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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

CATHY CHRISTENSON, JOHN JACQUES AND BRUECE MACHACYNSKI

Grievors

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Christenson et al. v. Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

For the Grievors: Daniel Fisher, Public Service Alliance of Canada

For the Respondent: Christine Langill, counsel

Heard at Windsor, Ontario,
April 3 to 5, 2012.

REASONS FOR DECISION

I. Grievances referred to adjudication

[1] Cathy Christenson, John Jacques and Bruce Machacynski (“the grievors”) are employees of the Canada Border Services Agency (CBSA or “the employer”) and, at the relevant time, each of them occupied the position of Use of Force / Firearms Instructor. The grievors filed grievances against five-day suspensions (37.5 hours) imposed on them for attending a bar in full uniform and wearing their duty firearm contrary to CBSA policies. Ms. Christenson filed her grievance on August 18, 2008 (PSLRB File No. 566-02-4624); Mr. Jacques on August 4, 2008 (PSLRB File No. 566-02-4625); and Mr. Machacynski on August 7, 2008 (PSLRB File No. 566-02-4626). As corrective action, the grievors requested that the disciplinary measures be rescinded. All of the grievances were referred to adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* on October 21, 2010.

II. Summary of the evidence

[2] The letters of discipline, termed disciplinary action reports, issued to the grievors by the employer were signed by Calvin Christianson (Exhibit E-1, Tabs 14, 15 and 16), who at the relevant time was Director, Policy and Implementation, in the Arming Directorate of the CBSA’s Division of Arming. The text of the three letters is identical save in one respect, which will be identified below and reads as follows:

On March 26, 2008, while in the position of Use of Force Trainer you attended a bar in full uniform and wearing your duty firearm contrary to the CBSA Uniform Policy and Standards of Appearance, the Policy on the Wearing of Protective and Defensive Equipment including Firearms and the Policy on the Possession, Transportation and Storage of Agency Firearms.

Your actions in this regard are considered to be a very serious form of misconduct. In determining the appropriate discipline to impose, elements such as your years of service, your blank disciplinary record and the fact you have expressed regret during the meeting have been taken into consideration. However, this does not outweigh the fact that your actions have subjected yourself and the organization to unnecessary safety risks as well as tainting the image of CBSA.

As an employee of the CBSA you are accountable for the way you conduct yourself. You are expected to act conscientiously and in accordance with CBSA policies.

As a result of your misconduct I am imposing a suspension in the form of a 5-shift suspension (37.5 hours).

...

[3] The only difference in the text of the letters is that the one issued to Mr. Jacques omitted the phrase “. . . and the fact you have expressed regret during the meeting . . .” The letter to Mr. Jacques was signed by Mr. Christianson on July 24, 2008, while he signed the two others on July 25, 2008.

[4] The employer called five witnesses. Mr. Jacques was the only grievor who testified.

[5] The evidence disclosed that the grievors’ work location was an administrative building housing the CBSA training facility at 63 Slack Road (“Slack Road”) in Ottawa, Ontario and that they were assigned to conduct a duty firearm practice session for Border Services Officers (BSOs) in Windsor, Ontario from March 26 to March 28, 2008. The practice session was held at the Windsor police range. On March 26 and 27, 2008, the session was held from 15:00 to 18:00 and from 19:00 to 22:00, and on March 28, 2008, from 15:00 to 18:00 (Exhibit E-1, Tab 34).

[6] A CBSA internal affairs investigation report into the incident was completed April 14, 2008 (Exhibit E-1, Tab 10). Separate disciplinary hearings were held with each grievor on July 8 and 11, 2008, during which the grievors were provided the opportunity to explain their actions (Exhibit E-1, Tabs 11, 12 and 13).

A. For the employer

1. Testimony of Calvin Christianson

[7] Mr. Christianson explained that it was announced in August 2006 that BSOs would be armed and that the CBSA’s arming initiative was subject to intense public and media attention. He stated that the CBSA strove to ensure that its policies concerning the wearing of firearms were restrictive.

[8] Mr. Christianson said that, as at the outset the CBSA did not have the internal resources to provide firearms training to its BSOs, initial training of instructors was provided by the RCMP, and then once certified, those instructors would train the BSOs and other CBSA personnel authorized to be armed. He stated that the grievors were in

the first group of CBSA officers to be trained and qualified as use of force / firearms trainers. Mr. Christianson explained that as part of their development, the trainers were given specific training on CBSA policies. They were considered leaders of the training program for the CBSA officers. He referred to Lesson 12 of the CBSA duty firearm course dealing with CBSA policies dated January 2008 (Exhibit E-1, Tab 38). Under the section titled “Policy on the Wearing of Protective and Defensive Equipment (Including Duty Firearms)”, one of the “Key Considerations” states: “Officers leaving a POE or other CBSA office for personal business, e.g. during meal or rest periods, are required to remove their defensive equipment and properly store it.”

[9] Mr. Christianson stated that in March 2008 the grievors did not directly report to him. At the time the discipline was issued, he was responsible for training delivery. He said that he determined the disciplinary penalty based on the investigation report and the reports of the disciplinary hearings, and took several factors into consideration. He had difficulty with the grievors’ claim that they were not aware of the policy. The initial policy, implemented in July 2007, was revised in December 2007 and made more restrictive. The change in policy was communicated directly to the grievors, among others, through an email dated December 17, 2007 (Exhibit E-1, Tab 8). This led him to decide that the grievors had engaged in a serious form of misconduct. There was also a belief that the policies did not apply to trainers. Mr. Christianson disagreed with this interpretation, particularly when one of the grievors, Mr. Jacques, had worked in the Windsor Tunnel and knew that, as of December 2007, BSOs were prohibited from wearing firearms off site, even to the Tim Hortons across the street from the work location. He said that in his mind the fact that the grievor knew this and thought that the policy did not apply to them as trainers was serious misconduct.

[10] Asked whether he believed the grievors acted in bad faith, Mr. Christianson said he would view that in several lights. According to the reports of the disciplinary hearings, Ms. Christenson and Mr. Machacynski expressed their reluctance to enter the establishment, while in his report Mr. Jacques stated that he did not recall that conversation. Furthermore, the grievors having said that the policy did not apply to them because they were not working at a CBSA location led him to conclude that the grievors were acting in bad faith.

[11] Mr. Christianson said that, in arriving at a penalty of a 5-day suspension, he consulted with labour relations staff, and initially the recommendation was a 10-day

suspension, then 7 days, before a 5-day suspension was settled upon. Other examples of firearms infractions were considered, such as a 3-day suspension imposed on an officer who attended a wake while wearing a firearm and a 5-day suspension for an officer who improperly displayed a firearm in a CBSA office. Both of the individuals were BSOs and not trainers, and those suspensions were not grieved.

[12] Concerning the statement in the letters of discipline that the grievors' actions constituted an unnecessary safety risk, Mr. Christianson stated that there was no requirement for an off-duty CBSA officer on meal break to be armed. Concerning the allegation that the grievors tainted the CBSA's image, Mr. Christianson was troubled by officers wearing firearms in a bar.

[13] Mr. Christianson stated that changes were made to the CBSA's *Policy on the Wearing of Protective and Defensive Equipment including Duty Firearms* between July 2007 and June 2009. The initial version of this policy, effective July 27, 2007 (Exhibit E-1, Tab 1) ("the July 2007 policy"), provided at section 6.0:

...

Officers in uniform shall wear both their protective and defensive equipment, including any duty firearm that is issued, when they are on duty and working at a port of entry or working at any other place while engaged in the administration or enforcement of CBSA program legislation. On duty means the hours of work scheduled and includes meal breaks for which employees may not receive payment.

...

[14] The second version of this policy, which became effective in December 2007 (Exhibit E-1, Tab 4) ("the December 2007 policy"), provided the following under the title "Purpose and Scope:"

...

9. The purpose of this policy is to set out the expectations of the CBSA with respect to the wearing of protective and defensive equipment by its employees.

10. This policy applies to all border services officers and inland enforcement officers, investigators, intelligence officers and members of management who are issued such equipment.

11. The policy applies equally to officers working with other law enforcement agencies on joint forces operations or other partnership initiatives.

...

[15] The policy now required officers to store their defensive equipment when leaving a port of entry (POE) or a CBSA office for rest or meal breaks, as provided under the title “Policy Statements – Wearing of Protective and Defensive Equipment:”

...

19. When leaving a port of entry or other CBSA office for personal business (e.g. for meal or rest breaks) or at the end of shift, officers shall store their defensive equipment on site at the port of entry or CBSA office. Exceptions may be authorized in writing by CBSA management for the removal of defensive equipment from a port of entry or CBSA office for the purposes of transporting and storing such equipment elsewhere (refer to the Policy on the Possession, Transportation and Storage of Agency Firearms, Ammunition and Controlled Items).

...

[16] The third version of the policy became effective June 24, 2009 (Exhibit E-2) (“the June 2009 policy”), and included the following, which resulted in yet another complete change of practice:

...

These changes reflect the CBSA’s need to adjust to the daily operational and logistical challenges that have been encountered since the policy was first issued in 2007.

The key changes are summarized below:

Officers will now be permitted to wear protective and defensive equipment, including their duty firearm, when they leave a port of entry or other CBSA office for short meal or rest periods, provided they are not carrying out other personal business during this period.

...

[17] Mr. Christianson said that, while the June 2009 policy would allow the grievors to wear firearms in the establishment in question, the Rock Bottom Bar and Grill (“the Rock Bottom”), in his view it would not demonstrate good judgment, given the time of day and the clientele present. He personally had difficulty with officers wearing

firearms in a location while lacking authority to act and to have control over people. Under the December 2007 policy in force at the time of the incident, the grievors should have removed their firearms and safely stored them before going on their meal break.

[18] Addressing the change to the July 2007 policy, Mr. Christianson said that senior management decided to tighten the policy because its interpretation by local CBSA offices led to inconsistency. He referred to an email dated December 13, 2007 that he received from the Director General, Arming Task Force (Exhibit E-1, Tab 5), which reads in part as follows:

...

As you are undoubtedly aware, one of the most problematic policy issues faced by the ATF since the policies came into effect on July 27, 2007, has been the interpretation of the Policy on the Wearing of Protective and Defensive Equipment Including Duty Firearms. The policy requires that officers wear their defensive equipment while "on duty", which has been defined as including periods for which employees may be on break. The policy was not intended to require employees to always wear their equipment during their break, regardless of where the break was taken - i.e., away from the POE [Port of Entry]. Accordingly, in response to the numerous questions we have received on this matter, we have revised the policy to make it clearer when and where employees are required to wear their equipment, when it is permissible to remove it, and when it is prohibited to wear it.

...

[19] Mr. Christianson also referred to procedures for transporting firearms from the CBSA *Arming Initiative Reference Manual* (Exhibit E-1, Tab 3). A section of this document, titled "Supervisors/Managers," states the following:

...

4.1 Ensure that employees have written authorization to transport firearms when required.

4.1.1 Note: Officers leaving a CBSA office for meals and other breaks are not authorized to retain possession of their defensive equipment.

...

[20] Concerning the options available to the grievors for safe storage of their firearms, Mr. Christianson stated that they could have availed themselves of a storage area at the Windsor police range. Another option was a lock box made available to CBSA trainers that can be chained to a pipe, or attached in a CBSA vehicle. While he was told that the grievors used a rented Chevrolet Suburban that did not have an attachment method, he nevertheless stated that it was not unreasonable to have stored the arms in that vehicle. Mr. Christianson said that based on the reports of the incident, there was a capacity to lock the firearms at the Windsor site. While acknowledging that this had not been clearly communicated to the grievors, they had not asked about storage facilities on those premises.

[21] Mr. Christianson said that the trainers had a specific rank insignia, as provided for in the *CBSA Uniform Policy and Standards of Appearance* (Exhibit E-1, Tab 1). The CBSA rank structure is set out at section 2.11 of the policy, which specifies an insignia for the position of “uniformed facilitator/trainer.”

[22] In cross-examination, Mr. Christianson said that he learned of the incident between 72 hours and 1 week after its occurrence. Concerning the allegation in the letters of discipline that the grievors’ actions had tainted the image of the CBSA, Mr. Christianson was asked whether he was aware of any complaints by third parties at the restaurant or by the media. He replied that he was not aware of any media reports or public domain sources of reporting about the incident.

[23] Mr. Christianson stated that, while the December 2007 policy did not specifically refer to trainers, his position was that it was intended to apply to all CBSA personnel who carried firearms. He stated that he considered the Windsor police range a CBSA office under the policy. Mr. Christianson said that a CBSA arming initiative implementation committee had inspected ranges to determine whether they conformed to CBSA policies for firearms practice and recertification. Mr. Christianson did not know whether the implementation committee had visited the Windsor police range. In his view, a range that had been approved or leased by the CBSA was a CBSA work location. Concerning storage of firearms, Mr. Christianson said that CBSA offices where armed officers were posted were fitted with storage facilities, although the policy provided for exceptions, depending on the location. While he had not personally visited the Windsor police range, he was informed that it contained a firearms storage facility.

[24] Asked about the judgment of the grievors in going to the Rock Bottom, Mr. Christianson said they could have gone to a drive-through, a take-out, or bought a meal before going to work. He did not think meal arrangements were made for firearms trainers while travelling, although he was not in their direct line of management. He did not direct employees under his supervision who were on travel status as to where they should take their meals. While officers were permitted as of June 2009 to wear their firearms while on a meal break, Mr. Christianson stated that in applying the discipline he relied on the policy in force at the time the discipline was issued.

[25] Asked about the reasons for having changed the policy to allow the wearing of firearms on meal and rest breaks, Mr. Christianson said that comments had been received concerning problems with the restrictions and that the policy was adjusted accordingly. The comments were mainly related to POEs, where the majority of armed officers were posted. One example was that officers working at the Windsor Tunnel could not walk across the street to get a coffee without removing their firearm. Mr. Christianson acknowledged that the June 2009 policy does not specify the type of restaurant that CBSA employees must patronize, e.g. whether or not alcohol is served.

[26] Mr. Christianson agreed that when implementing a new policy a certain number of changes may be necessary, as evidenced by the changes made to the arming policy. He said policies are normally subject to cyclical reviews and changes as required.

[27] Mr. Christianson was referred to Ms. Christenson's disciplinary hearing report (Exhibit E-1, Tab 11) and asked whether it was possible that the trainers had misunderstood that the policy applied to them. He replied that it was a possibility. However, he asserted that the December 2007 policy applied to the grievors. Mr. Christianson said that, Ms. Christenson and Mr. Machacynski said in their disciplinary hearings that they thought it was wrong to go to the Rock Bottom. That showed him that they knew it was not the right thing to do. Asked why that was not reflected in their disciplinary letters, Mr. Christianson said that the factor of regret was mentioned in them.

[28] In re-examination, Mr. Christianson said that the fact that Ms. Christenson and Mr. Machacynski expressed discomfort about the type of establishment indicated that they could have chosen to leave. He referred to the last section of the CBSA *Code of Conduct* last modified on August 3, 2007 (Exhibit E-1, Tab 42), titled, "On a final note,"

where it is recommended that employees ask themselves certain questions when in doubt about an action they are about to take. That section reads as follows:

This Code was created to guide your conduct as a public servant and a CBSA employee. However, it is impossible to cover all the situations you may face in the performance of your duties. In such situations, you must determine the appropriate course of action, based on common sense and public service values. Asking yourself the following questions should help you to make the right decision:

- *Is what I want to do legal and consistent with CBSA/public service policies?*
- *Is what I want to do consistent with CBSA/public service values?*
- *What are the consequences of the action I am about to take or the decision I am about to make?*
- *If I do it, will I feel comfortable?*
- *How will the media or general public perceive this action?*

Remember:

- *If you know it is wrong, or it “feels” wrong, don’t do it!*
- *If you are not certain, ask questions.*
- *Continue to ask until you get an answer.*

[29] Referring to the July 2007 policy, Mr. Christianson said that under section 9 of the policy, in one of the provisions under the title “Purpose and Scope,” the grievors are CBSA employees. He also stated that a CBSA office includes any location where CBSA employees are assigned to work.

2. Testimony of Ross Fairweather

[30] In 2008, Ross Fairweather was a senior policy advisor who had been working on the CBSA arming initiative policies since 2006 and providing advice and guidance concerning those policies.

[31] He stated that section 9 of the December 2007 policy applied to all CBSA employees who were issued protective equipment. He said that, according to section

19 of that policy, the grievors should have removed and stored their equipment. He also referred to section 11 of the *CBSA Policy on the Possession, Transportation and Storage of Agency Firearms, Ammunition and Controlled Items* effective July 27, 2007 (Exhibit E-1, Tab 2) concerning storage of firearms by a public agent under the *Public Agents Firearms Regulations*, SOR/98-203.

[32] Mr. Fairweather said that he and a colleague provided training on the arms policy to the trainers at the Slack Road training facility in Ottawa beginning in May 2007. They met with the trainers approximately six times and he believed that the grievors were present. The trainers were expected to learn the policies and then transmit them to the employees they would be training.

[33] Mr. Fairweather stated that it was known at the time that an officer could not leave a POE to go for a meal while wearing duty equipment. He said that the day before the hearing he visited the Rock Bottom for the first time. He said it was a bar with a wood floor on which there were peanuts. In his view, it was inappropriate for a uniformed officer to frequent that establishment, let alone wear arms.

[34] In cross-examination, Mr. Fairweather said he was not involved in the process that led to the grievors' disciplinary penalty.

[35] He was referred to section 8.31 of the *CBSA Directive on Agency Firearms and Defensive Equipment* effective March 31, 2012 (Exhibit E-3), which reads as follows:

8.31 *Officers may be permitted to wear defensive equipment while they are not directly engaged in the administration or enforcement of program legislation when:*

a. *Leaving an Agency facility for a short period (e.g. meal or rest break) and it is deemed by the officer's supervisor or manager not to be practicable to remove and store defensive equipment; and*

b. *Working outside of an Agency office and stopping for rest or meal breaks.*

[36] Mr. Fairweather said that he had no input into this policy, and that he was unaware why management changed the policy to allow employees to wear their arms while on a meal or rest break. He said that management had often considered making this change and that as the CBSA was a new agency, it made changes incrementally.

[37] Mr. Fairweather recalled that, before the incident involving the grievors, there was an issue concerning the ambiguity as to whether firearms trainers were CBSA officers. However, he expressed surprise that the trainers would not see themselves as officers, because in his view, they would not wish to relinquish their possible status as peace officers.

[38] Mr. Fairweather was unaware of the policy concerning moving firearms between Slack Road and the Connaught range, where firearms sessions were conducted. He believed that the officers had access to lock boxes for arms storage. He was unaware of a policy concerning storage of arms if there was not a storage facility at a range. Mr. Fairweather stated that for the grievors to have left the Windsor police range without making arrangements for storage would be contrary to the policy in force at the time.

[39] When told that the grievors did not store their firearms in a lock box because their rented vehicle did not have a secure attachment and that they had been trained that the firearm is safest when on their hip, Mr. Fairweather replied that he could not say what would have been a safer or better option for the grievors, as he was unaware of the options available to them. Mr. Fairweather acknowledged that, in theory, a holstered firearm is extremely secure and that an untrained person would have difficulty extracting the firearm from its holster.

[40] In re-examination, Mr. Fairweather expressed the view that section 9 of the December 2007 policy applied to trainers, as they are CBSA employees. He stated that section 10 of that policy did not exclude other employees, including the trainers, from compliance with the policy. He stated that, while the first group of trainers thought themselves close to the RCMP, having been trained by them, it was nevertheless expected that they comply with CBSA policies.

3. Testimony of Lana Horvath

[41] In March 2008, Lana Horvath was a training superintendent for a team of eight trainers, including the grievors, at the CBSA Slack Road training centre. She occupied that position from November 2007 to March 2008. Before that assignment, she was a superintendent at the Ambassador Bridge POE in Windsor.

[42] Ms. Horvath stated that her understanding of the policy in force in March 2008 was that officers should not wear their firearms when on a meal break. This was set out in an email dated December 13, 2007 issued by the director general of the arming task force and forwarded to her by Rob Leigh, the director of learning and training (Exhibit E-1, Tab 7). Paragraph 2 of the email stated: "Officers leaving a POE or other CBSA office for personal business, e.g. during meal or rest periods, are required to remove their defensive equipment and store it." Ms. Horvath said she would have forwarded the email to all trainers, including the grievors. She then referred to an email dated December 17, 2007 from a learning specialist to all trainers in Ottawa and Chilliwack, BC, to which was attached a communication bulletin prepared by the learning specialist and that included the directive from the director general. She said that all CBSA employees had access to the CBSA intranet.

[43] Referred to the statement by Mr. Jacques on page 11 of the investigation report that she had instructed him to purchase windshield wipers for a CBSA vehicle while in full uniform and armed, Ms. Horvath asserted that was false and stated she would not have asked the trainers to wear arms for such a purpose.

[44] Ms. Horvath said that her work shift was from 07:00 to 15:00, which differed from the trainers' shifts, as much of their time instructing at the Connaught range was in the afternoon. She was not present to police them and they were in a position of trust and were aware of the policy, especially as they were training the BSOs on policies. Ms. Horvath stated that the grievors were certified CBSA trainers. She referred to a CBSA arming policies reference manual dealing with its *Policy on the Use of Force* (Exhibit E-1, Tab 39), and more particularly to section 61 of that policy, titled "Certified CBSA Trainers," which reads in part as follows:

61. Certified CBSA trainers are responsible for the following:

...

b. Providing guidance to officers on the use of force, defensive equipment and duty firearms;

...

[45] Ms. Horvath stated that "providing guidance" included providing training on policies.

[46] Concerning the policy of storing arms before going on a meal break, Ms. Horvath said that that policy also applied to trainers while travelling. In Windsor, the policy was to store arms in a secure lock box or the trunk of a vehicle or at the facility where they were carrying out the training. She said that all trainers had lock boxes. Ms. Horvath said that she would have issued a CBSA form BSF390 to the grievors authorizing them to transport and store firearms at a place other than a CBSA office (Exhibit E-4).

[47] Ms. Horvath said she first learned of the March 26, 2008 incident involving the grievors via a call on March 27, 2008 from Karen McMahon, regional arming coordinator for the Windsor / St. Clair area. When she received the call, the director of learning and training was in her office. She immediately called Ms. Christenson and asked who had authorized the trainers to wear firearms during a meal break. She said Ms. Christenson replied that they had been authorized and Ms. Horvath then told her that she had not provided the authorization. Ms. Horvath said that Mr. Leigh was present throughout the call to Ms. Christenson. Ms. Horvath said that the grievors did not have written authorization and Ms. Christenson did not say who gave the authorization. The grievors did not call her before the meal break to ask whether they could wear their firearms. While the grievors did not have access to a BlackBerry as she did, they had her phone number and email address. After the call, Ms. Horvath was no longer involved with the matter and none of the grievors contacted her following the incident.

[48] In cross-examination, Ms. Horvath said she did not recall whether the trainers could wear their firearms while eating in the mess hall at the Connaught range, as she had only been to the mess hall once.

[49] Ms. Horvath said that she did not coordinate the training for BSOs at off-site training facilities. She scheduled the trainers for the practice sessions arranged by the arming coordinators. She did not recall whether she spoke with a contact person for a training facility.

[50] Ms. Horvath had toured the Connaught range and said that there was a lock-up area for arms where the ammunition was stored.

[51] Ms. Horvath was not aware that Mr. Jacques wore his firearm during breaks. When it was put to her that she had asked Mr. Jacques to obtain coffee for a

management meeting at Slack Road and that he was armed when on that errand, Ms. Horvath did not remember him being armed. When asked whether she went to a Chinese buffet with the trainers, who were armed, Ms. Horvath did not recall having done so.

[52] Ms. Horvath was referred to an email sent by her on December 2, 2008, which included an attachment dated March 28, 2008 titled “Incident in Windsor” (Exhibit G-1). She stated that, if she wrote in the attachment what she told Ms. Christenson during their telephone call, it meant it was accurate. Asked whether she took notes of that conversation, Ms. Horvath did not remember. Asked how she recalled the details of the conversation, she replied that she must have taken notes. She did not recall what she did with the notes. As the attachment stated that her call to Ms. Christenson was made on March 28, 2008, and not March 27, she said that the former date was correct.

[53] Ms. Horvath maintained the accuracy of her statement to the internal affairs investigators, recorded at paragraph (h) on page 19 of the report (Exhibit E-1, Tab 10), that she did not recall telling a trainer in full uniform to do a coffee run and that on one occasion she asked Mr. Jacques to get coffee but he was not armed.

[54] Ms. Horvath reiterated her statements recorded in the investigation report that she never instructed trainers that they could be in full uniform while at meals or breaks. It is their responsibility to make arrangements with other agencies to store their firearms and they must assess the risk of the area and, if necessary, one of the trainers would remain with the firearms while the others had their meal.

4. Testimony of Gerry Dundas

[55] In March 2008, Mr. Dundas was Chief of Enforcement Operations at the Windsor Tunnel POE. On March 26, 2008 at 18:00, Mr. Dundas was at the Rock Bottom seated at a table with his wife, who also was a CBSA employee, and some other couples who were friends of theirs. He described the establishment as a roadhouse style, with peanuts on the floor. He saw some other patrons there whom he believed were CBSA employees, but did not recall their names.

[56] He observed three CBSA officers, all wearing firearms, and only one of whom he knew, namely Mr. Jacques, with whom he had previously worked. He knew that

Mr. Jacques was a trainer, as he had been released from tunnel operations to be trained as an instructor. He did not recall seeing any rank insignia worn by the grievors. Mr. Dundas said that there were strict orders at the time not to permit CBSA employees to leave the work location while armed. According to the policy at the time, his employees were required to disarm and properly store their firearms before leaving the POE. He went to speak with Mr. Jacques and told him that he did not allow his staff to cross the street to get coffee while armed and yet the three grievors were at the Rock Bottom wearing their firearms. Mr. Jacques replied that there was no storage facility at the Windsor police range and that the safest place to store their arms was on their hips. Mr. Dundas said he voiced his discomfort and returned to his table. He said the conversation with Mr. Jacques was brief and that he did what he thought he should do as a manager.

[57] Although Mr. Dundas felt his staff should be allowed to cross the street to get coffee without disarming, he had to enforce the policy even though he did not believe in it. He thought that the grievors' actions were contrary to the policy. At the time, he did not know which policy applied to the trainers.

[58] Mr. Dundas said that there were proper storage facilities at the Ambassador Bridge POE, which was one-quarter of a kilometre from the Windsor police range. He said the establishment was one-quarter kilometre in the opposite direction from the Windsor police range.

[59] In cross-examination, Mr. Dundas did not dispute that Mr. Jacques first approached him at his table. He stated that he called his supervisor the next day to report the incident. Asked why he did not call his supervisor immediately, Mr. Dundas replied that Mr. Jacques provided an explanation that did not outrage him, the grievors did not report to him and he was not familiar with the policy concerning trainers. Mr. Dundas said that none of the CBSA employees in the establishment at the time approached him about the grievors being armed and in uniform. Mr. Dundas described the type of customers patronizing the establishment as university students, off-duty law enforcement personnel and patrons from the neighbourhood.

[60] In re-examination, Mr. Dundas explained that he was taken aback because he did not know the policy that applied to trainers and was familiar only with the policy he was administering, with which he did not necessarily agree. He said that the answer he received from Mr. Jacques was that his firearm was safer on his hip.

5. Testimony of Karen McMahon

[61] Ms. McMahon was the regional arming coordinator for the Windsor / St. Clair regions from February 2007 to February 2009. Her duties included scheduling firearms practice or recertification sessions when requested by CBSA headquarters and ensuring the attendance of the officers being trained. She said that the coordination of the firearms trainers was done through CBSA headquarters. She communicated with the managers of the trainees to keep them informed and ensure that the officers to be trained were released from their regular duties for that purpose. She referred to an email she issued on February 4, 2008 concerning the sessions scheduled from March 26 to 28, 2008 at the Windsor police range (Exhibit E-1, Tab 34). At that session, there were 10 to 12 officers from various POEs.

[62] Ms. McMahon said these sessions were from 15:00 to 18:00 and 19:00 to 22:00. During the one-hour break, she would prepare the set-up for the next session. When the BSO trainees arrived at the range, she would brief them on what to expect upon entering the range, and then the firearms instructors took over. She was not involved in the actual practice session. Ms. McMahon provided administrative oversight and cleaned up when the session was over.

[63] Ms. McMahon stated that the March 26 to 28, 2008 session was the second training session she conducted. She said that the trainers did not report to her as a manager. They reported to her when they arrived and, if they needed training material or ammunition, she would provide it. Ms. McMahon said that she could view the range from the control office and that the grievors did not use their firearms during the sessions.

[64] On March 26, 2008, following the meal break, the grievors arrived at the range at the same time as Ms. McMahon, just before 19:00. She observed that they wore their firearms and asked Mr. Jacques whether they had worn them at the meal break. She knew him, as he was from Windsor. Mr. Jacques replied, "We don't worry about that." Ms. McMahon said she did not say anything and made a mental note to report it to the grievors' managers, as it was contrary to policy.

[65] The next morning, March 27, 2008, she found an email in her inbox from the district director for the Ambassador Bridge POE, David MacRae, stating that the grievors had been observed by Mr. Dundas during their meal break. She later called the

district director to tell him that she had seen the grievors returning from the meal break and they had confirmed wearing their arms at dinner. Ms. McMahon said she told the grievors on March 27, 2008 that management was aware that they had worn their arms at dinner the previous evening; they replied that they knew about that.

[66] Ms. McMahon said the grievors did not ask her to make arrangements to store their arms. There were three options available to them. First, they could have used portable gun boxes. Second, the CBSA had made arrangements with the Windsor Police Service for storage at the range, which consisted of an 8' x 10' metal meshed locker where she kept the ammunition and training material. Ms. McMahon was the only person with a key to that locker. She said that a Windsor police range officer was present during the practice sessions and that the grievors could have made storage arrangements with him. Third, there were storage facilities at the Ambassador Bridge POE, which was a four-minute drive from the range. She said that the December 2007 policy clearly stated that armed officers who leave a facility must remove and store firearms. In March 2008, it was clear to Ms. McMahon that duty firearms were to be removed when going on break. She said this was mentioned in an email dated December 13, 2007 which she sent to middle and upper management (Exhibit E-1, Tab 6), and another email she issued January 12, 2008, which included a monthly update she had prepared (Exhibit E-1, Tab 9). The update was for full distribution, meaning that it was customary that it be forwarded to all personnel in the region.

[67] In cross-examination, Ms. McMahon was referred to her interview with the investigators, where it was recorded in paragraph (s) on page 5 that “. . . in fairness to the instructors, to her knowledge no arrangements were made to store their firearms.” Asked why she had not mentioned the firearms storage options available to the grievors, she said she did not impose any of the options on them, as she was not their manager and no one from CBSA headquarters contacted her to ask her to arrange storage for the grievors. She said that, in the Windsor region, officers store their firearms for breaks.

[68] Asked why she did not prevent the grievors from going to dinner on March 27, 2008 with their firearms if she felt they were contravening the policy, Ms. McMahon replied that she was not their manager, as they reported to headquarters. They told her that in Ottawa they wear their firearms during breaks.

[69] Ms. McMahon said the grievors knew about the storage locker at the range, as they often helped her carry the ammunition.

[70] Ms. McMahon acknowledged being aware of problems with the December 2007 policy and that armed officers were not in agreement with it. She said the policy had to be followed.

[71] In re-examination, Ms. McMahon said that the grievors could have contacted their manager about the policy and that none of the grievors asked her to store their firearms.

B. For the grievors

[72] Mr. Jacques had been working as a BSO until he began training as a Use of Force / Firearms instructor in January 2007. He completed his assignment as an instructor on March 31, 2008. He was trained by the RCMP and, once certified as a trainer, would instruct RCMP officers for firearms recertification when CBSA courses were not scheduled. Concerning storage of firearms, he was trained according to RCMP policies and later attended panel discussions held by Mr. Fairweather and a colleague.

[73] Mr. Jacques said that the trainers' classification within the CBSA changed several times, from FB-04 (BSO) to AS-04 (administrative services) and back to FB-04. The trainers were told that they were not officers, but trainers. His substantive position was as a BSO and peace officer, but now he was a trainer. He testified that he was not informed of his actual position from May 2007 to March 31, 2008, and that it seemed to be a grey area.

[74] Concerning the CBSA training materials, Mr. Jacques said that the training directorate copied RCMP material onto slides and modified the terminology to that of the CBSA. He said there was not much difference in the material, as he had viewed the RCMP slides during his training. However, there were some differences in the training received from the RCMP and that delivered by the trainers to CBSA officers. As an example, Mr. Jacques said that the RCMP training on weapons security was that the safest place for a firearm is in the holster. They were taught that the worst case would be a firearm stolen and used in committing a crime.

[75] Mr. Jacques said that only in the April/May 2007 period did they receive a lecture on draft CBSA arms policy from staff of the CBSA training and learning group. He said that the group prepared the lectures the trainers were to deliver.

[76] Mr. Jacques said that, as the CBSA did not own shooting ranges, his understanding was that they were not POEs or CBSA offices, but off-site facilities. He said that the first time he delivered training outside of the Connaught range was near Toronto. Ms. Horvath asked him for his availability and told him he was going to a specific range to train a certain number of officers.

[77] The second occasion on which Mr. Jacques delivered training outside of Ottawa was the assignment to Windsor. He said they were told to show up at the Windsor range and not to talk to anyone outside of their direct chain of command. Mr. Jacques said Ms. Christenson and Mr. Machacynski travelled by air. As his assignment as a trainer would end on March 31, 2008 and he was returning to his home in Windsor, Mr. Jacques drove his personal vehicle. He said his firearm had been shipped to the CBSA's regional office at 2500 Ouellette Street in Windsor. On March 26, 2008, he picked up his firearm, loaded and holstered it, and drove to the range. His understanding was that it was permissible to wear his firearm if he stopped for coffee or lunch.

[78] Mr. Jacques said that he was not given a tour of the range. A Windsor police range officer briefed him on procedure at that range. Mr. Jacques said that he had eyewear and targets with him in his vehicle for the practice session, and he helped Ms. McMahon carry ammunition from her vehicle.

[79] At the 18:00 meal break, Mr. Jacques said that being from Windsor he knew that the Rock Bottom was the closest establishment to the range. He said it was a gathering place for law enforcement personnel. The grievors drove there in a rental vehicle. Mr. Jacques said that the establishment, which was a large open room, was one-half to three-quarters full, and upon entering, he recognized Mr. Dundas and his wife. He went to their table to say hello and introduced the two other grievors. The grievors sat at a table, ordered non-alcoholic drinks and food.

[80] Mr. Jacques said Mr. Dundas came to their table and asked what they were doing there. Mr. Jacques told him they were conducting a firearms practice session. He said Mr. Dundas expressed frustration that he had to enforce a policy, and here were the

grievors carrying arms. Mr. Jacques told him that no such policy was enforced in Ottawa and that they did not have a place to store their arms. Upon their return to the range, they entered at the same time as Ms. McMahon. Mr. Jacques mentioned the conversation with Mr. Dundas and she replied "OK." After completion of the session at 22:00, Ms. McMahon took the excess ammunition to her vehicle.

[81] Mr. Jacques said that anybody involved at the training facility in Windsor would go to the Rock Bottom, as the owners understood that they had time constraints and the food was served rapidly. He said that it became a bar atmosphere after 21:00. When the grievors were there on March 26, 2008, Mr. Jacques said there were children in booster seats.

[82] Mr. Jacques said there was confusion concerning the status of the trainers and the trainers sought clarification of their classification from management, namely whether they were classified FB or AS. He said that at one point they were told they would have their badges taken away, as they were not peace officers.

[83] Mr. Jacques said that the trainers were told that they could no longer lock their pistols at the Connaught range, but had to do so at Slack Road. Therefore, they would load their pistols at Slack Road, holster them and drive to the Connaught range in a CBSA vehicle.

[84] Describing the method by which training was delivered, Mr. Jacques said that the candidates were divided into two groups. While one group was at the Connaught range, the second group would receive non-range training at Slack Road. Then the two groups would switch after the lunch break. Mr. Jacques said that when at Connaught the trainers would eat at the mess with their firearms loaded, while the candidates ate with holstered unloaded firearms. However, when training on the afternoon shift, the mess was closed. As they could not store their arms there, the trainers would go to the closest lunch place wearing their loaded firearms. They had no other option but to keep their firearms on their hips.

[85] Mr. Jacques said that, as Ms. Horvath's workday ended at 15:00, she did not attend the Connaught range. On one occasion in February 2008, she did attend and they went to a Chinese/Indian buffet at the meal break. Mr. Jacques said there were six or seven trainers, all of whom were wearing arms. The majority of the trainers travelled to the restaurant in a CBSA vehicle, while Ms. Christenson accompanied

Ms. Horvath, who drove her own vehicle. After the meal, the trainers and Ms. Horvath returned to the range, and Ms. Horvath left soon afterward, while the training continued.

[86] Mr. Jacques said that on another occasion he was instructed by Ms. Horvath to get coffee and pastries for a management meeting at Slack Road. He loaded his weapon, obtained money from Ms. Horvath and went to a Tim Hortons, where he had to enter the shop, as it was a large order. On yet another occasion, Ms. Horvath gave him money for a coffee run for the instructors, which he did while wearing his firearm. He was also instructed to buy windshield wipers for one of the CBSA vehicles. Mr. Jacques said he wore his loaded firearm for this errand to Canadian Tire, returned to Slack Road and unloaded his weapon.

[87] Mr. Jacques stated that, while conducting training at the Connaught range, the trainers were on travel status and were paid for their supper meal, as the range was more than 16 kilometres from their work location at Slack Road. While at Connaught, he believed that the trainers were on duty, as they had control of CBSA assets, such as vehicles, arms and ammunition. Mr. Jacques said that he believed that the trainers were in conformity with policy.

[88] On March 27, when the grievors were leaving on their meal break while wearing their firearms, Ms. McMahon asked whether they were going with their firearms. Mr. Jacques said that Mr. Machacynski said “yes” and she told them to be back by 19:00. Mr. Jacques did not recall any comments from Ms. McMahon on their return.

[89] Mr. Jacques said that the grievors did not receive any direction or orders from Mr. Dundas, Ms. McMahon or Ms. Horvath concerning their wearing firearms. He said that, if Mr. Dundas had asked them to leave the Rock Bottom, they would have left out of respect for the fact that he was a CBSA manager, even though he was not in their line of command. They would have complied with a directive not to wear their firearms had it been given by Ms. McMahon or Ms. Horvath. Mr. Jacques said that the grievors were not insubordinate, as they did not do anything wrong and would have to obey orders, even if they did not like them.

[90] In cross-examination, Mr. Jacques said that the trainers wore their arms when driving CBSA vehicles, as the vehicles did not have secured lock boxes. Concerning wearing his firearm to Tim Hortons, Mr. Jacques said he had no intention of using his

weapon, but that they were trained that it was part of the policy applicable then to wear the full uniform. At the time, it was the practice to load their firearms before leaving Slack Road. They instructed their students that if they were in uniform, they were to wear all of their tools, including their firearms. Asked whether those instructions were given after December 2007, Mr. Jacques replied that he taught the students the policy set out at paragraph 19 of the December 2007 policy. Thus, if they were going to a Tim Hortons, students were not permitted to leave the site while wearing their tools. Asked why he did not follow the same rule, Mr. Jacques replied that the trainers sought clarification of the rule and were told that the policy applicable to trainers would follow. He asserted that he wore his firearm in the presence of his supervisor and his supervisor's manager, Steven Durocher.

[91] Mr. Jacques said that when Ms. Horvath first arrived as the trainers' supervisor, she held a session with them to identify their issues. Mr. Jacques said the trainers sought clarification as to whether they were considered trainers or officers, and Ms. Horvath said she would look into it. Mr. Jacques said that the trainers were told they were not officers and that status of the trainers was clarified only in April 2012 under the *CBSA Directive on Agency Firearms and Defensive Equipment* effective March 31, 2012 (Exhibit E-3). Mr. Jacques said that the trainers had not been issued any insignia indicating their status as trainers, and he had not received any such insignia by the time his assignment as a trainer ended on March 31, 2008.

[92] Mr. Jacques said that the July 2007 policy stated that uniformed officers could wear duty firearms only when engaged in the administration or enforcement of CBSA program legislation. He said that the trainers were told that they were not enforcing CBSA program legislation. Mr. Jacques said that the trainers then told Mr. Durocher and Mr. Leigh that if they did not get clarification of their status they would not carry on with training, because they did not want to carry a firearm illegally. They offered to return all of their duty equipment and be returned to their substantive positions. They were told that clarification of their status would be forthcoming. Mr. Jacques stated that he believed that when the CBSA policies refer to an "officer," it is to a CBSA peace officer. He acknowledged that he was a CBSA employee. When he was shown the BSF390 form authorizing the transport and storing of firearms that Ms. Horvath testified was issued to the grievors (Exhibit E-4), Mr. Jacques said it was the first time he had received such a form. He was then referred to the following sentence on the form: "The holder of this letter is an employee of the CBSA who is an officer, as

defined in subsection 2(1) of the *Customs Act* . . .” Asked whether he would then be considered an officer, Mr. Jacques replied that he did not know.

[93] Asked why the grievors did not err on the side of caution by storing their firearms in Windsor, Mr. Jacques replied that in Ottawa they had worn their firearms to meals in front of supervisors. Furthermore, no arrangements had been made for their meals in Windsor. Asked whether he had received the communications bulletin attached to the email of December 17, 2007 (Exhibit E-1, Tab 8), Mr. Jacques said he received it, but was uncertain whether he read it. He said that the trainers were not provided with laptops, and at Slack Road 12 trainers and 1 RCMP officer shared one computer. He did not recall CBSA policies being posted at Slack Road during the time he was assigned there.

[94] Asked about Ms. McMahon’s testimony that she did not observe the grievors using their firearms at the practice sessions, Mr. Jacques replied that usually they would demonstrate firearm handling drills to the trainees using their own pistols, but could not say whether they did so that day.

[95] Asked about Ms. Christenson’s reluctance to enter the Rock Bottom as stated in the report of her disciplinary hearing (Exhibit E-1, Tab 11), Mr. Jacques replied that she did not want chicken wings, which were on special that evening. He said that Ms. Christenson was tough and outspoken and, if she objected, she would not have entered and would have asked to go somewhere else. While acknowledging that Mr. Machacynski had said that the grievors could not remain at Rock Bottom as it was a bar, Mr. Jacques said that they entered the premises in any event. Mr. Jacques disagreed with Mr. Machacynski’s statement as recorded in his disciplinary hearing report (Exhibit E-1, Tab 13) that there were drunk people at the bar. He said that at 18:00 the clientele consisted mainly of senior citizens and he did not observe anyone who was drunk.

[96] Mr. Jacques acknowledged that on March 27, 2008 the grievors went to Pizza Hut for their meal break while wearing their loaded firearms. He did not call Ms. Horvath and had no ability to send her an email. He did not call Mr. Fairweather as he did not have his telephone number.

[97] Mr. Jacques said he did not ask Ms. McMahon where to store their firearms and did not ask the Windsor police range officer. He was not aware of the possibility of

storing weapons at the Ambassador Bridge POE and did not know what facilities they had. He did not inquire, as the grievors had been told not to speak to anyone outside of their direct chain of command. He said it was a 10-minute drive from the Windsor Range to the Ambassador Bridge POE. He said that on March 26, 2008, he picked up his weapon at Ms. McMahon's office at 2500 Ouellette Street and helped her load ammunition into her vehicle.

[98] Mr. Jacques said it was unreasonable to have one of the grievors remain in the vehicle while the other ate, as that person would not have eaten. He said that the rented vehicle did not have a closed trunk or a place to lock a weapons container. Mr. Jacques said that the Windsor police range was in a separate area from the training facility. Although he had received training at the facility on many occasions, he had never been to the range.

III. Summary of the arguments

A. For the employer

[99] The employer framed the issue as follows: on March 26, 2008, the grievors went to a restaurant for their meal break and failed to remove their defensive equipment and store it according to CBSA policy. The employer stated that the applicable policy was that of December 2007 (Exhibit E-1, Tab 4), particularly section 19, cited earlier in this decision and reproduced here for convenience:

19. When leaving a port of entry or other CBSA office for personal business (e.g. for meal or rest breaks) or at the end of shift, officers shall store their defensive equipment on site at the port of entry or CBSA office. Exceptions may be authorized in writing by CBSA management for the removal of defensive equipment from a port of entry or CBSA office for the purposes of transporting and storing such equipment elsewhere (refer to the Policy on the Possession, Transportation and Storage of Agency Firearms, Ammunition and Controlled Items).

[100] The employer submitted that, as no exceptions for the grievors had been authorized in writing, they were in violation of the policy.

[101] The employer argued that the grievors had several options available to them: asking the Windsor police range officer for storage; storing their firearms at the Ambassador Bridge POE; storing the weapons in the locked containers of

Ms. Christenson and Mr. Machacynski; or bringing a meal to the session beforehand. The employer further argued that it was incumbent upon the grievors to request storage facilities, as they were program experts and were to lead by example. The employer referred to Ms. Horvath's testimony that the trainers were to conduct a risk assessment of the area for storage of their firearms.

[102] The employer also referred to the CBSA *Code of Conduct*, particularly to the section titled "Care and Use of Government Property and Valuables." Pointing out that duty firearms are included in the non-exhaustive list of government property, the employer referred to the following sentence: "You are expected to account for and protect any government property and valuables that you possess and control." The employer argued that this sentence means that employees must comply with government policies.

[103] The employer stated that Ms. Horvath said that she never instructed or advised the trainers that they could be in full uniform during meal or rest breaks. The employer argued that, because Ms. Horvath worked a different shift from the trainers, a great deal of trust was placed on them.

[104] The employer submitted that, while there was a misunderstanding about wearing firearms under the policy effective July 2007, the issue was clarified in the December 2007 policy. The employer argued that the confusion about the policy was not brought to the attention of Mr. Fairweather or Ms. Horvath. The employer questioned the reasonableness of the grievors wearing a firearm to go to a restaurant. The employer also questioned why the grievors had worn their firearms to Pizza Hut on March 27, 2008 after having heard the comments from Mr. Dundas the previous evening. The employer submitted that the evidence showed that the grievors had been made aware of the policy via email, a communications bulletin, as well as their lesson guide.

[105] The employer argued that the grievors' claim that the weapons policy did not apply to them was unreasonable because only one policy was in force. The employer submitted that there was no confusion concerning the term "officer" and that paragraph 10 of the December 2007 policy provided that it applied to all CBSA employees. The employer stated that, while paragraph 10 of that policy stipulated that it applied to the listed positions, the paragraph did not say the list was exclusive and that trainers were not specifically excluded. The employer referred to

Mr. Christianson's testimony that the policy was intended to apply to all CBSA personnel who carried duty firearms. The employer submitted that an interpretation that the grievors did not have to comply with the firearms policy would be absurd. The employer argued that, had the employer intended to treat the trainers differently, provision for that would have been included in the December 2007 policy.

[106] The employer submitted that the BSF390 form authorizing the transport and storing of firearms issued to Mr. Jacques clearly indicated that the bearer was an officer. The employer stated that one of the benefits of being an officer is that the form authorized the storage of a duty firearm in a hotel or the officer's home.

[107] The employer argued that the grievors should have considered the "On a final note" section of the *Code of Conduct* referred to by Mr. Christianson and reproduced earlier in this decision. The employer submitted that had the grievors asked themselves the questions set out therein, they would have realized that they were in contravention of the policy.

[108] The employer conceded that there had been no evidence that the CBSA's image had been tainted, as alleged in the letters of discipline. However, in view of the seriousness of the offences and the fact that the employer had taken all mitigating circumstances into consideration, the grievances should be dismissed. In support of its argument, the employer cited *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37.

B. For the grievors

[109] The grievors argued that they acted in good faith and submitted that there was no evidence of their bad faith. The grievors submitted that, while they might have exercised questionable judgment in patronizing an establishment such as the Rock Bottom while armed, their actions did not constitute misconduct. The grievors submitted several mitigating factors to be considered in mitigation of the penalty imposed.

[110] The grievors referred to Mr. Christianson's testimony that the arming initiative was in an evolutionary stage and that there were varying views of the arming policy within CBSA management.

[111] The grievors emphasized the testimony of Mr. Jacques that he believed he was on duty at an off-site location, which allowed him to carry his firearm on a meal break. They also referred to the fact that the grievors had been trained by the RCMP that the safest place for their firearms was holstered on their hip. In this regard, they referred to Mr. Fairweather's testimony that it would be difficult for an untrained person to remove a holstered firearm.

[112] The grievors referred to the testimony of both Mr. Christianson and Mr. Fairweather that there was some ambiguity in the situation of the trainers and that the issue as to whether trainers were CBSA officers had been raised. The grievors submitted that there was no specific management direction concerning the protocol to be followed by the trainers and that the grievors were conducting training at the Windsor police range for the first time. The grievors argued that the Windsor police range was neither a POE nor a CBSA office.

[113] The grievors submitted that the reluctance of Ms. Christenson and Mr. Machacynski to enter the Rock Bottom was set aside by the fact that they did enter and have a meal. The grievors argued that Mr. Dundas did not take exception to their presence or ask them to leave. His discomfort was due to the apparent conflict in the policy he had to enforce and the policy followed by the grievors. The grievors also referred to the fact that Ms. McMahon did not make any decision concerning the grievors wearing firearms to the meal break although well-placed to do so, and did not immediately report it. She only raised it after having received an email from Mr. MacRae the next day. The grievors submitted that, if their conduct was so egregious, Ms. McMahon would have immediately reported it. The grievors submitted that it would have been wholly inappropriate for them to have attended the Rock Bottom while armed after having completed the training session at 22:00.

[114] The grievors submitted that there were issues of credibility with Ms. Horvath's testimony, which they characterized as evasive and unresponsive. They pointed out that in examination-in-chief she denied that Mr. Jacques had been sent to purchase windshield wipers while armed, and in cross-examination stated that she did not recall the incident. Similarly, in cross-examination, Ms. Horvath stated that she did not recall having a meal at a Chinese/Indian buffet in the company of several armed trainers, although Mr. Jacques had testified that Ms. Horvath had driven Ms. Christenson to the restaurant. The grievors submitted that there were inconsistencies in Ms. Horvath's

testimony. In this regard, they referred to Mr. Jacques' testimony that he openly engaged in the practice of wearing arms to rest and meal breaks at Slack Road.

[115] The grievors submitted that they had no intention of violating CBSA policy and that they stated in their disciplinary interviews that they did not think that they had done anything wrong. The grievors also cited *Eden* in support of their argument.

C. Employer's rebuttal

[116] The employer stated that it was unfair to attack Ms. Horvath's credibility, as the events had occurred in 2008. The employer submitted that, in the investigation report, there was no mention by Mr. Jacques of the Chinese/Indian buffet, which he should have recalled at the time.

[117] The employer submitted that it relied on the policy as set out in paragraph 19 of the December 2007 policy. The employer further argued that the policy did not state that firearms were safer when holstered on the hip. The employer submitted that the employer had considered mitigating factors in imposing the discipline.

IV. Reasons

[118] The thrust of the employer's case against the grievors was that there was misconduct giving rise to discipline due to the alleged violation of its arming policy. The employer relied on paragraph 19 of the December 2007 policy that was in force at the date of the incident, and which I reproduce here for ease of reference:

19. When leaving a port of entry or other CBSA office for personal business (e.g. for meal or rest breaks) or at the end of shift, officers shall store their defensive equipment on site at the port of entry or CBSA office. Exceptions may be authorized in writing by CBSA management for the removal of defensive equipment from a port of entry or CBSA office for the purposes of transporting and storing such equipment elsewhere (refer to the Policy on the Possession, Transportation and Storage of Agency Firearms, Ammunition and Controlled Items).

[119] The purpose and scope sections of the December 2007 policy provided that:

9. The purpose of this policy is to set out the expectations of the CBSA with respect to the wearing of protective and defensive equipment by its employees.

10. This policy applies to all border services officers and inland enforcement officers, investigators, intelligence officers and members of management who are issued such equipment.

11. The policy applies equally to officers working with other law enforcement agencies on joint forces operations or other partnership initiatives.

...

[120] The employer submitted that, as the grievors were CBSA employees, they were subject to this policy. The employer also argued that the list of positions enumerated in paragraph 10 of the policy was non-exhaustive and did not specifically exclude trainers. Mr. Christianson testified that, while the December 2007 policy did not specifically refer to trainers, it was intended that the policy apply to all CBSA personnel who carried duty firearms.

[121] The grievors argued that the policy did not apply to them. They submitted that the wording of the policy did not include a reference to trainers and that management was aware of this. They further submitted that the application of the policy depended on whether or not they were officers, and their understanding was that they were not. They also submitted that the practice they utilized for securing their duty firearms was the best practice on the day of the incident because they were not in an area with adequate storage. Furthermore, the grievors did not consider themselves to be working at a POE or CBSA office, a matter that was not clear in the policy.

[122] The key issue in these grievances pertains to the fact that the policy was not at all clear as to the extent of its application. It has long been accepted in labour relations matters that, while it is the right of employers to establish rules and policies, such rules or policies must, among other things, be clear, be unequivocal, be brought to the attention of employees before being acted upon, and be consistently enforced: see Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 4:1520.

[123] The employer's arguments have not persuaded me that the grievors fall under the wording of the December 2007 policy. The wording of the policy does not specifically identify its application to the positions held by the grievors. The employer was aware of this gap in the policy and of the practice of trainers wearing their firearms during breaks. Finally, the grievors were not acting in bad faith when they wore their duty firearms on the date of the incident in question.

[124] Regarding the wording of the policy, paragraph 9 is the purpose provision of the policy, and paragraphs 10 and 11 describe its scope by enumerating the positions to which the policy applies. These two paragraphs contain no wording whatsoever that identifies the positions held by the grievors. They were not in management positions, and save for the reference to members of management who are issued protective and defensive equipment, each of the other positions listed is operational in nature. Moreover, the wording of paragraphs 10 and 11 does not state that the list of positions is non-exhaustive, and it cannot thereby be inferred that trainers are included.

[125] In addition, two other policies entered as exhibits by the employer expressly define and refer to Certified CBSA trainers. Had the drafters of the December 2007 policy intended to have included the trainers, they would have so stated in this policy.

[126] In her disciplinary hearing (Exhibit E-1, Tab 11), Ms. Christenson stated that she did not think that the policy applied to firearms instructors, as they were not specified in the policy. In his disciplinary hearing (Exhibit E-1, Tab 13), Mr. Machacynski stated that he did not think the policy applied to him and that the trainers had fallen into a void. Mr. Jacques testified that he believed that the trainers were in conformity with the policy and that they had done nothing wrong.

[127] The grievors submitted that there was ambiguity as to whether the trainers were CBSA officers. Although the employer argued that the misunderstanding about the application of the policy was not brought to the attention of Mr. Fairweather or Ms. Horvath, the evidence demonstrates otherwise. Mr. Jacques testified as to the uncertainty in this regard and said that the trainers brought this to the attention of Ms. Horvath when she first arrived. Mr. Fairweather testified in cross-examination that before the incident involving the grievors, there was an issue concerning the ambiguity as to whether firearms trainers were CBSA officers. In the CBSA's *Policy on the Use of Force* effective July 27, 2007 (Exhibit E-1, Tab 39), referred to in Ms. Horvath's testimony, there are separate definitions for trainers and officers. That policy defines a "certified CBSA trainer" as "a trainer who has been certified by the RCMP to deliver CDT [control and defensive tactics] training or a combination of CDT and firearms training." An officer is defined differently as, "for the purposes of this policy, any person employed by the CBSA in the administration or enforcement of acts and regulations known as 'program legislation' as defined in section 2 of the *Canada*

Border Services Agency Act.” That policy also sets out separate roles and responsibilities for trainers and officers.

[128] In his cross-examination, Mr. Jacques was referred to the form authorizing the transport and storage of firearms at a place other than a CBSA office (Exhibit E-4), which states that the holder of the form is an employee of the CBSA who is an officer. Asked whether he then considered himself an officer, Mr. Jacques replied that he did not know. I do not consider that form to be determinative of Mr. Jacques’ status. His uncontradicted testimony was that it was the first time he had been issued such a form. While the form states that the bearer is an officer under the *Customs Act*, the evidence is that the trainers were told by management that they were not enforcing CBSA program legislation. In my view, Mr. Jacques’ response in cross-examination is commensurate with his previously expressed belief that he had the status of a trainer, and not that of an officer.

[129] Based on the evidence, I find that not only was it unclear whether the grievors were officers, but also that they did not view themselves as officers. Rather, they believed that they were trainers to whom the policy did not apply. This was not an unfounded belief, but based on several events. For example, at one point when seeking clarification of their status, the grievors were told they were not officers. Another example is found in the testimony of Mr. Christianson, who stated that a rank insignia had been assigned to the position of “uniformed facilitator/trainer” in the *CBSA Uniform Policy and Standards of Appearance* (Exhibit E-1, Tab 1). Mr. Jacques testified that he had never received such insignia during his assignment as a trainer and Mr. Dundas did not recall seeing rank insignia on the grievors. Mr. Jacques also testified that the trainers were told they were not peace officers and that they were not enforcing CBSA program legislation. This evidence was not contested. In cross-examination, he stated that the trainers told Mr. Durocher and Mr. Leigh that if their status was not clarified they would cease their training duties, as they did not wish to carry firearms illegally. They were told that clarification would be forthcoming.

[130] Mr. Christianson acknowledged the confusion in the policies in this area. He testified that the employer’s initial July 2007 policy concerning the wearing of protective and defensive equipment by officers, including duty firearms, was interpreted and applied inconsistently by local CBSA offices across the country. As a result, management implemented changes which led to the December 2007 policy. He

also testified that the policy was loosened in June 2009 due to feedback from CBSA personnel, who found the more restrictive December 2007 policy unworkable. In addition, Mr. Jacques testified that the trainers discussed their status during their meeting Ms. Horvath when she first arrived, an issue that was important to address in order to clarify whether the policy applied to them.

[131] The employer submitted that the grievors should have adhered to the December 2007 policy, as it was the only policy in force and that, as Mr. Jacques testified, the trainers were teaching that policy to the trainees. The evidence is clear that this policy was communicated to the grievors by an email dated December 17, 2007 (Exhibit E-1, Tab 8). In addition, the grievors acknowledged that the trainers were teaching that policy to the trainees. However, given the functions of the grievors as trainers, the fact that they appeared on an email list does not necessarily mean that the policy would apply to them. This is especially true in a situation such as the present one, where the trainers had sought, but not received, clarification of their status.

[132] The grievors were in the first group of CBSA personnel to be trained as instructors by the RCMP. Mr. Jacques said that this training began in January 2007. As stated in the internal affairs investigation report, from June 2007 to March 31, 2008, Mr. Jacques was assigned as an AS-04 Use of Force / Firearms Trainer, stationed in Ottawa. His testimony was that during his assignment he regularly made coffee runs, ate meals and ran work-related errands while in full uniform wearing his duty firearm. In her statement to the investigators, Ms. Christenson said that the practice was that trainers could leave the Connaught range in full uniform for dinner and coffee breaks (Exhibit E-1, Tab 10, page 15, paragraph (gg)). In her disciplinary hearing, Ms. Christenson indicated that the trainers did this on numerous occasions and that she had done the same when attending a practice session in Chilliwack. In his statement to the investigators, Mr. Machacynski said he wore his firearm when going for coffee as well as when fuelling CBSA vehicles. He also stated that he was never directed by anyone, either in management or his supervisor, not to wear his firearm when leaving the training facility or the range. In addition, Mr. Machacynski said that during their training they were instructed that the firearm was to be worn when wearing full uniform, as the safest place for it was on the hip (Exhibit E-1, Tab 10, pages 17 and 18, paragraphs (w), (x), (y), (gg)).

[133] The grievors and the other trainers at Slack Road reported to Ms. Horvath. In her testimony, she experienced difficulty in recalling whether the grievors or other trainers would do coffee runs or run CBSA-related errands while wearing their duty firearms, or wore their firearms on meal or rest breaks. She said that she would not have directed Mr. Jacques to wear his firearm while purchasing windshield wipers for a CBSA vehicle. She did not recall if the trainers could wear their arms in the Connaught range mess hall, nor could she recall attending a Chinese/Indian buffet with the trainers, including the grievors, even though Mr. Jacques testified that she had driven Ms. Christenson to the restaurant. Ms. Horvath's testimony concerning the practices of the trainers at Slack Road concerning their firearms was unclear at times, while I found that of Mr. Jacques to be convincing. Furthermore, during their disciplinary interviews (Exhibit E-1, Tabs 11, 12 and 13), all three grievors stated that the practice at Slack Road was that when the trainers would leave the facility to pick something up, run a CBSA errand or go for a meal break, they would do so in full uniform and armed. The employer did not adduce any evidence to the contrary.

[134] Ms. Horvath's hours of work were from 07:00 to 15:00, which meant that she rarely attended the Connaught range. However, the evidence is clear that there were trainers at Slack Road during her shift. As Mr. Jacques testified, the trainees were divided into two groups, one receiving training lectures at Slack Road while the other was at the Connaught range, with the groups switching after the lunch break. As Ms. Horvath stated in her interview with the investigators, there may have been occasions when she requested trainers to do a coffee run, but she did not see them wearing their firearms.

[135] The evidence supports the grievors' position that they wore their firearms for meal and rest breaks and running CBSA errands while at the Ottawa Slack Road training facility. This practice continued even after the implementation of the December 2007 policy. Mr. Jacques' testimony, as well as his statements made to the investigators and in his disciplinary hearing, bear this out. The same applies to the statements made by Ms. Christenson and Mr. Machacynski to the investigators and during their disciplinary hearings. I find that there was a practice in place for trainers since their initial training with the RCMP that demonstrated that the grievors did not believe the policy applied to them.

[136] Mr. Christianson testified that the December 2007 policy was intended to apply to all CBSA personnel who carried firearms. While that may have been the intention, it is not supported by the evidence. The grievors did not believe that the policy applied to them and the policy was not enforced insofar as they and the other trainers were concerned. While on assignment in Windsor, the grievors were consistent in their conduct concerning the wearing of their duty firearms during meal and rest breaks, as they did while in Ottawa. When the grievors were approached by Mr. Dundas, Mr. Jacques told him that they were acting according to the policy as applied to trainers in Ottawa. The same response was provided to Ms. McMahon upon the grievors' return from their meal break at the Rock Bottom. As stated in the investigation report, Ms. McMahon told the investigators that Mr. Jacques told her that when the trainers left the training centre in Ottawa, they did not remove their firearms (Exhibit E-1, Tab 10, page 4, paragraph (p)). She also told the investigators that when Mr. Jacques informed her about the grievors' encounter with Mr. Dundas, she advised him that she would be speaking with Mr. Dundas and that they should not worry about it for the moment and continue with the sessions (Exhibit E-1, Tab 10, page 4, paragraph (q)).

[137] The next day, March 27, 2008, with Ms. McMahon's knowledge, the grievors went to Pizza Hut for their meal break while wearing their duty firearms. The employer's question in final argument as to why the grievors wore their firearms to Pizza Hut after having heard the comments from Mr. Dundas cannot be given much weight. The employer did not refer to the grievors' meal break on March 27, 2008 in the letters of discipline issued to them. In addition, this was yet another indication that the grievors were acting according to the practice they had followed since the beginning of their assignments as trainers and according to the policy as they understood it. There is no indication in the evidence that the grievors intentionally ignored the December 2007 policy concerning the wearing of duty firearms while on meal or rest breaks, or that they acted in bad faith.

[138] I do not agree with the employer that the grievors ought to have given greater consideration to the options for storage of their firearms at the Windsor police range. Mr. Christianson acknowledged that the capacity to store arms on those premises was not clearly communicated to the grievors. He stated that it was incumbent on them to ask, because he was of the view that a "CBSA office" was any place to which a CBSA employee was assigned to work. He concluded that this included the Windsor range

and that the grievors should have complied with the policy. However, Mr. Jacques testified that he believed the Windsor range to be an off-site facility, i.e. neither a POE nor a CBSA office. It is noteworthy that the term “CBSA office” was not defined in the December 2007 policy. It was not until the *CBSA Directive on Agency Firearms and Defensive Equipment* effective March 31, 2012 (Exhibit E-3) that the rules concerning trainers at facilities such as the Windsor range were clarified by section 8.32 of that policy, which reads as follows:

8.32 Employees engaged in instruction in the use of firearms and other defensive equipment may wear defensive equipment for purposes related to the instruction of others but when not instructing others, must follow the rules of the campus or training facility concerning the wearing, transportation, storage or handling of defensive equipment. Nothing in the foregoing statement shall be construed as permitting or mandating the wearing of defensive equipment outside the physical territory of the campus or training facility, except for authorized instructor practice or re-certification. Any request for authorized exemption shall be made in writing to the Director, Arming Division.

[139] In the letters of discipline, the employer alleged that the grievors violated CBSA policy by wearing their full uniforms, including their duty firearms, when they attended the Rock Bottom Bar and Grill for their meal break on March 26, 2008. The employer also alleged that in so doing, the grievors tainted the image of the CBSA. As the employer did not present any evidence of the CBSA’s image having been tainted, that allegation must fail. In view of the conclusion I have reached, I need not address the proportionality of the penalty. However, I point out that while the employer did not specify what proportion of the penalty imposed was based on that allegation, in my view, the lack of evidence on that point in itself would have warranted a reduction in the penalty.

[140] The letters of discipline also alleged that the grievors had engaged in “... a very serious form of misconduct.” The CBSA *Code of Conduct* (Exhibit E-1, Tab 42) includes an appendix setting out reference documents to which it is related. Among those listed is the CBSA *Discipline Policy*, which defines misconduct as follows:

- **Misconduct** - a wilful action or inaction on the part of an employee that includes a breach of the Criminal Code, the CBSA Code of Conduct and/or the Values and Ethics Code for the Public Service. It could also be related to attendance

and inappropriate personal behaviour at work or away from work.

[141] The term “wilful” is defined in the *New Shorter Oxford English Dictionary* as follows: “asserting or disposed to assert one’s own will contrary to persuasion, instruction or command; headstrong; obstinate;” In my view, the employer has not established that the grievors engaged in misconduct as defined in the *Discipline Policy*. The grievors believed that they were conducting themselves appropriately at all times. In addition, the evidence shows that the employer was aware of the uncertainty as to the application of the policy to trainers. The grievors believed that they were acting in conformity with CBSA practice as it applied to them. I conclude that the grievors’ conduct and behaviour reflected prudence and appropriateness according to the practices with which they had been trained by the RCMP and had continued to follow while on assignment as trainers.

[142] The employer submitted that I should consider the “On a final note” section of the *Code of Conduct*, which sets out a series of reflective questions that a CBSA employee must ask himself or herself when confronting the daily challenges of their work. Those questions ask whether or not an action is consistent or will be consistent with CBSA/public service values; what consequences there are to the action taken or to be taken; whether or not the employee feels comfortable and whether the media or general public will perceive that action in a certain way.

[143] The evidence shows that the grievors conducted themselves in a manner that they considered consistent with CBSA and public service values. On balance, the evidence does not disclose that the grievors should have been concerned about public perceptions. The only immediate consequence to their actions was that Mr. Dundas saw them at the Rock Bottom on March 26, 2008 and said he thought they were in violation of the policy. In response, Mr. Jacques told him that they were not. There was no further discussion about the matter and the next day, nobody in management in Windsor or Ottawa said anything to them. In addition, no explanation for this silence was given.

[144] Based on all of the evidence, I find that the December 2007 policy was unclear and applied inconsistently to the grievors as trainers. This lack of clarity was identified in the CBSA internal affairs investigation report, addressed to the Director General,

Arming Task Force, Operations Branch (Exhibit E-1, Tab 10). On page 23 of the report, under the title “Observations,” it is stated:

The following observations relate to the interpretation or application of procedures, which may require clarification in content or communication. These observations are provided for your consideration only:

...

- *Clarification with respect to section 9 and 10, the Policy on the Wearing of Protective and Defensive Equipment Including Duty Firearms, may be required to make clearer reference as to the applicability to CBSA Trainers.*

...

- *There should be clarification as to whether it is the responsibility of the Trainers or that of the Program Officer, Arming Task Force to ensure proper storage facilities are available when on the road training.*

[145] Both parties referred to *Eden* as being the decision that most closely deals with issues similar to those in this case. Several facts distinguish *Eden* from the present case. First, the grievor was not a trainer, but a BSO in the position of superintendent supervising other BSOs. There was no ambiguity in the policy as it applied to BSOs. Second, he left his loaded duty firearm and his protective equipment in an unsecured, unlocked filing cabinet drawer in the superintendent’s office. In the present case, the grievors’ duty firearms were secured in holsters on their hips as they had been trained. Third, the grievance in *Eden* requested that the 10-day suspension be reduced to one of 5 days, with which the adjudicator agreed. In my view, *Eden* is of little assistance in the present matter.

[146] As Mr. Christianson testified, a newly implemented policy evolves and adjustments are made as circumstances require. The wearing of duty firearms during meal and rest breaks was one policy area that required several adjustments. The issue of its applicability to the trainers was eventually addressed in the directive of March 31, 2012. However, for the date of the incident, March 26, 2008, I have found that the policy was not clear as regards trainers, nor was it consistently applied to them. I have also found that the grievors acted in good faith. In the circumstances, they should not have been subjected to disciplinary action.

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

(The Order appears on the next page)

V. Order

[148] The grievances are allowed.

[149] The deputy head is directed to reimburse each of the grievors five days (37.5 hours) of pay and any benefits they would normally have accrued had they worked on those days.

[150] The deputy head is directed to remove the letters of suspension and any related documentation from each of the grievors' disciplinary files and/or personnel records.

March 20, 2013.

**Steven B. Katkin,
adjudicator**