

**Date:** 20150805

**Files:** 566-02-8831 and 8832

**Citation:** 2015 PSLREB 70



*Public Service Labour Relations Act*

Before an adjudicator

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BETWEEN

**CHER HEYSER**

Grievor

and

**DEPUTY HEAD**  
**(Department of Employment and Social Development)**

Respondent

and

**TREASURY BOARD**  
**(Department of Employment and Social Development)**

Employer

Indexed as

*Heyser v. Deputy Head (Department of Employment and Social Development) and  
Treasury Board (Department of Employment and Social Development)*

In the matter of individual grievances referred to adjudication

**Before:** Steven B. Katkin, adjudicator

**For the Grievor:** Ray Domeij, Public Service Alliance of Canada

**For the Respondent and the Employer:** Lesa Brown, counsel

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Heard at Edmonton, Alberta,  
June 24 to 27, 2014.

## REASONS FOR DECISION

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### I. Individual grievances referred to adjudication

[1] Cher Heyser (“the grievor”) was at the relevant time employed by the Department of Human Resources and Skills Development (currently the Department of Employment and Social Development; for ease of reference, “the employer”) as an appeals specialist benefits officer classified at the PM-02 group and level in the employer’s Employment Insurance Pay and Processing Division in Edmonton, Alberta.

[2] On April 27, 2012, the employer terminated the grievor’s employment, based on paragraph 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*), as a result of the revocation of her reliability status based on an administrative investigation, which had determined that the grievor had falsified a medical document and had submitted it to the employer for the purpose of extending an existing teleworking agreement (“TWA”). Paragraph 12(1)(e) provides as follows:

*12. (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*

...

*(e) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct . . . .*

[3] The applicable collective agreement is that for the Program and Administrative Services Group bargaining unit concluded between the Treasury Board and the grievor’s bargaining agent, the Public Service Alliance of Canada (“the union”), which expired on June 20, 2014 (“the collective agreement”).

[4] On June 11, 2012, the grievor filed grievances against both the termination of her employment and the revocation of her reliability status. Both grievances were worded identically, as follows: “I am grieving the revocation of my security clearance status and termination of employment.” The grievances were referred to adjudication on July 29, 2013, the first under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) (disciplinary action resulting in termination, demotion, suspension or financial penalty; PSLREB File No. 566-02-8831), and the second alleging a violation of article 17 (Discipline) of the collective agreement under paragraph 209(1)(a) and for which the grievor had the support of her bargaining agent

as required by subsection 209(2) (PSLREB File No. 566-02-8832). As a corrective measure, the grievor sought reinstatement without loss of pay or benefits.

[5] The grievances were processed directly to the third and final level of the grievance procedure. The employer's final-level decision was identical in both files and contained the following wording:

...

*I find that the employer has not violated Article 17.02 of the PA collective agreement since no disciplinary action was taken in this matter. The employer carried out a review and reassessment of your reliability status. The holding of reliability status is required as a condition of employment. Since you no longer meet this requirement, your employment was terminated in accordance with the Financial Administration Act.*

...

[6] The employer's final-level decision also contained the following:

...

*... You are also seeking reversal of the revocation of your reliability status, cessation of discrimination, implementation of accommodation measures upon return to work, and \$40,000 damages for pain and suffering.*

...

[7] Save for the reversal of the revocation of the grievor's reliability status, the other remedies mentioned in the employer's final-level decision were not pursued at adjudication.

[8] At the outset of the hearing, the employer raised an objection to an adjudicator's jurisdiction to hear this matter on the ground that as a result of the revocation of her reliability status, the grievor no longer met the conditions of her employment. According to the employer, if I am satisfied that the grievor no longer met the conditions of her employment, I must conclude that the employer had cause for her termination under subsection 12(3) of the *FAA* and need go no further. Subsection 12(3) provides as follows:

*12. (3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*

[9] The employer submitted that as revoking reliability status is an administrative decision, it is not open to an adjudicator to examine the merits of such a decision unless it is found to constitute disguised discipline. The parties agreed to proceed with the evidence on the merits and that the employer's objection would be addressed more fully in argument.

[10] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *PSLRA* as that *Act* read immediately before that day.

## **II. Summary of the evidence**

### **A. For the employer**

[11] The employer called the following witnesses to testify: Andy Netzel, Debbie Smith, Kevin Morris, Frank Bourque and Peter Boyd. The grievor testified on her own behalf.

#### **1. Mr. Netzel**

[12] Mr. Netzel was at the relevant time Executive Head, Service Management, for the employer's Western Canada and Territories Region. He issued the letter dated April 27, 2012, terminating the grievor's employment (Exhibit E-1, Tab 8), which reads in part as follows:

...

*The Departmental Security Officer, in accordance with his delegation of authority, has revoked your Reliability Status.*

*Since employment with the Department requires a valid*

*Reliability Status, and given that you no longer meet this condition of employment, I hereby inform you of my decision to terminate your employment with Human Resources and Skills Development Canada pursuant to Section 12(1)(e) of the Financial Administrative [sic] Act. This decision is effective immediately.*

...

[13] Mr. Netzel became aware of the administrative investigation into the grievor in the fall of 2011, when a request to involve the employer's Special Investigations Unit (SIU) was sent to his office. He said that he was advised of such requests only for informational purposes, not for approvals. He later received a letter dated February 2, 2012, issued by the departmental security officer (DSO), Mr. Boyd (Exhibit E-1, Tab 4), advising him that the administrative investigation had concluded and having attached a copy of the investigation report ("the administrative investigation report"). The letter stated that the investigation had confirmed that the grievor had contravened the *Values and Ethics Code for the Public Service* and the "Guidelines of Conduct for the Public Service". I note that both the investigation report and the reliability status reassessment report alleged that the grievor acted contrary to the *Guidelines of Conduct for Service Canada*. That document is not mentioned in Mr. Boyd's letter to Mr. Netzel. While the employer included the *Guidelines of Conduct for Service Canada* in its book of documents, it was not entered into evidence and was not referred to by the employer in argument. I have accordingly disregarded that document.

[14] In cross-examination, Mr. Netzel testified that the employer had requested an updating of all TWAs, as there was heightened interest in protecting the public's private information, and it was believed that teleworking did not provide sufficient safeguards. As a result, fewer employees were on TWAs, and those who were because of accommodation measures were not to have access to clients' private information.

[15] Mr. Netzel stated he did not directly contact the grievor concerning her side of the story. He had reviewed her labour relations file as it pertained to this matter, which was clear of discipline and contained no references to unresolved issues concerning her. He was not aware that the grievor had been back in the workplace when he terminated her employment. When asked why the employer had not pursued the disciplinary process, Mr. Netzel replied it had been dealing with revoking the grievor's reliability status, and it had been decided that there was little point in proceeding with

both processes. If the grievor's reliability status were revoked, the employer would not proceed with discipline. Mr. Netzel stated that he had no involvement in the decision to revoke the grievor's reliability status.

[16] In re-examination, Mr. Netzel stated that neither the grievor's years of service nor the fact that she had returned to the workplace had any impact on his decision to terminate her employment.

## **2. Ms. Smith**

[17] From August 2010 to June 2012, Ms. Smith was a service manager in the employer's Employment Insurance Appeals Division for its Western region. Her duties included managing about 65 staff and ensuring that the employer's program objectives were delivered. Several team leaders reported to her, each of whom had 15 to 20 employees reporting to him or her. The grievor reported to one of the team leaders under Ms. Smith's supervision. At the relevant time, Ms. Smith's office was located in Kamloops, British Columbia.

[18] Ms. Smith said that the grievor had been working in the employer's appeals division for a lengthy period and that she was teleworking from her home. The TWA had been authorized based on her need to provide care to immediate family members, as documented in a medical certificate issued by Dr. Jennifer Tse on May 9, 2008 (Exhibit E-3, "Dr. Tse's 2008 certificate").

[19] Ms. Smith stated that in the fall of 2010, the employer was reviewing all the TWAs under the authority of its managers. The grievor and one other employee under Ms. Smith's authority had existing TWAs. Ms. Smith met with the grievor and explained that she would have to provide fresh information to support continuing her TWA.

[20] The grievor told Ms. Smith that she had been scheduled for major surgery and that she was very worried about it. During January 2011, Ms. Smith had discussions with the grievor about the TWA and told her that in view of her upcoming surgery, she would not have to provide new information until after it was done. Ms. Smith testified that she did not want the grievor to be stressed about the TWA and instead to focus on her health.

[21] On April 11, 2011, Ms. Smith received an email from the grievor containing a medical certificate dated March 31, 2011, bearing Dr. Tse's signature (Exhibit E-1,

Tab 2, “the 2011 certificate”) and documenting the grievor’s continuous need to provide care to immediate family members. Upon reading the certificate, Ms. Smith had concerns. She compared it to Dr. Tse’s 2008 certificate and found several similarities. She subsequently spoke with Dr. Tse, who confirmed that she had not issued the 2011 certificate and that she had not signed it. She referred Ms. Smith to her office manager, Mr. Morris, for future contacts. Ms. Smith then informed the executive director and a labour relations consultant and discussed the next steps.

[22] The grievor was convened to a fact-finding meeting on April 27, 2011, to discuss the 2011 certificate. In attendance were Ms. Smith, another manager who acted as note taker, the grievor, and her union representative, Réal Labbé. During the meeting, the grievor agreed she had emailed the certificate to Ms. Smith. The grievor said she thought that she had received it by mail, as it had appeared on her home office desk. She said it was her sons’ job to retrieve and open the mail.

[23] At the fact-finding meeting of April 27, 2011, the grievor produced a medical certificate from Dr. Paul Johnson that placed her on medical leave for five weeks effective the same day (Exhibit E-4, “Dr. Johnson’s certificate”). By letter dated May 8, 2011, Ms. Smith sent the grievor a typed copy of the minutes of the fact-finding meeting (Exhibit E-1, Tab 3). The letter requested that the grievor review the notes and advise Ms. Smith of any omissions or errors.

[24] The grievor’s major surgery took place on May 18, 2011. Ms. Smith stated that when the grievor went on medical leave, everything, including the fact-finding exercise, was suspended.

[25] Ms. Smith said that the grievor returned to work in October 2011 on a gradual basis. As there was no new information to support a TWA, she worked on the office premises. While at first the grievor worked in appeals, she was later moved to the mainstream operation to strengthen her adjudication skills before returning to appeals, and her work was closely monitored. During that time, her service manager was Mike Cannon, and she was supervised by a new team leader.

[26] In a letter to the grievor dated October 25, 2011 (Exhibit E-5), Ms. Smith informed her that she was the subject of an administrative investigation concerning an allegation of being in a conflict of interest by having knowingly submitted a false document in relation to a TWA extension. The letter stated that she would be

interviewed by the investigator, Mr. Bourque, on November 2, 2011. That letter informed the grievor that she was entitled to representation at the interview and included the following: “Should it be determined that the allegation against you is founded, disciplinary measures may be imposed. Your reliability status may also be reviewed should adverse information come to light during the course of the investigation.”

[27] In cross-examination, Ms. Smith said that before speaking with Dr. Tse, she had provided the 2011 certificate to her office. Following her initial conversation with Dr. Tse, she had several contacts with Mr. Morris.

[28] Concerning TWAs, Ms. Smith said that at a certain point, the Edmonton office lacked space. Consequently, some employees were on TWAs because of space constraints and others because of accommodation measures. The grievor was originally authorized for a TWA due to her family circumstances. In 2010, new information was required for all employees under Ms. Smith’s supervision who were on TWAs.

[29] When asked whether she had explained to the grievor the type of information required to extend her TWA, Ms. Smith replied that she believed so. The information would have been related to an accommodation measure, family reasons or other. Ms. Smith said senior management decided whether to authorize a TWA. She would submit for approval to senior management a description of an employee’s situation, but the employee’s name would not be identified.

[30] Asked whether the grievor cried during the fact-finding meeting of April 27, 2011, Ms. Smith said she was quiet. She acknowledged that during telephone conversations, the grievor did cry at times, as she was worried and upset about her critical medical condition. She also agreed that from Christmas 2010 to April 2011, the grievor was under stress and tearful. The grievor was still at work, and Ms. Smith urged her to take time off.

[31] Ms. Smith was surprised to receive Dr. Johnson’s certificate at the fact-finding meeting of April 27, 2011. She called him to verify its authenticity, which he confirmed.

[32] When asked in re-examination who had the authority to decide whether an



employee remained on a TWA, Ms. Smith replied that it was a committee consisting of Mr. Netzel, an assistant deputy minister and a third executive in order to ensure consistency across the region.

### **3. Mr. Morris**

[33] Mr. Morris has been Dr. Tse's office manager since September 2008. Among other duties, he is responsible for the electronic medical records software, including its maintenance, and compliance with Alberta health information legislation. He also tracks document creation and modification dates and times.

[34] Mr. Morris said Ms. Smith had contacted him concerning the 2011 certificate. Upon reading it, he suspected that it was false, as the writing style was not that of Dr. Tse. He then verified the logs in the electronic medical records system but could not locate it. Neither was the document in the creation and modification logs. He asked Dr. Tse, who told him she did not create the certificate.

[35] Mr. Morris said that while the banner on the 2011 certificate was from Dr. Tse's office, it was that used for her cosmetics practice, called "ShapeMD." He concluded that the certificate had been forged. In an email to Ms. Smith dated April 19, 2011 (Exhibit E-6), Mr. Morris stated that the banner was from Dr. Tse's cosmetics practice and that the grievor had not seen Dr. Tse for about a year. He also stated that Dr. Tse's 2008 certificate was genuine.

[36] Mr. Morris confirmed that he hand-delivered a letter dated July 9, 2010, from Dr. Tse to the grievor, terminating the patient relationship (Exhibit E-1, Tab 1, "Dr. Tse's 2010 letter").

[37] In cross-examination, Mr. Morris said that Dr. Tse's 2010 letter was generated from the electronic medical records system, including Dr. Tse's signature. He said that Dr. Tse reviews such letters to ensure that she would have signed them.

[38] When asked to compare Dr. Tse's 2008 certificate and the 2011 certificate, Mr. Morris first stated that he would not have found either certificate in the records system. He said that as he could prove that the 2011 certificate was not in the system, Dr. Tse's 2008 certificate would not be there either. When asked to read his email of April 19, 2011, to Ms. Smith confirming Dr. Tse's 2008 certificate to be genuine, Mr. Morris then said that Dr. Tse had told him that the grievor had dictated the text to

her. He recognized Dr. Tse's writing style, as she is his stepdaughter. He said he had not reviewed the grievor's file before testifying at the hearing.

[39] Mr. Morris said he met with Mr. Bourque and Ms. Smith in his home office but could not recall the date. The subject of the meeting was whether Dr. Tse's 2008 certificate and the 2011 certificate were genuine. He said the metadata from the records system would indicate the last time the grievor had been seen by Dr. Tse.

[40] Mr. Morris testified that telephone calls to the office are not voice recorded. While the system currently has a feature allowing the manual recording of the date and time of a telephone call, Mr. Morris did not recall when that feature was added. He said that most phone calls to the office are not recorded in any manner.

[41] Mr. Morris did not know when the grievor first became a patient of Dr. Tse. He stated in re-examination that Dr. Tse's 2008 certificate was issued before he began working for Dr. Tse.

#### **4. Mr. Bourque**

[42] Mr. Bourque has been a senior investigator with the employer's SIU since September 2010. His previous experience included 10 years as a police officer, 12 years as a private investigator in the field of insurance fraud and 5 years as an investigator for a major Canadian corporation.

[43] Mr. Bourque said that once he is assigned to investigate a matter, there is typically already some evidence in the file. In this instance, the file contained the 2011 certificate and the TWA. He contacted Ms. Smith, who provided him with Dr. Tse's 2008 certificate. He also contacted Mr. Morris, who provided Dr. Tse's 2010 letter and told him that the 2011 certificate did not originate from Dr. Tse's office.

[44] Mr. Bourque said that Ms. Smith kept him informed of the grievor's health and that once she had returned to work, the grievor was informed of the administrative investigation.

[45] Mr. Bourque interviewed the grievor and Mr. Morris separately on November 2, 2011. He said his interview with the grievor was informal and went well. Her union representative and her husband attended. He discussed some of the family history, as he had Dr. Tse's 2008 certificate. He said that he showed the grievor a copy

of the 2011 certificate and asked her about its origin. Mr. Bourque stated that the grievor admitted to having fabricated the 2011 certificate to extend her TWA. She could not explain why she had done so, as a certificate was not required, in view of her going on sick leave. The grievor told him she wrote the document in the expectation of meeting with Dr. Tse, in the same way as for Dr. Tse's 2008 certificate. She told him that, working with a PDF file, she was able to transfer Dr. Tse's signature from Dr. Tse's 2008 certificate to the 2011 certificate.

[46] Mr. Bourque had a copy of the notes of the fact-finding meeting of April 27, 2011, which stated that the grievor had denied fabricating the 2011 certificate. When he raised the matter with the grievor, she replied that she was not sure why she had lied to Ms. Smith but that she was in the same frame of mind as when she had fabricated the 2011 certificate, namely, highly emotional and worried about her upcoming major surgery.

[47] Mr. Bourque concluded that it was clear that the grievor had created a forged document. The administrative investigation report, dated February 2, 2012 (Exhibit E-1, Tab 5), concluded that the grievor had uttered a forged document, which is an offence under section 366 (Forgery) of the *Criminal Code* (R.S.C., 1985, c. C-46), and that she had contravened the *Values and Ethics Code for the Public Service* (Exhibit E-1, Tab 11), which contains the following statement under the title "Ethical Values": "Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law." Mr. Bourque stated that while at the time he was of the view that the grievor's actions were of a criminal nature, they were not serious to the point of warranting criminal charges.

[48] Mr. Bourque's involvement ended upon his submission of the administrative investigation report. He said that he was surprised to learn several months later that the grievor's reliability status had been revoked.

[49] In cross-examination, Mr. Bourque said he did not interview Dr. Tse. He did not have to interview Ms. Smith, as he had been in continuous discussions and had had a meeting with her. As for the *Criminal Code*, Mr. Bourque stated that while he thought the grievor had breached it, he did not report it to the police. Concerning the 2011 certificate, Mr. Bourque said that according to both Ms. Smith and the grievor, it was not necessary to provide such a certificate at that time.

[50] Mr. Bourque said that he was surprised at the revocation of the grievor's reliability status considering her circumstances, but Mr. Boyd had not discussed that with him.

[51] Mr. Bourque made an audio recording of his interview with the grievor and prepared notes of it (Exhibit G-1) a couple of days later. As he did not make an audio recording of his interview with Mr. Morris, he prepared those notes that same day (Exhibit G-2).

[52] The grievor told Mr. Bourque of the background to Dr. Tse's 2008 certificate. She said that a first certificate prepared by Dr. Tse was insufficient for the purposes of a TWA and that Dr. Tse had asked the grievor to prepare a text for her review. They both agreed to the text, which Dr. Tse signed. Mr. Morris had told Mr. Bourque that the grievor had brought in a text to be signed by Dr. Tse.

[53] Mr. Bourque said that the DSO would see only the administrative investigation report and not his interview notes.

[54] In re-examination, Mr. Bourque said that the administrative investigation notice addressed to the grievor is a template letter prepared by his unit, which is signed by local management. He stated that as indicated in his interview notes, the grievor had told him that she had some blank letterhead from Dr. Tse's office.

## **5. Mr. Boyd**

[55] Mr. Boyd was the DSO and the acting director general for the employer's Internal Integrity and Security section from the end of December 2011 to May 2012. His DSO duties included managing security operations for the employer, emergency preparedness and business continuity, and responsibility for the SIU and the values and ethics team. Claude Jacques, the manager of personnel security, was under his jurisdiction.

[56] Mr. Boyd stated that he was familiar with the *Policy on Government Security* (Exhibit E-1, Tab 9), which sets out the roles and responsibilities for security in the Government of Canada. It states that deputy heads of all departments are responsible for departmental security activities and appointing a DSO to manage the departmental security program. The *Personnel Security Standard* (Exhibit E-1, Tab 10) is the policy to apply in a department and concerns the assessment of reliability status.

[57] Mr. Boyd was aware of the administrative investigation into the grievor's actions, as he had received a draft of the administrative investigation report. He provided comments to ensure sufficient clarity to support the conclusions. Once in its final version, the administrative investigation report was returned to him.

[58] After providing the administrative investigation report to Mr. Netzel, he referred the matter to Mr. Jacques for a reliability status reassessment, in accordance with the procedure to follow when adverse information concerning an employee comes to light. He considered Mr. Jacques' report, dated February 17, 2012 (Exhibit E-1, Tab 6, "the reliability reassessment report"), when assessing the grievor's reliability status. When asked to provide a time frame for an undated letter he sent to Mr. Netzel informing him of the revocation of the grievor's reliability status, Mr. Boyd stated that he believed it was around the end of the 2011-2012 fiscal year.

[59] In arriving at his decision, Mr. Boyd said that he reviewed the administrative investigation report, the reliability reassessment report and the policy documents. He also held discussions with both Mr. Jacques and Lucie Clément, Mr. Jacques' supervisor. He considered the grievor's actions, which indicated a breakdown of trust in her. He stated that trust is essential for reliability status. In his view, the forgery was sufficient to conclude that the grievor's reliability status should be revoked.

[60] In cross-examination, Mr. Boyd stated that the conclusions of the administrative investigation report remained unchanged from the draft to the final version. He communicated with Ms. Clément and Mr. Jacques but had no contact with Mr. Bourque. His only contact with Mr. Netzel was by letter.

[61] When asked whether he had participated in the reliability reassessment report, Mr. Boyd said he sought Mr. Jacques' advice because of his vast experience in the area. His work focuses on investigation and security standards. Mr. Boyd stated that upon reading the administrative investigation report, it was evident to him that the matter had to go to personnel security for a reliability status reassessment. When queried as to why it did not go to labour relations, Mr. Boyd replied that his responsibilities were to assess security risks and take appropriate actions, not to manage or discipline employees. He said that he would have had some contact with the employer's director of labour relations. He did not know of any contact between Mr. Jacques and labour relations staff and said it was unlikely that Ms. Clément had had such contacts. Mr. Boyd did not speak with the grievor and was not aware of whether Mr. Jacques or

Ms. Clément had spoken with her.

[62] Mr. Boyd stated that the effect of revoking an employee's reliability status is the loss of his or her job, as reliability status is a condition of employment. That action would be taken by local management. When it was put to him that Mr. Bourque had expressed surprise at the decision, Mr. Boyd replied that he was not aware of the investigator's professional opinion.

[63] Mr. Boyd did not know of any other instance of a medical certificate being falsified during his five-month tenure as the DSO. He would have discussed it with Mr. Jacques.

[64] When asked why there was a delay of 2.5 months between the administrative investigation report, dated February 2, 2012, and the reliability reassessment report, approved by Ms. Clément on April 20, 2012, Mr. Boyd attributed it to a high workload in the employer's security administration at the time.

[65] Mr. Boyd stated that Mr. Jacques was provided with the administrative investigation file, including the data and notes gathered by the investigator.

[66] When asked about the grievor's actions allegedly constituting a criminal offence, Mr. Boyd replied that whether she had committed a criminal act was not a consideration in his decision to revoke her reliability status. He reviewed her behaviour and considered whether it contravened security policies.

[67] Mr. Boyd stated that his decision to revoke the grievor's reliability status was based on the facts of the case, namely, that she had broken the bond of trust by presenting fraudulent medical documents to management. When asked if anything had occurred between March 31, 2011, and the grievor's termination on April 27, 2012, Mr. Boyd said that did not factor into his decision; nor did the grievor's 22 years of service. He became aware of the matter in January 2012 when he received a draft of the administrative investigation report.

[68] Mr. Boyd said he did not know when the grievor received a copy of the administrative investigation report and did not see her response to it, as such a report is sent to local management, which deals with the employee. Mr. Boyd said that he did not revoke the grievor's reliability status before the reliability reassessment report was issued on April 17, 2012.

[69] When asked if there had been any suggestion that the grievor was untrustworthy following her return to work on October 18, 2011, Mr. Boyd replied that no new incidents had been reported.

[70] In re-examination, Mr. Boyd stated that his undated letter to Mr. Netzel (Exhibit E-1, Tab 7) was issued after the date of the reliability reassessment report, following which Mr. Boyd had no further involvement in the matter.

**B. For the grievor**

[71] The grievor had been employed in the public service since 1989. She had been on a TWA since 2008 due to her family circumstances as outlined in Dr. Tse's 2008 certificate. The grievor asserted that she did not dictate the contents of the certificate to Dr. Tse but that it was a joint composition. She stated that she and Dr. Tse exchanged emails concerning the content of the certificate before it was finalized. As of August or September 2008, the employer authorized the grievor to work from home under a TWA.

[72] The grievor testified that she had certain long-standing medical conditions for which she took medication, many of which had been prescribed by Dr. Tse, whose patient she had been since 1995.

[73] When in September 2010 Ms. Smith requested that the grievor provide new information to support her TWA, the grievor explained to her that she no longer had a physician and that she would go to a local clinic, where she would obtain a prescription for her medication. She said that Ms. Smith suggested that although she was no longer a patient of Dr. Tse's, she should try to contact her former physician.

[74] When the grievor learned she was to undergo major surgery, she was convinced she would not survive. She put her affairs in order, which included ensuring that programs and services required for her family's particular circumstances would be in place. She stated that she suffered what she termed "night terrors" from December 2010 until the date of her surgery, May 18, 2011.

[75] The grievor acknowledged that she submitted the 2011 certificate. She testified that in January and February 2011, she had phoned Dr. Tse's office and had left messages stating that she needed a new medical certificate. She did not receive replies to her messages but stated that it was "wonderful" when the 2011 certificate appeared

on her desk in her home office. She acknowledged that it resembled Dr. Tse's 2008 certificate. The grievor stated she did not recall writing the certificate and did not know where it came from and that it must have arrived in the mail. During the fact-finding meeting of April 27, 2011, Ms. Smith asked the grievor whether she had the envelope in which the certificate had arrived; she replied that she did not. When she asked Ms. Smith what the problem was, she was told that Dr. Tse had not written the 2011 certificate and that she was attempting to find out about it. After the fact-finding meeting, the grievor understood that the 2011 certificate would not be accepted to extend her TWA, as Ms. Smith found it suspicious. The grievor stated that that made sense to her. She said that the 2011 certificate was not intended for monetary gain.

[76] During the fact-finding meeting of April 27, 2011, the grievor submitted Dr. Johnson's certificate for time off work before her major surgery. The grievor described herself as "a basket case" from January to April 2011 and as stressed about her impending surgery.

[77] The grievor returned to work on October 18, 2011, on modified duties until sometime in November, after which she worked full-time. She said that she cried every day at work and that if she did not perform at a high level, she would not be granted a TWA, no matter her circumstances. When asked about working under close supervision after her return, the grievor said that every client file she worked on was reviewed by someone else before the decision was input into the system. She thought the employer was intentionally attempting to get her to resign.

[78] Before her meeting with Mr. Bourque on November 2, 2011, the grievor said she met with a union representative who told her to listen to what Mr. Bourque had to say and if it was reasonable, to agree and to not make waves. The grievor said she told Mr. Bourque that she wrote the 2011 certificate but that she did not remember writing it.

[79] The grievor said that during a meeting on April 23, 2012, she received a copy of the administrative investigation report and the letter from Mr. Boyd to Mr. Netzel dated February 2, 2012, from Mr. Cannon, a service manager at the employer's office located in the Meadowlark shopping centre in Edmonton ("the Meadowlark office"). Her union representative was present. The grievor was asked whether she had anything to say, and her representative advised her to save her comments. She said that her



original written response was lengthy, that she shortened it on the advice of her union representative and that she emailed it to Mr. Cannon on April 25, 2012 (Exhibit E-7). She stated that the union representative suggested that she say that she did not remember writing the 2011 certificate, which might have been her biggest mistake. She went on to say that while she could not recall writing the certificate, it would only make sense that she had written it.

[80] The grievor worked April 25, 26 and 27, 2012. At approximately 16:00 on April 27, 2012, she was ushered into an office where Kelvin Mathiuk and another service manager were present. Mr. Mathiuk said that he had a letter from Mr. Netzel terminating the grievor's employment and added that he had no choice in the matter, as it was not his call. The grievor asked for a union representative but was told it was too late in the day.

[81] The grievor said that at no time when speaking with Mr. Cannon was there any indication of the significance of the 2011 certificate. She stated that if she had had a choice, she never would have written the certificate. She said that as everyone said she wrote the certificate, she must have done so, but that she did not remember doing it.

[82] The grievor said that that it was difficult to believe that her actions had resulted in the loss of her employment after 22 years of service and 3 awards for service excellence. She has not worked since her termination.

[83] The grievor stated that after she had received Dr. Tse's 2010 letter, terminating the patient relationship, she left messages with whoever answered the phone at Dr. Tse's office in January and February 2011 stating that she had to speak with Dr. Tse concerning her TWA.

[84] Concerning the security issues relating to the TWA referred to in Mr. Netzel's testimony, the grievor said that was never raised with her. Before being approved for a TWA, her home was inspected by a team leader. She said she worked from home for family reasons, not because of her health.

[85] The grievor asserted that she never was provided a copy of the reliability status reassessment report. She first learned that the employer was considering revoking her reliability status on April 23, 2012, in Mr. Cannon's office. That same day, he emailed her copies of the letter from Mr. Boyd to Mr. Netzel dated February 2, 2012, and the

administrative investigation report.

[86] Referring to the reliability status reassessment report, which stated that her actions had contravened the *Criminal Code*, the grievor stated that she had never been charged with a criminal offence.

[87] When asked whether Mr. Bourque's notes of his interview with her were accurate, the grievor said she did not recall telling him about the medical condition listed in the fourth bullet of his notes. She said those had been Dr. Tse's words in her initial draft of Dr. Tse's 2008 certificate, which the grievor had refused, and then further exchanges with Dr. Tse took place concerning the wording of the certificate. The grievor added that while the interview notes referred to the fact that she had requested of Ms. Smith a change of team leader because she felt she was being discriminated against and micromanaged, that information was not included in the administrative investigation report.

[88] The grievor then addressed the section of Mr. Bourque's notes that stated that she told him she had copied and pasted Dr. Tse's signature from another medical document and that she had some of Dr. Tse's letterhead on which she printed the 2011 certificate. The grievor said she did not have such letterhead. She stated that she felt intimidated by Mr. Bourque and that he took some of her crying during the interview to be an affirmative response. She said she did not feel she could dispute what a trained professional came up with.

[89] At this stage, the employer sought to recall Mr. Bourque on the issue that the grievor appeared to state that her responses during the interview were made contrary to her interests because she felt intimidated. As the grievor did not object, I allowed Mr. Bourque to testify on that point before the grievor's cross-examination. Mr. Bourque's testimony on that issue was that having interviewed individuals for 30 years, he noted that the grievor was upset with her situation, but he did not observe her to be intimidated. He added that there was no tension during the interview and that after it had been completed, he asked her whether she had any questions. I note that during her testimony, the grievor stated that Mr. Bourque had been "very fair" with her.

[90] When asked whether she assumed responsibility for her actions, the grievor said she definitely submitted the 2011 certificate because it was the only conclusion that

made sense, and although she did not remember writing the document, she took full responsibility for it. She added that she felt she warranted discipline for her actions but not the termination of her employment.

[91] In cross-examination, the grievor stated that she became a patient of Dr. Johnson in January to February 2011. She contacted Dr. Tse because she had known the grievor for a decade and was aware of all her issues. When she told Ms. Smith that she was without a doctor, she suggested that the grievor contact Dr. Tse. Although she had asked Dr. Johnson for a note for the TWA, he refused because he did not think it logical to provide such a note when the grievor was going into major surgery.

[92] The grievor was referred to Mr. Bourque's notes of his interview with her stating that in the fall of 2010, Ms. Smith had said that since the grievor was to undergo major surgery, the TWA would be put on the back burner. The grievor agreed that Ms. Smith had said that, but in fact, Ms. Smith had sent her biweekly emails requesting a medical certificate, which she required by the end of the fiscal year.

[93] When asked why she had stated that it was "wonderful" when the 2011 certificate appeared on her desk at home, the grievor said it was because Dr. Tse had not returned her calls. She said that her sons brought in the mail and that the certificate appeared between March 31 and April 11, 2011.

[94] The grievor said that her last discussion with Dr. Tse occurred in May 2010. She was then referred to a statement in the 2011 certificate about the special needs of one of the grievor's immediate family members, and she was asked how Dr. Tse would have known of that. The grievor replied that she had no response and that it was unreasonable but that she was not in a reasonable frame of mind. She was next referred to another section of the 2011 certificate, which contained information about her critical medical condition in September 2010, and again, she was asked how Dr. Tse would have known of that. The grievor had no answer and did not know where that information originated.

[95] The grievor said she did not check with her sons or her husband as to whether they had placed the 2011 certificate on her desk; nor did she contact Dr. Tse's office to learn whether it had sent the certificate. She asserted that the certificate looked legitimate to her and that it never occurred to her that Dr. Tse would have information

that she would not have been aware of.

[96] The grievor was referred to the notes of the fact-finding meeting of April 27, 2011. She recalled having received the notes and said she was not satisfied they were accurate. Asked whether she provided follow up, she said she wrote a detailed letter but that her union representatives advised her to not make waves. She never responded to those notes.

[97] The grievor said that at the time of the fact-finding meeting of April 27, 2011, she thought that the 2011 certificate had come through the mail, but after the discussion with Ms. Smith and the interview with Mr. Bourque, she had no other answer but that it probably did not come through the mail and that that was the only reasonable answer. The grievor acknowledged that the signatures on Dr. Tse's 2010 letter, and on the 2011 certificate, appeared similar.

[98] The grievor acknowledged having received the administrative investigation report. When asked whether she was aware of potential consequences, she replied that she did not think it applied to her, as she did not recall writing the 2011 certificate. She said she met with her union representative before her interview by Mr. Bourque on November 2, 2011, and he told her to agree with whatever the investigator said. He said that the certificate was not required because she was going on sick leave before major surgery. The grievor said the experts had stated that Dr. Tse's office had no record of having written that certificate. She said she should have told Mr. Bourque that she did not recall writing the certificate. She said that she was untruthful with Mr. Bourque and that his testimony was the most accurate.

[99] The grievor said that while she was comfortable with her union representative's advice, he led her to believe that the interview with Mr. Bourque had gone well and that there would be no consequences. She felt that Mr. Bourque understood the situation.

[100] The grievor was referred to Mr. Bourque's interview notes, which indicate that she admitted she had written the 2011 certificate and had copied and pasted Dr. Tse's signature from another medical document. The grievor responded that it was wrong of her to have told Mr. Bourque that she had written the certificate. She said that Mr. Bourque had asked the question; she had "blubbed," and he had interpreted that as "Yes." Asked whether, despite Mr. Bourque's years of experience as an investigator, the grievor maintained that he had misinterpreted her demeanour, she replied in

the affirmative.

[101] The grievor was referred to another section of Mr. Bourque's interview notes, where it was stated that during the fact-finding meeting of April 27, 2011, she had not been truthful when questioned on the origin of the 2011 certificate. The grievor testified that in her interview by Mr. Bourque on November 2, 2011, she was going to go along with anything he said, which meant that she agreed at that time that the information she had provided Ms. Smith was faulty. The grievor asserted in her testimony that in fact, it was the other way around and that she had been untruthful to Mr. Bourque.

[102] The grievor acknowledged that she did not contact Mr. Bourque in any manner to raise concerns about the interview. She was asked why, if she felt she could not be truthful with Mr. Bourque and had told him something she did not believe she had done, she had not taken action. The grievor replied that she thought the matter was over, as she had worked from November 2011 to April 2012 without being made aware of a problem. She acknowledged that in her email to Mr. Cannon dated April 25, 2012, she did not mention that the information she provided to Mr. Bourque was incorrect or untrue. In the same email to Mr. Cannon, the grievor asked why the document he had sent her was called a "release package" and what it meant to be "released." She stated that when she saw the term "release package," it indicated to her that a decision had already been made to terminate her employment.

[103] The grievor added that a reason for not having followed up was that she had received a service excellence award on September 28, 2011. She had no idea that what she had done one year previously would have resulted in the loss of her job.

### **III. Summary of the arguments**

#### **A. For the employer**

[104] The employer's first submission concerned an adjudicator's jurisdiction over a termination of employment as a result of an employee's loss of reliability status. The employer referred to subsections 209(1) of the *PSLRA* and 12(3) of the *FAA*, the second of which provides that a termination of employment must be for cause.

[105] The employer stated that the issue is whether the grievor was terminated for cause. It submitted that there was no dispute that reliability status is a condition of

employment for all public servants. Her reliability status having been revoked, the grievor no longer met her conditions of employment, and she fell within the ambit of the *FAA*. Accordingly, if I am satisfied that her termination was for cause, then my review of the employer's actions must end there, and I must dismiss the grievance.

[106] The employer further submitted that if I decide that its actions should be reviewed, then my jurisdiction would be limited by section 209 of the *PSLRA*; that is, I must determine that the employer's action was disciplinary, resulting in termination, demotion, suspension or financial penalty, under paragraph 209(1)(b) of the *PSLRA*, or that it was a termination or demotion, under paragraph 209(1)(c). According to the employer's submission, I can take jurisdiction only if I find that its decision constituted disguised discipline.

[107] The employer submitted that there was no evidence to indicate that Mr. Boyd's decision was disciplinary in nature. He conducted an assessment under the *Personnel Security Standard*, and neither labour relations nor management had any influence on his decision. As the DSO, he had no authority to discipline employees. Mr. Boyd relied on the reliability reassessment report and Mr. Jacques' review of government policy. Mr. Boyd concluded that the grievor's behaviour was contrary to the *Values and Ethics Code for the Public Service* and that she posed a serious risk to the department. The employer requested that the portion of the grievance related to the revocation of the grievor's reliability status be dismissed for lack of jurisdiction.

[108] In support of its arguments on jurisdiction, the employer cited the following decisions: *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL); *Canada (Attorney General) v. Frazee*, 2007 FC 1176; *Canada (Attorney General) v. Basra*, 2008 FC 606; *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63; *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80 (application for judicial review dismissed: *Bergey v. Canada (Attorney General)*, 2015 FC 617); and *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61.

[109] The employer submitted in the alternative that if I determine that the revocation of the grievor's reliability status constituted disguised discipline, then I must decide whether she committed the alleged misconduct and if so, whether termination was the appropriate penalty.

[110] The employer submitted that the grievor admitted the misconduct and that it is highly probable she fabricated the 2011 certificate, as there is no other logical conclusion.

[111] Concerning the appropriateness of the penalty of termination, the employer submitted that adjudicators have viewed forging medical certificates as serious misconduct. The employer referred to several versions of her story put forth by the grievor in her testimony and submitted that it demonstrated a lack of forthrightness.

[112] The employer pointed out that the grievor did not call medical evidence to substantiate that she had recall problems. Therefore, there is no reason to mitigate on the basis of her health.

[113] Concerning rehabilitative potential, the employer submitted that the grievor accepted responsibility for her actions but that she did not remember falsifying the 2011 certificate. The employer stated in its submission that it is difficult to discern rehabilitative potential when an individual cannot take full responsibility for his or her actions. In addition, the employer stated that the grievor did not display remorse for her actions.

[114] In support of its alternative argument, the employer cited *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26, and *Morrow v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 43.

#### **B. For the grievor**

[115] The grievor first submitted that Mr. Netzel never indicated that he had concerns about her trustworthiness. She stressed that the only reason he issued the termination letter was that Mr. Boyd had revoked her reliability status. In April of 2012, there was no suggestion that there were issues concerning her reliability.

[116] The grievor pointed out that Ms. Smith acknowledged that the grievor was under stress and was tearful from Christmas 2010 to April 2011. After the fact-finding meeting of April 27, 2011, the matter was referred to the employer's security organization. There was no further action after the referral.

[117] The grievor submitted that when she was interviewed by Mr. Bourque on November 2, 2011, she did not dispute that she wrote the 2011 certificate, only that

she did not recall having done so. The only logical conclusion is that she wrote the certificate. She further submitted that while as of November 2, 2011, the employer had all the information it needed in order to reach a decision about her, it made its decision only 5.5 months later. She referred to the reliability reassessment report recommending the revocation of her reliability status and pointed out that Mr. Jacques had never spoken with Mr. Bourque. The grievor submitted that an adverse inference should be drawn from the fact that Mr. Jacques did not testify.

[118] The grievor pointed out that in an undated letter, Mr. Boyd informed Mr. Netzel that her reliability status had been revoked. She added that this must have occurred after April 20, 2012, the date on which the reliability reassessment report was approved by Mr. Jacques' supervisor, Ms. Clément. On April 23, 2012, the grievor was advised of the status of the administrative investigation, to which she was requested to respond; she did so on April 25, 2012. She submitted that Mr. Boyd never saw her response and that it was not taken into consideration. Her employment was terminated on April 27, 2012, one year after the fact-finding meeting of April 27, 2011. During that year, the employer possessed the information about her actions.

[119] The grievor submitted that the employer's action constituted disguised discipline. Her falsification of the 2011 certificate was culpable behaviour. Any doubt about it was removed when Mr. Bourque interviewed her on November 2, 2011. She raised the following questions: If the employer found her behaviour so reprehensible, why did it take one year to react? Why did it allow her to work on its premises for 5.5 months before deciding she was untrustworthy? She submitted that the employer chose the path of revoking her reliability status to avoid scrutiny at adjudication.

[120] The grievor submitted that there was a lack of administrative fairness in the employer's process. Neither Mr. Boyd nor Mr. Netzel had any contact with her, and no person involved in the decision making considered her explanation, which demonstrated the employer's true intent: to discipline her by terminating her employment without recourse to the grievance procedure.

[121] The grievor submitted that in the decisions the employer cited concerning falsifying medical certificates, a financial benefit was involved, while in this matter, the grievor did not derive a financial benefit but rather a continuation of the TWA, which was set up for family, not health reasons.



[122] The grievor submitted that the employer disciplined her based on her culpable behaviour while portraying its actions as administrative in nature. She submitted that her actions constituted a serious first offence, deserving of a lengthy suspension to serve as a deterrent, but that termination was too severe in the circumstances.

[123] The grievor referred to Ms. Smith's testimony that she was closely monitored upon her return to work, but there was no suggestion this was done for security reasons. No witness testified that he or she was unable to work with the grievor, and there was no basis on which to determine that she could no longer be trusted.

[124] Concerning her rehabilitative potential, the grievor said she expressed remorse during her interview with Mr. Bourque when she "blubbered."

[125] In support of her arguments, the grievor cited the following decisions: *Gunderson v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File Nos. 166-02-26327 and 26328 (19950912); *Deering v. Treasury Board (National Defence)*, PSSRB File No. 166-02-26518 (19960208); *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151; and *Gill v. Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 19.

### **C. Employer's rebuttal**

[126] Concerning the grievor's submission that an adverse inference should be drawn from Mr. Jacques not having been called to testify, the employer stated that he was not a decision maker but only an advisor who had no delegated authority.

[127] The employer submitted that there was no evidentiary basis behind the allegation that it chose the path of revoking the grievor's reliability status to avoid scrutiny at adjudication and that it had been open to the grievor to put that allegation to Ms. Smith or Mr. Netzel, which she failed to do. Furthermore, there was no indication that the employer treated the grievor's actions as worthy of discipline.

[128] While there was no financial benefit to be gained by the grievor's actions, there was a benefit to be gained in continuing her TWA.

[129] Concerning the grievor's remorse, Mr. Bourque did not equate the grievor's "blubbering" to a sign of remorse.

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**IV. Reasons**

[130] The employer objected that an adjudicator lacks jurisdiction to consider the grievor's challenge to the revocation of her reliability status and the consequent termination of her employment because the termination was an administrative measure under paragraph 12(1)(e) of the *FAA* and not a disciplinary action. Specifically, the employer submitted that the issue at adjudication is whether the grievor was terminated for cause and that as a valid reliability status was a condition of employment that the grievor no longer met, her termination satisfied the requirements of paragraph 12(1)(e) and subsection 12(3). Those provisions read as follows:

*12. (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*

*...*

*(e) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct . . . .*

*...*

*(3) Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c), (d) or (e) or (2)(c) or (d) may only be for cause.*

[131] The employer submitted that an adjudicator's jurisdiction over terminations is limited under section 209 of the *PSLRA* to those resulting from disciplinary actions under paragraph 209(1)(b) or those prescribed under paragraph 209(1)(c). However, according to the employer, I can take jurisdiction over the grievor's termination only if I find that it constituted disguised discipline.

[132] The grievor contended that the termination of her employment constituted disguised discipline. She submitted that the employer disciplined her for her behaviour while portraying its actions as administrative in nature. She asserted that the employer never made her aware of any security concerns it had about her.

[133] The types of termination grievances that may be referred to adjudication are set out in subsection 209(1) of the *PSLRA* as follows:

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

...

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

(c) in the case of an employee in the core public administration,

(i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or

...

(d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct.

[134] An adjudicator clearly has jurisdiction under paragraph 209(1)(b) of the *PSLRA* over a disciplinary action resulting in termination. Similarly, an adjudicator clearly has jurisdiction under paragraph 209(1)(c) of the *PSLRA* over the termination of an employee in the core public administration under paragraph 12(1)(d) of the *FAA* for unsatisfactory performance or under paragraph 12(1)(e) of the *FAA* for any other reason that does not relate to a breach of discipline or misconduct. As the grievor was an employee in the core public administration, it therefore follows that an adjudicator has jurisdiction under paragraphs 209(1)(b) and (c) of the *PSLRA* over her termination whether it resulted from a disciplinary action, from unsatisfactory performance or from any other reason that did not relate to a breach of discipline or misconduct. Although subsection 208(2) and paragraph 211(a) of the *PSLRA* provide for specific exceptions to an adjudicator's jurisdiction with respect to terminations, those exceptions do not apply in the grievor's case. Accordingly, an adjudicator has full jurisdiction over the grievor's termination.

[135] In this case, as in most termination cases in the federal public service, the employer bore the burden of proving that the termination was for cause. At the hearing, it submitted that the requirements of subsection 12(3) of the *FAA* applied to the grievor's termination. The requirement to prove cause meant that the grievor's

termination had to be justified by a legitimate employment-related reason. The reason referred to in the letter of termination that was provided to the grievor on April 27, 2012, reads as follows:

...

*The Departmental Security Officer, in accordance with his delegation of authority, has revoked your Reliability Status.*

*Since employment with the Department requires a valid Reliability Status, and given that you no longer meet this condition of employment, I hereby inform you of my decision to terminate your employment with Human Resources and Skills Development Canada pursuant to Section 12(1)(e) of the Financial Administrative [sic] Act. This decision is effective immediately.*

...

[136] According to the employer, if I am satisfied that the grievor's termination was based on the revocation of her reliability status, then my review of the employer's actions must end there. I do not agree. The employer cannot escape a review of its decision to revoke the grievor's reliability status in a case in which her termination was based solely on that decision, she squarely challenged that decision and an adjudicator has full jurisdiction over her termination. In those circumstances, therefore, my task is to determine whether the revocation of her reliability status constituted a legitimate cause for terminating her employment.

[137] As of the date of the fact-finding meeting of April 27, 2011, the employer was aware that the 2011 certificate, which the grievor had submitted, was fraudulent. Ms. Smith had spoken with Dr. Tse, who had confirmed that she had not written or signed that certificate and that she had not seen the grievor as a patient for approximately one year, which was confirmed by an email from Mr. Morris to Ms. Smith on April 19, 2011, a copy of which was provided to the grievor. When asked to account for the provenance of the certificate, the grievor said it had appeared on her desk at home, and she had no idea how it had arrived there, although it might have been by mail. She was provided with a copy of the notes of the fact-finding meeting but did not respond to them. In cross-examination, while acknowledging that her last contact with Dr. Tse was in May 2010, the grievor had no response as to why the 2011 certificate referred to events in September 2010 and March 2011.

[138] The grievor was absent on medical leave from April 27, 2011, underwent major surgery and recovery, and returned to work on October 18, 2011. From that date until the termination of her employment, she worked on the employer's premises at the Meadowlark office.

[139] In a letter to the grievor dated October 25, 2011, Ms. Smith informed her that she was the subject of an administrative investigation concerning an allegation that she was in a conflict of interest by having knowingly submitted a falsified document in relation to a TWA extension and that Mr. Bourque would interview her on November 2, 2011. That letter informed the grievor that she was entitled to representation at the interview and included the following: "Should it be determined that the allegation against you is founded, disciplinary measures may be imposed. Your reliability status may also be reviewed should adverse information come to light during the course of the investigation."

[140] During the interview with Mr. Bourque, the grievor admitted to having written the 2011 certificate and to having copied and pasted Dr. Tse's signature from another document in her possession.

[141] The administrative investigation report was issued three months later, on February 2, 2012. The report concluded that the elements to support a contravention of section 366 (Forgery) of the *Criminal Code* had been established and that the grievor had contravened the following statement in the "Ethical Values" section of the *Values and Ethics Code for the Public Service*: "Public servants shall act at all times in a manner that will bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law." Concerning the grievor's alleged contravention of the *Criminal Code*, Mr. Bourque stated that while at the time he was of the view that the grievor's actions were of a criminal nature, they were not serious to the point of warranting charges, and he did not report the grievor to the police.

[142] In a letter dated February 2, 2012, Mr. Boyd advised Mr. Netzel that the administrative investigation had been completed and informed him of the findings that the grievor had contravened the *Values and Ethics Code for the Public Service* and the "Guidelines of Conduct for the Public Service". As stated by Mr. Netzel, a copy of the administrative investigation report was attached to the letter.

[143] After providing the administrative investigation report to Mr. Netzel, Mr. Boyd

referred the matter to Mr. Jacques for a reliability status reassessment.

[144] The reliability status reassessment report was dated April 17, 2012, 2.5 months after the completion of the administrative investigation report on which it was based. The report cited the following extract from “Appendix B - Guidance on Use of Information for Reliability Checks” of the *Personnel Security Standard*:

...

*3. In checking reliability, the question to be answered is whether the individual can be relied upon not to abuse the trust that might be accorded. In other words, is there reasonable cause to believe that the individual may steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to him or her, or exhibit behaviour that would reflect negatively on their reliability. Such decisions are to involve an assessment of any risks attached to making the appointment or assignment, and, based on the level of reliability required and the nature of the duties to be performed, a judgement of whether such risks are acceptable or not.*

...

[Emphasis added]

[145] The following extracts also formed part of the reliability reassessment report:

...

*Ms. Heyser’s behaviour, lies, contradictions as well as her initial denial regarding the falsification of a doctor’s letter call into question her trustworthiness and reflect negatively on her reliability status.*

...

*Notwithstanding her explanations, as delineated in [the administrative investigation report], by creating, forging and submitting a document knowing fully that it to be false [sic] with intent that it should have been acted upon, Ms. Heyser acted contrary to the Criminal Code, the Values and Ethics Code for the Public Service and the Guidelines of Conduct for Service Canada.*

*Ms. Heyser’s activity as described above calls into question her trustworthiness and features of character and overall suitability, which are central tenets of obtaining and maintaining a Reliability Status.*

...

*... she placed the trust required of her as an employee of HRSDC in jeopardy and is significant enough to sever the bond of trust that exists between the employee and the employer.*

[Emphasis added]

[146] While portions of both the administrative investigation report and the reliability status reassessment report were devoted to the grievor's alleged contravention of the *Criminal Code*, Mr. Boyd testified that whether she might have committed a criminal act did not enter into his decision to revoke her reliability status. He stated that he based that decision on the facts of the case, namely, that she had broken the bond of trust by presenting a fraudulent medical document to management. When asked in cross-examination if there had been any suggestion that the grievor was untrustworthy following her return to work on October 18, 2011, Mr. Boyd replied that no new incidents had been reported. When asked if anything had occurred between March 31, 2011, and the grievor's termination on April 27, 2012, Mr. Boyd said that it did not factor into his decision.

[147] Mr. Boyd testified that the revocation of the grievor's reliability status was based entirely on the reliability status reassessment report, which recommended that, because of her actions, she was no longer trustworthy. However, in his undated letter to Mr. Netzel advising him of the revocation of the grievor's reliability status, Mr. Boyd stated that his decision was based on the administrative investigation report. The letter sets out the following reason for Mr. Boyd's decision:

*[The administrative investigation report] clearly indicates that Ms. Heyser's behaviour, activities, actions and her disregard for the Value and Ethics Code for public service employees under Treasury Board Secretariat pose a serious risk to the Department.*

[Emphasis added]

[148] Mr. Netzel said he was not involved in revoking the grievor's reliability status. He terminated her because she no longer met a condition of employment, namely, a valid reliability status.

[149] Did the employer have a legitimate concern about the risk that the grievor represented to its security? In my view, it did not. The employer's own *Personnel*

*Security Standard* required reasonable cause to believe that the grievor might steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to her, or exhibit behaviour that would create an unacceptable risk to the employer's operations.

[150] The grievor worked on the employer's premises from her return to work on October 18, 2011, until the date of her termination on April 27, 2012. The employer knew since April 2011 that Dr. Tse had neither issued nor signed the 2011 certificate. There was no evidence whatsoever that during that period the employer had any concerns that, based on the level of reliability required and the nature of the duties to be performed, there was an unacceptable risk that the grievor might steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to her, or otherwise exhibit behaviour that would injure the employer's operations. That would explain why the employer felt no need to restrict her duties, prohibit her from having unfettered access to her computer or in any manner restrict her movements in the office upon her return to work. Concerning the evidence that her work was closely monitored after her return, the grievor testified that the files she worked on were reviewed by another employee before being input into the system. The employer did not challenge her statement; nor did it submit evidence that such a review was done for security-related reasons.

[151] In *Braun, Shaver and Bergey*, all of which dealt with revocations of reliability status, the employer felt a need to restrict the grievors' duties by suspending them without pay pending an investigation. In *Gill*, the grievor was suspended without pay pending an investigation into criminal charges filed against him. In *Hillis*, the grievor was suspended 10 days for having released confidential client information to unauthorized individuals. Upon her return to work, her duties were restricted so that she would not have access to a database during a security investigation, which ultimately led to her reliability status being revoked.

[152] In this matter, although the employer was aware since April 27, 2011 that the grievor had falsified the 2011 certificate, it felt no need to take any security measures with respect to her presence in the workplace or to the discharge of her duties upon her return to work. The employer was aware of the administrative investigation into the grievor at that time. The fact that the employer unreservedly permitted her to work on its premises from October 18, 2011, until April 27, 2012, shows that it had no



genuine concerns with security risks related to her presence in the workplace. Similarly, the fact that it did not significantly alter how she performed her duties during that period indicates that she posed no genuine threat to its valuables, assets and information.

[153] In addition to questioning the grievor's trustworthiness, the reliability status reassessment report called into question her "... features of character and overall suitability ..." in support of revoking her reliability status. None of the employer's witnesses explained this phrase. If it referred to aspects of the grievor's behaviour, they would normally have been dealt with through applying disciplinary measures. In most circumstances, falsifying a medical certificate would attract a disciplinary response. In this case, all the factors Mr. Boyd relied on to support his decision to revoke the grievor's reliability status could have been addressed through the disciplinary process. However, that was not the path the employer chose. Mr. Netzel testified that the employer had decided to reassess the grievor's reliability status and that there would have been little point in proceeding with the disciplinary process if her reliability status had been revoked.

[154] Of interest was Mr. Bourque's statement during examination-in-chief that he was surprised to learn several months after submitting the administrative investigation report that the grievor's reliability status had been revoked. While he was not the decision maker, the reliability status reassessment report and Mr. Boyd's decision were based on the administrative investigation report.

[155] While the employer had a legitimate reason to initiate an investigation into the grievor's conduct, it knowingly allowed her back into the workplace without restriction for close to six months while being aware that she had falsified the 2011 certificate. The reason for revoking the grievor's reliability status set out in Mr. Boyd's letter to Mr. Netzel was that her conduct posed "... a serious risk to the Department." That statement is negated by and inconsistent with the evidence, given the grievor's presence in the workplace and Mr. Boyd's testimony that no incidents of her untrustworthiness since her return to work had been brought to his attention. Furthermore, there was no evidence of the level of reliability required and the nature of the duties to be performed, especially with respect to access to confidential or sensitive information. I was presented with no evidence whatsoever that during that period, the employer considered that there was an unacceptable risk that the grievor

might steal valuables, exploit assets and information for personal gain, fail to safeguard information and assets entrusted to her, or otherwise exhibit behaviour that would injure the employer' operations. All that remains is the finding in the administrative investigation report that the grievor did not "... act at all times in a manner that [would] bear the closest public scrutiny; an obligation that is not fully discharged by simply acting within the law."

[156] Therefore, I find that the grievor has demonstrated on a balance of probabilities that the employer did not have a legitimate concern that she "... pose[d] a serious risk to the Department ..." or that, in the words of its own *Personnel Security Standard*, there was "reasonable cause to believe" that she represented an unacceptable security risk when it decided to revoke her reliability status. The evidence has shown that the conditions required to revoke her reliability status were absent at the time of Mr. Boyd's decision, and therefore, I find that the consequential termination of her employment, not being for cause, constituted a contrived reliance on the *FAA*, a sham or camouflage. Further, Mr. Netzel testified that the fact that the grievor had returned to the workplace had no impact on his decision to terminate her employment because he was unaware of that fact. Although that fact was highly relevant in the circumstances and was known to the employer, it did not inform the decision to terminate the grievor's employment. Failure to consider a highly relevant fact in making a decision is sufficient to render that decision arbitrary.

[157] During its argument, the employer invited me to consider in the alternative whether the grievor's termination resulted from a disciplinary action.

[158] In numerous decisions under the *Public Service Staff Relations Act* (R.S.C. 1985, c. P-35) and the *PSLRA*, adjudicators have found that employers are bound by the grounds on which they rely at the time of a termination and that they should not be permitted to rely on new grounds at adjudication. This is what the employer attempted, since it relied solely on the revocation of the grievor's reliability status as the basis for terminating her employment.

[159] Further, the employer maintained throughout the grievance procedure that its decision to terminate the grievor was not disciplinary but administrative. Both grievances filed by the grievor stated the following: "I am grieving the revocation of my security clearance status and termination of employment." The first grievance challenged a disciplinary action resulting in termination; the second grievance alleged

a violation of article 17 (Discipline) of the collective agreement. The employer's final-level decision to both grievances was as follows:

*I find that the employer has not violated Article 17.02 of the PA collective agreement since no disciplinary action was taken in this matter. The employer carried out a review and reassessment of your reliability status. The holding of reliability status is required as a condition of employment. Since you no longer meet this requirement, your employment was terminated in accordance with the Financial Administration Act.*

[160] The employer bore the onus of establishing that the reasons for which it terminated the grievor's employment were legitimate at the time it made its decision. From the outset, the employer characterized the termination of the grievor's employment as non-disciplinary. All the evidence it presented was in support of that position. In its rebuttal argument, the employer submitted that there was no evidentiary basis to the allegation that it chose the path of revoking the grievor's reliability status to avoid scrutiny at adjudication. Furthermore, it maintained that there was no indication that it treated the grievor's actions as worthy of discipline.

[161] At adjudication, the employer attempted to change the grounds it had relied upon for the termination throughout the process. It would have been unfair to the grievor, and contrary to the rules of natural justice, to allow the employer to argue that her termination was disciplinary in the event that it failed to prove that the termination resulted from a non-disciplinary action. The employer made a strategic decision to revoke the grievor's reliability status instead of pursuing the disciplinary process. Therefore, I find that the grievance in PSLREB File No. 566-02-8831 will be allowed.

[162] As corrective measures, the grievor sought the reversal of the revocation of her reliability status and reinstatement without loss of pay and benefits. The employer's third and final-level decision contained the following:

...

*... You are also seeking reversal of the revocation of your reliability status, cessation of discrimination, implementation of accommodation measures upon return to work, and \$40,000 damages for pain and suffering.*

...

[163] Save for the reversal of the revocation of her reliability status, these remedies were not specified in the grievances; nor did the grievor pursue them at adjudication. Accordingly, I need not deal with them.

[164] Finally, although I have found that the evidence has shown that the conditions required to revoke the grievor's reliability status were absent at the time of Mr. Boyd's decision and that the consequential termination of her employment, not being for cause, constituted a contrived reliance on the *FAA*, a sham or camouflage, this did not clothe the employer's decision as a disciplinary action. As such, the grievance bearing PSLREB File No. 566-02-8832, alleging a breach of Article 17 (Discipline) of the collective agreement, will be dismissed as the provisions of that article were not triggered.

#### **V. Other observations**

[165] Even had the employer followed the disciplinary process, while I would have found that a disciplinary penalty was warranted, I would have concluded that terminating the grievor's employment was excessive based on all the facts of this case. Among the factors that would have led me to that conclusion are the following: the grievor's lengthy service of 22 years, free of discipline; the fact that the employer allowed her to work on its premises without restriction for almost six months before her termination without incident and without any apparent concern, thus demonstrating her rehabilitative potential; the fact that the falsification of the medical certificate was an isolated incident done without intent to defraud the employer or for personal financial gain, but rather due to her family circumstances; and the fact that her circumstances differ significantly from those of the grievors in *McKenzie* and *Morrow*, cited by the employer in support of terminating employment for falsifying medical certificates.

[166] *McKenzie* concerned the termination of a correctional officer who had forged her doctor's signature on nine medical certificates. Her attendance was being monitored, and she had been directed to submit a medical certificate within five days of every shift that she missed. She had previously received a five-day financial penalty for misconduct concerning her relationship with an offender. In upholding the termination, the adjudicator cited her brief service of four years, her previous discipline and lack of forthrightness. He also found that as peace officers, correctional officers are held to a higher standard than other public service employees.

[167] In *Morrow*, the grievor, a human resources assistant, was terminated for having submitted 14 forged medical certificates for 14 different absences over a 4-year period. The adjudicator concluded that the grievor was placed on certified sick leave for the vast majority of the days for which she presented forged medical certificates. In dismissing the grievance, the adjudicator found he could not mitigate the penalty on the basis of an isolated incident. Furthermore, the grievor did not acknowledge certain falsifications, blamed others on the employer and provided a contrived explanation of the process used to forge the signatures. The adjudicator stated that these elements undermined his assessment of her rehabilitative potential.

[168] However, the employer did not engage the disciplinary process in this matter.

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

*(The Order appears on the next page)*

**VI. Order**

[170] I declare that an adjudicator has jurisdiction over the revocation of the grievor's reliability status and the ensuing termination of her employment.

[171] I declare that the revocation of the grievor's reliability status was not based on a reasonable cause to believe that she represented an unacceptable security risk, and that her termination was not for cause.

[172] I order the grievor reinstated into her position retroactive to April 27, 2012, with all rights and benefits.

[173] I will remain seized for a period of 90 days from the date of this decision for the purpose of resolving any dispute that may arise concerning the implementation of the order in paragraph 172.

[174] I order removed from the grievor's disciplinary, labour relations and any other personnel records any documentation — other than this decision — that relates to the revocation of her reliability status and the termination of her employment.

[175] The grievance alleging a breach of the collective agreement in PSLREB File No. 566-02-8832 is dismissed.

August 5, 2015.

**Steven B. Katkin,  
adjudicator**