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Citation: 2014 PSLRB 94



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

JENNIFER POULIOT

Grievor

and

**DEPUTY HEAD
(Canadian Forces Grievance Board)**

Respondent

Indexed as

Pouliot v. Deputy Head (Canadian Forces Grievance Board)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Linda Gobeil, adjudicator

For the Grievor: Sean McGee, counsel

For the Respondent: Adrian Bieniasiewicz and Martin Desmeules, counsel

Heard at Ottawa, Ontario,
May 7 to 10, 2013, and January 6 to 9 and 20 to 23, 2014.
(PSLREB Translation)

I. Application before the Board

[1] On April 20, 2011, the grievor, Ms. Jennifer Pouliot, referred a grievance to adjudication under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”) against her employer, the Canadian Forces Grievance Board (“the Board” or “the employer”), challenging her suspension on March 16, 2011, pending an investigation.

[2] On April 28, 2011, the grievor filed another grievance under paragraph 209(1)(b) of the Act, this time against her termination on April 20, 2011.

[3] Since the grievance raised an issue about an interpretation of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), a “Form 24” was sent to the Canadian Human Rights Commission (CHRC). On May 15, 2013, the CHRC informed the Public Service Labour Relations Board that it did not intend to submit any comments in this case.

II. Summary of the evidence

[4] At the hearing, counsel for the employer reiterated his preliminary objection that I did not have jurisdiction to hear the suspension, pending an investigation, grievance because essentially that suspension was administrative, not disciplinary. Counsel for the employer submitted that because the paid suspension was replaced by a termination retroactive to March 16, 2011, the debate had become purely hypothetical. In support of his claims, he referred me to *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43, and *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62.

[5] On that point, and although he did not agree that I do not have the jurisdiction to deal with the suspension grievance, counsel for the grievor was also of the opinion that that issue could be resolved by dealing only with the dismissal grievance.

[6] Given the parties’ positions, I decided that this decision would cover both the suspension, pending an investigation, grievance and the grievor’s termination grievance.

A. For the employer

[7] The employer called 3 witnesses and submitted 100 supporting documents, with attachments.

[8] Ms. Caroline Maynard was the employer's first witness. She testified at length for the employer. Counsel for the grievor also cross-examined her at length. Ms. Maynard indicated that she has been Director of Operations and General Counsel for the Board since 2006. Thus, she was the grievor's supervisor when the grievor was suspended and terminated.

[9] Ms. Maynard testified that she reports directly to the chairperson, Mr. Hamel, with respect to the Board's legal affairs and for issues related to the Board's operations. Her immediate supervisor is Vice-Chairperson, Operations, Mr. James Price. Ms. Maynard stated that at the time of the grievances, she was responsible for a total of 18 employees, 15 of whom were in Operations and 3 were counsel, including Ms. Pouliot, who was an LA-2A counsel.

[10] Ms. Maynard related the history that led to the Board's creation. As for its mandate, she essentially indicated that it is responsible for reviewing and examining grievances filed by members of the Canadian Forces (CF), including reservists, against their organization. Once a grievance is reviewed and examined, the Board's mandate is to submit its conclusions or recommendations to the chief of the defence staff for a decision. Ms. Maynard emphasized that the Board must act impartially and entirely independently of the CF and that it is not part of the CF or the Department of National Defence (DND).

[11] Ms. Maynard indicated that the Board has jurisdiction over a wide variety of grievances. She mentioned that, for example, it could review military forces members' grievances about their pay, different allowances, their discharges from the CF, conflicts of interest, harassment, political activities, demotions, medical care, etc. According to her, the Board deals with 175 to 190 files per year.

[12] As for Ms. Pouliot's work, Ms. Maynard testified that since 2008, a Board member, counsel and someone from Operations have been assigned immediately to

each file, on reception. Then, when a grievance review or examination report is prepared, the counsel reviews it before the Board member signs it.

[13] Ms. Maynard testified that the Board originally hired the grievor as a grievance officer and team leader in Operations. In 2005, the grievor left the Board. She was hired on a permanent basis as Board counsel on March 28, 2007 (Exhibit E-4).

[14] Ms. Maynard testified that the Board's chairperson in 2007, Ms. Laurin, hesitated before hiring the grievor as Board counsel because Ms. Laurin and Ms. Maynard knew then that the grievor was a CF reservist. According to Ms. Maynard, Ms. Laurin was concerned with the Board's independence and its perceived independence if a person was both a Board employee and a CF reservist. Ms. Laurin was concerned about not giving the impression that the Board was "tied" to the CF. A Board counsel's duties are described in Exhibit E-5.

[15] Ms. Maynard indicated that despite everything, she and Ms. Laurin decided to hire the grievor because she ensured them that her reservist duties were purely operational and that they consisted of physical military exercises and artillery duties and that "[translation] it felt good to go into the field and do that type of exercise." According to Ms. Maynard, the grievor assured that her reservist status did not include any administrative duties and that it consisted strictly of operational exercises.

[16] Ms. Maynard emphasized that given the grievor's assurance and the fact that she was only a part-time reservist, Ms. Maynard did not see any problem, particularly since, in her opinion, a reservist's activities are usually carried out outside work hours.

[17] Ms. Maynard indicated that to address Ms. Laurin's expressed concerns about hiring a reservist counsel at the Board, before the hiring, they asked the commander of the reserve unit to which the grievor belonged, Lieutenant Colonel Becking, for a letter indicating the duties the grievor carried out as a reservist. They also asked him to confirm that no conflict of interest existed between reservist work and Board counsel work (Exhibit E-6). It must be noted that the grievor was fully aware of the concerns and discussions about her being a reservist who wanted to hold a Board counsel position.

[18] Ms. Maynard noted that Lieutenant Colonel Becking indicated in a letter dated February 28, 2007 that the grievor was a member of the 30th Field Artillery Regiment (“the 30th Regiment”). He also expressed his confidence that her reserve duties would not conflict with those that she would carry out as Board counsel. Ms. Maynard indicated that based on that letter and on the grievor’s submissions, Ms. Laurin decided to hire the grievor as counsel, even though she continued to be a CF reservist (Exhibit E-7). In cross-examination, Ms. Maynard maintained that she had many discussions with the grievor, who confirmed to her that her reservist role consisted of operational and physical activities, such as taking part on firing ranges and handling rifles.

[19] Ms. Maynard noted that although Exhibit E-6 indicates that the grievor was a member of the 30th Regiment, Ms. Maynard realized during the investigation leading to the grievor’s termination in March 2011 that the grievor had changed reserve units and had become a member of the Cameron Highlanders of Ottawa (CHoO) and that her duties had changed. They were no longer about manoeuvres or artillery but instead, by joining the CHoO, the grievor had become an adjutant to the CHoO commander, and her duties were not administrative in nature. In cross-examination, Ms. Maynard indicated that it had been up to the grievor to inform her that her reserve unit and duties had changed.

[20] Ms. Maynard testified that in this case, a change of reserve units would not have caused any problems had the duties remained operational. However, according to her, the situation was different in this case because, by becoming an adjutant to the lieutenant colonel commanding the CHoO, the grievor became an advisor to the CHoO commander. Thus, the facts on which Ms. Maynard and Ms. Laurin had based their decision that the grievor could be a counsel and reservist and that assumed that she would carry out duties involving manoeuvres and artillery changed when she became an advisor on files for the lieutenant colonel and after she did not advise the employer at any time of that important change.

[21] On that point, Ms. Maynard stated that an adjutant’s duties are similar to those of an executive assistant to the reserve commander. According to her, an adjutant also has administrative duties that consist of, for example, dealing with military

members'/reservists' grievances. According to Ms. Maynard, such grievances first go through the adjutant before being submitted to the lieutenant colonel.

[22] Under the circumstances, Ms. Maynard testified that because the grievor was involved in the process for grievances that could potentially come before the Board for review, her adjutant duties placed her in a conflict of interest or at least in a perceived conflict of interest, according to Ms. Maynard, and that perceived conflict also undermined the Board's credibility, which sought by all means to be seen and perceived as completely independent of the CF and the DND.

[23] Returning to the context before the termination, Ms. Maynard testified that on August 16, 2010, and later, on February 3, 2011 (Exhibits E-8 and E-9), the grievor asked her for leave with income averaging for February 21 to March 25, 2011. Ms. Maynard indicated that the grievor had made that type of request during the two preceding years and that it had been granted to allow her to participate in military exercises outside Ottawa.

[24] However, Ms. Maynard affirmed that in August 2010 and later, in February 2011, she was not able to approve the grievor's request because, since a pilot project had been implemented, the number of files to be referred to the Board had doubled. Thus, for operational reasons, the grievor's presence might have been required. Ms. Maynard indicated that although she was not able to grant the leave with income averaging that the grievor requested for February 21 to March 25, 2011, nonetheless, on February 3, 2011, she advised the grievor that if, for medical reasons, her doctor was of the opinion that she had employment limitations, the employer would respect the doctor's recommendations (Exhibit E-9). On that point, Ms. Maynard emphasized that given that the grievor had two dependent children, she sometimes had to miss work, and that the employer did not always ask her to provide a medical certificate, instead letting her make up the hours later.

[25] Ms. Maynard testified that the grievor informed her in a February 25, 2011, email that her doctor recommended a work stoppage from February 28, 2011, to March 25, 2011 (Exhibit E-11). Since the grievor had no sick leave left, Ms. Maynard agreed on February 24, 2011, to advance sick leave to her because, according to Ms. Maynard, she had no reason at that time to doubt that the grievor needed it

(Exhibit E-10).

[26] In cross-examination, Ms. Maynard agreed that on February 3, 2011, the grievor requested leave with income averaging as an accommodation (Exhibit E-9). However, according to Ms. Maynard, the grievor never submitted an accommodation request as such to her but instead first submitted a request for leave with income averaging, which was refused, and then duly submitted a request for sick leave, which was granted. Ms. Maynard submitted that, under the circumstances, she never had to rule on a request for accommodation as such (Exhibit G-7).

[27] Thus, Ms. Maynard testified that in March 2011 she realized that immediately after the start of the grievor's sick leave, the grievor planned to take part in a military exercise in Gogama, in northern Ontario, although she was on paid sick leave from her employer. For Ms. Maynard, the grievor carrying out reserve activities during her sick leave represented a serious problem, particularly as the grievor had never spoken to her about it.

[28] In response to counsel for the grievor, Ms. Maynard agreed that following her suspension on March 16, 2011, the grievor volunteered to be examined by Health Canada, but the employer refused her proposal. Ms. Maynard affirmed that when she received the medical certificate dated February 23, 2011, the only thing indicated was that the grievor could not work from February 28 to March 25, 2011. No question arose of "[translation] other therapeutic work." Ms. Maynard emphasized that the grievor never told her that going to the exercise in Gogama would have a therapeutic effect; nor did the grievor inform her that she would work for the reserve during her sick leave.

[29] When questioned about Dr. Bordeleau's June 1, 2011, letter (Exhibit G-13), Ms. Maynard stated that she had never seen it before. On that point, counsel for the employer objected to that letter being submitted on the grounds that, on one hand, it was also the first time he had seen it, and, on the other hand, it had been written on June 1, 2011, after the suspension in March 2011 and the termination on April 20, 2011. I allowed Dr. Bordeleau's letter to be submitted and took counsel for the employer's objection under reserve. Note that the evidence also revealed that the letter was not filed during the grievance process.

[30] In her testimony, Ms. Maynard also explained that Board members have access to the Board's computer system. Everyone, including the grievor at the time, has an account on the Board's system, which its information technology group manages. All Board files are on that system; it is its intranet.

[31] Ms. Maynard indicated that when she started at the Board in 2006, she realized that only two or three employees had access to the DND intranet site as well as the Board's intranet. The DND administers that system, the Defence Wide Area Network ("DWAN," or "RED" in French). Given that Board counsel, including the grievor, occasionally needed to consult documents for their work such as DND directives, policies and regulations on the DWAN, she asked that each counsel individually complete a request to access the DWAN system via a Board DWAN account. Thus, as of 2008, Ms. Maynard indicated that her counsel had two computer accounts, one on the Board's intranet and one for accessing the DND intranet system, i.e., the Board's DWAN system.

[32] Thus, according to Ms. Maynard, the Board's operations employees and counsel had two computers on their desks, with two accounts, one for work done on the Board's intranet, and the other to connect to the DND intranet system, the DWAN. Ms. Maynard emphasized that for everyday work, the Board's employees used the Board intranet system, not the DWAN, which was used only occasionally, when they wanted to consult a DND reference document. It is important to note that, and this will be mentioned later, the grievor, as a reservist, also had access to the DWAN system through a military account that the reserve assigned to her for its purposes. Thus, in her case, she had a Board intranet account, a Board DWAN account, which was to be used only occasionally for research purposes in her counsel work, and another DWAN account, as a reservist.

[33] As for the facts about the inappropriate use of the Board's DWAN system that led to the grievor's termination, Ms. Maynard stated that just before Christmas 2010, she realized that the grievor was spending a lot of time using the Board's DWAN system, which should have been used only exceptionally. Ms. Maynard testified that she raised it with the grievor, who apparently replied that she was having problems with the Board's intranet system and that the problem was reported to the Board's

computer technicians. Ms. Maynard indicated that despite her intervention, she later noted that the grievor continued to regularly use the Board's DWAN system. Ms. Maynard affirmed that she later understood that the grievor was using the Board's DWAN system instead of its intranet system because it allowed her to use just one account for both her counsel work and her reservist work.

[34] Ms. Maynard agreed that although, effectively, problems occurred with the Board's intranet system, nonetheless, she noted that in February 2011, the grievor was still regularly using the Board's DWAN system instead of its intranet system. Ms. Maynard testified that she then again raised the issue of using the Board's DWAN system with the grievor, who replied that because she had begun her work on Federal Court decisions on the Board's DWAN system, it was more practical for her to continue on that system, but that she would stop using the Board's DWAN system once she completed her work.

[35] Ms. Maynard testified that that she allowed the grievor to complete the Federal Court decisions work but that the grievor was to use the Board's DWAN system only exceptionally. Ms. Maynard mentioned that, among other things, she was concerned by the use of the Board's DWAN system because, unlike the Board's intranet system, which was rated Protected "B", the Board's DWAN account was rated Protected "A" and therefore was less secure.

[36] Ms. Maynard testified that on Friday, February 25, 2011, just before going on her sick leave, which was to be from February 28, 2011, to March 25, 2011, the grievor sent her the report on the Federal Court decisions that she had been asked for in April 2010 and that was part of the grievor's performance objectives for 2010-2011. Ms. Maynard indicated that she asked the grievor in April 2010 to prepare a report covering about seven Federal Court judgments that mentioned the Board.

[37] Ms. Maynard indicated that when she received the report on February 25, 2011, she realized that the number of hours that the grievor claimed to have put into producing the report was too high compared to what was requested. Ms. Maynard testified that she questioned whether the time spent using the employer's system was used more for personal use or to do reserve work on Board working hours. On that point, Ms. Maynard indicated that the grievor's working hours were normally between

08:30 to 09:30 and 16:30 to 17:30.

[38] Ms. Maynard indicated that she then contacted Mr. André Pilon from the DND's information technology group on February 28, 2011, when the grievor began her sick leave, to have him check as to whether the grievor had used the Board's DWAN system to do Board work or whether, instead, the grievor had used that system to do work related to her reservist duties. Ms. Maynard testified that Mr. Pilon apparently confirmed that the grievor's use of the Board's DWAN system was not related to her Board work but that she had exchanged several emails with reserve members from her account on the Board's DWAN system. Ms. Maynard indicated that she then asked Mr. Pilon to provide her with copies of the emails in question. According to Ms. Maynard, Mr. Pilon apparently replied that to do that he would need to interrupt the grievor's access to the Board's DWAN system but that, however, he could not do it at that specific time as the grievor was using the Board's DWAN system for her reserve dealings at the very moment he was speaking with Ms. Maynard. Ms. Maynard testified that she was surprised to learn that the grievor was using the Board's DWAN computer system that day as it was supposed to be used only exceptionally. Furthermore, on that day, February 28, 2011, the grievor was actually on sick leave until March 25, 2011, and therefore should not have been working.

[39] Ms. Maynard testified that she received copies of the emails in question from the grievor and that after the investigation, the grievor's access to the Board's DWAN system and its intranet system were permanently cancelled on or about March 8, 2011 (Exhibit E-16). Ms. Maynard testified that Mr. Kevin Bouchard from the DND information technology service brought a copy of all documentation, including emails and documents that the grievor had prepared, sent or received on the Board's DWAN system while employed by the Board. According to Ms. Maynard, the vast majority of it was documents or correspondence between the grievor and her reserve unit and was in no way related to her Board work.

[40] Ms. Maynard indicated that she consulted the annual leave file for April 1, 2010, to February 28, 2011, and that she realized that, for example, on November 29, 2010, the grievor had claimed one day of sick leave (Exhibit E-20), while a pay stub from the reserve showed that she had also claimed pay for that same day, when she claimed to

be sick (Exhibit E-23). According to Ms. Maynard, that translation work, about a political candidacy, was in no way related to the grievor's Board work (Exhibit E-24).

[41] Throughout her testimony, Ms. Maynard filed as evidence many emails that the grievor prepared or that were addressed to her about her reservist duties that were in her Board DWAN account. Ms. Maynard testified that she received copies of those emails and documents from Mr. Bouchard following an information request that she submitted on March 2 and 8, 2011 (Exhibit E-16). For example, Ms. Maynard referred to Exhibit E-27, which shows that on February 17, 2011, during working hours, the grievor sent her reserve colleagues a list of things to do to prepare for the exercise in Gogama to be held in March 2011.

[42] Ms. Maynard also emphasized that the February 17, 2011, email was sent from the Board's DWAN account, that the address at the top of the page indicates that the email is from the "CFGB," i.e., the "Canadian Forces Grievance Board," and that on page 2, it indicates the Board office telephone number. According to Ms. Maynard, that risked suggesting to the email's recipients that the Board was behind it. For Ms. Maynard, as well as being an inappropriate use of the Board's DWAN system, it was an example of the Board's independence being compromised.

[43] Ms. Maynard also pointed out that the fact that the grievor signed "CP" or sometimes "[translation] Adj't" clearly showed that she was aware that by using the Board's DWAN system, she risked a misunderstanding as to her role and the Board's in that exchange and that she wanted to be clear that she was not acting as counsel but as a reservist. According to Ms. Maynard, the pages of Exhibits E-32, E-42, E-46, E-47, E-50, E-51, E-52, E-53, E-62, page 4, and those following, are further examples in which the grievor exchanged emails with reserve members from the Board's DWAN account but in which she was well aware that she needed to sign "CP" for captain so that her contacts would know that she was acting as a reservist.

[44] In her testimony, Ms. Maynard emphasized that the grievor knew perfectly well that she was using the Board's DWAN account, not her military DWAN account, because doing so was most practical for her. Ms. Maynard referred to the March 2, 2011, email from the grievor to Mr. Mario Laurin of the information technology group on the DND's military side in which the grievor clearly indicated that she was

voluntarily using the Board's DWAN account both for her work as Board counsel and for her reservist duties with the CHoO to avoid duplicating emails (Exhibit E-76). For the grievor, having two accounts was more difficult to manage and could have led to confusion. For Ms. Maynard, the grievor knowingly used the Board's DWAN account for her exchanges with reserve members. Exhibits E-76 (the March 2 and 3, 2011, emails) and E-77 read as follows:

From: Pouliot JL @ MND CFGB @ Ottawa-Hull
Sent: Thursday, 3, March, 2011 12:16 PM
To: Henningsen PO2 NCM @ CH of O @ Ottawa-Hull
Cc: Laurin M @ 2 ASG Sig Sqn Det Ottawa @ Ottawa-Hull
Subject: FW: Pki request

Importance: High

PO2 Henningsen,

I don't understand the problem here - I have a DND DWAN account and have the system access I need to both my Reserve unit and day job accounts.

Why would I need two?

I also have a level III Security Clearance with DND both as a civilian and as a military officer?

So I am not sure why we would do all this extra work just so I can get issued a PKI card to do my job?

Please follow up with your contacts and advise.

Thx,

CP

From: Laurin M @ 2 ASG Sig Sqn Det Ottawa @ Ottawa-Hull
Sent: Wednesday, 2, March, 2011 11:48 AM
To: Pouliot JL @ MND CFGB @ Ottawa-Hull
Subject: RE: Pki request

Please complete those form again and they have to create another accmpt to use your pki with the army.

This form is for your new account to be complete by your ISSO

PO2 NCM Henningsen 990-6207
<http://lfcms.kingston.mil.ca/Default.aspx?sectionID=143000440004799&type=D>

This form is for your pki << File: PKI Request Form - DND 2369.pdf >> with your pri XXX not DXXXXXXXX

Thank you.

From: Pouliot JL @ MND CFGB @ Ottawa-Hull
Sent: Wednesday, 2, March, 2011 11:16 AM
To: Laurin M @ 2 ASG Sig Sqn Det Ottawa @ Ottawa-Hull
Subject: RE: Pki request

Hi,

I am a civilian employeed during the day and a Reservist with the Cameron Highlanders of Ottawa at night.

I keep only the one DWAN account and use it for both jobs to avoid duplication of e-mail traffic, having to manage two accounts and to avoid confusion.

The request for PKI was staffed for access as the Regimental Adjutant with the Camerons and you have my correct service number.

My PRI (ending in XXX) would only be used for matters relating to my civilian employment for which I have a separate encryption key.

Does this clarify the situation for you?

...

From: Pouliot JL @ MND CFGB @ Ottawa-Hull
Sent: Monday, 25, October, 2010 12:11 PM
To: Clark Capt LM @ 2 ASG HQ@Petawawa
Cc: Pouliot MWO CJFP@2 ASG HQ G1 Ops@Petawawa; Henningsen PO2 NCM@CH of O@Ottawa-Hull
Subject: RE: More CF 98 Info

I am a class A reservist with the Chof O and a full time civilian employee with the Public Service.

Rather than manage two DWAN accounts, it is easier to have the one, but I can assure you that I am a Capt and the Adjt with the CHofO.

Also, because of mailbox management issues (mine is currently almost full), can you fwd the incrypted file to our unit Chief Clerk: PO2 Henningsen - CC to this e-mail.

She is on leave today, but will be able to look at it tomorrow.

Thanks,

CP

From: Clark Capt LM @ 2 ASG HQ@Petawawa
Sent: Monday, 25, October, 2010 12:06 PM
To: Pouliot JL @ MND CFGB @ Ottawa-Hull
Cc: Pouliot MWO CJFP@2 ASG HQ G1 Ops@Petawawa
Subject: More CF 98 Info

Hello Capt Pouliot,

I have rec'd more info and would like to send to you encrypted; pls advise if you plan to get a PKI card so I can send protected info to you electronically. If not, I will mail the info to you as supplemental material to the letter that was mailed out to you last Friday.

I am also curious as to why Outlook does not show your rank or that you work at CHoO?

Thanks,

Clark, L.M. (Lisa)

[Sic throughout]

[45] According to Ms. Maynard, the fact that in July 2010 the grievor indicated in one of her out-of-office messages that she should be contacted through her Hotmail account for all messages that were not related to Board business clearly showed that she knew perfectly well that her reserve emails were normally sent to her at her Board DWAN account (Exhibit E-78). For Ms. Maynard, the additional fact that in September 2009, in an email from a CF member to the grievor, this time as Board counsel (not as a reservist), she signed "Jennifer" rather than "CP" clearly showed again that she differentiated and that she knew that she was using the Board DWAN account for her work both as counsel and as a reservist. Thus, she adapted her signature depending on the email's subject. If the email's subject was a grievance before the Board, she signed "Jennifer"; if it was about her reserve activities, she signed "CP" for

captain (Exhibits E-79 and E-80). In cross-examination, Ms. Maynard agreed that she did not intervene in June 2010 when she received a copy of an email from the grievor to a reserve colleague using the Board's DWAN account (Exhibit G-3).

[46] Ms. Maynard also testified that the investigation revealed that in addition to the emails exchanged between the grievor and reserve members, the grievor worked on several documents during Board business hours that were not related to her work as counsel but were instead related to her reservist duties. According to Ms. Maynard, Exhibit E-29 refers to the CHoO file, and Exhibit E-31 provides details about documents found in that CHoO file. All those documents are related to the grievor's reservist work. According to Ms. Maynard, not only should the grievor not have done that type of work, but also those military documents also should never have been in the Board's DWAN account.

[47] Ms. Maynard also stated that page 2 of Exhibit E-31 refers to "ROG," meaning "Redress of Grievance," which clearly shows that the grievor, who was counsel, put herself in a conflict of interest by being involved, as a reservist, in affairs that could potentially have come before the Board. According to Ms. Maynard, as a reservist, the grievor should never have worked on or been involved with CF members' grievance files.

[48] On that point, Ms. Maynard referred to Exhibits E-4, E-33 and E-35, which, according to her, show that the grievor was involved in files related to military members' applications for relief, which is further proof that she was in a conflict of interest. Ms. Maynard emphasized that the grievance mentioned in Exhibit E-35 about "Release Sgt B" is exactly the type of file that could be the subject of a grievance before the Board. For Ms. Maynard, Exhibits E-36, E-37, E-38, E-40, E-43, E-46, E-61, E-66, E-71, E-95 and E-96 are more examples of the grievor's involvement in her reserve adjutant role in claims or grievances by her CHoO unit members that could have come before the Board for review and recommendation. Among other things, Ms. Maynard also referred to Exhibit E-64, which deals with a relocation problem encountered by a member of the grievor's CHoO reserve unit. According to Ms. Maynard, any grievance dealing with the relocation of a CF member can come before the Board for analysis and recommendation. Thus, Exhibit E-64 should never have been in the file in the grievor's

Board DWAN account. In cross-examination, Ms. Maynard agreed that it is possible for a Board counsel to disqualify himself or herself if a grievance is from a military member of his or her reserve unit.

[49] In response to counsel for the grievor, who asked Ms. Maynard about the other documents that show that the grievor was in a real or potential conflict of interest in her duties as Board counsel, Ms. Maynard referred to the following exhibits, in this order: E-70, E-69, E-68, E-67, E-65, E-64, E-62, E-56, E-55, E-48, E-47, E-44, E-41, E-39, E-34, E-32 and E-28.

[50] At this point, it is important to note that in the interests of efficiency and to facilitate the presentation of evidence with respect to the employer's allegation that the grievor allegedly used her Board DWAN system account to exchange emails and to work on reserve documents, the parties agreed at the hearing that all emails and attachments that the employer filed in support of its arguments that the grievor used her Board DWAN system account for reserve unit work during working hours represent only a sampling of the evidence that it gathered during its investigation. The parties agreed to the following wording on January 6, 2014, at 13:45:

[Translation]

The parties agree that Ms. Pouliot sent and received at least 1445 emails and attachments about her reservist duties between September 2010 and March 16, 2011, similar to the emails in Exhibit E-32, at page 4, with the signature block "CP" and her office telephone number. The parties also agree that those emails were sent from and received in the DWAN system (CFGB account).

Ms. Pouliot admitted that she sent and received emails and attachments about her reservist duties using her CFGB account on the DWAN system during working hours and that on some days, the number of those emails was large.

[51] For Ms. Maynard, even the grievor acknowledged that she spent most of her time at the Board working for the reserve. On this point, Ms. Maynard referred me to Exhibit E-44, in which the grievor admits that her reservist work is beginning to take up too much of her time. Exhibit E-44 reads as follows:

...

Can we line something up to meet and go over the consolidated list on a Tuesday night if you/your staff are avail. As you saw at our last mtg, I work with a notebook and not a spreadsheet for now - the target keeps moving too fast for me to nail it down to a spreadsheet yet... But I am getting there!

Also, my part-time job is starting to spill over rather conspicuously into my day job and I am maxed out on weekday commitments right now with supervising our full time NES/Rel team - spent my lunch working on the ROG and 2 hours at the post office yesterday after work registering 65 Notification letters and dropped in again on them this morning to hand over the bar code tags/make sure things stay on track... We have great momentum going on that front right now and I want to capitalise [sic] on it as best I can.

...

[52] Ms. Maynard testified that as early as February 18, 2011, the grievor had planned to take part in manoeuvre exercises named Gogama for her reserve unit in northern Ontario on March 13, 2011, during the same period when she would be on sick leave. According to Ms. Maynard, the grievor booked her airline reservation on February 18, 2011, and planned to leave on March 13, 2011, while on sick leave (Exhibit E-25). Ms. Maynard indicated that the grievor never told her that she would participate in exercises with her reserve unit in Gogama. According to Ms. Maynard, she learned that information during her investigation in March 2011, at the same time as she learned that the grievor was then part of a new reserve unit, the CHoO, and that she was an adjutant in that unit, meaning that her duties had become administrative and not operational. In cross-examination, Ms. Maynard emphasized that the grievor never told her that an exercise such as Gogama was therapeutic for her but that the grievor instead stated that it helped her to “[translation] take a break and change the air.”

[53] Ms. Maynard testified that the grievor cancelled her airline ticket and her participation in the Gogama exercise on March 11, 2011 (Exhibit E-72), immediately after she learned that she was under investigation for, notably, working while on sick leave (Exhibit E-73). As for the days on which she allegedly worked and was paid by the reserve when she was already being paid by the Board, Ms. Maynard indicated that on August 19, 2011, the grievor’s representative agreed that the grievor was actually paid

for two days on which she worked for the reserve while on sick leave that had already paid by the Board (Exhibit E-74).

[54] Ms. Maynard also testified that she discovered during the investigation that on February 23, 2011, the grievor, who was then preparing to go on sick leave from February 28, 2011, to March 25, 2011, informed her reservist colleagues that she would be prepared to translate for them beginning on the first day of her sick leave (Exhibit E-24). According to Ms. Maynard, that translation work was in no way related to her Board counsel work. Additionally, the day before going on her sick leave, the grievor still seemed very involved with and was doing work for the reserve (Exhibits E-57 and E-58). Ms. Maynard also indicated that she discovered that on March 7, 2011, while the grievor was on sick leave, she continued to do reserve work by exchanging emails with her reserve colleagues and agreeing to attend meetings with them (Exhibits E-26, E-28, E-32, last page, E-41, page 1, and E-60, page 2).

[55] When questioned as to how she would react were the grievor reinstated, Ms. Maynard replied that it would be extremely difficult for her because the team of three counsel under her supervision is very small and that she found that the grievor lied to her or at least “[translation] played with the truth.” Ms. Maynard emphasized that she always accommodated the grievor by giving her a certain amount of flexibility in her work hours and by advancing her sick leave. For Ms. Maynard, the grievor should have spoken to her and checked with her since Ms. Maynard’s office and the grievor’s were about 15 feet apart and they saw each other several times a day. For Ms. Maynard, the grievor’s conduct was incompatible with that of counsel who must provide legal opinions. According to Ms. Maynard, the grievor’s conduct irreparably broke the relationship of trust between her and her employer. On that point, Ms. Maynard admitted in cross-examination that the grievor’s performance evaluations had always been positive (Exhibits G-1 and G-2).

[56] Mr. Bouchard was the employer’s second witness. Since April 2010, he has been responsible for applying computer systems security policies on the DND’s civilian side at the CS-02 group and level. Before that, Mr. Bouchard was in the military police and worked in the information technology field. He explained that his duties consisted of monitoring the system to identify violations.

[57] Essentially, Mr. Bouchard affirmed that both the civilian and the military sides regularly use the DWAN system, including DND reserves. He indicated that the DWAN system is accessed on a “need-to-know basis.” Although the DWAN system is within the DND, some other organizations have access to it, such as the Board, which is one of the external organizations for which Mr. Bouchard is responsible. According to him, not everyone at the Board has an account that provides access to DND’s DWAN system. The Board decides who has access.

[58] Mr. Bouchard affirmed that if someone has two different functions, such as civilian and military duties, then that person must have two DWAN accounts, as each account has a different purpose, and each account must be used for its intended purposes. Thus, in this case, military information must be in one account, and civilian information must be stored and transferred from a Board DWAN account. Mr. Bouchard emphasized that what is civilian must not be “[translation] mixed” with what is military; as such, it would be inappropriate, for example, for a Board member to be confused with a member of the military.

[59] Mr. Bouchard testified that he became involved in the grievor’s file following a call from a colleague, Mr. André Pilon, who informed him that a Board member might be in a conflict of interest with their military duties. Therefore, Mr. Bouchard inspected the grievor’s DWAN account at the Board to check whether military activities were recorded in that account.

[60] Mr. Bouchard affirmed that he identified several military emails in the grievor’s civilian DWAN account. He mentioned Exhibits E-28 and E-32 as examples of emails that she would have exchanged using her Board DWAN account.

[61] Mr. Bouchard also indicated that Exhibit E-81 is a copy of documents that he found on the “Q” partition of the grievor’s Board DWAN account. He stated that on the left of page 1 of Exhibit E-81, the document refers to file “CHoO,” which is the reserve unit of which the grievor is a member. According to Mr. Bouchard, when that CHoO file is opened, several military documents become accessible (example on the right of Exhibit E-81, page 1), which were, at the time of his verification, in the grievor’s Board DWAN account. According to him, Exhibit E-81 also shows the date and time when she allegedly had access to those documents.

[62] As for Exhibit E-81 and all its attachments, Mr. Bouchard agreed that other than for those parts of Exhibit E-81 that indicate that the grievor is the document's author, there is no evidence that she worked on or modified the documents in Exhibit E-81 other than by saving them.

[63] Mr. Bruno Hamel was the employer's final witness. He has been the Board's chairperson since 2009. Before becoming the Board's chairperson, he stated that he had served in the CF for 28 years.

[64] Mr. Hamel indicated that the Board, in its current form, was created in 2000. It has approximately 35 employees and is divided into three sectors: operations (which includes legal services), corporate and members. Legal services includes three counsel and the general counsel, who is Ms. Maynard (Exhibit E-1). The Board is a quasi-judicial tribunal and is independent of the DND and the CF. Its mandate is to review grievances of members of the military in a completely separate and external context from that of the DND and the CF.

[65] The Board's role is to analyze and make recommendations to the chief of staff on the merits of grievances filed by CF members. Mr. Hamel explained that CF members, including those in the reserve, may file grievances against their commanding officers with respect to many issues, including discharge, salary, benefits, demotion, participation in political activities, harassment, etc. In such cases, if the member of the military is not satisfied with the remedy, he or she can refer the grievance to the chief of staff. With some exceptions, the commander-in-chief is required, before his or her decision, to refer the grievance to the Board for a review and recommendation. Therefore, the Board's role is to analyze grievances and make recommendations to the chief of staff for decisions. Mr. Hamel stated that in 85% of the cases, the chief of staff agrees in whole or in part with the Board's recommendations.

[66] In his testimony, Mr. Hamel greatly emphasized the Board's independent nature and that it is in no way part of the CF or the DND. On that point, Mr. Hamel stated that for all Board corporate affairs, as the chairperson, he deals directly with the central government agencies at issue, such as the Treasury Board, without going through the DND or the CF.

[67] Mr. Hamel affirmed that the Board's independence is its *raison d'être*. It is its foundation. For him, whether that independence is real or perceived, it must be preserved. It goes to the Board's credibility. He maintained that the independence issue is his main warhorse and that since being appointed Chairperson, he has sought to communicate and defend it, such as in his appearances before a House of Commons Committee in February 2011 (Exhibits E-83 and E-84). For him, it is surprising to see that despite his efforts, many military members still wrongly believe that the Board is part of the DND. Hence, much work remains with respect to that issue.

[68] Mr. Hamel indicated that he knew the grievor when they both worked at the Board. He was then her director. She worked as a grievance officer. He affirmed that things were very good between them. According to him, she was one of the best analysts in his portfolio at that time. She left and then returned to hold a counsel position with the Board.

[69] Mr. Hamel explained that he also left the Board and that he returned as its chairperson in 2009. The grievor was then already in her counsel position. He testified that he dealt with her on several levels. For example, he met with all his staff daily. Thus, in addition to discussing certain files with the grievor, he saw her almost every day, and together, they discussed all sorts of topics.

[70] Mr. Hamel affirmed that although everyday management was the responsibility of Mr. Price and Ms. Maynard, nonetheless, he knew the grievor very well and enjoyed working with her from both a personal and professional standpoint. He stated that he liked her analytical ability and straight talk. He emphasized that he never had any clashes with her and admitted in cross-examination that he had never had any problems with the quality or quantity of her work. Mr. Hamel indicated that she had a flexible schedule and that her work hours were between 07:00 and 17:00.

[71] As for the events that led to the termination, Mr. Hamel testified that in March 2011 Ms. Maynard advised him of allegations that the grievor had apparently worked while on sick leave and that she had used the Board's DWAN account to do reserve work. He indicated that he took those allegations seriously and that he asked that the grievor be relieved of her duties with pay on March 9, 2011, while the matter was investigated (Exhibit E-73).

[72] Mr. Hamel testified that on March 16, 2011, he concluded that the allegations were founded. Thus, he suspended the grievor without pay pending her submissions (Exhibit E-85), which were received on April 6, 2011 (Exhibit G-15). He stated that later, at the hearing of the grievor's grievances, her counsel indicated at that time that she exchanged only about 30 emails during her work hours at the Board using its DWAN system. He testified that he then requested the entire investigation file and realized that, on the contrary, she had exchanged the vast majority of the 2000 emails listed with reserve colleagues from her Board DWAN system account and that, in addition, the "Q" partition of the account contained approximately 50 files, including many documents related to her reservist work (Exhibit E-81).

[73] Mr. Hamel testified that after reading the comments in the grievor's response (Exhibit G-15), he concluded that he should dismiss her for the six reasons set out in his April 20, 2011, letter (Exhibit D-86).

[74] Going back to the April 20, 2011 letter, Mr. Hamel stated that although all the reasons set out in the letter justified the termination, some were serious enough on their own to merit termination.

[75] For example, according to Mr. Hamel, the fact that the grievor worked for the reserve while on sick leave paid by her employer and that she was preparing to attend a military exercise in Gogama during that leave was very serious. Although, in some cases, according to Mr. Hamel, it seems that the grievor was paid for the same time by the employer and by the reserve, nonetheless, it would be just as serious without the double remuneration (Exhibits E-22 and E-23).

[76] For Mr. Hamel, the fact that the grievor worked for the reserve while on sick leave was even more serious given that based on her false representations, the employer advanced her sick leave in good faith. For him, no equivocation is possible. In February 2011, Dr. Bordeleau concluded that the grievor needed to be off work. The consequence of that diagnosis was that she was to rest at home and to not work for another organization or leave home to take part in an exercise during that sick leave. For him, by doing so, she failed in her duty to be ethical and did not demonstrate integrity. She first planned to take leave with income averaging. But when, for operational reasons, she saw that that was not possible, she decided to take sick leave

to get there. Only on March 9, 2011, when advised that she was under investigation did she end her plan to travel to northern Ontario. In cross-examination, Mr. Hamel agreed that the employer had allowed the grievor to attend an exercise in the past that was similar to that in Gogama. However, he specified that the situations were different because first, the grievor had not been on sick leave, and second, her reserve duties had been closer to those of an infantry soldier and she had not held an adjutant position.

[77] When questioned by the grievor's counsel, who asked whether the employer was required to follow the opinion of a doctor who advises an employee suffering from anxiety to take part in a military exercise, Mr. Hamel replied in the negative, explaining that, for him, taking part in a military exercise is not simply an activity but is really employment. Either one serves in the reserves or one does not. Mr. Hamel emphasized that the reserve exists as a reinforcement for the regular force. It is true employment; reservists are paid. For Mr. Hamel, it would be wrong to minimize the work done in the reserves and to try to reduce that work to a simple activity. Being in the reserve is serious employment; it is not a place to "[translation] play ball."

[78] As for the grievor performing reserve work that was in no way related to her counsel work during Board working hours, Mr. Hamel maintained that that fact was also a determining element in his decision to dismiss her. For him, it was very serious misconduct, as it was not a matter of a few personal emails being exchanged during Board working hours. According to him, of close to 2000 emails found in her DWAN account, the vast majority were related to her reserve activities. Those emails were allegedly exchanged during Board working hours. Mr. Hamel maintained that in addition to those emails, the series of documents found on the "Q" partition of the grievor's Board DWAN account must be added that were also related to her reservist work. She also allegedly worked on those documents during her Board working hours (Exhibit E-81). In cross-examination, Mr. Hamel agreed that he allowed his employees to exchange personal emails during working hours as long as it was reasonable.

[79] Mr. Hamel also affirmed that the fact that the grievor used her Board DWAN account for her reserve affairs was also an element that, in itself, justified the termination. For him, access to the Board's DWAN account, which thus provides access

to the Internet and the DND intranet and allows for exchanges with CF grievors using an encrypted key (PKI), is a privilege strictly reserved to employees of the Board's operations group. Other employees do not have access. For Mr. Hamel, the grievor was aware that using the Board's DWAN was strictly limited to her Board work purposes. He indicated that she had signed a document to that effect in the past when she was a grievance officer (Exhibit E-87).

[80] Mr. Hamel emphasized that by using her DWAN account to exchange emails and documents with her reserve colleagues, the grievor infringed the Board's use-of-technology and security policies. According to him, the result of exchanging close to 2000 emails and documents with the reserve using her Board DWAN account is that the Board is now a depository of that information, which is in no way related to its mandate. At the hearing, Mr. Hamel indicated that he was very concerned about, for example, a request being filed under the *Access to Information Act* for data belonging to the CF that should absolutely not be part of the Board's inventory. For him, by her actions, the grievor imposed a responsibility on the Board for which it was simply not mandated.

[81] For Mr. Hamel, the fact that the grievor's email exchanges with her reserve colleagues using her Board DWAN account include a reference to the Board, i.e., "MND CFGB @ Ottawa-Hull [Ministry of National Defence Forces]," makes the offence even more serious because, at the very least, there is a risk that military stakeholders will conclude that the Board is part of the CF (Exhibits E-41 and E-42). For him, that goes against the very reason for the Board's mandate, which is its independence from the CF.

[82] On that point, Mr. Hamel dismissed the grievor's argument that she thought that she was using her military DWAN account in her reserve correspondence. He stated that he was convinced that she was fully aware when she used her Board DWAN account of the risk of confusion between the two entities, being the Board and the reserve. According to him, that also explains why, in many emails to her reserve colleagues, she signed, "CP". She wanted to make it clear at the time that she was acting as adjutant, not as counsel (Exhibits E-41, E-42, E-76 and E-77).

[83] Mr. Hamel maintained that the grievor's actions were irreconcilable with one of

her conditions of employment, which was to demonstrate integrity. He emphasized that she acted knowingly with respect to all the facts alleged against her. He affirmed that under the circumstances, he no longer has confidence in her, particularly as she held a counsel position. For him, someone holding a counsel position with a tribunal such as the Board must be squeaky clean. In this case, it went to the Board's reputation and credibility.

[84] Mr. Hamel also affirmed that the grievor's conduct led him to question the merits of allowing a reservist to be a Board employee at the same time. For him, she knew full well when she was hired that her double employment raised a sensitive issue. It had been up to her to advise her superior when she became an adjutant with the CHoO. She did not. In his testimony, Mr. Hamel reviewed an adjutant's duties, as represented in Exhibit E-88 found on the "Q" partition of the grievor's Board DWAN account. On this point, Mr. Hamel pointed out that he had also held an adjutant position, when he was with the CF in Bosnia. According to him, an adjutant's duties, such as those of the grievor with the CHoO, are similar to those of an executive director. He affirmed that, for example, an adjutant has supervisory duties and that in the grievor's case, reservists reported to her. He also maintained that an adjutant is the unit commander's advisor and that it must be remembered that grievances by reservists, as applicable, thus must go through the adjutant before being referred to the unit commander. If those grievances are not resolved, they must therefore be referred to the Board, where the grievor held a counsel position. For Mr. Hamel, by holding positions as both counsel and adjutant, she thus placed herself in a real or apparent conflict of interest.

[85] In cross-examination, Mr. Hamel indicated that although the adjutant work description does not specify processing grievances as a task as such, the fact remains that that task is covered by the catchall clause in paragraph "m" of Exhibit E-88. In addition, Mr. Hamel affirmed that he knew from his experience as an adjutant that processing grievances in the unit is part of any adjutant's duties. In his testimony, Mr. Hamel affirmed that he was convinced that in her adjutant role, the grievor gave advice on the merits of grievances. On that point, Mr. Hamel stated that he was basing himself on Exhibit E-92 (which is also the attachment to E-85) and attachment 5, which frequently refers to "ROG," or "Redress of Grievance." Thus, according to Mr. Hamel,

when an adjutant like the grievor handles an ROG for the commanding officer, it necessarily involves giving advice to the commanding officer about the grievance.

[86] Mr. Hamel testified that he always accommodated the grievor when she made such a request. For example, he affirmed that in the past he had allowed her to bring her children to the office and that he had allowed her to take part in military exercises while being paid. He maintained that at the time of the grievor's sick leave request in February 2011, the employer complied with the doctor's directives, which took her off work, plain and simple. For him, there was never a question of a request for accommodation other than allowing the grievor to be off work from February 28, 2011, to March 25, 2011.

[87] Mr. Hamel concluded his testimony by affirming that he also considered that the grievor being counsel was an aggravating factor. For him, the grievor, who had had police career and had become counsel, should have realized the scope of her actions. He admitted that he felt betrayed by her conduct and stated that he can no longer have confidence in her and that he and Ms. Maynard still doubt the grievor's candour, particularly given that, according to him, the grievor still does not seem to realize the seriousness of her conduct and that she has never expressed any remorse. Mr. Hamel indicated that in five years as Board chairperson, it was the first time he dismissed an employee.

B. For the grievor

[88] Dr. Marie-José Bordeleau testified for the grievor. Dr. Bordeleau has been a doctor since 1997 and practised at the family medicine clinic at the University of Ottawa during the period in question.

[89] Dr. Bordeleau affirmed that the grievor has been her patient since January 2003 and that she saw the grievor on February 23, 2011. Dr. Bordeleau testified that during that appointment, the grievor indicated that she was "[translation] feeling down lately," that she felt sad and that she had consulted a psychologist, who had referred her to Dr. Bordeleau. For her, although the grievor was not suffering from depression, nonetheless, she had symptoms of depression. Dr. Bordeleau then gave her a note for a medical leave for February 28, 2011, to March 28, 2011 (Exhibit E-11).

[90] Dr. Bordeleau affirmed that at the February 23, 2011, meeting, the grievor told her that she was planning to take a few days to carry out reserve work in northern Ontario (Gogama) in March 2011 during that medical leave. Dr. Bordeleau indicated that she agreed with the grievor being off her counsel work and spending a few days in the north as the grievor told her that she enjoyed that type of exercise and that it helped her relax. Dr. Bordeleau indicated that for her, the exercise in the north was work but was not full-time and was just for a few days. Dr. Bordeleau stated that she prescribed Ativan for the grievor, to help her sleep.

[91] Dr. Bordeleau indicated that she saw the grievor again on March 8, 2011, for a follow-up. According to Dr. Bordeleau, the grievor then began to feel better but was still not ready to return to work. Dr. Bordeleau reiterated that she knew that the grievor was to go on an exercise in the north for a few days and that that exercise would have a positive effect on the grievor's condition.

[92] Dr. Bordeleau testified that she saw the grievor again on April 7, 2011, that her psychological condition had deteriorated because of the events that occurred with her employer and that she was then on unpaid leave.

[93] In cross-examination, Dr. Bordeleau indicated that she never spoke to the employer about the grievor's health and stated that the symptoms identified during the visit on February 23, 2011, were caused in large part by the grievor's personal situation. Dr. Bordeleau stated that although the grievor was not in a crisis during that meeting, nonetheless, she seemed overwhelmed. As for the reservist work to be carried out in northern Ontario, Dr. Bordeleau indicated that when the grievor spoke with her about that exercise on February 23, 2011, Dr. Bordeleau did not think that it was work for which the grievor would be paid. Only on April 7, 2011, did she learn that the reserve would have paid the grievor for that exercise. Dr. Bordeleau indicated that her understanding of the exercise in March 2011 was that the grievor was going to northern Ontario, to an isolated area, and that she would spend a few days in a camp in the woods.

[94] Dr. Bordeleau testified that she did not remember whether the grievor told her that she would be doing translation work during her sick leave and that it is hard to say if doing management work can be stressful for a person on sick leave. As for the

draft letter contained in Exhibit E-90, at page 16, Dr. Bordeleau confirmed that the grievor prepared it but that Dr. Bordeleau finalized it and sent it to the employer on June 1, 2011 (Exhibit G-13). When questioned about what she meant in her June 1, 2011, letter when she stated: “[translation] From a medical perspective, the work was therapeutic for Ms. Pouliot . . .” and: “[translation] She was able to perform her reservist duties on March 3 and 7, 2011, during her absence from the office because that type of work did not involve the same intellectual demands as her work as counsel,” Dr. Bordeleau affirmed that for her, the exercise in the north was not work that required concentration or reading or writing documents. For her, it was physical work that was more of a pastime and that had a therapeutic effect for the grievor. Dr. Bordeleau concluded that although the grievor performed preparatory work before the exercise in northern Ontario, she is still of the same opinion.

[95] Ms. Lisa Ross also testified for the grievor. Ms. Ross is currently a DND military employee with the detachment sector computer system support group.

[96] Essentially, Ms. Ross affirmed that on February 8, 2008, as the grievor had not used her civilian account for 30 days, it would be cancelled unless she advised otherwise within 30 days (Exhibit G-20, second-last page). According to Ms. Ross, on February 20, 2008, the grievor called Mr. Pearce on the civilian side of the DND’s information technology branch to inquire about it; however, nothing in the file refers to their discussion (Exhibit G-20).

[97] According to Ms. Ross, a civilian request was then made to the information technology service on the DND’s military side to close the grievor’s military account (Exhibit G-21). Ms. Ross testified that although page 3 of Exhibit E-21 indicates that the client (the grievor) asked that her account be deleted, no indication exists that she asked to have her military account deleted.

[98] Ms. Ross testified that according to Exhibit G-21 (page 3), the military side of the DND’s information technology group received the request to close the grievor’s military account from Mr. Cory Dodds of the DND’s civilian information technology group at 11:42 on February 20, 2008.

[99] According to Ms. Ross, the grievor was not copied on that email (Exhibit G-21,

page 1). Ms. Ross testified that it is not normal for a class “A” reservist such as the grievor to ask to have her military account deleted. According to Ms. Ross, given that the correspondence about deleting an account was between the grievor and civilian employees at the DND, it must be concluded that the grievor was asking to have her Board DWAN account closed, not her military DWAN account (Exhibit G-21, page 3).

[100] In cross-examination, Ms. Ross agreed that following Mr. Pearce’s February 20, 2008, email, the grievor spoke with him and that she did not know the content of their conversation (Exhibit G-20, last page). Ms. Ross also indicated that because the civilian side of information technology was involved, it meant that the grievor wanted to close her civilian account, not her military account.

[101] Lieutenant Colonel Kelly also testified for the grievor. From 2010 to 2011, he was the CHoO reserve unit’s full-time commanding officer. When he arrived in September 2010, the grievor was already a part-time unit member.

[102] Lieutenant Colonel Kelly indicated that at the outset, he had a discussion with the grievor in which she mentioned to him that she was also Board counsel. According to him, she then allegedly told him of her discussions with Lieutenant Colonel Becking in 2007 with respect to the issue of conflict of interest.

[103] Lieutenant Colonel Kelly affirmed that he did not feel that any conflict of interest would arise if the grievor were both a reserve adjutant and Board counsel. He explained that two sections of the unit are for processing grievances. First is the process of filing a grievance, and second is the issue of the grievance’s merits. For him, although the grievor could have been involved by supervising someone responsible for filing a grievance, she was never involved in examining a grievance’s merits.

[104] Lieutenant Colonel Kelly indicated that to his knowledge, only two grievances existed when he arrived at the unit. According to him, no others were filed during 2010-2011. He also affirmed that it was not very likely that the grievor as part of her adjutant duties could have given orders that would have been the subject of a grievance by junior members of the military and that, regardless, he had the expertise needed to render a decision to determine a grievance.

[105] As for the March 2011 exercise in Gogama, the Lieutenant Colonel indicated that he had been its commander and that the grievor was to have taken part in it only for three days because she was having problems at home. Lieutenant Colonel Kelly testified that had the grievor gone on the exercise, she would have been in a command post in a heated tent, and she would have handled the tactical side of the mission and would have prepared orders for him. In cross-examination, he indicated that during the exercise in Gogama, the grievor would have had a small group of 5 or 6 people under her command and that the exercise lasts 24 hours, with 4 to 6 hours to sleep. Lieutenant Colonel Kelly also acknowledged that Exhibits E-97 and E-98 show the grievor's involvement in preparing the Gogama exercise.

[106] Lieutenant Colonel Kelly indicated that the Board tried to question him about the matter and that he wrote to it on May 2, 2011, to give his position. In that letter, he indicated notably that the grievor never gave him legal advice, that she was never in a conflict of interest, that her interactions with the reserve during her Board working hours were brief and that she was never paid (Exhibits G-22 and E-75).

[107] In cross-examination, Lieutenant Colonel Kelly indicated that it is possible that the adjutant would see the file were a grievance filed. Questioned about Exhibit E-95 on "ROGs," he affirmed that it seemed to him that in that email, the grievor told the other reserve members to become involved. On Exhibit E-96, about a grievance and a letter of authority to deal with a grievance, and in which the grievor was involved, the Lieutenant Colonel indicated that it was a form letter that he probably signed.

[108] The grievor was the last witness in this case. She has been a widow since 2005. Her husband, a member of the military, passed away suddenly in April 2005, two years after returning from Afghanistan. She was then left alone to raise her two girls, who are now 11 and 14 years old.

[109] The grievor explained that she began her part-time reservist career from 1985 to 1987. She then joined the CF full-time from 1992 to January 2001. She had to leave the CF in 2001 to care for her daughter, who was two years old at the time and had health problems. However, she continued her law education part-time. In 2005, when her spouse passed away, she held a PM-05 position at the Board.

[110] The grievor testified that after her husband's death, she left the Board to become more involved in the CF, which she considered her second family. In 2006, she also lost her father, with whom she had been very close and who had also served in the CF. She then held a PM-06 position as a civilian analyst with the CF. She indicated that Ms. Maynard contacted her in 2007. She had become general counsel and wanted to offer the grievor a position as Board counsel. The grievor accepted the offer and returned to the Board to work as counsel. She testified that at that time, she had already been a part-time reservist since 2006 with the 30th Regiment under Lieutenant Colonel Becking's command.

[111] The grievor affirmed that when she was hired as Board counsel, she discussed her reservist status with the Chairperson, Ms. Laurin, and Ms. Maynard. According to the grievor, at that time, her reservist status was seen as an asset for the Board counsel position. She indicated that she told Ms. Laurin that for her, being a reservist was very important, as it "[translation] nourished her as a person," and that if she had to choose between being a CF reservist or being in a Board counsel position, she would choose the reservist position.

[112] The grievor explained that she also raised the conflict of interest issue with Lieutenant Colonel Becking and that he understood the situation very well because he was a public servant and a part-time reservist. According to the grievor, Lieutenant Colonel Becking affirmed that in 30 years as a reservist, he had never had to process a grievance as a unit commander. She testified that he decided to write to Ms. Laurin on February 28, 2007, on his own initiative to explain the grievor's role in the reserve unit and the fact that she would not process grievances for members (Exhibit E-6). The grievor affirmed that Lieutenant Colonel Becking assured her that she would never be in a conflict of interest due to her reservist duties.

[113] The grievor testified that on five occasions in her counsel work, she visited Ms. Maynard to ask her to reassign complainant files that involved her friends or her late husband's friends. According to the grievor, Ms. Maynard allegedly told her at the time that if the situation arose too often, she would need to reconsider her reservist role.

[114] The grievor explained that she had been a CHoO member in the past. She

decided to return to it in 2009. Shortly after that, Lieutenant Colonel Kelly joined it as the unit commander.

[115] The grievor testified that she did not mention to Mr. Hamel in 2009 that her role and reserve unit changed since she was hired as counsel in 2007. However, she stated that when she started in the CHoO unit, she explained to Lieutenant Colonel Kelly that she held a Board counsel position. According to her, Lieutenant Colonel Kelly did not know of the Board at that time; she also explained to him the limitations in her reservist role due to being Board counsel and mentioned that because of her husband's death, her mental health needed consideration.

[116] The grievor objected to Mr. Hamel's description of an adjutant's duties, for which he produced a job description in his testimony. According to her, when Mr. Hamel carried out those duties, he was in the regular force, and in addition, he was posted to Bosnia, which explained that he might have been involved in the grievance decision process. According to her, her CHoO adjutant role was different because she had been only a part-time reservist and not posted abroad. She affirmed that she had in no way been Lieutenant Colonel Kelly's "[translation] right arm."

[117] In her testimony, the grievor challenged the employer's argument that she was in a conflict of interest when she dealt with reservists' claims or challenges that could have been the subjects of grievances that could have been referred to the Board.

[118] The grievor indicated that her adjutant work consisted of receiving correspondence addressed to Lieutenant Colonel Kelly and giving it to him in the evenings. Thus, according to her, Exhibit E-37 is simply a claim for water bottles. It is not a grievance. Exhibits E-38, E-46, E-93 and E-94 are all related to the same individual and the same matter. Although the three exhibits refer to a grievance, that grievance was filed before the grievor joined the CHoO and, regardless, it was never examined on its merits. She also stated that the reference in Exhibit E-38 that she was "... the unit officer responsible for staffing your ROG" simply meant that she was required to ensure that the grievance was recorded. For her, it did not mean that she was involved in the decision process on the grievance's merits.

[119] For the grievor, Exhibit E-39 is another example of a grievance that was already

processed when she arrived at the CHoO. As for Exhibit E-41, which refers to another grievance, she stated that she was not involved in determining that grievance. As for Exhibit E-48, which deals with a medical discharge, the grievor affirmed that, on one hand, it is not a grievance, and regardless, Lieutenant Colonel Kelly did not have the authority to deal with that request. For her, Exhibit E-42 is also not a grievance; instead, it is an email in which Lieutenant Colonel Kelly wishes to provide his opinion on a process for reservists.

[120] As for Exhibit E-96, which contains a draft letter to be signed by Lieutenant Colonel Kelly about a grievance, the grievor maintained that it is a registration of a grievance and that she would not normally handle that type of task. However, because a grievance must be dealt with quickly, as soon as it is filed, she explained that she simply forwarded the information to the person responsible for registering the grievance. As for the draft letter in Exhibit E-96, the grievor affirmed that she did not write it but acknowledged that she “[translation] worked on it.” In cross-examination, the grievor indicated that Exhibit E-64, entitled “Request for Redress of Grievance,” was not related to a grievance as such as the document was not signed or filed. However, she agreed that that type of document went through her as adjutant before reaching the Lieutenant Colonel for a decision.

[121] In terms of the allegation about her participation in the Gogama exercise in March 2011 while on sick leave, the grievor testified that she submitted a request for leave with income averaging when she was with the Board in 2007, which was approved. In August 2010, she submitted the same request to Ms. Maynard for the period from February 21 to March 25, 2011 (Exhibit E-8). The grievor indicated that she submitted that request because she had already used all her annual leave following her husband’s death. She felt that the leave would allow her to rest because she needed a “break,” particularly given that the winter is quiet at the Board.

[122] For the grievor, in December 2010, she thought she could still be granted leave with income averaging. At the same time, she testified that her personal situation had changed. She stated that in the fall of 2010, her two daughters, then 8 and 11 years old, began to have behavioural problems. They no longer wanted to go to school; one had difficulties with her academic performance, and it was very difficult. In

December 2010, she learned that one of her daughters had been assaulted. In her words, she stated that she was “[translation] floored” when she heard the news. Thus, she had to take her two daughters out of school. Although she was overwhelmed, she testified that she continued to work.

[123] The grievor indicated that Christmas 2010 was particularly difficult and that in January 2011, while she was still trying to find another school for her children, she also had to voluntarily place her children with parents and friends for two weeks. On January 27, 2011, as things had subsided, the children returned to stay with their mother. She testified that in January 2011, after all those events, she felt “[translation] destroyed.”

[124] The grievor agreed that she did not properly communicate her problems to Ms. Maynard during that period. She did not tell her that things were not going well and that she had major problems at home. The grievor indicated that she did not provide details to Ms. Maynard because she preferred to pretend that everything was fine. According to the grievor, she tried to hang on, thinking that her request for leave with income averaging would be granted. According to her, Ms. Maynard apparently suggested that she contact her doctor. On that point, several times at the hearing, the grievor mentioned that Ms. Maynard was “[translation] a good person.”

[125] The grievor testified that in February 2011 she continued to complete her work at the Federal Court but that she reduced her reserve activities. She also mentioned that she informed Lieutenant Colonel Kelly of her personal problems with her children because officers must reveal their physical and mental conditions to their superiors.

[126] The grievor admitted that she continued to work for the reserve even though she was on sick leave as of February 28, 2011. She explained that at that time, because of all her problems, she could not concentrate and do intellectual work such as counsel work. She affirmed that she was having problems concentrating and having difficulty preparing legal opinions, that she no longer trusted herself as counsel, and that she was questioning herself as a mother. She affirmed that she indicated to Ms. Maynard during that period that she did not feel up to giving legal opinions.

[127] The grievor explained that although she could not carry out her counsel duties

from February 28, 2011 to March 25, 2011, nonetheless, she was able to continue her reserve work. According to her, working with Lieutenant Colonel Kelly helped her. He reduced her duties and gave her confidence. He “[translation] picked her up.” She stated that working with her “[translation] military family” helped her overcome her fears. She felt that her reserve colleagues supported her. For her, working in the reserve was easy, while her Board work was more “[translation] detached and more professional.” In cross-examination, she admitted that she could not explain why she sought paid hours of work with the reserve at the same time as she was on sick leave for a month (Exhibit E-100). She reiterated that for her, the reserve activities pleased her and were easy and enjoyable.

[128] As for the Gogama military exercise, the grievor mentioned that Lieutenant Colonel Kelly decided that she would take part for only three days and that Dr. Bordeleau did not want her participating in that exercise day and night. The grievor indicated that in the end, she did not take part in the Gogama exercise because of her employer’s March 9, 2011, letter (Exhibit E-73).

[129] The grievor testified that she did not remember whether on February 18, 2011, when she received the airline ticket to the Gogama exercise, she was thinking about taking part in it (Exhibit E-25). In cross-examination, she admitted that she visited her doctor on February 23, 2011, once the tickets for the Gogama exercise were purchased (Exhibits E-11 and E-25).

[130] As for the work the grievor would have performed with the reserve before February 28, 2011, while on sick leave, she agreed that sometimes while home sick, she exchanged emails with reserve colleagues from her BlackBerry or laptop computer. She also admitted that on February 28, 2011, the first day of her sick leave, she went to the armoury and did work for the reserve (Exhibits E-41, E-60-E-91, page 10) and that she also did paid work for the reserve while she on sick leave on March 3 and 7, 2011. Although she also admitted that she did work for her reserve unit during her sick leave, such as exchanging emails on February 28, 2011, she specified that she often sent emails while walking using her BlackBerry. Although the grievor admitted that she exchanged emails with reserve colleagues in early March 2011 while on sick leave, she submitted that it relaxed her and indicated that none of that was work for her as she

was not paid and was not in uniform at that time (Exhibit E-91).

[131] When questioned about an accommodation request, the grievor replied that her request for leave for the month of March 2011 had not been an accommodation request. According to her, the parties did not refer to accommodation at that time.

[132] As for the grievor's use of the Board's DWAN system for her reserve activities, she testified that she never took any formal courses about using the Board's computer system. She also stated that her reserve unit provided her with a BlackBerry and a laptop computer and that in 2007, there were problems with the Board's intranet computer system, resulting in her needing to use the Board's DWAN system for her work. She indicated that she always had access to a military DWAN account as a reservist. According to her, as a reservist, it is essential to have access to such an account. She explained that two computers were in her Board office, one connected to the Board's intranet computer system and another, on a different table, to the Board's DWAN, which allowed certain Board employees, including her, to access the DND intranet computer network.

[133] According to the grievor, since the Board's employees had more limited access to its DWAN than reservists, she thus used the Board's DWAN system less often. So, when the question arose about deleting an account, she therefore thought it was her Board DWAN account being deleted, not her military DWAN account.

[134] When questioned about Exhibit E-15, which indicates that the client had asked that the military DWAN account be deleted, the grievor maintained that, in 2008, she believed that her Board DWAN account was to be deleted, not her military account. She explained that DND civilian information technology officials contacted her in February 2008 about an inactive account and that therefore she concluded that they wanted to deactivate her Board DWAN account because she did not use it very much. According to her, had they wanted to deactivate her military DWAN account, Ms. Ross and her colleagues from the DND's military side should have contacted her.

[135] The grievor agreed that it was unacceptable that after her military DWAN account was cancelled, the information from that account was saved to her Board DWAN account. For her, it should not have happened because the information from

her reserve unit is “[translation] sensitive” and should therefore not have been in the Board’s DWAN account. She emphasized that it was done without her knowledge and without her being able to notice the difference.

[136] On that point, the grievor emphasized that she did not know that after her military DWAN account had been deleted, the reserve files (Exhibits E-29 and E-31) were saved in her Board DWAN account. According to her, when she accessed those files, she believed in good faith that she was working from her military DWAN account, unaware that it had been deleted. She stated that because she used the same password for her Board and Military DWAN accounts, she did not notice any difference when using that password, even though her military DWAN account had been deleted.

[137] The grievor also explained that in 2010, she had two PKI cards, one for her Board DWAN account and the other for her military DWAN account. Those PKI cards were required for accessing protected information. According to her, those two cards were identical. She indicated that she simply used the wrong card when she used the Board’s DWAN account. Her intention was to use her military PKI card (Exhibit E-77).

[138] When questioned in cross-examination about why she questioned the justification for having two DWAN accounts, one for her counsel activities and one for her reservist activities (Exhibit E-76), the grievor replied that a difference existed between wondering if she might have two accounts and stating that she knew that she actually had two accounts.

[139] In her testimony, the grievor explained that although she exchanged personal emails with reserve colleagues, she always made up that time in the evening. She affirmed that thus, every time the employer maintained that she exchanged emails or worked on documents on behalf of the reserve during work hours, she always made up that time after work hours. She also testified that she was not the author of several of the documents found on the “Q” partition of her Board DWAN account (Exhibit E-64). In cross-examination, she indicated that most of the time, her reserve colleagues contacted her by email and that she made a mistake when she asked that they contact her by telephone during her Board work hours (Exhibit E-54, page 3).

[140] The grievor concluded that she should never have used the Board’s DWAN

account for her reserve activities but maintained that she was unaware of any of it. She also affirmed that she was never involved in grievance files while she was both Board counsel and a reservist. However, she agreed that she did so indirectly. In response to my question, she indicated that she is now a full-time CF member but is still asking to be reinstated to her Board counsel position.

III. Summary of the arguments

A. For the employer

[141] Counsel for the employer argued that the employer terminated the grievor's employment for the six reasons listed in Mr. Hamel's April 20, 2011, letter, which was preceded by his letters of March 9 and 16, 2011, in which he set out the allegations against the grievor.

[142] The six reasons listed in the April 20, 2011, letter are essentially that the grievor did the following:

- worked as a reservist while on sick leave;
- performed reservist work unrelated to her counsel work during Board working hours;
- contravened the Board's *Policy on the Acceptable Use of Information Technology*;
- contravened the Board's *Security Directives*;
- contravened the Treasury Board's *Values and Ethics Code for the Public Service*; and
- jeopardized and possibly compromised, undermined or damaged the Board's independence.

[143] Counsel for the employer generally maintained that even today, the grievor does not seem to realize the significance and seriousness of her actions. Throughout the procedure, she minimized the impact of her actions, and her defence, as a last resort,

was to plead that the employer was at fault because it did not accommodate her.

1. Working for the reserve while on sick leave paid by the employer

[144] For counsel for the employer, although all the reasons cited by the employer are serious, the simple fact that the grievor worked for the reserve while on sick leave was enough to merit termination.

[145] Counsel argued that in August 2010, the grievor requested leave with income averaging for February 21 to March 25, 2011. According to counsel, the grievor had used that type of leave in the past, among other things, to take part in a military exercise similar to the one in Gogama. However, in February 2011, for operational reasons, the employer refused her leave request. However, it indicated to her that if she had limitations due to her medical situation, it would comply with the doctor's recommendations (Exhibit E-9).

[146] Counsel for the employer noted that on February 18, 2011, the grievor received airline tickets by email from Ms. Sue London that permitted her to attend the military exercise to be held in March 2011 (Exhibit E-25). For counsel for the employer, that is a determining fact, and it must lead me to conclude that by February 18, 2011, not only was the grievor scheduled to take part in the military exercise to be held in Gogama in March 2011 but also that she continued to want to go. According to counsel, it is important to note that during that period, the grievor never advised the employer that she was still planning her Gogama trip.

[147] According to counsel, when the grievor saw Dr. Bordeleau on February 23, 2011, not only did she know that her leave with income averaging in March 2011 had been refused, but also, she continued to prepare for her trip to Gogama, since she had already received her airline tickets. She requested medical leave knowing that her airline tickets were already purchased, and thus, she planned to go to Gogama during her sick leave. Thus, according to counsel for the employer, although she might have mentioned to her doctor that she wanted to go to Gogama, she never said anything to her employer.

[148] Counsel for the employer also argued that the grievor did not mention

everything during her meeting with Dr. Bordeleau. For example, she never revealed that she would be doing administrative work during that week of military exercises in Gogama, thus leading the doctor to believe that the exercise involved only physical activities that would have relaxed her. According to counsel, for example, the grievor never revealed to Dr. Bordeleau the preparation table of things to do for the exercise in Gogama, which would have shown all the mental effort needed to put the logistics of the exercise in place (Exhibits E-97 to 98).

[149] According to counsel, Dr. Bordeleau's diagnosis could have been very different had she had all the information. Counsel for the employer also questioned the grievor's statement that she was in a crisis when she visited Dr. Bordeleau on February 23. According to counsel, if that were truly so, then the grievor would have immediately ceased work, and the doctor would also have ordered her off work starting that day. However, as the grievor and her doctor felt it was appropriate to wait another week before beginning the medical leave, on February 28, therefore, the situation was not very critical (Exhibit E-10). Counsel also submitted that at the hearing, the grievor raised for the first time the difficult situation that she and one of her daughters experienced and that that situation involving one of her children was never mentioned to her employer.

[150] Counsel for the employer also raised the fact that according to him, the grievor's testimony affirming that in February 2011 she was not well and that she asked Lieutenant Colonel Kelly to reduce her duties cannot be reconciled with the fact that she asked to work extra hours for the reserve, as shown in Exhibit E-100. For counsel, not only did the grievor want to work more for the reserve, but also, already in February, when she knew that she would attend the Gogama exercise from March 13 to 18, she indicated in Exhibit E-100 that she wanted to do more than the 16 hours of work already scheduled.

[151] Counsel also submitted that the grievor was also very willing to handle translation work for the reserve during her sick leave. For counsel, Exhibit E-24 clearly demonstrates that on February 23, 2011, the same day she saw Dr. Bordeleau and indicated that she was exhausted and not feeling well, she agreed to handle translation for the reserve, indicating that she was on leave for the first four weeks of March and

that she was prepared to give a lot of time to the reserve (Exhibit E-24).

[152] Counsel for the employer referred me to Exhibit E-49, which shows that on February 25, 2011, the day before leaving on her sick leave, the grievor was already planning to go to the reserve's premises to do work while on sick leave. For counsel, Exhibits E-41 and E-60 are further examples of the work the grievor did for the reserve while on sick leave.

[153] As for the argument that the employer did not accommodate the grievor by granting her the leave with income averaging that she had requested earlier, counsel argued that on February 24, 2011, the grievor indicated that she had to stop working, for medical reasons, as of February 28, 2011. As she did not have the medical leave needed to cover the period from February 25 to March 28, 2011, the employer advanced her the required leave (Exhibit E-10). No other request for accommodation was made. Thus, the employer met its obligations.

2. Using the Board's DWAN account for military activities, which contravened security policies and jeopardized the Board's impartiality and independence

[154] First, counsel for the employer maintained that the grievor was guilty of using her Board DWAN account for her reserve activities. For counsel, that practice was entirely unacceptable in this context because, on one hand, as Board counsel, she could not place military data and information in a Board account. Thus, according to counsel for the employer, by voluntarily allowing the transfer of such military data and information to the Board's account, she made the Board a trustee and made it responsible for that information, which made the Board vulnerable, simply from the perspective of the application of the *Access to Information Act*.

[155] In addition, in her reserve adjutant duties, the grievor was likely to deal with grievances that could have been brought before the Board for analysis and recommendation. For counsel for the employer, by using her Board DWAN account for military correspondence, she risked that her reserve colleagues would conclude that the Board was part of the DND or the CF when, for example, they read references in the emails to the "CFGB" (Canadian Forces Grievance Board or the Board) or read that the telephone number shown was the Board's. For counsel for the employer, that shed

doubt on the Board's independence and credibility in military members' eyes. In addition, the fact that in many cases the grievor signed "CP" at the bottom of emails when using the Board's DWAN account for her military affairs clearly indicated that she was aware of the risk of a misunderstanding, but she continued to use the Board's DWAN for military purposes, despite everything. For counsel for the employer, a real risk existed that military members with grievance files before the Board would conclude that Board staff consisted of members of the military, which seriously jeopardized the principles of impartiality and independence that are the Board's very foundation (Exhibits E-41 and E-42).

[156] With respect to the argument that the grievor cannot be held responsible for errors that the civilian side of the DND's information technology sector made, which closed her military account and thus, unknown to her, migrated all data to her Board DWAN account, counsel for the employer rejected the argument outright, submitting that, in the interests of efficiency, the grievor asked that her military account be closed and that she have only one account, her Board DWAN account. Counsel for the employer referred me to Exhibit G-20, page 2, which shows that the grievor was advised in February 2008 that she had to contact the civilian side of the DND's information technology sector or her account would be deleted. Counsel emphasized that the same page of Exhibit G-20 indicates that the grievor contacted it on February 20, asking about the situation. Counsel for the employer also referred me to page 3 of Exhibit G-20, which shows that, on February 20, Mr. Pearce emailed the grievor, indicating that her military account could be deleted. Counsel also referred me to Exhibit G-21, which, in his opinion, leaves no doubt about the grievor's intention to delete her military account on February 20, 2008. According to counsel, that all amply demonstrates that the grievor acted deliberately and knowingly when she asked to have her military account deleted, in the interests of efficiency. Counsel also referred me to Exhibits E-76 and E-77.

[157] Counsel for the employer pointed out that when she was a grievance officer, the grievor signed a document that stated in its introduction that using the Board's DWAN account was to be limited to Board activities (Exhibit E-87), and therefore, it could not be used for military activities, such as those of the reserve (Exhibits E-17 and E-18). In addition, according to counsel, Exhibit E-33, in which the grievor signed "CP" for

“captain” and in which she gave reserve members her Board telephone number, clearly shows that she knew that by using the Board’s DWAN account for reserve activities, she needed to identify herself with her title of captain so that her reserve recipients would know that they were dealing with her as a captain. According to counsel, the grievor surely noted that the “[translation] military signature block” was not there. Therefore, she should have concluded that the Board’s DWAN account was being used.

[158] For counsel for the employer, that also demonstrated that the grievor wanted reserve members to contact her at the Board’s offices about reserve activities. For counsel, those facts are very serious and clearly demonstrate that not only was the grievor aware of what she was doing, but also by voluntarily confusing her Board DWAN account and her military DWAN account as a reservist, she jeopardized the Board’s impartiality and independence. Counsel referred to Mr. Hamel’s testimony, in which he explained the efforts made to inform everyone that the Board was independent and that it had no ties to the military apparatus.

[159] Counsel for the employer also maintained that the grievor failed in her duty of loyalty and thus, by her actions, discredited her employer by not revealing in 2009 that her reservist duties had changed and that her new reserve duties were not limited to operational exercises. For counsel, when the grievor became CHoO adjutant, she became the right arm of the lieutenant colonel and therefore was or could have been involved in grievance files that potentially could have come before the Board.

[160] For counsel for the employer, the exchange of letters between the Board’s chairperson in 2007 and Lieutenant Colonel Becking clearly shows the employer’s concern that, when she was part of the 30th Regiment, the grievor not be involved in reserve duties that would place her in a conflict of interest when she worked as Board counsel (Exhibits E-6 and E-7). Counsel for the employer maintained that since the grievor’s duties changed when she became CHoO adjutant, it was up to her to advise her employer that her duties had changed. Counsel for the employer referred me to the adjutant job description, Exhibit E-88, which in his opinion clearly shows that it is not just a clerical position involving only note taking. For counsel, the job description shows the real danger of a conflict of interest or, at the very least, the appearance of such a conflict of interest between her duties in the reserve, in which she might have

been required to deal with grievances from reserve unit members, and her counsel duties.

3. The grievor performed work other than her Board counsel work

[161] For counsel for the employer, not only did the grievor know that she was using her Board DWAN account to exchange emails with the reserve, but also she spent most of her time during Board work hours handling reserve affairs rather than files under the Board's mandate.

[162] On that point, counsel for the employer returned to the fact that it was uncontested that from September 2010 to March 16, 2011, during work hours, the grievor received and sent at least 1455 emails about her adjutant duties and that similar to Exhibit E-32, those emails were sent or received on the Board's DWAN account. Counsel for the employer also submitted Exhibits E-45, E-51 and E-56 as additional examples. He also referred me to Exhibit E-99, which contains a list of reserve duties that the grievor allegedly carried out while working as Board counsel. Exhibit E-99 was found in the file in the grievor's Board DWAN account.

[163] Counsel also referred me to Exhibits E-29, E-31 and E-32, which are, in his opinion, further evidence that the grievor spent a very large portion of her time handling reservist duties instead of her Board counsel work. According to counsel for the employer, the proportion of work spent on her reservist role was such that the grievor seemed concerned by it when she indicated to a reserve colleague that her reservist work was starting to take up too much time, to the detriment of her counsel work (Exhibit E-44). Exhibit E-44 reads as follows:

...

Also, my part-time job is starting to spill over rather conspicuously into my day job and I am maxed out on weekday commitments right now with supervising our full time NES/Rel team - spent my lunch working on the ROG and 2 hours at the post office yesterday after work registering 65 Notification letters and dropped in again on them this morning to hand over the bar code tags/make sure things stay on track... We have great momentum going on that front right now and I want to capitalise [sic] on it as best I can.

...

[164] Counsel for the employer concluded by asking that I dismiss the grievor's grievance. In his opinion, it was proven that she worked as a reservist while on sick leave, that she spent a lot of time doing reservist work during her Board work hours, that she also knowingly used her Board DWAN account for reserve affairs and by doing so harmed the Board, which strives to be seen as independent of the CF and the DND, and that she migrated military information to a civilian organization, i.e., the Board. Counsel also argued that she never revealed to her employer that she had changed duties and reserve units, which placed her in a conflict of interest with her counsel work. For counsel for the employer, her deliberate actions resulted in the employer losing confidence in her. The relationship of trust was irreparably broken.

[165] In support of his arguments, counsel for the employer referred me to the decisions in *Halifax Herald v. Halifax Typographical Union, Local 30130 (Bulmer Grievance)*, [2012] N.S.L.A.A. No. 1 (QL); *General Electric Canada v. CAW, Local 524 (Humphries Grievance)*, [2009] O.L.A.A. No. 77 (QL); *Way v. Canada Revenue Agency*, 2008 PSLRB 39; *Kohler Ltd. v. Hytec Employees Assn. (Funk Grievance)*, [2007] B.C.C.A.A.A. No. 246 (QL); *Goyette v. Treasury Board (Solicitor General of Canada - Correctional Service of Canada)*, 2002 PSSRB 107; *Royal Columbian Hospital v. Hospital Employees' Union (Saligumba Grievance)*, [2001] B.C.C.A.A.A. No. 39 (QL); *Kenroc Tools Corp. v. U.S.W.A.*, [1990] O.L.A.A. No. 172 (QL); *McKinley v. BC Tel*, 2001 SCC 38; *Kennedy House Youth Services Inc. v. O.P.S.E.U., Loc. 585* (1996), 53 L.A.C. (4th) 54; *Pagé v. Canada (Attorney General)*, 2009 FC 1299; *Ontario Public Service Employees Union v. Ontario (Ministry of Community and Social Services) (Lall Grievance)* (2012), 216 L.A.C. (4th) 184; *Brazeau v. Deputy Head Department of Public Works and Government Services*, 2008 PSLRB 62; *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35; *Paneswar v. Best Buy et al., (No. 2)*, 2013 BCHRT 22; *Cann v. Rona Inc.*, 2012 HRTO 754; *Crowley v. Liquor Control Board of Ontario (LCBO) et al.*, 2011 HRTO 1429; *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68; *Skytrain British Columbia Rapid Transit Co. v. Canadian Union of Public Employees, Local 7000 (Olsen)*, [2009] B.C.C.A.A.A. No. 85 (QL); *Matheson v. Okanagan Similkameen School District No. 53 and Collis*, 2009

BCHRT 112; and *TRW Linkage & Suspension Division v. Thompson Products Employees' Association*, [2005] O.L.A.A. No. 658 (QL).

B. For the grievor

[166] Counsel for the grievor first emphasized that to meet the balance of probabilities standard, the employer's evidence had to be clear and convincing, which it was not, in this case.

[167] For counsel for the grievor, the employer built a house of cards that had no foundation. It did not meet its burden of proof by demonstrating that the grievor carried out reproachable actions and that everything was done knowingly. Her counsel also submitted that the employer then challenged certain facts, such as Dr. Bordeleau's diagnosis, when its witnesses affirmed in their testimonies that they did not doubt the accuracy of the medical certificate that she issued.

[168] Counsel for the grievor emphasized the facts that the grievor was an employee who had always had good performance evaluations (Exhibits G-1 and G-2) and that the employer never reproached her for the quality or quantity of her work. According to counsel, although the employer accused her of spending long periods on her computer for military affairs, her supervisor never mentioned that she did not work as hard as the others did. For counsel, no evidence showed that she did not carry out her workload in the same way as did the other two counsel in the office.

[169] In that vein, counsel for the grievor maintained that while it was acknowledged that the grievor sent and received personal emails during work hours, both Ms. Maynard and Mr. Hamel admitted that the employer allowed it. Under the circumstances, how then could the employer accuse the grievor of doing so?

[170] Counsel for the grievor refuted at length the allegations in support of the employer's decision to dismiss the grievor. They are specifically as follows.

1. Performing military activities during normal Board work hours

[171] On this issue, counsel for the grievor argued that the employer exaggerated what occurred. According to counsel, although it was agreed that the grievor was able

to send and receive 1400 emails similar to that in Exhibit E-32, nevertheless, it must be remembered that it occurred over a period of six months, that the emails could have been read or sent very quickly, and that once again, those email exchanges did not affect her performance. In addition, her counsel emphasized that both Ms. Maynard and Mr. Hamel admitted that the employer allowed employees to send and receive emails during work hours. On this issue, for counsel for the grievor, since the emails between the grievor and the reserve members were in no way related to her Board counsel work, I must conclude that they were personal and therefore that the employer permitted them. Counsel also maintained that Mr. Bouchard, the employer witness, was unable to identify documents about her military activities that the grievor allegedly worked on during work hours.

[172] Counsel for the grievor referred me to *Ontario (Ministry of Natural Resources) v. O.P.S.E.U.* (2005), 143 L.A.C. (4th) 14, in support of his argument that the employer allowed the computer system to be used for personal purposes. It could not then change the rules of the game.

[173] Counsel for the grievor also referred me to *Fraser Health Authority (Surrey Memorial Hospital) v. Health Sciences Association of British Columbia*, [2011] B.C.C.A.A.A. No. 125 (QL), in which the arbitrator decided to reinstate an employee who had made excessive use of the Internet at work, and the decision in *Andrews v. Deputy Head (Department of Citizenship and Immigration)*, 2011 PSLRB 100, in which an employee was reinstated who had been terminated for using his computer during work hours to view pornographic material.

2. Performing military activities while on paid sick leave

[174] Counsel for the grievor reviewed the grievor's testimony and emphasized the fact that when she left on sick leave on February 25, 2011, she was emotionally very upset following several serious and difficult events that had affected her family life. Counsel noted that before going on sick leave, the grievor first requested leave with income averaging in August 2011 (Exhibit E-8) for February 21, 2011, to March 25, 2011. That leave, which had allowed her to recharge by taking part in military exercises, was always granted to her in the past; however, her request in 2011 was refused. Counsel argued that the evidence showed that when she left on sick leave on

February 25, 2011, the grievor, who is a widow with custody of two young children, indicated to Ms. Maynard that she was not feeling well psychologically and advised Ms. Maynard of the particularly difficult and traumatic situation involving one of her young children. Counsel for the grievor emphasized that in February 2011, the grievor was in an existential crisis and that she shared with Ms. Maynard all the facts about her health and the difficult situation involving one of her children. Counsel for the grievor stated that the grievor insisted on finishing her work and completing it the week before leaving on sick leave, thus demonstrating how dedicated she was even though she was in a precarious psychological situation.

[175] Counsel for the grievor argued that the grievor provided the employer with a medical certificate to justify her absence from February 28, 2011, to March 25, 2011, (Exhibit E-10) and that both Ms. Maynard and Mr. Hamel affirmed in their testimonies that they did not question the medical certificate that Dr. Bordeleau issued on February 23, 2011.

[176] On that point, counsel for the grievor submitted that Dr. Bordeleau's testimony was clear that she agreed to the grievor taking part in an exercise, such as the one planned for March 2011. Counsel for the grievor pointed out that Dr. Bordeleau reiterated in her testimony that she was aware on February 23, 2011, when she signed the medical certificate that the grievor would be on sick leave until March 28, 2011, but that at the same time she would take part in a military exercise. For Dr. Bordeleau, that exercise had a therapeutic effect for the grievor (Exhibit G-13). Counsel referred me to paragraphs 30 and 31 of *C.E.P. v. Bell Canada* (1996), 53 L.A.C. (4th) 228, in which the arbitrator concluded that even when on sick leave, a person can do a type of work if that other work is beneficial to the employee. Pages 18 and 19 of *Société canadienne des postes c. L'Association canadienne des maîtres de poste et adjoints*, [1996] C.L.A.D. No. 429 (QL), were also cited. Counsel also cited *Consumer Gas (Ottawa Gas) v. E.C.W.U., Local 6720* (1988), 11 C.L.A.S. 29, in support of his claims that, under the circumstances, the grievor was justified in carrying out therapeutic duties, such as taking part in the Gogama exercise while on sick leave. The decision in *Greater Toronto Airports Authority v. Public Service Alliance of Canada*, [2007] C.L.A.D. No. 1 (QL), was also cited.

[177] For counsel for the grievor, it was not up to the employer to decide what the appropriate treatment was for the grievor to follow in February 2011. Thus, the employer could not have decided that she should have stayed home doing nothing while on sick leave. Dr. Bordeleau's expertise must be relied on. Her opinion was that the grievor needed to get out of the house and get her mind off things. In this case, she simply followed her doctor's orders by wanting to take part in the military exercise planned for March 2011. Her counsel concluded that if the employer did not agree with the doctor's orders, it simply needed to refer her for a Health Canada evaluation; it did not. On that point, counsel referred me to *Parkridge Care Home v. Hospital Employees' Union*, [1991] B.C.C.A.A.A. No. 15 (QL), at 16, in support of his argument that unless proven otherwise, an expert's testimony must be relied on, Dr. Bordeleau's in this case, which was that it was therapeutic for the grievor to take part in those military activities. Counsel also cited *Perley and Rideau Veterans' Health Centre v. C.U.P.E., Local 870*, [2011] O.L.A.A. No. 199 (QL), at para 93, in which the arbitrator reinstated an employee who was terminated for attending a course while on sick leave.

[178] As for the alleged work that the grievor did for the reserve while on sick leave, her counsel emphasized the fact that, on one hand, she did not receive any pay, other than for maybe two days, and that, on the other hand, Lieutenant Colonel Kelly testified that the number of emails that she was able to exchange and her attendance at reserve unit meetings while on sick leave were minimal (Exhibit G-23, paragraph 5).

[179] Counsel for the grievor also emphasized the fact that given the grievor's fragile psychological situation in February and March 2011, not only was she unable to do her counsel work, but she also had an ethical obligation to not take any actions as counsel, due to her medical condition.

3. Using the Board's DWAN system for reserve business

[180] Counsel for the grievor returned to the fact that one of the grounds for terminating the grievor was that she allegedly knowingly asked to have her access to her military computer account closed so that she could use only the Board DWAN account. First, counsel emphasized that the evidence showed that access to a military account is essential for any reservist to function and therefore that no reservist would ask for his or her access to such an account to be removed.

[181] Counsel for the grievor also argued that the evidence showed that the civilian side of the DND's information technology group first contacted her to report that her military account was inactive. Because she did not reply, an employee from the DND's civilian side contacted her again to advise her that she had to contact Cornwall to advise it of her intent about using her military account. She did not; hence, her military account was closed (Exhibit G-20).

[182] According to counsel for the grievor, there is no evidence that the grievor asked to have her military account deleted so that she could use her Board DWAN account for transactions for her Board work and for her reservist work.

[183] According to counsel for the grievor, although deleting the grievor's military account resulted in all data and information about her reservist duties being transferred to her Board DWAN account, it was done without her knowledge. For her counsel, immediately after her military account was deleted, the grievor continued to use the password that she had used for her military account, not knowing that she was actually accessing her Board DWAN account. Counsel for the grievor argued that the evidence showed that even though her military account had ceased to exist, the password remained identical. Thus, once her military account was deleted, she could not have known that her computer transactions as a reservist were being carried out from her Board DWAN account. On this issue, her counsel emphasized that she testified that she did not know that the reservist data had come to be in a Board DWAN account and that had she had known or realized it, she would have quickly stopped everything.

[184] According to counsel for the grievor, the employer's argument does not hold water that the grievor should have known that she was using her Board DWAN account for her reservist transactions, particularly because she signed "C.P. Pouliot" (Exhibit G-3), thus demonstrating that she knew that she was working on a civilian account but wanted to be clear that she was writing as a reservist. According to counsel, it must be noted that Ms. Maynard received a copy of that email and that she never took any action (Exhibit G-3).

4. Accommodation request

[185] Counsel for the grievor also argued that the employer, although aware of the grievor's health problems and the difficult situation involving one of her daughters, did not accommodate her as required. Counsel noted that the employer was aware that she was a reservist and that in the past, she had been able to use the leave with income averaging program to recharge for a week by taking part in a military exercise similar to the one planned for Gogama in March 2011. However, despite the grievor's request and the fact that she shared with her supervisor Ms. Maynard that she was not well and that she was in a difficult situation involving one of her daughters (Exhibit E-9, the grievor's February 3, 2011, email), the employer rejected her request for leave with income averaging for the month of March 2011, which would have allowed her to recover. By doing so, the employer failed in its duty to accommodate her. She was in need and had advised her employer of her precarious situation. It was up to the employer to find a solution, which it did not do. For counsel, the evidence showed that the employer did not consider any alternatives and that it never stated that the situation was such that accommodating her would have imposed undue hardship on it. Counsel emphasized that if doubts existed about the grievor's accommodation request (Exhibit G-15, page 4, point 3), her April 6, 2011, request was certainly clear.

5. Conflict of interest created by performing adjutant duties while working for the Board

[186] On this matter, counsel for the grievor categorically rejected the employer's allegations that she jeopardized and undermined the Board's independence by carrying out her counsel work and her CHoO adjutant duties at the same time. First, counsel noted that the grievor was very clear and transparent by disclosing that she was a reserve member to the Board's chairperson at the time, Ms. Laurin. For counsel for the grievor, Ms. Laurin accepted and understood the situation. However, she felt it appropriate to confirm the appropriate caveats in writing to Lieutenant Colonel Becking (Exhibit E-6).

[187] For counsel for the grievor, the fact that the grievor later joined another unit and became an adjutant did not add any risks of conflict of interest for her. Counsel emphasized that Mr. Hamel could not substitute his Bosnian adjutant experience to

conclude that the grievor was in a conflict of interest when she became the CHoO adjutant.

[188] According to counsel for the grievor, the testimonies of the grievor and Lieutenant Colonel Kelly showed that her role with him had been of relatively little importance, that she was not his right arm, and that she forwarded his instructions without any decision-making authority or even advisory authority to him. Under the circumstances, her adjutant role could not have put her in a conflict of interest with her Board counsel role.

[189] In particular, in terms of member grievances that could have been forwarded to Lieutenant Colonel Kelly and that were then likely to come before the Board, counsel for the grievor emphasized that no evidence was adduced showing that the grievor was directly or indirectly involved in the decision-making process or that she provided opinions about those grievances.

[190] Counsel submitted that the evidence demonstrated that only one request arose, about a claim for a reimbursement for water bottles, in which the grievor was involved, and that, again, her involvement was limited to recording the claim in a register, and nothing more. Counsel maintained that if the grievor had been in a conflict of interest with respect to a grievance, she would have asked to recuse herself. On that point, the agreement that existed when Ms. Laurin was chairperson was still valid; her judgment was relied on.

[191] Counsel for the grievor also referred to Lieutenant Colonel Kelly's testimony that the grievor mentioned to him the limitations caused by her Board counsel work and that therefore she could not place herself in a conflict of interest. Counsel also emphasized that Lieutenant Colonel Kelly clearly indicated that the grievor was never involved in reserve grievance files and that she never issued legal opinions of any kind; in short, she was never in a conflict of interest with her employer (Exhibit G-22, paragraph 6).

[192] Finally, counsel for the grievor also cited *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73, and *Consumers Gas v. Communications, Energy and Paperworkers Union*, [1999] O.L.A.A. No. 649 (QL).

IV. Reasons

[193] In this case, the employer terminated the grievor primarily for the following:

- working for her CF reserve unit while on sick leave that it paid for;
- spending considerable time during Board working hours doing reservist work;
- knowingly using the Board's DWAN computer system in the interest of convenience to exchange emails and work on reserve documents, thus migrating military information to the Board's databases, which compromised its integrity and contravened its technology and security directives; and
- placing herself in a conflict of interest by being involved as a reservist in grievance files that could potentially have come before the Board.

[194] After considering at length the evidence before me and considering all exhibits and attachments filed in support of the evidence, I concluded that the grievor's grievance must be dismissed. I must also point out that the parties submitted about 35 decisions to me in support of their arguments. Although sometimes similarities arose to the facts and the issues mentioned in this case, they are distinct cases, in which the context and facts often differed. Although I consulted those decisions, I will not refer to them, with a few exceptions.

[195] One of the employer's allegations was that the grievor worked for her reserve unit while on sick leave, which her employer paid for. In his testimony, Mr. Hamel indicated that that, in itself, for him, was so serious that it alone merited termination. I do not believe that the facts of this allegation are in dispute. Thus, in my opinion, the employer established that while the grievor was on sick leave on February 28 and on March 3 and 4, 2011, she exchanged emails with her reserve colleagues and went to the unit's premises on February 28, 2011, to perform certain duties. She also admitted that she worked for and was paid by the reserve while on sick leave paid by the Board in November 2010 (Exhibits E-20, E-23 and E-24). She also testified that she exchanged messages on her BlackBerry while on walks and that she performed simple tasks while with her reserve unit. Although in my opinion, the grievor should have first advised her supervisor of those facts, those actions, by themselves, in my opinion, did not

merit termination.

[196] However, there is more. The evidence revealed that in February 2011, after the employer refused, for operational reasons, to authorize leave with income averaging, the grievor requested sick leave. That leave was granted, supported by a medical certificate from Dr. Bordeleau. Ms. Maynard even went so far as to advance sick leave to the grievor. According to the evidence, the grievor saw Dr. Bordeleau on February 23, 2011 (Exhibits E-10 and E-11), after she received the airline tickets to allow her to travel to the military exercise in Gogama, in northern Ontario, on February 18, 2011 (Exhibit E-25). At no time did the grievor mention that exercise to her employer, which was to be held during her sick leave; yet, she knew during her meeting with Dr. Bordeleau that she was scheduled to take part in it. She chose to not reveal anything to her employer. Only when the employer checked her computer account in early March 2011 did it realize that she was scheduled to take part in the exercise.

[197] The grievor tried to justify not advising the employer by stating that she was in a very precarious physical and mental state in February 2011 because she was a widow, and one of her children was having serious problems at school. On that point, the evidence demonstrated that Dr. Bordeleau was not only aware that the grievor was planning to attend a military exercise in Gogama in February 2011, but also that she encouraged that type of exercise, which she qualified as “[translation] therapeutic” in a letter submitted to the employer after the grievor’s termination. In his arguments, counsel for the employer referred me to *Parkridge* and maintained that the employer had to rely on Dr. Bordeleau’s diagnosis about the therapeutic effects of the Gogama exercise for the grievor. On that point, and although Dr. Bordeleau’s testimony was very credible, I must first note that unlike in *Parkridge*, Dr. Bordeleau indicated in her testimony that she had the impression that the Gogama exercise was more physical than intellectual. However, the evidence showed that the grievor was to work more on planning the exercise than taking part in it physically. Additionally, as for Dr. Bordeleau’s testimony and the indication in Exhibit G-13 that “[translation] the work was therapeutic,” I must point out that this information was not shared with the employer until June 2011, after the termination. It was up to the grievor to advise her employer, as applicable, which she did not do. Instead, it seems to me that the grievor

absolutely wanted to take part in the Gogama exercise. To that end, she deliberately sought and obtained approval from her doctor to go. However, she never revealed to her doctor that her leave with income averaging was first refused. Counsel for the grievor also referred me to *Consumer Gas*, in which the employee was reinstated. Again, the facts in this case are different. In *Consumer Gas*, the employer was not able to prove that the grievor had repaired cars during his sick leave. In this case, the evidence showed that the grievor performed work during her sick leave and that she prepared to attend an exercise in Gogama during her sick leave.

[198] I find it hard to understand why the grievor did not share with her supervisor her plan to continue carrying out certain duties for the reserve and to attend the exercise in Gogama and that that exercise would have had a therapeutic effect for her. She testified that at that time, she maintained a facade and wanted to appear strong. Unlike the situation described in *Greater Toronto Airports* cited by her counsel and in which the employer did not clearly communicate with the employee, in this case, the grievor admitted that she was not clear in her communications with Ms. Maynard and that she did not give her all the information about her personal situation. In fact, apart from the fact that she was having health problems, the grievor admitted that she did not advise Ms. Maynard of details about her personal situation or of the worrisome situation with one of her daughters, even though, in the past, the evidence showed that the employer always helped her when it was made aware of difficult periods. However, she admitted that she shared her difficult situation with Lieutenant Colonel Kelly. She hid nothing from him. It seems to me that she placed much less importance on her duty of loyalty when it involved her employer.

[199] It also seems that on Friday, February 25, 2011, the grievor was already planning her travel schedule for the reserve, as is seen, for example, in Exhibits E-24 and E-41. She even wanted to add work hours at the reserve (Exhibit E-100). Once again, I do not understand why she did not feel that it was important to inform her employer that she was planning those activities, particularly since, according to her, Ms. Maynard “[translation] was a good person” who did not hesitate to advance her sick leave and had always been understanding with her. The grievor admitted that she did not give her supervisor details about her personal situation. She also indicated that she did not communicate her difficulties well to Ms. Maynard. It seems that the grievor

made a choice in which she felt that it was important to advise her superior in the reserve of her difficult situation but that it was not necessary to do the same for her employer. The fact that the grievor feels very strong ties to the reserve is very honourable and clearly very laudable. However, her employer was entitled to require the same transparency from its employee. The duty of loyalty also applies to the grievor's relationship with her employer. It seems to me that she adopted two different standards with respect to the transparency to use depending on whether she was dealing with her employer or the reserve. It was not up to her to decide what was acceptable for one organization and not the other. She had just as much of a duty of loyalty to her employer. Therefore, I can understand why the employer has concerns about the level of trust in her.

[200] In his arguments, the grievor's counsel noted that the employer failed in its duty to accommodate the grievor by not allowing her to take part in reserve activities while on sick leave. I cannot accept that argument. First, the grievor clearly admitted in her testimony that accommodation was not an issue when she submitted her sick leave request on February 23, 2011. In addition, as indicated earlier and as she admitted, throughout her employment at the Board, her supervisors were very flexible with her if she informed them of her situation. I agree with counsel for the employer that the grievor never advised the employer of her work limitations. She submitted a medical certificate on February 23, 2011, indicating that she would be "[translation] off work" from February 28, 2011, to March 25, 2011 (Exhibits E-10 and E-13), and nothing more. The employer accepted that medical certificate, going so far as to advance her sick leave. Under the circumstances, and with the information available to it, I do not see how the employer could or should have thought that accommodation was required.

[201] According to Mr. Hamel, another important reason for the termination is that the grievor spent a considerable amount of time during her Board working hours exchanging emails with or working on documents for the reserve. Again, the alleged facts were not truly in dispute. Although, on one hand, the employer argued that the time she spent exchanging emails and working on documents for the reserve during work hours was unusual and unreasonable, and on the other hand, she tried to minimize the amount and the impact, the fact remains that the parties agreed to the following wording on January 6, 2014, about that allegation:

[Translation]

The parties agree that Ms. Pouliot sent and received at least 1445 emails and attachments about her reservist duties between September 2010 and March 16, 2011, similar to the emails in Exhibit E-32, with the signature block "CP" and her office telephone number. The parties also agree that those emails were sent from and received in the DWAN system (CFGB account).

Ms. Pouliot admitted that she sent and received emails and attachments about her reservist duties using her CFGB account on the DWAN system during working hours and that on some days, the number of those emails was large.

[202] From that statement, I hold that it is admitted that during Board work hours, the grievor exchanged no less than 1455 emails with her reserve colleagues over a period of about 6 months. The statement also indicates that she signed those emails "CP" for captain and that the Board office telephone number appeared in them. Therefore, it seems that she maintained substantial correspondence with her reserve colleagues during work hours. In addition, Exhibit E-32, cited as an example, includes references to files that contain reserve working documents. Although the employer was unable to state in its testimony how much of those documents the grievor wrote or how much time she spent on them, nonetheless, it seems that given that sample, the reservist work unreasonably monopolized her work hours.

[203] Counsel for the grievor argued that the evidence showed that the grievor nonetheless met her deadlines, that the quality of her work was not affected, that her performance evaluations were always satisfactory and that the employer never accused her of not being up to the task. Counsel for the grievor also emphasized the fact that Mr. Hamel and Ms. Maynard admitted that the Board's policy allowed exchanging personal emails during work hours. It is true that the employer did not demonstrate that the grievor did not do her share of the work and that the Board's policy allowed exchanging personal emails during work hours. However, in this case, it seems to me that it is a matter in which common sense must prevail and that, as indicated by Mr. Hamel, employees must be trusted to do the work for which they are hired and paid. On that point, Mr. Hamel referred to the fact that, for example, the Board allows employees to occasionally email their families, their banks, etc. Thus, the fact that the employer openly tolerates periodically exchanging personal emails is one thing.

However, although no number was proffered as being an acceptable number of personal emails to exchange, in my opinion, it is a matter of degree.

[204] In this case, the fact that the grievor exchanged more than 1455 emails and received or worked on a very large number of documents that show up in files such as Exhibit E-32 goes well beyond what is acceptable, even in a workplace that allows exchanging personal emails. This situation is different from the one covered in *Ontario (Ministry of Natural Resources)*. In that decision, cited by counsel for the grievor, the employees were reinstated to their positions based on several mitigating factors, the main one being that the supervisors had also taken part in exchanging the disputed emails. When deciding to reinstate them, the arbitrator also considered that some of those employees had many years of service or did not receive adequate training. In this case, on one hand, management was not involved in the alleged facts, the grievor had relatively fewer years of service and was aware of the danger of confusing her civilian and military accounts, and finally, she carried out reserve work during her Board working hours. Furthermore, the minimum number of 1400 emails seems to me very significant. Finally, the grievor admitted that she noticed that she was spending too much time on reserve matters during her regular work hours. Exhibit E-44 reads as follows:

...

Also, my part-time job is starting to spill over rather conspicuously into my day job and I am maxed out on weekday commitments right now with supervising our full time NES/Rel team - spent my lunch working on the ROG and 2 hours at the post office yesterday after work registering 65 Notification letters and dropped in again on them this morning to hand over the bar code tags/make sure things stay on track. . . We have great momentum going on that front right now and I want to capitalised [sic] on it as best I can.

...

[205] This case also differs from *Fraser Health Authority* and *Andrews*, in which, respectively, the employee had already ceased inappropriately using the computer system when the employer ran its investigation. In *Fraser Health Authority*, the arbitrator concluded that the employer had not proven that the employee had

excessively used the Internet. In this case, I felt that that was proven. In *Andrews*, a lack of supervision contributed to the employee using his computer inappropriately for a long period. It is different in this case, in which the grievor was counsel and, as such, should have needed a minimal level of supervision by her employer, which trusted her.

[206] The employer's allegation that the grievor exchanged more than 1455 emails and attachments is only one aspect of the problem. It also accused her of knowingly using her Board DWAN account, out of convenience, to exchange emails with her reserve colleagues or to work on reserve documents. The unquestionable result is that by thus using her Board DWAN account for her military affairs, she migrated military information to the Board's databases. That military information should not be in the Board's inventory.

[207] To fully understand the issue in that allegation, it seems important to me to return to the evidence the parties adduced at the hearing. The heart of the evidence on that allegation can be summarized as follows. The Board has its own computer system, commonly called the intranet. The Board allows certain employees, such as counsel, accounts to access to the DND DWAN system. Among other things, that access allows counsel to consult directives and other information specific to the DND. However, it must be noted that as a reservist, the grievor already had access to the DND DWAN system through a military account with the DND. Thus, for example, while employed as Board counsel, she had two DWAN accounts, one with the Board for her counsel work and one military account independent from the Board account that allowed her to do her military work. Thus, if the grievor wanted to access her military DWAN account, she needed to do it separately from using the Board DWAN account. The evidence showed that the grievor chose to use the same password for both accounts.

[208] The employer alleged essentially that the grievor found it easier when working as Board counsel to use her Board DWAN account to access her military affairs. According to the employer, it meant that she could avoid exiting her Board DWAN account to login to her military DWAN account. The employer accused her of knowingly cancelling her military account so that she would have to manage only her Board DWAN account. According to the employer, the grievor's approach was

calculated, and on several occasions, as seen in Exhibit E-32, while using the Board DWAN system to correspond with her reserve colleagues, she used the letters “CP” in her signature block to clearly identify to reserve recipients that for the purposes of that correspondence, she was acting as a member of the military, not as Board counsel. For the employer, that clearly shows that she knew that she was using the Board DWAN account for military purposes.

[209] The employer maintained that the consequences of such actions are serious because, on one hand, the grievor blurred the line between Board’s mandate and the reserve’s. According to Mr. Hamel, her actions undermined the Board’s efforts to be seen and perceived as independent of the CF. In his testimony, he emphasized that the Board’s *raison d’être* is to be seen as completely independent of the CF when the Board must deal with military members’ grievances.

[210] Mr. Hamel also emphasized that by using the Board’s DWAN system to exchange emails with reservists or to process any type of military information, the grievor migrated military information to the Board’s DWAN system that should not have been there. Thus, for him, the Board became a depository of information for which, on the one hand, it was far from being mandated, and that also raised questions about, for example, the application of the *Access to Information Act*. In support of its evidence, the employer referred me to Exhibits E-76 and E-77, which, according to it, are irrefutable evidence that the grievor acted knowingly when she cancelled her military DWAN account to use only her Board DWAN account.

[211] Although the grievor acknowledged that her military account was deleted and that it is problematic for military information to be stored on the Board DWAN account, she affirmed that it was done without her knowledge and that she never asked for it or understood why her military DWAN account was cancelled. For the grievor, everything began in 2007 when she was having difficulties with the Board’s intranet system. She affirmed that she was then contacted by the DND’s civilian side, which advised her that because her account had been inactive for three months, it would be cancelled unless instructed otherwise. The grievor affirmed that she did not understand that it was her military DWAN account. As for the employer’s evidence that she signed “CP” to identify herself as such to her reserve colleagues when using the

Board's DWAN system, the grievor affirmed that she did not realize she was using the Board's DWAN system during those transactions.

[212] Although that aspect of the evidence is slightly more technical, and given that the grievor's use of the Board's DWAN system for her military activities was not challenged, it remains essential for me to determine whether the employer demonstrated on a balance of probabilities that the grievor knew that she was using the Board's DWAN system. After reviewing all the submitted facts and exhibits, I concluded that out of convenience, she acted in a deliberate manner by using the Board's DWAN system for her military transactions. For me, Exhibits E-76 and E-77 are persuasive and can lead to no other conclusion, and they read as follows:

From: Pouliot JL @ MND CFGB @ Ottawa-Hull
Sent: Thursday, 3, March, 2011 12:16 PM
To: Henningsen PO2 NCM @ CH of O @ Ottawa-Hull
Cc: Laurin M @ 2 ASG Sig Sqn Det Ottawa @ Ottawa-Hull
Subject: FW: Pki request

Importance: High

PO2 Henningsen,

I don't understand the problem here - I have a DND DWAN account and have the system access I need to both my Reserve unit and day job accounts.

Why would I need two?

I also have a level III Security Clearance with DND both as a civilian and as a military officer?

So I am not sure why we would do all this extra work just so I can get issued a PKI card to do my job?

Please follow up with your contacts and advise.

Thx,

CP

From: Laurin M @ 2 ASG Sig Sqn Det Ottawa @ Ottawa-Hull
Sent: Wednesday, 2, March, 2011 11:48 AM
To: Pouliot JL @ MND CFGB @ Ottawa-Hull

Subject: RE: Pki request

Please complete those form again and they have to create another accompt to use your pki with the army.

This form is for your new account to be complete by your ISSO

PO2 NCM Henningsen 990-6207

<http://lfcms.kingston.mil.ca/Default.aspx?sectionID=143000440004799&type=D>

This form is for your pki << File: PKI Request Form - DND 2369.pdf >> with your pri XXX not XXXXXXXXXX

Thank you.

From: Pouliot JL @ MND CFGB @ Ottawa-Hull
Sent: Wednesday, 2, March, 2011 11:16 AM
To: Laurin M @ 2 ASG Sig Sqn Det Ottawa @ Ottawa-Hull
Subject: RE: Pki request

Hi,

I am a civilian employeed during the day and a Reservist with the Cameron Highlanders of Ottawa at night.

I keep only the one DWAN account and use it for both jobs to avoid duplication of e-mail traffic, having to manage two accounts and to avoid confusion.

The request for PKI was staffed for access as the Regimental Adjutant with the Camerons and you have my correct service number.

My PRI (ending in XXX) would only be used for matters relating to my civilian employment for which I have a separate encryption key.

Does this clarify the situation for you?

...

From: Pouliot JL @ MND CFGB @ Ottawa-Hull
Sent: Monday, 25, October, 2010 12:11 PM
To: Clark Capt LM @ 2 ASG HQ@Petawawa
Cc: Pouliot MWO CJFP@2 ASG HQ G1 Ops@Petawawa; Henningsen PO2 NCM@CH of O@Ottawa-Hull
Subject: RE: More CF 98 Info

I am a class A reservist with the Chof O and a full time civilian employee with the Public Service.

Rather than manage two DWAN accounts, it is easier to have the one, but I can assure you that I am a Capt and the Adjt with the CHofO.

Also, because of mailbox management issues (mine is currently almost full), can you fwd the incrypted file to our unit Chief Clerk: PO2 Henningsen - CC to this e-mail.

She is on leave today, but will be able to look at it tomorrow.

Thanks,

CP

From: Clark Capt LM @ 2 ASG HQ@Petawawa
Sent: Monday, 25, October, 2010 12:06 PM
To: Pouliot JL @ MND CFGB @ Ottawa-Hull
Cc: Pouliot MWO CJFP@2 ASG HQ G1 Ops@Petawawa
Subject: More CF 98 Info

Hello Capt Pouliot,

I have rec'd more info and would like to send to you encrypted; pls advise if you plan to get a PKI card so I can send protected info to you electronically. If not, I will mail the info to you as supplemental material to the letter that was mailed out to you last Friday.

I am also curious as to why Outlook does not show your rank or that you work at CHoO?

Thanks,

Clark, L.M. (Lisa)

[Sic throughout]

[213] It must also be noted that at the hearing, the grievor was unable to truly explain the content of her responses in Exhibits E-76 and E-77, even though, in my opinion, her words are quite clear and leave no room for more than one interpretation. In effect, when I read those exhibits, I found it hard to see how the grievor could state that she was not even aware that one of her DWAN accounts would be closed. At the very least,

she should have had questions, given the consequences of not differentiating between using a Board DWAN account or a military DWAN account.

[214] In addition, I find it hard to understand how the grievor's argument that she thought her Board DWAN account would be deleted would significantly help her cause. In effect, because the evidence demonstrated that she also needed to use her Board DWAN account for her Board work, how could she have logically thought that, without question, her Board DWAN account would be deleted?

[215] I agree with Mr. Hamel that by doing so, on one hand, the grievor at the very least blurred the Board's mandate for reserve members. Mr. Hamel indicated that one of his main duties is to ensure that members of the military perceive the Board as independent from the CF. I can find only that the grievor's actions were contrary to the Board's mandate, which seeks to affirm its independence and credibility. In fact, it is reasonable to conclude that a reservist who potentially or actually wants to refer a grievance to the Board will likely question its independence if he or she realizes that that Board counsel is another reservist who uses the Board's computer system in her everyday transactions with the reserve. It is very likely that in that scenario, the reservist would conclude that the other reservist with whom he or she is dealing, in this case the grievor, and the counsel are part of the same organization.

[216] To me, that employer allegation is not just theoretical — it is real. In effect, although its evidence did not demonstrate that any military member concluded that the grievor/reservist and the grievor/counsel were part of the same organization, the fact remains that the evidence revealed that, at the very least, a reservist questioned the grievor's role and status and that she used the Board's DWAN for military purposes. On that point, again, the grievor's response in Exhibit E-77 is persuasive.

[217] The employer also invoked the fact that in her position as reserve adjutant, the grievor placed herself in a conflict of interest. Essentially, the facts are that when she was hired as Board counsel, she already held an infantry soldier position in the 30th Regiment reserve unit. It was submitted in evidence that, at that time, it had raised concerns for the chairperson, Ms. Laurin. The evidence showed that the Board's chairperson in 2007 and Ms. Maynard clearly advised the grievor of the importance of this issue. However, after discussions they had with the grievor about the nature of her

reserve duties, which consisted mostly of physical tasks, and confirmation from Lieutenant Colonel Becking that she would never be in a conflict of interest, the Chairperson approved hiring the grievor as counsel while she continued to be a reservist. However, it changed in 2007, when the grievor changed duties and reserve units to become an adjutant with the CHoO. However, she never informed the employer of that change. After the discussions she had with Ms. Laurin, Ms. Maynard and Lieutenant Colonel Becking, the grievor should have known that that was important.

[218] According to Mr. Hamel, who relied on his own experience in Bosnia, an adjutant's role is to be the right arm of the lieutenant colonel. Therefore, it is reasonable to conclude that the grievor was involved or that she could have been involved in decision-making processes about reserve grievances, which would thus have created a conflict of interest when those grievances were referred to the Board for review.

[219] In her testimony, the grievor categorically denied being involved in the merits of grievances or claims from her reserve unit. In his testimony, Lieutenant Colonel Kelly was also categorical. According to the grievor and him, her role was always limited to forwarding his instructions to the other reservists and to ensuring that correspondence addressed to him for his information or signature was on his desk.

[220] Despite the fact that many documents bearing the reference ROG (redress of grievance) were in the Board files, the employer was unable to demonstrate that the grievor had influenced the decision-making process in those files in any way. However, I note that, at the very least, the grievor lacked transparency in that area and that although the employer was unable to prove that a conflict of interest occurred, nonetheless, I feel that there is ample evidence to demonstrate the appearance of a conflict of interest. From her discussions with Ms. Laurin, involving Lieutenant Colonel Becking, the grievor was aware that this issue was very important to the Board. It was up to her to inform her superiors that not only had her reserve unit changed, but also that her duties were also no longer the same. The fact that in practical terms, there is no evidence of the grievor's involvement in the merits of grievances does not change the situation in any way. She is counsel. She understands very well that issues of

perception are sometimes very important, depending on the environment in which they arise. I can understand that the employer questioned the trust to be shown her.

[221] In closing, I would like to note that throughout the hearing, which lasted approximately three weeks, I had the opportunity to hear detailed evidence. Therefore, I was able to become familiar with the Board's work environment from 2007 to 2011. To me, the work environment seemed very good and flexible. I conclude without any difficulty that Ms. Maynard showed considerable empathy toward the trials that the grievor faced. The grievor also admitted that she did not clearly communicate all the information about her personal situation to her superior. Once again, given the work climate at the Board during the period in question, I truly believe that had the grievor shown greater transparency toward her supervisors, we would not be at this point.

[222] In that vein, both Mr. Hamel and Ms. Maynard testified that, under the circumstances, and given that the Board's legal services is a very small team, they did not see how the grievor could reintegrate into her counsel position. For them, the relationship of trust is irreparably broken. Both questioned how, after these incidents, they could trust the legal opinions that the grievor may provide to them. There would always be doubt. I understand that Mr. Hamel and Ms. Maynard feel let down. As indicated earlier, they feel betrayed, and yet nothing justified that lack of trust on the grievor's part.

[223] To me, one constant in this case justified the employer concluding that the relationship of trust was irreparably broken. Throughout this affair, the grievor was selective about and did not seem concerned with the impact of her actions on her work as Board counsel.

[224] The same is true for the reserve work done during Board working hours. The grievor did not seem to see a problem with spending considerable time on reserve activities rather than doing what she was paid to do. Another example in which she clearly lacked transparency with her employer is the exercise in Gogama. Once again, she could have informed her employer of her intention to take part in that exercise. Given that the employer had allowed that type of participation in the past, there was reason to believe that the employer would have allowed her to go to Gogama. Instead, she decided to say nothing. By doing so, she planted doubt about her loyalty to the

employer. It is not surprising that the employer claims today that the relationship of trust was irreparably broken. Similarly, the grievor knowingly chose to use her Board DWAN account for her reserve activities because it was more practical, regardless of the possible consequences of her actions. Once again, this is another example in which she made a choice. Under the circumstances, I do not believe that the employer can be faulted for no longer trusting her.

[225] Furthermore, in this case it must be remembered that the grievor held a counsel position. The employer was entitled to expect greater transparency from her, particularly as she worked in a small environment.

[226] One final observation. In her testimony, to me, the grievor seemed very intelligent, very articulate and truly passionate about everything about the CF. On several occasions, when referring to her reserve duty, she did so with great enthusiasm, referring to the reserves as “[translation] her family” and stating that her actions in the reserve made her happy and “[translation] made her smile.” The grievor also affirmed that when she was hired as counsel, she advised Ms. Laurin that if she had to decide between her reserve role and her counsel work, she would choose the reserve. I sincerely believe that this feeling remains; in addition, the grievor now holds a permanent position with the CF. Thus, and although at one time she indicated that maybe she should not have acted as she did, I did not feel that she truly regretted what happened. Instead, I understood that she felt that through her actions, she responded to an imperative greater than her employer’s. In my opinion, under the circumstances, her reintegration with the employer is inappropriate in light of past events and the work context, in which the employer must have full trust in its counsel.

[227] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[228] The grievances in files 566-02-5913 and 566-02-5914 are dismissed.

October 31, 2014.

PSLREB Translation

**Linda Gobeil,
adjudicator**