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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

ROSEMARY HOOD

Grievor

and

CANADIAN FOOD INSPECTION AGENCY

Employer

Indexed as

Hood v. Canadian Food Inspection Agency

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Herself

For the Employer: Martin Desmeules, counsel

Heard at Winnipeg, Manitoba,
December 6 to 9, 2011 and September 18 to 21, 2012.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Rosemary Hood (“the grievor”) was a veterinarian, classified VM-03, employed by the Canadian Food Inspection Agency (CFIA or “the employer”) as a special projects officer in the National Centre for Foreign Animal Disease (NCFAD), Science Branch, in Winnipeg, Manitoba.

[2] On January 8, 2010, the grievor was suspended from work with pay until an independent medical assessment certified her fitness to work. On April 26, 2010, the grievor was placed on leave without pay because the employer alleged that she continued to refuse to undergo a fitness-to-work (FTW) evaluation. On September 16, 2010, the grievor’s employment was terminated.

[3] On January 13, 2010, the grievor filed a grievance against the suspension with pay imposed on January 8, 2010. She alleged that the suspension was imposed without reasonable grounds and in bad faith and that it constituted disguised discipline. As corrective action, she requested that the requirement to undergo a medical examination be removed, that she be permitted to return to the workplace immediately, and that all pay and benefits be restored to her. On May 27, 2010, she filed a second grievance against the employer’s decision to place her on leave without pay, alleging that it was imposed without reasonable grounds and constituted disguised discipline. She sought the same corrective action as that requested in the grievance filed on January 13, 2010.

[4] The employer responded to the two grievances together at the final level of the grievance process on July 19, 2010. Both grievances were denied and were referred to adjudication on August 26, 2010. These are the only grievances before me. Although there was some evidence at the hearing that a grievance against the termination of the grievor’s employment was filed, that grievance is not before me.

II. Preliminary matters

[5] Issues concerning witnesses were raised by both parties. The employer wished to call Dr. Marc Couturier to testify. Dr. Couturier provided a medical assessment at the employer’s request, based on a review of the grievor’s file in August 2010. Since that assessment occurred almost eight months after the employer’s initial decision to suspend the grievor, its relevance to the issue was questioned. In the end, Dr. Couturier did not testify.

[6] The grievor wished to call a number of witnesses whose testimony related to the merits of a number of issues that she had raised in the years preceding her suspensions. The issues related to complaints concerning ergonomic assessments, as well as health and safety and harassment. As the relevance of their evidence to the issue before me was not demonstrated, those witnesses did not testify.

[7] The grievor also asked to have a summons issued for Dr. Soren Alexandersen, who is Executive Director of the NCFAD. The employer objected on the grounds that Dr. Alexandersen's testimony was, at best, marginally relevant, and he was not easily available to attend the hearing. After hearing the parties on this issue, I ruled that his evidence was relevant. Arrangements were made to accommodate his travel schedule to allow him to testify.

[8] The grievor represented herself throughout the hearing. With the consent of the employer, I tried to provide her with some guidance on process and, in particular, tried to explain the different phases of the hearing and the difference between evidence and argument. Nevertheless, the hearing presented considerable challenges for her, as it does for many self-represented grievors. In particular, the requirement that evidence be relevant to the issues in dispute seemed difficult for her to grasp. To her, everything that happened in the course of her employment between 2007 and her suspension in January 2010 was relevant, and narrowing the focus to the issues raised in the two grievances before me was difficult for her. The grievor also had some difficulty accepting the difference between evidence and argument. For the most part, the employer allowed her to present her case as she wished without objection, which allowed the hearing to proceed relatively smoothly.

[9] At the start of the hearing, the employer made an objection to my jurisdiction to hear the grievances on the grounds that the grievor's suspensions were administrative rather than disciplinary. It was agreed that the parties would present all their evidence and that the employer's objection to jurisdiction would be argued fully in the final arguments.

III. Summary of the evidence

[10] The employer called Greg McLean, Dr. John Copps, Dr. Primal Silva and Dr. Shane Renwick to testify and entered 47 documents into evidence. The grievor testified on her own behalf and called Dr. Margaret Morrison, Dr. John Pasick,

Dr. Cecilia Basic, Dr. Chris Kranendonk, Dr. Corne Van Rensburg, Kevin Smith and Dr. Alexandersen to testify. She entered 82 documents into evidence.

[11] Although the grievances contest the employer's decisions on January 8 and April 26, 2010 to suspend the grievor, first with pay and then without pay, both parties introduced considerable evidence of earlier events to provide context. Given that fact, it makes more sense to present it chronologically rather than in the order it was presented by the witnesses.

[12] The grievor is a veterinarian. She began working for the employer in 2001 as a researcher studying chronic wasting disease in the CFIA's Animal Disease Surveillance Unit in Ottawa, Ontario. Her supervisor was Dr. John Kelleher. She testified that in the beginning she was highly connected across the country and attended many international and industry meetings where she presented papers. She said that she was the only veterinarian in her unit who went to Washington, D.C. and contributed ideas to the Centers of Excellence. She believed that her success created jealousy in the working group.

[13] In 2004, an outbreak of avian influenza led to the dispersal of the other members of the unit, who were assigned to particular outbreaks of the disease. The grievor testified that she was left in the unit on her own, with no administrative assistant. She stated that she developed carpal tunnel syndrome during that period because she had to scan and send messages concerning animal disease reports and outbreak responses to about 500 people.

[14] The grievor testified that the outbreak led to a realization that it was necessary to share outbreak response mechanisms with the provinces. Therefore, the Canadian Animal Health Surveillance Network (CAHSN) was developed. The CAHSN links data systems from the provinces, the Public Health Agency of Canada (PHAC) and the CFIA.

[15] In August 2005, the grievor was asked to join to the CAHSN project. At that time, she was still located in Ottawa, but the project was situated in Winnipeg. She stated that one of her former colleagues, Dr. Wayne Lees, had become Chief Veterinarian of Manitoba and was championing the project on behalf of the province. Another colleague, Dr. Paul Kitching, was the lead on the project for the CFIA. The grievor went to Winnipeg for a short period to work on the project, working out of the PHAC. Although she returned to Ottawa, she moved to Winnipeg in 2006 to work

full-time on the CAHSN, working out of the Manitoba Agriculture, Food and Rural Initiatives (MAFRI) building at the University of Manitoba.

[16] The grievor testified that Dr. Kelleher, her supervisor in the Animal Disease Surveillance Unit, retired in 2005 and was replaced by Dr. Christine Power. When she first moved to Winnipeg in 2006, the grievor was seconded to the CAHSN, and her substantive position remained in Ottawa. She testified that problems developed in her relationship with Dr. Power, which the grievor attributed to resentment that she was leaving Ottawa. She testified that she filed a harassment complaint against Dr. Power, which was resolved through mediation. However, because of her problems with Dr. Power, she asked to be permanently appointed to the position of special project officer in Winnipeg, reporting to Dr. Kitching.

[17] Mr. McLean is currently the head of management services for the CFIA's NCFAD and is located at the Winnipeg laboratory. He is responsible for financial administration, human resources, procurement and contracting for the different laboratories of the NCFAD. Although he has been in this position only for a year, he provided similar services for the Winnipeg laboratory since 2006 and in that capacity became acquainted with the grievor. He was also appointed as the financial lead on the CAHSN project.

[18] Mr. McLean testified that he developed a work friendship with the grievor when she first arrived in Winnipeg. He said that, initially, she was very excited about the CAHSN, but over time, her enthusiasm waned. She began to complain about how she believed she was being treated, and she expressed concern that Dr. Kitching was divesting the CFIA's role in the CAHSN to Manitoba.

[19] Mr. McLean explained that the grievor was based in the provincial laboratory so that she could have close contact with the staff working on the CAHSN. However, she began to complain that she was not getting any support and that she was being excluded from discussions and meetings. She complained to him that to her face, her ideas were not being accepted, but that, later, others presented them as their ideas, with no attribution to her, and that she was being excluded by the old boys' network.

[20] Dr. Morrison works for the employer as a veterinary program specialist and works with the Foreign Animal Disease section. She first met the grievor in 2006 on a training course in Saskatchewan. The grievor was very interested in Dr. Morrison's

work, and so Dr. Morrison began to link her into a number of working groups that included experts from across the country who were all involved in developing common information systems for sharing information and creating a common language. She felt that she and the grievor had a good collaborative relationship.

[21] Dr. Morrison testified that, in the summer of 2007, an exercise was set up to test the Canadian Emergency Response System (CEMERS). Dr. Morrison and the grievor thought that it would be a good opportunity to test data management and the CAHSN's relationship to the CEMERS, but that aspect of the exercise was not approved. The exercise was held at the end of August 2007 at the MAFRI building in Winnipeg. The grievor was present but was told not to speak to anyone. Dr. Morrison found the environment strange. She testified that she found that the grievor's colleagues were rude to the grievor and that the grievor's office was like a closet. She testified that, at the end of 2007, she received an email from the grievor advising her that she had been removed from the CAHSN project. Dr. Morrison testified that she did not really know what was going on but that she put it down to the grievor's environment and lack of support.

[22] The grievor testified that, by the summer of 2007, she was being excluded from meetings, and her work environment was unpleasant. She stated that she was being pushed out of her job by Dr. Lees who, she believed, was taking charge of everything. She testified that her relationship with Dr. Kitching deteriorated to the point that she believed that he "fired" her by giving all her work to another colleague, Dr. Harold Kloeze. She testified that it was so upsetting to her that she experienced it as a sensation of an explosion and that she believed that it was a psychological injury.

[23] Mr. McLean testified that, in fact, the grievor was reassigned to research in the Communications Centre. He said that concerns had been expressed by the provincial partners in the CAHSN that the grievor was creating confusion. It was thought that research would be a good project for her because she was bright, but her contact with the provincial partners in the CAHSN project was diminished by the new assignment. He stated that the grievor told him that she wanted to continue to work in epidemiology. He acknowledged that he did not know if any formal, administrative process was used to change her work assignment.

[24] In December 2007, the grievor went on sick leave due to stress. On January 17, 2008, she sent an email (Exhibit E-1) to Mr. McLean in which she stated that she would return to work on January 21, 2008. She attached a copy of an email to Dr. Kitching in which she explained her reasons for her leave of absence, among other things, and asked to meet with him on her return to work. On January 18, Mr. McLean, Dr. Kitching and Joanne Sigfusson, who represented one of the industry partners in the CAHSN, met to discuss concerns about the grievor's emotional and mental state. As a result, a meeting was set up with the grievor and her union representative on her return to work because Dr. Kitching wanted her to undergo a FTW assessment.

[25] On January 21, 2008, Mr. McLean met with the grievor and her union representative at the request of Dr. Kitching. Dr. Copps, who was the deputy director of the NCFAD and was located in Winnipeg, also attended the meeting. Dr. Copps testified that he did not normally work with the grievor. His only real experience working with her arose in the summer of 2007, when they had worked together briefly during an outbreak of avian flu. He recounted that, at that time, he had one incident with her when she reacted by swearing at him when he suggested how she could present some information. He was upset by that and asked her to leave his office. He also reported it to Dr. Kitching. He did not know if Dr. Kitching dealt with it. After that event, they had no real working relationship, but he was asked to attend the January 2008 meeting to take notes and act as a witness.

[26] Both Mr. McLean's and Dr. Copps' notes of the meeting were entered in evidence (Exhibits E-3 and E-11). Although the grievor had presented a medical certificate that stated that she was fit to work, she was told that Dr. Kitching wanted her to undergo a FTW assessment. Mr. McLean explained to her that Dr. Kitching was concerned because, before she went on stress leave, she had frequent emotional breakdowns at work, she cried in front of co-workers, she sent many emails that were incomprehensible and confused, she seemed unable to work in harmony with her colleagues, and she seemed to be uncertain and confused about the CAHSN project, among other things. Mr. McLean testified that, although the grievor was reluctant to agree to the FTW assessment, she signed the consent form on the spur of the moment, even though he advised her to think about it first (Exhibit E-3).

[27] The grievor testified that she signed the consent form because she wanted to return to work. However, she believed that Dr. Kitching wanted her to undergo the

assessment as a means to get rid of her. She stated that, while she was emotional and did cry at work, it was in response to the treatment that she was experiencing. She disputed the reasons given for the request, stating that no one ever told her that there were problems with her communications in emails. In her view, it was completely false that she could not work in harmony with others.

[28] Although the grievor signed the consent form to initiate the FTW assessment, it never took place. Both she and Mr. McLean testified that Dr. Kitching changed his mind about requiring it after the grievor insisted that she was fit. He confirmed in an email that he thought that there was no longer any advantage in having the grievor undergo such an examination (Exhibit E-4).

[29] In March 2008, the grievor filed a lengthy complaint with multiple allegations of harassment by Dr. Kitching (Exhibit G-57). The allegations included such matters as a claim that Dr. Kitching used sexual innuendo when speaking to her on a number of occasions, tolerated and engaged in gender bias and discrimination against her, undermined her position because she is female, diminished her position and publicly belittled her on many occasions, and removed her from her CAHSN position improperly, among other issues. The grievor cited over 40 examples in support of her allegations, many of them involving the CAHSN and its members. Because of the complaint, her work assignment was changed so that she would no longer have to interact with him or other members of the CAHSN project (Exhibit G-48). Although the grievor reported to Mr. McLean immediately after filing her harassment complaint, subsequently she reported to Dr. Judith Bossé, Vice-President of the Science Branch.

[30] The grievor testified that the details of the complaint were shared with the members of the CAHSN project. She stated that the work environment became toxic and that she was isolated and marginalized. For example, Ms. Sigfusson, one of the private-industry partners on the project, actively supported Dr. Kitching (Exhibits G-56 and G-72). The grievor testified that she felt numb and disoriented during the period just after filing her harassment complaint (Exhibit G-49).

[31] On July 27, 2008, a meeting was held involving Dr. Kitching and others from the CAHSN project concerning funding. The grievor wished to attend, even though, as Mr. McLean testified, she was no longer working on the CAHSN. She was told that she was not to attend the meeting. While the meeting was taking place, the grievor was

seen taking photographs in the proximity of the meeting room. The employer believed that she was taking photographs of the meeting participants. She also took a photograph of Mr. McLean. He testified that she did not tell him why she took his photograph. The grievor testified that she took the photographs to prove that she was at work, since Dr. Kitching apparently said he did not know when she worked.

[32] That incident and other issues, such as an alleged complaint from a provincial colleague about an incoherent email from her, led the employer to believe that the grievor's behaviour was deteriorating (Exhibit E-7). Following the incident on July 27, 2008, the grievor took two days of sick leave. She testified that the incivility in the workplace made her feel constantly threatened.

[33] On Friday, August 1, 2008, Dr. Bossé instructed the grievor to take a leave of absence until a FTW assessment was completed (Exhibit G-58). Concerns about the grievor's mental health seem to have led to concerns about security. In her harassment complaint, the grievor had described in vivid and disturbing detail her belief that Dr. Kitching had psychologically assaulted her. The employer provided its security services with the following excerpt of that description, along with a request to remove the grievor's access to the building (Exhibit G-39):

I experienced this as a psychological assault and injury. The physical sensation was of being shot in the forehead at point blank range.

I had a reaction, the sensation of and visualized (imagined) my brains spraying across the room onto the walls behind me. This (sensation of) loss of brain matter felt real, like an explosion in my head. I then entered into a period of what I would call psychological trauma (shock, stress) as a result. I was unable to make sense of nor comprehend (bewildered and in a state of confusion) what had just happened, why it had happened

[34] In addition, the grievor's remote computer access was monitored in case she did anything untoward while suspended from work (Exhibit G-28). The grievor believed that, in essence, she was locked out.

[35] Dr. Basic testified on behalf of the grievor. She explained that, between September 2007 and June 2009, she worked at the PHAC in Winnipeg. Her office was two doors away from the grievor's office, and they became acquainted. She explained that there was some overlap in their work and that the grievor told her about her work

environment. From the grievor, she learned about some of the difficulties that the grievor faced, including her ergonomics and harassment issues. She testified that the grievor was emotional and quick to cry but that she also recovered quickly. In Dr. Basic's opinion, the grievor's emotional displays were a way of dealing with stress.

[36] In August 2008, Dr. Basic noticed that the grievor was removed from her office. She testified that she saw the grievor walking down the hall carrying a storage bin, with a man following her. Dr. Basic said that she did not know what was going on, but over that fall, she noticed that the grievor was away from the workplace for an extended period. When she called the grievor, she learned that the grievor had been sent home. She testified that, from her experience and observation of the grievor in the workplace, she thought that the grievor handled her circumstances extremely well. She said that the stories the grievor told her about her circumstances horrified her. She believed that the grievor worked in a toxic work environment, based on what the grievor told her.

[37] The grievor was on leave from August 5, 2008 until January 27, 2009. During that period, a number of discussions took place about who would perform the FTW assessment. The employer wanted the grievor to be assessed by a mental health specialist, and the grievor wanted her own doctors to provide the assessment. In the end, no FTW assessment was completed.

[38] Dr. Silva testified that, in September 2008, he became Executive Director, Science Strategies (now Animal Health Science), Science Branch, and that he reported to Dr. Bossé. Drs. Mohit Baxi and Renwick, in addition to another director, reported to him. He was located in Ottawa and, at that point, had no employees from outside the Ottawa area reporting to him. Soon after he started in the position, he and Dr. Bossé discussed a new assignment for the grievor. Dr. Bossé told him that she wanted to provide the grievor a new work environment and new supervisor as a way of moving forward. She had decided not to insist on the fitness-to-work assessment that she had requested in August 2008. Instead, she hoped that a new assignment and new work environment would resolve any outstanding problems. Dr. Silva testified that the employer's underlying desire was to come to a resolution about what happened in the past without being judgemental.

[39] Although the discussions about a new assignment for the grievor began in the fall of 2008, the grievor did not return to work until January 2009. She testified that she had wrist surgery in the fall and that, although she was well enough to return to work and tried to on December 10, 2008, she was not permitted to return to the workplace until January 27, 2009.

[40] When the grievor returned to work in January 2009, she reported directly to Dr. Baxi, who was located in Ottawa. Dr. Silva testified that the grievor was assigned to work on a project collecting data on emerging and re-emerging animal diseases to determine how they were being handled internationally. The study was significant because it was intended to help the CFIA develop policies to address diseases that Canada was not yet experiencing, to protect the country.

[41] In March 2009, Dr. Silva invited the grievor to attend a meeting in Ottawa to discuss the project and, in particular, his expectations about its completion. He testified that the grievor found it difficult to move beyond issues from the past. He said that, while he had hoped to start fresh and define specific goals, as time passed he realized that the grievor kept returning to issues that she believed were unresolved.

[42] The grievor testified that, when she went to Ottawa in March 2009, she learned from the support staff that her supervisor, Dr. Baxi, was leaving at the end of that month. She stated that no-one in authority told her about the changes in her reporting relationship and that she had no idea whom she would be reporting to once Dr. Baxi left.

[43] On April 1, 2009, Dr. Renwick took on Dr. Baxi's position as director of the Animal Health Science division. He also became the grievor's immediate supervisor. He testified that the fact that the grievor worked in Winnipeg while he was located in Ottawa meant that his interaction with her was mainly through email. Aspects of the supervisory relationship that required face-to-face interaction were handled by on-site managers.

[44] Dr. Renwick testified that the grievor's initial task was to begin a review of the literature on infectious diseases and, in particular, on emerging infectious diseases. It was considered very important work. He said that his focus was to get her project moving, which required her to prepare a project outline. However, by the end of August 2009, Dr. Renwick still had not received her outline (Exhibit E-29).

[45] On August 21, 2009, the grievor sent a number of emails that concerned Dr. Renwick. In one, she complained about “foreign-hired lab management,” which Dr. Alexandersen, who had become the NCFAD director in August 2008, believed was an unflattering reference to him (Exhibit E-30). In another email, she complained that she was experiencing an “ongoing harassment scenario,” that she was being subjected to rude and dismissive treatment, and that she was excluded from a lunch meeting that she believed she should have attended. She believed that her work environment was poisoned and stated that she found her situation intolerable (Exhibit E-33).

[46] Concerned about the emails and the fact that the grievor had not met her work deadlines, Dr. Renwick initiated a disciplinary process (Exhibit E-33), which resulted in a written reprimand for insubordination (Exhibit E-34). He testified that he hoped that the reprimand would provide the grievor with a stimulus for self-correction.

[47] The grievor continued to be concerned about the harassment complaint that she had filed against Dr. Kitching, who had retired and had begun working with a provincial government. Earlier in August 2009, she filed a security incident report that dealt with her complaint against Dr. Kitching and her belief that it had never been resolved (Exhibit G-36). On September 3, 2009, Dr. Martine Dubuc, who replaced Dr. Bossé as the vice-president of the Science Branch, responded to the grievor’s harassment complaint (Exhibit G-50). Dr. Dubuc upheld only one of the grievor’s many allegations against Dr. Kitching, finding that he had improperly told her to “shut up.” She also found that the proper complaint process had not been followed, in that the complaint had been improperly distributed. However, as the grievor testified, no remedy was attached to the finding of harassment, other than the declaration that the one allegation was upheld.

[48] The grievor testified that, in autumn 2009, she found the workplace difficult. She stated that she felt under constant threat. Even though her doctor had recommended a change of work environment in July 2009, she felt that nothing was done to assist her (Exhibit E-37). Dr. Renwick testified that he had not been aware of the doctor’s recommendation until it was brought to his attention later in the autumn and said that he did not know of any accommodation arising from the recommendation. He testified that he thought that the doctor’s recommendation might provide an opening for a request for a FTW assessment, as emotional stress might have been an explanation for her behaviour and unproductive work performance.

[49] Although the grievor found the workplace difficult, she testified that she believed that the work she produced was excellent. She said that she worked without assistance or communication with Dr. Renwick. She said that he would cancel conference calls on the days on which they were to be held. She said that he changed the project in October and gave her a new one, with a deadline for December 31, 2009, even though he was of the view that it was the same project. She also felt that the imposition of a deadline was not acceptable as a creative person in a toxic environment could not write to a deadline. She felt that it was impossible to accomplish anything in an environment of discipline and reprimands. She contended that her access to the library, which she needed for her research, was denied. However, on cross-examination she acknowledged that only after-hours access to the library was denied to her. On September 21, 2009, in response to an email from Dr. Renwick asking her to provide her project outline, the grievor wrote the following (Exhibit G-68):

Please reframe [sic] from any negative emails to me with a dominating tone, as I am under a harassment complaint process and this does harm to me personally at the emotional and motivational level, creating ongoing harm as a result - at this time of ongoing harassment in CFIA, as yet unaddressed, and for which I am attempting to conclude and finalize. . . .

[50] By the end of November 2009, Dr. Silva became concerned because the grievor was not meeting the employer's expectations in terms of progress in her project, and she had grievances in progress. He testified that he wanted to understand what was going on, so he scheduled an all-day meeting on December 1, 2009, with the grievor, her union representative, Dr. Renwick and himself. Dr. Renwick and the grievor testified that the grievor's lawyer also attended.

[51] Dr. Silva testified that one of the purposes of the meeting was to find a way to restore the workplace balance and to help the grievor's project move along. To that end, they discussed any barriers and tried to find ways to assist the grievor. An agreement was reached on how the grievor could order supplies, on resolving her ergonomic issues and on restoring communications. They also discussed the employer's expectations concerning her project, and deadlines for completed drafts of the project were established.

[52] However, as the December 1 meeting went on, Dr. Silva testified that it became more difficult because the grievor became emotional and could not focus on the

issues. He explained that she referred to issues that were not part of the meeting or the project. In her testimony, the grievor acknowledged that the meeting broke down, which she attributed to the fact that Dr. Silva raised the subject of the picture-taking incident of 2008. She stated that that triggered an emotional response so severe that she had to leave. She said that it was painful to her to have colleagues spread such misinformation, and she felt that Dr. Silva raised the subject solely to humiliate and degrade her.

[53] On December 14, 2009, the grievor sent an email to Dr. Renwick asking for an extension to the date on which the first draft of her project was expected (Exhibit E-39). In it, she blamed the lack of access to the library after hours for delaying her completion of the draft. Dr. Renwick denied the request, noting that the completion date had already been extended once. He considered that she had more than enough time to complete a project that had been in the planning stages for months and told her that he would consider failure to respect the deadline insubordination.

[54] On December 17, 2009, the grievor submitted a draft of the project. In an email to Dr. Renwick (Exhibit E-40), she stated that she considered the draft rough and that she submitted it only because of his threat of insubordination. She noted that she had asked for an extension because of the stress related to her human resources issues. She also noted that the December 1 meeting had upset her for several weeks, as it caused her to have to explain and relive past events.

[55] On December 21, 2009, the grievor told Benoit Lamarche, a human resources advisor, that she was “exhausted from all of the ongoing stress and unresolved conflict, confusion and misinformation going around and around, the spin. It is like asking a drowning man to sing” (Exhibit E-41). In response, both Mr. Lamarche and Dr. Renwick suggested to the grievor that she take time off, but the grievor refused (Exhibit E-43), feeling that it would result in what she described as “coerced sick leave.”

[56] The grievor testified that she worked over the Christmas period and completed a 100-page document that she did not wish to show anyone because she felt that it was too rough. She asked Dr. Renwick for another extension, but he refused to grant it. She testified that she was concerned because the scientist that she had asked to mentor

her, Dr. Harvey Artsob, was retiring at the end of January 2010 and she needed the extension so that she could take advantage of his assistance.

[57] On January 4 and 5, 2010, the grievor sent a number of emails to Eleanor Percy, the occupational health nurse from the PHAC who had performed an ergonomic assessment of the grievor's workspace in 2007. The grievor was looking for copies of the ergonomic assessment as well as a critical incident report that she believed she had filed in August 2008. In the first email that the grievor sent to Ms. Percy, dated December 18, 2009, she simply asked for copies of the ergonomic report and the critical incident report. In the second email, dated January 4, 2010, which responded to Ms. Percy's assertion that she did not have the requested reports, the grievor wrote that she believed that Ms. Percy was required to keep records for five years. She stated that "[t]his failure to follow due process and address the employee [*sic*] issue is a violation of the Health and Safety Act." She also noted that her request was part of a legal process. In the third email to Ms. Percy, also dated January 4, 2010, the grievor noted that Ms. Percy did the assessment and sat on the health and safety committee. The grievor wondered why, given Ms. Percy's role, the ergonomic report had not been acted on and noted that she had sent several emails asking Ms. Percy to address the matter. She asked about who had authorized Ms. Percy's non-compliance and for an explanation as to the process.

[58] The email exchange about the grievor's request resulted in a complaint by the nurse's supervisor, Catherine Robertson, to Dr. Copps (Exhibit G-2). In it, Ms. Robertson noted that there were concerns about the grievor's increasing tone of anger and frustration, which led to concerns about the grievor's health and the potential for an "escalating situation" in the workplace.

[59] The grievor testified that, on January 5, 2010, she had a disciplinary meeting with Dr. Renwick concerning the tone of her emails. She stated that Dr. Renwick took the position that her tone was rude and contrary to the code of conduct. She stated that, in her opinion, his concern was trivial compared to the fact that her harassment complaint had been passed around and that she had been falsely stigmatized as being mentally ill. She stated that she was not allowed to speak to anyone, to see anyone or to associate with colleagues. She stated that she was being treated like she was a bad child by a younger man and that it was intolerable.

[60] On January 5, 2010, the grievor submitted a “Hazardous Occurrence Investigation Report” (HOIR) (Exhibit G-64). In it, she described the incident as follows:

Harassment is a personal attack [sic] inflicting psychological trauma. 1) failure to accommodate for Carpal Tunnel Syndrome (CTS) reported in the Ergonomic Assessment Report June 22, 2007, 2) verbal directive, as attack - delivered a psychological shock - undocumented and unexplained job change. 3) Told to take sick leave, on return presented with FTW 4) Marginalized, excluded from meetings 5) Subjected to ridicule and gossip - after March 14, 2008 formal written Protected B Harassment complaint (1-4) 6) Written Slander (ATIP) 7) Malicious Retaliation - lock out Aug 1, 2008 for 6 months, no documentation - using the contents of the confidential Harassment Complaint 8) FTW allegation throughout 9) No supervision and coercive job change 10) Solitary confinement - no contact with CFIA personnel, ongoing, Global email to staff - Soren Alexandersen directive - not to talk to Rosemary Hood.

[61] The HOIR was submitted to both Dr. Alexandersen and the occupational safety and health advisor. Dr. Alexandersen forwarded it to both Dr. Renwick and an HR advisor (Exhibit G-23). He noted that, although the HOIR identified him as the grievor’s supervisor, he was not. In an email later that day to Mr. McLean and Dr. Copps, he also stated that he believed that the situation with the grievor was escalating. He testified that, by using the word “escalating,” he was referring to all the different complaints and emails from the grievor, as well as the email complaint from Ms. Robertson. He said that he saw the grievor’s behaviour as part of a pattern of behaviour going back to the autumn, and he thought that it might potentially be a disciplinary matter.

[62] As a result of the grievor’s emails to Ms. Percy concerning the ergonomic assessment done in 2007, Drs. Silva and Renwick asked Dr. Copps to ascertain what action had been taken to satisfy the recommendations in the assessment. On January 6, 2010, Dr. Copps and Mr. McLean went to the grievor’s office with a copy of the ergonomic assessment to determine what equipment from the assessment had been provided. Dr. Copps testified that, before they went to the grievor’s office, he called her and left a message to tell her what they planned to do. Mr. McLean and Dr. Copps inventoried the grievor’s office based on the ergonomic assessment, which Dr. Copps then sent to Drs. Silva and Renwick. Dr. Copps testified that he also advised Dr. Alexandersen of his actions.

[63] The grievor testified that she first learned that Mr. McLean and Dr. Copps had entered her office when she had lunch with Mr. McLean that day. She said that he told her what they had done and that she could go shopping for new equipment. She felt that there should have been some administrative arrangement to help her purchase equipment as she had made purchases in the past and knew that the requisitioning process was complicated.

[64] On the morning of January 7, 2010, the grievor went to Dr. Copps' office. He testified that she stood in the hallway by his office and asked for an explanation as to why he entered her office without her permission. He testified that he explained to her that he was checking her office equipment for Dr. Silva and Dr. Renwick. He said that, after he told her, she started to raise her voice, asking again why he and Mr. McLean had entered her office. He said that she became incoherent and began yelling that it was his fault and that he had no compassion or understanding. She walked down the hall but came back and yelled at him again. She pointed her finger at him and scared him. He said that he tried not to react or make any expression that could be misinterpreted. After the grievor left, he asked Mr. McLean and a clerk, who both were working outside his office, to make notes of what they heard. He testified that he felt violated by the encounter and that he was still shaking in the afternoon. He made notes of the conversation, which he sent to Dr. Renwick and others (Exhibit E-14).

[65] Mr. McLean testified that the grievor was very excited and angry during her exchange with Dr. Copps. He said that, although Dr. Copps repeatedly told the grievor to raise the matter with her supervisor, she was completely focused on him. He provided notes of his observations to Dr. Alexandersen, Dr. Renwick and others (Exhibit E-9).

[66] The grievor testified that she walked to her mailbox near Dr. Copps' office on the morning of January 7. She noticed that his door was ajar, so she knocked. He was talking to his wife, who was standing behind the door. Mrs. Copps left, but the grievor remained in the hall because the office was small. She asked him why he had entered her office, and he told her to talk to Dr. Silva or Dr. Renwick. She testified that, in that moment, she realized that it was Dr. Copps who was making things so difficult for her.

[67] The grievor testified that she then walked down the hall to her mailbox while she tried to figure out what to say. She walked back to Dr. Copps' office and asked him

about the next steps. At that point, she testified that Dr. Copps began to disrespect her. She found it difficult to accept that she was being belittled. In defiance, she raised her hands. She denied pointing her finger at him. She testified that she told him that she had been in extreme pain and asked why he did not understand. She testified that she was upset that he could not treat her nicely. She said that the conversation was demeaning and harassing. She believed that he created the situation so that he could get rid of her. When he told her that he was a busy man and that he did not have time for her, she left. She acknowledged that she was angry with Dr. Copps. She testified that she had had enough of him because he had not spoken to her for two years and then entered her locked office and later refused to explain his action. He did not respect her. She sent an email to Dr. Dubuc registering her anger that Dr. Copps entered her office without notice and failed to act on the ergonomic report (Exhibit G-80).

[68] Dr. Chris Kranendonk testified. He is the diagnostic and training coordinator employed in the NCFAD. He has known the grievor for many years. He explained that, on January 7, 2010, the grievor came to see him for advice on ergonomic equipment. He said that he showed her around the office so she could look at special ergonomic equipment. One of his staff had carpal tunnel syndrome, and the office had been equipped to deal with that issue. The grievor told him that she was considering purchasing ergonomic equipment. He stated that he was not aware of the incident between the grievor and Dr. Copps.

[69] Dr. Silva testified that he was advised about the situation between Dr. Copps and the grievor. He felt that it was a significant event that required a response from management. He believed that he had a responsibility to ensure the safety of workers as well as Dr. Hood's safety, because of her emotional state. He stated that the employer depended upon people like Dr. Copps to manage the laboratory and that any disruption of the lab's function would put the country at risk because it would interfere with the lab's ability to provide timely advice and intervention. He felt that it was important to get the balance right. He instructed Dr. Copps to remove the grievor from the workplace. Although he wanted Dr. Copps to do it on January 7, the grievor was no longer in the building, and so he arranged to have it done the following day. Both Dr. Silva and Dr. Renwick testified that the decision to have the grievor removed from the workplace was taken collectively, although the enforcement of that decision relied on the on-site managers.

[70] On January 8, 2010, Dr. Copps, Mr. McLean and Chad Pucknel, the head of security, and another security guard went to the grievor's office. Dr. Copps told the grievor that she was to call Dr. Silva and put him on the speakerphone so that everyone could hear the conversation. The grievor testified that she also included a friend in the conversation so that she would have a witness. Dr. Silva told the grievor that, because of her recent behaviour, including emails and the situation with Dr. Copps, she was to gather her personal belongings and be escorted from the building immediately. The grievor became very upset. Dr. Copps testified that she began yelling at him, and so he left the room. After some time, in which the grievor packed up her personal belongings, she was escorted from the building.

[71] Dr. Pasick testified. He works at the NCFAD. He stated that he was approached on January 7, 2010, to be a witness to the grievor's removal from the building. He said that it was late in the day. He asked them to find someone else to do it as he did not have time.

[72] Mr. Smith testified. He is Acting Director, Regional Security Program for the PHAC and Health Canada. He confirmed that the grievor's proximity card, which allowed access to the building, was deactivated on January 8, 2010. In addition, her Internet access was deactivated.

[73] Dr. Silva testified that the decision to have the grievor removed from the workplace was intended to allay any fears that employees had of being threatened. When asked who was threatened, he stated that Dr. Copps felt frightened and threatened and that his capacity to work was affected. Dr. Silva testified that he believed that the incident with Dr. Copps was part of a pattern of behaviour by the grievor. Therefore, his intention in asking for a FTW evaluation was to determine if there were any impediments to the grievor's ability to work in harmony with her colleagues and if any accommodations were required. He felt that a FTW assessment was necessary because other actions had not addressed the root cause of the issues. Dr. Renwick, who wrote the letter suspending the grievor with pay (Exhibit E-17), testified that the employer wanted a complete medical assessment that covered both her physical and psychological well-being.

[74] On January 12, 2010, the grievor requested permission to attend a lecture in the workplace, but Dr. Renwick denied it (Exhibit G-11). He testified that his decision not

to allow her to return to the workplace was based on a policy that was in place at that time as well as on the wishes of local management, which expressed anxiety and uncertainty about her behaviour in the workplace. He identified Dr. Copps as the person concerned about the grievor's behaviour.

[75] Dr. Silva testified that, following the initial letter on January 8, 2010, which suspended the grievor with pay, the employer sent further letters requesting that she undergo a FTW evaluation. On February 25, 2010, following an intervention from the grievor's union representative, the employer agreed that the grievor could use her own doctor to perform the assessment (Exhibit E-18). On March 10, 2010, Dr. Silva reiterated his agreement that the grievor's physician could perform the assessment, provided that it was based on the concerns that Dr. Silva wished to bring to the doctor's attention (Exhibit E-21). He also explained that he would not accept a medical certificate that she provided on March 3, 2010 because he had not been able to share his concerns and questions with the doctor (Exhibit E-19). On March 17, 2010, the grievor advised the employer through her union representative that she was not willing to undergo a FTW assessment (Exhibit E-22). As a result of her refusal, the employer changed the suspension from being with pay to without pay (Exhibits E-23 and E-24), effective April 26, 2010. On September 14, 2010, the employer advised the grievor that her employment would be terminated effective September 16, 2010, as a result of her refusal to undergo a FTW assessment (Exhibit E-26).

[76] The grievor testified that she would not see a psychiatrist. She believed that the request for a FTW assessment was being used as a tool to harass her. In her opinion, the claim that she had psychiatric problems was fallacious and had already been dismissed in a memorandum of understanding she had negotiated with Dr. Silva. The claims that she had psychiatric problems were all lies. She also stated that she provided many medical certificates that stated that she was fit to work.

[77] Dr. Van Rensburg is the grievor's family physician. He testified that he provided medical certificates for her. On July 8, 2009, he provided a certificate (Exhibit G-15), at the grievor's request, which stated as follows: "Dr. Hood is experiencing a significant amount of emotional stress due to her current work environment. She would greatly benefit from a change in her work environment."

[78] On February 22, 2010, he signed a standard form certifying that the grievor was able to return to work (Exhibit G-16). On April 5, 2010, he signed another form certifying that the grievor was “physically and mentally fit to return to work” (Exhibit G-17). He signed similar forms in May and October 2010 (Exhibits G-18 and G-19) and received a certificate from the grievor’s psychologist, Dr. Shore, dated March 30, 2010, which certified that the grievor could function in a “cooperative” work environment (Exhibit G-22). Dr. Van Rensburg testified that he had not spoken to Dr. Shore. He also acknowledged that he did not specialize in psychiatry or psychology and that he performed no psychological testing of the grievor. He stated that he gave the medical certificates on request to the grievor, not to the employer and that he knew about her work environment only from what she told him. He never saw the employer’s letter sent to him and Dr. Shore, which provided specific information about the employer’s concerns and asked for answers to questions concerning her fitness to work based on the information provided (Exhibit E-21).

IV. Summary of the arguments

A. For the employer

[79] The employer argued that these two grievances relate to one ongoing suspension, imposed because the grievor refused to undergo a FTW assessment. For the first three months, the suspension was with pay, and then, after repeated requests and warnings that the suspension would change to being without pay if she continued to refuse to attend the FTW evaluation, the suspension was changed to being without pay. The employer stated that it was entitled to performance from its employees and that, in this case, no performance was provided. For that reason, the suspension was changed to being without pay.

[80] The suspension in this case was administrative, not disciplinary. Therefore, the Public Service Labour Relations Board (PSLRB) does not have jurisdiction to entertain the grievances. Under section 209 of the *Public Service Labour Relations Act (PSLRA)*, only disciplinary suspensions are adjudicable.

[81] The employer argued that, in order to determine whether a suspension is administrative or disciplinary, it is necessary to determine the employer’s intention when it imposed the suspension. In this case, extensive and detailed background evidence was presented to establish the context in which the employer determined that

it was necessary to ask the grievor to obtain a FTW assessment. All the evidence relating to past incidents and issues established a pattern of behaviour by the grievor leading up to the incident with Dr. Copps on January 8, 2010, which persuaded the employer that a FTW assessment was necessary.

[82] In summarizing the evidence, the employer noted that, at the end of 2007, the grievor took a leave of absence for reasons that are not entirely clear but that, in the employer's submission, related to the fact that she felt overwhelmed and stressed. When she returned to work in January 2008, the employer met with her to address some of her behaviour that had given rise to concerns. At the meeting on January 21, 2008, the employer made its first request for a FTW assessment. The request was twofold. First, the grievor was returning from a period of stress leave and the employer wished to ascertain whether she was completely well. Second, the employer wished to know if an underlying condition would explain the behaviour and difficulties with relationships that the grievor seemed to experience. The employer needed to know if some accommodation was required that would help the grievor in the workplace and only a doctor could tell it that.

[83] After the meeting in January 2008, the grievor filed a harassment complaint against her supervisor, Dr. Kitching. The employer contended that it is important to note that, of the 47 or 48 allegations set out in the complaint, only one was founded. It is also important to note that the grievor put in evidence a description of how she felt when Dr. Kitching told her that she was no longer part of the CAHSN. That description raised legitimate questions about the grievor's well-being. The picture-taking incident, the grievor's mood swings, and her crying and emotional behaviour all led to a concern about whether she was well.

[84] In 2009, the employer tried to provide the grievor with a new beginning by changing her reporting relationship and assigning her to a new supervisor. However, the employer contended that that was not successful. The grievor failed to meet deadlines and failed to produce. She was reprimanded twice for the tone of her emails. It was clear from her emails to her supervisor and others that she was stressed. Dr. Renwick advised her take some time off, but she refused. At that point, Dr. Renwick was concerned about her mental state.

[85] In the first week of January 2010, the employer's concerns heightened. Complaints were received about the tone of the grievor's emails. Concerns were raised about her health, and fears were expressed that the situation could escalate because she seemed to be increasingly angry and frustrated. To add to the concerns, the grievor confronted Dr. Copps. The employer argued that it did not matter whether the grievor had legitimate grounds to be frustrated about the equipment provided to her; her concerns did not excuse her disruptive behaviour.

[86] The employer could have taken a performance management approach in the circumstances, given the grievor's lack of work production. It also could have taken a disciplinary approach to the grievor's disruptive and unsettling behaviour in Dr. Copps' office. But, in fact, it first wanted to know if there was a medical reason for the grievor's behaviour and lack of performance. The employer was concerned that, over several years, her work relationships never seemed to work out. Therefore, taking everything into account, including her statement that she was exhausted and felt threatened, the employer suspended her with pay pending a FTW evaluation, rather than disciplining her.

[87] The employer cited *Canada (Attorney General) v. Frazee*, 2007 FC 1176, and, in particular, noted that the Court held that not every adverse action is disciplinary. In determining whether an action is disciplinary, the primary factor is the employer's intention. In this case, Drs. Silva and Renwick clearly testified that they were motivated by their concern for the grievor's health and well-being, as well as that of other employees, and that it was not their intention to correct her behaviour through discipline. The employer also cited *Basra v. Canada (Attorney General)*, 2010 FCA 24, and *Lindsay v. Canada (Attorney General)*, 2010 FC 389.

[88] The employer stated that, while it might have had reasons to discipline the grievor, it did not. The suspension was administrative, not disciplinary. Further, the grievor was given many warnings before the suspension with pay was converted to a suspension without pay. The decision not to provide a FTW assessment was within the grievor's control. She could not simply ignore the employer's request and continue to be paid indefinitely.

[89] The employer asked that the grievances be dismissed on the grounds that the suspensions were not disciplinary, and therefore, the PSLRB does not have jurisdiction

to hear them.

B. For the grievor

[90] The grievor stated that the question that must be answered is, where is the line drawn? What is reasonable in the circumstances? She argued that it is necessary to go back to the beginning, when an “attribution error” occurred that was so severe it created a problem. In the face of her unresolved harassment complaint, which is still unresolved, the work environment became so inflamed that it was unacceptable. The failure to resolve her harassment complaint started everything.

[91] The grievor argued that Mr. McLean was responsible for much of the injustice that she faced because he gave her bad advice. Therefore, he acted inappropriately. He was also present at the meeting in January 2008, when she was told that there was a condition placed on her return to work. She understood that it was another control tactic by the employer, which had *de facto* fired her. The grievor stated that her decision to file the harassment complaint was based on her understanding that the staffing action that “fired” her was disguised discipline and was inappropriate.

[92] The grievor stated that she worked on an ineffective team and that the amount of work she generated far surpassed that of the others. She stated that she moved too quickly. The concepts that she presented not only produced intellectual property for the Government of Canada but also generated links and bridges that had never been built before in the CFIA. The grievor said that she was a poster child of accomplishment and that she successfully led teams in harmony and cooperation in Ottawa and Winnipeg. For that reason, she was scapegoated and regarded as uncooperative and non-productive.

[93] The grievor claimed that Dr. Kitching deferred CFIA business to people outside the CFIA who had no real knowledge of CFIA requirements or issues. She stated that the mandate for the CAHSN was ignored and then given to the control of the province of Manitoba. She stated that she believed that CFIA management in Ottawa failed to understand what was going on and that it did not understand why she refused to give her work to an employee from outside the CFIA.

[94] The grievor argued that the actions of Dr. Copps also failed the test of reasonableness. She suggested that he labelled her unstable to get rid of her. She

stated that he acted beyond his responsibilities and that erred in his treatment of her. He entered her office without notice. He violated a health and safety act and Parts 2 and 3 of the *Canada Labour Code*, R.S.C. 1985, c. L-2. She had a right to work in a safe workplace, free of psychological harassment. The story that Dr. Copps told was a fallacy, but he could get away with it because he was a director and he was given the green light to act by Dr. Alexandersen.

[95] The grievor contended that there was systemic discrimination in the workplace in the form of slavery that had to stop. She stated that management had no control, did not follow its own policies and ruled in a biased manner. She was found guilty, and there was no escape. She argued that the spirit of the law is to resolve issues as soon as possible, assuming the test of reasonableness.

[96] The grievor contended that Dr. Copps' actions failed the test of reasonableness because he did not follow the appropriate process. She argued that Dr. Copps was both the instigator of the problem and the executioner. He removed her from her job using the excuse of her "behaviour." He apologized to others but not to her. The grievor argued that he failed the test of reasonableness because he did not apologize to her and did not offer her an opportunity to apologize to him, even though she was the one traumatized. The grievor argued that Dr. Copps' report concerning her that was sent to Ottawa was part of a strategy to get rid of her through entrapment.

[97] The grievor noted that the employer is responsible for maintaining civil conduct in the workplace, and yet, Dr. Copps instructed others to remove her from work in a public display. No-one saw it as discrimination or harassment, but she believed that her treatment at work was a hate crime in progress and that it constituted stalking. Clearly, her work environment met the definition of an unsafe workplace.

[98] The grievor contended that she worked in an atmosphere of isolation and that isolation is a form of violence. She argued that she was denied the right to speak out and that she was punished severely for doing so. She was punished for using surnames in emails, and she was punished for making reasonable requests to the employer for normal working conditions. Her harassment complaint was trivialized. The investigation was not conducted properly and failed the test of reasonableness. There was no remedy imposed that would ensure her well-being and that of the employer.

[99] The grievor stated that her grievances were about disguised discipline. Dr. Copps disciplined her over trivial matters. He overreacted, and no-one cared. She stated that the employer had to disguise the discipline because it would not have won a grievance had it used discipline directly. She believed that the employer used the indirect approach rather than a direct one because it had to hide the fact that it was culpable in failing to provide a safe workplace. She stated that it is clear that the suspensions were disciplinary because the demand for a FTW assessment made them disciplinary.

C. Employer's rebuttal

[100] The employer noted that all that was required of the grievor was that she undergo a FTW evaluation. The situation was completely within her control. The employer waited a month after she indicated her refusal to undergo the assessment before converting the suspension to one without pay. The employer wanted to give her every opportunity to comply.

V. Reasons

[101] The two grievances before me were referred to adjudication under paragraph 209(1)(b) of the *PSLRA*, which provides as follows:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

(b) a disciplinary action resulting in termination, demotion, suspension or financial penalty;

...

[102] The first grievance concerns the employer's decision to send the grievor home from work with pay pending the result of a complete medical assessment. The employer suspended both her access to the workplace and her electronic access. The letter to the grievor that imposed those actions provided, in part, as follows (Exhibit E-17):

...

As your manager, it is my responsibility to ensure the health and safety of employees. Recent incidents have raised concerns in your workplace. To ensure that we provide you and others with a healthy work environment, I will be requesting an appointment for a complete medical assessment in order to provide us with guidance moving forward.

Until an appointment is made, you will be at home with pay. My office will confirm the details of the appointment as soon as possible.

Once your assessment has been completed and more information is available, we will be in a better position to determine the next steps for the project that you have been working on.

In the meantime, we will be suspending your access to the workplace as well as your IT accounts.

...

[103] The second grievance concerns the employer's decision to convert the grievor's status to leave without pay. On April 26, 2010, the employer wrote to the grievor, as follows (Exhibit E-25):

...

This letter is further to my letter of March 19, 2010, whereby you were asked to reconsider your position to undergo a fitness to work evaluation. Subsequently, you sent me an email on March 31, 2010, and advised me that you would not go for such as assessment. Consequently, you are now being placed on leave without pay effective April 26, 2010.

I request that you reconsider my request and that you provide your consent to undergo a fitness to work assessment. I would like to advise you that failure to provide your consent could result in the termination of your employment with the Canadian Food Inspection Agency for non-disciplinary reasons.

...

[104] The grievor grieved the first letter on January 13, 2010 and the second letter on May 27, 2010. In both grievances, she alleged that the actions were suspensions and constituted disguised discipline.

[105] At the hearing, the employer objected to my jurisdiction to hear both grievances on the grounds that its actions were not disciplinary in nature but constituted administrative suspensions. Accordingly, they did not fall within the subjects set out in subsection 209(1) of the *PSLRA* that could be referred to adjudication. The essence of the employer's argument on this point was that the initial action, which was a suspension with pay, was based on its need to ensure the health and safety of its employees, including the grievor, and that the second action was a consequence of the grievor's continued inability to provide any work or performance because she refused to satisfy the employer's requirement for a FTW assessment. Both actions, it argued, were purely administrative.

[106] Both suspensions arose in the context of the employer's demand that the grievor undergo a medical assessment to determine her fitness to work. The grievor argued that that demand was camouflaged discipline, designed to suspend and ultimately to effect the termination of her employment in a manner that she could not challenge.

[107] To be adjudicable, the grievances before me must relate to disciplinary suspensions. The employer's simple assertion that the suspensions were administrative, and therefore not adjudicable, does not necessarily make them so. In *Grover v. National Research Council of Canada*, 2005 PSLRB 150 (upheld in *Canada (Attorney General) v. Grover*, 2007 FC 28 and in 2008 FCA 97), the adjudicator noted, at paragraph 120, as follows:

. . . the simple fact that the employer characterised [sic] its actions as administrative by referring to an administrative policy or prerogative does not automatically make them so. An analysis of the facts and context will be determinative.

[108] I must determine whether in substance the actions taken by the employer can be characterized as disciplinary. For the most part, that is a factual analysis. Discipline is intended to punish conduct that the employer deems unacceptable and culpable. Generally, disciplinary penalties are intended to be corrective and, therefore, to progress from warnings to more substantial penalties. But, as the employer argued, not every adverse action affecting an employee is discipline. It is also true that employer actions that appear administrative in nature may, in fact, be disguised discipline, as the grievor alleged in this case.

[109] It is not possible to determine the employer's intent in suspending the grievor without first examining its demand that she undergo a medical assessment to determine her fitness to work, particularly in light of its acknowledgment that even though it might have had grounds to discipline the grievor, it did not. If the employer did not have legitimate grounds to ask for the assessment, its motive for suspending the grievor pending that examination is more open to question.

[110] Employers do not have an absolute right to demand that employees undergo medical examinations. The Federal Court stated in paragraph 64 of *Grover* that the "... foundational principle is that employees have a strong right to privacy with respect to their bodily integrity and a medical practitioner; therefore, a trespass is committed if an employee is examined against his or her will." However, as the Court also noted in the following paragraph that employers have the obligation to ensure the health and safety of employees and therefore have a right to ask for an employee's medical information if there are "... reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace."

[111] As noted by the Federal Court in *Grover*, the employer must balance an employee's privacy rights with its need to ensure safety in the workplace. In so doing, it must choose the least intrusive means possible to obtain the necessary information. Furthermore, if the employer is not prepared to accept a medical certificate from an employee's physician, it must explain why the certificate is deficient and indicate precisely what information it requires. The Court observed that requests for independent medical examinations will arise rarely, and only in clear and exceptional circumstances. It stated as follows:

...

[70] Numerous cases speak to the requirement that a medical examination must be shown to be "necessary" due to a "legitimate doubt". The onus lies on the employer, who must be prepared to call "cogent evidence" to support its position. The need for a medical examination is described as "drastic action" which must have a "substantial basis" and will only be required in "rare cases". . . .

...

[112] In this case, the request that the grievor undergo a medical assessment by a physician chosen by the employer to determine her fitness to work was precipitated by

an angry confrontation between the grievor and Dr. Copps. Dr. Copps testified that he was frightened and shaken by the incident that occurred on January 7, 2010. In his handwritten notes, he described the grievor's behaviour as "belligerent [*sic*], manic, and out of control" (Exhibit E-14).

[113] In addition to the incident with Dr. Copps, the employer relied on other incidents and issues to justify its request for an independent medical examination. Dr. Silva testified that the incident with Dr. Copps seemed to be part of a pattern of behaviour that caused the employer concern. While the incident with Dr. Copps was the only one that the employer identified as threatening, there was evidence that the email exchange with Ms. Percy, in December 2009 and early January 2010, also gave rise to concerns that the grievor's anger and frustration were "escalating."

[114] The letter to the grievor's doctors, dated March 10, 2010 (Exhibit E-21), set out the employer's concerns about the grievor's fitness to work in detail. In particular, that letter identified the incident in August 2008, when the grievor was thought to be taking photographs of employees attending a meeting to which she was not invited, as well as shouting in the workplace and accusing others of shouting. It also identified the reprimands that she had been given for her inappropriate tone in emails and her poor work performance and the fact that she missed deadlines as being concerns for the employer. It noted that she and her union representatives had also identified concerns with her health. Finally, the letter identified the incident with Dr. Copps on January 7, 2010.

[115] At the hearing, the employer presented a great deal of evidence relating to the grievor's behaviour going back to 2007. It was presented for the purpose of providing context to the employer's decision to suspend her in January 2010. There is no doubt that within the body of evidence before me there are examples of behaviour and statements by the grievor that could give rise to legitimate concerns about her well-being. The vivid description in her 2008 harassment complaint of her reaction to being reassigned, which she likened to being shot in the head, is a striking and unsettling example of worrying behaviour. But, I must note that there is no evidence that that statement, for example, was considered when the decision was made to ask for an independent medical and psychological assessment.

[116] However, the grievor also connected events that occurred before 2009 to the

events that precipitated her suspension in January 2010, both at the hearing and in her dealings with Drs. Silva and Renwick. She believed strongly that her harassment complaint, which was filed in March 2008 and responded to in September 2009, remained unresolved. Dr. Silva testified that, at a meeting in March 2009, the grievor found it difficult to let go of issues from the past. In August 2009, the grievor wrote in an email that she was experiencing ongoing harassment (Exhibit E-33). She filed a security incident report that related to her complaint against Dr. Kitching, who had retired from the CFIA. Likewise, in September 2009, she wrote to Dr. Renwick, stating that she was “under a harassment complaint process” (Exhibit G-68). She testified that, in a meeting on December 1, 2009, Dr. Silva raised the subject of the picture-taking incident, which so upset her that she had to leave. In an email to Dr. Renwick on December 17, 2009, she referred to her emotional turmoil following the December 1 meeting as the explanation for her inability to complete her work and asked for an extension because of the stress related to her human resources issues (Exhibit E-40).

[117] The picture that emerges from the evidence is that of an employee who was experiencing a great deal of stress in the workplace, and the stress was longstanding. There were clear signs that the grievor was troubled. She testified that she found the workplace difficult and that she felt that she was under constant threat. In July 2009, her psychologist recommended a change of work environment because of the stress that she was experiencing (Exhibit E-37). At the meeting on December 1, 2009, the grievor became so emotional that she had to leave. Later that month, she wrote to a human resources advisor that she was “exhausted” from all the stress (Exhibit E-41). On January 5, 2010, she filed an HOIR in which she described her work environment as “solitary confinement,” and set out a list of issues that clearly demonstrated her sense of isolation, marginalization and stress (Exhibit G-64).

[118] Most employers are not doctors, psychologists or psychiatrists. They have few tools at their disposal to deal with employees who demonstrate signs of distress in the workplace. And yet, as the Federal Court held in *Grover*, employers have an obligation to ensure the health and safety of employees in the workplace. One of the tools available to employers is the right to require an employee to undergo a FTW assessment. As the Federal Court held in *Grover*, it is not a tool to be used lightly or punitively but when there are “. . . reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace.” In my view, that test must include a reasonable concern that the employee in question presents a risk to

herself or himself. I do not believe that a responsible employer could ignore the signs of stress and instability exhibited by the grievor in the months preceding her suspension on January 8, 2010. Therefore, I find that the employer was justified in requiring that she undergo an independent medical examination to determine her fitness to work.

[119] When the employer suspended the grievor on January 8, 2010, it was with pay. Initially, the employer wanted the grievor to attend a practitioner of its choosing, but following a request from the grievor's union representative, the employer agreed on February 25, 2010, to allow the grievor to have the evaluation done by her physician. Explanations were provided as to why a prior medical certificate provided by the grievor's doctor did not meet the employer's requirements. Those requirements were clearly set out. Therefore, I find that the employer attempted to be as minimally intrusive as it could. Only after the grievor categorically refused to undergo the requested assessment, even with her own physician, was she suspended without pay, effective April 26, 2010.

[120] Can the suspensions of the grievor be characterized as disciplinary? I do not believe so. The indicia of discipline, which are that it is intended to be both punitive and corrective, are not present in this case. Although the employer reprimanded the grievor in the fall of 2009 for the tone of her emails, there is no evidence of a continuing or escalating disciplinary response. The employer's purpose in requiring the grievor to undergo a medical assessment was not disciplinary but was motivated instead by a legitimate concern about the state of her health. Her salary was maintained for more than three months after the initial suspension, and only after the employer was advised that the grievor would not consent to a FTW evaluation, even by her own physician, was she placed on leave without pay, on the principle of "no work, no pay." While I appreciate that, from the grievor's perspective, that decision was punitive, I do not find that it was a disciplinary response. Given that I find that the suspension with pay on January 8, 2010 and the suspension without pay on April 26, 2010 were administrative rather than disciplinary in nature, I find that I am without jurisdiction to hear the two grievances before me.

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

(The Order appears on the next page)

VI. Order

[122] The grievances are dismissed.

May 6, 2013.

**Kate Rogers,
adjudicator**