude" of the employee in question. . . .*

. . .

[265] The fundamental purpose of progressive discipline is to be corrective and rehabilitative. In addition, arbitrators and adjudicators have ruled that employers have a positive duty to offer training and counselling to employees for the parts of their jobs in which their performance is deficient (*Canadian Labour Arbitration*, at para 7:4422).

[266] The employer's conduct is also relevant when considering whether discipline was appropriate (*Canadian Labour Arbitration*, at para at 7:4410).

[267] A fundamental human resources principle widely accepted in arbitral jurisprudence is that untimely discipline may be invalidated due to a delay or due to a pattern of behaviour condoned by the employer (see *Canadian Labour Arbitration*, at paras 7:2100, 7:2120 and 7:2140, and *Manitoba Pool Elevators Brandon Stockyards v. United Food and Commercial Workers' Union, Local 832* (1993), 35 L.A.C. (4th) 276, at 11 and 12).

[268] In *Doucette* (para 100), the adjudicator held that employers are not entitled to delay discipline in order to group incidents.

[269] Evidence of prejudice is not always required to invalidate discipline for delay. While lengthy delays have been held inherently prejudicial, the issue is not always pertinent. In *Corporation of the Borough of North York v. Canadian Union Of Public Employees, Local 373* (1979), 20 L.A.C. (2d) 289, a termination for "serious misconduct" was voided due to the employer's delay of eight months and seven weeks to discipline the employee. The arbitrator's comment that "[a] decision unduly delayed cannot be corrected at all; it is simply invalid," has been cited with approval in cases in which no evidence of prejudice was required (see *Manitoba Pool Elevators Brandon Stockyards* and *Brunswick Bottling Ltd. v. Retail, Wholesale and Department Store Union, Local 1065* (1984), 16 L.A.C. (3d) 249).

[270] The Federal Court, at para 74 of *Pachowski v. Canada (Treasury Board)*, 2000 F.C.J. No. 1679 (T.D.) (QL), accepted that condonation is pertinent to an adjudicator's determination of whether the employer properly applied progressive discipline. If the employer has not previously enforced certain rules or provisions of a collective agreement, it may not discipline their breach without clear notice or warning to employees. Recently, in *Lindsay v. Canada Border Services Agency*, 2009 PSLRB 62, the adjudicator reduced the suspension imposed for the employee's violation of the dress code after finding that the employer had not previously enforced such a strict standard. Even in cases of serious misconduct, such as theft, delays of as short as four months have invalidated the discipline (*University of Ottawa v. International Union of Operating Engineers, Local 796-B* (1994), 42 L.A.C. (4th) 300). Employers may not stand by while a pattern of behaviour continues that it perceives as warranting discipline. Fundamental to the principle of progressive discipline is that it be corrective. Once a reasonable period has passed, employees are entitled to believe that the conduct is

forgiven. That principle (of condonation) is reflected as follows in *Treasury Board's Guidelines for Discipline* (Exhibit G-288):

. . .

> *Disciplinary action, however, should not be delayed; a lengthy time gap between the breach of discipline and management's response tends to dissociate the offence from the corrective action. Such delay may also be considered as condoning and may weaken management's case at adjudication.*

. . .

[271] Dr. Lambert was disciplined for intentionally misleading the employer as to the statuses of seven files that had been assigned to him. However, there is no evidence that he misled the employer about the statuses of those files. He discussed their statuses on a number of occasions and, when asked, always provided an accurate account of the work that remained to be done and explained the barriers to completion. The employer's concerns were about the pace of his work and his failure to meet target dates for completion. The employer never asked Dr. Lambert if he intended to mislead it or whether he deliberately withheld his services. The employer inferred insubordination when it refused to accept Dr. Lambert's explanation for the delays in completing and returning the files assigned to him. When the proper context is considered, the reasons provided by Dr. Lambert provide a reasonable justification for what occurred with the files between May 2002 and May 2004.

[272] The sharp change in Dr. Lambert's employment relationship and the concerns expressed by the employer about his work performance coincide with the events surrounding the issuance of the NOC for Tylosin. No other employee was subject to such formal monitoring. It is clear that, following the Tylosin debate and his removal from the acting team leader position, Dr. Lambert viewed some of the employer's conduct with concern. In July 2002, after he spoke publicly, Dr. Lambert felt that his supervisors were not simply monitoring his work but that they were "gunning" for him. He felt that it did not matter what he did; he would be blamed. He felt that his supervisors were creating a paper trail to build a case against him.

[273] Dr. Lambert also engaged the PSIO process.. It required his significant involvement beginning May 31, 2002 and continuing throughout the period for which discipline was imposed, particularly in summer and autumn 2002. Although the PSIO

rendered its decision on May 21, 2003, an application for judicial review followed, requiring more input from Dr. Lambert. In furthering the PSIO complaint, Dr. Lambert was called on to attend meetings, assist in drafting letters and provide material in support of the complaint. Those events and processes were not only time-consuming but also distracting.

[274] Dr. Lambert's conduct was not consistent with an attempt to intentionally mislead his employer or to withhold his services. For example, from November 2003 to January 2004, Dr. Lambert took the initiative to continue working on Regumate after the employer had taken the position that he was removed from that file. The employer accepted and used that work. When provided with a short time to prepare an issue sheet with respect to Avatec at the SIRC, he completed the task on time. Dr. Lambert was not evasive or disingenuous when asked about his files. He frankly admitted to Ms. Kirkpatrick on January 27, 2004 that he should have submitted the file months earlier.

[275] Dr. Lambert is an experienced and competent evaluator who worked for the employer dutifully and competently for many years.

[276] When Ms. Kirkpatrick decided to impose the 10-day suspension on Dr. Lambert, she did not consult with Dr. V. Sharma or Dr. R. Sharma, despite the fact that they had been his supervisors for the majority of the period at issue.

[277] When it imposed discipline, the employer did not properly consider mitigating factors. Ms. Kirkpatrick considered Dr. Lambert's experience and previous positive performance record as aggravating rather than as mitigating factors. Nor did Ms. Kirkpatrick consider that Dr. Lambert was willing to admit where he had erred. He frankly admitted that he should have submitted the Avatec review much earlier. That should have given Ms. Kirkpatrick pause, and it should have made credible Dr. Lambert's explanation for delays with the other submissions.

[278] During the discipline period, the employer became concerned with Dr. Lambert's use of sick leave. However, rather than consider it as affecting his pace of work, or enquiring into Dr. Lambert's health, the employer adopted a strict approach. Ms. Kirkpatrick did not discuss accommodation issues with Dr. Lambert. The EAP was never suggested to him. Rather, Ms. Kirkpatrick was suspicious of Dr. Lambert's sick leave and told him that he would need to provide a medical certificate for every day of

leave. In fact, Dr. Lambert had taken almost 60 sick days during that period, and he felt that Ms. Kirkpatrick's approach was further harassment and an abuse of authority. The employer did not follow up on this allegation. . In the end, Ms. Kirkpatrick approved all of his sick leave. He was never disciplined for his absence, and his use of sick leave played no part in Ms. Kirkpatrick's decision to impose the 10-day suspension.

[279] In certain circumstances, in which a sophisticated employer flatly refuses to apply well-established human resources mechanisms, it is not necessarily incumbent on the employee to demonstrate an alternative cause for his or her conduct to quash the discipline. In *Manitoba v. Manitoba Government and General Employees' Union* (2002), 114 L.A.C. (4th) 371, at para 29, 32 and 33, the arbitrator held that a long-term employee's sudden decline in work output was not insubordination. Although the arbitrator noted that the employee had advanced some credible explanations for his delays, they were not before the employer when it imposed discipline, and the arbitrator's focus moved to the employer's failure to apply standard human resources mechanisms.

[280] Dr. Lambert observed in his evidence that, if there is no follow up from a petitioner within a very short time, it is reasonable to conclude that its ESC has been abandoned. When Dr. Lambert's work output began to be monitored in May 2002, the ESCs were all overdue. There was no indication that any of the petitioners ever followed up with their submissions, and the employer never raised the ESCs specifically. Some ESCs were controversial, which slowed their progress.

[281] In assessing the appropriate penalty, Ms. Kirkpatrick inappropriately considered Dr. Lambert's discipline for speaking out. The relevance of previous discipline in this instance should have been guided by the behaviour that it was designed to correct. Dr. Lambert grieved being disciplined for intentionally refusing to work. Although the previous discipline was characterized as misconduct, it was imposed for making and endorsing allegedly misleading comments in the media. That had nothing to do with Dr. Lambert's performance, his work output or his failure to respond to the employer's requests; nor was it characterized as insubordination. All of an employee's conduct can be generalized as behaviour, whether it is attendance issues or workplace theft (*Doucette*, at paras 58 and 99).

[282] Moreover, there is no evidence that Dr. Lambert made subsequent public comments that the employer considered inappropriate. For the purposes of progressive discipline, it should be concluded that the discipline had the intended effect on his behaviour. Accordingly, the previous discipline cannot be relied on for this grievance (*Doucette*, at para 99).

3. Employer's reply

[283] There was no evidence that external factors beyond his control contributed to Dr. Lambert's delays in completing his assignments. While there may have been differences of scientific opinion as to how the submissions should have been pursued, there was no indication that the working relationship and communication had broken down.

[284] A point made often by Dr. Lambert is that the employer had sole responsibility to repeatedly request and demand that he complete his work. He did not accept personal responsibility for completing the work that he was being paid to do. When such a request was made in June 2003, the employer was labelled as harassing Dr. Lambert. In short, the employer's position did not matter; Dr. Lambert would not submit his work and would then accuse the employer of acting improperly.

[285] The fact that no requests for updates were made between August and November 2003 did not alleviate Dr. Lambert's responsibility to complete the work as assigned, within the required deadlines.

[286] Dr. Lambert did not give any indication to his employer that the time frames that he suggested were not sufficient to carry out the remaining work. He also did not state to the employer that he required any form of accommodation. At no time did Dr. Lambert give any indication that the tension in the work environment precluded him from completing the tasks. Indeed, one would have thought that the move to the new office area would have alleviated much of the day-to-day tension. In addition, although Dr. Lambert stated that there was "tension" in the workplace, he provided no evidence to explain how it kept him from completing and submitting his assignments. Dr. Lambert provided many reasons during the hearing that were not provided to the employer when it requested updates from him.

[287] Dr. Lambert cited *Myler* for the proposition that a technical violation of an order that was clearly articulated would not necessarily amount to insubordination if no

harm resulted or if it were condoned. The facts in *Myler* are distinguishable. The grievor in that case eventually did his job and stopped short of doing it only to seek clarification as to whether the task formed part of his job functions. In contrast, Dr. Lambert failed to respond to his supervisors' repeated requests for updates and completed work assignments. Even when Dr. Lambert completed work, he failed to submit it until he received a demand that it be done immediately. It cannot be said that no harm resulted in the case of Dr. Lambert. Harm occurs when an employer has to make repeated requests for work with none forthcoming until they are no longer requests but demands.

[288] On the issue of condonation, the decision in *Community Living Espanola v. Canadian Union of Public Employees, Local 2462* (2006), 84 C.L.A.S. 216, at para 32 to 36, deals as follows with many of the cases relied upon by Dr. Lambert:

> *In my view, invalidating discipline for delay without hearing the case on its merits must be seen as an extraordinary step. . . .*
>
> . . .
>
> *. . . the arbitrator* [should] *. . . nullify the discipline without hearing the merits only where the union can establish that the employer's delay has caused prejudice to the grievor. Indeed, in nearly all the cases where the arbitrator has nullified the discipline because of delay, prejudice to the grievor, rather than a general principle against delay, is the real focus of the concern. The prejudice may take different forms - such as condonation, inability to remember a routine task from weeks or months earlier, loss of an important witness - but it is the common factor in most of the cases. . . .*
>
> . . .

[289] There is no condonation in this case. Dr. Lambert was well aware of the employer's expectations that he should do his work. He chose not comply with deadlines, even when they were self-imposed.

[290] The employer is not precluded from considering an employee's prior discipline record even if the further acts of misconduct are different in nature: *Northwest Territories Power Corp. v. Union of Northern Workers* (2004), 132 L.A.C. (4th) 275; *Weyerhaeuser Co. (Drayton Valley Operations) v. United Steelworks Local 1-207* (2007), 159 L.A.C. (4th) 56; and *Alcan Smelters Inc. and Chemicals Inc. v. Canadian Auto Workers, Local 2301* (1998), 77 L.A.C. (4th) 303.

[291] In the alternative, the suspension is reasonable under the circumstances even without considering Dr. Lambert's prior record. In any event, Dr. Lambert's actions for the 5-day and 10-day suspensions constitute a continuing pattern of conduct, even though they were not of the same type.

C. <u>Reasons</u>

[292] Dr. Lambert was disciplined for the following three types of misconduct (from the disciplinary letter, Exhibit E-283, tab A-2):

> 1) intentionally misleading the employer on the statuses of assigned files (in essence, an act of dishonesty);
>
> 2) deliberately withholding services by failing to complete work as promised; and
>
> 3) insubordination, demonstrated by ignoring requests for updates on the statuses of files and through failing to return files when requested.

[293] The parties' submissions focused on insubordination. I agree that Dr. Lambert's alleged misconduct is aptly captured by insubordination.

[294] Dr. Lambert grieved his negative performance evaluation. That grievance is not before me. The PDP evidence, including the evaluation, is only relevant insofar as it shows that the employer initially attempted to address work performance issues through a non-disciplinary process. It is also evident that Dr. Lambert was aware of the legitimate concerns of his supervisors about his lack of productivity.

[295] Dr. Lambert submitted that he felt that the employer was "gunning" for him and that the timing of the attention paid to his work production was suspicious, coming as it did soon after the Tylosin issues. It is clear that Dr. Lambert was at the forefront of the employer's attention at that time, given his prominent role in speaking to the media. That did not prevent the employer from monitoring his work and insisting on work production. No evidence was adduced to show that it was a sham or a made-up exercise by the employer. The evidence shows that the employer had legitimate concerns about Dr. Lambert's work productivity. Therefore, I need not consider the timing of the attention paid to Dr. Lambert.

[296] A finding of insubordination requires the following three elements: 1) evidence of a clear order or instruction by someone in authority; 2) evidence that the order or

instruction was not obeyed; and 3) the absence of any reasonable explanation for the failure to comply with the order or instruction.

[297] There is no doubt that Dr. Lambert's supervisors assigned him specific files to work on during the period in question. The evidence is also clear that the employer regularly asked for status updates (I will address the condonation submissions later). The evidence is clear that Dr. Lambert either ignored requests for updates or made commitments to deliver completed files and then failed to meet those commitments. The evidence also shows that Dr. Lambert failed to return files promptly when ordered. That evidence shows that there were clear orders or instructions from Dr. Lambert's supervisors and that he consistently refused to comply with those instructions.

[298] The Avatec Premix review, completed on March 26, 2002 and not submitted until November 6, 2003, is a telling example. On June 18, 2002, Dr. Lambert stated that it was completed and that it would be submitted on June 20, 2002. No explanation was provided as to why it was not submitted until about 16 months later.

[299] A failure to complete assigned tasks changes from being a performance issue to a misconduct issue when the employee's intention is to not complete the work or if no reasonable explanation is provided for the failure to complete the work.

[300] There can be legitimate reasons for not following an order or instruction from a supervisor. I will now turn to the explanations given by Dr. Lambert for his failure to complete his work tasks. The first explanation is that the conduct was not intentional; in other words, that it did not warrant a disciplinary response from the employer. Dr. Lambert admitted that he had the necessary knowledge and experience to perform the assigned tasks. His previous performance evaluation also demonstrated that he was capable of performing the duties of an evaluator. The significant amount of approved sick leave taken by Dr. Lambert could have had an effect on his productivity, but it does not explain his failure to respond to requests for updates when he was in the office and also cannot explain his failure to complete most of his assigned work.

[301] As suggested by Dr. Lambert in both cross-examination and in his submissions, there may have been health- or stress-related reasons for the delays, or he may have had difficulties prioritizing. However, Dr. Lambert did not raise any such concerns with the employer, and no evidence was adduced at the hearing that any such factors affected his ability to complete assigned tasks.

[302] There was evidence that Dr. Lambert was working on his several grievances and the PSIO investigation during his regular work hours, which was not a ground for the discipline. No evidence was presented that the amount of time spent on those activities interfered with his assigned workload. No doubt, those activities were both distracting and stressful. However, difficulties with one's employer cannot be an excuse for little or no work production.

[303] The fact that the ESCs may have been abandoned by investigators is irrelevant. The fact remains that the work was assigned and was not completed in a reasonable period. No evidence was provided as to why the investigators did not follow up on their applications, but it seems evident that a key aspect of an ESC is to obtain timely approval to allow for a study that may be time sensitive.

[304] Dr. Lambert submitted that the employer had an obligation to identify appropriate training for him. The employer identified training on managing priorities and time management in the performance evaluation. Dr. Lambert did not identify any training that would have helped him with his workload. Dr. Lambert did not identify any problems that would have benefitted from training.

[305] Dr. Lambert submitted that the employer condoned his behaviour by taking a lot of time before raising its concerns with him. Dr. Lambert's supervisors did ask for periodic updates. He was clearly told that it was expected that he would complete assigned tasks. An employer is entitled to expect that assigned work is being done and is not required to ask for weekly or monthly status updates. Dr. Lambert was employed as a professional, and the employer should have been able to treat him as one without being accused of condoning his failure to complete the work.

[306] Therefore, I conclude that the employer established that Dr. Lambert was insubordinate by his failure to respond to requests for updates, by his failure to return files when requested and by not completing assigned tasks.

[307] Dr. Lambert submitted that the employer did not consider, as a mitigating factor, the fact that he admitted in January 2004 that he should have submitted the file "months earlier." In my view, his admission was too little, too late. Frankly, it is stating the obvious. It does not mitigate his constant failure to respond to requests from supervisors or to complete his work assignments.

[308] Dr. Lambert submitted that the 10-day suspension was not appropriate progressive discipline. Dr. Lambert was given a 5-day suspension on March 12, 2004 for speaking to the media and received this 10-day suspension just over two months later. I will address the delay in imposing the 5-day disciplinary measure in my reasons for the grievances about speaking to the media. However, the 5-day suspension was for activities that occurred between July 2002 and November 2003. Dr. Lambert was aware that his behaviour during that period was under investigation and that the employer considered those activities misconduct.

[309] This is not like the situation in *Doucette*, in which the positive effect of the corrective measure was observable (in that case, improved attendance). In this case, although Dr. Lambert had not spoken to the media since November 2003, his insubordination behaviour continued. When considering progressive discipline, it is important to examine the nature of the behaviour to correct. In both acts of misconduct, there was a failure to follow instructions from the employer and a wilful intent to challenge the employer's authority. Therefore, progressive discipline was appropriate in this case.

[310] However, should I be wrong in this conclusion, I would also have found that a 10-day suspension was appropriate, given the length of the delays in producing work, the failure to provide work that was in fact completed and the prolonged efforts of the employer to obtain the work.

V. <u>Discipline for speaking to the media</u>

A. <u>Discipline imposed</u>

[311] The grievors were disciplined for speaking to the media on a number of occasions between July 3, 2002 and November 12, 2003. Dr. Chopra received a 20-day suspension, Dr. Haydon received a 10-day suspension and Dr. Lambert received a 5-day suspension. I will summarize the media events chronologically as in some cases more than one grievor was interviewed.

[312] The employer imposed discipline on Dr. Chopra on December 9, 2003. Discipline was imposed on Dr. Haydon on February 17, 2004 and on Dr. Lambert on March 12, 2004.

[313] In the letters of discipline, the employer explained that the discipline had been delayed because a “full and comprehensive review” was required and because there was a “mutual decision to await the outcome” of the investigation into allegations of wrongdoing made by the grievors to the PSIO on May 31, 2002. The grievors dispute that there was a mutual agreement. The PSIO report was released on March 21, 2003.

B. Previous discipline

[314] Dr. Chopra and Dr. Haydon had already been disciplined for speaking to the media. Both were reprimanded in 1998 for speaking to the media about their concerns with the drug approval process. The reprimands were rescinded by a decision of the Federal Court (*Haydon No. 1*). Dr. Haydon received a 10-day suspension for speaking to the media about a ban on Brazilian beef, which was reduced to a 5-day suspension at adjudication. Dr. Chopra received a 5-day suspension for comments he made to the media about the stockpiling of anthrax vaccine. The decisions in those matters set out the details of the discipline imposed, and I have provided only a brief summary in this decision as a necessary context for the events that followed.

[315] In 1998, Dr. Chopra and Dr. Haydon were interviewed on television. Both expressed concerns about the drug review process and the impact it could have on the health of Canadians. In particular, Dr. Chopra discussed the health and safety concerns that he and Dr. Haydon had with respect to the approval of growth hormones and antibiotics and that they were being pressured to approve drugs of questionable safety; see *Haydon No. 1*, at page 112. In that decision, the Federal Court highlighted some of the grievors’ efforts to raise the issues internally. It also referred to the conclusions in a parliamentary committee report on rBST, a growth hormone. Dr. Chopra and Dr. Haydon had testified before that committee. The Court stated as follows (at page 115):

. . .

> *In addition, concerns with respect to the drug approval process were underscored by the Standing Senate Committee on Agriculture and Forestry (the "Committee") mandated by the Senate of Canada as a result of the controversy surrounding the drug rBST (a growth hormone). In their interim report, the Committee makes numerous recommendations, among them, is the recommendation that the Government conduct an evaluation of the drug approval process to ensure that it fully safeguards human and animal health and safety. In fact, the Committee highlighted specific*

> *concerns with the approval process. For instance, the Committee indicated that it believes that Health Canada drug evaluators must be permitted to undertake their duties without perceived pressure from industry or from Health Canada management for them to approve drugs of questionable safety.*

. . .

[316] The Federal Court concluded that Dr. Haydon's and Dr. Chopra's comments to the media were an exception to the duty of loyalty owed by employees to their employers because they disclosed ". . . a legitimate public concern with respect to the efficacy of the drug approval process . . ." (at page 115). The Court concluded that it was unreasonable to prevent Dr. Chopra and Dr. Haydon from going to the media in cases of legitimate safety or health concerns about the employer's policies. The Court also concluded that the scientists had been justified in going to the media and that they should not have been reprimanded (at page 120).

[317] In February 2001, Dr. Haydon was interviewed by *The Globe and Mail* newspaper and made comments about a recent ban on beef imports from Brazil. She stated that the ban was connected to a trade dispute with Brazil and was not in place because of legitimate health concerns. She received a 10-day suspension, which she grieved. At adjudication, it was reduced to five days (*Haydon v. Treasury Board (Health Canada)*, 2002 PSSRB 10). The adjudicator concluded in his decision (issued on January 25, 2002) that her comments were not about public health or safety. The adjudicator's decision was maintained on judicial review (*Haydon v. Canada (Treasury Board)*, 2004 FC 749 ("*Haydon No. 2*") and 2005 FCA 249; leave to appeal to the Supreme Court of Canada dismissed).

[318] Dr. Chopra received a five-day suspension on March 25, 2002 for comments he made in the media about the stockpiling of antibiotics and smallpox vaccine after the notorious events of September 11, 2001. On judicial review, the adjudicator's decision dismissing the grievance (2003 PSSRB 115) was maintained (*Chopra v. Canada (Treasury Board)*, 2005 FC 958 and 2006 FCA 295; leave to appeal to the Supreme Court dismissed).

C. <u>Speaking to the media</u>

1. *CTV National News* (Dr. Chopra, Dr. Haydon and Dr. Lambert, July 3, 2002)

[319] On the *CTV National News* on July 3, 2003, a report aired about the veterinary drug approval process at Health Canada (Exhibit E-15, tab C-1). The reporter, Jennifer Tryon, stated in her introduction that four scientists had felt pressure to approve certain drugs that might not have been safe. Dr. Chopra was interviewed, and stated that "[w]e were being pressured to pass drugs of questionable safety to favour the pharmaceutical companies." Dr. Haydon stated, "The public doesn't know what happens in Health Canada and this is why I am here to speak out." Dr. Lambert stated that "[o]ur job is at stake, but I think what is important is the public safety."

[320] The reporter also referred to the discipline imposed on Dr. Basudde, who was also quoted.

[321] Dr. Alexander was interviewed and stated, "Health Canada staff are not being pressured by manufacturers." A representative of the non-prescription drug manufacturers association stated that lobbying had been done and that he would be "a little disappointed" if internal pressure to speed up the approval process had not been created.

[322] The reporter concluded by saying that the "dissident" scientists would not be satisfied until there was a full Senate investigation into the drug approval process.

2. *Canada AM* (Dr. Chopra and Dr. Lambert, July 4, 2002)

[323] Both Dr. Chopra and Dr. Lambert were interviewed on *Canada AM* on July 4, 2002. Dr. Chopra was asked about the incident that led to the four scientists speaking out. He replied as follows:

> *[This] . . . is the latest and is the worst example of something that has been happening for a number of years going back to 1996 and before. There has been pressure all the way through to approve drugs quickly and drugs that we think are of questionable safety, and we have been complaining about it. We've been writing to our bosses at Health Canada. We've been writing to every minister since then. We have gone to many courts, tribunals, and nobody in the country will deal with this issue. They will deal with only things of a personal nature. Well now the situation has come that if we even ask for a discussion on the subject then the department now officially is beginning to reprimand individuals.*

[324] The interviewer asked Dr. Chopra about the reprimand. Dr. Chopra said that the reprimand was that "you may be suspended, you may be demoted" and that a letter of reprimand might be issued stating "that if you do not agree with us, which we call being disrespectful, then you may be dismissed."

[325] Dr. Lambert was asked by the interviewer about implants with Tylosin. Dr. Lambert stated that he had not been able to approve the submission because the company did not submit a human safety letter. He said that, because he raised that issue, he was removed from his acting team leader position and was "punished."

[326] Dr. Chopra was asked about implants with Tylosin. He stated that "both those drugs are banned in Europe." He also said that the only person who could "fix the problem" was the Prime Minister.

[327] Dr. Lambert was asked if he thought he would be fired for speaking to the media. Dr. Lambert said, "We don't know, but I think what was important was to go public because it's a public safety issue and we cannot be silent on that issue."

3. <u>Open letter to veterinary organizations (July 17, 2002)</u>

[328] The grievors sent an open letter to the Canadian Veterinarian Medical Association (CVMA) and to all provincial veterinary medical associations and provincial veterinarian licensing bodies (Exhibit E-198, tab 3). The grievors stated that they were ". . . attempting to stop our supervisors from pressuring us to approve or maintain a series of veterinary drugs without the required proof of Human Safety under the *Food and Drugs Act* and *Regulations*." They also noted that the issues impinged on food safety and health and were of "grave concern" to them and to the public.

4. <u>Grievors' letter to the Deputy Minister (August 19, 2002)</u>

[329] On August 19, 2002, the grievors and Dr. Basudde wrote to the Deputy Minister about "complaints of wrongdoing" and attached some documents (Exhibit E-198, tab 2). The Minister, the Clerk of the Privy Council, Dr. Edward Keyserlingk (the head of the PSIO) and the President of the PIPSC were copied. The grievors wrote as follows:

> *. . .* [the attached correspondence] *shows that Health Canada managers responding to these complaints are some of the very same individuals who are accused of committing a series of acts of wrongdoing in this department. The position that they appear to take is that since these issues are under*

> *investigation by the Public Service Integrity Office (PSIO), they are not obliged to take the necessary action in their purview. We stress that the issues involved in this matter are the legal responsibility of the Health Canada management under your jurisdiction and not that of PSIO. We find this situation to be detrimental to the public interest. To leave resolution of these issues to PSIO can only be considered as an abdication of the management's due responsibility under the laws of Canada. Difficult as it might be, we ask for your immediate response.*

. . .

[330] The attachments included the CTV news transcripts and documentation about the employer's fact-finding investigation.

5. *CBC National News* and *Country Canada* (Dr. Chopra and Dr. Lambert, October 17 and 21, 2002)

[331] Dr. Chopra and Dr. Lambert were interviewed for a *Country Canada* report. Portions of those interviews were excerpted for the *CBC National News* as a "teaser" for the upcoming *Country Canada* episode. The report was about the approval of the Component with Tylosin.

[332] Dr. Chopra agreed with the interviewer that he had been called a troublemaker but that many other people in Canada had called him a hero. He stated that the drug should not have been approved because the company had provided no data. Dr. Chopra told the interviewer that the submission came to his attention because of his particular expertise in AMR. He also said that his "science has never been questioned by anyone in the department."

[333] Dr. Chopra told the interviewer that the pressure to approve drugs did not come directly from the pharmaceutical companies but indirectly, through their lobbying of the Prime Minister, the Minister and the PCO. He said that the pressure then flows down to his level.

[334] Dr. Chopra told the interviewer about the pressure to approve Baytril and referred to the Baytril Roadblocks report. He said, "If I'm told approve this drug because it's already approved by the US, I don't need to look at the data, that's where the buck stops, because if I do that then I will be lying."

[335] Dr. Chopra referred to himself in the interview as a "confirmed whistleblower" and said, "Don't ask me to bend the law. I cannot bend the law."

[336] Dr. Lambert was also interviewed. He told the interviewer that there was no human safety data to support the submission.

[337] Dr. Chopra disagreed with the interviewer's suggestion that there was a scientific difference of opinion with Ms. Kirkpatrick. He said that there could not be a difference of opinion with no data.

[338] The interviewer spoke about the May 6, 2002 review (Exhibit G-42) of Dr. Mehrotra and Dr. Shabnam (who Dr. Chopra referred to as relative newcomers to Health Canada), stating that they approved the submission despite their comment that ". . . no anti-microbial residue data were submitted, and therefore no conclusion could be made." Dr. Chopra told the interviewer that, if there was no data, nobody could approve the drug, according to the law. He said that he and his colleagues told Ms. Kirkpatrick that this was wrongdoing and that she did not have the authority to approve the submission.

[339] Dr. Lambert told the interviewer that the approval of the submission was "mind-boggling" and unacceptable.

[340] Dr. Chopra then spoke about risk management, stating the following:

> *They call it risk management. In other words, to make profit let us take risk, and we will wait 20 or 30 years. If cancers occur, reproductive disorders occur, if people . . . too many people die from antimicrobial resistance, then we will think about it. Then we will manage it.*

[341] The interviewer then summarized the removal of Dr. Lambert from his acting position and said that he was demoted and replaced by one of the scientists who had approved the implants. Dr. Lambert told the interviewer that the reason he was given for being removed from the acting position was that he lacked judgment. He said, "Maybe I lack judgment for my career, but I don't lack judgment for health, for science."

[342] The interviewer quoted from the memo that Ms. Kirkpatrick sent to Dr. Chopra, Dr. Lambert and Dr. Basudde on May 16, 2002 (Exhibit E-33), which he described as

confidential. Dr. Chopra told the interviewer that either Ms. Kirkpatrick was right or he was right and that the Minister or Deputy Minister would have to choose.

[343] Dr. Chopra told the interviewer his views about Ms. Kirkpatrick. He said, "She got herself appointed as Director General. She has a PhD in physical chemistry. She's not a veterinarian, she's not a microbiologist, she's not a biologist. All of those things."

[344] The interviewer quoted Dr. Chopra as saying that a growing list of drugs made him uneasy. Dr. Chopra then stated, "Nothing is going to happen to you tomorrow, or maybe even a year's time. But over [the] long term you may get cancer, there will be reproductive disorders in . . . your children and grandchildren."

[345] A report appeared in *Le Devoir* on October 22, 2002, which largely reported about and reproduced some of the quotes from *Country Canada*. In addition, Dr. Lambert was interviewed by the *Le Devoir* reporter (Exhibit E-18, tab D-4, an unofficial translation):

> *Gerard Lambert pointed out that "a few years ago, the decision not to allow other non-therapeutic uses of this drug as a growth enhancer had been made, because it creates resistance to other antibiotics, erythromycin, which is commonly used to treat infection in children."*
>
> . . .
>
> *"If we approved the product proposed by the company, no one would give us a hard time," admitted Dr. Lambert. "However, I did request a meeting to re-evaluate the case, since there seemed to be an unwillingness to request new data. The managers did not appreciate my actions. I was criticized for not being a team player and lacking professional judgment. I finally lost my position as a team leader, because I didn't support the decision of the others."*

6. <u>Letter to the Prime Minister (November 4, 2002)</u>

[346] The grievors and Dr. Basudde wrote to the Prime Minister on November 4, 2002 with their concerns about the drug approval process (Exhibit E-19, tab D-2). The letter was copied to the following individuals and organizations: the Minister of Health, the Deputy Minister of Health, the Clerk of the Privy Council, the PSIO, the President of PIPSC, the Council of Canadians, the National Farmers Union, the Canadian Health Coalition, the Sierra Club of Canada and the Sierra Legal Defence Fund.

[347] The letter referred to the obligations under the *FDA* and its regulations and stated that ". . . no government official, regardless of rank is permitted to make any compromises." The letter continued as follows:

> *However, during the last several years, each of us and others have been subjected to consistent harassment and coercion to bend the law and pass or maintain certain veterinary products with questionable records of safety. . . .*
>
> *Please note that prior to this letter our concerns about these issues have duly and repeatedly been transmitted to each and every level of government authorities under your charge, including a series of Health Canada Ministers, Deputy Ministers, Privy Council Clerks and most recently the Public Service Integrity Officer. Unfortunately, instead of anyone correcting the situation, we are the ones who continue to be labeled and even punished as "trouble makers."*
>
> . . .
>
> *Thus, the situation that we and, through us, all the people of Canada confront* [,] *Prime Minister, has become truly desperate and urgent. The only remaining authority that we have not yet directly requested to intervene in this regard is that of your own office.*
>
> *We trust that you will give it your due consideration and reply to us at your earliest convenience.*

[348] The grievors included background material with the letter (Exhibit E-198, tabs 2 to 4). The Clerk of the Privy Council replied on December 16, 2002 and noted that it was inappropriate for him to comment on the matters raised in the letter because they were under investigation by the PSIO (Exhibit E-198, tab 1).

7. <u>Press conference and media coverage (November 18, 2002)</u>

[349] On November 15, 2002, Ms. Kirkpatrick emailed the grievors and Dr. Basudde, advising them that she had become aware of a press conference scheduled for the following Monday (Exhibit E-19, tab D-1), at which the grievors were scheduled to speak. She sent the email at 18:30. She wrote the following:

> . . .
>
> *Through previous discussions and through the courts, you are aware of the balance that needs to be struck between the public interest in maintaining an impartial and effective public service and employees' freedom of speech. I would*

> *remind you of your responsibility as a public servant and employee of this department. Further, I would also like to take this opportunity to remind you of:*
>
> *(1) the mechanisms in place for hearing and debating analyses in decision-making in scientific and regulatory matters including VDD's internal mechanisms. In this regard, and as you are aware, VDD has a Peer Review Policy which highlights that process; and*
>
> *(2) the mechanisms in place to raise and have personal issues addressed by VDD managers and more formally through the appropriate Public Service processes.*
>
> *I trust that you will bear the foregoing in mind and discharge your duties accordingly.*

[350] At the press conference, Nadege Adam, a representative of the Council of Canadians, introduced the grievors and Dr. Basudde (Exhibit E-19, tab D-4). She stated that the purpose of the news conference was "to denounce Health Canada's practices that have put the health of Canadians at risk and to demand action on the part of the government." Dr. Chopra spoke about the letter the grievors had written to the Prime Minister. He reiterated that drugs had to be approved based on data, not on testimonials. He also said that he was not talking about just one drug but the "whole system." He continued as follows: "We must do our job which is to make sure that the data required under the Canadian *Food and Drugs Act* which comes under the criminal code is provided. To falsify and to say anything else otherwise would be wrong and would be against the criminal code."

[351] Dr. Haydon spoke at the news conference and said, "We have all been damaged and we have all been harassed and coerced."

[352] Dr. Chopra said that the NOC for the implants with Tylosin was imminent, that the four scientists felt that it should not be issued and that this combination was banned in Europe. He also referred to Ms. Kirkpatrick's memo, saying that she said that, since the drug was approved in the United States, there was no need for a meeting to discuss the concerns of the four scientists. He also questioned why the number of evaluators had been increasing at the employer. He asked, "To what advantage? There's nothing new in terms of new discoveries . . . new drugs."

[353] Dr. Chopra summarized the email the four scientists had received from Ms. Kirkpatrick on the previous Friday evening and said that he considered it

"intimidation" and "clearly a threat." He characterized the email as stating that, "[d]espite the fact that the Federal Court has ruled that it is our duty to the public as public service employees, now we're being told we should only be going to courts or internal mechanisms." He said that they had exhausted all internal mechanisms and that the different tribunals and courts had said that they did not have the jurisdiction to deal with human safety.

[354] Dr. Chopra answered as follows a question from a reporter about which specific drugs were in question:

> *. . . certainly we're not talking about any specific products. We have said from the beginning and we are saying it today again, the two classes of drugs which are in question, these are all hormones for growth of meat, milk, anything. They're not used for any therapy, any disease in animals. They're only to increase yields. They must be banned because they are carcinogenic, several of them are carcinogenic and cancer does not develop in one day or in one event. They're* [the United States] *willing to take a chance, one in a million is alright to make profit but we're not talking about one in a million, we're talking about not one drug, we're talking about several . . . It may be 15 per million, it may be 20 per million and then . . . when you're using those drugs for the life of animals all the way up to consumption time just imagine what we're doing. Cancer starts in one single cell. We cannot determine the residue that will trigger one single cell to become cancerous.*

[355] Dr. Chopra then proceeded to talk about antibiotics and AMR. He also commented on food safety standards in Canada as follows:

> *. . . anybody who tells us Canada has the highest . . . food safety standard is absolutely false because the only way to compare that with Canada is to other industrialized countries. Look at the other industrialized countries, in Europe they have banned these things. If we compare ourselves to the poorer countries, you cannot show . . . that they are eating unhealthy food or unhealthier food than the Canadians do.*

[356] Dr. Haydon said, "[I]t's a shame that public funds are actually being spent to harm the public," and that the four scientists were asking for an inquiry into the drug approval process.

[357] *The Globe and Mail* online edition, posted on November 18, 2002 (Exhibit E-19, tab D-5), contained a quote from Dr. Chopra's interview with *Country Canada* about risk management.

[358] Dr. Haydon was quoted in a subsequent update of *The Globe and Mail* article (Exhibit E-19, tab D-6) as saying that the drug approval system was in "chaos."

8. <u>CFAX-AM interview (Dr. Chopra, November 21, 2002)</u>

[359] Dr. Chopra was interviewed on CFAX-AM in Victoria, British Columbia, by telephone on November 21, 2002 (Exhibit E-15, tab F-1). Dr. Chopra stated, "Over the years, gradually, it's been mounting to the point where it simply cannot be tolerated. Public is being damaged." He went on to say the following:

> *. . . some of these drugs, like hormones, cause cancer. We know they cause cancer. . . . The world agrees they cause cancer. But they keep on pretending that it doesn't cause cancer. How do you prove it actually causes cancer in humans, because you have to wait 20 or 30 years. And yet it's been shown that some of these hormones can begin the cancer and then promote the cancer. And yet they have maintained and they've never had data to show that they don't. And Europe, as a consequence, has banned the use of all hormones in food production.*
>
> *The second problem is antibiotics. And various of these antibiotics . . . can also as a result cause antimicrobial resistance . . . people can become sick or actually die, and there's nothing to treat them with.*

[360] The interviewer then asked Dr. Chopra (about Ms. Kirkpatrick), "Who is she, and is she a scientist?" Dr. Chopra replied that "she could claim to be a scientist" but that she was not a veterinarian and had no drug experience. He then continued:

> *. . . that's the kind of problem that's been happening in Health Canada. They bring* [in] *some generic managers and they say they know how to manage science, and you guys just sign on the bottom line and everything will be fine. And if you sign, we'll promote you; if you don't sign we'll demote you, we'll humiliate you, we'll fire you, we'll suspend you, all those things that are going on. . . .*

[361] In the interview, Dr. Chopra recounted his involvement with the dispute involving Dr. Lambert and Dr. Basudde and the approval of the Tylosin implants. He referred to an email that he had sent in which he wrote that ". . . both these drugs are

banned in Europe." He then gave an account of Ms. Kirkpatrick's meeting with Dr. Basudde and Dr. Lambert (although he did not attend). He said that Ms. Kirkpatrick had described Dr. Basudde's body language as threatening and that she had called security. He also said that she had told Dr. Basudde that he needed psychiatric treatment and that she could recommend someone or he could go to a psychiatrist of his own choosing.

[362] Dr. Chopra said that companies were applying pressure and that the drug evaluators were being asked to "look the other way." He said that, because of trade with the United States, there was pressure to pass drugs originating there. He also referred to the criminal charges that had recently been laid against two of the employer's officials in connection with the tainted blood scandal.

[363] The interviewer then turned to the BSE issue and referred to a "cover-up." Dr. Chopra replied, "Well, here you go."

[364] The interviewer suggested that, as a scientist, Dr. Chopra could either ". . . toe the line and play politics . . . or you're going to either get disciplined or you're going to get fired. Is that correct?" Dr. Chopra replied, "Precisely."

[365] The interviewer then asked if the employer or "anybody that you know of" was getting paid by pharmaceutical companies to pass drugs. Dr. Chopra stated the following:

> *. . . of course I have no knowledge of that kind of thing directly. You see, when people talk about corruption, automatically money and bribe comes to mind.*
>
> . . .
>
> *It's not how modern corruption works. As we know, the fall of the dot-com business and this is bio dot-com. It's the same kind of thing.*

[366] The interviewer asked Dr. Chopra if he believed that a lot of corruption was occurring at Health Canada. Dr. Chopra replied as follows:

> *Well, in the sense if people who don't deserve, who don't have the knowledge, get the jobs and are maintained for years and years and years, and they keep on bringing more and more people, and so this . . . you know, the word "corruption" is a technical . . . word because it's a legal term in that sense.*

> *should say that I'm speaking as a citizen and not because I work at Health Canada, but therefore I refuse to shut up. . . .*

[370] Dr. Chopra then commented about food irradiation. He asked why it was being done. He stated that the presence of bacteria on food was an indicator of contamination, that the source of the contamination should be identified and that it should not simply be destroyed at the end of the process. He concluded with the following: "Because you are covering up wrongdoing."

[371] Ms. Kirkpatrick emailed Dr. Chopra on February 12, 2003 about the food irradiation session (Exhibit E-15, tab G-2). The email included a transcript of his remarks. Ms. Kirkpatrick repeated some of her earlier email about the session. She stated that she did not warn him that he should not be at the session and that she did not tell him that he was not a citizen. She stated that she was assessing the situation and that she offered him an opportunity to provide input by February 19, 2003. Dr. Chopra replied on the following day and asked that he be provided with a complete transcript of the entire session (not just his own comments) as well as the "back-and-forth" communications with the organizers. He then said that any further queries should be directed to his lawyer, Mr. Yazbeck.

10. *CBC Radio One* report on BSE surveillance (Dr. Haydon, May 21, 2003)

[372] Dr. Haydon was interviewed by the CBC about a recent discovery of a BSE-infected cow in Alberta. Dr. Haydon was quoted as saying that the preventive steps taken by the government were not enough because the disease can remain dormant for up to a decade. The report referred to Dr. Haydon warning that more should have been done in 2001. She said, "I'm sorry to say that I told you so. And I think this is just the beginning."

11. *CTV News* and *The Globe and Mail* BSE reports (Dr. Chopra and Dr. Haydon, June 5, 2003)

[373] Dr. Haydon and Dr. Chopra were interviewed by a CTV reporter on June 5, 2003 (Exhibit E-19, tab E-2). The reporter stated that the BSE case had "come as no surprise" to the four scientists (the grievors and Dr. Basudde). Dr. Chopra said, "It was bound to happen." Dr. Haydon was asked how long she had been telling the employer about ruminant feed spreading BSE. She replied that she had been doing so since February 2001. Dr. Chopra said, "Why are we taking this risk? It's such a simple thing, that you

don't feed it and the disease stops. It doesn't spread. It's as simple as that. Why wouldn't they listen?"

[374] The Minister was interviewed and said that the BSE letter from the grievors was the first time they had approached her about the issue. The reporter stated that, coincidentally, Dr. Chopra was suspended from his job three days after sending the letter. Dr. Chopra stated, "I have no proof that . . . this is the reason why it happened. But it makes you wonder."

[375] A report from *The Globe and Mail* (Exhibit E-19, tab E-3) stated that Dr. Chopra had been suspended for two weeks and that he had been fined three months' pay ". . . soon after urging the department to ban animal feeds that are suspected to cause mad cow disease." Dr. Chopra was reported as saying that he was suspicious of the timing of the disciplinary measures. Dr. Haydon was reported as saying that she was upset with Dr. Chopra's suspension since the scientists had complied with an employer request not to make the matter public. She is quoted as saying the following: "Now look what happens when we send a polite letter internally."

12. CTV's *Canada Now* BSE report (Dr. Chopra and Dr. Haydon, June 6, 2003)

[376] Dr. Chopra and Dr. Haydon were interviewed on CTV's *Canada Now* program on June 6, 2003 about BSE and the letter that they had written to the Minister on May 27, 2003. After summarizing the letter and describing the steps Dr. Haydon had taken to raise the issue, Dr. Chopra was asked whether his argument was anecdotal. He stated the following:

. . .

> *No. That is complete nonsense. How long does it take to test that such practices will actually cause mad cow disease? Because this cow was eight years old. How many cows would you need to prove that it causes mad cow disease? How many cows will need to be fed to people to say that it kills people? This can run into many, many years - fifty years. Millions of people, millions of cows. There is no way. That whole proof is already there. To say that it was only cow and we need proof — well . . . that proof is already there.*

[377] The reporter asked Dr. Haydon whether it was fair to say that she was saying, "why take the chance" of not imposing a complete ban. She agreed, and said, "For the

public safety, I just don't feel that we should take that risk. We've already had examples of many people dying in Europe."

13. <u>Dave Rutherford's show (Dr. Chopra and Dr. Haydon, June 6, 2003)</u>

[378] Dr. Chopra and Dr. Haydon were interviewed by Dave Rutherford by telephone for a live radio show on June 6, 2003 (Exhibit E-19, tab E-5). Dr. Chopra talked about the necessity of a "complete and immediate ban" and stated that Canada was continuing with "this disastrous practice." Dr. Haydon was asked about the ban on ruminant feed introduced in 1997 and replied as follows:

> *I don't consider that a true ban. To me, that was a paper tiger. Nobody was checking up on that. And how does a farmer know that his feed that went through the feed mill wasn't contaminated with chicken feed ahead of it? . . . Nobody's checking on that. And I don't consider that a true ban. A true ban has to be a complete ban of all this rendered material in all types of feed.*

[379] Dr. Chopra and Dr. Haydon were asked if they had evidence or if they suspected cross-contamination. Dr. Chopra said that the 1997 ban was not a ban but an advisory to farmers, and added, "So, that's not a ban. If it's a ban, then our [CFIA] . . . inspectors would go and remove them and prosecute people who do such things. So it's not a ban." Dr. Chopra said that it was simply a label warning. He also said that research showed that BSE was in several species and that it could cross over from feeding, injections and "various other ways."

[380] Dr. Chopra stated that, after writing the letter to the Minister on May 27, 2003, "It was used as another excuse to actually suspend me for three months . . . without pay."

[381] Dr. Chopra also stated that the four scientists had received a backdated letter that day from the ADM that stated that the employer would arrange discussions at some future date. He then stated, "There's a national emergency going on. And who is covering up here?" Dr. Chopra explained that the letter was dated June 4, 2003 but that it was delivered to the four scientists only after they had gone to the media. Dr. Haydon stated the following:

. . .

> *. . . You know, to receive a letter backdated two days after we've already spoken to the media, this is just unbelievable that this is happening. They should have invited us two years ago to discuss this when I initially spoke about it. And they have transcripts. They have tape recordings of my conversations mentioning all this and all my concerns at that time. Now, who was sleeping?*

[382] The interviewer asked whether it was true that BSE would not cross over into other species. Both Dr. Chopra and Dr. Haydon said that that statement was wrong. Dr. Haydon said that United Kingdom scientists had demonstrated in a lab environment that pigs could be infected with BSE. She said the following:

> *The interesting thing about that is that the pigs don't show the same clinical signs as the cows did. Now, if they are incubating this condition and then spreading it and amplifying it in the feed, and then that feed goes back to ruminants, we are really in trouble.*

[383] Dr. Chopra explained to the interviewer how BSE spreads. He said that Britain continued to export ruminant material to Canada as late as 2000. The interviewer asked Dr. Haydon whether BSE could be transmitted to other species. Dr. Haydon agreed that "that can be said" and that an "awful lot" is not known about the disease. She said that she and her colleagues had concerns about human safety.

[384] The interviewer asked Dr. Chopra and Dr. Haydon if they expected other ramifications for speaking out. Dr. Chopra said that he had already been suspended for three weeks and that he had been "ordered to go into isolation." Dr. Haydon said that she had been "threatened that I could be moved and isolated to a different location as well."

14. Stirling Faux's show, CHED-AM (Dr. Chopra, October 4, 2003)

[385] Dr. Chopra was interviewed by telephone on a radio talk show, on October 4, 2003 (Exhibit E-15, tab I-1). He was asked about the drug approval process, and he talked about being told to approve drugs because they had been approved in the United States. He also said there was a need for whistleblower legislation because he was not getting protection. He said that pressure was coming from the PCO and that it did not come directly from the companies.

[386] Dr. Chopra said that the grievors had been separated by being put into a different building and that they were not allowed to enter the VDD office. He said, "We

cannot meet with anybody else because they said, well we're speaking with the media, so that's not good for their jobs, so therefore you are exiled. You stay by yourself in your little cubbyholes and I will deal with you in time."

[387] Dr. Chopra was asked about possible whistleblower legislation. He said, "Individuals who do these things should be personally sued. This will be the only way that these types of corruptions will stop."

D. <u>Fact-finding by the employer</u>

1. <u>*CTV news* reports</u>

[388] A fact-finding meeting with Ms. Dobbin took place on July 22, 2002 (Exhibit E-15, tabs C-3 and C-4). On August 2, 2002, she wrote separately to the grievors (e.g., Exhibit E-15, tab C-6), noting that an internal disclosure to the PSIO had been made and that a decision about the comments made to the media would not be made until the employer reviewed the PSIO's findings. She noted that ". . .we regard this matter as serious in nature, and have undertaken a thorough and comprehensive review." She told them that the review of the grievors' comments would continue.

[389] The grievors and Dr. Basudde sent a letter to Ms. Dobbin on August 8, 2002 (Exhibit E-15, tab C-7), noting that the investigation would be postponed pending the conclusion of the complaint to the PSIO, along with the following: "Be that as it may, we find these actions to be one more example of the continuing harassment against us by senior management."

2. <u>BSE media comments</u>

[390] Ms. Kirkpatrick conducted a fact-finding inquiry of the BSE media comments through emailed questions (July 30, 2003, Exhibit E-19, tab E-8). She asked for the basis of the grievors' comments. She also asked about efforts to raise their concerns internally, ". . . given existing mechanisms to encourage debate and address concerns."

[391] Both Dr. Chopra and Dr. Haydon provided answers in writing and documents (Exhibits E-15, tab H-7, and E-19, tab E-9). In their responses, both grievors stated that the journalists had contacted them. They stated that the information being sought by the journalists was particular to the grievors and that it could not have been provided by a spokesperson of the employer.

E. <u>Suspension letters</u>

1. <u>Commonalities</u>

[392] All three grievors were given similar letters of discipline. In this section, I will summarize the common elements in the letters along with those elements particular to each grievor.

[393] In the letters, the employer noted that the grievors were its scientists and that the nature of the drug evaluator position within the VDD “. . . involves matters that are of public health importance.” The letter (Exhibit E-19, tab A-1) continued as follows:

> *. . . Your position is what made your remarks particularly newsworthy. The media consistently attributed your comments to you as a Health Canada scientist. Notwithstanding that you have no official role with respect to the relevant files, you persisted in making public comments which left the impression that you were fully informed and that you spoke with authority on these subjects.*
>
> . . .

[394] The employer also noted that, during the fact-finding process, the grievors stated that they felt compelled to speak because of their frustration with internal processes. The employer stated that the grievors “. . . neglected to exhaust those internal processes, did not await their outcomes when engaged and . . . refused to accept conclusions (reached through due scientific process) that differed from [their] own.” The letters also noted that the grievors “eroded public trust” in the employer by making “. . . unsubstantiated allegations and erroneous statements, and by disseminating misleading information.”

[395] The employer also stated in the letters that the public statements were unfounded and that they were “. . . disrespectful of your work colleagues/peers and those charged with assessing and managing the subjects at hand and are also damaging to the public you purport to want to protect.”

[396] The employer also concluded that the grievors had not provided any information that supported a finding that their actions were appropriate speech by a public servant. It added the following: “. . . your actions demonstrated a lack of judgment and objectivity, and impact negatively on your ability to perform impartially

and effectively the duties of drug evaluators in the public service and of the public's perception of that."

2. <u>Dr. Chopra's 20-day suspension</u>

[397] When it imposed the discipline, the employer relied on Dr. Chopra's statements from July 3, 2002 to October 4, 2003. In particular, the letter set out the following statements as being of concern:

> *a) that you and others were being pressured to pass drugs of questionable safety; that this pressure comes from the drug companies or the Privy Council Office and that if you do not "look the other way." or words to that effect, you are disciplined;*
>
> *b) that there is wrongdoing and cover-ups; and*
>
> *c) that people are getting harmed.*
>
> *Furthermore, you made erroneous statements in public, for example, that Tylosin is banned in Europe; that there was no data on Tylosin products; that you were disciplined because you expressed your views relating to BSE.*
>
> *. . .Notwithstanding the fact that you were not involved in the actual review of the Tylosin products referred to in the media, nor in the scientific evaluation of food irradiation proposals, nor as a member of the team that dealt with the BSE incident, you persisted in making public comments which left the impression that you are fully informed and that you spoke with authority on these subjects.*

[398] In Dr. Chopra's suspension letter, the employer stated that his absence from the workplace from February 3 to May 30, 2003 "was also a further significant factor." The employer also considered Dr. Chopra's disciplinary record and "the repetitive nature" of his behaviour in imposing the discipline. Dr. Chopra was also warned that any further acts of misconduct "will lead to termination of employment."

3. <u>Dr. Lambert's 5-day suspension</u>

[399] For Dr. Lambert's suspension, the employer relied on statements he made between July 3, 2002 and November 18, 2002. In particular, the letter set out the following statements as being of concern:

> *a) you supported the unfounded allegation that you and others "were being pressured to pass drugs of questionable safety to favour the pharmaceutical companies"; and*

> *b) you made unfounded allegations that you and "others have been subjected to consistent harassment and coercion to bend the law and pass or maintain certain veterinary products with questionable records of safety."*
>
> *Furthermore, you made and supported erroneous statements made in public including: that Tylosin is banned in Europe; and that there were no data on Tylosin products.*

[400] The employer stated in the letter that it considered both Dr. Lambert's disciplinary record and the repetitive nature of his behaviour in imposing discipline. He was also warned that any further acts of misconduct ". . . will lead to further disciplinary action up to and including termination" of employment.

4. Dr. Haydon's 10-day suspension

[401] For suspending Dr. Haydon, the employer relied on statements she made between July 3, 2002 and June 6, 2003. In particular, the letter set out the following statements as being of concern:

> *a) you supported the unfounded allegation that you and others " were being pressured to pass drugs of questionable safety to favour the pharmaceutical companies;"*
>
> *b) you supported unfounded allegations that you "and others have been subjected to consistent harassment and coercion to bend the law and pass or maintain certain veterinary products with questionable records of safety"; and*
>
> *c) you explicitly stated in relation to the drug-review process that "it's a shame that public funds are actually being spent to harm the public', and that "this whole situation is chaos."*
>
> *Furthermore, you supported erroneous statements made in public, including: that Tylosin is banned in Europe; that there were no data on Tylosin products; that one of your colleagues was disciplined because he expressed his views relating to BSE.*

[402] The employer stated in the letter that it considered both Dr. Haydon's disciplinary record and the repetitive nature of her behaviour when it imposed discipline. She was also warned that any further acts of misconduct ". . . will lead to further disciplinary action up to and including termination" of employment.

F. Submissions

1. For the employer

[403] Counsel for the employer summarized the relevant case law and then applied the facts adduced at the hearing to the legal principles set out in the jurisprudence.

[404] In *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455, the Supreme Court noted that freedom of speech is not an absolute value but one that must be balanced against competing values, such as the duty of loyalty, which ensures an impartial and effective public service (at para 21).

[405] In that case, the Supreme Court established that, as a general rule, public service employees should be loyal to their employer (at para 41). In the following non-exhaustive list of circumstances, a public servant may publicly express opposition to the policies of a government if (also at para 41):

- the government were engaged in illegal acts;
- the policies jeopardized the life, health or safety of the employee or others; or
- the opposition had no impact on his or her ability to effectively perform his or her duties or on the public perception of that ability.

[406] The Supreme Court stated that, with respect to an impairment to perform the specific job, the general rule is that direct evidence is required. However, the rule is not absolute. When the nature of the occupation is important and sensitive, and the substance, form and context of the criticism are extreme, then an inference of impairment can be drawn without calling direct evidence.

[407] The general rule is that an employee must exhaust all internal avenues before speaking publicly on an issue (*Forgie v. Treasury Board (Immigration Appeal Board*, PSSRB File No. 166-0215843 (19861119)). There is a heavy onus on an employee to establish that he or she has done everything reasonable to raise the issue internally. It is not sufficient for the employee to claim that he or she doubted that the internal avenues would lead to a successful resolution. In addition, if the employer has commenced a review of the issues raised, it is not appropriate for an employee to speak publicly while the process is underway.

[408] In *Grahn v. Canada (Treasury Board),* [1987] F.C.J. No. 36 (C.A.)(QL), the Federal Court of Appeal (FCA) determined that allegations have to be substantiated to gain the protection of the exceptions to the duty of loyalty. In *Haydon No. 2*, the Federal Court held that before going public an employee is required to make an effort to get all the facts and to give the employer an opportunity to explain or correct the problem. The first step for an employee is to ensure that the facts are correct. An employee is in breach of his or her duty of loyalty if he or she either knows that the public allegations were false or is reckless as to their truth. The employee must demonstrate that the public statements were true and reasonably sustainable.

[409] In *Haydon No. 2*, the Federal Court held that it was necessary for the adjudicator to "qualify the nature" of the reported statements (at para 58): "Was she trying to alert the public to a potential danger or was she simply criticising the actions of the government . . . ? Was she denouncing an illegal act? Was she expressing her opinion as a simple citizen? Was she speaking as a scientist?"

[410] In that case, the adjudicator concluded that Dr. Haydon did not alert the public to a potential danger. The Federal Court also agreed with the adjudicator's conclusion that, because of her position, she could not be considered as providing an opinion as a citizen. The public's assumption is that people like Dr. Haydon, Dr. Chopra and Dr. Lambert have expertise and that the information they convey will be accurate and not misleading. When the information is misleading, it can lead to panic. In *Haydon No. 2*, the Federal Court stated that it was necessary for Dr. Haydon to prove her allegations. It also stated that it is irrelevant if her comments were taken out of context by the journalist.

[411] In *Haydon No. 2*, the Federal Court commented on the adjudicator's failure to refer to the impact of Dr. Haydon's comments on the performance of her duties. The Court noted that it was not surprising since she was not discharged but simply suspended. The Court also noted that her comments affected the perception of her ability to conduct her duties effectively and that they had an impact on the public perception of the operations and integrity of the CFIA and Health Canada.

[412] In *Haydon No. 2*, the FCA emphasized that Dr. Haydon was not part of the science team responsible for BSE issues. The Court also noted that the trade dispute at issue was widely known at the relevant time and was the subject of numerous press

reports. The Court also concluded that direct evidence is not required when an inference of impairment can be drawn.

[413] In the decision on discipline imposed on Dr. Chopra for his comments relating to anthrax PSSRB 115, the adjudicator noted the importance of checking facts, which is also a theme in these grievances. Ms. Kirkpatrick informed Dr. Chopra on two occasions that, should he speak to the media, he would have to ensure that his facts were accurate. Also in the anthrax decision, the adjudicator referred to comments that were hypothetical and that were not based on any actual knowledge of the situation. The same situation often arose in this hearing. Dr. Chopra often said that his statements were his interpretations or that they were what he believed could have happened, but he did not provide any facts to support those statements.

[414] The case law states that an employee cannot provide only one side of a story. For example, an employee cannot state that Tylosin is banned because that is an inaccurate statement. It is banned only for specified purposes and is allowed for others. As stated in the anthrax decision, the comments at play here are ". . . theatrical in tone, derogatory and unproven in substance" (at para 97).

[415] In the judicial review of the anthrax decision , the Federal Court addressed the idea that the Federal Court created the following further exception to the duty of loyalty in *Haydon No. 1*: "matters of legitimate public concern." The grievors used that phrase at this hearing. The Federal Court concluded that those words were intended only as a general description underlying the exceptions already established in *Fraser* (see also *Read v. Canada (Attorney General)*, 2006 FCA 283).

[416] In the anthrax decision, it was concluded that the testimony of Dr. Chopra's supervisor that Dr. Chopra's comments had increased tensions in their working relationship as well as the impugning of the government's motives by Dr. Chopra were sufficient to sustain the finding of impairment.

[417] The FCA in *Read* also noted that the whistleblower defence must be used responsibly and that it is not a license for ". . . disgruntled employees to breach their common law duty of loyalty or their oath of secrecy" (at para 52). All the jurisprudence states that, to take advantage of the exception to the duty of loyalty, a serious issue must exist, with facts to back it up.

[418] In *Read*, the FCA also stated (at para 119) that the purpose of the exceptions in *Fraser* is not to encourage or allow public servants to debate issues as if they were ordinary members of the public. Rather, their purpose is to allow public servants to expose, in exceptional circumstances, government wrongdoing.

[419] Counsel for the employer also referred me to *Labadie v. Deputy Head (Correctional Service of Canada)*, 2008 PSLRB 85. In that case, the employer's policy on disclosure was at issue, as it is in these grievances. Counsel pointed out the similarities in the statements made by Mr. Labadie to those made by the grievors.

[420] The case law demonstrates that the grievors should have continued with the PSIO process before speaking to the public.

2. <u>For the grievors</u>

[421] Counsel for the grievors provided articles and book excerpts about whistle-blowing and the characteristics of whistleblowers. I reviewed them and am of the view that they are not relevant to these grievances. The articles are more in the nature of opinion evidence. In any event, the information contained in them is not relevant to the determination of these grievances.

[422] Counsel for the grievors also referred me to some American cases on whistle-blowing. Given the development of Canadian jurisprudence on the issues before me, I do not need to refer to American jurisprudence, and I have not summarized the submissions of the parties on it.

[423] Expression is a fundamental freedom under the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). In a pluralistic and democratic society, diverse ideas and opinions are prized for their inherent value to the community and to the individual. Freedom of expression ensures that everyone can express their thoughts, opinions, beliefs, and ". . . all expressions of the heart and mind . . . ," no matter how unpopular, distasteful or contrary to the mainstream (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8. Disciplining a federal public servant for exercising his or her freedom of expression has the effect of imposing limits on a fundamental freedom that are inconsistent with the *Charter* right. The employer must provide clear and cogent evidence to support the constitutional violation and establish minimal impairment of this right. When a limitation is imposed on freedom of expression (such as the

requirement to prove the truth of a public statement or to exhaust an internal recourse), must be justified in accordance with the strict standards of section 1 of the *Charter* (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at 92).

[424] This approach is in accordance with the fundamental public interest with respect to both the disclosure of information about the operation of government and the debate on matters of public concern. Information disclosure is widely recognized as one of the central components of a free and democratic society. The Supreme Court has held that the public has an essential interest in knowing about the conduct of police investigations, even when the operations of a police force may be impacted (*R. v. Mentuck*, 2001 SCC 76, at para 50 to 52). This is equally applicable to public health issues, including food safety, as was recently confirmed in *Toronto Sun Wah Trading Inc. v. Canada (Attorney General)*, 2007 FC 1091, at para 23). The limits placed on the grievors in this case do not only affect them personally but also the whole of Canadian society and democracy. In *Ministry of Attorney General, Corrections Branch v. British Columbia Government Employees Union* (1981), 3 L.A.C. (3d) 140, at 162 and 163), the arbitrator stated as follows that the duty of fidelity owed by employees did not mean that employees must remain silent when they discover wrongdoing:

. . .

> *. . . Neither the public nor the employer's long-term best interests are served if these employees, from fear of losing their jobs, are so intimidated that they do not bring information about wrongdoing at their place of employment to the attention of those who can correct such wrongdoing. . . .*

. . .

[425] As stated in *Fraser*, public service employees cannot be "silent members of society" in light of the importance of a ". . . free and robust public discussion of public issues" to democratic societies (at paras 30 to 34 and 41 to 50). The Supreme Court concluded that, although public service employees' duty of loyalty could result in a fettering of their free speech in certain circumstances, they may actively and publicly express their views, including opposition to the policies of the government, in other circumstances. For example, the duty of loyalty will be qualified if the government is engaged in illegal acts, if its policies jeopardize the life, health, or safety of the employee or others, or if the criticism has no impact on the employee's ability to effectively perform his or her duties or the public's perception of that ability. The

Supreme Court also stated that there may also be other qualifications on the duty of loyalty.

[426] Although the *Fraser* decision is the first important case addressing the issue of public servant free speech, it cannot be applied automatically or without considering the particular facts that apply to the grievors in this case. It was not decided under the *Charter*. While exceptions to the duty of loyalty have been found consistent with the *Charter* (*Haydon No. 1*), any other aspect of the judgment can be applied only if it meets *Charter* scrutiny. This same consideration applies to decisions not based on the *Charter*, such as *Grahn*. The balancing that was used in *Fraser* (at paras 31 to 36) and in similar cases is now irrelevant. Under the *Charter*, there is a *prima facie* right to speak publicly which can be limited only in the narrowest of circumstances.

[427] In *Fraser*, clear warnings were given to the grievor that escalated over time. That is not so in this case. In *Fraser*, effectiveness as a public service employee was squarely at issue because it was a termination of employment case. In this case, the grievors continued in their jobs, with the same duties. There was no evidence that their job performance was impaired or that they became ineffective. In *Fraser*, the public comments were not job related. For that reason, there was virtually no direct evidence of impairment to Mr. Fraser in performing his job or of the public's perception of his ability to perform it. In that case, it was appropriate for the adjudicator to ignore the general requirement of direct evidence of impairment and to rely on inference. In this case, there is no doubt that the grievors' comments related directly to their duties, and it was incumbent on the employer to provide direct evidence of impairment.

[428] Mr. Fraser engaged in sustained and highly visible attacks on major government policies. The attacks were clearly extreme. His comments were significantly different from the comments made by these grievors. Given the nature of Mr. Fraser's attacks, there was no clear public interest in his comments, which is clearly not so in this case, in which the public's interest in health and safety goes without saying.

[429] *Fraser* is generally silent on the need to use internal review processes or to prove the truth of one's comments. The fact that the Supreme Court did not find against Mr. Fraser on those key issues indicates that, in any case, they cannot be absolute requirements.

[430] In *Haydon No. 1*, the Federal Court considered the impact of the duty of loyalty on an employee's *Charter* rights and found that the duty was consistent with section 1 of the *Charter*. The Court also set out the following broader principle on the nature of free speech by a public service employee (at para 120): "Where a matter is of legitimate public concern requiring a public debate, the duty of loyalty cannot be absolute to the extent of preventing public disclosure by a government official."

[431] It is clear from *Fraser* that a public comment will always be justifiable if there is no impact on the employee's ability to perform his or her duties or on the public perception of that ability. In other words, if there is no such impairment, it is unnecessary for the employee to even demonstrate that there was a matter of public interest or concern.

[432] As a general rule, direct evidence of impairment is required. This need is heightened when the employer's action would otherwise result in a violation of an employee's *Charter* rights (a factor that was not present in *Fraser*). This is because the clearest evidence is necessary to support a constitutional infringement under section 1 of the *Charter*. Section 1 states that rights are guaranteed unless their violation ". . . can be demonstrably justified in a free and democratic society." "Demonstrably" means that the best possible evidence is required. Only in the clearest of cases can an inference be relied upon.

[433] Even if there is evidence of impairment to an employee's ability to perform his or her duties, critical public comments may still be justified on other grounds, such as raising matters of public concern, e.g., government illegality or public health and safety risks. Therefore, it is an error of law to focus solely on the impact of public comments on the performance of duties.

[434] All the public comments made by the grievors concerned the health and safety of the public. They either addressed specific concerns about the safety of certain drugs or general concerns about how drugs are assessed and approved for use. There can be no doubt that their concerns were about health and safety and that therefore they clearly fall into one of the exceptions expressly set out in *Fraser*. Food safety is a matter of serious public concern, as shown by a review of media commentary (e.g., see Exhibit G-124) and jurisprudence. *Haydon No. 1* is determinative of these grievances. The employer has characterized that decision as a stepping-stone to other judgments and has not addressed its key findings. The decision has been affirmed by the Federal

Court and the FCA in other decisions. The reasons in *Haydon No. 1* are crucial because they set the standard for the grievors' view of their rights and obligations and also because they affirm that comments like the ones at issue in this case cannot be subject to discipline. If the grievors' comments in *Haydon No. 1* were justified, then it must follow that the comments in this case are justified, since they were about the same subjects and were more moderate in tone.

[435] There is no absolute obligation to raise matters internally before speaking publicly, as argued by the employer. The law is clear that exhausting internal recourse for an issue will justify an employee making public comments about that issue. However, it does not follow that failing to proceed internally will automatically result in a conclusion that speaking publicly was not justified. Resort to an internal mechanism is not a prerequisite but is simply a defence for discipline arising from public comments. In any event, the evidence is clear that the grievors made many efforts to raise their concerns internally through a variety of mechanisms before speaking publicly.

[436] In *Haydon No. 1*, the Federal Court confirmed that public criticism is justified when a reasonable attempt to resolve the matter "would have been unsuccessful." It is clear that the Court contemplated circumstances in which adjudicators might be required to assess whether an internal mechanism would have been successful, even if it had not been engaged. One of the measures of whether the mechanism would have been successful is its past performance. There is a long history of the employer simply failing to take the grievors' concerns seriously, even though they were raised on numerous occasions.

[437] An absolute requirement for internal recourse can be justified only if it is based on an appropriate *Charter* analysis, which in turn must be based on evidence that supports the reason for such a limitation. In some cases, the nature of the comments themselves may be such that it makes little sense to proceed internally. For example, the comments may not relate to the employer for which the employee works. If the comments are not specifically harmful or are a legitimate exercise of public expression, then there is no need to engage any internal review mechanism. Requiring an employee to exhaust internal review mechanisms creates a real and substantial risk that, in some cases, employees will be afraid for fear of retribution or intimidated such that public comments will never be made. That concern is real in this case. The PSIO

found that Dr. Lambert was subjected to reprisal for raising concerns internally, but Ms. Kirkpatrick repeatedly stated in her evidence that she did not accept the legitimacy of the PSIO's decision.

[438] In each case, an adjudicator must consider the nature of the particular public comment and what any internal review mechanism could have achieved. Unlike in *Forgie*, in which the grievor simply had doubts about the effectiveness of internal avenues, in this case, the evidence shows that the internal avenues offered by the employer and pursued by the grievors were completely ineffective. Even though the grievors provided the employer with the evidence supporting their concerns, no one ever replied with any explanation as to why their views were substantively wrong or why decision makers in the employer had reached the opposite conclusion. The internal recourse was merely a one-way process, without any dialogue or meaningful feedback.

[439] The employer relied on the premise that the grievors must prove the truth of their comments to escape discipline. That premise is based on the principle enunciated in *Grahn*, which is inconsistent with the *Charter* and that has been overturned by subsequent decisions. The guarantee of freedom of expression ensures that there is debate when differing views are held, ultimately resulting in better-informed decisions. It does not stifle opinions because they may be wrong. Requiring proof of the truth of an employee's allegations, as opposed to supporting evidence or reasonable sustainability, sets the bar too high. It is generally accepted that, if an employee acts fraudulently or in bad faith, then discipline may be upheld. In this case, there was no evidence of bad faith. The grievors' intention throughout was to engage in debate on important public health and food safety issues.

[440] In many cases, an employee speaks publicly to trigger a process that will get at the truth. In such circumstances, even if an employee is wrong, there is a clear public interest in ensuring that a full and proper debate takes place about an issue of public importance. Were employees always required to prove the truth of their concerns, there would be a significant and chilling effect on participation in public debate on matters of significant importance. A requirement to prove truth in all circumstances is not consistent with the *Charter*. In many cases, the truth is not provable. In these grievances, the very nature of the debate raised questions of scientific or medical opinion. Debate is inevitable, and evidence for the different views presented is not

conclusive. To require proof of truth would limit the circumstances in which employees could speak to all but the clearest and the least contentious cases.

[441] In *Haydon No. 1*, absolute proof was not required. In *Haydon No. 2*, the Federal Court noted that the accuracy or truthfulness of the statements is only one factor to consider. The Court held that comments should generally be "reasonably sustainable" (at para 48). In *Read*, the FCA did not require absolute proof of truth but rather a "reasonable basis" for the expressed concerns (at para 69). In this case, the grievors established a rational and scientific basis for their concerns. Many times, the debate between the grievors and the employer was a matter of opinion. The employer often relied on evidence gathered after discipline was imposed to suggest that the grievors' views were not scientifically supported. For many such instances, the evidence was not put to the grievors until the hearing. The employer cannot assert that it had concerns with the facts (as stated by the grievors) when it did nothing to address those facts at the relevant times.

[442] The employer's position does not consider the public interest. The employer often asserted that the public was being misled but provided no evidence. The public is more than capable of hearing, understanding and participating in this important debate. If the employer's position were accepted, there would be virtually no debate on these important issues. This is an unacceptable result in a democracy governed by the *Charter*.

[443] Evidence of direct impairment to the duties of an employee is required, except in very limited and exceptional circumstances, which do not apply here. The employer cannot resort to an inference of impairment. This is particularly so in this case, given that the right of the grievors to speak in public is protected by the *Charter*. An infringement of a *Charter* right can be upheld only in limited and clearly supported circumstances. As a result, the clearest and most cogent evidence is necessary, which invariably will be direct evidence (*Gendron v. Treasury Board (Department of Canadian Heritage)*, 2006 PSLRB 27). To rely on inference, there must be a rationale. The employer has offered no reason that relying solely on inference is necessary. It would have been easy to tender direct evidence. In addition, it is a fact that the employer's actions were inconsistent with a negative impact on duties, as nothing was done to assist the grievors or to otherwise reassign their work. Even if there was some evidence from which impairment could be inferred, such a finding would not be determinative

of whether the comments were appropriate, as they might nevertheless come within another of the exceptions contemplated by *Fraser*. Unlike in *Fraser*, the grievors' comments engaged debate on matters of legitimate public interest and raised concerns of serious risks to public health and safety.

[444] The employer referred to the grievors justifying their comments on the basis of "legitimate public concern." The grievors acknowledge that the FCA clearly rejected an interpretation of *Haydon No. 1* that established a new category of legitimate public interest. The grievors have consistently maintained that their comments are about public health and safety and that they therefore fall squarely within one of the accepted exceptions to the duty of loyalty.

[445] The employer's delay in imposing discipline meant that it condoned the grievors' actions. There was no mutual agreement to await the outcome of the PSIO investigation.

3. Employer's reply

[446] An employee's freedom of speech is fettered and not unlimited, as suggested by the grievors. It does not matter if the issue is of legitimate public concern, which is not one of the exceptions to the duty of loyalty. It is not up to the employer to prove that drugs are safe. The burden is on the grievors to prove that what they said fell within one of the exceptions detailed in *Fraser*.

[447] It is not sufficient for the grievors to use their dissatisfaction with the recourse or investigation process that was available to them as a justification for speaking to the media. They were obligated to complete the internal process (in this case, the PSIO investigation). The grievors could have asked Ms. Kirkpatrick about taking a matter to the SIRC, which was not the employer's obligation to suggest.

[448] No evidence was adduced at the hearing showing that Tylosin or beef hormones are dangerous. A belief in the legitimacy of one's allegations is not sufficient to meet the test for an exception to the duty of loyalty. Those allegations must be supported by facts. Acting in good faith is not sufficient to justify speaking to the media. Just because a matter is in the public realm does not give an employee the right to speak publicly about it.

[449] Criticizing the qualifications of Ms. Kirkpatrick is not an exception to the duty of loyalty.

[450] There was no condonation by the employer. The grievors were warned time and again about speaking to the media. The length of the delay in imposing discipline, the reasons for it and its impact are to be considered by an adjudicator, in the context of the facts and circumstances of the case. The requirement is to balance the employer's reasons for the delay against the prejudice that the grievors suffered. There was no prejudice in this case.

4. Submissions on *Tobin* (FC and FCA)

[451] After the oral submissions, the parties made written submissions on two decisions relied on by the employer; *Canada (Attorney General) v. Tobin*, 2008 FC 740, and *Tobin v. Attorney General of Canada*, 2009 FCA 254.

[452] The employer referred me to *Labadie*, in which the adjudicator referred to the *Tobin* decision of the Federal Court as the leading case on the obligation to prove damage caused to an organization's reputation (at paras 219 and 220). In *Labadie*, the adjudicator inferred that the employer's reputation had been negatively affected by the grievor's conduct. In both *Tobin* decisions, the Federal Court and the FCA referred to the *Fraser* test.

[453] The employer submitted that the FCA was of the view that, in certain circumstances, specific conduct brings the reputation of a federal institution into discredit. Determining that conduct calls for common sense and measured judgement rather than empirical evidence.

[454] The grievors submitted that *Tobin* decisions were not relevant to the grievances before me. The grievors' submissions on the question of proof of negative impact are based on the *Fraser* decision. Nothing in the *Tobin* decisions changes the basic principle set out in *Fraser*. *Tobin* does not alter the standard applicable in this case, which is that the employer must have a solid rationale for relying on indirect evidence of impairment. For the FCA in its *Tobin* decision, the issue was that the adjudicator had established a standard that was too high. That is not so in this case, since the stated bases for termination can be proven by direct evidence. The Court also recognized the role of direct evidence of loss of reputation in some circumstances (at para 60).

[455] The grievors submitted that *Labadie* is restricted to its own facts. Moreover, *Labadie* does not add anything to the jurisprudence, particularly given that it was released before the FCA's *Tobin* decision. In addition, it appears in *Labadie* that the question of whether direct evidence was necessary was not even argued; the adjudicator simply made the inference without explaining why it was necessary.

[456] The grievors submitted that, in addition, *Tobin* and *Labadie* decisions are about the impact on the employer's reputation. By contrast, in these grievances, the employer's position is based less on the impact on its reputation than on the impact on the ability of employees to perform their duties. Accordingly, the *Tobin* and *Labadie* decisions can be distinguished because they deal with circumstances in which it was inherently more difficult to prove the employer's case. In this case, the general rule requiring direct evidence still clearly applies, and the employer failed to provide a legitimate reason for deviating from that general rule.

G. Reasons

1. Preliminary considerations

a. Condonation

[457] The grievors submitted that the delay in imposing discipline was condonation by the employer of their behaviour. It was clear to the grievors that the employer had concerns about them speaking to the media. Fact-finding processes were conducted. Although it may be that the grievors did not agree to wait for the results of the PSIO investigation, it was a legitimate reason for the employer to hold off considering discipline; see *Stewart v. Public Service Staff Relations Board*, [1978] 1 F.C. 133 (C.A.).

b. The law on speaking out publicly

[458] Two important values must be balanced when examining the parameters for public statements made by public service employees. Freedom of expression is an important value that has been recognized in the *Charter*. Employees, as individuals, have a right to freedom of expression. The other value that must be balanced against freedom of expression is the duty of loyalty that all employees owe to their employers. For public service employees, the duty of loyalty is important because it supports the public interest by assuring an impartial and effective public service (*Fraser*, at para 42).

[459] The duty of loyalty of public service employees has been determined a reasonable limit on the right of freedom of expression under the *Charter* (*Haydon No. 1*, and *Read*, at para 109).

[460] *Fraser* established the exceptions to the duty of loyalty of a public service employee (and when speaking publicly is permitted). The exceptions arise if there 1) are illegal acts; 2) are policies that jeopardize the life, health or safety of the public or 3) is no impact on the employee's ability to effectively perform his or her duties. Although it is not an exhaustive list, the FCA has stated that an exception is not created simply because the matter is of public concern. In *Read*, the FCA clearly rejected such an exception (at para 120) when it stated that *Fraser* did not create one that would allow public service employees ". . . to voice all of their concerns or disagreements with government policies and departmental activities." The FCA also stated the following (at para 119):

> *. . . such an exception to the duty of loyalty . . . is not warranted. It is important to remind ourselves that the purpose of the exceptions formulated in* Fraser, supra*, is not to encourage or allow public servants to debate issues as if they were ordinary members of the public, unencumbered by responsibilities to their employer. Rather, the purpose of the exceptions, as I understand them, is to allow public servants to expose, in exceptional circumstances, government wrongdoing. It appears to me that the exceptions are sufficiently broad to allow public servants to speak out when circumstances arise where disclosure must take precedence over the duty of loyalty.*

[461] A relevant factor in determining the appropriate balance between freedom of expression and the duty of loyalty is the employee's position and its public visibility. In this case, the grievors were in important positions that had some visibility, and their opinions would be given some weight by the general public (*Haydon No. 2*, at para 61).

[462] What the grievors meant to convey to the media is not relevant. As noted in *Haydon No. 2*, the grievors' published comments are relevant (at para 62).

[463] Some of the issues raised by the grievors were about the health and safety of the public. Specifically, concerns about the pressure to approve drugs, about BSE and about AMR do concern public health and safety. However, not every issue of public health and safety warrants public speaking by public service employees. Implicit in the exceptions to the duty of loyalty is the idea that the concern being raised is not already

in the public sphere or is not being addressed by anyone as a pressing public safety or health concern. As noted in *Haydon No. 2*, at para 58, the question to ask is whether the employee is alerting the public to a potential danger or whether he or she is simply criticizing the actions of the government. The issues raised by the grievors were already in the public sphere and were the subject of public debate. In addition, the government was taking active steps to address the issues of BSE and AMR. Dr. Haydon and Dr. Chopra had raised the issue of the pressure to approve drugs on previous occasions. Those comments were, in fact, the subject of the earlier litigation that resulted in *Haydon No. 1*. The allegations of pressure to approve drugs were also addressed by a Senate committee. BSE was the subject of public debate, and the government was taking measures to address the risks. AMR was also the subject of public debate and was fully investigated by the McEwan Advisory Committee, which made recommendations that the employer and other departments were addressing. The potential dangers of BSE and AMR were known to the public. The grievors' comments were simply criticisms of the government's approaches or actions with respect to those dangers.

[464] An employee is expected to first raise concerns internally about the actions of his or her employer. As stated in *Haydon No. 2* (at para 47), a loyal employee will give the employer a reasonable opportunity to correct the problem. In *Haydon No. 1*, the obligation to raise a matter internally before going public was worded in two different ways. At para 112, the Federal Court stated that public criticism can be justified if a reasonable attempt to resolve a matter internally "would have been" unsuccessful. At para 120, the Court stated that, as a general rule, public criticism is justified if reasonable attempts to resolve the matter internally "are" unsuccessful. The grievors have attempted to argue through hindsight that, since their concerns were not resolved to their satisfaction, they were free to raise criticisms without waiting for the different processes to complete (e.g., the PSIO investigation). The assessment of whether internal resolution is possible should be made at the time of the alleged misconduct. In this case, the grievors knew that the PSIO was investigating their claims of undue pressure. While the obligation to use internal recourse mechanisms is not absolute, the availability of internal recourse is a factor to consider. The grievors did not wait to hear from the PSIO on the scope of the investigation or until they had a sense of the progress of the investigation.

[465] Direct evidence of impairment to perform the duties of the position is generally required but is not an absolute requirement (*Fraser*). If the nature of the position held is both important and sensitive, and if the substance and form of the public statements are extreme, an inference can be drawn of impairment (at paras 47 and 48 of *Fraser*). In *Fraser*, the criticism of the employer was prolonged and increasingly derogatory in tone. Mr. Fraser had begun to impugn the character of individuals and the integrity of the government. The Supreme Court described him as "vitriolic and vituperative." In these grievances, similar observations can be made. The grievors' comments became increasingly vituperative, especially those of Dr. Chopra and Dr. Haydon.

[466] However, there is also direct evidence of impairment. In *Chopra* (2006 FCA 295, at para 12), the FCA held that Ms. Kirkpatrick's evidence that Dr. Chopra's public comments had increased tensions in their working relationship and his allegations impugning the government's motives were sufficient to sustain findings of impairment. In *Read v. Attorney General of Canada*, 2005 FC 798 (at para 68), the Federal Court noted that, when an important member of a work unit challenges the head of that unit, the challenge will impact the working of the unit and will lead to a presumption of misconduct. In *Chopra* (2005 FC 958*)*, the Federal Court held that evidence of a difficult relationship with a supervisor as a result of the employee's conduct was a relevant factor. There was an abundance of evidence about the strained working relationship between each grievor and Ms. Kirkpatrick. In addition, the fact that colleagues of the grievors filed a harassment complaint against them because of their public comments is evidence of difficult relationships in the workplace.

[467] The grievors suggested that, since their employment was not terminated for speaking publicly, the employer cannot show any impairment to their ability to perform their duties, which is a view that adjudicators and courts have not accepted. An impairment of the ability to perform the duties of a position is reversible. Employees whose abilities have been impaired can be rehabilitated. In this case, the employer determined that the impairment was not permanent and imposed suspensions rather than terminations of employment.

[468] I will now assess each grievor's comments.

2. <u>Decisions on the speaking out grievances</u>

a. <u>Dr. Lambert</u>

[469] Dr. Lambert commented on the drug approval process in the July 3, 2002 news report (Exhibit E-15, tab C-1), stating that public safety was important and that the grievors' jobs were at stake. In the interview on July 4, 2003, he said that he could not approve Tylosin because of the lack of human safety data. He also said that, because he raised the issue, he was removed from his acting position and was punished. He repeated those statements in an interview on October 21, 2002 on the CBC and in an interview with *Le Devoir* on October 22, 2002.

[470] Dr. Lambert was justified in raising with the media the impending approval of Tylosin because of human safety concerns. His statement that no data on human safety had been provided was misleading, since in fact data had been provided, although not data that Dr. Lambert viewed as satisfactory. His allegations about being removed from his acting position were premature, since he had already engaged the internal PSIO process that would review the facts (and that ultimately agreed with his assertion that he had suffered a reprisal as a result of raising concerns about human safety). Although using internal processes before speaking to the media is not always required, the existence of an internal process is a factor to be considered when assessing a grievance such as his. Although Dr. Lambert's concern about being removed from the acting position turned out to be well founded, the fact that he raised the issue publicly before it had been fully investigated (and perhaps resolved) supports the imposition of some discipline.

[471] Dr. Lambert attended the November 18, 2002 press conference. He did not speak. However, the organizers introduced him. It can be concluded that, by his presence, he supported the purpose of the news conference, as articulated by the conference organizers, "to denounce Health Canada's practices that have put the health of Canadians at risk." His support of that statement and the allegations that surround it also justifies some discipline. The tenor of the press conference was that the health of Canadians was at immediate risk. The presence of four Health Canada scientists, including Dr. Lambert, added legitimacy to the concerns of the public interest groups. The legitimate concerns of the public interest groups holding the press conference did not amount to an immediate public emergency.

[472] Dr. Lambert received a five-day suspension, which was within the appropriate range for a first disciplinary response to his actions. Dr. Lambert should have waited for the PSIO internal process to complete before commenting on the reasons for his removal from his acting position. He also lent support to inflammatory accusations about danger to the public that were not supported by the evidence. The disciplinary measure is also appropriate considering the disciplinary measures imposed on the other grievors, as Dr. Lambert did not speak publicly to the same extent as them.

b. Dr. Haydon

[473] Dr. Haydon stated in the July 3, 2002 interview that she was speaking because the public "does not know what happens in Health Canada." At the November 18, 2002 press conference, she stated that it was a "shame that public funds are actually being spent to harm the public" and that the drug approval system was in "chaos." The public interest groups that sponsored the press conference used Dr. Haydon and the other grievors to legitimize their concerns about the drug approval system. It is not appropriate for government employees to allow themselves to be used in this way. In addition, Dr. Haydon's statement that the drug approval system was in chaos was not supported by the evidence and was unnecessarily inflammatory.

[474] In the June 5, 2003 interview, Dr. Haydon was upset with Dr. Chopra's suspension and said, "Now look at what happens when we send a polite letter internally" about BSE. There is no evidence to support the contention that Dr. Chopra was suspended because of the letter that he co-wrote. Dr. Chopra was suspended for refusing to accept the end of his telework arrangement. An opinion such as this, expressed publicly, must be supported by some evidence.

[475] In the June 6, 2003 interview, Dr. Haydon stated that she and the other grievors had been "threatened" that they could be "moved and isolated" because they had raised concerns about BSE. However, the evidence is that the grievors were moved to different office space as a result of their harassment complaint and that of their colleagues.

[476] Dr. Haydon said in the May 21, 2003 interview that she had told the employer about the BSE risk. In the June 6, 2003 interview, she stated that Canada should not take the risk associated with animal ruminants and that "many people were dying in Europe." The implication of this statement is that, if the grievors were not listened to,

many people would die in Canada. She also stated that the government was sleeping and that it was not taking action on BSE. She stated that BSE could be transmitted to other species. BSE was not within the job responsibilities of a drug evaluator. Dr. Haydon was entering into the public debate about BSE, and her status as a veterinarian with the federal government gave weight to her public statements. However, she had no specific knowledge gained from her work on the health effects of BSE or on the actions being taken by the CFIA. In fact, the government was taking action, although not the action that she and Dr. Chopra thought should have been taken and certainly not as quickly as they would have liked. Her categorical statement that BSE could be transmitted from one species to another was not supported by the evidence.

[477] Dr. Haydon also accused the employer of backdating a letter about BSE in her interview on June 6, 2003 (Exhibit E-19, tab E-5), without evidence to support that statement. The allegation is serious and is not supported by any evidence. In addition, her allegation was not about public health or safety.

[478] Dr. Haydon received a 10-day suspension. Given my findings on her public comments, I find that it was justified. The suspension followed a five-day suspension, also imposed for speaking to the media. On this basis alone, a 10-day suspension is an appropriate response for similar behaviour.

c. Dr. Chopra

[479] Dr. Chopra stated in his interviews broadcast on July 3 and July 4, 2002 that there was pressure to approve drugs "of questionable safety." He stated that asking for a discussion of the approval process "results in reprimands," referring to the situation of Dr. Lambert with respect to Tylosin. He suggested that raising such issues could result in demotion, suspension or dismissal. The PSIO was investigating Dr. Lambert's removal from the acting team leader position. Dr. Chopra should not have spoken of that issue while it was in the early investigation stages. There was no evidence to support his allegation that raising issues could result in demotion, suspension or dismissal.

[480] In his October 2002 interview with the CBC, Dr. Chopra said that the pressure to approve drugs came indirectly through the lobbying of the Prime Minister, other ministers and the PCO by drug manufacturers. He also stated that he was told to

approve drugs because they had already been approved in the United States and suggested that he had been told that he did not need to look at the data. Dr. Chopra had no evidence to support those allegations. He was told to consider the approval by the United States in coming to his own conclusions. I can find no evidence that Dr. Chopra was told not to look at data.

[481] In the July 3 and 4, 2002 interviews, Dr. Chopra stated categorically that Tylosin was banned in Europe. The evidence has shown that Tylosin was banned for non-therapeutic purposes in Europe but that it was not banned for therapeutic purposes. At the press conference in November 2002, he was more accurate in his statement that the combination of drugs in the Tylosin implant was banned in Europe.

[482] Dr. Chopra suggested in the October 2002 interview that the manufacturer provided no data on Tylosin, when the company did provide data, just not the data that Dr. Chopra and the other grievors thought appropriate.

[483] In the November 2002 press conference, Dr. Chopra stated that the approval of Tylosin was contrary to the *Criminal Code*, R.S.C. 1985, c. C-46. He also stated that Canada does not have a high food safety standard and compared Canada to countries in the Third World. By saying that the approval of Tylosin was contrary to the *Criminal Code*, Dr. Chopra implied that the government had engaged in criminal conduct, of which there is no evidence. At best, Dr. Chopra could have argued that the actions of his employer were contrary to the *FDA* and its regulations. Similarly, Dr. Chopra provided no support for his allegation that Canada had Third World food safety standards. This comment was disparaging of Canada's food safety system and was without foundation.

[484] In his interview broadcast on November 21, 2002, Dr. Chopra compared the pressure to approve drugs to the criminal charges laid in connection with the tainted blood scandal. Again, there is no evidence of criminal conduct by the government, and his comment was both misleading and inflammatory.

[485] In the November 21, 2002 interview, Dr. Chopra agreed with the interviewer that there was a cover-up of BSE. That is a serious allegation that is not supported by any evidence.

[486] He was also asked in the November 21, 2002 interview if anyone was being paid by the manufacturers to approve drugs. Bribery is a serious accusation of government malfeasance. Dr. Chopra was not categorical in his response. He said that he had no direct knowledge. He then stated that most people think of bribery when speaking of corruption. He continued that that, however, is not "how modern corruption works." He described "corruption" as a "technical word." He implied that employees at Health Canada were in their positions because of corruption. He said that he did not know whether money was involved. The lack of clarity in Dr. Chopra's comments could lead the average listener to wonder if money was changing hands. In addition, he stated that it was because of corruption that unqualified people were in positions as drug evaluators. Dr. Chopra had no evidence to support his allegation that his colleagues were unqualified and had no basis for concluding that their appointments were a result of corruption, however that word is defined.

[487] At the food irradiation information session on January 24, 2003, Dr. Chopra suggested that food irradiation was being used to cover up wrongdoing. The use of the loaded word "cover-up" was inappropriate, and there was no evidence to support the allegation.

[488] In the October 2002 interview with the CBC, Dr. Chopra said that Ms. Kirkpatrick "got herself appointed" to her position and that "she is not a veterinarian." He also stated at the November 2002 press conference that Ms. Kirkpatrick had threatened the grievors in the email that she sent before the press conference. He also questioned Ms. Kirkpatrick's qualifications. He described a meeting between Ms. Kirkpatrick and Dr. Basudde that he did not attend. At all those times, he commented negatively about his supervisor in a public forum. None of his comments was about public safety; they were clearly insubordinate. He had no justification for stating them publicly.

[489] When interviewed on June 5, 2003 (Exhibit E-19, tabs E-2 and E-3), Dr. Chopra stated that he was suspicious of the timing of his 10-day suspension (for insubordination following the termination of his telework arrangement). He said that there was no proof that the suspension was connected to him raising issues about BSE, but he wondered about it. In the June 6, 2003 interview, he stated that his raising of BSE issues was used as an excuse to suspend him. Dr. Chopra did not provide any context for his suspension. There is no evidence that Dr. Chopra was suspended for

raising those concerns. In the June 6, 2003 interview, he also stated that he had been ordered into isolation as a result of raising the BSE issue. As I have already noted, the grievors were moved to a new location within the employer's complex as a result of harassment allegations both by and against the grievors and not because they had raised concerns about the BSE.

[490] In the interview of June 6, 2003 (Exhibit E-19, tab E-5), Dr. Chopra said that research showed that BSE was present in several species and that it could cross from one species to another by feeding, injection and "various other ways." The evidence was at best inconclusive on BSE crossing over. Dr. Chopra's statement is misleading.

[491] In the June 6, 2003 interview, Dr. Chopra accused Ms. Gorman of backdating a letter and of "covering up." There is no evidence to support Dr. Chopra's contention that the letter was backdated. Even were the letter dated before the date on which it was delivered, it would not be evidence of a cover-up.

[492] In Dr. Chopra's interview on October 4, 2003 (Exhibit E-15, tab I-1), he stated that pressure to approve drugs was coming from the PCO. There is no evidence to show that the PCO was putting pressure on drug evaluators or their supervisors to approve drugs. He also said that he and the other grievors had been moved to a different building and that they were not allowed into the VDD office. There was no evidence adduced that the grievors were not allowed into the VDD offices. He also said that the grievors could not meet with anyone. There was no evidence adduced that they were prevented from meeting with colleagues in the VDD. In the interview, he was also asked about his views on whistleblower legislation. He replied that individuals should be personally sued, as that was the only way that "these types of corruptions will stop." His views on whistleblower legislation are not of concern but rather his repeated suggestion that corruption exists within the federal government — an allegation not supported by the evidence.

[493] Dr. Chopra received a 20-day suspension for his public comments. Given my findings about those comments, I find that the disciplinary measure was appropriate in the circumstances. Dr. Chopra made comments that were not about public safety, were extremely critical of his supervisor, alleged corruption at the highest levels of government without any supporting evidence and were misleading as to the nature of the risk to the public. In light of his 10-day suspension, a 20-day suspension is within the acceptable range of discipline.

VI. Termination grievances

A. General matters

1. Credibility of Ms. Kirkpatrick

[494] In the grievors' submissions on the termination grievances, the issue of Ms. Kirkpatrick's credibility was raised. The grievors' position was that her testimony should be treated with considerable caution because of the following three factors: the evidence demonstrated a significant degree of hostility on her part and a refusal to acknowledge the grievors' concerns, she refused to retain critical documents about the termination grievances after being advised by counsel for the grievors to do so, and she was a paid witness and has been a consultant to the employer since her retirement in 2005. The grievors implied that she was paid to achieve a successful outcome of these proceedings.

[495] The employer disputed the three allegations.

[496] There is no doubt that there was a certain amount of personal animosity between the grievors and Ms. Kirkpatrick. It is also clear that the animosity was on both sides. In workplace disputes, especially those involving discipline, animosity between managers and affected employees is normal. However, it is not a reliable factor for determining credibility. Credibility is better measured through a careful examination of the evidence provided by the witnesses and not through generalized statements about animosity. There is no evidence that Ms. Kirkpatrick deliberately destroyed documents, and I can draw no conclusions about credibility based on a failure to retain draft versions of documents. The allegation that Ms. Kirkpatrick has a pecuniary interest in the outcome of the grievances is also not supported by any evidence. Ms. Kirkpatrick's contracts were introduced as evidence at the hearing. There was no evidence from those contracts or in the oral testimony that she was being paid on a contingency basis or that she was promised a bonus if the employer were successful at this adjudication. Public service is not public servitude. As a retired employee, Ms. Kirkpatrick is not required to work for free. Payment for services rendered is irrelevant in a determination of credibility.

2. The timing of the three terminations of employment

[497] The grievors made submissions on the timing of all three terminations. The fact that all three grievors had their employment terminated on the same day is not

nefarious. The employer has a right to address what it considers misconduct in the workplace. The employer addressed an issue that it had identified as common to all three grievors: delays in completing assigned work. It addressed that issue by closely monitoring the performance of each grievor on assigned projects. The employer likely had some reason to terminate the employment of all three grievors on the same day, but that strategic or tactical reason does not impugn the decisions made separately to terminate the employment of all three grievors.

B. <u>Evidence</u>

1. <u>Dr. Chopra's termination</u>

[498] Dr. Chopra's employment was terminated on July 14, 2004. The letter of termination, signed by Ms. Kirkpatrick, reads as follows:

> *In early April you were assigned a project, which you agreed was well within the scope of your duties and professional capabilities as a senior veterinary drug evaluator. It was understood and agreed that the work would be completed within 90 days. Given concerns raised previously about your work performance, it was considered appropriate to seek progress updates at regular intervals.*
>
> *The initial, thirty day progress review was completed on May 5, 2004. From my review, I determined that no actual work was completed in that period and you provided no reasonable rationale for the total lack of progress. On two further occasions you were provided with additional specific instructions as to what the project required but your responses failed to demonstrate that any meaningful work as was requested was done. Based on the foregoing, I have concluded that you have chosen to deliberately refuse to comply with my instructions and I have also concluded that your conduct in that regard constitutes insubordination.*
>
> *Given your previous disciplinary record and your continued unwillingness to accept responsibility for work assigned to you, I have determined that the bond of trust that is essential to a productive employer employee relationship has been irreparably breached, that there is no reasonable expectation that your behaviour will change and that the existing employer employee relationship is no longer viable.*
>
> *On the basis of the foregoing I have decided to terminate your employment for cause pursuant to the authority delegated to me by the Deputy Head and in accordance with the Financial Administration Act Section 11(2)(f). In reaching*

> *my decision I have considered mitigating factors, particularly your lengthy years of service.*

[499] Dr. Chopra's last performance evaluation was prepared by Dr. Mehrotra and Dr. V. Sharma (discussed in Dr. Chopra's 10-day suspension grievance) and was signed on February 21, 2003 (Exhibit E-3, tab C-3). It contained the following comments:

> *When asked to undertake a duty or assignment, Dr. Chopra, who is classified as a Senior Drug Evaluator in the Human Safety Division, almost invariably indicates that he is unable to take on these duties unless he is given firstly the opportunity to meet with the Director General so that he may discuss the nature and the validity of the request/job which he is being asked to take on or indicates that the task is not feasible. Because no meaningful justification is given by Dr. Chopra to warrant such meetings and in light of his position as a Senior Drug Evaluator, it is not unreasonable therefore for management to view this approach at the very least as a delaying tactic and/or lack of interest in doing the assigned task.*
>
> . . .
>
> *Dr. Chopra's attitude towards work is unacceptable. His approach to work and low productivity undermine management actions implemented regarding the continuing improvement in establishing work goals, work delivery and a healthy workplace which are critical to the organization functioning and employees well-being.*

[500] In March 2003, Ms. Kirkpatrick became Dr. Chopra's supervisor. In November 2003, Dr. Chopra completed a submission review. He did not receive any further assignments until April 2004. In December 2003, he was absent from the office for part of the month and again in January and February 2004. In March, he was absent for just over a week. Evidence was adduced as to why Dr. Chopra did not request further work and why no work was assigned to him. I have not summarized this evidence because it is not relevant. Dr. Chopra's failure to seek more work was not relied on by the employer as a ground for terminating his employment.

[501] Ms. Kirkpatrick consulted with human resource advisors when she developed an assignment for Dr. Chopra. She also relied on Dr. Adewoye to develop an assignment. Dr. Adewoye was one of 16 complainants who had filed a harassment complaint against the grievors. He was not called as a witness.

[502] Ms. Kirkpatrick met with Dr. Chopra on April 5, 2004 to discuss issues about his leave and the performance appraisal process and to give him his new assignment. The meeting lasted approximately 30 minutes. Dr. Chopra testified that very little time was spent discussing the assignment. He testified that he did not ask any questions about the assignment because he was concerned about his poor relationship with Ms. Kirkpatrick and her ongoing criticisms of his work.

[503] Conflicting evidence was adduced as to whether Dr. Chopra was given a copy of the assignment at the meeting. In any event, he had a copy of it by April 7, 2004 (Exhibit E-3, tab B-2). Ms. Kirkpatrick testified that the assignment was developed to help the VDD respond to the recommendations in the McEwan Report, which was released in June 2002. In her testimony, Ms. Kirkpatrick identified the specific recommendations in the McEwan Report, which formed the basis of the assignment.

[504] The assignment consisted of two parts (Exhibit E-3, tab B-2). The first was to propose a ". . . classification of antimicrobial drugs on the basis of the risk of human exposure to resistant bacteria or resistance genes associated with specific antimicrobial drugs." Dr. Chopra was also instructed that the ". . . appropriate scientific rationale as well as an assessment of the weight of scientific evidence should be developed to justify the proposed classification scheme." The assignment document included relevant documents. He was also advised that he could consult other international documents.

[505] The second part of the assignment was to develop a new "evidence-based rating system" for evaluating the weight to be given to scientific evidence related to AMR. The assignment document identified the Australian approach as a good model for consideration.

[506] Dr. Chopra was given a deadline of three months to complete the assignment.

[507] Dr. Chopra had participated in the work of the McEwan Advisory Committee. Dr. Chopra has extensive knowledge of antimicrobial drugs and considers himself an AMR expert.

[508] On May 4, 2004, Ms. Kirkpatrick met with Dr. Chopra to review his progress on his assignment. The meeting lasted approximately 30 minutes. Ms. Kirkpatrick made notes before and during the meeting (Exhibit E-3, tab B-3). Her notes indicate that she

did not expect him to develop a classification system but instead to develop the basis for one. At the meeting, Dr. Chopra told her that he was assembling information. He could not explain his approach to the assignment. He also told her that he had not received much direction from her and that guidelines were not useful. In his testimony, Dr. Chopra stated that, when he referred to guidelines, he was not referring to the assignment. He stated that he was asked to provide a classification system, not guidelines.

[509] At the meeting, Ms. Kirkpatrick asked Dr. Chopra if there were any obstacles or challenges to completing the assignment. He told her that he wanted a list of all the approved submissions for antimicrobial drugs. Ms. Kirkpatrick testified that she told him that she did not see that list as relevant to the assignment. Ms. Kirkpatrick testified that the list of approved drugs was available on the Internet.

[510] Ms. Kirkpatrick requested that Dr. Chopra provide an update on his progress by the end of that week.

[511] In an email sent on the same day as the meeting (Exhibit E-3, tab B-5), Ms. Kirkpatrick summarized her expectations as follows:

> *. . . for this first report, I asked that you provide an outline of the approach you are taking to meet the stated objectives of this assignment. As you pointed out during our meeting, there is a great deal of literature pertaining to the subject of AMR so it will be important to have a well thought out plan for identifying/focussing in on salient research. As a third of the time for undertaking this work has already gone by, it will also be important to identify any obstacles that you have encountered or anticipate so as to take appropriate action as soon as possible. . . .*

[512] Dr. Chopra replied on the following day with his status report. In his covering email (Exhibit E-3, tab B-5), he stated the following:

> *. . . this is a huge project of international importance and with many different dimensions. As for some assistance to me, although I am pleased to be the lead worker for it, I shall very much appreciate it if you could arrange for me to discuss it with as many scientific evaluators as possible, particularly those in HSD, during the course of this project.*

[513] The status report (Exhibit E-3, tab B-4) was just over three pages long. It reproduced the text of his assignment. In a section entitled “Available Information and

Reflections," he wrote that he had requested lists of recently and previously approved classes of antimicrobial drugs for animals. He then listed a number of anti-bacterial drugs and anti-coccidial drugs. In a section entitled "issues," he noted "multi-drug resistance" and "no new discoveries of antibiotics for the past many years, nor on the horizon."

[514] Ms. Kirkpatrick replied as follows on the same day (Exhibit E-3, tab B-5):

> *. . . The submitted information does not outline your approach. The entries under "Available Information and Reflections" do not provide me with any further insights as to your plan for identifying/focussing on salient research; nor do they inform as to their relevance to the task at hand. Perhaps if you submit some details of your findings to date, it would facilitate this understanding.*
>
> *In order to respond to your request, there is a need for greater details. To this end, please provide a complete response as requested by the end of this week.*

[515] Dr. Chopra replied as follows on May 7, 2004 (Exhibit E-3, tab B-5):

> *My approach to the task at hand is to obtain the necessary background information, which I am doing, from both the published and unpublished sources and to consult, if allowed, with other scientific evaluators in VDD for their views on the subject. As for your question concerning **the relevance** of this approach I am not sure what else should I be doing from your point of view. Without such information and discussion I fail to see how a project of this magnitude and human health risk assessment should proceed to reach the required **evidence-based** evaluation.*
>
> *In your description of the task you asked me to produce a **comprehensive evidence-based classification ... that could be used as the basis of human exposure to resistant bacteria or resistance genes associated with specific antimicrobial drugs** via the animal applications of these drugs which, in my humble opinion, is scientifically not amenable. Moreover, this is not the method that appears to have been followed at VDD for the recent approval of a long-pending New Drug Submission on Enrofloxacin, Baytril, and another one of this genre, Advocin, which too will have to be approved if one wants to be equitable about it. Nor was this method followed for the withdrawal period reduction for the various swine applications of chlortetracycline from the prevailing 7-days duration to 0-day.*

Also, I find your instruction to ***Review the current Health Canada Guideline Evidence Based Rating System and . . . formulate a draft Rating System that can be utilized to evaluate the weight of scientific evidence as it relates to antimicrobial resistance*** *to be at variance with most scientific opinions on this subject in the internationally published literature. As for your instruction to produce such* ***evidence-based rating systems*** *I have carefully examined both the Canadian and Australian classification schemes. I agree that both these schemes have much in common and that the Canadian rating system would be simpler to use. However, I find both these systems to be impractical from the viewpoint of the duly necessary avoidance and prevention of AMR following the actual use of any particular class of antimicrobial drugs (AMDs). According to the published literature, the use of any kind of AMDs and the consequent emergence of AMR involving serious human health impacts go hand in hand along the naturally occurring frequency of microbial mutations. Furthermore, AMR is not necessarily restricted to the use of any one class of AMDs. It cuts across a whole range of these drugs which is how during the past few years multidrug-resistant Salmonella and other human pathogens of animal origin came to prevail with extremely serious human health impacts, including death. Similarly, there exist frequently reported observations of multidrug-resistant enterococci of animal origin which are not amenable to treatment by virtually any antibiotic under the sun.*

As I have been mentioning on numerous previous occasions that for the curtailment and control of both the present and future AMR of animal origin one must take guidance from the evidence-based and universally acclaimed scientific studies in Denmark which show that the only way to achieve these objectives is to drastically reduce or eliminate all AMDs for non-therapeutic, sub-therapeutic and growth-enhancing purposes.

Finally, published reports and the latest VDD list of New Drug Submissions confirm that no new inventions of AMDs for either human or animal applications have occurred for, at least, the last fifteen years and that no new ones are on the horizon. Thus, increasing incidence of rnultidrug-resistance and the absence of the duly necessary treatment of human infections have been proving to be intractable and therefore extremely risky from public health point of view.

My initial notes and reflections concerning all these issues are based on evidence-based and peer-reviewed reports in the published literature. However, I am not asking for only my view of these reports to prevail. It is precisely for this reason that I asked you to arrange for a wider discussion

> *with as many scientific evaluators as possible, particularly those from HSD.*
>
> *As for your request for **greater details of my findings to date** and their implications for human health I submit a list of some of the most pertinent publications that I have thus far utilized for the task at hand. Should you wish to receive a copy of the actual publications for these references I can forward those as well for your perusal. In addition, of course, I am available to discuss any and all inherent issues that you might wish to raise.*
>
> . . .
>
> [Emphasis in the original]

[516] Dr. Chopra testified that his opinion that the assignment was not scientifically amenable was based on his experience and knowledge. He testified that a comprehensive evidence-based classification system that could be used to classify human exposure to resistant bacteria was not scientifically possible.

[517] Ms. Kirkpatrick testified that, although she did not see the relevance of Dr. Chopra talking to his colleagues about the assignment, she did not prevent him from doing so.

[518] Dr. Chopra contacted the individual responsible for the list of submissions at the VDD at some point before May 10, 2004 to obtain a list of approved antimicrobial drugs (Exhibit E-3, tab B-6). Ms. Kirkpatrick was made aware of this request and sent Dr. Chopra an email on May 14, 2004 (Exhibit E-3, tab B-6). She advised him that the staff in that section were busy with other priorities and that she had instructed them not to provide that information to him. She wrote that she arrived at that determination after taking into account their previous discussions on the assignment. She asked that any similar future requests be made through her so that she could consider the request in the context of his assignment and its potential impact on the work of others.

[519] Ms. Kirkpatrick replied as follows on May 17, 2004 to Dr. Chopra's email of May 7, 2004 (Exhibit E-3, tab B-5):

> *Your response . . . still does not address my instruction to provide an update of the work completed to date and an outline of the scientific approach you are following to complete this project by the first week of July 2004. As you*

> *well know, simply gathering views and background information does not constitute science or a scientific approach. The same applies for your opinions on the utility of the project you have been assigned. I'm sure that after almost six weeks you have defined a research and analysis framework upon which these views are based and within which the background documents will be applied and upon which conclusions can be reached. Please provide me with a copy of your detailed approach for completing this project as instructed.*

[520] Dr. Chopra replied as follows on the following day (Exhibit E-3, tab B-5):

> *I thought your instruction for the AMR assignment was exactly what I have been following all along. However, your statement that* ***[simply] gathering views and background information does not constitute science or scientific*** *approach for this project surprises me, particularly since I am not being allowed by you to obtain critical data and information from the departmental records and also the duly necessary scientific consultation with other qualified scientists in VDD.*

. . .

> *For the assignment to compare Health Canada versus Australian* ***Rating Systems*** *I reported to have found no practical difference between the two methodologies to either forestall or prevent AMR of human health impacts via the farm and other animal applications of any class of AMDs. I also reported both these systems to be recommending not to utilize certain classes of drugs, such as enrofloxacin, for food-producing animals which, in reality, has not been followed in the recent Canadian approval of Baytril for bovine respiratory diesease* [*sic*].
>
> *As for the formulation of a new draft rating system toward better clinical applications of AMDs in human and animal medicine I found the system recommended by the Australian Expert Advisory Group on Antimicrobial Resistance (EAGAR) to be a perfectly* ***good model*** *without the need for any further modification.*
>
> *Concerning the issue of combination products, I found amoxicillin-clavulanate to be an irrelevant example. Clavulanic acid is not an antibiotic. The reason for this combination is basically to enhance the bio-availability of amoxicillin in patients in need to receive this antibiotic regardless of whether the patient in question is an animal or human. A pertinent and more problematic example, in my opinion, would be served by prepackaged combination products such as peniciliin+streptomycin that used to be sold*

> *for the treatment of veterinary infections. From the information that I gathered I found that although this particular product was ordered to be withdrawn from the Canadian market some years ago there does remain the problem of several separately approved antimicrobial drugs that are either being utilized jointly or sequentially for a variety of sub-therapeutic treatments and growth promoting purposes in many different species of food-producing animals. In there lies, in my opinion, the biggest problem of AMR of animal origin with human health impacts. The reason for these Impacts is due to the numerously reported observations of multiple drug-resistance in human pathogens, such as Salmonella typhimurium, E, coli* [*sic*]*, and Campylobacter, of animal origin with apparently no harmful effects to the health of either the treated or contact animals.*
>
> *These are thus far my findings on the assignment at hand. Should you feel my approach is improper or requires additional explanation or modification on any specific points in my reports please let me know about your concerns other than the time within which you expect me to complete this assignment.*
>
> *I expect to submit a complete report on or before the assigned date - July 6, 2004. I hope this meets with your concurrence.*
>
> [Emphasis in the original]

[521] Ms. Kirkpatrick testified that she concluded from Dr. Chopra's email that he had not made any progress in his assignment and that he was spending time on matters unrelated to it. She testified that his assignment was to develop a system for assessing evidence, not to determine whether a classification system could prevent AMR.

[522] Dr. Chopra testified that, if Ms. Kirkpatrick did not understand the basis for his conclusions in his emails, she could have asked someone on her staff. He testified that, as the director general, she was supposed to know what he wrote about.

[523] Dr. Chopra testified that, by not letting him review the VDD files and talk to other VDD scientists, Ms. Kirkpatrick refused to let him do the assigned work. He testified that he wanted to review the files to obtain evidence to demonstrate that AMR had occurred, that there is a cause-and-effect relationship to each antibiotic and that doses and durations have been increasing. He testified that, since Ms. Kirkpatrick asked for an evidence-based approach, he needed to gather the evidence. The information he sought in the files was about the antibiotics that had been approved

and about the outstanding submissions. He also wanted to know what the companies thought and what they had done with respect to antimicrobial drugs.

[524] Ms. Kirkpatrick had no further discussions with Dr. Chopra about his assignment. Dr. Chopra went on sick leave on May 21, 2004. He did not return to work. His employment was terminated on July 14, 2004.

[525] Ms. Kirkpatrick testified that she considered Dr. Chopra's long service as an aggravating factor since someone with his length of service had the experience and skills necessary to undertake the assignment.

[526] At the hearing, Dr. Chopra introduced a number of articles (Exhibits G-364 to G-376) about AMR. The articles were not provided to Ms. Kirkpatrick at the time of his assignment. In cross-examination, Dr. Chopra was not able to recall if he had consulted the articles during his assignment. He testified that he did not consult the references listed in the McEwan Report.

[527] On the nature of the assignment, Dr. Chopra testified that the issue was not classification but what to do with whatever classification was chosen. He testified that classification was not going to solve the problem, which was related to the approval and use of antimicrobial drugs. He testified that examining a classification system was not doing what was necessary for public health. He described the assignment as an impossible task.

[528] Dr. Chopra testified that he did not tell Ms. Kirkpatrick that he would not do the assignment. He testified that he did not know what to do with it. Since he told her that both classification systems that she provided were acceptable, he testified that "the project stops right there" as the assignment did not need to go any further. He testified that he was unable to "concoct" a new parallel classification system and that at that point he gave up. He also testified that in his view he had completed the project.

[529] Dr. Chopra testified that he had been asked to produce guidelines in 2002. At that time, he told his supervisor that nobody could produce guidelines on how to approve antimicrobial drugs. When he was given the assignment by Ms. Kirkpatrick in April 2004, he testified that he wondered what she expected him to do and whether he

was expected to write recommendations that went against his previous recommendations.

2. Dr. Haydon's termination

[530] Dr. Haydon's employment was terminated on July 14, 2004. The grounds for her termination were set out as follows (Exhibit E-350, tab A-1):

> *In early December 2003, you and your immediate supervisor held a discussion regarding your performance evaluation and for the second consecutive year your performance was assessed as being significantly below acceptable standards for a senior veterinary drug evaluator. At that time, you indicated that the review of submissions in your possession would be concluded in less than two months - this commitment was not met. In early May 2004, you were provided with a written warning that significant improvements were expected in your overall performance.*
>
> *Your response to these events has been most disturbing. Under no circumstances, and contrary to your assertions otherwise, can you claim a lack of knowledge of the issues brought to your attention during your performance evaluation process. However, you have again chosen not to accept any responsibility for your negative performance.*
>
> *The most recent scheduled update on your work assignment shows little evidence of any efforts or intention on your part to achieve the significant improvements required in your performance. Specifically, I note the commitment by you to finally complete, by June 4, 2004, the drug submissions which have been in your possession for over two years. Instead of complying with the agreed instructions, you submitted an incomplete draft document and stated that there would be further delays in completing the assignment, despite not having any other work assigned to you. The final report submitted by you lacks coherency and is incomplete, and is inadequate to reach any decision respecting the disposition of the submissions. I conclude that the excessive amount of time consumed by you to assemble this inconclusive report is a deliberate and systematic attempt on your part to avoid and evade work assigned in accordance with instructions given to you, and that your conduct constitutes insubordination.*
>
> *Given your previous disciplinary record and your continued unwillingness to accept responsibility for work assigned to you, I have determined that the bond of trust that is essential to a productive employer employee relationship has been irreparably breached, that there is no reasonable expectation*

> *that your behaviour will change and that the existing employer employee relationship is no longer viable.*
>
> *On the basis of the foregoing, I have decided to terminate your employment for cause pursuant to the authority delegated to me by the Deputy Head and in accordance with the Financial Administration Act Section 11(2)(f). In reaching my decision I have considered mitigating factors, particularly your years of service.*

. . .

[531] Dr. Haydon received a performance evaluation for the period from June to September 2001, which she signed on February 4, 2002 (Exhibit E-350, tab B-3). In it, Dr. Alexander noted the following:

> *Dr. Haydon is very dedicated to conducting her reviews in a complete and thorough manner.*

. . .

> *The evaluation of Synergistin Injection was delayed this past fall by the need to review animal safety data which was previously submitted but for which a review did not exist on file. Dr. Haydon also indicated that ongoing appeals actions during this time period also required her participation and preparation time which contributed to interruptions in review time.*
>
> *I have discussed with Dr. Haydon my need to be kept apprised of other requests for or work activities which are part of her duties for the purpose of fairly assessing her workload.*

. . .

[532] The assignment at issue in this grievance was for Pirsue, a trade name for the generic antibiotic pirlimycin. Pirsue, in an aqueous gel formulation, was issued a NOC in 1996. Pirsue was used to treat mastitis in dairy cattle. In August 2000, the manufacturer made an NDS for Pirsue Sterile Solution. In both products, the dosage of the antibiotic was the same. The new formulation did not contain the benzyl alcohol and carboxymethyl cellulose sodium that were in the aqueous gel formulation. For the efficacy component of the NDS, the manufacturer relied on a report prepared on the bioequivalence of the new formulation with the already approved aqueous gel.

[533] The manufacturer also submitted two SNDS in February 2001. The first was for an additional use of the Pirsue aqueous gel to treat clinical and subclinical mastitis

caused by certain kinds of bacteria. The second was for an additional use for the not-yet approved Pirsue Sterile Solution for the clinical and subclinical treatment of mastitis for bacteria other than that specified in the original NDS.

[534] Pirsue was assigned to Dr. Haydon for review in late January 2002 (Exhibit E-350, tab B-2). By March 2002, all three applications had been assigned to Dr. Haydon for review.

[535] All evaluators and supervisors in the Clinical Evaluation Division were required to prepare work plans for every three-month period. Dr. Haydon's work plan for October to December 2002 was provided to Dr. Alexander on December 4, 2002 (Exhibit E-350, tab B-7). In October, she worked on no other assignment than Pirsue. In November, she was assigned an ESC. She noted in her work plan that the NDS for Pirsue was "almost complete" and that she was acquiring and reviewing relevant papers.

[536] On December 11, 2002, Dr. Haydon told Dr. Alexander that her review of the NDS showed that the efficacy data was unsatisfactory and that there were concerns about AMR (Exhibit E-350, tab B-9).

[537] Dr. Haydon did not refer to the Pirsue assignments in her January to March 2003 work plan (Exhibit E-350, tab B-7).

[538] The draft performance evaluation prepared by Dr. Alexander for the period from January 1, 2002 to September 30, 2002 contained the following comments (Exhibit E-350, tab B-11):

. . .

> *Dr. Haydon is a senior scientific evaluator in the Clinical Evaluation Division of VDD. This performance evaluation covers a 9 month period during which time she completed one submission which was assigned to her two years earlier and four ESCs; provided comments and advice on several issues; performed 1 week of EDR duty; and, organized and/or participated in several meetings. A further submission (Pirsue) has been under review since April 2002 and notwithstanding the fact that Margaret required becoming familiar with this type of submission, the review time has been lengthy. Overall, Margaret's level of performance is low.*

> ***Areas requiring additional effort:***
>
> *In this next year I will set goals with Dr. Haydon in an effort to reduce the review times for submission reviews. For example, the time for completion of review reports could be reduced by focusing on the review of scientific/technical aspects of data and decreasing the amount of unnecessary/extraneous details in evaluation reports. We have also discussed over this year the need to stay within the mandate of our Division which is to review animal safety and efficacy. We are always able to point out issues which may be of importance to food safety to the Human Safety Division but recommendations should be left to the responsible Division.*
>
> . . .
>
> ***Objectives for the period October 2002 to September 2003***
>
> *In the coming months, Dr. Haydon will be expected to:*
>
> > *a) perform in a fully satisfactory manner the duties within her position as a Senior Drug Evaluator and meet the deliverables and deadlines.*
> >
> > *b) demonstrate continued improvement in her work methods, approach to duties, teamwork and collaboration with her colleagues.*
> >
> > *c) contribute positively to the organization goals and commitments.*

[539] On February 5, 2003, Mr. Yazbeck wrote to the Deputy Minister of Health Canada (copying, among others, Ms. Gorman), raising concerns about the performance evaluations of all three grievors and allegations of harassment (Exhibit G-2, tab C). In the letter, he requested that the performance evaluations be rescinded.

[540] On February 13, 2003, Dr. Haydon emailed Dr. Alexander about her performance discussion and draft evaluation (Exhibit E-350, tab B-10). She wrote that his comments were harassment and retaliation and referred Dr. Alexander to the two letters written by her counsel on February 5, 2003. She stated in her email that further discussions should be conducted through her legal counsel.

[541] On February 21, 2003, Dr. Alexander emailed Dr. Haydon, advising her that he would sign her performance evaluation and that she had not responded to his requests for feedback (Exhibit E-350, tab B-10). In addition, he reminded her that she was required to undertake and complete her assigned work.

[542] On February 27, 2003, Mr. Yazbeck wrote to Ms. Gorman, expressing concern that the evaluations were being signed and requesting that the performance evaluation process be stopped (Exhibit G-2, tab G).

[543] Dr. Haydon grieved her performance evaluation. In preparation for the grievance hearing, Dr. Alexander prepared some background notes for Ms. Gorman (Exhibit E-350, tab B-8), as follows:

. . .

> *The conclusion reached by me was that in comparison to other Senior Evaluators, Dr. Haydon's performance is low. I did not suggest that the work that she completed was unsatisfactory, however, her ability to set goals and accomplish tasks in a timely manner is low in comparison with other staff. Senior evaluators in the Clinical Evaluation Division are classifed* [sic] *at the VM-04 level and have 10 or more years experience in the review of New Drug Submissions. There are presently 5 Senior Evaluators and three less experienced evaluators in the Clinical Evaluation Division.*
>
> *The one report for a new drug submission which I did receive was very long and included 37 pages of historical information on the previous clearance for the drug as well as considerable commentary on the Human Safety review. I did counsel her in May 2002 that her reports should stay within the mandate of the Division (animal safety and efficacy) and not deal with human safety evaluations….*
>
> *In my evaluation, I have compared her achievements with other evaluator's accomplishments. Other Senior evaluators and even newer evaluators are able to set deadlines and complete evaluations in a timely manner (as noted above) without supervision and prodding.*

. . .

> *I am committed to assist Dr. Haydon in improving her performance but I need to know that she is committed to this objective.*

[544] Dr. Alexander consulted with Ms. Kirkpatrick and human resource advisors when he drafted Dr. Haydon's performance evaluation.

[545] Dr. Haydon completed and signed her review of the NDS for Pirsue on March 31, 2003 (Exhibit E-353) and submitted it on May 8, 2003. She also provided a draft ADL on

May 9, 2003 (Exhibit E-350, tab B-12). Dr. Haydon's only remaining assignments from that point were the two SNDS files for Pirsue.

[546] The NDS review prepared by Dr. Haydon was sent for a second review to another evaluator, Dr. Malik. The second review was completed on July 11, 2003, and an amended ADL was sent to the manufacturer on August 26, 2003. The VDD received the manufacturer's response on October 17, 2003. The manufacturer submitted one report on safety and supporting data for a report on safety that had already been submitted. On efficacy, the manufacture reiterated its earlier position on bioequivalence.

[547] On November 14, 2003, Dr. Alexander asked Dr. Haydon and Dr. Malik to meet with him to discuss the additional data submitted by the manufacturer. Dr. Haydon obtained a copy of the manufacturer's response that same day. Dr. Alexander met with the two evaluators on November 18, 2003. At the meeting, Dr. Haydon was assigned the review of the ADL response. Dr. Alexander asked Dr. Haydon about the approval of Pirsue by the United States. In addition, Dr. Alexander asked her to review the summary of the United States' approval. Dr. Haydon testified that she did not recall being asked to carry out that review.

[548] In an email sent on November 19, 2003 (Exhibit E-350, tab B-15), summarizing the discussion, Dr. Haydon commented in detail about aspects of the ADL. She also made the following comments:

. . .

> *3. Comments were made concerning a number of Canadian Adverse Drug Reaction reports filed with VDD concerning the marketed Pirsue Aqueous Gel formulation.*
>
> *VDD has not received data from safety studies conducted with the subject product, Pirsue Sterile Solution.*
>
> *B) Pharmacodynamics*
>
> *The manufacturer is proposing to add additional "precaution/contraindication" statements without submitting the requested scientific data. Unsatisfactory*
>
> *C) Efficacy*

> *1. The manufacturer appears to still be pursuing bioequivalence studies despite the study being rejected and because it did not address the subject product.*
>
> *The manufacturer made reference to a summary* [study] *. . . demonstration of efficacy.*
>
> *2. The manufacturer has replied that "no further clinical efficacy data is available for the subject product".*
>
> *VDD has received no efficacy data from efficacy studies conducted with the subject product, as was requested.*
>
> *3. In response to questions concerning approvals in other countries the comments were:*
>
> *The National Mastitis Council Annual Meeting Proceedings (1995) published paper authored by Louisiana State University and Upjohn scientists (W.E. Owens et al) noted unsatisfactory efficacy of Pirsue Aqueous Gel and described their results from off-label studies.*
>
> *In Europe, pirlirnycin hydrochloride is approved only for treatment of subclinical mastitis following 8 consecutive intramammary infusions (approx. 30 % efficacy) and a milk withholding period of 13 days. (NOTE: Unacceptable under conditions of the Canadian Food and Drugs Act and Regulations). The European approval was based on another multi-country European study which has not been submitted to Canada.*
>
> *From my initial assessment of the new manufacturer's response, Pirsue Sterile Solution cannot be recommended for approval.*

[549] In his reply to her email, Dr. Alexander wrote that he had a similar understanding of what had been discussed.

[550] Dr. Alexander testified that reviewing the additional data should not have taken much time.

[551] On December 4, 2003, Dr. Alexander met with Dr. Haydon to discuss her performance evaluation. At the meeting, Dr. Haydon raised her concern about reviewing the SNDS for Pirsue Sterile Solution before the review of the NDS for the same product was approved.

[552] After the meeting, Dr. Haydon wrote an email to Dr. Alexander (Exhibit E-350, tab B-9) and stated that she would wait for his decision as to whether to proceed with the review of the SNDS for the Pirsue Sterile Solution.

[553] Dr. Alexander wrote to Dr. Haydon on February 17, 2004 (Exhibit E-350, tab B-18), requesting an update on the status of the Pirsue reviews and an estimated time of completion. In her reply of February 18, Dr. Haydon indicated that she had been sick at the end of December and for most of the month of January and that she would be serving her 10-day suspension from February 19 to March 3, 2004. She stated that, under the circumstances, she could not provide a status report or an estimated completion time. She wrote that she had a rough draft of a memo concerning the status of the SNDS for Pirsue Sterile Solution that she would complete on her return to work. Dr. Alexander replied that they could discuss the submission on her return to work and that he would set up a meeting in early March to discuss the timelines for the completion of the submissions. No meeting was held in March.

[554] On March 23, 2004, Dr. Haydon sent a memo to Dr. Malik outlining her concerns about the review of the SNDS of Pirsue Sterile Solution (Exhibit E-350, tab B-19). In addition to comments about the bioequivalence study, Dr. Haydon made the following comments:

. . .

> *A subsequent review of the NDS for PIRSUE STERILE SOLUTION indicates that bioequivalence data has not been submitted by the manufacturer. There are also significant differences in the formulations of the two products, the NDS PIRSUE STERILE SOLUTION and the previously approved PIRSUE AQUEOUS GEL. There is no satisfactory data to support safety and efficacy claims for the NDS PIRSUE STERILE SOLUTION and consequently this drug cannot be recommended for a Notice of Compliance under provisions of the Food and Drugs Act and Regulations. Under these circumstances, it is inappropriate and contrary to the Food and Drugs Act and Regulations to review an SNDS for PIRSUE STERILE SOLUTION when the original NDS has not been found to be satisfactory for issuance of a Notice of Compliance.*

[555] Dr. Alexander testified that the VDD had approved reviewing both submissions at the same time because they were linked and relied on the same data. The approval for evaluating both submissions at the same time was made with the understanding

that approval for the SNDS would not be given unless the original NDS was also approved.

[556] On May 6, 2004, Dr. Alexander met with Dr. Haydon and gave her the following letter as a follow-up to their performance evaluation discussions of December 2003 (Exhibit E-350, tab B-21):

> *This letter is to follow up our discussion in December 2003 concerning your job performance evaluation. As I stated in that meeting, your evaluated job performance has not improved since the last review period and has failed to meet the minimal standard set for drug evaluators. Your workload has been reduced to allow you to focus on specific submissions to be completed in a timely manner, yet these continue to drag on. Despite not assigning new work, in order to give you more time to focus on outstanding submissions, there remains large amounts of unaccounted for and unproductive time. Your productivity generally is so minimal as to be almost non-existent. Furthermore, there appears to be some reluctance on your part to conduct your work within the animal safety and efficacy mandate of the Division instead opting to include issues dealing with human safety evaluations.*
>
> *I have raised these issues with you before both in discussion and formal performance review documents, but unfortunately, your performance has continued to deteriorate. I would also point out that your previous PDP attempted to set out in a more formal and structured fashion a work plan to assist us in the task of planning and scheduling your work and thereby, hopefully, improving your performance. Unfortunately, these efforts have failed and your performance remains at an unsatisfactory level, which cannot continue. I am now of the opinion that a more focussed approach is required to address your performance issues.*
>
> *Commencing immediately, I will be shortening your work planning and review cycle to periods of approximately one month in duration. It is my intention that we will establish more specific and detailed work plans for you to complete during each period and you will be assessed monthly on your success. This will also give us an opportunity to address any barriers preventing you from achieving the required level of performance for a senior drug evaluator. You should ensure that any issues that prevent you from accomplishing your assigned work plan are brought to my attention immediately.*
>
> *The VDD has an important role to play in the delivery of Health Canada's mandate. Although staff levels have*

> *increased significantly in recent years, we still require and expect full performance of all employees. As I stated above, your current level of performance cannot continue and you must be prepared to work at the same level as other employees.*
>
> *Unfortunately, I must point out that should your performance fail to rise to the standards expected of a senior drug evaluator, this could result in your demotion or even termination of your employment.*

[557] Ms. Kirkpatrick was involved with drafting the letter (Exhibit G-313). She testified that she agreed with its observations and conclusions.

[558] Dr. Alexander also signed Dr. Haydon's performance evaluation for the period from October 2002 to September 30, 2003 on the same day (Exhibit E-350, tab B-16). It reads as follows:

. . .

> *I have asked Dr. Haydon during our discussion on December 11, 2003 to ensure that all work that was completed was accounted for in her lists of accomplishments so that I could fairly assess her work. Dr. Haydon was not assigned additional tasks after January 2003 in an effort to allow her to complete submissions in a timely manner.*
>
> *Based on the accomplishments, I could not account for her time over the evaluation period and therefore would assess that Dr. Haydon's level of [sic] continues to be low.*

. . .

> *Clear expectations will need to be set with regard to performance and time lines for completion of projects will be agreed upon. When time lines are not going to be met it is expected that Dr. Haydon will inform me in advance and explain the reasons for these timelines not being met.*

. . .

> *In the next 6 months, Dr. Haydon will be expected to:*
>
> *-complete all assigned work in a fully satisfactory manner, setting timelines for completion of this work with her supervisor and meeting these deadlines.*
>
> *-demonstrate improvement in her work and approach to her duties.*

. . .

[559] Dr. Haydon emailed Dr. Alexander on May 12, 2004 (Exhibit E-350, tab B-22), responding to the meeting of May 6 and the letter. She wrote the following:

> *. . . please give me the evidence for your accusations against me on May 6, 2004.*
>
> *Please tell me what specific delays in my outputs were caused personally by me.*
>
> *Kindly let me know the dates, time, minutes for the accusation that "there remains large amounts of unaccounted for and unproductive time".*
>
> *Show me what part of work output [sic] my evaluations are not pertinent to the mandate of my job description.*
>
> *Please describe incidents, e-mails, meetings, instructions, corrections or any other communications during this period of performance appraisal.*
>
> *Short of receiving this information, I would consider your accusations to be baseless and the cause of an aggravated harassment against me.*

[560] Dr. Alexander replied on June 1, 2004 (Exhibit E-350, tab B-22) as follows:

> *. . . My concerns about your unacceptable performance and output have been adequately documented and discussed with you. To continually repeat the same discussions would not in my opinion be productive. As stated in my letter you should be focussing on making a dramatic and immediate improvement to your performance.*
>
> *I look forward to seeing this improvement when we next meet and will expect a complete update on your current assignment at that time. I would like to schedule this PDP review meeting for you on June 7, 2004 at 2:00 p.m. in my office to review your progress to date.*

[561] Dr. Alexander testified that he did not answer Dr. Haydon's questions because she wanted him to defend his point of view when he had already expressed his concerns about her performance.

[562] Dr. Haydon testified that a short meeting with Dr. Alexander took place on June 7, 2004. Dr. Alexander had no recollection of it.

[563] Dr. Haydon signed her review of the ADL for the Pirsue NDS on June 8, 2004 and forwarded it to Dr. Alexander the next day (Exhibit E-351, tab 4-A). Dr. Alexander

provided a copy to Ms. Kirkpatrick. Each reviewed the document independently and met to discuss it for approximately an hour in late June. Dr. Alexander also prepared notes on the review for Ms. Kirkpatrick (dated June 23, 2004), and Ms. Kirkpatrick testified that she reviewed those notes (Exhibit E-363).

[564] Dr. Alexander wrote, in part, as follows:

. . .

> *In general the report is long, complex and often difficult to review for the data to be reviewed. The conclusions are long for the safety in the intended species and are more comments on the data. Conclusions should be short and to the point. To do a proper review of this report on my part would take a great deal of time and would necessitate validation of the conclusions by looking at the original data. I would estimate at least 1-2 weeks full-time. I will have to assign this to another evaluator to advise. I may not disagree with her final conclusions but I would not feel comfortable concluding this without a very thorough second review.*
>
> *I would expect an evaluator with her experience to be able to provide a more succinct report and evaluation of the data.*
>
> *Despite the fact that I have mentioned to her several times that the U.S. has concluded on this submission she has not given any consideration to the U.S. product clearance.*

. . .

[565] Dr. Haydon provided a review of the SNDS for the Pirsue aqueous gel on June 18, 2004. In his notes prepared for Ms. Kirkpatrick, Dr. Alexander wrote as follows (Exhibit E-363):

. . .

> *She . . . has only paid minimal attention to the data that was provided to support the new indications.*
>
> *This submission again would require a considerable amount of second review to conclude on the submission which I will need to provide to a second reviewer.*

. . .

[566] Ms. Kirkpatrick testified that, after examining Dr. Haydon's review, she concluded that it raised more questions than answers and that it was incoherent. She also testified that she felt that the review could not be used to reach any conclusions

on the submission. She also concluded that a second reviewer would not be able to conduct another review based on what the first review contained. She testified that a second reviewer should be able to conduct his or her review on the basis of the contents of the first review and should not have to review the original application and data.

[567] Ms. Kirkpatrick testified that, after going over the review and speaking with Dr. Alexander, she no longer saw Dr. Haydon's actions as a performance issue but as a behavioural issue. She testified that, when reaching her conclusions, she considered Dr. Alexander's notes and their conversations.

[568] At the hearing, it became clear that there were some inconsistencies in the letter of termination (Exhibit E-350, tab A-2). In the third para, Ms. Kirkpatrick wrote as follows: "Instead of complying with the agreed instructions, you submitted an incomplete draft document and stated that there would be further delays in completing the assignment . . . ." Ms. Kirkpatrick testified that that sentence did not refer to the June 9, 2004 review (which had been completed) but to the February 18, 2004 email (Exhibit E-350, tab B-18), summarized earlier in this decision in the evidence summary. She testified that the sentence was misplaced when the letter was drafted and that it should have been placed earlier in the paragraph.

[569] At the hearing, the employer identified 30 problems with Dr. Haydon's review. The employer provided detailed submissions on each identified problem. The evidence on the 30 problems was adduced to demonstrate the employer's assertion in the letter of termination that the review lacked coherency, was incomplete and was therefore inadequate. I have summarized the evidence on some of the identified problems, which is sufficient to demonstrate the employer's concerns.

[570] In the review, Dr. Haydon spent what Ms. Kirkpatrick characterized as an excessive amount of time assessing the HSD residue review, which was outside her job responsibilities.

[571] In the review, Dr. Haydon stated that treatment with Pirsue resulted in poor milk quality and that the "significantly increased" somatic cell count amounted to "sterile pus" in the milk (Exhibit E-351, tab 4-B). Ms. Kirkpatrick testified that the review did not provide any analysis or supporting rationale for its conclusion about milk quality.

[572] Dr. Haydon referred to Pirsue causing significant irritation of the mammary glands. Ms. Kirkpatrick testified that Dr. Haydon did not summarize the manufacturer's explanation for the observed effects of the drug in her review. Ms. Kirkpatrick testified that an evaluator's role is to address explanations provided by the manufacturer and to explain the rationale for accepting or rejecting its argument. Dr. Haydon did not do so in her review.

[573] Dr. Haydon set out the results for cows that were disqualified from the study in great detail (about 22 pages of a 68-page review). Ms. Kirkpatrick testified that there might be good reasons to review the data for disqualified animals. However, in this case Dr. Haydon provided no rationale for considering those cows and no explanation of what was learned from her examination.

[574] Dr. Haydon dismissed the bioequivalence study without reviewing it scientifically, according to Ms. Kirkpatrick. Dr. Haydon rejected the study on the basis that Pirsue Sterile Solution was a different formulation but did not provide any analysis of the study. Dr. Haydon did not address the fact that Pirsue Sterile Solution had been approved in the United States based on the same bioequivalence study. Ms. Kirkpatrick testified that a simple conclusion is not sufficient and that Dr. Haydon should have provided an explanation for her conclusion.

[575] Dr. Haydon did not examine the United States' approval of Pirsue and in particular its approval of the bioequivalence study. Dr. Alexander had asked her to examine it at the meeting on November 18, 2003, summarized earlier in this decision.

[576] The employer identified 12 examples of word-for-word repetition within the review. Those examples are set out in detail in its written submissions. Ms. Kirkpatrick testified that this repetition made the review very difficult to follow and incoherent.

[577] Ms. Kirkpatrick testified that she did not discuss her concerns with Dr. Haydon because she felt that she had nothing to gain by speaking to her. She concluded that Dr. Haydon had no intention of completing assigned work and that her conduct was insubordination and not poor performance.

[578] Dr. Haydon testified that she was competent to perform her evaluator duties. She testified that she always felt that she was trying to do her job professionally and to the best of her abilities. Her review submitted on June 9, 2004 was never meant to

be final because additional data was required. She testified that her actions were not a deliberate effort to avoid work. She was trying to produce the best report that she could.

[579] From December 15, 2003 to January 2, 2004, Dr. Haydon was on approved annual leave. For almost all of January 2004, Dr. Haydon was on approved sick leave. From February 19 to March 3, 2004, she served her 10-day suspension (discussed earlier in this decision). She was off for approximately five days between then and June 21, 2004. On June 21, 2004, she went on sick leave until the date of termination of her employment.

3. Dr. Lambert's termination

[580] Dr. Lambert's employment was terminated effective July 14, 2004. The letter of termination of employment to Dr. Lambert was in French (Exhibit E-341, tab A-1). The parties referred only to the English version in their evidence and submissions. The letter was originally written in English and was translated. Ms. Kirkpatrick wrote as follows:

. . .

> *In early May you were assigned the task of evaluating specified data contained in a veterinary drug submission. You agreed that this assignment was well within your professional capabilities and could be completed within a three month period of time. Concurrently, and pursuant to on-going discussions respecting your performance, you were advised that significant improvements were expected in your overall performance. Given concerns raised over the last two years about your work performance as a senior veterinary drug evaluator, I considered it appropriate to seek updates on your progress at regular intervals. You also agreed to comply with this request.*
>
> *You assured me just prior to the due date of the first progress report that an update would be submitted. You failed to submit the update by the due date. When you eventually did submit your update, I determined that no actual work or progress had been accomplished by you. This on-going pattern of procrastination and misuse of work time has from my perspective become the norm for you and based on your performance to date, I see no efforts or intention on your part to correct the situation.*
>
> *Upon consideration of this I have concluded that your refusal to respect and comply with the instructions that I provided to*

> *you constitutes insubordination.*
>
> *Given your previous disciplinary record and your continued unwillingness to accept responsibility for your work, I have determined that the bond of trust that is essential to a productive employer employee relationship has been irreparably breached, that there is no reasonable expectation that your behaviour will change and that the existing employer employee relationship is no longer viable.*
>
> *On the basis of the foregoing, I have decided to terminate your employment for cause pursuant to the authority delegated to me by the Deputy Head and in accordance with the Financial Administration Act Section 11(2)(f). In reaching my decision I have considered mitigating factors, particularly your lengthy years of service.*
>
> *The termination of your employment will take effect immediately.*
>
> *You have the right to grieve this decision within 25 days of the receipt of this letter.*

[581] Dr. Lambert testified that he was not assigned any work from February 2004 until the assignment that led to the termination of his employment. Ms. Kirkpatrick was Dr. Lambert's direct supervisor at that time.

[582] Ms. Kirkpatrick testified that she asked Dr. Vilim, with the assistance of Dr. R. Sharma, to identify an assignment for Dr. Lambert that would include a review of toxicology, an area within Dr. Lambert's expertise. She testified that she wanted him to have an assignment that she could use to establish reasonable expectations once it was completed. She testified that, after his previous insubordination (for which he received a 10-day suspension), she wanted to "put him back on track" in terms of completing work. She also testified that giving Dr. Lambert just the one assignment would allow him to concentrate on his work. In the past, Dr. Lambert had told Ms. Kirkpatrick that conflicting priorities had made it difficult for him to concentrate. Dr. R. Sharma responded to the request by email on April 20, 2004 (Exhibit E-341, tab B-1) and identified an NDS review for the "Draxxin Injectable Solution" ("Draxxin"). He told her that the assignment could be completed in three months. The Draxxin submission included nine volumes of data.

[583] Ms. Kirkpatrick met with Dr. Lambert on May 4, 2004. She assigned him the first review of the toxicity data for the Draxxin submission. Ms. Kirkpatrick had handwritten notes both prepared in advance of and taken during the meeting

(Exhibit E-341, tab B-2). She told Dr. Lambert that he was to complete the assignment in three months and assigned a due date of the first week of August. She also told him that he was to provide monthly updates on the status of his review and that he should advise her of any problems “at any time.” She told him that the first update was due the first week of June. Dr. Lambert testified that she did not give him any details of what to include in his updates. He also testified that she did not warn him of any disciplinary consequences if he did not provide updates or complete the assignment.

[584] After the meeting (and on the same day), Ms. Kirkpatrick sent Dr. Lambert an email that reads as follows (Exhibit E-341, tab B-6):

> *This is to confirm our discussion this afternoon. You have been assigned the task of reviewing the toxicity data in this submission. These data consist of 9 volumes (available from Judy Robinson) and you are requested to review items 3.2 to 3.7 inclusive as identified in the submission Table of Contents (a copy of which was provided to you at our meeting). The timeframe for this review is 3 months from today i.e. August 4th, 2004. I also requested that you provide me with monthly updates of your progress and in addition, advise me at any time of any difficulties that you may encounter in conducting this review.*

[585] Dr. Lambert signed out the Draxxin file on May 6, 2004 (Exhibit G-290). On May 10, 2004, Dr. Lambert took 4.5 hours of approved leave (Exhibit E-341, tab B-10).

[586] Dr. Lambert sent two emails to Ms. Kirkpatrick on May 13, 2004. The first (Exhibit G-285) was sent in error, and he asked her to ignore it (Exhibit E-341, tab B-7). Because of some confusion about when the email was sent, Ms. Kirkpatrick’s assistant deleted the first email and did not provide a copy of the revised email to Ms. Kirkpatrick. She was made aware by her assistant that Dr. Lambert had sent an email but that he had then asked that it be disregarded. In his email, Dr. Lambert asked why Ms. Kirkpatrick was excluding some of the studies on file from his review and wanted to know her rationale. He also noted the following:

. . .

> *A report on antimicrobial resistance is on file. . . This NDS does not comply with Human Safety requirements of the Food and Drugs Act and Regulations and additional data is required. Was the recommendation forwarded to the drug manufacturer? There is no letter to this effect on file.*

> *. . . there is no report on metabolism in the intended species and in different laboratory animal species. That review is essential for the review of toxicity data. If that part of the review is not completed, I would not be able to finalize my review of total toxicity package.*
>
> *. . . there is no review report from the manufacturing and chemical evaluation division. This report is important for the active ingredient(s) to be well characterized. There is a problem of stability of the product with formation of metabolic derivative.*

. . .

[587] Dr. Lambert also noted the lack of pharmacology information in the parts of the file given to him for review. In cross-examination, Dr. Lambert agreed that none of his expressed concerns prevented him from starting his review. He also testified that the identified issues were relevant to completing the assignment.

[588] Dr. Lambert's 10-day disciplinary suspension (addressed earlier in this decision) was imposed on May 14, 2004. It was served from May 17 to 28, inclusive.

[589] Ms. Kirkpatrick met with Dr. Lambert on June 11, 2004 to discuss his performance evaluation for the period from October 1, 2002 to September 30, 2003. Ms. Kirkpatrick made handwritten notes of the meeting (Exhibit E-341, tab B-8). She also discussed the PSIO's recommendation that Dr. Lambert be provided with a "career-enhancing opportunity." She provided Dr. Lambert with a performance evaluation letter on that same day. Dr. Lambert told her that, "in practical terms, my career is finished" (as recorded in Ms. Kirkpatrick's notes).

[590] Ms. Kirkpatrick reminded Dr. Lambert that his first monthly update was due June 16, 2004. At that point, Dr. Lambert referred to his May 13 email. Ms. Kirkpatrick told him that, as he had instructed, her assistant had deleted the email. He agreed that the email had been confusing and said that he would resend it. He testified that he brought the email with him and that he gave a copy to Ms. Kirkpatrick, who could not recall receiving it. She testified that they did not discuss the issues that he raised in his email but that she told him that she would look at it. In a note handwritten on or about June 18, 2004, she wrote that she had not received the email. Dr. Lambert forwarded it to her on June 24, 2004 (Exhibit G-285).

[591] Dr. Lambert testified that he tried to give Ms. Kirkpatrick a draft of the Draxxin

report at the meeting but that she refused to accept it because time still remained for him to complete his assignment.

[592] At the meeting, Ms. Kirkpatrick gave Dr. Lambert the following letter about his work performance (Exhibit E-341, tab B-9):

> *This letter is to follow up our discussions on January 21, 2004 and February 18, 2004 concerning your job performance evaluation.*
>
> *As I stated in those meetings, your job performance has not improved since the last review period and has again failed to meet the minimum acceptable standard for drug evaluators. This is the second consecutive Performance Discussion Process (PDP) in which your performance has been evaluated as being at an unacceptable level.*
>
> *Your workload had been reduced to allow you to focus on completing specific overdue submissions which had remained uncompleted since prior to your previous PDP. Despite not assigning new work, in order to give you more time to focus on these outstanding submissions, these files were still not submitted until early this year and the quality f [sic] your work was poor. Your failure to apply yourself to your assigned work and use your time productively has resulted in a low level of output which is unacceptable for a professional at your level and displays a complete disregard for the needs of our clients.*
>
> *These issues have been raised with you before, both in discussions and formal performance review documents, but unfortunately your performance has failed to improve. As was indicated to you at our May 4, 2004 meeting, I am of the opinion that a more focussed approach is required to address your performance issues.*
>
> *As confirmed in my May 4, 2004 e-mail to you, your work planning and review cycle has been shortened to periods of approximately one month in duration. My intention in this regard is that we will establish more specific and detailed work plans for you to complete during each period and you will be assessed monthly on your progress. This will also give us an opportunity to address barriers, if any, preventing you from achieving the required level of performance for a senior Drug Evaluator. You should ensure that any issues that prevent you from accomplishing your assigned work plan, within established timelines, are brought to my attention immediately.*
>
> *The VDD has an important role to play in the delivery of Health Canada's mandate. Although staff levels have*

> *increased significantly in recent years, we still require and expect to full performance of all employees. As stated above, your current level of performance cannot continue and you must be prepared to work at the same level as other employees.*
>
> *Unfortunately, I must point out that should your performance fail to rise to the standards expected of a senior Drug Evaluator, this could result in your demotion or even the termination of your employment.*
>
> *As I indicated orally to you, I sincerely hope that this situation will improve and I want you to know that I am available to provide the necessary support required to enable you to achieve the required level of performance. I look forward to an immediate and sustained improvement in your performance.*

[593] Dr. Lambert testified that Ms. Kirkpatrick summarized the letter at the meeting but that he was not given an opportunity to prepare a response.

[594] Dr. Lambert testified that it was his understanding that the monthly update requested by Ms. Kirkpatrick was to be an overview of the data submitted. He did not seek any clarification from Ms. Kirkpatrick as to what she expected in an update.

[595] Dr. Lambert testified that he continued to work on the Draxxin assignment. He testified that he completed a second draft Draxxin report late in the day on June 18, 2004 (a Friday). He testified that he wanted to add a "DRAFT" watermark on each page and that he had difficulty doing so. He testified that he finished it late that day and that he was unable to deliver it to Ms. Kirkpatrick. He testified that he wanted to give it to Ms. Kirkpatrick personally.

[596] On Monday, June 21, 2004, Dr. Lambert called Ms. Kirkpatrick's assistant to inform her that he would be on sick leave. He told her that he would be off for the rest of the week and likely longer. He also told her that he would email the report that he told her had been due the previous Friday. Ms. Kirkpatrick's assistant forwarded that information to her (Exhibit E-283, tab C-4). Dr. Lambert testified that he went on sick leave because of stress.

[597] Dr. Lambert testified that he had problems opening his draft report on his home computer. In cross-examination, Dr. Lambert testified that he was in the office on the afternoon of June 23, 2004 for about an hour. He testified that he copied his draft Draxxin report to a floppy disk. He was asked in cross-examination why he did not

forward an electronic copy while he was in the office. He admitted that he could have but that he was "under stress."

[598] Dr. Lambert emailed a copy of the draft to Ms. Kirkpatrick on June 24, 2004 (Exhibit E-341, tab B-14). In his email, Dr. Lambert stated that he had been unable to send the draft from his home on the previous Monday (June 21). He stated that a hard copy was in his office. He also forwarded an electronic copy of his May 13, 2004 email (Exhibit E-341, tab B-13).

[599] Ms. Kirkpatrick asked Dr. R. Sharma to review Dr. Lambert's May 13, 2004 email. Dr. R. Sharma and Dr. Bhim Bhatia provided comments to Ms. Kirkpatrick on June 24, 2004 (Exhibit E-341, tab B-15) for her to use in her reply to Dr. Lambert. The comments noted that some of the information not provided to Dr. Lambert ". . . may not be relevant for the initiation of the review of the toxicity data," while other information was not required to initiate the review. Dr. R. Sharma also concluded that parts of the volumes not provided to Dr. Lambert were "indeed relevant" and were available for him to consult. Dr. Sharma concluded that the fact that the HSD was reviewing AMR "should not preclude" the initiation of Dr. Lambert's review. The available report on comparative metabolism was appropriate for Dr. Lambert to consult at the "concluding stage" of his review. He also concluded that Dr. Lambert could examine the submitted pharmacokinetics and pharmacodynamics data ". . . if you consider that it will help you in completing . . ." the review. Ms. Kirkpatrick testified that she did not prevent Dr. Lambert from consulting other material on file. Her intention was to focus Dr. Lambert's attention on the relevant material in the submission.

[600] Ms. Kirkpatrick testified that she did not view Dr. Lambert's May 13, 2004 email as an update of his progress on the assignment. She viewed the email as a discussion of the assignment. It was her view that it did not show that any progress had been made. Ms. Kirkpatrick testified that she did not reply to Dr. Lambert's May 13, 2004 email because he was on sick leave.

[601] Ms. Kirkpatrick testified that, after she reviewed Dr. Lambert's draft, she concluded that he had summarized information provided by the manufacturer and that he had not provided any comments on the studies submitted by the manufacturer. She asked Dr. R. Sharma to review the document to determine whether her assessment was correct. Dr. Bhatia assisted Dr R. Sharma in examining the draft report. Dr. R. Sharma provided his report to Ms. Kirkpatrick on June 26, 2004 (Exhibit E-341,

tab B-16). In his draft memo, Dr. R. Sharma outlined those parts of the draft report that were word-for-word copied from the manufacturer's submission document. Dr. Lambert was not provided a copy of Dr. Sharma's comments.

[602] Ms. Kirkpatrick testified that, based on her examination of the draft report and the comments provided by Dr. R. Sharma, she concluded that Dr. Lambert had done no work and that he had made no progress on the review. She expected a clear indication of progress in his update. She testified that Dr. Lambert did not show that he had done any analysis of the data or that he had reached any conclusions on the submission. She was expecting that he would make significant conclusions at that point of his review. She testified that it showed her that Dr. Lambert was continuing to withhold services and that he was insubordinate.

[603] Ms. Kirkpatrick testified that she did not contact Dr. Lambert to discuss her concerns because they had already had two years of discussions and because discipline had been imposed for the same conduct. Dr. Lambert had not told her of any problems with the work. She testified that, at that point, she had felt that the employer had "gone the full distance" and that nothing more could be done.

[604] Dr. Lambert remained on sick leave until his employment was terminated. Ms. Kirkpatrick testified that she concluded that his sick leave was not related to being able to complete the review. She testified that she did not wait until the end of his sick leave to terminate his employment because "nothing would change as a consequence," and there was no point in delaying the termination of his employment any longer.

[605] In cross-examination, Dr. Lambert agreed that the assignment was clear-cut and that he was capable of doing it.

[606] Ms. Kirkpatrick outlined in her evidence the following factors, which she considered were in favour of terminating Dr. Lambert's employment: he was qualified to do the work and understood what was required; he was warned of the consequences of not doing his assigned work, his previous discipline and her conclusion that further discipline short of termination would achieve nothing.

[607] Ms. Kirkpatrick acknowledged that she was aware of the Treasury Board *Guidelines for Discipline* (Exhibit G-288).

C. Submissions

1. Dr. Chopra's termination grievance

a. For the employer

[608] The following three distinct questions need to be answered in the typical discharge grievance (*Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P.162*, [1977] 1 Can. LRBR 1):

1. Has the employee provided just and reasonable cause for some form of discipline by the employer?
2. If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances of the case?
3. Finally, if the arbitrator considers that discharge was excessive, what alternative measure should be substituted as just and equitable?

[609] The employer had just and reasonable cause to discipline Dr. Chopra.

[610] The essential ingredients necessary to establish insubordination are as follows (*Canadian Labour Arbitration*, at para 7:3612):

- proof that an order was in fact given;
- the order was clearly communicated to the employee by someone with the proper authority; and
- the employee either refused to acknowledge it or actually refused to comply with it.

[611] However, even if no specific order is given, an employee may be found to have been insubordinate if it can be concluded that he or she must have been aware of the duties expected of him or her and that he or she refused to discharge them. In addition, it is not necessary for an employer to prove that the employee intended to defy the order, that he or she had a blameworthy state of mind or that it suffered any financial loss (*Canadian Labour Arbitration*, at para 7:3612).

[612] Dr. Chopra knew that Ms. Kirkpatrick was expecting monthly progress updates on the assignment. She confirmed her expectations in writing following their meeting on May 4, 2004. She advised Dr. Chopra that she was expecting an outline of his approach to the assignment and that a well-thought-out plan for identifying and focusing on the salient research was important. Although they exchanged more emails,

Dr. Chopra's failure to comply with her requests led to the termination of his employment.

[613] In *Trilea-Scarborough Shopping Centre Holdings Ltd.*, at para 9 and 12, the arbitrator held that, even though there was no direct order given to the grievor, there was no doubt that the grievor was well aware of what was expected of him. The arbitrator found that the grievor did not wish to do the assigned work and that the only thing that prevented him from doing the work assigned to him was his wilful opposition. Dr. Chopra's insubordination was similar.

[614] It is apparent from his emails to Ms. Kirkpatrick that, even though Dr. Chopra had been directed to perform the assignment, he was not prepared to proceed. Instead, he put up imaginary obstacles that he perceived as standing in his way, such as "meeting with other scientific evaluators." Dr. Chopra wanted to do things his way and his way only, and he refused to take direction from Ms. Kirkpatrick by not providing her with the information that she requested. Dr. Chopra failed to perform his work as requested. Thus, he was insubordinate.

[615] In *Vancouver General Hospital v. Hospital Employees' Union* (2002), 107 L.A.C. (4th) 392, the arbitrator held that the grievor's conduct of continuously disregarding the employer's direction showed a conscious disregard of standards and work practices that rendered it deliberate and repetitive. The arbitrator considered the grievor's pattern of ignoring those standards as premeditated. Although in that case the grievor was a long-service employee, the pattern of conduct implicit in his failure to respond to remedial initiatives negated his length of service.

[616] Bald-faced conclusions, reiterations and criticisms of the assignment by Dr. Chopra did not satisfy the requirement set out by Ms. Kirkpatrick to provide an update, an outline of his approach to meet the stated objectives of the assignment and a well-thought-out plan for identifying and focusing on salient research.

[617] As in *British Columbia Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258* (2002), 113 L.A.C. (4th) 337, Dr. Chopra found a successive number of different ways to respond to Ms. Kirkpatrick's instructions without ever actually completing his work as requested. By his actions, Dr. Chopra was insubordinate by not complying with his employer's instructions.

[618] In *British Columbia Hydro and Power Authority*, the arbitrator noted that, although any one of the incidents of insubordination might not have attracted significant discipline, an overall picture emerged of a defiant and contemptuous employee who constantly and deliberately challenged the employer's right to operate the workplace. Insubordination of that nature is considered a very serious form of misconduct that goes to the very root of the employment relationship. In that decision, the arbitrator also noted that the grievor's lack of remorse or recognition of insubordination would make reinstatement "purposeless" since the grievor's ". . . scorn and disrespect for members of management . . ." continued. That situation is similar to that of this grievance. Dr. Chopra engaged in behaviour that was defiant of the employer's authority to assign tasks and to expect them to be completed. It is not up to Dr. Chopra to question the utility of an assignment or to question instructions from the employer when performing his duties. Dr. Chopra did not do what was asked of him and yet maintained even during this hearing that his assignment had been completed, even though it had not.

[619] Dr. Chopra demonstrated a defiant attitude with his employer, which continues to this day. Dr. Chopra refuses to recognize any wrongdoing on his part. Everyone is to blame but him. As the arbitrator found in *British Columbia Hydro and Power Authority*, the employer submits that, in the absence of any regret or remorse or any sense of a need to apologize, reinstating Dr. Chopra would be purposeless. There is absolutely no basis on which to conclude that, were he reinstated, Dr. Chopra's behaviour would change. Termination was not an excessive response.

[620] The employer made submissions in the alternative. It submitted that, were I to determine that discharge was excessive, compensation in lieu of reinstatement was the appropriate remedy. Since I have determined that discharge was not excessive, I have not summarized those submissions.

b. <u>For the grievor</u>

[621] The concerns expressed by Dr. Chopra in earlier AMR projects were consistent with and relevant to the assignment at issue in his termination. Dr. Chopra expressly wished to discuss the scientific issues raised by this assignment with his colleagues precisely to obtain their views and other relevant information. Not only did Ms. Kirkpatrick's deliberate denial of access to Dr. Chopra's colleagues negatively affect his ability to work on the assignment in question, it also illustrated the

employer's long-standing approach to dealing with Dr. Chopra and his colleagues, namely, isolating both them and their views.

[622] Ms. Kirkpatrick assumed that Dr. Chopra could determine the nature and scope of the assignment by osmosis, in spite of the fact that, in many cases, Dr. Chopra had not been involved in relevant discussions of AMR issues. It is noteworthy that, in its arguments on the speaking-out grievances, the employer maintained that the McEwan Report was a clear example of how it dealt with AMR issues. However, for this termination grievance, the employer effectively ignored Dr. Chopra's expertise on AMR. Although the employer is prepared to treat the McEwan Report as an exhaustive response to the AMR question on the one hand, on the other hand, it is critical of Dr. Chopra for relying on that report as evidence that the employer had not done all it could with respect to AMR issues. As appears from his evidence, this was one of the bases for Dr. Chopra's underlying concerns with the assignment.

[623] Dr. Chopra's absences from the workplace from December 2003 until his termination on July 14, 2004 illustrate the substantial stress and difficulty that existed in the workplace and that significantly affected Dr. Chopra and his colleagues. Even though, by any objective standard, the stress and difficulty in the workplace would have contributed to how the grievors conducted their assignments, the employer was completely uninterested in it.

[624] The assignment given to Dr. Chopra was not clear and precise. The proper way to approach AMR issues has been and remains the subject of considerable debate and discussion among scientists both within the employer and in the scientific community at large. The employer's attempts to suggest that Dr. Chopra was simply following up on well-established principles or processes governing AMR is misplaced at best and misleading at worst. The only way to legitimize the employer's position is by assuming that Dr. Chopra and his colleagues were simply wrong in their views about AMR.

[625] It is important to closely compare the actual documentation (both the assignment itself and Ms. Kirkpatrick's notes) and the evidence tendered by Ms. Kirkpatrick at the hearing. The evidence at the hearing was substantially and significantly more detailed than the information that was provided to Dr. Chopra.

[626] Ms. Kirkpatrick confirmed that the three-month time frame for completing the assignment did not take into account any other workplace issues, such as conflict,

ongoing disputes, investigations or other factors. Importantly, Ms. Kirkpatrick confirmed that she did not consider any of those factors in her decision to terminate Dr. Chopra's employment, as she had already concluded that nothing would change by May 18, 2004.

[627] It is significant that Dr. Adewoye (who developed the assignment) was also one of the 16 employees of the employer who filed a harassment complaint against the grievors.

[628] Ms. Kirkpatrick testified that she received advice from human resources, labour relations and legal counsel on how to deal with the assignment before it was even given to Dr. Chopra. It is highly unusual for a manager to seek such advice before simply assigning work to an employee, unless the manager is already contemplating or predisposed towards disciplinary action. Clearly, the evidence indicates that the employer planned to discipline Dr. Chopra well in advance of providing him the assignment.

[629] Dr. Chopra's assignment was clearly quite complex and difficult to understand, even for someone familiar with AMR issues. The level of detail, which Ms. Kirkpatrick testified to in the hearing, was never conveyed to Dr. Chopra while he was employed. With respect to the second component of the project, Ms. Kirkpatrick described Dr. Chopra's assignment as identifying other factors that might contribute to AMR development, as well as seeking and applying information to determine the risk categorization of specific classes of antimicrobials. Dr. Chopra testified that it was not clear to him how that could be done within the confines imposed by Ms. Kirkpatrick, as he did not understand how weight could be assigned to evidence without actually reviewing that evidence. It is noteworthy that, even in its submissions, the employer is unable to cite evidence that clearly articulates Ms. Kirkpatrick's expectations. Instead, the employer surmises the "essence" of what the assignment was about, infers what specific portions of the assignment "really" meant and attempts to articulate what Ms. Kirkpatrick "was asking" for or "looking for" in certain portions of the assignment. Such language clearly demonstrates that the assignment was never properly communicated to Dr. Chopra.

[630] Dr. Chopra testified that he did not understand what Ms. Kirkpatrick meant by a parallel classification, that he was not familiar with the employer's "Guideline Evidence-Based Rating System" and that he thought that the issues raised in the

assignment had already been addressed by the McEwan Advisory Committee. Dr. Chopra further indicated that he did not understand what Ms. Kirkpatrick meant by "evidence-based" in the context of the assignment as drug evaluators are not engaged in primary research. It subsequently became clear that Ms. Kirkpatrick did not want him to rely on either the scientific literature or the employer's files. At the April 5, 2004 meeting, Dr. Chopra did not understand the nature of the assignment. However, he testified that he did not ask any questions at the meeting because he was concerned about his poor relationship with Ms. Kirkpatrick and her ongoing criticisms of his work.

[631] Dr. Chopra also very clearly expressed his view that there was really nothing new on the market in terms of antimicrobials aside from fluoroquinolones and that guidelines would not be useful. Although the employer argued that Dr. Chopra's attitude on that point was inappropriate and that it amounted to insubordination, the reality is that Dr. Chopra's views were well known long before the assignment, and therefore, they should not have surprised Ms. Kirkpatrick. Rather than assuming that Dr. Chopra was being insubordinate, the reasonable approach would have been to engage him in a discussion to convince him otherwise and to explain the employer's viewpoint.

[632] Ms. Kirkpatrick was simply unprepared to concede that lack of access to NOC files was an obstacle for Dr. Chopra. Nor would she accept that that information might be relevant to the assignment. Rather, Ms. Kirkpatrick maintained that the assignment was to develop a categorization scheme, not to assess what had already been approved. However, Ms. Kirkpatrick never bothered to discuss with Dr. Chopra why he thought the requested information would be relevant. Dr. Chopra testified that he wanted to review the antimicrobial drug submission files because experiences with past drug approvals could have been of assistance to understanding and assessing the AMR risk. The logic in Dr. Chopra's interest in the dosage and duration of antibiotic treatments over time is obvious. Increasing the dosage and duration clearly implies that antimicrobial drugs are no longer as effective at their former doses or durations. Accordingly, evidence concerning dosage and duration is on its face highly relevant to the AMR issue. Although Ms. Kirkpatrick acknowledged that she had a general idea that Dr. Chopra had that concern, she never considered whether it was the reason he wanted to review the VDD's submission files.

[633] The following facts were already clear by May 2004, only one month after Dr. Chopra was given his assignment:

- Dr. Chopra was not clear as to what was expected of him.
- Although Ms. Kirkpatrick was aware of Dr. Chopra's uncertainty about the assignment, she took no steps to clarify her expectations or to ensure that the assignment had been clearly communicated to Dr. Chopra.
- Dr. Chopra had identified several obstacles that interfered with his approach to the assignment, and Ms. Kirkpatrick was simply uninterested in his concerns about them.
- Ms. Kirkpatrick was already suspicious of Dr. Chopra's motivations with respect to the assignment.
- Ms. Kirkpatrick's evidence at the hearing was fundamentally different from what actually transpired at the relevant time.
- Ms. Kirkpatrick conceded that little had been done to monitor Dr. Chopra's performance until this point but that, as far as she knew, it caused no issues.
- All three grievors were being dealt with in a coordinated manner in terms of being provided with an assignment and being closely scrutinized.

[634] The events that followed demonstrated that the employer simply failed to make any effort to address the issues and to provide Dr. Chopra with an opportunity to complete his assignment.

[635] At no time after the May 4, 2004 meeting did Ms. Kirkpatrick approach Dr. Chopra to confirm or discuss his understanding or recollection of what had transpired at the meeting; nor did she discuss with him the assignment in a general manner. Also, Ms. Kirkpatrick at no time mentioned that discipline might arise as a consequence of Dr. Chopra's approach to the assignment. Rather, the email exchange reveals that Ms. Kirkpatrick firmly believed that Dr. Chopra was being "disingenuous" about his work and that nothing Dr. Chopra could have said would have dissuaded her from the view that he was acting inappropriately. No manager should make such assumptions and simply deem an employee insubordinate.

[636] Ms. Kirkpatrick testified that she had no reason to doubt that Dr. Chopra would complete the assignment at their April 5 meeting, that she had suspicions by early May that he would not and that, by May 18, nothing Dr. Chopra could have said would have changed her mind. Accordingly, it must follow that Ms. Kirkpatrick's only reason for developing suspicions is contained in her email exchanges with Dr. Chopra at that

time. However, the exchanges clearly show that, although Dr. Chopra was indeed working on the assignment, Ms. Kirkpatrick never bothered to verify that he was. Instead, Ms. Kirkpatrick testified that it was her view that it was not possible that Dr. Chopra was working on the assignment because his emails were too general. That evidence is unhelpful at best, as it would have been impossible to determine whether Dr. Chopra was in fact performing his duties without specifically asking him.

[637] Dr. Chopra's May 7, 2004 concerns about the assignment were no different from the many other debates he and his colleagues had had with each other and with others at the employer over the years. Dr. Chopra's comments were a normal and natural response for a scientist tasked with undertaking a complex project such as the assignment and, as such, did not call for discipline, but rather for further discussion as part of an ongoing exchange of views and ideas. However, Ms. Kirkpatrick was not interested in discussing the matter with Dr. Chopra, opting instead to treat Dr. Chopra's comments as insubordination.

[638] Ms. Kirkpatrick raised concerns about Dr. Chopra's assignments only at this hearing. This uncontested fact can lead to only two possible conclusions: the concerns identified by Ms. Kirkpatrick during the course of this hearing, amplified in the employer's submissions, did not exist in 2004, and, even if the employer had those concerns at that time, it failed to properly address them. If those concerns were legitimate, Ms. Kirkpatrick ought to have discussed them with Dr. Chopra and should have provided him with an opportunity to respond or to correct his behaviour. In either case, discipline cannot be supported.

[639] It is a fundamentally good practice in human resources that, when an employee expresses concerns or questions about an assignment, the manager or supervisor should discuss the matter directly with the employee. Dr. Chopra raised his concerns with Ms. Kirkpatrick, but the employer simply failed or refused to follow up. No discussion took place.

[640] When it terminated Dr. Chopra, the employer failed to follow the steps set out in the Treasury Board's guidelines for imposing discipline (Exhibit G-288). Specifically, Ms. Kirkpatrick's decision to impose discipline was based on what was clearly a less than fair and objective investigation into Dr. Chopra's conduct.

[641] Insubordination cases require the employer to prove the following three essential points:

- that there was a clear order, which the employee understood;
- that the order was given, or clearly communicated, by someone with the proper authority; and
- that the employee either refused to acknowledge the order or actually refused to comply with it.

[642] Additionally, in *Canadian Labour Arbitration*, (at para 7:3612) have identified a number of factors to mitigate the severity of discipline for insubordination, including the absence of an intention to defy the employer or of a blameworthy state of mind and no financial loss for the employer.

[643] An employee may be found to have been insubordinate if it is clear that he or she was aware of the duties expected of him or her and that he or she refused to discharge them. However, the law is clear that, for a case of insubordination to be made, the employer's instructions must have been clearly communicated to the employee. If the employer's instructions have not been clearly communicated to the employee, discipline for insubordination is without just cause and must be rescinded. The threshold for a clear order, which the grievor understood, is quite high, given the serious nature of a finding of insubordination. As observed by the arbitrator in *Nanaimo Collating Inc.* (at para 36), absent a military-style work environment, directions must be specific and express to engage insubordination.

[644] A clear order, which the grievor understood, comprises both objective and subjective elements. The facts must demonstrate that the employer's order was objectively clear and comprehensible, and the test also calls for a subjective assessment as to whether the grievor in fact understood the order. Dr. Chopra submits that, in this case, neither element of the first requirement of insubordination is met. The instructions given to him about the assignment were anything but clear. Moreover, his testimony and the documentary evidence from May 2004 clearly demonstrate that he did not understand what Ms. Kirkpatrick expected of him.

[645] Repeating an order and underlining the consequences of refusal before imposing discipline have been accepted as positive practices by employers in insubordination cases. This is particularly appropriate in workplaces that have

experienced interpersonal tensions, harassment complaints or allegations of discrimination. In *Grover*, the grievor was found to have been insubordinate when he refused an order to run an employment competition. However, it was noted that, before imposing discipline, the employer in that case had repeated the order twice in writing and had subsequently issued a clear warning to the grievor. Significantly, the employer's warning included express language that any further refusal would be viewed as insubordination. The discipline was upheld because the grievor continued to refuse to run the competition even after receiving the final warning.

[646] In addition to the requirements that the order be clear and understood by the grievor, the law is clear that a mere technical violation of even an express order does not necessarily amount to insubordination if no harm results or if it can be said that the conduct was condoned. In *Myler*, the adjudicator noted that insubordination is primarily an attitude of defiance towards authority.

[647] The employer failed to meet the test for insubordination. First, Ms. Kirkpatrick's expectations about the assignment were never clearly communicated to Dr. Chopra. Second, even after Dr. Chopra had expressly requested clarification, Ms. Kirkpatrick failed to clarify her instructions or to discuss them with him. Finally, there is absolutely no evidence that Dr. Chopra deliberately refused to work on the assignment. To the contrary, the evidence was clear that Dr. Chopra was willing to give his best efforts to apply his extensive knowledge and experience of AMR issues, to comply with Ms. Kirkpatrick's instructions and to assist the employer in implementing the recommendations of the McEwan Report.

[648] Dr. Chopra's evidence was that, from that perspective, his assignment was ultimately not necessary, as the findings of the McEwan Report and the broader international consensus already made clear that a decision was required by the employer as to the action to take with respect to the use of antibiotics in food-producing animals. However, Dr. Chopra's evidence was clear that he was still prepared to work on the assignment, despite his personal views as to its value in terms of its overall contribution to the AMR issue. Ms. Kirkpatrick repeatedly testified that she was not open to Dr. Chopra's proposed way of dealing with the assignment, regardless of his justification. Accordingly, Dr. Chopra advised Ms. Kirkpatrick that he did not think that it would be possible to complete the assignment under those circumstances.

[649] Ms. Kirkpatrick's evidence and the submissions on behalf of the employer made it clear that the employer attempted to fabricate a case of insubordination out of allegations and assertions that more properly go to other grounds, none of which were relied on in the letter of termination. Specifically, the employer led extensive evidence concerning Dr. Chopra's use of sick leave and his work performance. Indeed, most of the employer's evidence about Dr. Chopra's termination dealt with the quality of his work on the assignment. However, neither absenteeism nor work performance issues were ever advanced as grounds for his termination. In these circumstances, it is important to pay close attention to the specific requirements of the test for insubordination and to the kind of evidence that may properly be relied on to support such a claim.

[650] The situation in *Trilea-Scarborough Shopping Centre Holdings Ltd.* is quite unlike this case. It should also be noted that, although cause for discipline was indeed found in that case, it was in fact held that discharge was not warranted under the circumstances, despite that the grievor in that case had expressly refused to perform assigned work that had been clearly communicated by his supervisor. In contrast to the grievor in that case, the evidence clearly demonstrates that Dr. Chopra was very interested in his work, particularly with respect to AMR issues, but that he simply did not understand what Ms. Kirkpatrick expected him to do in the assignment. Unlike the situation in *Trilea-Scarborough Shopping Centre Holdings Ltd.*, Dr. Chopra's assignment was complex and multi-faceted, and the evidence is clear that he neither understood the assignment nor shared Ms. Kirkpatrick's understanding of what was expected. The evidence is clear that he applied his knowledge and expertise of AMR issues in an attempt to understand the assignment and to develop an appropriate approach for completing it.

[651] *Vancouver General Hospital* differs significantly from this case in a number of important respects. Indeed, the facts in *Vancouver General Hospital* serve as an excellent illustration of the employer's many failures leading to Dr. Chopra's termination. Unlike this case, the employer in *Vancouver General Hospital* terminated the employee for ". . . poor performance and misconduct associated with [that grievor's] work patterns . . ." rather than insubordination. Before terminating the employee, the employer in that case had documented and attempted to address a wide range of issues on the part of the employee, including rude behaviour, failing to complete routine tasks, taking extended breaks, poor attendance and failing to report

for work, and identifying himself as a supervisor. The employer undertook numerous good-faith steps to assist him to improve his performance and behaviour, including issuing a letter of expectations about performance and behaviour, providing instructions, coaching, and retraining on several work procedures, issuing two suspensions about performance and behaviour, undertaking a help to assist the employee improve his attendance and reliability, and undertaking a series of investigations into the culminating incidents. As was the case in *Grover*, the importance of taking such steps before imposing discipline is clear. The employer took no such steps with respect to Dr. Chopra.

[652] Finally, the arbitrator in *Vancouver General Hospital* noted that the grievor in that case demonstrated a "profound unwillingness to acknowledge fault," and the employer in this case implies that the same is true of Dr. Chopra. However, this case involves significantly more complex and nuanced work than was assigned to the grievor in *Vancouver General Hospital*. Science is a field, the foundational methodology of which is based on ongoing and vigorous debate. Accordingly, Dr. Chopra sought to discuss the AMR issue with other evaluators and repeatedly testified that he was open to changing his views through a process of scientific debate but that he was prevented from doing so by Ms. Kirkpatrick. Moreover, Ms. Kirkpatrick's testimony made it clear that she had not been open to discussions with Dr. Chopra and that she would not have accepted his views even had such discussions taken place. Clearly, Ms. Kirkpatrick's bottom line was that she was right and that Dr. Chopra was wrong.

[653] The facts in this case are clearly distinguishable from *Crossley Carpet Mills Ltd. v. C.A.W. – Canada, Local 4612*, [2003] N.S.L.A.A. No. 22 (QL); *British Columbia Hydro and Power Authority*, and *Grover*, in which the disciplined employees frequently and blatantly disregarded both clear instructions and warnings of discipline. Moreover, it is important to note that the termination of the grievor in *BC Hydro* was the culmination of a lengthy series of disciplinary measures imposed for insubordination. In this case, it bears repeating that Ms. Kirkpatrick had at no time imposed discipline for any of Dr. Chopra's previous work; nor had she ever mentioned insubordination in the context of the assignment at any point after it was assigned.

[654] The employer relies on the decision in *Crossley Carpet Mills Ltd.* to support its assessment that Dr. Chopra's conduct was sufficiently egregious as to warrant discharge. The grievor in *Crossley Carpet Mills Ltd.* had a long history of "vitriolic

disdain" and "in-your-face" insubordination, including no fewer than 12 separate incidents eliciting written warnings or disciplinary suspensions — steps that the arbitrator found constituted ". . . repeated and ample warnings about exactly where [the grievor's] conduct was taking him." Those facts can hardly be said to be akin to the conduct at issue in this case. Indeed, such comparisons are illustrative of the employer's tendency to paint Dr. Chopra in an extremely negative light at every opportunity.

[655] The employer also relies on *Shuniah Forest Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local 2693*, [2000] O.L.A.A. No. 811 (QL), a case dealing with a two-week suspension, to support its position that termination was justified in this case. The grievor in *Shuniah Forest Products Ltd.* was found to have deliberately refused to carry out the known expectations of his supervisor, which brought that case squarely within the scope of insubordination. By contrast, the evidence in this case is clear that neither components of the requirement for a clear order, which the grievor understood, were met.

[656] The principle of progressive discipline flows from the employer's duty to warn employees of the seriousness with which it views certain behaviour and is based on the idea that, along with deterrence, correction and rehabilitation are the primary purposes of workplace discipline. As a corollary to this principle, employers have a positive duty to offer training and counselling to employees in aspects of their jobs in which their performance is deficient. The employer wholly failed to apply the principles of progressive discipline with respect to Dr. Chopra's termination. The employer gave Dr. Chopra no opportunity to correct his behaviour; nor did it provide any warning of the serious consequences it was set to impose. Dr. Chopra was never advised of the apparent deficiencies that gave rise to the employer's allegations of insubordination, let alone afforded training or counselling with respect to his performance.

[657] As noted in *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, at para 92, it is incumbent on decision makers to seek out and know the facts before making and rendering a decision. Dr. Chopra submits that, by failing to raise her concerns or follow up with him in any way, Ms. Kirkpatrick failed to ascertain the requisite facts before deciding to impose discipline. If Ms. Kirkpatrick held the view that Dr. Chopra's alleged failure to provide an adequate status report by

May 4 constituted insubordination, it was incumbent upon her to bring the matter to his attention and to impose any discipline that she deemed necessary in a timely fashion. Instead, Ms. Kirkpatrick had no contact with him following her May 17, 2004 email until the letter of termination on July 14, 2004, nearly two months later and while Dr. Chopra was away on certified sick leave. In those circumstances, it is clear that he was not even aware of Ms. Kirkpatrick's concerns, let alone afforded an opportunity to correct his behaviour before being terminated.

[658] Legitimate differences of opinion or mere frustration with an employee do not amount to insubordination, particularly if the employer has failed to meet its obligations of taking appropriate corrective steps and engaging in progressive discipline. This case is similar to the situation in *Nanaimo Collating Inc.*. In that case, the employer was frustrated with the grievor and imposed discipline without first taking the requisite steps to address its dissatisfaction. As was held in *Nanaimo Collating Inc.*, Dr. Chopra submits that his disciplinary termination cannot be upheld in such circumstances.

[659] The elements of a final or culminating incident warranting termination were not made in this case. The elements of the test for a culminating incident are set out in *Doucette*, at paras 93 and 94.

[660] Along with the alleged culminating incident not meriting discipline, the employer's reliance on previous discipline is inappropriate. Dr. Chopra's prior disciplinary record, which dealt with his telework arrangement and incidents of speaking out, is not substantially related to his alleged failure to meet Ms. Kirkpatrick's expectations for the assignment. Although the previous discipline was characterized as misconduct, it had nothing to do with his performance, work output or being allegedly disingenuous when reporting his progress to the employer. Accordingly, it is submitted that the circumstances surrounding the assignment cannot be seen as a culminating incident that warranted termination.

[661] Despite the termination letter's express reference to the statutory power concerning termination for a breach of discipline or misconduct, Ms. Kirkpatrick's evidence and the employer's submissions suggest that the essence of the employer's concern was in fact more properly characterized as a non-disciplinary termination of employment for unsatisfactory performance. Not only does the employer fail to meet the test for insubordination, but the bulk of the employer's evidence and submissions

were directed at Dr. Chopra's performance, a ground of termination that clearly falls under para 11(2)(*g*) of the *Financial Administration Act* R.S.C. 1985, C. F-11 (*FAA*). The employer cannot rely on allegations of unsatisfactory work performance to substantiate a termination for breach of discipline or misconduct under para 11(2)(*f*) of that *Act*.

[662] Dr. Chopra made submissions in the alternative on the issue of unsatisfactory work performance. First, it is clear that Ms. Kirkpatrick did not consider or follow the appropriate steps for dealing with issues of unsatisfactory work performance. Ms. Kirkpatrick did not even complete a PDP or implement a work plan for Dr. Chopra during the period leading up to the assignment. Such failures can amount only to a lack of fairness in dealing with Dr. Chopra. As was held in *Dhaliwal*, a failure to use the guidelines in the Treasury Board's policy results in a decision made in bad faith. In *O'Leary v. Treasury Board (Department of Indian Affairs and Northern Development)*, 2007 PSLRB 10, the employer's failure to provide proper training had "set the stage" for the grievor's unsatisfactory performance. The adjudicator in that case found that, rather than receiving the required support, the grievor received close supervision aimed at documenting his failings rather than at helping him to overcome them. In *Manitoba*, at para 29, 32 and 33, the arbitrator held that a long-term employee's sudden decline of work output was not insubordination and expressed concern at the employer's failure to apply standard human resources mechanisms to assist a struggling employee. Ms. Kirkpatrick sharply criticized Dr. Chopra and concluded that he was not doing any work, but she did nothing that could have helped him meet her expectations. In those circumstances, the employer clearly failed to meet its obligations with respect to dealing with Dr. Chopra's allegedly unsatisfactory performance. Given the shortcomings with respect to meeting its performance-related obligations in particular, it is simply not open to the employer to rely on Dr. Chopra's purportedly unsatisfactory work performance at adjudication to support its allegations of insubordination.

c. <u>Employer's reply</u>

[663] The fundamental problem with Dr. Chopra's behaviour with respect to his assignment, which was clear in his evidence of several other matters, was his attempt to hijack the assignment and make it into something of his own choosing. He was given a very specific assignment. He was not asked to elaborate on AMR, its emerging problems or the many things that he wanted to do. He was specifically tasked with

reviewing and creating a classification or categorization scheme and a weighting scheme for several types of evidence. However, Dr. Chopra wished to delve into the specifics of AMR, which was not the assignment.

[664] While the evidence was substantial and significantly detailed and in a format that required extensive explanation, the employer is required to ensure that the adjudicator understands its case, including the intricacies of complex scientific discussion.

[665] It is trite to say that Ms. Kirkpatrick and Dr. Adewoye would not have had the same elaborate discussions that took place at the hearing; nor would those same discussions have taken place with Dr. Chopra. They have extensive scientific backgrounds and work daily on scientific issues in a scientific environment.

[666] It is irrelevant that Dr. Adewoye was one of the individuals who filed a harassment complaint against the grievors. No indication exists of anything untoward in the creation of the assignment or in the actions of Dr. Adewoye.

[667] If Dr. Chopra did not understand the instructions provided to him, as set out by Ms. Kirkpatrick at their meeting and as further clarified by the documentation provided to him, then why did he make no attempt to clarify the assignment? It was not until Ms. Kirkpatrick invited him to a meeting on May 4, 2004 to discuss the assignment that any discussion took place. Ms. Kirkpatrick could assume only that Dr. Chopra understood it and that he had no difficulties with it. If he had been unclear as to what his assignment comprised, it was incumbent upon him to make the appropriate inquiries. It is interesting to note that Dr. Chopra, who has never before shied away from speaking his mind, would use this as an excuse.

[668] The submission that Ms. Kirkpatrick was not interested in allowing Dr. Chopra to consult his colleagues is incorrect. She did not see the point of having a discussion before any work had been carried out, given the extensive AMR work that had already been carried by the McEwan Advisory Committee . In addition, she indicated in her testimony that she was not about to organize a meeting for Dr. Chopra, who was free to discuss matters with his colleagues as he saw fit.

[669] It is clear from his submissions that Dr. Chopra still wishes to debate the appropriateness of the assignment rather than attempt to carry out the work. The

employer was of the view that Dr. Chopra had his own agenda and that he was attempting to superimpose that agenda on his assignment and to conduct an assignment of his choosing rather than what was assigned. His evidence and submissions support that view.

[670] The decisions relied on by Dr. Chopra on insubordination are distinguishable as they involve a finding of whether the employers in fact gave direct orders and whether those orders were clearly communicated. Ms. Kirkpatrick's instructions and further explanations to Dr. Chopra about her expectations were clear. There was no confusion over what was expected of him under the circumstances.

[671] Dr. Chopra argued that there are both objective and subjective elements to a finding of whether the employer gave a clear order. In particular, he argued that the test calls for a subjective assessment as to whether he in fact understood the assignment. The case law that he submitted does not mention a subjective element to the test. Regardless, Ms. Kirkpatrick's request and further confirmations of her request left no doubt that the employer's expectations were clear.

[672] Contrary to Dr. Chopra's submissions, the evidence about his responses to the assignment was not about the quality of his work but rather about the fact that he did no work on the assignment.

[673] On the issue of the failure to warn him, Dr. Chopra submits that repeating an order and underlining the consequences of refusal have been accepted as positive employer practices in insubordination cases. The failure to warn an employee is fatal in cases dealing with matters such as work performance issues and innocent absenteeism. However, the employer did not perceive Dr. Chopra's failure to comply with its instructions as a work-performance issue but as a disciplinary matter. Dr. Chopra did not, under the circumstances, require a warning that he might be disciplined. He knew what was expected of him and chose not to comply. In any event, by that time, 10- and 20-day suspensions had been imposed on him. The 20-day suspension clearly stated that further acts of misconduct would lead to the termination of his employment. Dr. Chopra was aware that his job was on the line and that, if he did not comply with his employer's directions, the termination of his employment was next.

[674] The facts in *Myler* are distinguishable. The grievor in that case eventually did his job and stopped short of doing it only to seek clarification on whether the task formed part of his job functions. Unlike in *Myler*, it cannot be said that no harm resulted in this case. An employer is harmed when an employee does not work.

[675] The employer does not have an obligation to offer training and counselling for shortcomings related to insubordination rather than to performance.

[676] Dr. Chopra argued that, before terminating him, Ms. Kirkpatrick declined to give him the opportunity to defend himself against the allegation that he had done no work. Any procedural unfairness that might have resulted, as argued by Dr. Chopra, has been cured by this new hearing (*Tipple v. Canada (Treasury Board),* [1985] F.C.J. No. 818 (C.A.) (QL)).

[677] The doctrine of the culminating incident enables an employer to rely on an employee's poor employment record to justify taking more serious action than might otherwise be warranted. The employer is not precluded from considering an employee's prior discipline record even if the later acts of misconduct are different in nature; see (*Northwest Territories Power Corp.*, at para 25; *Weyerhaeuser Co. (Drayton Valley Operations*, at para 11*;* and *Alcan Smelters Inc. and Chemicals Inc.*, at para 45-47.

[678] At no time did Dr. Chopra ever lead the employer to believe that he did not have the professional competence to perform his job. Dr. Chopra's actions with respect to the assignment were not treated as performance-related issues as he suggested; instead, they were treated as culpable acts of insubordination. *Dhaliwal* is about the issue of jurisdiction in a rejection on probation case. The duty of good faith is raised in that context. *Dhaliwal* is completely distinguishable from the facts of this case.

[679] *Manitoba* is distinguishable from this case in that the arbitrator found that the grievor's non-performance was not intentional or negligent. Furthermore, the grievor's explanations were uncontradicted, as counsel for the employer did not cross-examine the grievor in that case. Dr. Chopra was certainly cross-examined by the employer and stated that the assignment was completed. He did not complete the assignment and in fact provided nothing. To that extent, he was insubordinate.

2. Dr. Haydon's termination grievance

a. For the employer

[680] The employer made submissions on the law relating to insubordination similar to those it made in its submissions for Dr. Chopra's termination of employment grievance. I have not repeated them.

[681] Dr. Haydon's review, submitted in June 2004, was too incoherent, incomplete and inadequate to reach any decision about the disposition of the NDS. Given that Dr. Haydon carried out her review for initially over 14 months and then for another 7 months after the manufacturer provided additional data, that she ignored explicit instructions from Dr. Alexander, and that the end product was so poorly written that it was effectively useless and needed redoing, Ms. Kirkpatrick determined that Dr. Haydon was deliberately avoiding and evading work to the point that her actions constituted insubordination.

[682] Dr. Haydon's insubordination was similar to that described in *Trilea-Scarborough Centre Holdings*, in which the arbitrator found that there was no doubt that the grievor knew what was expected of him and that the only thing preventing him from doing the assigned work was his wilful opposition. As an example, Dr. Haydon ignored Dr. Alexander's instructions to review the bioequivalence study on Pirsue Sterile Solution (originally) and again when she was provided with the additional data in October 2003. She ignored Dr. Alexander's instructions to consider the United States summary of the approval of the product. Dr. Haydon was aware of the instructions. The employer submitted that the only possible conclusion is that the only thing preventing Dr. Haydon from following through on the instructions was her own wilful opposition. As in *Vancouver General Hospital*, Dr. Haydon displayed a pattern of work performance that reflected her assessment of what was required as opposed to following the directions of her supervisor. Not only did Dr. Haydon not do her job in reviewing the NDS, she took an inordinately long time to produce a document that was essentially useless to her employer.

[683] As indicated in *Vancouver General Hospital*, mitigating factors do not serve to exculpate a grievor's conduct. Although they may sometimes serve as an assurance that a grievor will not commit further acts of misconduct, other times a grievor's pattern of conduct can also serve to negate his or her length of service. Dr. Haydon had over 20 years of experience with the employer. The review of the Pirsue NDS was

well within her competence, yet she continuously failed to deliver according to the employer's expectations, of which she was well aware. No other conclusion can be drawn from the facts in Dr. Haydon's case but that the employment relationship irretrievably broke down. It is clear that Dr. Haydon persisted in behaving insubordinately, which she defended during the hearing, and that she defied the employer's authority.

[684] Terminating Dr. Haydon's employment was not an excessive response by the employer. She was well aware of its concerns with and expectations of her work. The employer submitted that the penalty of discharge was not too severe and that it ought to be maintained.

b. For the grievor

[685] Dr. Haydon made similar submissions on the common treatment of all three grievors. I have summarized them in the summary of submissions for Dr. Chopra's termination grievance.

[686] The issues of how to resolve scientific differences of opinion and how to properly weigh the conclusions of foreign regulatory agencies arose repeatedly while Ms. Kirkpatrick was director general. In the context of this grievance, the issue of what constituted a bioequivalent substance and the issue of what weight to give a report from the United States Food and Drug Administration arose between the employer's managers and its scientists. There is no evidence that the employer's management put into place structures that would resolve scientific disagreements and that would allow the employer's work to carry on. Similarly, there is no evidence of policies concerning the use of foreign regulatory opinions that would have guided the scientists and the manufacturers submitting studies for review.

[687] During virtually all of January and February and early March 2004, Dr. Haydon was absent from the workplace due to illness or suspension for speaking out. In early June 2004, Dr. Haydon completed and submitted all the outstanding drug submission reviews assigned to her. She was terminated on July 14, 2004, while on sick leave, and without being provided with any of the employer's reasons for terminating her.

[688] The termination letter relied on insubordination as the sole ground for terminating Dr. Haydon's employment. The letter was vague and referred to documents and events that were inconsistent with her knowledge. In her testimony,

Ms. Kirkpatrick offered conflicting explanations about the documents and events that she relied on in her letter.

[689] The employer adduced an enormous amount of evidence on the reports produced by Dr. Haydon. A considerable part of it was about conclusions reached years after her employment was terminated. It is unacceptable that all those concerns with Dr. Haydon's work were identified essentially via this hearing. Basic labour relations and human resources principles require that any such deficiencies in an employee's work be raised with the employee at the relevant time so that the employee has an opportunity to respond and to otherwise correct his or her performance. The employer was simply uninterested in hearing from Dr. Haydon. The only conclusion is that the employer was intent on terminating Dr. Haydon despite a lack of legitimate grounds.

[690] The employer did not present evidence to support its contention that Dr. Haydon deliberately failed or refused to carry out instructions. The employer relied upon assumptions and stereotypes to conclude that she deliberately failed or refused to carry out instructions. Any reasonable person would have checked those assumptions or stereotypes against the facts by at least engaging Dr. Haydon directly to determine her side of the story.

[691] Almost without exception, the evidence tendered by the employer was of a kind that an employer might adduce to justify a dismissal on the basis of poor work performance. The employer maintained that the evidence about Dr. Haydon's work performance was relevant to its claim that she had been insubordinate before her termination. However, the employer never advanced anything other than insubordination as grounds for her termination. It never introduced evidence sufficient to overcome the justifiable suspicion that must fall on an employer that purports to impose tightly regimented, time-limited monitoring processes on three different employees and that then stops all three processes at different stages and fires all three employees on the same day.

[692] Ms. Kirkpatrick testified that she reached her conclusions on Dr. Haydon's actions independently of Dr. Alexander. The employer did not establish the relevance of Dr. Alexander's evidence.

[693] Dr. Alexander was mostly responsible for monitoring Dr. Haydon's performance and for providing her with advice or guidance. However, Dr. Alexander did so at very few opportunities. Moreover, Dr. Alexander's correspondence at the relevant time demonstrated that he often agreed with Dr. Haydon's requests for more time or with her reasons for proceeding how she did. In spite of that, Dr. Haydon was subsequently harshly criticized for acting the same way. Dr. Alexander's actions sent a clear message that Dr. Haydon was working in an appropriate fashion all along. Although Ms. Kirkpatrick may have disagreed, it was not open to her to impose discipline when no issues had previously been raised.

[694] Dr. Haydon was cross-examined in detail about performance-related matters that do not demonstrate any basis for termination. Instead, those matters ought to have been discussed with Dr. Haydon at the relevant times and should not have been resolved through cross-examination. Dr. Haydon had legitimate and reasonable explanations for how she structured her report and used the data. Although there is little doubt that the employer disagreed with either Dr. Haydon's opinion or her process, those matters do not merit discipline. In any case, given that the stated basis for disciplining Dr. Haydon was insubordination, those matters do not help the employer's position. Although the evidence demonstrated a disagreement with respect to the science employed by Dr. Haydon, it did not demonstrate insubordination or other behaviour on her part that warranted termination.

[695] No reasonable explanation was provided as to why Dr. Alexander did not respond to very specific questions raised by Dr. Haydon concerning her performance on May 12, 2004 (Exhibit E-350, tab B-15). By any standard, a responsible manager would have listened to the questions and would have responded appropriately so that dialogue would have ensued that might have helped Dr. Haydon address any of the alleged performance issues. The employer's failure only increases the doubt of the legitimacy of its intentions.

[696] It is incorrect and unacceptable to assert that Dr. Haydon chose not to accept any responsibility for her negative performance. As noted, in spite of very difficult circumstances, she did in fact complete her assignments. It would appear that the employer equates disagreement with a performance appraisal with not accepting responsibility for negative performance. In some circumstances that may be the case.

However, it cannot be the case if the employer does not express a genuine interest in discussing performance with the employee.

[697] In both direct examination and cross-examination, Ms. Kirkpatrick testified that the incomplete draft referred to in the letter of termination was the memo concerning the SNDS for Pirsue Sterile Solution that Dr. Alexander and Dr. Haydon agreed to include in her work plan. Ms. Kirkpatrick's testimony was very confusing; the most likely explanation is that Ms. Kirkpatrick tailored her testimony to fit the documentary record. It appears that her position is that, when she referred to an incomplete draft, she meant that Dr. Haydon was obligated to produce a complete report about the Pirsue submissions and that the fact that Dr. Haydon's memo dealt only with her concerns that the *FDA* did not allow her to proceed with the SNDS before the NDS was dealt with made it "incomplete." Ms. Kirkpatrick's position also appears to be that the fact that the memo was approved by Dr. Haydon's supervisor as part of her work plan was not a barrier to Ms. Kirkpatrick relying on it for not just disciplinary action but also for termination. A more plausible reading of the letter is that the sentences are in the order that Ms. Kirkpatrick intended. The language is consistent with an intention to terminate Dr. Haydon before she was able to complete her work on the Pirsue submissions. The most obvious interpretation of the phrase "The most recent scheduled update on your work assignment . . ." is that it refers to the meeting scheduled between Dr. Alexander and Dr. Haydon on June 7, 2004. In short, it appears to be the remnants of a letter that was drafted in anticipation of Dr. Haydon being unable to complete the review of the Pirsue submissions and that had material added to it after Dr. Haydon submitted her completed work.

[698] Dr. Haydon repeatedly indicated that she was not legally allowed to proceed with an SNDS before the NDS underway was finalized. In short, many of Dr. Haydon's actions at that time were related directly to her view that she was being asked to do something illegal. There is no doubt that an SNDS must, by definition, follow the original review for an NDS. If there were other reasons that could have enabled Dr. Haydon to continue her review, her supervisors should have discussed them with her. Instead, as is typical of the employer, Dr. Haydon's concerns about being directed to commit an illegal act were met with either no response or with a simple assertion that she had to proceed as instructed. There is no evidence whatsoever that Dr. Haydon's supervisors considered that she thought that she was being asked to act illegally when she was told to complete her assignment. Needless to say, that factor

should be crucial when determining whether insubordination occurred. Moreover, the employer is not entitled to criticize Dr. Haydon about her position on that issue when it did not bother to discuss her concerns with her at the relevant time.

[699] That issue also reflects an ongoing pattern applicable to all three grievors. Concerns of legality, insufficient data or access to evidence were simply met with silence or rejections, followed by direct criticism and, ultimately, discipline, which was improper by any standard.

[700] Ms. Kirkpatrick's evidence of how she arrived at the decision to terminate Dr. Haydon was confusing at best and appeared tailored to close the gaps in the written record on which she attempted to rely. All of Ms. Kirkpatrick's cross-examination on this topic should be reviewed closely. Even were one to accept her evidence of a sudden change of heart about the nature of the problems in the employer-employee relationship between Dr. Haydon and the employer, a sudden conversion followed by a failure to consider other information as it becomes available is not responsible human resources practice. The fact of the matter is that, even if Ms. Kirkpatrick's "conversion" was legitimate, the proper response was not to assume the worst on Dr. Haydon's part. Instead, the proper response would have been to make inquiries as to why such a change occurred. Moreover, at the very least, any decision to terminate ought to have awaited the reports that Dr. Haydon ultimately completed.

[701] However, Ms. Kirkpatrick's evidence was that, once she reached her conclusion, she did not need to consider either the written notes provided to her by Dr. Alexander on June 23 or the two other reports produced by Dr. Haydon in June 2004. It is unreasonable in the extreme that Ms. Kirkpatrick reached that conclusion without considering the notes provided by Dr. Haydon's direct supervisor or without actually considering Dr. Haydon's other two reports. Clearly, those documents were extremely relevant and might have provided information about the nature of Dr. Haydon's work and whether in fact she had intended to complete it. Ms. Kirkpatrick's attitude towards Dr. Haydon is the same that she exhibited towards Drs. Chopra and Lambert. She assumed that they were being insubordinate, presumably based on the opinions that she already held of them, and failed to do what was normal and required by law, namely, to actually make inquiries into the serious allegations.

[702] Dr. Haydon made submissions on the insubordination jurisprudence similar to those raised in Dr. Chopra's grievance. I have not repeated them.

[703] In her evidence, Ms. Kirkpatrick confirmed that she relied on only two disciplinary incidents when considering the appropriate penalty for Dr. Haydon. Dr. Haydon maintained that the alleged culminating incident did not merit discipline. In addition, Ms. Kirkpatrick's reliance on previous discipline was inappropriate. The facts behind both of Dr. Haydon's suspensions were unrelated to insubordination. Relying on those suspensions violated the third element of the test for a culminating incident. Discipline should be imposed relative to the behaviour it is attempting to correct. Dr. Haydon was disciplined for a ". . . deliberate and systematic attempt . . . to avoid and evade work . . . ." Although the previous discipline was characterized as misconduct, it was imposed because Dr. Haydon made and endorsed allegedly misleading comments in the media. The first discipline, about Brazilian beef, was imposed quickly and for a single incident. However, the second discipline, for speaking out, was imposed for a collection of incidents that occurred over 11 months, and discipline was imposed 9 months after the last incident. Neither discipline had anything to do with Dr. Haydon's performance, her work output or her failure to respond to the employer's requests; nor was it characterized as insubordination.

[704] Additionally, the February 20, 2002 letter stated that the discipline would remain on Dr. Haydon's file for two years. However, Ms. Kirkpatrick relied on it both when she imposed discipline in February 2004 for the speaking out incident and when she made her decision to terminate Dr. Haydon's employment in July 2004. As noted in *Doucette*, "[i]t seriously undermines the purpose of progressive discipline to impose discipline all at once for a series of offences that take place over an extended period of time." In that case, the employer's reliance on discipline that became more severe due to its five-month delay and its grouping of offences lessened its impact with respect to the culminating incident analysis. Moreover, there is no evidence that Dr. Haydon made further public comments that the employer viewed as inappropriate after she was disciplined. Therefore, for the purposes of progressive discipline, it should be concluded that that discipline had the intended corrective effect on her behaviour. Accordingly, the older incidents should not have influenced the discipline imposed for insubordination. Furthermore, the delay in imposing discipline on Dr. Haydon for speaking out reduced her opportunity to demonstrate whether the discipline imposed had been corrective. Accordingly, the previous discipline should not have been used to justify her termination.

[705] Ultimately, when considering the relevance of the previous discipline, particularly in the context of the principles of corrective discipline and the employer's conduct, it becomes clear that no culminating incident justifying termination occurred. The employer relied on only two previous disciplinary offences, both of which are clearly not relevant, and one of which was stale and should not have been on Dr. Haydon's record. That is far less than the significant record that failed to justify termination in *Doucette*, which included 3 suspensions, one for 20 days.

[706] In insubordination cases, the facts must demonstrate that the employer's order was objectively clear and comprehensible. The test also calls for a subjective assessment as to whether the grievor in fact understood the assignment. Neither element of the first requirement of insubordination is met in this case. The instructions given to Dr. Haydon concerning the timelines and methods to be used in completing the Pirsue submission reviews were anything but clear. However, at the end of the day, the instructions were complied with in the way that any reasonable person would have — by completing and submitting submission review reports.

[707] The employer failed to meet the insubordination test. First, Ms. Kirkpatrick's expectations with respect to the form and content of the Pirsue report were never communicated to Dr. Haydon. Second, Dr. Haydon was never given a chance to respond or react to Ms. Kirkpatrick's expectations. Finally, there is absolutely no evidence that Dr. Haydon deliberately failed to act on Ms. Kirkpatrick's expectations (as they were never communicated to her before this hearing). To the contrary, the fact that Dr. Haydon completed and submitted her work demonstrates that she followed the instructions given to her by her immediate supervisor to the best of her ability and understanding and that she moved the employer's important work forward.

[708] The perversity of this case appears when it is noted that, when the employer began demanding the rapid completion of assignments and began setting rigid timelines for reviews, Dr. Haydon completed the assignments in her work plan, but the employer failed to meet its own timelines for reviews. The employer then terminated her, using her completed assignments as the reason.

[709] Ms. Kirkpatrick's evidence and the employer's submissions make it clear that the employer attempted to fabricate a case of insubordination out of allegations and assertions that would more properly be associated with other grounds, none of which was relied on in the letter of termination. Specifically, the employer led extensive

evidence about Dr. Haydon's scientific and compositional methods and about what it retroactively attempted to paint as failings in her work performance. However, to the extent that it was possible to understand Dr. Haydon's termination letter, none of those issues were specified as grounds for discipline. Under these circumstances, it is important to pay close attention to the specific requirements of the test for insubordination and to the kind of evidence that may properly be relied on to support such a claim. Dr. Haydon's assignment was communicated to her through the ongoing performance review process in discussions and correspondence with her immediate supervisor. Ms. Kirkpatrick did not enter the process except when she declared that Dr. Haydon had engaged in conduct worthy of dismissal, without having sought information from Dr. Haydon or, in any significant manner, from her supervisor.

[710] In contrast to the situation in *Trilea-Scarborough Shopping Centre Holdings*, Dr. Haydon is obviously passionate and committed to her work and brings a lifetime of knowledge about cattle and its health to that work. However, Dr. Haydon simply could not understand what Ms. Kirkpatrick expected her to do in her assignment, as Ms. Kirkpatrick's standards and expectations were communicated to Dr. Haydon only when the employer began presenting its case in response to Dr. Haydon's grievance.

[711] *Vancouver General Hospital* differs significantly from this case in a number of important respects. Indeed, the facts in that case serve as an excellent illustration of the employer's many failures that led to Dr. Haydon's termination. Before terminating the employee in that case, the employer undertook numerous good-faith steps to improve the employee's performance and behaviour. It took no such steps for Dr. Haydon. Despite closely monitoring Dr. Haydon from behind Dr. Alexander, Ms. Kirkpatrick provided Dr. Haydon no guidance, offered her no support, failed to implement the employer's own performance review scheme, refused to acknowledge Dr. Haydon's concerns about the quality of evidence being put forward or and the legal requirements governing its review, and failed to raise with Dr. Haydon even those specific concerns that Ms. Kirkpatrick purportedly relied on to terminate Dr. Haydon's employment. If there were in fact problems with Dr. Haydon's scientific approach or with how she constructed her reports, they were not raised at the time of the initial review of Pirsue (despite Dr. Alexander's concerns about history in drug submission reviews). At the time of Dr. Haydon's termination, the employer had not created any mechanisms for using the DMF to settle scientific differences of opinion or to provide

its employees any other guidance about how they were expected to conduct scientific inquiries.

[712] The employer implied that Dr. Haydon failed to acknowledge fault. However, it must be noted that Ms. Kirkpatrick's evidence focused mainly on her issues with Dr. Haydon attempting to defend her rights under the relevant collective agreement and the laws of Canada. It must also be emphasized again that the fault for which Ms. Kirkpatrick imposed discipline was not revealed to Dr. Haydon until the employer began responding to her grievance at this hearing.

[713] The facts in this case are clearly distinguishable from cases of so-called "in-your-face" insubordination, such as *Crossley Carpet Mills Ltd.*, *British Columbia Hydro and Power Authority* or *Grover*, in which the disciplined employees frequently and blatantly disregarded both clear instructions and warnings of discipline.

[714] Dr. Haydon's letter of termination cites para 11(2)(*f*) of the *FAA* as the authority. The evidence of Ms. Kirkpatrick and Dr. Alexander, along with the employer's submissions, together suggests that the employer's action is properly characterized as a non-disciplinary termination of employment for unsatisfactory performance. Not only did the employer fail to meet the test for insubordination, but the bulk of its evidence and submissions were directed at Dr. Haydon's performance, a ground for termination that clearly falls under para 11(2)(*g*) and not under para 11(2)(*f*). Dr. Haydon did not agree that her work performance was in any way unsatisfactory enough to warrant termination. This issue lies at the heart of the employer's case. However, Dr. Haydon submitted that the employer cannot rely on allegations of unsatisfactory work performance to substantiate a termination for breach of discipline or misconduct under para 11(2)(*f*).

[715] Dr. Haydon made further submissions on the issue of unsatisfactory work performance. They are the same as those made in Dr. Chopra's grievance, and I have not repeated them.

[716] Although the facts were different, the impact of Ms. Kirkpatrick's handling of Dr. Haydon's Pirsue NDS report was the same. She concluded that Dr. Haydon deliberately avoided producing any useful work, but she did nothing to help Dr. Haydon meet her expectations, including not even revealing those expectations to Dr. Haydon. In these circumstances, the employer clearly failed to meet its obligations

to deal with Dr. Haydon's allegedly unsatisfactory performance. Particularly in light of the shortcomings with respect to meeting its performance-related obligations, it is simply not now open to the employer to rely on Dr. Haydon's purportedly unsatisfactory work performance to support its allegations of insubordination.

[717] In her evidence, Dr. Haydon provided legitimate and reasonable explanations for all her actions. Although the employer might disagree with her rationale, that is not a basis for a finding of insubordination. The employer's submissions illustrate one indisputable fact: it never raised the vast majority of its criticisms at the relevant times. That was due, in part, as Dr. Alexander frankly admitted, to the fact that many of the criticisms were identified only after Dr. Haydon was terminated (and presumably in support of the employer's position during this adjudication). Moreover, the evidence demonstrated that the comments provided by Dr. Alexander or Ms. Kirkpatrick at the relevant times were, by definition, extremely limited. That is particularly true for Ms. Kirkpatrick, who was not even interested in seeing two of the reports prepared by Dr. Haydon. In short, the employer seeks to justify terminating Dr. Haydon on the basis of a number of criticisms, the majority of which were not raised with her directly. Upholding a termination under these circumstances is not only contrary to labour relations law and human resources practice, it is also fundamentally inconsistent with basic notions of fairness and common sense. Clearly, by articulating 30 separate "problems," the employer is attempting to justify a termination that cannot be supported.

[718] The possibility of discipline for performance deficiencies and related concerns were not raised with Dr. Haydon until spring 2004. Accordingly, any events from before that time cannot be relied on at adjudication to support discipline. On the contrary, the employer's reliance on that history suggests that it did not have much to support its position and that accordingly it is left with no option but to reach back in time. That period is particularly significant given that Dr. Haydon completed a Pirsue review in March 2003 (Exhibit E-353). At that time, no issues were raised with Dr. Haydon concerning the form of her report, the analysis she employed or the science that she used. In fact, not only were no issues noted with Dr. Haydon's March 2003 Pirsue review, an ADL was sent out based on that review that largely adopted her recommendations. Indeed, Dr. Haydon's direct and uncontradicted evidence was that Dr. Malik never expressed a concern about her March 31, 2003 report, even though he worked on that file after she completed her review. The fact that no concerns were

raised in March 2003 casts significant doubt on the employer's purported criticisms of the 2004 document. Of course, the only thing that had changed by spring 2004 was the employer's obvious desire to terminate the employment of Dr. Haydon and her colleagues.

[719] The employer is quite prepared to interpret Dr. Haydon's evidence in a way that supports its opinion about her motivations. For example, the employer argued that Dr. Haydon intimated that a manufacturer was misleading the VDD. That allegation is problematic for several reasons. First, it ought to have been discussed at the relevant time. Second, it does not support insubordination. Finally, and most significantly, even were Dr. Haydon intimating that the manufacturer was misleading the VDD, it should not have resulted in discipline or harsh, critical commentary. The employer, it seems assumed that the manufacturer could not possibly have been misleading the VDD. Obviously, if it were possible, then it would have serious health and safety ramifications. This single para illustrates that the employer holds unbending views and that it is not prepared to consider concerns identified by its own scientists. Instead, it lashes out at them and accuses them of acting inappropriately. The allegations that Dr. Haydon made false statements were never addressed by the employer at the relevant time. The employer's failure to do so is *prima facie* evidence that the alleged false statements were not problems, particularly since many similar intimations were in Dr. Haydon's March 2003 report.

[720] The employer purportedly identified comments by Dr. Haydon that were repetitive and that made the review confusing, difficult to follow and incoherent. Again, no evidence was adduced that connects that criticism to insubordinate behaviour. To the contrary, it indicates that, at best, the employer's concerns with Dr. Haydon's work were performance related. Clearly, those concerns ought to have been addressed in a non-disciplinary fashion.

[721] The employer asserted that Dr. Haydon's actions represented a deliberate attempt to avoid work. To some extent, the employer has contradicted itself. Although Dr. Haydon's supervisors initially concluded that her problems were performance related, they ultimately rejected their own analysis and found that Dr. Haydon was not a poor or underachieving performer but that, rather, she was behaving deliberately. The only rationale given for this drastic change in approach is Ms. Kirkpatrick's simple assertions that it was the case. Ms. Kirkpatrick's evidence on that point cannot be

accepted for the simple reason that it is based on her own perception and assumptions. Were the employer truly concerned that Dr. Haydon had been insubordinate, it should have taken steps at that time to obtain her point of view and to verify or test its hypothesis. That Ms. Kirkpatrick did not is fatal to the employer's position. In addition, its course of proceeding was directly contrary to the Treasury Board's guidelines on discipline, which call for a fair and objective approach as well as for providing the employee with an opportunity to respond to allegations. Not only does Ms. Kirkpatrick's failure to take those steps indicate that she did not have the capacity to assess Dr. Haydon's motivations, the fact is that the employer's actions, which were contrary to the Treasury Board's guidelines, undermined its legitimacy.

c. Employer's reply

[722] Although Dr. Haydon has experience as a veterinarian and has a particular interest in large animals, no evidence was adduced that would classify Dr. Haydon as an expert with respect to BSE or mastitis. Indeed as the evidence showed, Dr. Haydon had no particular training and conducted no particular work with respect to BSE. On mastitis, if Dr. Haydon had any particular expertise, she would not have required such a lengthy period before commencing her review of Pirsue Sterile Solution to get up to speed on mastitis. It is particularly noteworthy that she spent that significant amount of time getting up to speed when she was given the Pirsue assignments, which she admitted were her first for a mastitis product. A review of Dr. Haydon's professional experience indicates that, although she had been in private and public practice as a veterinarian, it ended in 1983. Almost 20 years passed since her hands-on experience with mastitis and its treatment.

[723] The employer put in place several structures to resolve scientific disagreements and to permit its work to be carried on, including creating the SIRC, the three teams within the HSD, the Stakeholder Committee and the policy to conduct second reviews.

[724] The enormous volume of evidence concerning the reports that Dr. Haydon produced, particularly about the Pirsue Sterile Solution NDS (ADL) review dated June 8, 2004, would be expected given that the reason for Dr. Haydon's discharge was that she did not carry out a scientific review. The employer had to prove that Dr. Haydon had not carried out any work and that her review was incoherent, inaccurate and incomplete, which did not permit it to make a decision. All that is set out in the letter of discharge. Although all the witnesses provided considerable testimony, including

scientific evidence, no scientific studies were put to Dr. Haydon that postdated her review. Possibly postdating her review were general scientific documents and background that were introduced to assist the adjudicator in understanding the basics so that he would later understand the specific scientific issues at hand.

[725] The basis for terminating Dr. Haydon's employment was not a scientific difference of opinion but insubordination in the form of producing a review that was incoherent, inconsistent and incomplete, as well as misleading. It was necessary to examine the entire review in exacting detail, given that it was the employer's position that the review demonstrated that Dr. Haydon had performed no work.

[726] Dr. Alexander responded to Dr. Haydon's very specific questions by indicating that they had already been answered. Dr. Haydon requires more than disliking the answers previously provided to her to support an allegation that she was not provided with information. Dr. Alexander made it clear to her in the February 2003 performance review discussion the errors and problems that existed with her work and what she had to do to correct them. He also discussed them with her in their December 2003 performance review meeting. Rather than discuss those problems at that time, Dr. Haydon chose to accuse Dr. Alexander of harassing her. It is not reasonable to state that Ms. Kirkpatrick ignored Dr. Haydon's harassment concern. In essence, Dr. Haydon accused Dr. Alexander of harassing her when he provided her with a performance evaluation with which she did not agree. There has been absolutely no evidence of any harassment by Dr. Alexander. Indeed, when Dr. Haydon made that allegation, she provided no particulars whatsoever. To date, no evidence has ever surfaced that Dr. Alexander's actions in completing the performance evaluation constituted harassment.

[727] Dr. Haydon is not a lawyer; nor does she have any legal training. Dr. Haydon was specifically instructed to conduct a review. Nothing in the *FDA* or its regulations makes it illegal to conduct a review of an SNDS before an NDS has been issued an NOC. Dr. Alexander and Ms. Kirkpatrick explained that a discussion had taken place and that a decision had been made that the review of the SNDS of the Pirsue Sterile Solution would take place concurrently with the review of the NDS, since it was the same product. No evidence was adduced at the hearing about Dr. Haydon's alleged illegality. She was well aware of the concurrent review of the SNDS and the NDS for Pirsue Sterile Solution as early as December 2002.

[728] The basis of terminating of Dr. Haydon's employment was not that she did not submit a report. The termination was based on a determination that the report did not constitute any work. That is clear from the significant review made of the report before the hearing. The employer led extensive evidence concerning Dr. Haydon's scientific and compositional methods, which was not a retroactive attempt to point out failings in her work performance but was to indicate that the June 2004 Pirsue Sterile Solution NDS (ADL) review constituted a complete lack of work. As stated by Ms. Kirkpatrick in her evidence, as well as in her letter of discharge, the work was incomplete, inaccurate and incoherent, as well as misleading.

[729] In reply, the employer made similar submissions on the law relating to insubordination as it did in Dr. Chopra's termination grievance. I have not repeated them.

[730] The facts in *Myler* are distinguishable in that the grievor in that case eventually did his job and stopped short of doing it only to seek clarification as to whether the required task was part of his job functions. On the contrary, with respect to Dr. Haydon, the employer concluded not only that she ignored her supervisor's explicit instructions but also that the end product was so inconclusive that it was viewed as a systematic attempt on Dr. Haydon's part to avoid and evade assigned work. Unlike in *Myler*, it cannot be said that no harm resulted in this case.

[731] Dr. Haydon argued that Ms. Kirkpatrick declined to give her the opportunity to defend herself against the reasons for termination. Any procedural unfairness that may have resulted as argued by Dr. Haydon has been cured by this hearing *de novo* (*Tipple*).

[732] The employer made similar submissions about the culminating incident and progressive discipline as it raised in Dr. Chopra's grievance. I have not repeated them.

[733] Dr. Haydon was suspended for 10 days for misconduct and was warned that any further acts of misconduct would lead to further disciplinary action, up to and including the termination of her employment.

[734] At no time did Dr. Haydon lead the employer to believe that she did not have the professional competence to perform her job. Dr. Haydon's actions with respect to her submissions on Pirsue were not treated as performance-related issues but as

culpable acts of insubordination. Dr. Haydon knew that she was expected to analyze data and to provide rationales for her conclusions. Instead, she submitted a review that was misleading, incoherent and incomplete and that was inadequate for reaching any decision with respect to the disposition of the submissions. Consequently, Dr. Haydon's actions with respect to the Pirsue reviews constituted insubordination.

3. Dr. Lambert's termination grievance

a. For the employer

[735] The employer relied on the same submissions on the insubordination jurisprudence as it did in the grievance submissions for Dr. Chopra and Dr. Haydon. I will not repeat them.

[736] The employer submitted that it had just and reasonable cause to discipline Dr. Lambert.

[737] Ms. Kirkpatrick met with Dr. Lambert on May 4, 2004 specifically to assign him the Draxxin review. She explained to him that he would be given three months to complete the evaluation and that he would not be asked to perform any other work. Given his past behaviour of not submitting assignments and not meeting deadlines, Ms. Kirkpatrick explained to Dr. Lambert that he would be required to provide her with monthly updates of his progress. She even followed up with an email repeating those exact words. Dr. Lambert understood that his job was on the line and that, if he did not comply with his employer's directions, the termination of his employment was a potential outcome. Not only did Dr. Lambert fail to meet his June 16, 2004 deadline for providing his first monthly update, he also failed to demonstrate, as requested, any progress. Dr. Lambert's conduct was insubordinate.

[738] Dr. Lambert was previously disciplined for not completing assignments and was warned that any further acts of misconduct could lead to further disciplinary action, up to and including the termination of his employment. Dr. Lambert was well aware that his employment was in jeopardy, yet he still failed to submit a Draxxin update by the specified date of June 16, 2004. When he finally submitted his draft report, it was in essence a regurgitation of what the manufacturer submitted. Dr. Lambert merely scanned the manufacturer's submission and provided a cut-and-paste job to Ms. Kirkpatrick. Although Dr. Lambert's evidence was that what he provided demonstrated that he had completed work on the Draxxin file, Ms. Kirkpatrick viewed the document

for what it was, a cut-and-paste job that would have taken no more than a few hours to complete, with no indication that any progress had been made in evaluating the studies in question. Ms. Kirkpatrick viewed Dr. Lambert's actions as a repetition of his previous insubordinate behaviour, for which he had been disciplined.

[739] Ms. Kirkpatrick made it clear to Dr. Lambert in their meeting of May 4, 2004 and in the email sent to him after that meeting that she required progress updates from him. Dr. Lambert may have considered his document of June 24, 2004 adequate, but it was not. If there was any confusion over Ms. Kirkpatrick's expectations, it was incumbent on Dr. Lambert to seek clarification. He did not. Dr. Lambert was well aware of what was expected of him. Dr. Lambert failed to meet the requirements set by his employer, and his actions were insubordinate. As in *Vancouver General Hospital*, Dr. Lambert consciously disregarded what was expected of him, such that his actions can be viewed as nothing less than ". . . deliberate and reflective of aconscious choice to perform his duties in a manner he chose to consider adequate" (at para 40).

[740] The decision to dismiss Dr. Lambert was not excessive. As indicated in the *Vancouver General Hospital* case, mitigating factors do not serve to excuse a grievor's conduct. While they may serve, in some cases, as an assurance that the grievor will not commit further acts of misconduct, in other cases an employee's pattern of conduct can also serve to "negate" his or her years of service. In the case of Dr. Lambert, he had over 30 years of experience with the employer. The review of the Draxxin material was well within his competence, and yet he continuously failed to deliver according to the employer's expectations, of which he was well aware. No other conclusion can be drawn from the facts in Dr. Lambert's case but that the employment relationship had irretrievably broken down.

[741] In cross-examination, Dr. Lambert stated that, in his opinion, Ms. Kirkpatrick wanted monthly updates because she wanted to control him. That was his view both when she asked for monthly updates and when he testified at the hearing. Even disregarding that Dr. Lambert consistently failed to respond to his supervisor's requests for information, that he failed to submit work even when it was completed and that he had just received a 10-day suspension for insubordination for his behaviour, in Dr. Lambert's mind, the request for monthly updates was an issue of his employer controlling his work and his behaviour. Dr. Lambert failed to take any responsibility for his actions during his last two years of employment with the

employer. Clearly, he maintains that mindset to this day.

[742] Ms. Kirkpatrick clearly indicated both at the meeting of May 4, 2004 and in her follow-up email of that same day that, if Dr. Lambert had any problems conducting the evaluation, he was to advise her. There was some dispute in Dr. Lambert's evidence as to whether he knew how to prepare Ms. Kirkpatrick's requested monthly update. However, in cross-examination, Dr. Lambert admitted that, even if he were unsure, he never asked Ms. Kirkpatrick what she meant by "monthly update." In any event, Dr. Lambert stated in cross-examination that Ms. Kirkpatrick wanted an update on the status of his progress on the project. Dr. Lambert was well aware of what was expected of him. As in *Shuniah Forest Products Ltd.*, by his actions, Dr. Lambert was insubordinate. He knew what was expected of him; he simply did not comply.

[743] The fact that Dr. Lambert tried to provide a copy of his draft report to Ms. Kirkpatrick at the meeting of June 11, 2004 is irrelevant. The June 11, 2004 meeting was scheduled to discuss Dr. Lambert's PDP evaluation. Although Ms. Kirkpatrick told Dr. Lambert to send the update to her the following week when it was due, nothing prevented him from forwarding the document to her after the meeting on June 11, 2004. Furthermore, whether Dr. Lambert believed the due date was June 16 or 18, 2004 is moot because on June 18 he had a signed copy of his draft Draxxin report sitting on his desk at work and yet did not bring it to Ms. Kirkpatrick's office. Nor did he email her a copy. In cross-examination, Dr. Lambert admitted that he could have done both. The only conclusion that can be drawn is that he chose not to do either. Dr. Lambert was insubordinate. He knew what was expected of him. He knew that his job was in jeopardy. In this case, the penalty of discharge was not too severe.

[744] There is no justification or excuse for Dr. Lambert's actions, which is proof of the pattern of insubordinate conduct. Dr. Lambert simply deflected responsibility for his actions and made one excuse after another for not complying with his supervisor's directions. The employer submitted that there was just and reasonable cause for discipline and that the penalty of discharge was not too severe.

b. <u>For the grievor</u>

[745] Dr. Lambert made the same submissions on the common treatment of all three grievors that were made in the submissions for Dr. Chopra's termination grievance. I will not repeat them.

[746] Dr. Lambert was terminated after about 30 years of service as a drug evaluator for submitting an interim monthly update that was missing specific content that he had never been asked to provide. Despite the fact that he had provided three reports of his work, the employer determined that he had done nothing. Dr. Lambert's supervisor reached her conclusion largely by viewing his conduct through the lens of a negative interpretation of his previous behaviour. She made no effort to apply accepted human resources principles or to assist him in any way, refusing to contemplate that the corrective discipline that she had imposed just three weeks earlier had produced the desired results.

[747] Dr. Lambert was not insubordinate. He was terminated part of the way into a three-month assignment. He provided a monthly update that met the requirements that were communicated in his employer's order. The order was unclear that more detail was expected. It cannot meet the high threshold of specificity required to ground discipline for insubordination.

[748] Additionally, the monthly update incident was not severe enough to warrant termination, and the facts do not meet the test for a culminating incident. The employer relied on two previous instances of discipline, one of which was irrelevant to insubordination.

[749] There was no discussion at the May 4, 2004 meeting of using the assignment as an opportunity for learning or as a means to improve Dr. Lambert's performance. No warning or discussion of discipline arose as a possible consequence of any failure to meet the expectations of the assignment.

[750] Dr. Lambert made identical submissions on the insubordination jurisprudence as were made in the submissions for Dr. Chopra's termination grievance. I will not repeat them.

[751] Despite the fact that *Vancouver General Hospital* deals with performance and not insubordination, neither the employer's nor Dr. Lambert's conduct was similar to that of the parties in that case. Dr. Lambert made a number of inquiries and requests for training and assistance. The employer acted on none of them. In contrast, the employer in *Vancouver General Hospital* offered coaching or retraining to the grievor in that case and imposed discipline only when that failed. In this grievance, Dr. Lambert is not accused of any rude behaviour or fraudulent misconduct, as was the

grievor in *Vancouver General Hospital.*

[752] The facts in *Bérard* are easily distinguished. The first of two grievances in that case concerns that grievor's third successive failure to submit a performance appraisal on time. The employer in that case was proactive and drafted a ". . . specific schedule for all the procedures relating to the performance appraisal." The employer then negotiated an extension to the schedule but gave Ms. Bérard notice that it would hold her to a strict deadline, stating that, "[i]f you do not meet this deadline, appropriate disciplinary action will be taken against you for disobeying my instructions." The second grievance in *Bérard* also dealt with a well-established pattern of behaviour. The grievor failed to inform a Commissionaire that she had locked a set of keys in the employer's car at an off-site location, which caused the employer significant disruption and cost. That situation is nothing like the alleged insubordination by Dr. Lambert in this case of withholding regular services. Ms. Bérard's error was aggravated by her choice not to remedy the situation that she had caused, which occurred in a context in which she had been reprimanded several times for related conduct and had been the subject of a number of independent complaints, some involving verbal abuse. Moreover, despite a significant history of misconduct, the employer in *Bérard* did not terminate her but imposed only a one-day suspension almost immediately after the conduct had occurred.

[753] The employer argued that *Bérard* is relevant to Dr. Lambert's conduct of failing to email his second draft report to Ms. Kirkpatrick before June 24, 2004. However, Dr. Lambert was not disciplined for submitting that report late; he was held insubordinate for doing no work. Moreover, no one at the employer provided Dr. Lambert with anything like the explicit warning given to Ms. Bérard, and no harm resulted or was foreseeable from Dr. Lambert's alleged delay, which occurred while he was on certified sick leave.

[754] The employer also relied on *Shuniah Forest Products Ltd.*, a case dealing with a two-week suspension, to support its position that termination was justified. That case's circumstances are also wholly unlike the circumstances in Dr. Lambert's attempts to submit his monthly updates. The grievor in *Shuniah Forest Products Ltd.* was found to have deliberately refused to carry out the known expectations of his supervisor. That finding brings the case squarely within the scope of insubordination. By contrast, the evidence is clear that neither components of the requirement for a

clear order, which Dr. Lambert understood were met in this case.

[755] As noted in *Canadian Labour Arbitration*, the fundamental purposes of progressive discipline are correction and rehabilitation (para 7:4422). The authors further note that the employer's conduct is also relevant in considering whether discipline is appropriate, pointing out that the employer bears some responsibility for a given situation because it was inattentive or because it encouraged events as they developed (para 7:4410).

[756] In this case, the employer alleged that Dr. Lambert refused an order to perform a specific kind of work in the first month of a three-month assignment. Dr. Lambert was terminated before the deadline for the completion of the Draxxin review and was not terminated for failing to complete the full assignment. He was held insubordinate solely on the basis of the content of his first monthly update. On that basis alone, the termination of Dr. Lambert cannot be upheld. Simply put, it is irrational and illogical to terminate an employee based on the content of his or her first monthly update when no chance is given to complete the assignment. That is particularly true when, as in this case, the initial instructions are less than clear and when the employee had legitimate concerns about the scope of the assignment and in fact was performing the work in question. Moreover, as noted above, in the early stages of the Draxxin assignment, Dr. Lambert made legitimate and genuine attempts to discuss with Ms. Kirkpatrick his concerns about the nature of the task. She refused to take advantage of those opportunities. It is unacceptable for the employer to rely on those factual circumstances when Ms. Kirkpatrick did not take legitimate steps to deal with the issues in the first place.

[757] Insubordination requires an employee to refuse a clearly communicated and understood order. In this case, Dr. Lambert was ordered to complete the Draxxin review within three months and to provide monthly updates. He submitted that, to the extent possible, he complied with that order. Indeed, it is logically impossible to terminate an employee for not complying with an order when the employee is never allowed the opportunity to complete it. As noted, a considerable amount of time remained to finish the review.

[758] The assignment, as communicated to Dr. Lambert, contained the following two elements: 1) "review toxicity data," and 2) provide "monthly updates" of "progress." The content of the monthly updates is not specified beyond "status" and "progress."

With respect to the updates, Ms. Kirkpatrick included no specific directions. She did not break the task up and did not ask for specific volumes to be reviewed in the first month. Nor did she ask to see Dr. Lambert's work in progress, such as notes, comments or working drafts. However, Ms. Kirkpatrick advanced a very specific understanding of the content of the monthly updates in her evidence at the hearing. That understanding was not expressed in her email or in the meeting of May 4, 2004. In her view, the first update had to include "results of analysis" and "preliminary comments" of the toxicity studies.

[759] Although Dr. Lambert had experience meeting expectations for toxicity reviews throughout his 30-year career as a drug evaluator, he had never been told to produce a "monthly update" before. It cannot be presumed that Ms. Kirkpatrick's specific conception of "results of analysis" and "preliminary comments" would be clearly communicated to Dr. Lambert by the general terms "monthly updates," "status" or "progress." This is particularly the case given the fact that Ms. Kirkpatrick did not provide any valuable detail of what she expected of Dr. Lambert in their early meetings.

[760] Ms. Kirkpatrick did not indicate in any of her communications that discipline might result from her evaluation of the content of the first monthly update or that the update would be the sole indicator of Dr. Lambert's work. Additionally, on June 11, 2004, Ms. Kirkpatrick refused to accept his monthly update. No reasonable explanation has been provided as to why Ms. Kirkpatrick refused to accept the monthly update. Had she approached the assignment reasonably, Ms. Kirkpatrick would have had the opportunity to discuss the monthly update with Dr. Lambert and perhaps to address any concerns that either had.

[761] Ms. Kirkpatrick's direction to Dr. Lambert on May 4, 2004 lacked the clarity required to enforce an order. She did not take the simple step of specifically defining her understanding of the required content of the first monthly update. She certainly never advised Dr. Lambert that his job depended on including "results of analysis" or "preliminary comments." Rather, her communications with Dr. Lambert about the monthly updates were vague. Although her communications were clearly orders, she described them in writing as "requests," and included them in a performance-based reprimand letter that suggested that follow up would occur after the first "cycle." The elements of the order that were actually communicated to and understood by

Dr. Lambert were that he was to advise Ms. Kirkpatrick of the status of his work on the Draxxin assignment after one month. Dr. Lambert clearly completed that task.

[762] In her evidence, Ms. Kirkpatrick acknowledged that Dr. Lambert did perform work and that he did make progress during the relevant period. She further acknowledged that his email of May 13, 2004 and his draft reports were evidence of his work. Her acknowledgements are extremely significant, if not determinative, of the allegation that Dr. Lambert was insubordinate. Clearly he was working, and clearly he did not know that Ms. Kirkpatrick disagreed with his work.

[763] Given the terms of the assignment, it was necessary for Dr. Lambert to investigate the concerns that led to his email of May 13, 2004. The employer did not deny that that was an appropriate way to begin the project. In cross-examination, Ms. Kirkpatrick agreed that Dr. Lambert's email of May 13, 2004 demonstrated that, a week after being assigned the task, he had commenced working.

[764] As noted, Ms. Kirkpatrick's decision to terminate Dr. Lambert was ultimately based on her conclusion that he had done no work. However, she acknowledged that, in fact, she had no idea whether Dr. Lambert had actually done the work for which she terminated him for failing to do.

[765] Ms. Kirkpatrick was aware of the Treasury Board *Guidelines for Discipline*, which were in force when Dr. Lambert was terminated (Exhibit G-288). The guidelines include an express obligation on managers considering discipline to "[c]onduct a fair and objective investigation" that was to consider and provide "the employee's response to the allegation(s)" and to ensure that ". . . employees have a right to be confronted with the alleged wrongdoing and to have an opportunity to respond." None of those steps were taken with respect to Dr. Lambert's discipline. Ms. Kirkpatrick reached her conclusion based solely on written documents and never confronted Dr. Lambert with the allegation that he had done no "actual work." Had she complied with the *Guidelines*, she could have confirmed whether Dr. Lambert had completed the kind of work that she had envisioned, and to a sufficient degree. Instead, Ms. Kirkpatrick preferred to proceed on the basis of her assumption.

[766] Dr. Lambert was not insubordinate. To the extent that the order was clearly communicated or that it could have reasonably been implied, he complied with it. His conduct of producing three written updates in the first month of his assignment is

utterly incompatible with an attitude of defiance or contempt for his superiors. Rather, the facts are consistent with an employee working on a larger assignment and who, at the very most, failed to include specific details of an element of that assignment, which was never communicated to him. That is not insubordination.

[767] Although Dr. Lambert indeed worked on the Draxxin assignment and complied with the employer's instructions, it should be kept in mind that other serious events and issues occurred in May and June 2004, which affected his work output. The evidence is uncontradicted that several issues in the workplace directly affected his working life. It is equally uncontradicted that the employer in general, and Ms. Kirkpatrick in particular, did not consider the impact of those events on Dr. Lambert. First, Dr. Lambert was clearly worried that his employment was in danger. He formed that view once the employer removed him from an acting team leader position as a reprisal for expressing his views about the approval of the drug Tylosin in May 2002. He had formed the view that the employer had been gunning for him and that it would find fault with anything he did. As noted previously, Dr. Lambert's views were not speculative; the PSIO had found that he was the subject of reprisal, a decision that the employer refused to acknowledge. Those events and others had led to a poisoned work environment for Dr. Lambert. His conduct and performance in May and June 2004 cannot be viewed in isolation from those events. He was constantly dealing with harassment or discipline. It is particularly significant that, in the midst of that period, after it was found that he had not harassed his colleagues, the ADM personally admonished him for creating a poisoned work environment. That is certainly consistent with Dr. Lambert's impression that the employer was gunning for him and that his career was already over and would have been counter-productive to completing his task. Those circumstances did not justify the employer's approach of applying a strict interpretation to the contents of the monthly updates. In troubled workplaces, and with an employee whom the employer has perceived as problematic, insubordination has been upheld when employers diligently applied the principles of progressive discipline. Those principles include repeating orders, explicitly warning that conduct is being perceived as insubordinate and conducting investigations in which the problematic employee is given the opportunity to respond to the specific allegation of insubordination.

[768] The Treasury Board *Guidelines for Discipline* use the word "corrective" when describing progressive discipline. Ms. Kirkpatrick acknowledged that the earlier

suspension imposed on Dr. Lambert was designed to be corrective and that the Draxxin assignment was designed to be rehabilitative.

[769] That evidence strongly suggests that the monitoring of Dr. Lambert's work on Draxxin, including his monthly updates, was in fact part of a performance management effort. If that were the case, the employer utterly failed in its duty as an employer to help Dr. Lambert improve his performance. No counselling or training was offered despite his requests, the recommendation of his previous supervisor and the PSIO's direction that he be provided with performance-enhancing opportunities.

[770] Ms. Kirkpatrick's conduct is inconsistent with her statement that she intended to get Dr. Lambert "back on track," meaning to help him improve his performance. Rather, her conduct is consistent with her view that he was insubordinate and that his insubordination would not change. She took a hands-off approach to Dr. Lambert's work and placed the onus completely on him to comply with her instructions. She believed that following up and counselling were inappropriate, which is completely at odds with the principles of progressive discipline applied by the employers in *Doucette*, and *Grover*. In *Paquette*, although four suspensions, ranging from 1 to 20 days, had been imposed on the employee, when faced with an incident that was held to have demonstrated insolence and contempt, the employer in that case conducted an investigation that provided the grievor in that case with an opportunity to answer its allegations. Ms. Kirkpatrick's approach left no room for improvement following the 10-day suspension. Immediately following that corrective discipline, and for the "two years" to which she repeatedly referred, and despite her statement that she intended Dr. Lambert to get back on track, Ms. Kirkpatrick's attitude towards him was pessimistic, and she refused to contemplate any improvement. Although Dr. Lambert had received no warnings of discipline about work output in the two years of allegedly constant and repeated misconduct, two written warnings were actually issued, just before his termination and after Ms. Kirkpatrick had formed her negative view of him (in the 10-day suspension, dated May 14, 2004, and in the letter of June 11, 2004).

[771] Ms. Kirkpatrick's conduct and her evidence at the hearing reveal that, by the time the Draxxin review was assigned, she had predetermined that Dr. Lambert refused to work. As was held in *Nanaimo Collating Inc.*, a termination cannot be upheld when the employer ignores the principles of progressive discipline due to a jaded view of an employee's performance.

[772] Using a prior record to support discipline is contingent on a culminating incident that justifies a review of previous discipline (*Canadian Labour Arbitration*, at para 7:4312). In her evidence, Ms. Kirkpatrick confirmed that she relied on only two disciplinary incidents when she considered the appropriate penalty for Dr. Lambert. While the alleged culminating incident does not merit discipline, it is also true that the employer's reliance on previous discipline is inappropriate. The facts behind the five-day suspension are unrelated to insubordination. Using that suspension violates the test for a culminating incident. The relevance of the discipline imposed should be guided by the behaviour that it was designed to correct. In this case, Dr. Lambert was disciplined for an intentional refusal to work. The earlier discipline was characterized as misconduct and was imposed because Dr. Lambert made and endorsed allegedly misleading comments in the media. That had nothing to do with Dr. Lambert's performance, work output or failure to respond to the employer's requests; nor was it characterized as insubordination. Additionally, as noted in *Doucette,* "[i]t seriously undermines the purpose of progressive discipline to impose discipline all at once for a series of offences that take place over an extended period of time" (at para 100). In that case, the employer relied on discipline that became more severe due to a five-month delay and to a grouping of offences, which lessened its effect on the culminating incident analysis. In this case, extensive delays occurred in imposing discipline for both the 5-day and 10-day suspensions. In both cases, while discipline could have been imposed as early as July 2002, none was until March and May 2004. The delay in imposing discipline for speaking out is particularly significant considering that, had Dr. Lambert been disciplined immediately following the first incident (July 3, 2002), the discipline would have expired under the relevant collective agreement's two-year sunset clause. Moreover, there is no evidence that Dr. Lambert made any further public comments that the employer viewed as inappropriate. Therefore, for the purposes of progressive discipline, it should be concluded that the discipline had the intended corrective effect on Dr. Lambert's behaviour. Accordingly, that incident should not have influenced any discipline for insubordination.

[773] Furthermore, Dr. Lambert had virtually no opportunity to demonstrate improvement in the 3 weeks following the imposition of the 10-day suspension. His employment was terminated well before the due date of the assignment, with no investigation into the work he had actually performed. Accordingly, the previous discipline should not be relied on to justify termination.

[774] Ultimately, considering the relevance of the earlier discipline, particularly in the context of the principles of corrective discipline and the employer's own conduct, it is clear that no culminating incident occurred justifying termination. The employer relied on only two previous disciplinary offences, one of which is clearly not relevant. That is far less than the significant record, which failed to justify termination in *Doucette.* That case included three suspensions, one for 20 days.

c. <u>Employer's reply</u>

[775] With respect to receiving no work assignments between February and May 2004, Dr. Lambert had demonstrated through his behaviour over the previous 20 to 23 months an inability to complete work assigned to him in a timely manner. Dr. Lambert advised no one in management that he was without an assignment.

[776] One would expect that someone of Dr. Lambert's background and experience would understand that "update" means to bring another person up to date as to the status of their work. "Update" is a very simple term with a simple meaning.

[777] The issues raised in the May 13, 2004 email are irrelevant. Dr. Lambert made numerous comments and submissions about his inability to either commence or carry out the Draxxin review due to issues with certain volumes. His comments and submissions were inaccurate and incorrect. Dr. Lambert was never limited by Ms. Kirkpatrick from accessing any of the volumes and materials of the Draxxin review. Indeed, Dr. Lambert confirmed that he had access to all the volumes and that he did in fact sign them all out, which went beyond the scope of Ms. Kirkpatrick's directions for his assignment. It is clear that, despite his May 13, 2004 email and Ms. Kirkpatrick's lack of response, Dr. Lambert accessed the materials from volumes of the Draxxin submission.

[778] Dr. Lambert was not reprimanded for poor performance in the June 11, 2004 letter, which was a follow up to the PDP process, confirming the steps that were required of him to improve his performance. It was not a disciplinary measure.

[779] It is irrelevant whether anyone enquired with Dr. Lambert as to the whereabouts of his assignment. As an experienced employee, he should have known the perils of not submitting his assignment when it was due and of not specifying why it had been delayed. Whether he agreed or disagreed with the 10-day suspension, Dr. Lambert was well aware of the employer's position that he had been insubordinate by not

submitting his assignments and by not responding to related inquiries. The 10-day suspension was imposed in the midst of an assignment, so he was certainly aware of the risk of discipline and indeed of discharge if he did not handle the assignment in a timely fashion. Ms. Kirkpatrick made it perfectly clear that it was up to him to contact her if he had any problems.

[780] The cases cited by counsel for the grievors on insubordination are distinguishable as they involve a finding of whether the employers in those cases in fact gave direct orders and whether they were clearly communicated. Ms. Kirkpatrick made it clear to Dr. Lambert in their meeting of May 4, 2004 and in the email sent to Dr. Lambert following that meeting that she required an update of his progress. If Dr. Lambert was confused over what was expected of him, he should have asked Ms. Kirkpatrick for clarification. In cross-examination, Dr. Lambert admitted that he never sought clarification from Ms. Kirkpatrick and that he knew that Ms. Kirkpatrick wanted the status of his progress on the Draxxin project. Therefore, the employer submitted that the case law submitted by Dr. Lambert with respect to providing a clear order to substantiate insubordination is not relevant. There was no confusion over what was expected of Dr. Lambert under the circumstances.

[781] In *Lyons v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File No. 166-02-22400 (19931112), although the suspension was reduced from three days to one, the adjudicator still found that the actions of the grievor in that case in the second incident justified discipline. Although the grievor was not warned that he would be disciplined for failing to carry out a request of the employer, the discipline was nonetheless upheld.

[782] Dr. Lambert submitted that repeating an order and underlining the consequences of refusal have been accepted as positive practices in insubordination cases. That analysis applies only to cases dealing with work performance issues and innocent absenteeism. However, the employer did not consider Dr. Lambert's failure to comply with its instructions a work performance issue but viewed it as disciplinary. Under the circumstances, Dr. Lambert did not require a warning that he might be disciplined. He knew what was expected of him and simply chose not to comply. In any event, by that time, a 10-day suspension had been imposed on Dr. Lambert for insubordination. Dr. Lambert was aware that his job was on the line and that if he did not comply with the employer's directions that the termination of his employment was

a potential outcome. By his actions, Dr. Lambert was insubordinate.

[783] It is also worthy of note that, in *Lyons*, one of the reasons the adjudicator reduced the penalty was that the grievor in that case submitted medical evidence that he was being treated for stress and job-related pressures and that, when the relevant incidents took place, he was diagnosed with a medical condition. No such medical evidence was put forward in Dr. Lambert's case. Therefore, the employer's position is that it was justified in discharging Dr. Lambert and that, when the mitigating factors are analyzed, the penalty should not be reduced.

[784] In *National Harbours Board*, and *Vancouver*, the failure of the grievor in that case to advise his employer of his reasons for not working a second shift is relevant. The arbitrator held that the grievor should have been more definite and decisive and that he should have provided an explanation for his actions. Similarly, Dr. Lambert's behaviour does not show the degree of responsibility that the employer is entitled to expect, and discipline is therefore warranted.

[785] The facts in *Myler* are distinguishable. The grievor in that case eventually did his job and stopped only to seek clarification on whether the task in question formed part of his job functions.

[786] *Nanaimo Collating Inc.* is distinguishable on its facts. The arbitrator held that the employer overreacted in that case because discipline was levied after an unclear order and because there was doubt as to whether a person in authority had actually given an order.

[787] Dr. Lambert argued that, before she terminated him, Ms. Kirkpatrick did not provide him with the opportunity to defend himself against the allegation that he had done no work. In response, the employer relied on *Tipple*, in which the Federal Court of Appeal held that any procedural unfairness is cured by a hearing *de novo*, such as this hearing.

[788] The employer made identical submissions on Dr. Lambert's culminating incident as it made in its reply submissions in Dr. Chopra's termination grievance. I will not repeat them.

D. Reasons

1. Dr. Chopra's termination grievance

[789] The criteria for a finding of insubordination are clear. Was there a clear order, given by a person in authority, and was that order disobeyed? For the reasons set out in this decision, I have concluded that Dr. Chopra was insubordinate when he refused to work on the assignment and consequently showed no progress.

[790] There is no dispute that Ms. Kirkpatrick was a person in authority and that she was Dr. Chopra's direct supervisor.

[791] Dr. Chopra submitted that there was something nefarious about Ms. Kirkpatrick consulting with professional advisors before establishing an assignment for him. If a manager has legitimate concerns about the conduct of an employee, there can be nothing nefarious in consulting professional advisors.

[792] Dr. Chopra submitted that the determination of whether the order was clear has a subjective element. In other words, he submitted that the employee's understanding of the order is a relevant consideration when determining whether insubordination occurred. He provided no support for his contention. The clarity of an order is an objective assessment of its content and the context in which it was given. If an employee expresses confusion when an order is given, that may be a relevant consideration of the context within which it is given. However, Dr. Chopra did not tell Ms. Kirkpatrick that he did not understand the assignment; he merely disagreed with its foundation.

[793] Dr. Chopra testified that he did not raise his confusion about the assignment at the May 4, 2004 meeting because he was concerned about his relationship with Ms. Kirkpatrick. That testimony is not credible. He had no qualms in the past about raising concerns with her or with others. He was not reticent about sharing his views on the assignment in later emails to Ms. Kirkpatrick.

[794] Dr. Chopra submitted that the nature of the assignment was not clearly communicated and that it was complex and difficult to understand. Someone of his experience and expertise should not have had any difficulties understanding the assignment. His correspondence with Ms. Kirkpatrick on classification systems and AMR demonstrate that he had a good understanding of what was requested.

[795] In an early decision about insubordination, the arbitrator noted that the workplace “is not a debating society” (*Ford Motor Co.* (1944), 3 L.A. 779, cited in Mitchnick and Etherington, *Labour Arbitration in Canada*, at page 13-2). Dr. Chopra was intent on debating the merits of his assignment with Ms. Kirkpatrick rather than doing the assigned work. That debate continued at this hearing. He suggested in his submissions that it was up to the employer to convince him of the merits of the assignment. That turned the employment relationship on its head. In an employment relationship, the employee must follow legitimate instructions. The workplace is not a democracy in which supervisors must convince employees of the merits of following a particular order.

[796] Dr. Chopra was given specific instructions at the May 4, 2004 meeting not to pursue his plan to review all the submission files for antimicrobial drugs. He disobeyed those instructions and requested a list of submissions from the responsible VDD section.

[797] Dr. Chopra’s testimony was confusing as to the status of his progress on the assignment. At one point, he testified that he had completed the project, and at another point, he said that the task was impossible and that he had given up. I believe that the latter is more likely. He decided that the assignment was not worthy of his attention. In his emails to Ms. Kirkpatrick, he said that the assignment was not scientifically amenable. He informed her that she could pick one classification system; both were equally valid. He did not explain his conclusion.

[798] The status report prepared by Dr. Chopra did not demonstrate any progress on the assignment. It repeated the assignment and then contained point-form headings with no explanations of their importance or relevance to the assignment. His suggestion that Ms. Kirkpatrick should either have known what he was referring to or should have asked her staff to help her understand entirely misses the nature of the employment relationship. He seems to suggest that he was not part of the VDD staff. A supervisor should not have to seek an explanation for a status report from other employees. As his supervisor, she requested a status report and was entitled to one.

[799] I understand that it was Dr. Chopra’s view that the assignment was not appropriate and that it was a waste of his time. I also understand that he wanted to change the scope of his assignment and make it into a full-blown inquiry into AMR involving an in-depth review of VDD files and discussions with VDD scientists.

However, his supervisor gave him a much more focused assignment. An employee is not free to change an assignment without the approval of his or her supervisor. I am not qualified to opine on whether Dr. Chopra's views on the merits of the approach set out in the assignment were valid. However, that is not the point. He was required to work on the assignment and to complete the tasks. In completing the assigned work, it was open to him to also include his scientific opinion on the weaknesses of the approach suggested by the assignment. It was not open to him to simply ignore the tasks assigned to him.

[800] Dr. Chopra submitted that he was not given an opportunity to respond to Ms. Kirkpatrick's concerns. She expressed her concerns in her emails to him. He had an opportunity to clarify his approach in his reply emails.

[801] Dr. Chopra submitted that Ms. Kirkpatrick failed to warn him of the consequences of failing to complete the assignment. He had previous discipline on his record, and he had clearly been warned in those suspension letters of the consequences of further misconducts. In addition, the general expectation is that employees are to follow instructions. Therefore, it is implicit that failing to follow instructions or an order could lead to discipline.

[802] Dr. Chopra suggested that one thing to consider when determining insubordination is whether the employer suffered any harm as a result of it. While some orders might fall under that exception, the order in this case is not one of them. The assignment was within his area of responsibility, and the employer is entitled to receive service from its employees. Employees are not free to pick and choose assignments to complete, even if they do not believe that an assignment has any value.

[803] Dr. Chopra's intentions with respect to the assignment were made clear at the hearing. He stated that classification was not the proper approach and that Ms. Kirkpatrick was trying to "pin it on me." He also testified that classification was completely irrelevant. I find that, based on his emails to Ms. Kirkpatrick and his testimony at this hearing, Dr. Chopra actively avoided his assigned work and that he was insubordinate.

[804] Dr. Chopra's employment was terminated while he was on approved sick leave. However, his misconduct occurred before the commencement of his sick leave.

Consequently, it was open to the employer to terminate his employment while he was on sick leave.

[805] Dr. Chopra had three suspensions on his record at the time of his insubordination (one for 5 days, one for 10 and one for 20). The 5-day suspension was upheld at adjudication. I have dismissed the grievances against the other two suspensions. The 10-day suspension was for an act of insubordination. The 20-day suspension was for speaking to the media. I do not accept his submission that progressive discipline does not apply. The 20-day suspension was related to the conduct in question in this case. It was a further demonstration of his lack of respect for his employer.

[806] The only mitigating factor at play is Dr. Chopra's long service. However, it is not sufficient to mitigate his actions. He has demonstrated that he is incapable of being supervised.

[807] Accordingly, the grievance is dismissed.

2. Dr. Haydon's termination grievance

[808] Dr. Haydon's employment was terminated for insubordination. What the employer initially treated as a performance-related concern became a matter of misconduct when it concluded that the lack of productivity and the quality of Dr. Haydon's work as an experienced evaluator was an intentional act of misconduct.

[809] Dr. Haydon grieved her negative performance evaluation. That grievance is not before me. The evidence related to the performance evaluation is relevant only insofar as it shows that the employer initially attempted to address work performance issues through a non-disciplinary process. It is also evidence that Dr. Haydon was aware of the legitimate concerns of Dr. Alexander, her supervisor, about her lack of productivity.

[810] There was confusion in Ms. Kirkpatrick's testimony as to the document she was referring to in the letter of termination. Although the letter was certainly drafted sloppily, it sufficiently states the employer's grounds for terminating Dr. Haydon's employment.

[811] In essence, the employer concluded that the amount of time Dr. Haydon spent preparing an inadequate, incoherent and inconclusive report was a deliberate and systematic attempt to “avoid and evade” work assigned to her.

[812] A finding of insubordination requires proving the following three elements: 1) evidence of a clear order or instruction given by someone in authority; 2) evidence that the order or instruction was disobeyed; and 3) the absence of any reasonable explanation for the failure to comply with the order or instruction.

[813] Dr. Haydon was assigned the review of the Pirsue submissions. As a senior veterinary drug evaluator, Dr. Haydon was aware of her duties and responsibilities in conducting a review. In addition, the evidence shows that she was instructed by her supervisor to consider the United States’ approval of the same drug. The instructions to Dr. Haydon were clear.

[814] Dr. Alexander initially considered Dr. Haydon’s failure to adequately perform her duties as a senior veterinary drug evaluator as a performance issue. He raised his concerns in performance discussions with her and in her performance evaluations. However, Dr. Haydon chose to consider those criticisms of her performance as harassment. She was unwilling to direct her mind to his legitimate concerns about her overall job performance. The employer initially made efforts to draw deficiencies to Dr. Haydon’s attention, to set out expectations and to set out the consequences of a failure to meet the expected standards for a senior veterinary drug evaluator. Dr. Haydon did not recognize either at that time or at this hearing any fault or deficiencies in her work.

[815] The 30 problems with the review document, identified by the employer at the hearing, were not raised with Dr. Haydon before her employment was terminated. However, she was either aware of or should have been aware of many of the identified problems. The identified problems demonstrated a sloppiness in presentation and analysis that were, for an evaluator of Dr. Haydon's experience, unacceptable and ultimately unexplained. Dr. Haydon did not acknowledge any deficiencies in her work and testified that she worked to the best of her abilities at the relevant time.

[816] As did the arbitrator in *Vancouver General Hospital*, I conclude that Dr. Haydon displayed a conscious disregard of the standards and work expectations of a senior

evaluator, which rendered her conduct deliberate. She made a ". . . conscious choice to perform [her] duties in a manner [she] chose to consider adequate" (at para 40).

[817] Dr. Haydon provided no reasonable explanation for failing to obey her supervisor's instructions and for failing to meet the standards expected of a senior evaluator. As I have already noted, she refused to recognize any deficiencies in her work and testified that she worked to the best of her abilities at the relevant time.

[818] In *Manitoba*, the arbitrator rightly concluded that a disciplinary response to a long-service employee's sudden failure to keep up with his workload was not appropriate. The *Manitoba* case is in many respects the exact opposite of this case. The arbitrator in that case concluded that the grievor was trying very hard to keep up with his work and that he had an explanation for his problem meeting deadlines. Dr. Haydon did not provide any credible evidence to explain her failure to perform at a level acceptable for a senior evaluator. In fact, she denied that her performance was unsatisfactory. In *Manitoba*, the arbitrator was also convinced that there was nothing intentional or negligent in the grievor's behaviour. I have found that Dr. Haydon's conduct demonstrated a conscious choice to disregard her obligations as a senior veterinary drug evaluator. In addition, in *Manitoba*, the employer did not provide additional supervisory guidance or instructions to the grievor. In this case, Dr. Alexander made efforts to advise Dr. Haydon of his concerns and to offer assistance to her in improving her performance.

[819] Dr. Haydon relied on condonation to support her arguments that the grievance should be allowed. I find that there was no condonation by the employer. The employer made efforts to raise performance concerns with Dr. Haydon that were ultimately unsuccessful. In my view, the employer's initial efforts to address performance issues through the evaluation process and to give Dr. Haydon an opportunity to demonstrate an improvement in performance cannot be considered condonation.

[820] With the discipline already on record, terminating Dr. Haydon's employment was not an excessive disciplinary measure. I cannot accept Dr. Haydon's contention that her misconduct was not similar to her previous misconduct. All the acts of misconduct demonstrate an underlying defiance of her employer. They displayed Dr. Haydon's fundamental inability to accept supervision and direction from her employer.

[821] Progressive discipline does not follow a lock-step progression. In this case, the employer demonstrated that Dr. Haydon is not capable of working under supervision and that the employment relationship is not salvageable. In addition, her failure to acknowledge any remorse or failure on her part also supports a finding that the employment relationship cannot be restored. Dr. Haydon remained quietly defiant to the end. As articulated in *British Columbia Hydro and Power Authority*, the absence of regret or remorse makes reinstatement "purposeless" (at para 71).

[822] Accordingly, the grievance is dismissed.

3. <u>Dr. Lambert's termination grievance</u>

[823] Dr. Lambert's employment was terminated for his failure to provide an update on his progress on an assignment and his failure to demonstrate any progress on the assignment. The employer considered his failures insubordination. Dr. Lambert was clearly struggling with his assignment and with balancing work priorities. However, for the reasons set out in this decision, I find that the employer was hasty in reaching the conclusion that it did and that it did not fairly assess his progress on the assignment. Accordingly, I find that the employer did not have just cause to terminate Dr. Lambert's employment.

[824] An allegation of insubordination will be founded if a clearly understood order from a person in authority is disobeyed. There is no dispute that Ms. Kirkpatrick had the authority to issue an order to Dr. Lambert. In the termination letter (Exhibit E-341, tab A-1), the employer relies on Dr. Lambert's failure to provide an update of his work by the June 16, 2004 deadline. It also relies on Ms. Kirkpatrick's determination after reviewing the draft report that "no actual work or progress" had been accomplished. The letter of termination also refers to statements about Dr. Lambert's performance evaluation discussions and statements in a letter about his job performance provided on June 11, 2004 (Exhibit E-341, tab B-9). In that letter, Ms. Kirkpatrick raised the possibility of demotion or "even termination of employment." The *PSSRA* did not allow the employer to demote an employee for disciplinary reasons. It is also clear from the letter that the employer was taking a non-disciplinary approach to its concerns with Dr. Lambert's performance. Therefore, it is surprising that, within a month of the letter, the employer suddenly began a disciplinary approach. However, the importance of the letter is in the clear message that it conveys on expectations of performance. That is relevant because those expectations relate to Ms. Kirkpatrick's order.

[825] The performance evaluation letter of June 11, 2004 refers to the establishment of "more specific and detailed work plans" and to a monthly assessment. Ms. Kirkpatrick also wrote that Dr. Lambert should bring to her attention any issues preventing him from accomplishing his work plan. She concluded by writing that she was available to provide the necessary support to enable him to achieve the required level of performance. The letter is a strong statement of Ms. Kirkpatrick's expectations. However, she did not meet her commitments in the letter. Any meaningful assessment of work progress should include some discussions with the employee in question. No discussion was held with Dr. Lambert on his progress in June 2004. Ms. Kirkpatrick refused to discuss his progress at the meeting of June 11, 2004 and said that the update was not due until the following week. In addition, Ms. Kirkpatrick did not respond to Dr. Lambert's email of May 13, 2004, in which he raised issues that, in his view, prevented him from completing his work plan. Although Ms. Kirkpatrick stated that she was available to provide the necessary support, she did not make any efforts to discuss Dr. Lambert's progress with him after June 11, 2004.

[826] The order to provide a monthly update was clear. However, what Dr. Lambert was required to include in a monthly update was not clear. He had never been required to provide such an update in the past, and it was not common practice at the VDD. At the hearing, Ms. Kirkpatrick testified at length about what she expected to see in an update. She did not communicate those expectations to Dr. Lambert at the relevant time. Dr. Lambert complied with the part of the order requiring him to raise issues that he believed impeded his progress. Although some justifiable confusion occurred about the email when he sent it, any confusion had been addressed by the June 11, 2004 meeting. There is some confusion as to when Ms. Kirkpatrick reviewed the email, although it is clear that she had a response to the concerns drafted by Dr. R. Sharma by June 24, 2004. Ms. Kirkpatrick testified about her reaction to the issues raised by Dr. Lambert but did not respond to his concerns at the relevant time.

[827] Dr. Lambert did not comply with the order to provide a monthly update by June 16, 2004. He testified that he had finished the draft report on Friday, June 18, 2004 and that he had some problems adding a watermark. He then went on sick leave starting June 21, 2004. He did visit the office on June 23 to obtain an electronic copy of the draft assignment, which he submitted electronically on June 24, 2004. Dr. Lambert did not provide an adequate explanation for failing to submit the monthly update before June 24, 2004. However, the employer never asked Dr. Lambert about

the reasons for the delay. In addition, given that Dr. Lambert was on approved sick leave, I find that the delay was not significant.

[828] I agree that Ms. Kirkpatrick had reason to be concerned about Dr. Lambert's progress on the assignment when she did not receive an update on June 16, 2004 and, significantly, when she received his draft report on June 24, 2004. However, she had given Dr. Lambert three months to complete the assignment, and she reached a conclusion on his progress about halfway through the assigned period. That assessment was premature, especially since she had not been clear to Dr. Lambert about her expectations on his progress within the first month of the assignment.

[829] In addition, Dr. Lambert was on approved sick leave when his employment was terminated. The employer approved his sick leave and never asked for any details of his illness. Ms. Kirkpatrick concluded that his illness did not interfere with his ability to meet the requirements of the assignment. However, she never asked for further medical information so that she could adequately answer that question.

[830] The other grievors were also on sick leave at the time of their termination of employment. However, Dr. Chopra had clearly communicated his intention not to complete the assignment, and Dr. Haydon had also shown her reluctance to complete the assigned task. Dr. Lambert's deadline for completing the work had not yet expired. He had not communicated to the employer or demonstrated by his actions the intention not to complete the work. The employer should have inquired about the possible impact of the illness on the ability of Dr. Lambert to complete his assignment prior to determining whether or not he was insubordinate.

[831] Ms. Kirkpatrick did not provide any feedback to Dr. Lambert about her dissatisfaction with his progress until her testimony at this hearing. In particular, she did not share with him the draft memo prepared by Dr. R. Sharma about the draft report. The employer's failure to confront Dr. Lambert with its concerns about his progress cannot be cured by raising those concerns for the first time at adjudication, as suggested by the employer (relying on *Tipple*). The principle in *Tipple* applies to procedural errors in the conduct of an investigation into alleged misconduct. It would be unfair to apply the same reasoning to correct the employer's omissions in the steps leading up to the disciplinary measure.

a. <u>Remedy</u>

[832] The employer argued in its submissions for Dr. Chopra's termination that compensation in lieu of reinstatement was the appropriate remedy were the grievance allowed. It did not make similar submissions in this grievance. However, I will address that remedy. The employer submitted that the Federal Court of Appeal's decision in *Gannon v. Canada (Treasury Board)*, 2004 FCA 417 was not determinative of the power of an adjudicator to order compensation in lieu of reinstatement. I disagree. The Court's ruling is clear. An adjudicator does not have the power under the *PSSRA* to award compensation in lieu of reinstatement. Therefore, I will order Dr. Lambert reinstated to his position at the employer.

[833] Dr. Lambert asked for compensation for all lost income and benefits, subject to the agreement of the parties. I will leave it to the parties to negotiate the loss of income and benefits measured against any income that Dr. Lambert has received in the interim. I will retain jurisdiction to address any issues about damages for loss of income and benefits for a period of 90 days from the date of this order.

[834] Dr. Lambert asked for an award of interest on the amounts owed him. The ability of an adjudicator to award interest under the *PSSRA* was addressed in *Nantel v. Canada (Attorney General)*, 2008 FCA 351. The Federal Court of Appeal held that, in light of the express grant of the authority to award interest under the *Public Service Labour Relations Act*, it was clear that adjudicators do not have the authority to grant interest under the *PSSRA* (at paras 6 to 8).

VII. Orders

[835] PSSRB File No. 166-02-33999: the grievance is dismissed.

[836] PSSRB File No. 166-02-35125: the grievance is dismissed.

[837] PSSRB Files Nos. 166-02-34767, 34768 and 35107: the grievances are dismissed.

[838] PSSRB File No. 166-02-34331: the grievance is dismissed.

[839] PSSRB File No. 166-02-34330: the grievance is dismissed.

[840] PSSRB File No. 166-02-34329: the grievance is allowed.

[841] I retain jurisdiction for a period of 90 days to address any issues related to the implementation of the order concerning Dr. Lambert's termination grievance (PSLRB File No. 166-02-34329).

August 4, 2011.

Ian R. Mackenzie,
adjudicator

Dates of hearing

2005

November 21
December 13 to 16

2006

February 7 and 8
April 10 to 12 and 24 to 27
May 16 to 18
May 30 to June 2
June 14 to 16 and 27 to 30
August 29 to 31
October 11 to 13
November 7 to 9 and 21 to 23
December 5 to 7

2007

January 9 to 11 and 23 to 25
March 26 to 28
May 8 to 10, 15, 16 and 18
June 12 to 15, 19, 20, 22 and 26 to 28
September 18, 19 and 21
October 10 to 12 and 26

2008

January 22 to 25
March 31
April 4, 8, 9 and 11
May 6, 7, 9, 13 to 15, 26, 27 and 30
June 3 to 5 and 23 to 25
September 9, 10, 12, 23, 24 and 26
October 7, 9, 20, 21, and 24
November 3, 4 and 6
December 8, 9, 11 and 12

2009

January 20 to 23 and 26 to 30
March 9 to 12
April 6 to 9
May 13, 14, 20 and 25
July 7 to 10 and 13 to 16
September 1 to 3, 8 to 11 and 15

Dates of written submissions

Employer's submissions

April 6 and 7, 2009
October 23, 2009

Grievors' submissions

April 8, 2009
December 16, 2009

Employer's reply submissions

April 9, 2009
January 22, 2010

Grievors' submissions on the right of sur-reply

March 10, 2010

Employer's submissions on the right of sur-reply

April 12, 2010

Grievors' rebuttal submissions on the right of sur-reply

April 20, 2010

List of acronyms

ADL Additional Data Letter
ADM Assistant Deputy Minister
AMR Antimicrobial Resistance
AMRL Administrative Maximum Residue Limit
BRD Bovine Respiratory Disease
BSE Bovine Spongiform Encephalopathy
BVD Bureau of Veterinary Drugs
CAHI Canadian Animal Health Institute
CFIA Canadian Food Inspection Agency
CIPARS Canadian Integrated Program for Anti-microbial Resistance Surveillance
CVMA Canadian Veterinary Medical Association
EDR emergency drug release
EDS Experimental drug submission
ESC Experimental Studies Certificate
FDA *Food and Drugs Act*
HC Health Canada
HSD Human Safety Division
JETACAR Joint Expert Technical Advisory Committee on Antimicrobial Resistance
JPMAC Joint Program Management Advisory Committee
MBM Meat and bone meal
NDS New Drug Submission
NOC Notice of Compliance
PCO Privy Council Office
PDP Performance Discussion Process
PIPSC Professional Institute of the Public Service of Canada
PSIC Public Service Integrity Commissioner
PSIO Public Service Integrity Officer
SIRC Science Issues Review Committee
SNDS Supplemental New Drug Submission
SRM Specified Risk Material
VDD Veterinary Drugs Directorate
WHO World Health Organization