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10102, and 10375

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*Public Service Labour Relations
and Employment Board Act and
Public Service Labour Relations Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

DAVID FÉTHIÈRE

Grievor

and

**DEPUTY HEAD
(Royal Canadian Mounted Police)**

Respondent

Indexed as
Féthière v. Deputy Head (Royal Canadian Mounted Police)

In the matter of individual grievances referred to adjudication

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and
Employment Board

For the Grievor: Goretti Fukamusenge, Public Service Alliance of Canada

For the Respondent: Léa Bou Karam, counsel

Heard at Montreal, Quebec,
September 29 to October 2, 2015.
(PSLREB Translation)

I. Individual grievances referred to adjudication

[1] On August 28, 2014, David Féthière (“the grievor”) was terminated from his position with the Royal Canadian Mounted Police (“the RCMP” or “the employer”) after his RCMP reliability status (“RRS”), an essential condition of employment, was revoked on June 20, 2014. The grievor is not a member of the RCMP. He is a civilian employee.

[2] Several grievances about the incidents surrounding the termination were filed between September 25, 2012, and September 9, 2014, and were referred to adjudication by the grievor: files 566-02-10375 (termination grievance); 566-02-10102 (reliability status revocation grievance); 566-02-9770 (employment suspension grievance); 566-02-9771 (reliability status suspension grievance) and 566-02-9772 (discrimination grievance, under the terms of the collective agreement).

[3] 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 (“the 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[4] The parties agree that a triggering event is the source of the dispute. The employer submits that following that event, the security investigation led to the suspension and revocation of the grievor’s reliability status, which were purely administrative measures. The grievor submits that to the contrary, he was disciplined twice for the incident and that the measures taken should be seen as disguised disciplinary actions.

[5] The employer objected to the Board’s jurisdiction over the revocation of the reliability status and the suspension of employment as the *PSLRA* allegedly does not give the Board jurisdiction over those issues. As for the Board’s jurisdiction over the termination, it is necessarily limited: holding a valid reliability status is an essential

condition of employment in the public service. The loss of reliability status necessarily results in the loss of employment. It is a purely administrative mechanism in which the employee's misconduct is simply not a factor in the decision. As the termination decision was based on the revocation of reliability status, the analysis ends. The grievor is of the opinion that on the contrary, the Board has jurisdiction because all the employer's actions were allegedly disciplinary.

[6] For the following reasons, I am of the opinion that the suspension of employment and termination were in fact disguised disciplinary measures and that the suspension and revocation of reliability status constituted a camouflage of the employer's true intentions and that they were disciplinary measures. I dismiss the discrimination grievance as it is unfounded.

II. Summary of the evidence

[7] Although the employer claims that the measures taken against the grievor were administrative and that therefore the grievor bears the burden of proof, it agreed to proceed first, acknowledging that it had much more information on the grounds for the suspension and revocation of reliability status.

[8] The first witness was Jacques Rainville. At the time of the incidents surrounding the suspension and termination of the grievor's employment, he was a Sergeant Major with the RCMP, responsible for the investigations unit at the Centre of Operations Linked to Telemarketing Fraud ("the COLT").

[9] The grievor held a CR-04 clerk position in that unit. Mr. Rainville was not his immediate supervisor but was the unit head. His office was near the different cubicles where the unit's employees worked, including the grievor. Thus, he had the opportunity to see him and greet him on several occasions.

[10] About 20 RCMP officers worked under Mr. Rainville in telemarketing fraud investigations. Those officers worked directly with the grievor, whose duties consisted of offering administrative support for operations.

[11] Mr. Rainville testified concerning a section of the guide for public service employees working at the RCMP, chapter 2.3, "Conduct", section 1.1, which reads as follows:

[Translation]

1.1 Public service employees must conduct themselves in accordance with the established rules for their work area and maintain the highest standards in all areas of conduct, consistent with employment at the RCMP.

[12] Mr. Rainville explained that employees are expected to respect RCMP values, including abiding by the law; to show ethics and integrity; and to avoid tarnishing the RCMP's image in the community's eyes.

[13] The employer presented Mr. Rainville with a description of the grievor's duties, to which the grievor objected on the grounds that Mr. Rainville did not directly supervise him. Mr. Rainville also stated that it was the first time that he had seen that job description.

[14] I allowed the objection, but nonetheless, I allowed Mr. Rainville to list the databases to which the grievor had access for his work as those tools are essential to the work of the unit led by Mr. Rainville.

[15] Those databases are as follows:

- PIRS: Police Information Retrieval System
- OSR: Operations Statistical Reporting
- NCDB: National Criminal Data Bank
- CPIC: Canadian Police Information Centre (data on criminalized individuals in Canada)
- PROS: Police Reporting and Occurrence System

[16] When asked about his interactions with the grievor, Mr. Rainville replied that he might have assigned him duties on occasion, that they never had any conflict at work, and that he never saw the grievor intoxicated in the workplace. He was also aware that the grievor had back problems.

[17] On July 7, 2012, Mr. Rainville held a large party at his home, to which he invited all employees from his unit, colleagues from the RCMP, and members of other police forces (such as the Sûreté du Québec and the Montreal police). The party was on the

edge of a lake, and Mr. Rainville invited his neighbours, out of friendship and to avoid any noise complaints. Guests were invited for noon and the party ended at about midnight, or at least the noisy portion did, to comply with local bylaws.

[18] The grievor arrived in the early afternoon. After a while, he had already drunk too much. He asked Mr. Rainville if he could smoke a joint. Mr. Rainville responded categorically no — as an RCMP officer, he could not permit an illegal gesture in the presence of a large number of police officers and in front of his neighbours, who all knew his profession.

[19] The grievor returned to his car. A female police officer reported to Mr. Rainville that the grievor offered her to smoke a joint, which she refused. Another police officer, Julie Lachance, told him that she had seen the grievor after that and that there was an undeniable odour of marijuana.

[20] Mr. Rainville asked Ms. Lachance and another officer, France Panneton, to take action, which they did. The grievor's car keys were taken away, and he was asked to hand over the marijuana he had left, which he willingly did. Mr. Rainville explained that the officers decided the next day to destroy the marijuana, a form of tolerance known as "no-case seizure". In response to my question about that decision, Mr. Rainville replied that the police do this based on the circumstances — in this case, the minimal amount of drugs seized justified the action.

[21] The grievor fell asleep in his car and ended the night on a sofa in Mr. Rainville's living room. The next morning, Mr. Rainville found that the grievor was in a condition to drive, so he returned his keys to him, and the grievor went home.

[22] The following Monday, Mr. Rainville filed an incident report, the usual practice when something unusual happens. That report resulted in two separate processes: an investigation for an allegation of misconduct, which could have led to disciplinary measures, and a security investigation, to determine whether the grievor should retain his reliability status.

[23] On July 10, 2012, the grievor asked to meet with Mr. Rainville to discuss the incident. The grievor apologized but tried to minimize the matter, specifically mentioning that marijuana would soon be legalized. He had always thought that a minimal amount of marijuana was already legal.

[24] Mr. Rainville replied that marijuana was not legal and that using it jeopardized the image of the RCMP. He noted the negative impact both for the RCMP and for Mr. Rainville as host. On about August 14 or 15, the grievor left on sick leave (according to Mr. Rainville's testimony, one of the reports indicated August 20; the difference is not significant).

[25] The second witness was Maryse Quesnel. In 2012, she was the departmental security risk manager in the Central Region (an administrative division of the RCMP for Ontario and Quebec). Ms. Quesnel has been an RCMP officer for 20 years. Her role as a risk manager is to assess the risk that an applicant or employee represents for RCMP assets, employees, or information.

[26] Ms. Quesnel explained that when an incident report is filed, the RCMP conducts "[translation] an examination for just cause" to reassess the assignment of reliability status. The framework for the examination is set out in the RCMP Security Guide ("the Guide").

[27] Part 1.1 of the Guide refers to the fact that reliability status is required for anyone whose duties require access to protected information. The "Protected B" level includes information about organized crime, police operations, etc. The information contained in the databases listed in paragraph 16 includes, among other things, Protected B information.

[28] Chapter 1.10 of the Guide deals with examination for just cause, i.e., the review of the assignment of reliability status. It indicates that an examination for just cause occurs "[translation] to clarify any new information that may hinder the individual's ability to maintain . . . RCMP reliability status (RRS)". The reliability assessment states that the factors set out in Appendix 1-10-1 of the Guide must be taken into consideration. Ms. Quesnel explained that those factors are used to assess the vulnerability of an employee — the more vulnerable an employee, the more likely he or she is to be approached by criminals to disclose information held by the RCMP.

[29] The following factors are listed in Appendix 1-10-1 of the Guide (I retain only those raised with respect to the grievor):

[Translation]

2.1 is a loner, constantly stays away from other employees

and does not seem to have any friends;

...

2.3 systematically dishonest, both orally and in writing;

...

2.5 is heavily indebted or has other financial difficulties;

2.6 has excessive desires or hopes, wants to be too well off in very little time or has hopes that far exceed his or her capacities;

...

2.8 alcohol abuse that hinders judgment or integrity;

...

2.12 personal problems that seem to be a source of major stress for the employee;

...

2.18 associates with criminals or questionable individuals in a manner that is unrelated to police duties;

2.19 allegations or admissions about criminal activities, independent of formal accusations.

[30] In conducting an “examination for just cause”, the security or reliability interview indicated on Form 1020 can be used. The form is used when hiring to determine if reliability status should be assigned. If it is used after that as part of an examination for just cause, only the relevant questions are asked, not all 88 questions. The form is also used when an employee returns to work after an absence of one year, regardless of the reasons for the absence.

[31] On July 9, 2012, Ms. Quesnel was informed of the incident report filed by Mr. Rainville. It was the first time she had heard of the grievor. Ms. Quesnel’s mandate consisted of assessing the risk presented by the incident and the grievor’s situation, specifically whether there was a risk to the RCMP and whether the reliability status should be maintained.

[32] To begin the process, Ms. Quesnel requested a credit report and consulted the security file, which includes the Form 1020 completed when the grievor was hired in 2008. On reading the file, she found that the grievor had used marijuana in the past.

The file also included a credit report that indicated existing debts.

[33] On August 8, 2012, Ms. Quesnel met with the grievor in the presence of two union representatives. The purpose was essentially to repeat certain questions from Form 1020, particularly about debts and using illegal drugs.

[34] During the interview, the grievor told Ms. Quesnel that for him, his personal and professional lives were two separate worlds. That itself is a risk, in Ms. Quesnel's opinion: an RCMP employee must understand that he or she is required to abide by Canadian laws at all times.

[35] When questioned about his debts, the grievor replied that he no longer had any. In February 2012, while he was off work for health reasons, he filed a consumer proposal (under the *Bankruptcy and Insolvency Act* (R.S.C. 1985, c. B-3)). Since then, his consolidated debts have been settled through monthly payments. He reported payments on his car and his rent.

[36] When questioned about using illegal drugs, the grievor replied that he uses "pot", more regularly since August 2011 when he left work on leave. He uses it to relieve his back pain, on the advice of friends who provide him the drug at no cost. He added that he has essentially quit since July 7, 2012, but that he would not refuse a few puffs if a joint were being passed around among friends.

[37] As for alcohol, the grievor acknowledged that he has a problem. In fact, he promised to consult AA the following Monday. He wanted to learn to control his drinking. He did not commit any stupid acts under the effects of alcohol apart from what he did on July 7, 2012, but he woke up two or three times per month with a hangover.

[38] The interview form ended with the following comment by Ms. Quesnel:

[Translation]

Following the interview, I had a discussion with Féthière about the illegality of marijuana. He does not seem to see the problem as he does not use it at work and it does not affect his performance. He does not see the risk for the Force. I mentioned to him that that when buying it, if his friends tell the dealer that an RCMP employee will be using it, not only would that reflect poorly on the RCMP, but that it could also open a door to blackmail or bribery. Féthière does not seem

to see the connection.

[39] Ms. Quesnel concluded from her interview with the grievor that there were risk factors in his case: the fairly precarious financial situation, the use of alcohol, and the use of illegal drugs. All those facts made the grievor vulnerable, which created a risk for the RCMP. She added that the grievor did not seem to take the situation seriously. After the interview, the departmental security section in the Central Region recommended suspending the grievor's reliability status. The recommendation was signed by Ms. Quesnel and Michel Bastien, the section's acting commanding officer. The rationale for the recommendation was as follows:

[Translation]

FETHIERE admitted to using marijuana four to six times per month. Such use is described as "regular use" in recruitment policy AM 23.10.1.2.1.5. FETHIERE has used marijuana from time to time for many years . . . He used it on July 7, 2012, at a party hosted by a member of the RCMP and again less than a week ago, and he would accept a few puffs if they were offered to him now. FETHIERE's regular use of drugs and his comment that "he does not see the problem because it is almost legalized" demonstrate a lack of respect for other employees and the laws in effect in Canada. Under section 1.5.1.2 of the Security Guide, an RRS is based on the honesty, loyalty, reliability, and integrity of an individual. FETHIERE's loyalty and integrity are in doubt.

[40] I note that recruitment policy AM 23.10.2.1.5 applies to members of the RCMP, not civilian employees like Mr. Féthière.

[41] On August 24, 2012, the grievor received a letter informing him that his reliability status was suspended and that as a result, he was prohibited from unescorted access to the workplace. Given the suspension of his reliability status, he was also suspended from his duties, according to a letter sent to him on August 28, 2012. When he received those letters, the grievor was on sick leave.

[42] In October 2013, Ms. Quesnel was advised of an email from the grievor, indicating his intention to return to work. On the advice of his doctor, he proposed a return to work on November 4, 2013.

[43] Ms. Quesnel was somewhat surprised to learn that the grievor did not seem to understand that the suspension of his reliability status was an obstacle to his return to work.

[44] Once again, an investigation into the grievor's reliability was required for two reasons: an absence of more than one year, and a reassessment of the file, to see if the risk (which had led to suspending his reliability status) had changed. Jacques Morin, a temporary civilian employee and former RCMP officer, conducted the interview, as Ms. Quesnel was not available.

[45] The security interview took place on November 4, 2013. Mr. Morin's notes are much less clear than those that Ms. Quesnel included in the same interview form. Mr. Morin did not testify. Ms. Quesnel indicated that she read the report and listened to the recording of the interview.

[46] New facts emerged in the interview on November 4, 2013, particularly concerning drug use. In 2008, when questioned about the use of illegal drugs, the grievor did not mention marijuana and his occasional use. In 2013, he stated that he had tried everything when he was young, except heroin.

[47] The grievor stated during the November 4, 2013, interview that he had used marijuana since the suspension of his reliability status but less and less. He avoided going to the home of one of his family members and stayed away from his friends. His use of alcohol had diminished considerably, and he had been receiving psychological help for several months.

[48] Ms. Quesnel requested a credit report. According to the report, despite being off work and the grievor's very low income, his financial situation had improved; he continued to make payments according to the terms of his consumer proposal, and he paid his bills. However, he had accumulated a certain number of parking tickets.

[49] Ms. Quesnel explained that one element of data from the credit report indicated the debt-credit ratio as a percentage. The higher the figure, the worse the credit situation. In 2012, the percentage was 89%; in 2013 it was 67% — an objective finding of improvement in the grievor's financial situation.

[50] After reviewing the interview conducted by Mr. Morin, Ms. Quesnel contacted the grievor by telephone to obtain certain clarifications. She noted that the grievor continued to use marijuana after the security interview on August 8, 2012, although she had advised him during that interview of the risks that he was facing. He admitted to smoking marijuana a few times since August 2012. The following is an excerpt from

Ms. Quesnel's report, dated December 13, 2013, which recommends the revocation of his reliability status:

[Translation]

When Sgt. Quesnel told him that she was disappointed that he had used again since their meeting in August 2012, FETHIERE replied "you don't just stop like that" (using).

[51] In that report, Ms. Quesnel provided the following rationale for her recommendation to revoke his reliability status:

[Translation]

FETHIERE's RCMP reliability status was suspended in 2012 following his use of illegal drugs. Although he made changes for the better (leaving the home of [a family member] and reducing his use of alcohol) and took steps to seek help (detox centre in fall 2012 and psychotherapy, although started more than a year after the suspension), the fact nonetheless remains that he used marijuana after his status was suspended, which was the very reason for the suspension. The use of marijuana is illegal and continuing to do so after having his status suspended shows negligence and a lack of respect for the RCMP, the Values and Ethics Code for the Public Service, and Canadian law.

FETHIERE did not seem to take the situation seriously during his interview in 2012, and he still does not take it seriously now. FETHIERE's answers about his use of illegal drugs during the security interview in 2008, during administrative/just cause investigations in 2012, and during his interview and telephone conversation with Sgt. Quesnel in fall 2013 are contradictory. His nonchalance, his financial problems, and his access to several databanks can make him susceptible to bribes and coercion and thus make him a risk to the RCMP.

[52] In her testimony, Ms. Quesnel indicated the factors (from Appendix 1-10-1 of the Guide, see earlier) that she considered in her evaluation:

[Translation]

2.1 is a loner, constantly stays away from other employees and does not seem to have any friends: in the interview in 2013, the grievor indicated that he was avoiding associating with his friends and that he preferred to stay in his room alone.

2.3 systematically dishonest, both orally and in writing: his responses about his use of illegal drugs varied from one interview to another.

2.5 is heavily indebted or has other financial difficulties: he is heavily indebted.

2.6 has excessive desires or hopes, wants to be too well off in very little time or has hopes that far exceed his or her capacities: he is not very realistic about his financial situation and seems to think that everything can be easily resolved.

2.8 alcohol abuse that hinders judgment or integrity: alcohol abuse has certainly hindered his judgment.

2.12 personal problems that seem to be a source of major stress for the employee: the grievor alluded to problems with depression.

2.18 associates with criminals or questionable individuals in a manner that is unrelated to police duties: the people who provide him with marijuana, even for free, are trafficking and are therefore criminals. A member of his family who also uses is also a criminal.

2.19 allegations or admissions about criminal activities, independent of formal accusations: the grievor admitted to purchasing marijuana on a few occasions; using marijuana is a criminal activity.

[53] Thus, according to Ms. Quesnel, several factors from Appendix 1-10 of the Guide are present. When asked “Are there other factors?”, she replied that it was primarily dishonesty, illustrated by the different answers about using, and the grievor’s poor judgement and alcohol abuse, to the point that he did not remember offering to a police officer to smoke a joint, all together. In effect, she not only considered those factors in her evaluation but also the risks for the RCMP, its assets, its employees, and its facilities.

[54] Ms. Quesnel’s role in the 2013 security investigation about the grievor ended with the report on December 13, 2013. The report was submitted to the departmental security officer for subsequent analysis. The departmental security officer at the time was Michel Aubin, the next witness. Note that following the incident on July 7, 2012, there was an “[translation] administrative investigation into alleged misconduct” (disciplinary investigation). The report is dated July 30, 2012. On November 4, 2013, the grievor went to work, to attend the security interview with Mr. Morin. The employer

gave him a letter indicating a disciplinary suspension of 10 days without pay for using marijuana on July 7, 2012. That sanction would do the following: “[translation] begin on the date on which you return to work, to be determined at the end of the security process”.

[55] The letter indicating the disciplinary suspension of 10 days without pay explains the misconduct related to the sanction as follows:

[Translation]

This is pursuant to the findings of the investigation into the events of July 7, 2012, in which you allegedly used or were in possession of marijuana, contrary to the Controlled Drugs and Substances Act.

Our investigation revealed that on July 7, 2012 . . . at a work-related event, you were in possession of and used marijuana. We find that you did so in a deliberate manner and that in this case, it constitutes serious misconduct. This type of behaviour is unacceptable, and we will not tolerate it. We invite you to consider the consequences for you and the organization.

. . .

[56] In the same disciplinary suspension letter, the employer added the following:

[Translation]

We call on your sense of responsibility so that this type of situation does not occur again. Any repeat offence will not be tolerated and may result in stricter disciplinary measures, up to and including termination of employment.

[57] Mr. Aubin is the director general of departmental security at the RCMP or the departmental security officer. As such, he has the delegation from the Commissioner of the RCMP to suspend or revoke reliability statuses. He testified about the decision-making process that led to the revocation of the grievor's reliability status.

[58] Mr. Aubin has been an RCMP officer for 33 years. He has had a varied career. He has been a uniformed officer, a drugs and narcotics officer, and an undercover officer. He worked for four years on international drug trafficking files, in cooperation with the U.S. Drug Enforcement Administration. He is recognized as an expert witness by Ontario courts with respect to narcotics trafficking and money laundering. He has also worked on organized crime files.

[59] Mr. Aubin testified about the importance of reliability status for RCMP employees. Reliability status is an essential condition for any job in the public service but is particularly important for the RCMP, which has a large number of databanks containing police information not only from the RCMP but also from several police departments in Canada.

[60] One of the threats faced by the RCMP is that of organized crime constantly seeking to have access to RCMP information. To counter that risk, the RCMP takes precautionary measures, including reliability status.

[61] Mr. Aubin testified of the phenomenon known as the “little hook”, i.e., the technique used by criminals to get close to an RCMP employee by “hooking” the employee using a weakness — sex (prostitution services), gambling (loan sharking), drug abuse (providing drugs), etc.

[62] Mr. Aubin then talked about the security investigation process. Once an investigation report is received, it is reviewed by the Risk Management office in Ottawa. Members of the RCMP and an advisory committee made up of RCMP senior officials review the report. They issue a recommendation, which is not binding on the departmental security officer, who is solely responsible for the decision with respect to reliability status.

[63] Before ordering the revocation of a reliability status, the departmental security officer sends prior notice to the person in question to allow him or her to present any relevant information. On May 29, 2014, after reviewing the case and the recommendation from the advisory committee, Mr. Aubin sent a notice letter to the grievor to inform him that he was considering revoking his reliability status. The grievor did not respond to that letter.

[64] On June 20, 2014, Mr. Aubin signed a letter to the grievor indicating that his reliability status was revoked, as follows:

[Translation]

... the fundamental causes that led to the suspension of your RCMP reliability status (RRS) still remain and represent an unacceptable risk to the security of RCMP operations, information, assets, and staff.

An RRS is obtained and maintained based on the pillars of

honesty, loyalty, reliability, and integrity.

[65] Mr. Aubin testified that he considered all the elements in the grievor's security file. That file did not include any information about the disciplinary investigation. They are two separate processes, and the RCMP strives to ensure that there is no crossover between them. Both sides are aware of the other investigation, but nothing more. Mr. Aubin explained that it is a matter of ensuring the integrity of the two investigations. (In fact, the next day, Mr. Aubin told me that he reviewed the security file after a question I asked about the grievances. Apart from the documents about the grievances, the file also includes the disciplinary investigation report. However, according to him, the report did not really have any effect on his decision.)

[66] Mr. Aubin explained the six reasons that led him to revoke the grievor's reliability status.

[67] The first reason was the drug use. Reliability status means that the employee can be trusted and that information to which the employee has access will be protected.

[68] The grievor indicated in 2008 that he had used drugs but that he was no longer using them. However, in July 2012, it was discovered that he was still using. Worse still, he continued to use drugs even after the incident in July 2012.

[69] The second reason was the grievor's negligence. According to Mr. Aubin, this was in fact the biggest problem. The grievor knew in 2008 that he was not to use drugs or associate with traffickers; however, he continued to. The fact that he used drugs on the private property of an RCMP member, that he continued to use drugs, and that he states that it is almost legal truly demonstrates his negligence. After all, the RCMP's mission is to enforce the laws of Canada; therefore, Mr. Aubin stated that that negligence "[translation] bothered me". As a further example, Mr. Aubin added the fact that the grievor did not respond to his letter on May 29, 2014, offering him the opportunity to present his point of view on the revocation of his reliability status.

[70] The grievor seemed to take lightly the risk of associating with individuals who matched the definition of traffickers. His drug use did not improve after July 2012, another sign of negligence.

[71] The third reason is, in fact, the grievor's association with people who provided

him with marijuana, regardless of whether or not he paid for it. Of his own admission, his personal world was completely separated from his professional world. However, an RCMP employee must be careful choosing friends. By stating that his two worlds were separate, he did not make the link to the risks.

[72] The fourth reason is related to the grievor's financial situation, i.e., his ability to meet his financial obligations. By itself, it would not be critical. However, in this case, his attitude again shows how he takes things lightly.

[73] The fifth reason is the fact that the grievor's work includes access to RCMP databanks. He worked in the COLT unit and had access to Protected B information. He had access to information on investigations and the movements of RCMP officers. An information leak would have harmed them.

[74] Mr. Aubin stated that there were six reasons, and counsel for the employer reminded him of the sixth, honesty, to which Mr. Aubin replied: "[translation] Yes, in effect, in both ways", in the grievor's responses to the questions (about using drugs), in his evasiveness answering questions during the investigation of the July 2012 events, and in his inconsistencies.

[75] Employment at the RCMP was not suitable for the grievor, who presented a risk to the organization that Mr. Aubin could not tolerate.

[76] And, given what the RCMP represents, namely, respect for and enforcement of the law, the grievor's loyalty to the organization and his colleagues could be questioned.

[77] In response to my question about his knowledge of the grievance procedures underway, Mr. Aubin replied that he was not aware of them. He recanted the next morning, stating that he was informed of the grievances but that it was a separate process that had no effect on his evaluation of the grievor's reliability.

[78] Under cross-examination, Mr. Aubin insisted on the separate nature of the security investigation and the disciplinary investigation. The purpose of a security investigation is to protect the RCMP against risks. In this case, although there was no evidence of a leak or of unauthorized access to information, the risk was unacceptable because the grievor was exposed to exploitation.

[79] Mr. Aubin stated that corruption is possible when an employee is vulnerable. He has seen situations similar to the grievor's that always began with a deviation — with unacceptable behaviour.

[80] Mr. Aubin did consider the possibility of another position for the grievor; however, at the RCMP, reliability status is essential everywhere due to the proximity of RCMP officers, verbal exchanges on operations, and access to sensitive information. The revocation was not done lightly.

[81] The grievor's representative questioned Mr. Aubin about why there were no criminal charges if the grievor's actions had been criminal. Mr. Aubin responded that someone else made that decision. However, he added that that was unrelated to the risk concerns. The fact was that the grievor did not meet the criteria needed to maintain his reliability status.

[82] The employer's last witness was Chief Superintendent Gaétan Courchesne. He is the officer in charge of criminal investigations at the RCMP, which is the department that includes COLT. Mr. Courchesne signed the suspension of employment letter and the letter recommending terminating the grievor's employment as acting commanding officer of Division "C". Only the commissioner of the RCMP has the authority to sign the termination letter. According to his testimony, once reliability status is suspended or revoked, suspension or revocation of employment, respectively, is automatic. There is no review done of the security file or the disciplinary file.

[83] Finally, on August 28, 2014, the grievor's employment was terminated. The termination letter indicated that because he had lost his reliability status, he no longer met an essential requirement of his position and therefore that his employment was terminated with cause under paragraph 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*).

[84] The letter recommending termination, signed by Mr. Courchesne, reads as follows:

[Translation]

Mr. David Féthière is a public service employee in the Commercial Crimes Section at "C" Division.

An investigation was conducted and revealed that on July 7,

2012 . . . at a work-related event, the employee was in possession of and used marijuana. The results of that investigation were then submitted to the Departmental Security Branch in Ottawa for review and decision. Mr. Féthière's reliability status was subsequently suspended on August 24, 2012, and permanently revoked on June 20, 2014.

As such, Mr. Féthière no longer meets the security standards required by the Royal Canadian Mounted Police for hiring, i.e., maintaining a reliability status during the period of employment. Thus, we cannot consider the employee for other positions within the organization.

Therefore, I recommend the termination of Mr. David Féthière's employment for reasons other than a breach of discipline or misconduct. To that end, please find attached all relevant documentation in support of the termination of Mr. Féthière's employment. . . .

[85] The grievor testified on his own behalf.

[86] He now works at Manulife, and has since September 8, 2015, as a support specialist.

[87] Before that, he was a CR-04 administrative assistant with the RCMP, in the Commercial Crimes Section. His work consisted primarily of transcribing interviews, updating files, entering data in PROS (Police Reporting and Occurrence System), and performing word processing.

[88] He was hired by the RCMP in 2008 as a front desk clerk. He started at the Commercial Crimes unit in 2011. He was off work for back pain, for which he underwent two surgeries. He was off work from August 2011 to April 2012, then again from August 2012 until his termination in August 2014.

[89] When questioned about the grounds for his grievances against the suspension of his reliability status and the suspension of his employment, the grievor stated that he saw those measures as overly severe punishments. The employer showed no understanding.

[90] In addition, the grievor withdrew the grievance that he first filed against the 10-day disciplinary suspension without pay, as indicated in his email dated January 6, 2014. In his opinion, that sanction was fair. He hoped that with that sanction, the rest of his problems would be resolved, as everything seemed related to the initial incident

on July 7, 2012.

[91] To explain his discrimination grievance, the grievor stated that he felt that he was treated “[translation] like a rag”, as though he was let down. When his counsel asked him “[translation] discrimination related to what”, he replied “the entire situation”.

[92] The grievor filed the grievance against the revocation of his reliability status because it was an overly severe measure to punish him for using marijuana. He now understands that it is prohibited. Specifically, he understood that he needs to make changes.

[93] The termination grievance was motivated by the fact that the grievor could not understand why he would lose his job for using such a small amount.

[94] The grievor used marijuana primarily because of his back pain. He never obtained a medical prescription because he never thought of asking for one.

[95] The grievor stated that he did not remember reading the letter from Mr. Aubin on May 29, 2014, offering him an opportunity to make observations before his reliability status was revoked. He added that he was in the middle of moving and that he may not have seen it.

[96] I interrupted to indicate to the grievor that the letter on May 29, 2014, was served in person and that his signature was on the service document, dated June 3, 2014. He replied that he did not say that he had not seen it but simply that he did not remember seeing it. He stated that he was a nervous wreck at the time and was afraid of getting bad news.

[97] The grievor submitted as evidence performance assessments that clearly showed that he was a good employee and was very willing and well appreciated by his superiors and colleagues. The tone of the narrative assessments was very positive.

[98] The grievor also submitted as evidence a document from an attending psychologist, to which counsel for the employer objected. I allowed the document, as I did the document from the Dollard-Cormier Centre dated February 8, 2013, as confirmation of the grievor’s steps to improve his psychological state and control his drinking. The documents do not establish any addiction in the medical sense.

[99] Questioned about his “negligent” nature, the grievor replied that he is not negligent, that his alcohol problem made him negligent, and that he thought he could do anything when drunk. He has changed, he has understood, and he has taken steps to correct the situation. He repeated that he is not negligent. The evidence also shows that he is on top of things when he is not drunk.

[100] The grievor vehemently denied being dishonest. To the contrary, he stated that he is “[translation] truthful and direct”.

[101] The grievor confirmed that in effect, in his opinion, his private and professional lives are completely separate. He was not talking about his private life at work and vice versa. He never tried to access data at work that was not directly related to his work.

[102] The grievor stated that he is indebted because he overspent; he became carried away with credit. Nonetheless, he tried to pay his bills every month and called the creditor if he could not pay. He consolidated his debts.

[103] As for the incident on July 7, 2012, he acknowledged that he had lacked judgement. And he remembers little about it because he was extremely drunk. He remembered that it was a minimal amount of marijuana and that he had a few puffs on a joint. He did not remember asking Mr. Rainville for permission or offering a joint to a female police officer. He remembers going off by himself to smoke a joint on the road.

[104] The grievor did not understand why his minimal use of marijuana worried the RCMP so much. He never talked about his work outside work. He now understands and is making many changes in his life to improve.

III. Summary of the arguments

A. Employer’s arguments

[105] In its opening statement, the employer stated that there are three issues in dispute. First, is the grievance concerning the suspension of employment rendered irrelevant because the termination is retroactive to the start of that suspension? Then, do the decisions being challenged constitute disciplinary measures? Finally, was the termination justified? The employer entirely rejected the allegations of discrimination as no grounds for discrimination were established.

[106] Those three questions came up again in the employer's arguments but were presented differently. The employer chose instead to address each grievance in turn.

[107] The suspension of reliability status grievance was not appropriately referred to adjudication because on the referral form, the grievor cited paragraph 209(1)(c) of the *PSLRA*, which covers only demotions or terminations for non-disciplinary reasons. Nothing in the enabling statute gives the Board jurisdiction over a suspension of reliability status.

[108] According to the employer, the suspension of employment is an administrative measure as the only reason it was imposed was the suspension of reliability status and the fact that as a result, the grievor could not carry out his duties. It would be absurd to pay him when he cannot work.

[109] And the suspension of employment grievance is irrelevant because the termination was retroactive. Adjudicators have already ruled several times on the issue, as in *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43, and *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107.

[110] The revocation of reliability status cannot be referred to adjudication; the Board simply does not have jurisdiction over that type of administrative measure. In that sense, the employer referred me to *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63, *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80, and *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61. The Board cannot consider whether the grounds for revocation were reasonable. Only the Federal Court has that authority. Consequently, the adjudicator erred in *Heyser v. Deputy Head (Department of Employment and Social Development) and Treasury Board (Department of Employment and Social Development)*, 2015 PSLRB 70. The employer cited the decision in *Myers v. Canada (Attorney General)*, 2007 FC 947, as an illustration of the Federal Court reviewing a reliability status revocation.

[111] The employer recognized that the Board can examine whether the revocation of reliability status constituted a disguised disciplinary measure as confirmed in *Braun, Nasrallah v. Deputy Head (Department of Human Resources and Skills Development)*,

2012 PSLRB 12, *Bergey, Gravelle, and Shaver*.

[112] In this case, the revocation of the grievor's reliability status was clearly an administrative measure. It was up to the grievor to show that it was a disciplinary measure (*Canada (Attorney General) v. Frazee*, 2007 FC 1176). However, the evidence did not support that claim. The revocation came after a security investigation. It was established through testimonies that the disciplinary investigation was completely separate and that there was no crossover between the two parallel processes.

[113] The RCMP presented detailed evidence of the thorough process that led to the decision to revoke the grievor's reliability status. There was no camouflage. The evidence clearly established that it was a risk assessment. There was clearly misconduct and a reprehensible act, but the situation as a whole must be considered. Once again, the issue focuses on the risk assessment. The employer referred me to the factors in Appendix 1-10-1 of the Guide that played a role in the analysis by Ms. Quesnel and Mr. Aubin.

[114] The termination grievance must also be dismissed because it was the logical result of the revocation of the reliability status. The employer referred me to *Bergey*. The revocation was a valid ground for termination within the meaning of paragraph 12(1)(e) and subsection 12(3) of the *FAA*.

[115] In his opening remarks, the grievor referred to double jeopardy or a double penalty. There was no double penalty — there were two decision-making processes in two different areas, i.e., discipline and security. The employer cited *Koulatchenko v. Financial Transactions and Reports Analysis Centre of Canada*, 2014 FC 206, for the capacity of an adjudicator to reinstate a security clearance.

[116] The employer referred to *Heyser*, in which the adjudicator reversed a revocation of reliability status and reinstated the employee in her duties. That decision is pending judicial review. The employer noted what it considered an error in paragraph 36 of that decision, in which the adjudicator stated that he had jurisdiction to consider the justification of the revocation, which was the sole ground for termination. According to the employer, that is an error in law, as only the Federal Court has such authority.

[117] Thus, in the case at hand, the revocation was justified, and therefore, the termination was too. The RCMP concluded that the grievor was not reliable based on

several risk factors, including his use of marijuana, financial situation, and negligence.

B. Grievor's arguments

[118] The grievor's opening statement began with a French proverb: "*Avec des si, on mettrait Paris en bouteille*". (The approximate English equivalent is: "If wishes were horses, beggars could ride.") According to the grievor, the employer's speculative reasoning to justify "administrative" measures against him does not hold up: it is clearly a camouflaged manoeuvre to get rid of an employee who has become an embarrassment.

[119] The employer chose to deal with the grievances separately, but in fact, they form a whole, a sequence that led to the termination. The grievor is of the opinion that all the measures taken against him were disciplinary measures because they were all based on culpable conduct, the incident on July 7, 2012. From that moment, the finger was pointed at him. It is clear that it wanted to punish him and teach him a lesson.

[120] The jurisprudence is clear (*Canada (Attorney General) v. Basra*, 2008 FC 606, referring to *Frazer*): it is not enough for the employer to state that the measures are administrative; they must be considered in light of the employer's intention and the effect on the employee.

[121] In this case, the suspension of employment deprived the grievor of his income. The employer then blamed him for his indebtedness, when his precarious financial situation was due to its actions. The consequence of such a long suspension without pay is so severe that it cannot be said that it is not a punitive measure.

[122] In the first-level response to the suspension from employment grievance, the employer's intention was clear: protect the measure from any review by an adjudicator. Mr. Courchesne indicated in his response that the measure was administrative and therefore was not arbitrable.

[123] The employer could have simply applied a disciplinary measure. In the November 4, 2013, letter, which imposed a 10-day disciplinary suspension, the true nature of the administrative measure becomes clear. It is striking to note that the "administrative" measures always cite the incident on July 7, 2012. However, the grievor was punished once and for all by the disciplinary measure on November 4, 2013; hence the double penalty argument. The grievor continues to be punished for his

error in judgement, which he has acknowledged. The suspension and revocation of his reliability status and the recommendation to terminate his employment all cited the events of July 7, 2012.

[124] The grievor addressed again the retroactive nature of the termination. According to him, that is an abuse of authority. The employer claimed that he was terminated in August 2012. However, the reason for termination was the revocation of the reliability status in 2014. The grievor does not concede that the termination was justified, but if it were, it would be abusive to state that it was effective in 2012 when the reason for termination took place in 2014.

[125] The discrimination grievance was based on the fact that the employer refused to reinstate the grievor when he was able to return to work in November 2013. The discrimination was based on his alcohol addiction. Since July 2012, it wanted nothing more to do with him. There was no other reason for preventing him from returning to work in November 2013.

[126] The triggering event in this entire punitive sequence occurred on July 7, 2012. However, that incident took place outside the workplace and outside work hours. For an incident outside the workplace, the criteria set out in *Millhaven Fibres Limited, Millhaven Works v. Oil, Chemical and Atomic Workers International Union, Local 9-670 (1967)*, (1A) Union Management Arbitration Cases 328, must be applied.

[127] Those criteria are as follows:

- The employee's conduct is harmful to the employer, such as its reputation. Mr. Rainville was asked if there had been any repercussions in the media or rumours at work, to which he replied that there had not been any.
- The conduct renders the employee unable to perform his duties. The grievor's performance assessments show that he was an excellent employee. He worked for another month after July 7, 2012, without any problems.
- Colleagues refuse to work with the employee. There were no allegations in that sense.
- The employee is guilty or accused of an offence under the *Criminal Code* (R.S.C. 1985, c. C-46). Not in this case. To the contrary, the police chose to

dispose of the small amount of marijuana that was found, and the grievor was fully cooperative.

- The employer would have difficulty directing its operations and workforce. There is no evidence that the grievor presented a risk for operations or that he had jeopardized any RCMP assets or information.

[128] The employer's fears were based entirely on hypotheses. The link to the grievor's minimal use of marijuana, the possible link between the people providing him with marijuana and organized crime, and the potential breach of RCMP information are not convincing. Certainly, the RCMP is a special organization; it is clearly a police service, but an employee cannot be terminated solely because there is a fear that he could constitute a risk, nothing more.

[129] The termination was disciplinary and was overly severe. The grievor referred me to *Simoneau v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 57, and to *Phillips and Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-21694 (19911105).

[130] In the grievor's case, mitigating factors must be noted, particularly that he had to wait a long time for the disciplinary investigation's results, that he took steps toward healing, and that he found a job after his termination.

[131] The employer accused the grievor of being dishonest, while the situation is very much the contrary. Since 2008, he has been an open book. He has never hidden his use of marijuana. He indicated it at the outset.

[132] The decision in *Heyser* applies to this case, as the facts are similar. The adjudicator in *Heyser* was correct in stating that the employer cannot escape a review of the revocation of reliability status when it is the sole reason for termination.

[133] The RCMP has the necessary tools to detect any leak. There is no evidence of a leak or that the grievor represented a risk of an information leak. There are only allegations that did not lead to prosecution but that were used as a pretext for termination based on a possible risk.

[134] As for the requested remedy, while the grievor requested reinstatement in his grievances, he has since reconsidered. Mr. Aubin's testimony in particular convinced

him that it would not be in his interests to return to work at the RCMP, where he seems seen as undesirable. Thus, he requests compensation based on the model used in *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2011 PSLRB 137, and *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2012 PSLRB 96.

[135] The grievor also requested damages under the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*) to sanction the employer for having concealed its true intentions behind administrative claims. It caused him to lose income and then used his financial situation against him. He was unjustly characterized as a criminal. He experienced stress and humiliation. The effect on his health is irreparable. Thus he seeks \$20 000 as compensation for pain and suffering and \$20 000 as special compensation.

C. Employer's rebuttal

[136] In its rebuttal, the employer stated that there is no evidence to support the discrimination grievance. Moreover, the retroactive nature of the termination is not abusive as it is well established in the jurisprudence. The employer added that the criteria set out in *Millhaven* do not apply in this case as the Board is not examining a misconduct grievance.

[137] As for the grievor's requested remedy, compensation was proposed rather than reinstatement for the first time at the hearing. The Board would need to allow the employer to address that matter if it finds in the grievor's favour.

IV. Reasons

A. Relevant legislative provisions

[138] The employer objected to the Board's jurisdiction over the suspension of the grievor's employment and the suspension and revocation of his reliability status. It is appropriate to cite several legislative provisions that apply in this case as they are essential to determining the Board's jurisdiction.

[139] The following are the relevant provisions of the *PSLRA*:

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

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award;

(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,

...

[140] These are the relevant provisions of the *FAA* that apply in this case:

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.

B. Analysis

[141] The employer claimed that the Board does not have jurisdiction to rule on the suspension of employment, which is an administrative measure. Jurisdiction over the termination is very limited as it was based on a valid reason, according to the employer. Those two measures were based on the suspension and revocation of the reliability status, over which, again according to the employer, the Board has no jurisdiction.

[142] The suspension of reliability status grievance was referred to the Board under

paragraph 209(1)(c) of the *PSLRA*, while it should have been referred under paragraph 209(1)(b). The grievor's position on the disciplinary nature of that measure was always clear. Therefore, I deem that the grievance is before me under paragraph 209(1)(b). Under subsection 241(1), no proceeding under the *PSLRA* is invalid by reason only of a defect in form or a technical irregularity.

[143] As for the termination, whatever the reason, the Board has jurisdiction under paragraphs 209(1)(b) and (c). According to the letter dated August 28, 2014, it was a termination of employment with cause under paragraph 12(1)(e) of the *FAA*, the alleged reason in this case being the revocation of reliability status. As in *Heyser*, I find that the Board must (as that adjudicator had to) consider whether the reason is in fact legitimate.

[144] Both parties cited *Heyser*, at paragraph 136:

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.

[145] According to the employer, the adjudicator in *Heyser* erred as only the Federal Court has the authority to review a decision to revoke reliability status. The grievor claimed that to the contrary, the adjudicator was correct in stating that he was entitled to review the alleged "legitimate cause", i.e., the revocation.

[146] I note in passing that *Myers*, cited by the employer to claim that only the Federal Court has jurisdiction over the issue of revocation, does not indicate the sole jurisdiction of the Federal Court.

[147] Like the adjudicator in *Heyser*, I am of the opinion that the grievor's reliability status was not revoked for a legitimate cause of security, contrary to the employer's claim.

[148] In this case, the revocation of reliability status was instead a disguised

disciplinary measure that punished behaviour that the RCMP deemed unacceptable, i.e., using marijuana. As will be shown, I do not believe that the grievor's actions posed "[translation] an unacceptable risk to the security of RCMP operations, information, assets, and staff", contrary to what is suggested in the letter dated June 20, 2014, in which the grievor was advised of the revocation of his reliability status.

[149] The employer's actions, both in suspending and revoking the reliability status, were disciplinary in nature. For that reason, I feel that I also have jurisdiction over the suspension of employment, as the suspension of reliability status was actually a disciplinary measure that led to the suspension under paragraph 209(1)(b) of the *PSLRA*.

[150] First, I will show how the revocation of the reliability status did not address actual security concerns. Second, I will explain how the suspension and revocation of the reliability status were disciplinary measures. Third, and finally, I find that the termination and suspension of employment were based on a false pretext.

1. The revocation of reliability status did not address actual security concerns

[151] Ms. Quesnel and Mr. Aubin both testified about the factors that they considered when revoking the grievor's reliability status. Those factors applied to the suspension of the reliability status, but it is striking to see that despite a net improvement in the grievor's situation, his reliability status was nonetheless revoked. The main factor, according to Ms. Quesnel and Mr. Aubin, was the fact that the grievor continued to use marijuana.

[152] Look again at the risk factors mentioned by Ms. Quesnel.

[153] Factor 2.1 in Appendix 1-10-1 of the Guide indicates, "[he] is a loner, constantly stays away from other employees and does not seem to have any friends". According to Ms. Quesnel, during the security interview in 2013, the grievor suggested that he had become a loner and that he stayed in his room.

[154] The context needs to be understood. In 2013, the grievor had already been in a psychological process for some time (followed by a psychologist and attending a centre to help reduce his use of alcohol). He had also broken his ties with one of his family members and has avoided his former associates. Why fault him for having turned a page? Nothing in his performance assessments at work showed that he was

someone who was asocial. To the contrary, according to the one from January to August 2011: “[translation] David, who is very versatile and is always in a good mood, is an asset to the section. He has excellent interpersonal relations with all employees in the sector. He is also well appreciated by them and by his supervisor.”

[155] Factor 2.3 in Appendix 1-10-1 of the Guide indicates the following: “systematically dishonest, both orally and in writing”. According to Ms. Quesnel, the grievor’s responses about using illegal drugs varied from one interview to another.

[156] In effect, the grievor’s responses to the question about whether he had ever used and was currently using drugs were not the same in 2008, 2012, and 2013.

[157] Note first that the response changed between 2008 and 2012, but that change is less significant in my opinion than the interviewer change. I have no information on how the questions were asked. I can see by how the questionnaire was completed that the three people conducting the interviews in 2008, 2012, and 2013 were very different. It is not surprising to me that they obtained different responses.

[158] In 2008, the grievor’s response to the question about past and current use of illegal drugs or prescription medication was as follows:

[Translation]

Used marijuana, a joint, a few puffs on a joint, with friends while playing party games. Stated that the last time was more than a year ago.

[159] In that same interview, the interviewer noted the following with respect to the question about the grievor’s future use of illegal drugs or prescription medication:

[Translation]

Stated that he does not intend to use it but that he is human. Stated that if he gets the job, he will say no to his friends if they offer but will not report them.

[160] In 2012, one question combined the grievor’s past, current, and future use. Ms. Quesnel was the interviewer at that time, and the grievor responded as follows:

[Translation]

Yes drugs - pot - no medication

Socially in the past . . . it was more regular

5 to 6 times per month, sometimes 10, rare

25-30 times in the past

More regularly while off work in 2011

[back pain] 1 time every 3-4 days, 4-5 puffs

Needed to reduce the pain pot 1st time . . . mushroom blotter. . .

[161] All the lines are filled in; on the right, with an asterisk, it is harder to read, but I make out “[translation] future - if I had one joint since July 7, 2012 . . . [in her testimony, Ms. Quesnel added, “that’s all”] would have 2-3 puffs . . . if offered”.

[162] Finally, in 2013, the same questions as in 2012 were asked by Mr. Morin about the grievor’s past, current, and future use of illegal drugs or prescription medication:

[Translation]

Any hash no . . .

[I read “hash”, but Ms. Quesnel, who listened to the recording, said it should be “heroin”.]

[163] Thus, according to Ms. Quesnel, the grievor is dishonest because, in 2008 and 2012, he did not say that he had tried everything when he was younger.

[164] Once again, I note the difference between the interviewers and the fact that I do not know how the questions were asked. In his summary of the interview, Mr. Morin wrote:

[Translation]

He used drugs, and he tried everything including cocaine at about the age of . . . The applicant stated that it was natural for him to have tried drugs. The applicant stated that the last time he used marijuana was last summer [the interview took place in November 2013].

[165] What strikes me, to the contrary, is the grievor’s honesty. It would have been much easier for him to lie in 2013 to get his reliability status back. On July 7, 2012, when the police asked him to give him the marijuana that he had on him, he promptly did so. He admitted to his use of marijuana in every interview and did not conceal it.

[166] In the grievor's testimony, I found that he tended to be vague, particularly about dates. For instance, to determine the dates when he was on sick leave, I had to make a continuous effort and rely on performance assessment documents. However, I do not see that imprecision as dishonesty on the grievor's part. I understand that at different times, depending on how the interviewer asked the questions, the grievor might have answered differently. As for the important issue for the RCMP of his use of marijuana, the grievor never lied, although the temptation to lie must have been strong, in November 2013, when he wanted to return to work.

[167] Factor 2.5 in Appendix 1-10-1 of the Guide indicates the following: "is heavily indebted or has other financial difficulties". According to Ms. Quesnel, the grievor is heavily indebted.

[168] That problem of indebtedness was already there in 2008 when he was granted his reliability status. He was still in debt in 2012, but he had taken steps, under the *Bankruptcy and Insolvency Act*, to consolidate his debts through a consumer proposal, to settle his monthly payments. Extraordinarily, his situation improved, although modestly, while he was suspended without pay. He continued to make his monthly payments despite his meager income. The credit-debt ratio clearly improved between 2012 and 2013.

[169] The grievor has lived with that debt situation since at least 2008. He has taken steps to control it. It improved, even without regular work. The employer's concern in this area is hard to understand.

[170] Factor 2.6 in Appendix 1-10-1 of the Guide refers to excessive hope that exceeds the subject's actual capacity. Ms. Quesnel mentioned it briefly, stating that the grievor seemed to think that he could resolve his financial problems quickly, without too much difficulty, which she saw as an example of his negligence. Based on the grievor's testimony and his responses during the interviews, I do not see any illusion or negligence but instead unwavering optimism. I do not see how it could be interpreted as a risk factor.

[171] Factor 2.8 in Appendix 1-10-1 of the Guide indicates the following: "alcohol abuse that hinders judgment or integrity". According to Ms. Quesnel, the grievor's alcohol abuse certainly hindered his judgment.

[172] In effect, alcohol abuse played a major role in the unfortunate incident on July 7, 2012. However, that was the only time the employer (again, outside the workplace) witnessed such abuse. The grievor never went to work drunk. And I accept the grievor's testimony that he has taken steps since then to considerably reduce his use of alcohol.

[173] Factor 2.12 in Appendix 1-10-1 of the Guide indicates the following: "personal problems that seem to be a source of major stress for the employee". According to Ms. Quesnel, the grievor alluded to problems with depression.

[174] That is a reference to past problems. The portrait of the grievor from his performance assessments is not that of a person suffering depression. And I note that he has undertaken a psychological process not only for his alcohol problems but also, more generally, for better life adjustment. I have been presented with no evidence of the manifestation of personal problems at work.

[175] Factor 2.18 in Appendix 1-10-1 of the Guide indicates the following: "associates with criminals or questionable individuals in a manner that is unrelated to police duties". According to Ms. Quesnel, the individuals who provide marijuana to the grievor, even for free, are trafficking and are therefore criminals. A member of his family whom he associated with also uses and is also allegedly a criminal.

[176] This is at the heart of the employer's risk argument. According to Ms. Quesnel, passing on a joint constitutes trafficking and is a criminal act. One would think that the RCMP would have wanted to locate the grievor's associates who traffic when his drugs were seized on July 7, 2012. Instead, it chose to apply a policy of no-case seizure.

[177] Ms. Quesnel and Mr. Aubin tried to convince me that the fact that the grievor smoked a joint on a Friday evening could allow organized crime to gain access to information contained in RCMP databanks.

[178] The grievor worked in the Commercial Crimes section in telemarketing fraud. The main database he used contained incident reports. It is true that he had access to other databanks, but according to his testimony, which was uncontradicted, he did not use them.

[179] I accept that the RCMP has police experience that I do not have. I also accept

*Public Service Labour Relations and Employment Board Act and
Public Service Labour Relations Act*

that risk assessment is part of its daily activities. However, infiltration of the RCMP by the grievor being manipulated by organized crime seems so unlikely to me that I must reject that unreasonable theory on which all the employer's claims are based. If that risk of a leak is set aside (again, by an employee working as a clerk on telemarketing fraud investigations), everything falls apart.

[180] I believe the grievor when he stated that he will take a joint if it is being passed around and that he willingly accepts small amounts of marijuana that are given to him. I tried to understand the employer's position by asking Mr. Aubin what the fear was. That on learning that the grievor smokes a joint once a week, organized crime will try to pressure him with blackmail? By telling the RCMP what it already knows? That they would offer him what he already gets? Mr. Aubin replied that the infiltration of the RCMP is a constant concern for organized crime. Agreed. If I apply the balance of probabilities, the scale does not lean in favour of a possible infiltration through the grievor who was before me.

[181] Factor 2.19 in Appendix 1-10-1 of the Guide indicates the following: "allegations or admissions about criminal activities, independent of formal accusations". According to Ms. Quesnel, the grievor admitted to having purchased marijuana on a few occasions. Thus, possessing marijuana is a criminal activity. In my opinion, it is enough in this case to note police tolerance for minimal amounts as witnessed by the no-case seizure policy.

[182] According to Mr. Aubin, six factors weighed in his assessment of the risk posed by the grievor and his determination relative to the revocation of the grievor's reliability status.

[183] The first factor was the use of marijuana. Mr. Aubin stated that he was "shocked" to learn that the grievor continued to use marijuana after the events of 2012 (the party on July 7 and the subsequent suspension of his reliability status).

[184] Mr. Aubin did not refer first to the risk; he referred to the fact that the grievor continued to use marijuana when the RCMP deems it unacceptable. According to Mr. Aubin, the grievor promised to not smoke any more marijuana if he got the job in 2008. However, he continued. He cannot be trusted.

[185] I must note that I am not addressing the illegality of using marijuana. The

Controlled Drugs and Substances Act, the starting point for the disciplinary investigation following the incident on July 7, 2012, prohibits anyone from possessing and trafficking marijuana. In their testimonies, Ms. Quesnel and Mr. Aubin suggested several times that the very use of it is prohibited.

[186] The second factor, and the most important, according to Mr. Aubin, is the grievor's negligence. The fact that the grievor is of the opinion that the use of marijuana is not serious constitutes negligence. The RCMP is responsible for enforcing the law in Canada. According to Mr. Aubin, the grievor does not seem to take seriously the risk that he represents by associating with criminal elements. Again, that is negligence.

[187] The grievor stated in his testimony that he was not at all negligent. What I understand is that they are not referring to the same things. In the grievor's testimony and in the interviews and documents on record, it becomes clear that his life was not easy. However, at work, he always took pride in being an excellent employee.

[188] The negligence of which the grievor is accused is that of not taking seriously the prohibition on smoking marijuana. That prohibition was never explicit. According to Mr. Aubin, at a meeting about the grievances, one of the union representatives stated that the grievor was never formally prohibited from using marijuana at home. The employer then replied that it also did not prohibit employees from committing murder before adding that employees are expected to abide by the laws of Canada.

[189] The third factor is the grievor's link to the people who provide him with marijuana, whether free or not. Those people are disreputable. According to Mr. Aubin, an employee of the RCMP must carefully choose his or her friends.

[190] At the time of the revocation of the grievor's reliability status, the undisputed evidence showed that the grievor had reduced his associations with disreputable people and that he no longer visited one of the members of his family. According to the interview in 2013, he avoids certain people who regularly acquire marijuana.

[191] The fourth factor is the grievor's financial situation. I addressed this issue earlier.

[192] The fifth factor is access to RCMP information, not only the databases but also the movements of officers responsible for investigations.

[193] I found it curious that this factor is fifth instead of first. That suggests that Mr. Aubin's real concern is the grievor's use of marijuana. I addressed earlier the unlikelihood of the risk of an information leak cited by the employer.

[194] The sixth factor is honesty. Mr. Aubin referred to the contradictions in the responses during security interviews in 2008, 2012, and 2013. He added that the grievor represented a risk to the RCMP that Mr. Aubin could not tolerate.

[195] Mr. Aubin also mentioned the lack of loyalty, i.e., not obeying the law, and another example of negligence, the fact that the grievor did not respond to the letter on May 29, 2014, informing him that Mr. Aubin was considering revoking his reliability status.

[196] The fact that the grievor did not reply to the letter on May 29, 2014, which gave him an opportunity to speak about the proposed revocation, is in effect curious. In his testimony on this matter, the grievor explained that he might not have been able to respond at that time. Regardless, that omission does not seem to me a serious enough reason to revoke a reliability status.

[197] The revocation of reliability status cannot be based on personality or on how a grievor reacts, unless of course it poses a serious risk. In this case, the only risk cited by the employer is the infiltration of the RCMP by organized crime, a risk that seems to me, as I stated earlier, unlikely under the circumstances.

[198] What stands out from this risk assessment, both in the testimony by Ms. Quesnel and that of Mr. Aubin, is the concern for the RCMP's image and the inconsistency of the grievor working for a police service responsible for enforcing the law while using marijuana.

[199] Ms. Quesnel and Mr. Aubin's perception of a certain inconsistency, even negligence, on the part of the grievor could be accepted. However, the link to a serious risk was never established. And the risk was cited as the grounds for suspending the reliability status more than a month after the incident report by Mr. Rainville, dated July 9, 2012. It was not until August 24, 2012, that the grievor's reliability status was suspended. In the meantime, he continued to work at the same duties, even though the employer knew that he was using marijuana.

[200] Therefore, I conclude that the suspension and revocation of the reliability status

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were not justified by the risk factors identified by the employer. Those measures camouflaged the employer's true intention, which had the goal of changing the grievor's behaviour with respect to his use of marijuana and, if not, to punish him for the misconduct.

2. The reliability status suspension and revocation are disciplinary measures

[201] Adjudicators on many occasions, and the Board on several occasions, have had to rule on the true nature of measures taken by an employer that it claims are administrative. The parties agree on the criteria that must be applied in deciding whether the measures are administrative or disciplinary. In that sense, they referred me to the Federal Court decision in *Frazee* and to *Canadian Labour Arbitration* by Brown and Beatty. I cite the decision in *Braun*, which cites those two sources and summarizes the law as follows:

...

135 It is generally accepted that a suspension without pay pending investigation and the suspension or revocation of a reliability status are not a priori deemed disciplinary actions. However, that general assumption does not exclude the concept of disguised discipline. As the Federal Court outlined in Frazee:

...

[i]t is accepted, nonetheless, that how the employer chooses to characterize its decision cannot be by itself a determinative factor. The concept of disguised discipline is a well known and a necessary controlling consideration which allows an adjudicator to look behind the employer's stated motivation to determine what was actually intended. .

.

...

136 In Canadian Labour Arbitration, Brown & Beatty discussed as follows the difference between disciplinary and administrative measures:

...

In deciding whether an employee has been disciplined or not, arbitrators look at both the purpose and effect of the employer's action. The

essential characteristic of disciplinary action is an intention to correct bad behaviour on an employee's part by punishing the employee in some way. An employer's assurance that it did not intend its action to be disciplinary often, but not always, settles the question.

Where an employee's behaviour is not culpable and/or the employer's purpose is not to punish, whatever action is taken will generally be characterized as non-disciplinary. On the basis of this definition, arbitrators have ruled that suspensions . . . pending the resolution of criminal charges . . . the revocation of a civil servant's "reliability status". . . have all been characterized as non-disciplinary. . .

137 The Federal Court in Basra and in Frazee indicated that the primary factor in determining whether an employee was disciplined concerns the intention of the employer. In Frazee, the Court stated that "[t]he question to be asked is whether the employer intended to impose discipline and whether its impugned decision was likely to be relied upon in the imposition of future discipline. . . ."

138 To decide the jurisdictional issue, I must determine whether the decisions to suspend the grievor without pay and then to suspend and revoke his RRS were administrative or whether they amounted to disguised discipline.

. . .

[Emphasis added]

[202] In *Canada (Attorney General) v. Grover*, 2007 FC 28, the employer imposed unpaid leave on Mr. Grover, under the pretext that he refused to undergo a medical examination and that as a result, he put his own health and that of others at risk. After a careful review of all the circumstances, the adjudicator concluded that the measure was disciplinary and that it was in fact an attempt to change Mr. Grover's behaviour by punishing him.

[203] The Federal Court confirmed the importance for the adjudicator of looking at "the substance . . . rather than the form" of the employer's decision:

[46] The PSSRA established a regime for the resolution of grievances by employees in the federal public sector. In accordance with this regime, some grievances are classified as non-adjudicable, which means that the final level of decision-maker is the employer and there is no right to independent

adjudication; however, employees have the right to adjudication before the Board for other kinds of issues that are regarded as more significant. Early on, the Courts recognized that some employers might try to avoid adjudication by attempting to mischaracterize the true nature of their actions. The Board adjudicators are required to look at the substance of an action rather than its form to determine whether they have jurisdiction. In the words of the Court of Appeal, "A camouflage to deprive a person of a protection given by statute is hardly tolerable." (PSSRA, above, sections 91 and 92; Canada (Attorney General) v. Penner, [1989] 3 F.C. 429 (C.A.))

[204] The Federal Court dismissed the application for judicial review, deeming that the evaluation of the situation by the adjudicator was reasonable:

...

[53] The adjudicator also noted that the NRC did not offer Dr. Grover the opportunity to exhaust his sick leave and it refused his request for vacation leave. There was no reason to deny Dr. Grover in this way unless the motivation was to punish or otherwise compel a different course of conduct on his part. These are the very hallmarks of disciplinary action. The adjudicator clearly demonstrated that she understood the proper principles of discipline by stating. "The measures were used to bring compliance on the part of the grievor."...

...

[205] The disciplinary nature of the measures suspending and revoking the reliability status make them arbitrable, as confirmed in the following decisions:

[Braun:]

...

138 To decide the jurisdictional issue, I must determine whether the decisions to suspend the grievor without pay and then to suspend and revoke his RRS were administrative or whether they amounted to disguised discipline.

...

140 *I can take jurisdiction over the grievances only if the evidence supports a conclusion of disguised discipline.*

...

[Gravelle:]

...

103 *The Act [PSLRA] does not give me jurisdiction to review administrative decision made by the employer, such as an employer's decision to revoke an employee's reliability status. The only way that I could have jurisdiction over it would be if the revocation were disguised discipline. . . .*

...

[Bergey:]

...

814 *Both parties acknowledged that the judicial and arbitral jurisprudence has recognized that adjudicators have very limited jurisdiction when it comes to reviewing the employer's actions in suspending and revoking an employee's security clearance. The case law traditionally suggests that such decisions are administrative and that the Board lacks jurisdiction over them unless there is evidence to establish on a balance of probabilities that such a decision was disguised discipline rather than administrative or that it was tainted by bad faith or procedural unfairness to a point that it cannot be remedied at a de novo (new) hearing before an adjudicator.*

...

838 *I must now apply the principles set out in the case law to this case, beginning with the question of whether the true characterization of the employer's decisions to suspend and revoke the grievor's RCMP reliability status were administrative or whether there was a disciplinary component. The employer could not use the security review process to simply avoid adjudication for disciplining an employee. If there is no valid concern with an employee's RCMP reliability status, then revoking it would be improper.*

839 *Whether the employer's actions were administrative or disciplinary is a factual issue. I must look at both the purpose and effect of its actions to determine their true characterization. The grievor bore the burden of establishing that the suspension and revocation decisions were disguised discipline.*

...

[206] In my mind, the employer's disciplinary intention is clearly established in this

case. The employer attempted to present the suspension and revocation of the grievor's reliability status as purely administrative, but the two people responsible for the security investigation, Ms. Quesnel and Mr. Aubin, betrayed the disciplinary intention on several occasions, in many ways.

[207] For instance, during the second security investigation, in 2013, Ms. Quesnel expressed her disappointment and discontent with the fact that the grievor continued to use marijuana, despite her express recommendations. In her recommendation to revoke the reliability status, she wrote, "[translation] he used marijuana after his status was suspended, which was the very reason for the suspension". This is what is seen in *Grover* — a desire to change the grievor's behaviour and get him to stop using marijuana, which is the very definition of a disciplinary measure.

[208] In Mr. Aubin's testimony can be seen the disapproval of the grievor's behaviour. He cannot be an RCMP employee and contravene the laws of Canada at the same time. The idea comes up often that the grievor's behaviour of using marijuana could tarnish the RCMP's image.

[209] The grievor's representative rightly noted how the so-called "administrative" letters cited the allegations of misconduct on July 7, 2012, finally recommending termination.

[210] Following the events of July 7, 2012, the grievor received a first letter dated July 11, 2012, which stated:

[Translation]

This is to advise you that an administrative investigation will be conducted into the following allegation: on or about July 7, 2012 . . . at a gathering, you used or were in possession of marijuana, contrary to the Controlled Drugs and Substances Act.

During the investigation and before management made a final decision, you had an opportunity to provide clarification or mitigating circumstances that in your opinion, were not examined during the investigation or that must be taken into account before the investigation report is finalized.

If we determine that the allegation against you is founded, administrative and/or disciplinary measures may be taken. We are counting on your full cooperation in the investigation. Management wants the investigation to be thorough and

quick. Please consult your collective agreement for information on your right to representation, as applicable. . . .

[211] The letter was signed by Roland Garant, to whom Mr. Rainville reported. Note that the letter refers to only one investigation, while Ms. Quesnel and Mr. Aubin emphasized the fact that there were two investigations: a security investigation and one that was “[translation] administrative for disciplinary purposes”. The witnesses confirmed that in effect, there were two investigations, but the initial letter referred only to one.

[212] The justification for the recommended suspension of reliability status, dated August 14, 2012, reads as follows:

[Translation]

FETHIERE admitted to using marijuana four to six times per month. Such use is described as “regular use” in recruitment policy AM 23.10.1.2.1.5. FETHIERE has used marijuana from time to time for many years . . . He used it on July 7, 2012, at a party hosted by a member of the RCMP and again less than a week ago, and he would accept a few puffs if they were offered to him now. FETHIERE’s regular use of drugs and his comment that “he does not see the problem because it is almost legalized” demonstrate a lack of respect for other employees and the laws in effect in Canada. Under section 1.5.1.2 of the Security Guide, an RRS is based on the honesty, loyalty, reliability, and integrity of an individual. FETHIERE’s loyalty and integrity are in doubt.

[213] Note that as confirmed by Ms. Quesnel, recruitment policy AM 23.10.2.1.5 applies to RCMP members, who are peace officers, and not civilian employees like the grievor.

[214] The letter suspending reliability status, dated August 24, 2012, reads as follows:

[Translation]

This is to advise you that your RCMP reliability status is immediately suspended.

I have been informed by our Departmental Security office in the Central Region that you are the subject of an administrative investigation following an allegation that you used and were in possession of marijuana, an illegal drug, on July 7, 2012. You have also admitted to having used since then and intend to use again.

I have reviewed the circumstances of this case as they were reported to me, and I find sufficient grounds to immediately suspend your RCMP reliability status. Your actions raise doubts concerning your integrity and reliability. . . .

[215] The letter was signed by Pierre Giguère, Director General of Departmental Security. Note that the disciplinary investigation was the subject of a report submitted on July 30, 2012, and that the grievor was advised of the resulting disciplinary sanction, a suspension for 10 days without pay, on November 4, 2013.

[216] The relevant portions of the letter imposing the 10-day disciplinary suspension are as follows:

[Translation]

This is pursuant to the findings of the investigation into the events of July 7, 2012, in which you allegedly used or were in possession of marijuana, contrary to the Controlled Drugs and Substances Act.

Our investigation revealed that on July 7, 2012 . . . at a work-related event, you were in possession of and used marijuana. We find that you did so in a deliberate manner and that in this case, it constitutes serious misconduct. This type of behaviour is unacceptable, and we will not tolerate it. We invite you to consider the consequences for yourself and the organization.

We call on your sense of responsibility so that this type of situation does not occur again. Any repeat offence will not be tolerated and may result in stricter disciplinary measures, up to and including termination of employment.

[217] The recommendation to revoke the grievor's reliability status reads as follows:

[Translation]

FETHIERE's RCMP reliability status was suspended in 2012 following his use of illegal drugs. Although he made changes for the better (leaving the home of [a family member] and reducing his use of alcohol) and took steps to seek help (detox centre in fall 2012 and psychotherapy, although started more than a year after the suspension), the fact nonetheless remains that he used marijuana after his status was suspended, which was the very reason for the suspension. The use of marijuana is illegal and continuing to do so after having his status suspended shows negligence and a lack of respect for the RCMP, the Values and Ethics Code for the Public Service, and Canadian law.

FETHIERE did not seem to take the situation seriously during his interview in 2012 and he still does not take it seriously now. FETHIERE's answers about his use of illegal drugs during the security interview in 2008, during administrative/just cause investigations in 2012, and during his interview and telephone conversation with Sgt. Quesnel in fall 2013 are contradictory. His nonchalance, his financial problems, and his access to several databanks can make him susceptible to bribes and coercion and thus make him a risk to the RCMP.

[218] Clearly, the grievor's misconduct on July 7, 2012, was very serious in the eyes of the employer. Clearly, based on all the testimonies, and particularly that of Mr. Rainville, the misconduct was serious because it tarnished the image of the RCMP, an organization responsible for enforcing the law that according to the employer, employed someone who contravened the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19), in sight and knowledge of all the guests at the party at Mr. Rainville's home on July 7, 2012. By itself, the act was not that serious. The context greatly increased its scope. The destruction of the evidence by the police, decided unanimously by the officers at the scene, is significant. It is not the seriousness of the act or, in my opinion, the alleged risks that explain what happened next, it is the need for the RCMP to preserve its image.

[219] Under the guise of concern about risk, the grievor was reproached for using marijuana. The grievor's use was the real, and disguised, reason for the suspension and revocation of his reliability status.

[220] The grievor's supervisors never unequivocally told him that he was prohibited from smoking marijuana. However, that was what they punished him for with the suspension of reliability status and the suspension of employment, as witnessed by Ms. Quesnel's reaction when she learned that he continued to use marijuana despite the suspension of the reliability status. On one hand, the employer claimed that it cannot trust someone who breaks the law; on the other hand, the officers showed a sort of tolerance by applying the policy of no-case seizure through the local destruction of the grievor's marijuana. Far be it for me to reproach the police for that compassionate decision. However, that decision by the police somewhat undermines the employer's theory about the risk posed by the grievor. The disciplinary nature of the suspension and revocation of the reliability status seems to me to be well established.

3. The termination was based on a false pretext

[221] The analysis of that decision is based essentially on the disciplinary nature of the administrative measures taken by the employer (the suspension and revocation of the reliability status). Therefore, the Board's jurisdiction is established under paragraph 209(1)(b) of the *PSLRA*. The board has jurisdiction over termination under paragraphs 209(1)(b) and (c), which state that the Board can be seized of any termination grievance referred to it. Whatever the basis of the termination, subsection 12(3) of the *FAA* states that the termination must be for cause.

[222] Paragraph 12(1)(e) of the *FAA* provides for termination "for reasons other than breaches of discipline or misconduct". The employer claims that the revocation of reliability status constitutes such a reason. However, as seen earlier, the revocation of reliability status is not legitimate because it was not based on actual security reasons. The termination cannot be based on paragraph 12(1)(e) of the *FAA* because there is no just cause, for reasons other than misconduct, to terminate the grievor's employment.

[223] As the Federal Court stated in *Canada v. Rinaldi*, 1997 CanLII 16721 (FC), to justify a termination, the employer cannot rely on grounds that are in fact a false pretext.

[224] In *Rinaldi*, the issue was whether the adjudicator was correct in stating that he had jurisdiction to hear a termination of employment grievance under the *Public Service Employment Act* (R.S.C. 1985, c. P-33), while referral to adjudication was excluded under subsection 92(3) of the *Public Service Staff Relations Act* (R.S.C. 1985, c. P-35) of the time. The adjudicator ruled that she would have jurisdiction to allow the grievance if the grievor could establish that his layoff was a ruse or a subterfuge to terminate his employment on other grounds.

[225] The Federal Court agreed with the adjudicator and stated that the employer could not falsely invoke a law to preclude the adjudication of a termination. That finding was upheld by the Federal Court in *Grover*. To be successful, the grievor needed to establish that the employer's use of the *Public Service Employment Act* is contrived and a false pretext. In note 15 in the decision, the Court writes:

When the employer argues that the employment was terminated under the Public Service Employment Act, the only way to show that it was not would be to prove that the

conditions required to apply it were in fact not present at the relevant time and that the employment cannot therefore have been terminated under that Act.

[226] The revocation of the grievor's reliability status does not stand up to that analysis: the pretext of security serves to conceal the true reason for the termination.

[227] It has been shown in detail why I feel that the suspension and revocation of the reliability status were disciplinary. When the decision was made to terminate the grievor's employment, the letter recommending the termination included the following passage:

[Translation]

...

An investigation was conducted and revealed that on July 7, 2012 . . . at a work-related event, the employee was in possession of and used marijuana. The results of that investigation were then submitted to the Departmental Security Branch in Ottawa for review and decision. Mr. Féthière's reliability status was subsequently suspended on August 24, 2012, and permanently revoked on June 20, 2014.

As such, Mr. Féthière no longer meets the security standards required by the Royal Canadian Mounted Police for hiring, i.e., maintaining a reliability status during the period of employment. Thus, we cannot consider the employee for other positions within the organization.

...

[228] Once again, despite invoking the revocation of the grievor's reliability status, the starting point is again the events of July 7, 2012.

[229] Thus, I conclude that the reason cited for the termination, i.e., the revocation of the reliability status, is simply a means of camouflaging the discipline against the grievor. That revocation of reliability status, as shown earlier, is not actually based on legitimate security concerns but instead on a concealed desire to terminate the employment of an employee who uses marijuana. The revocation of reliability status is a false pretext. The evidence does not support any security justification to explain the termination of the grievor's employment.

[230] In the same sense, the employer cannot claim that the suspension of

employment is a justified administrative measure, when it is due to the suspension of reliability status, which is a disciplinary measure.

4. Is the discrimination grievance founded?

[231] To establish discrimination, a practice by the employer must be demonstrated that applies differently to the employee on one of the prohibited grounds under the *CHRA* or the collective agreement, which essentially reiterates the same grounds. Alcoholism and drug addiction are recognized as disabilities and, at the outset, are prohibited grounds of discrimination that would require the employer to provide a certain level of accommodation.

[232] No evidence was submitted concerning the problem of addiction to alcohol or marijuana. The grievor admitted that he had problems controlling his use of alcohol. There is an indication that it corresponded to alcoholism. The grievor never went to work drunk. The grievor also stated that he was not addicted to marijuana, and there is nothing in the evidence before me to demonstrate that. There is also nothing in the evidence to establish that the employer believed that the grievor had a problem with alcohol or marijuana addiction.

[233] Neither alcohol abuse nor using marijuana is a prohibited ground of discrimination. The measures the employer took were not justified, but I cannot say that they were discriminatory. Therefore, this grievance will be dismissed.

C. Remedy

[234] As the alleged reason for the termination is a false pretext, the termination is overturned. The suspension of employment is also overturned. The revocation of reliability status and its suspension are also overturned.

[235] At the end of the hearing, the grievor asked that the reinstatement sought in the grievances be replaced by compensation. However, the parties have not yet had an opportunity to present their evidence and arguments in that sense. I invite them to try to reach an agreement on the compensation to be paid to the grievor under the circumstances.

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

(The Order appears on the next page)

V. Order

[237] Grievance 566-02-9772, about discrimination, is dismissed.

[238] Grievance 566-02-9771, about against the reliability status suspension, is allowed.

[239] Grievance 566-02-9770, about the employment suspension, is allowed.

[240] Grievance 566-02-10102, about the reliability status revocation, is allowed.

[241] Grievance 566-02-10375, about the termination, is allowed.

[242] I will remain seized of this case for a period of 90 days with respect to the matter of the compensation the grievor is entitled to under the circumstances.

February 22, 2016.

PSLREB Translation

**Marie-Claire Perrault,
a panel of the Public Service
Labour Relations and Employment Board**