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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

KAREN GRANT

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Grant v. Deputy Head (Canada Border Services Agency)

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: Erin Hallock, counsel

For the Respondent: Lesa Brown, counsel, Treasury Board Secretariat Legal Services

Heard at Hamilton, Ontario,
November 3 to 6, 2015.
Written submissions filed December 21, 2015, and January 18 and 29, 2016.
Additional written submissions filed March 29, April 11 and 18, 2016.

I. Individual grievances referred to adjudication

[1] Karen Grant ("the grievor") worked for the Canada Border Services Agency (CBSA or "the respondent") and its predecessors for 13 years, from 2001 to 2014. On August 27, 2014, she received a letter informing her that her reliability status (a mandatory condition of employment resulting from a reliability screening process) had been revoked. On the same day, she received a termination letter, based on the revocation of her reliability status.

[2] Three grievances related to these matters have been referred to the Public Service Labour Relations and Employment Board ("the Board") for adjudication. Grievance 566-02-10950 deals with the investigation into the grievor's conduct and the suspension of her reliability status and her resulting suspension without pay. Grievance 566-02-10951 deals with the revocation of her reliability status. Finally, grievance 566-02-10952 deals with her termination.

[3] The grievor presented her grievances at first level in July and September 2014. 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 Board to replace the Public Service Labour Relations Board ("the former Board") as well as the 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*. In March 2015, the grievances were referred to the Board for adjudication.

[4] For the purposes of this decision, the three grievances will be dealt with together. Before the hearing, the respondent objected to the Board's jurisdiction over the suspension and reliability status revocation, the investigation process, and the suspension without pay, since they are all administrative matters that could not be referred to adjudication. The respondent did agree to proceed with all the evidence on the merits and reserved its right to make submissions about jurisdiction in its arguments.

[5] Arguments were presented by way of written submissions. In its submissions, the respondent requested to be heard further on remedies should the grievances be allowed. The Board requested further submissions on the remedies prior to issuing the present decision.

[6] For the reasons set out later in this decision, I find that the Board has jurisdiction to deal with all aspects of the grievances and that the grievances should be allowed. I find that the revocation of the grievor's reliability status was not legitimate, and thus cannot be a cause for termination. The suspension and revocation of the reliability status were in fact a camouflage of the Employer's true intentions, and they were disciplinary in nature. I find that the suspension without pay and the termination were also disguised discipline. The grievances are allowed.

II. Summary of the evidence

[7] The respondent called four witnesses: Hervé Dominique, senior investigator, Personnel Security and Professional Standards Division (PSPSD), who conducted the professional standards investigation ("PSI"); Ken McCarthy, director, PSPSD, who presented the investigation's findings to the Security Review Committee ("SRC"); Rick Comerford, regional director general, Southern Ontario Region, who signed both the letter of suspension without pay and the termination letter; and Pierre Giguère, departmental security officer ("DSO") and director general of security, who signed the letters of suspension and of revocation of the grievor's reliability status.

[8] Three witnesses testified for the grievor: herself; Johanne Brown, her former supervisor at the Port of Entry ("POE") where she worked; and Melissa Mancini, who was the observer at the investigation interview.

[9] The grievor worked at the Fort Erie (Peace Bridge) POE ("FE POE"). She started as a customs officer and through the course of her career, she was appointed as a superintendent on an acting basis several times. Finally, in June 2013, she participated successfully in an appointment process and was appointed superintendent on an indeterminate basis.

[10] The FE POE is a very busy place, with 14 lanes of high-volume traffic. Several types of travellers enter Canada — single travellers, families, groups, and daily commuters, as well as commercial operators. An additional lane is reserved for buses.

People on intercity buses, people on ski trips, seniors' expeditions, hockey teams (both professional and amateur) - all sorts of groups travel by bus, including musicians. Of special interest in the last category are country music groups. The grievor is a big fan of country music. She has travelled to Nashville, Tennessee, on numerous occasions with friends and family. Over the years, she has developed a number of friendships with several country music musicians and tour directors.

[11] In 2013, several reports came to light at the CBSA about illegal actions at the border. In the course of the investigation into the allegations at FE POE concerning the former chief, the grievor's name came up, so the respondent requested an investigation from the PSPSD into the grievor's possible misconduct.

[12] Mr. Dominique was in charge of the investigation. He gathered evidence from the grievor's CBSA email account, spoke with several witnesses who worked at the FE POE, and invited the grievor to an interview in December 2013, which was the first time she learned that she was under investigation. The interview occurred in January 2014. At the interview, she was asked about a number of emails. In addition, a number of photographs were copied from her email account. It is unclear whether she saw any of them, but in any event, I accept the evidence that they were pictures of her with different country music groups. They simply confirm that she was friends with them, which she does not deny.

[13] At the interview, the grievor was also confronted with several witness statements made by border services officers ("BSO") who had worked with her or had reported to her when she was superintendent. The allegations lacked specifics — times, dates, and exact locations — but they were included in the PSI report (the "report").

[14] After the interview, Mr. Dominique continued to receive information from the analysis of the grievor's emails, which was not shown to her until the hearing but appeared in the report.

[15] The report has several sections and bases its evidence on three main sources: the grievor's emails, her interview, and the witness statements.

[16] The report states at the start that the investigation into the grievor's alleged misconduct followed on the heels of the investigation into the former chief's

misconduct. The purpose of the investigation is stated as follows at paragraph 5 of the report:

> *To determine the validity of the allegation that Superintendent Karen GRANT breached the CBSA Code of Conduct, which includes the conflict of interest guidelines, in relation to her involvement in the clearance and / or facilitation of persons and professional entertainers entering Canada.*

[17] The report then summarizes the allegations against the former chief and adds that the grievor might have been involved in facilitating the entry of performing artists into Canada in return for favours, such as free tickets.

[18] One of the issues in this case is the pre-vetting process that occurred at the FE POE. The investigator describes it at paragraph 12 in the report as follows:

> *The following process pertains to performing artists and their crews who are seeking entry into Canada for entertainment purposes. A tour manager sends an advance notification* [of the] *crew manifest including tombstone data by fax to the POE. The objective is to facilitate their entry in a timely manner. The manifest is assigned to a BSO who is responsible to conduct indices checks in various databases, for criminality or previous immigration/customs enforcement. In the case where someone is found to be criminally inadmissible, the BSO determines the severity of the offence and if the subject's status merits a TRP. On occasion the BSO will contact the tour manager in an attempt to reach the individual of concern directly to obtain more information.*

[19] A Temporary Resident Permit (TRP) allows entry into Canada for a specific time, for a specific purpose. A person may have a conviction for drunk driving, rendering him or her inadmissible for entry into Canada. A TRP overrides this and grants temporary admission.

[20] The report further explains that the authority to grant a TRP in a minor criminality case rests entirely with the BSO reviewing the case when a group reaches the border. For major criminality, the chief's approval is required. A TRP application is made at a POE or at a Canadian consulate and costs $200.

A. Eight allegations of misconduct

[21] At paragraph 13, the report details the alleged misconduct that surfaced from the preliminary inquiry into the grievor's emails as follows:

1) She accepted invitations to concerts and solicited benefits for herself and her family.

2) She used her personal email account to conduct CBSA business.

3) She conducted unauthorized queries in CBSA databases.

4) She attempted to influence the immigration process at other POEs.

5) She sent sensitive CBSA information to a third party.

6) She made derogatory comments about colleagues and CBSA partners and used inappropriate language in her official communications.

7) She used official government identification for personal matters.

8) She facilitated and provided preferential treatment, unfair advantages, and extraordinary assistance to travellers with whom she associated.

[22] Each allegation was supported by email evidence, and the investigator provided examples. During the interview, the grievor was shown some but not all the emails supporting the allegations. What follows is a review of the email evidence supporting each allegation and the grievor's responses to the allegations, which include both her initial responses to the report and her statements at the hearing.

1. Accepting invitations and soliciting benefits

[23] In a number of emails, the grievor discussed with someone, who asked for information about crossing the border, about the possibility of accessing concert tickets or attending a post-performance fan party.

[24] She responded that concert discussions have nothing to do with her work and that there is no evidence of improper behaviour, i.e., of an exchange of favours. On one level, that information would be provided to anyone who asks for it. The conversation then heads in a different direction, about possibly buying tickets that the organizers

release at the last minute, outside ordinary channels.

2. Using personal email to conduct CBSA business

[25] Some tour organizers had her personal email address, which a third party probably provided. When emails were about her work, she sent them to her work email. One example occurred when a tour organizer contacted her through her personal email. She asked for the list of crew members, to verify if they would have problems at the border. The list, with birthdates, was sent to her personal email; she then forwarded it to her CBSA account.

[26] The grievor responded that she could not help it if people contacted her via her personal email; she thought sending the information to her CBSA account was the right thing to do. She had never thought of the possibility that using unsecured email put the personal information in it at risk.

3. Conducting unauthorized queries in CBSA databases

[27] On a number of occasions, the grievor carried out searches in advance in several police and border services databases to flag any potential admissibility problems. She did so even if a tour was not scheduled to cross at her POE. The investigator provides an example of a search the grievor conducted (with her login code) for a band that crossed the border at another POE.

[28] The grievor responded that she was not shown the search that displayed her login code at the interview, during which she denied that she would carry out searches if a group was to cross the border at another POE.

[29] At the hearing, confronted with the evidence of the search, she explained that she thought she was providing good service to people who would be crossing the border by letting them know in advance what to expect and what to prepare — for example, court documents. Any BSO contacted by phone or email through the CBSA's website would have provided that service. As the superintendent, she was authorized to carry out such searches, but it is more probable that she would have asked a BSO in immigration to vet the manifest. A few emails show instances where she asked a BSO to pre-vet a manifest.

4. Attempting to influence the immigration process at other POEs

[30] Not all POEs necessarily implemented pre-vetting to determine the need for TRPs in the same fashion. The investigator gives an email exchange as an example of attempting to influence unduly. In the exchange, the grievor suggested to a contact at Pearson Airport that perhaps he should look into making the TRP process more agile. In another instance, the grievor told an officer at another POE that a group that was to come through the border had no criminality and should be able to cross easily.

[31] The grievor responded that the investigator's first example was an exchange between colleagues about best practices; there was no attempt to influence and no power to do so. In the second instance, the BSO at the other POE would have found the information provided (no criminality) in any event.

5. Sending sensitive CBSA information to a third party

[32] This allegation refers to an incident in which the grievor got in touch with a tour manager and stated that one of the crew members, whom she named, would have admissibility problems.

[33] She responded that tour managers are aware of their crew members' minor convictions, which is why they seek advice. A tour manager may then either speak to the person concerned to discuss whether the TRP will be obtainable or change the manifest and substitute another musician.

6. Making derogatory comments about colleagues and CBSA partners, and using inappropriate language in official communications

[34] The investigator provides a number of examples of the grievor's use of inappropriate language and derogatory comments.

[35] The grievor responded by readily admitting that it was wrong to use such language and to make derogatory comments about colleagues. She fully apologized for her behaviour and stated that it has been corrected since the January 2014 interview.

7. Using official government identification for personal matters

[36] This allegation refers to a specific incident when the grievor offered a family member the use of her government ID to obtain a reduced hotel room rate while on vacation.

[37] The grievor responded that it was common practice among her colleagues to use their government IDs to obtain better rates on rooms when travelling, including on vacation. Having been made aware that it was wrong, she stated that she would never consider doing it again. In that specific instance, the family member did not use the grievor's government ID, although the government rate was viewed when shopping for the best deal. In the end, a different preferred rate was obtained.

8. Facilitating and providing preferential treatment, unfair advantages, and extraordinary assistance to preferred travellers

[38] This allegation includes the grievor calling ahead to another POE and informing it about a tour crossing the border, searching a database to counsel the tour manager on the necessary procedures, and reading the manifest to see if everything was in order.

[39] The grievor responded that that service would be provided to anyone who requested it.

B. Witness statements

[40] In addition to the email evidence, the report includes witness statements, mostly undated, which describe the grievor facilitating the entry of tour buses, either by allowing them through or by ordering BSOs to issue TRPs without the formal paperwork.

[41] The grievor vigorously denied any wrongdoing and ever allowing goods or persons to enter Canada illegally. The statements lack specifics. Moreover, as the superintendent, the grievor did not have the authority to override a BSO's assessment of admissibility. In one case, the chief had ordered a TRP issued, and the grievor had relayed that order to the BSO. She did not have the authority to contradict her chief.

C. The investigator's conclusions

[42] In his findings, the investigator concludes that the grievor breached the CBSA's *Code of Conduct* (Exhibit E-6) with respect to gifts. She obtained tickets through her contacts, with whom she also had professional dealings, whether the tickets were free or at a discounted or favourable price. Under the *Code of Conduct*, Chapter 2, Section D, Subsection 4, "Gifts, Hospitality and Other Benefits", one can read the following:

> *We are expected to use our best judgment to avoid situations of real, apparent or potential conflicts of interest by considering the following criteria on gifts, hospitality and other benefits while keeping in mind the full context of the* Values and Ethics Code for the Public Sector, *this* Code of Conduct *and the* Policy on Conflict of Interest and Post-Employment.

[43] The relevant criterion the investigator refers to is the prohibition on accepting any gifts or benefits "… that may have a real, apparent or potential influence on our objectivity in carrying out our official duties and responsibilities …" (per Chapter 2, Section D, subsection 4.1 of the *Code of Conduct*).

[44] In the *Code of Conduct*'s margin, a boxed tip reads as follows: **"Tip**: Our BSOs from Edmunston [*sic*], NB, use the following test: 'Would I have received this gift if I did not work for CBSA?' If the answer is no, they decline the gift [emphasis in the original]."

[45] The grievor emphatically repeated in her responses and her rebuttal and at the hearing that whatever favours she might have received from friends in the music industry (better tickets, entry to fan parties, etc.) had nothing to do with her job at the CBSA and everything to do with her friendships with those people. She also stated emphatically that she mostly paid for her tickets, although she conceded that she sometimes asked through her work email whether tickets were available and that the former chief had given her tickets.

[46] The investigator concludes that the grievor used her personal email to conduct CBSA business and that she accessed "… sensitive information held by the government in files that were not of her concern", contrary to Chapter 1, Section D, Subsection 6 of the *Code of Conduct*. By disclosing information on a crew member's criminality to a tour manager, she breached subsection 8 under the same section.

[47] The investigator also concludes that by using inappropriate language and making derogatory comments about CBSA colleagues and a CBSA partner to a member of the public, the grievor breached Chapter 1, Section D, Subsection 10, "Contact with the Public", in the *Code of Conduct*. The investigator also concludes that the grievor misused her government ID, contrary to Chapter 1, Section D, Subsection 7, "Care and Use of Government Property and Assets", again in the *Code of Conduct*.

[48] Finally, by contacting other CBSA offices for the benefit of people with whom she associated and thus giving them preferential treatment, the grievor breached Chapter 2, Section C, "General Responsibilities and Duties", and Chapter 2, Section D, Subsection 6, "Avoidance of Preferential Treatment" of the *Code of Conduct*. By doing so, she influenced the immigration process and provided extraordinary assistance to persons she associated with.

D. *Code of Conduct*

[49] Chapter 2, Section C, "General Responsibilities and Duties", reflects the duties already stated, which are avoiding any conflicts of interest "… between our official responsibilities and our private affairs …", refraining from using government property "… for anything other than officially approved activities …", and not "… assisting private entities or persons in their dealings with the government that would result in preferential treatment of the entities or persons".

[50] Again, a tip is offered in the margin, as follows: **"Tips to resolve conflicts of interest**: If a family member or friend comes through the PIL [Primary Inspection Line], whenever possible, have someone else clear them [emphasis in the original]."

[51] Preferential treatment also has a specific section at Chapter 2, Section D, Subsection 6, "Avoidance of Preferential Treatment". That section includes the following two paragraphs:

…

> *This means that we are prohibited from granting preferential treatment or advantages to family, friends or any other person or entity. We are not to offer extraordinary assistance to any entity or persons already dealing with the government without the knowledge and support of our supervisor.…*
>
> *Providing information that is publicly accessible is not considered preferential treatment.*
>
> [Emphasis added]

[52] At the hearing, the grievor's former supervisor testified to the fact that BSOs are constantly answering questions from friends and family about the rules at the border, such as: What can I bring in? What duty-free amount am I entitled to? The former supervisor saw nothing wrong with answering those questions, provided the answers

were correct.

[53] The Board notes that in the *Code of Conduct*, at Chapter 2, Section G, "Consequences", the following text appears: "If we do not comply with the requirements set out in this chapter we may be subject to disciplinary measures, up to and including termination of employment."

E. Reliability status suspended

[54] The report was forwarded on June 9, 2014, to both Mr. Comerford and the SRC. Mr. Comerford testified that he was "shocked" by the report and at the extent of wrongdoing. His first reaction was to place the grievor on leave with pay (letter of June 10, 2014) "… in order to complete the disciplinary process". The letter is signed by Jeff Walters, Fort Erie district director, who reported to Mr. Comerford.

[55] The SRC met on June 12, 2014. It is made up of senior CBSA managers and is chaired by Mr. McCarthy. Its members have no special training in or any responsibility for security matters; rather, they sit as representatives of CBSA management. At this meeting, the members were provided with the report; the grievor had not yet been given a copy.

[56] The SRC concluded that the grievor had abused her position of trust and authority at the FE POE, had arranged for the vetting of manifests, had provided preferential treatment to friends, and had received benefits through her relationships in the music industry. The most important point, according to Mr. Giguère, the DSO who suspended the grievor's reliability status following the SRC's unanimous recommendation, was the SRC's conclusion that the grievor "did not appear to acknowledge the conflict of interest situation that she was in, and the risks such a conflict pose to the Agency".

[57] The day after the SRC meeting, Mr. Giguère signed a letter sent to the grievor suspending her reliability status. Mr. Comerford then signed a letter suspending her without pay, since she could not work without a reliability status. Both letters and a redacted version of the report were handed to her shortly after that. From then on, she had no access to the workplace. She had 14 days to respond to the allegations in the report.

F. Grievor's response to the report

[58] The grievor provided a detailed rebuttal to the report. However, as will be illustrated further on in this decision, as she had received a vetted copy of the report, she had some gaps in her responses. Essentially, the rebuttal explained that she provided help and information to all travellers, including people she knows in the music industry. She has never allowed anyone illegal entry into Canada; nor would she have the power to. Pre-vetting manifests was often delegated to others; providing fax numbers and information about other POEs was part of her information duties. The information she provided was publicly available.

[59] The grievor acknowledged the inappropriate language she used and the derogatory comments she made about her colleagues. She apologized and stated that she would change her behaviour. She also acknowledged that using her government ID was inappropriate for any advantage unrelated to work, although she added that she had learned this in the course of the investigation.

[60] She had also learned that the respondent considered the help and assistance she provided to her friends a conflict of interest. She denied any wrongdoing and stated that she would provide the same assistance to anyone who required it.

[61] In the rebuttal, the grievor disputed most of the witnesses' statements, which are neither dated nor detailed. At the hearing, the respondent's counsel stated that the respondent was not relying on the witness statements.

[62] The grievor ended her rebuttal with the following paragraph:

> *While I cannot alter what has transpired, I have taken steps to ensure that similar incidents and misunderstandings will not occur in the future. I value our professional relationship and firmly believe that I will continue to produce solid and secure work that will benefit CBSA and our clients. I understand, if in the future CBSA feels that I should recuse myself from dealing with friends in the entertainment business. I want the agency to rest assured that I have learned from this experience and will never put myself or CBSA in this type of situation again. I am willing to change myself and take whatever steps I must to regain the trust of the CBSA and my fellow officers.*

G. Reliability status revoked

[63] After Mr. Comerford met with the grievor, he asked the PSPSD to review her rebuttal in detail. Its response was provided to the SRC, along with the grievor's rebuttal.

[64] The SRC ultimately decided to recommend revoking the grievor's reliability status. One of the notes made about the meeting is that in her rebuttal, the grievor had not fully responded to the allegations. I have already stated that in the end, the respondent did not rely on the witnesses' statements to justify revoking the grievor's reliability status, but the SRC certainly appears to have done so. The next paragraph provides an example of the grievor's "incomplete response" to an allegation.

[65] The allegation in the report reads as follows at paragraph 24:

> *According to BSO COBER, on February 28, 2012, Superintendent GRANT brought the tour manager of the Hunter Hayes band to the immigration counter. She instructed him to issue a TRP for the individual, on behalf of Superintendent TAYLOR. It was unusual behaviour from Superintendent GRANT since BSO COBER had the delegated authority to deal with travellers who are inadmissible for criminality under IRPA A36(2).*

[66] The grievor received the following vetted version to prepare her rebuttal (Exhibit G-3, page 16):

> *According to BSO COBER, on February 28, 2012, Superintendent GRANT brought the tour manager of the* [redacted] *band to the immigration counter. She instructed him to issue a TRP for the individual, on behalf of* [redacted]. *It was unusual behaviour from Superintendent GRANT since BSO COBER had the delegated authority to deal with travellers who are inadmissible for criminality under IRPA A36(2).*

[67] The following was the grievor's response in rebuttal:

> *BSO Cober states that on February 28, 2012, I escorted a client to the immigration counter. He states that it was unusual behaviour for me as he had the delegated authority to deal with travelers for criminality under IRPA A36(2). I do not disagree with BSO Cober having the delegated authority. I disagree that my behaviour was unusual. I asked Herve Dominique to provide me further details from BSO Cober regarding my duties. I asked Herve Dominique if Cober was*

> *aware if I was tending to administrative duties in the office or working in buses, or the yard. I asked Herve Dominique what time of day this was and to confirm if I was actually on shift on this date? Herve Dominique could not provide me with any of these details and BSO Cober did not either.*
> *I will state that if I brought a client to the immigration counter that I was more likely working in the bus terminal or a secondary capacity assisting officers. I would have received an email from* [the former chief] *or the staff regarding the band manifests results. It is daily practice to read and be aware of the tours crossing on a daily basis. None of the actions that have occurred are "unusual behavior" for me or any other officer in my position. They are part of my job.*

[68] The following was the comment from the PSPSD review of July 30, 2014: "GRANT escorted a tour manager into secondary and instructed the BSO to 'issue a TRP on behalf of Superintendent Taylor'. GRANT does not address this specific instruction in her rebuttal. The BSO must assess whether a TRP is warranted in this type of case."

[69] The grievor could not address that specific instruction since it was not in the vetted report she received. She might have thought she was responding to instructions from her chief, who would have had the authority to order the TRP issued. As a superintendent, the grievor did not have the authority to order the BSO to issue the TRP; there is no evidence that she did.

[70] The PSPSD's response to the rebuttal essentially maintains the report's findings while conceding that the witness statements are in large part a matter of "he said, she said". When asked at the hearing why the witness statements had been left in the report, if they were only cases of "he said, she said", Mr. McCarthy answered that that was a very good question; he did not have an answer, except that matters had been a bit rushed.

[71] Additional emails, found after the interview, were used for the report. According to the July 30 PSPSD response, the rebuttal was the grievor's opportunity to respond. Again, the vetted report she received hindered a fulsome response.

[72] The report quotes the following email as an example of providing extraordinary assistance. This is the vetted version received by the grievor:

> *On July 5, 2013,* [redacted] *wrote: "...normally,* [redacted] *assists bands* [redacted]*...but I told* [redacted] *that there was*

> *this awesome lady at the border that had us covered... We're less than two weeks away from the* [redacted] *to be released...I will make sure to send you a copy when I get them...".*

[73] The grievor states the following in her rebuttal: "I was not provided with or asked about this email during the PSI interview and cannot comment. It is also not confirmed in the report if this is from my email."

[74] The PSPSD July 30 response to this passage is as follows:

> *26. This additional evidence of GRANT providing extraordinary assistance to her friends, as opposed to them using the services of another individual who takes care of concerts at Rama, was found after the PSI interview. GRANT's rebuttal was her opportunity to address this.*

[75] At the hearing, the grievor explained more fully that offering assistance felt like a normal part of the job. The bands could have found the information she provided online. Some individuals and firms offer the simple service of filling out the manifest and handling the pre-vetting with a POE, for a fee. By providing assistance, the grievor was helping tour managers avoid costs. There is no evidence of any favouritism and no indication that the same pre-vetting and help with the manifest would not have been done for any other group.

[76] Again, it seems important to emphasize that the grievor did not have access to her emails in the process of answering the allegations, while the respondent had access throughout the investigation. She stated that the service she offered to the country music bands was no different from the service she offered to all other clients, which the respondent did not contradict.

[77] In the report of the SRC's August 7, 2014, meeting, at which revoking the grievor's reliability status was recommended, the following notes appear, which seem to constitute the whole of the rationale for the revocation:

> ***The Security review Committee (SRC) (August 7, 2014) noted that:***
>
> - *GRANT had put a lot of effort into her rebuttal, however, all the committee members agreed that her rebuttal did not completely offer or address the allegations put forth within the PSI Report.*

> - *GRANT continuously abused her authority and her position at the CBSA to obtain benefits from clients.*
>
> - *GRANT had no reason to be processing or pre-vetting persons known to her, when in fact they should have been referred to another CBSA employee to assist.*
>
> - *GRANT, through her rebuttal never denied the allegations.*
>
> - *GRANT demonstrates remorse for non-security issues (derogatory comments) but did not show any remorse for the substantive issues.*
>
> - *GRANTS's honesty, integrity and trustworthiness are still questionable.*
>
> [Emphasis in the original]

[78] Following the SRC meeting, Mr. Giguère, the DSO, signed the revocation letter on August 27, 2014. Because reliability status is an essential condition of work at CBSA, the grievor's termination was automatic.

[79] At the hearing, Mr. Giguère referred to the grievor's rebuttal to justify his decision to revoke her reliability status. He mentioned specifically a sentence in the paragraph quoted earlier: "I understand, if in the future CBSA feels that I should recuse myself from dealing with friends in the entertainment business." He stated that this single sentence showed that the grievor had not understood the importance of the conflict of interest; she was waiting for the respondent to tell her what to do, as she did not see the wrongdoing. Thus, her trustworthiness was in question.

[80] Both Mr. Giguère and Mr. McCarthy referred to the principles of reliability status as covered by the acronym "HIT": honesty, integrity, and trustworthiness. In the grievor's case, according to those two witnesses, mainly the trustworthiness aspect was questionable.

[81] Mr. Giguère did not refer to a further letter the grievor had sent him in July 2014. Her letter ends with the following:

> *I have taken full ownership for the mistakes that I have made as noted in the PSI Final Report, being my use of inappropriate language on my CBSA e-mail. I will ensure that this never happens again.*
>
> *I also now fully appreciate and understand the changes to*

> *the Code of Conduct concerning perception. I now understand that even though all proper procedures were followed by me with respect to the clearance of persons and professional entertainers entering Canada, the fact that I am a country music fan, my assistance of these clients involved in the country music industry could be perceived as a conflict of interest. In the future, I will follow any direction given by my supervisors with respect to my assistance of country music entertainers. I will also conduct myself cautiously in all that I do.*
>
> *As a result of the above, I respectfully request that you reinstate my reliability status.*

[82] There is no indication that this letter was shown to the SRC.

III. Summary of the arguments

A. For the respondent

[83] The respondent submits that the Board does not have jurisdiction over the grievances that deal with the PSI investigation, the grievor's indefinite suspension, and the suspension and revocation of her reliability status.

[84] The respondent submits that the PSI investigation was administrative and could not be referred to adjudication under section 209 of the *PSLRA*. It further submits that the investigation was procedurally fair. In any event, if any procedural defects arose, they were cured by this hearing (*Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (QL)(C.A.).

[85] The indefinite suspension was not disciplinary but administrative; therefore, again, the Board does not have jurisdiction. There was no disciplinary intent; rather, the respondent needed to further investigate if its security interests were threatened. With the suspension of the grievor's reliability status, which is an essential condition of employment, the respondent had no choice but to suspend her. In any event, the suspension issue is moot as the termination of her employment was retroactive to the date of the suspension.

[86] Furthermore, the respondent argues that the Board lacks jurisdiction over the suspension and subsequent revocation of the grievor's reliability status, which would be adjudicable only if they were disciplinary measures; if not, then the recourse would be an application for judicial review before the Federal Court (*Myers v. Canada*

(Attorney General), 2007 FC 947).

[87] According to the respondent, the revocation of the grievor's reliability status was sufficient to justify her termination under s. 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). The issue is not whether the decision to revoke her reliability status was made unreasonably or in bad faith but rather whether it constituted a disciplinary measure. If not, the Board has no jurisdiction, since the revocation of reliability status is cause for the purposes of the *FAA*.

[88] There is no indication that the security measure taken by Mr. Giguère, which was revoking the grievor's reliability status, was meant to impose discipline; as a matter of fact, Mr. Giguère had no disciplinary authority over her.

[89] The respondent submits that *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70, in which the adjudicator ruled that a reliability status revocation could be examined by an adjudicator, was wrongly decided. In any event, *Heyser* is distinguishable. In the present case, two distinct processes occurred, one disciplinary, the other security-driven. The security process was logically applied and ultimately resulted in the revocation of the grievor's reliability status.

B. For the grievor

[90] The grievor asserts that contrary to what the respondent submits, the Board does have jurisdiction to consider the decision to revoke her reliability status without having to resort to determining whether it was in fact disguised discipline.

[91] The respondent's position is contrary to a proper and meaningful interpretation of section 209 of the *PSLRA*. Whereas s. 209(1)(b) gives the Board jurisdiction over disciplinary measures, s. 209(1)(c) gives it jurisdiction over terminations under the *FAA* for reasons that do not relate to misconduct or a breach of discipline. For the Board's jurisdiction to have any meaning, it must have broad authority to assess the procedure followed in a termination that was not based on discipline. Otherwise, s. 209(1)(c) serves no meaningful purpose.

[92] In other words, the fact that the respondent maintains that there is an administrative reason for the termination (i.e., the revocation of the grievor's reliability status) does not deprive the Board of its role of assessing whether there was just cause

for termination under the *FAA*, which is confirmed by the Board's recent decision in *Heyser*.

[93] The grievor argues that in this case, as in *Heyser*, the Board must ask whether the respondent had a legitimate concern about the security risk she represented; as in *Heyser*, the answer should be negative.

[94] Consequently, the Board has jurisdiction to consider the merits of the PSI investigation and the decisions to suspend and then revoke the grievor's reliability status, as those facts underlay the termination under the *FAA*.

[95] Moreover, the Board has jurisdiction to examine the suspension and revocation of the grievor's reliability status on the basis established by the former Board, notably in *Bergey v. Treasury Board (Royal Canadian Mounted Police)*, 2013 PSLRB 80, which is that such an assessment is within an adjudicator's jurisdiction when the respondent's actions are tainted by bad faith or procedural unfairness or when disguised discipline is present. The grievor asserts that all these conditions apply in the present case.

[96] The grievor maintains that the PSI investigation was flawed. She was not provided with specific details about the allegations made against her. A number of documents were not brought to her attention during her interview. New information uncovered after the interview was never addressed with her. The vetted copy of the report did not provide all the information the respondent relied on when making its decisions.

[97] The grievor also submits that the respondent acted in bad faith by not taking into account any exculpatory evidence but rather reaching unsupported conclusions. It is clear from both the report and the investigator's testimony that the investigation into the allegations against the former chief at the FE POE played a large part in the investigation into the allegations against the grievor. The investigation failed to take into account the hierarchy between the former chief and the grievor and did not consider that her actions were within the bounds of the accepted practices at the FE POE.

[98] The investigation was biased, with a predetermined outcome, which is obvious from the fact that none of the explanations the grievor provided in response found their way into the report; it remained entirely unchanged despite the many corrections

she brought to light.

[99] The process to suspend and then revoke the grievor's reliability status was also flawed. She was provided with very little information about the security concerns and was given no indication of what type of information she should provide to counter the questioning of her integrity and trustworthiness. The SRC's process unfolded without any possible meaningful input from her.

[100] The grievor also argues that the SRC failed to follow its own procedure. It considered only the negative elements of the investigation, without taking into account the complete absence of discipline in the grievor's record and her explanations concerning the allegations, despite its mandate to consider all relevant circumstances. There appears to have been no meaningful discussion of any actual security risk. The security concerns that led to the suspension and revocation of the grievor's reliability status were never identified to her, were never referred to in the decision-making process, and were not clarified at the hearing.

[101] Those procedural flaws cannot be remedied by a *de novo* hearing before the Board, according to the respondent's own reasoning, since the Board's lack of jurisdiction precludes reviewing the decisions that led to revoking the grievor's reliability status.

[102] The grievor's suspension was initially a disciplinary measure, as stated in the June 10 letter; the suspension due to reliability status suspension followed, but in fact, it was simply a continuation of the disciplinary suspension. She was suspended as a direct result of the investigation's findings of misconduct; therefore, the suspension can logically be considered disciplinary.

[103] Finally, the grievor submits that the termination can be considered disguised discipline. Mr. Comerford testified that termination would have been the disciplinary outcome of the investigation but that the process was superseded by the security process. The grievor argues that the security process took precedence to avoid the heightened scrutiny the Board would apply to a disciplinary termination.

IV. Reasons

[104] There is some confusion as to the numbering of the grievances. However, there is agreement on their substance: they pertain to the PSI investigation, the grievor's

indefinite suspension, the suspension and revocation of her reliability status, and the termination of her employment.

[105] The respondent objected to the Board's jurisdiction over the suspension and revocation of the grievor's reliability status, and I shall deal with that objection in the paragraphs that follow. It also objected to the Board's jurisdiction over the PSI investigation because it was an administrative process. Since it led to the suspension and revocation of the grievor's reliability status, if I find that the Board has jurisdiction to examine that suspension and revocation, it would follow that it has jurisdiction to examine the PSI investigation and how it was carried out. For the termination, the Board has jurisdiction under s. 209(1)(c) of the *PSLRA*. Termination in the federal public service must be for cause. It may be that the respondent had cause, but the Board always retains jurisdiction to determine whether that was so.

A. <u>Objection to jurisdiction</u>

[106] I wish to start with a quote that informs the present reasons, drawn from *Canada (Attorney General) v. Grover*, 2007 FC 28:

> *[46] The* PSSRA [Public Service Staff Relations Act, *(R.S.C. (1985) c. P-35), predecessor legislation to the* PSLRA] *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." (*Canada (Attorney General) v. Penner, *[1989] 3 F.C. 429 (C.A.), [1989] F.C.J. No. 461 (QL))*

[107] The respondent objects to the Board's jurisdiction to deal with the suspension and revocation of the grievor's reliability status, as they were administrative measures, for which the Board has no jurisdiction. The provisions that give the Board jurisdiction to deal with grievances are found at section 209 of the *PSLRA*. The relevant provisions read as follows:

> ***209 (1)*** *An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to*
>
> …
>
> ***(b)*** *a disciplinary action resulting in termination, demotion, suspension or financial penalty;*
>
> ***(c)*** *in the case of an employee in the core public administration,*
>
> ***(i)*** *demotion or termination under paragraph 12(1)(d) of the* Financial Administration Act *for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct.…*
>
> …

[108] The *FAA* provides for the Treasury Board's authority over matters related to the federal public service. Termination (which is delegated to deputy heads) is one of the Treasury Board's powers but must always be for cause. For the purposes of this decision, the relevant *FAA* provisions read as follows:

> …
>
> ***12 (1)*** *Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion, for which he or she is deputy head,*
>
> …
>
> ***(c)*** *establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties;*
>
> …
>
> ***(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.*
>
> …

[109] There are two possible approaches with which to deal with the respondent's objection. One is to consider the termination grievance under s. 209(1)(c) of the *PSLRA*; the other is to consider all the grievances under s. 209(1)(b). The grievor invoked both provisions in her notice of reference to the Board for adjudication of her grievances. I will address s. 209(1)(b) later in the decision.

[110] Under s. 209(1)(c), I come to the conclusion that the Board has jurisdiction to examine the revocation of the reliability status, as this is the cause for the termination.

[111] The respondent cited *Myers* as authority for the fact that only the Federal Court has jurisdiction to examine a revocation of reliability status. Mr. Myers was terminated, and his enhanced reliability status was revoked afterwards. He sought judicial review of that subsequent decision. Since the revocation had occurred after his termination, he did not have access to the grievance process, as he was no longer an employee when the reliability status was revoked. The facts in the instant case are very different: the loss of reliability status preceded and was the cause of the termination.

[112] There is no dispute that the Board has jurisdiction to examine a termination under s. 12(1)(e) of the *FAA* and determine whether the cause invoked is truly the cause and not a sham. In other words, the Board has jurisdiction to examine the legitimacy of the revocation of reliability status that is the stated cause for the termination. I would add that the respondent did not advance any authority in support of the proposition that the Federal Court is the proper forum to adjudicate at first instance whether there is cause for termination in the public service. That authority is explicitly and exclusively given to the Board by section 209 of the *PSLRA*. Determining whether there is cause necessarily involves looking at the alleged cause.

B. <u>The revocation of reliability status as an illegitimate cause for the termination</u>

[113] The respondent's termination letter indicates the revocation of the grievor's reliability status as the cause for the termination and notes that the termination is being done under s. 12(1)(e) of the *FAA*.

[114] *Heyser*, a recent Board decision, dealt with a similar situation, in which the grievor's misconduct resulted in the revocation of her reliability status and consequent termination. I agree with the adjudicator in *Heyser* that since adjudicators have jurisdiction to determine a grievance against a termination for reasons other than discipline, and since that termination must be for cause, an adjudicator is obligated to consider whether the alleged cause, in this case as in *Heyser*, the revocation of reliability status, is legitimate as opposed to a sham or camouflage.

[115] The Board's jurisdiction to consider the revocation of reliability status was, in fact, even mentioned by Mr. Giguère in his letter of August 27, 2014, in which he states the following at the second-last paragraph:

> *Section 6 of the Treasury Board Secretariat's Policy on Government Security, Personnel Security Standard stipulates that you may challenge a negative decision based on the results of a reliability check through the current grievance procedures in accordance with sections 208 and 209 of the Public Service Labour Relations Act, as well as through a complaint to the Canadian Human Rights Commission or the Federal Court, Trial Division.*

[116] The Treasury Board Secretariat's "Personnel Security Standard" was rescinded on October 20, 2014, but applied at the time of the grievor's termination. It states, under section 6, "Review and redress", at s. 6.2, "Reliability status", the following:

> *Employees who wish to challenge a negative decision based on the results of a reliability check may do so through current grievance procedures in accordance with Sections 91 and 92 of the* Public Service Staff Relations Act. *Departments … must ensure that reliability check grievances proceed directly to the final level of the grievance procedure.*
>
> *Individuals from outside the Public Service, such as applicants and contractors, may complain to the Canadian Human Rights Commission, the Public Service Commission's Investigation Directorate or the Federal Court, Trial Division, according to the specifics of each case.*
>
> [Emphasis added]

[117] Thus a distinction is drawn between individuals from within and from outside the federal public service. Those on the inside have access to the grievance process to challenge negative decisions based on reliability checks. Sections 91 and 92 of the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), referred to in the excerpt, are

the predecessors of sections 208 and 209 of the *PSLRA*. Since revoking reliability status is not specifically mentioned in any those sections, the recourse must concern the suspension or termination that results from the suspension or revocation of the reliability status, as being a "… negative decision based on the results of a reliability check …", as stated in the last quote.

[118] To determine whether the revocation of the grievor's reliability status was legitimate, I have considered the documents applicable to her reliability status. Although the DSO was not bound by the SRC's recommendation, much was made of that process, to show how the reliability status review was conducted.

[119] Two documents concern the SRC process: the SRC's terms of reference and a checklist for the SRC. Both documents refer to the Personnel Security Standard.

[120] The Personnel Security Standard, at section 2.7, details as follows the criteria taken into account for reliability checks:

- 2.7.1 Verification of personal, educational and employment data and reference checks
- 2.7.2 Results of the criminal records check
- 2.7.3 Discrepancies between criminal record check and declaration
- 2.7.4 Credit check
- 2.7.5 Special provisions of the Criminal Code that preclude employment unless a pardon is granted.

[121] Presumably, reliability status would be reassessed if any of those factors changed in the course of employment. This was not the case for the grievor.

[122] The SRC's terms of reference are as follows:

> *The mandate of the Security Review committee (SRC) is to review and assess information in order to make recommendations to the Departmental Security Officer (DSO) on suspensions, revocations or reinstatements of Reliability Status screenings for existing employees; and the issuance of security notification letters where security risks can be accepted by the DSO.*

[123] The section entitled "Roles and Responsibilities" states that the SRC will review the circumstances of the cases presented to it by assessing the individual against the following: honesty, integrity, and trustworthiness. The terms of reference then adds the following:

> *The Committee also looks at the following Security Assessment Information taken from the Treasury Board of Canada Secretariat's Policy on Government Security (PGS).*
>
> *As per the PGS, adverse information concerning an individual is assessed with respect to:*
>
> - *Its nature*
> - *Seriousness*
> - *Surrounding circumstances*
> - *Frequency*
> - *The willingness of participation*
> - *The individual's age at the time of the incident(s) and*
> - *The degree of rehabilitation*
>
> *Other areas for assessment:*
>
> - *Recognition of the seriousness of the misconduct by the employee;*
> - *The aggravating and mitigating factors;*
> - *The possibility his situation was error of judgment (intent/mens rea);*
> - *Other relevant personal circumstances;*
> - *The consequences in terms of injury/potential injury to the organization;*
> - *How would a reasonable person placed in the same context interpret the facts;*
> - *Is the organization ready to accept the level of risk this employee represents;*
> - *Consider the balance of probabilities; and*
> - *Seriousness of the misconduct.*

[124] The security assessment information just detailed is related to security clearances, not to reliability screening. By applying those criteria to reliability screening reassessments (as seems to have been done in this case), the SRC applied a much stricter standard than provided in the Personnel Security Standard.

[125] This may be the respondent's prerogative; however, imposing those additional conditions to a reliability screening review may lead to unfair results, as starkly illustrated in this case.

[126] For a cause for dismissal to be legitimate, it must be reasonable. Reasonableness can be a vague term, which is why Canadian courts have attempted to set the parameters of reasonableness in the different circumstances in which the term needs to be applied.

[127] The Supreme Court of Canada established in *Dunsmuir v. New Brunswick*, 2008 SCC 9, a useful definition of reasonableness in the context of administrative law. Granted, the definition is given in the context of judicial review, but it is still useful in giving the parameters of a "reasonable decision":

> *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.* [Dunsmuir, at para. 47]

[128] The respondent's stated goal in applying reliability screening is to ensure that border officers can be trusted to use government assets and information and to make decisions in a way that ensures security and the integrity of services, in the context of border security. The revocation of the reliability status must be based on facts that logically support the decision.

[129] Reliability screening must also be done while preserving the rights of the persons screened, as stated in the Personnel Security Standard. Privacy and the right to respond to adverse allegations are such rights. In the case of an employee, a reliability screening review must also respect that employee's right to his or her job, which is not absolute, but work as an important component of an individual's dignity and sense of worth must be taken into account. The following passage from *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 S.C.R. 313 at para. 91, by Chief Justice

Dickson is often quoted on this topic:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.…*

[130] Not making the grievor's work experience part of the review was a deficiency in the SRC process and the resulting decisions to suspend and then revoke the grievor's reliability status. The process was so focused on the alleged wrongdoing that it seems that the grievor's work profile was completely ignored. The work environment at the FE POE was not considered; her supervisors were not consulted, and her credentials as a committed and involved employee were not taken into account. Instead, perceived misconduct that the respondent had made no effort to correct or even point out served as the entire reasoning for determining her future. The points noted in the SRC's final recommendation to revoke her reliability status show how important the misconduct was to the SRC, with no thought for the possibility of a correction.

[131] Some conclusions of the SRC leading to the recommendation to revoke the reliability status are not based on any tangible evidence, notably, "GRANT continuously abused her authority and her position at the CBSA to obtain benefits from clients", for which there is no evidence. The grievor did not have the authority to impose any decision on immigration BSOs. She never offered any service that would not have been available to other clients, including pre-vetting, which was a recognized process at the FE POE. From the tone of her exchanges with friends, whether on her CBSA email account or her personal email (her private realm), any so-called benefits resulted from long-standing friendships, not CBSA services. I agree with the respondent that such exchanges should not appear in a work context. That being said, the wider context points to long-standing relationships completely unrelated to favours at the border.

[132] Another unfair conclusion is that the grievor did not fully respond to the allegations in the report. As shown earlier, the vetted report did not fully inform the grievor, especially since it included redacted emails that had not been shown to her at the interview. The incompleteness of her rebuttal can certainly not be traced to unreliability.

[133] To remain "within a range of possible, acceptable outcomes which are

defensible in respect of the facts and law", the revocation of reliability status would need to be based on genuine concerns about the grievor's reliability. No evidence was presented to show how the grievor was unreliable. There may have been an appearance of conflict of interest, and the use of her personal email to respond to enquiries, but such behaviour could easily have been corrected. No effort was made to address the misconduct underlying the decision. The grievor had thirteen years of impeccable performance. Surely this should have been taken into account. This is not a case where the behaviour is so egregious that the employee can no longer be trusted. Rather, the situation is one of perceived conflict of interest that could have easily been resolved by the respondent.

[134] The decision to revoke the grievor's reliability status was not truly founded on security concerns, but rather, was based entirely on misconduct, with no attempt to correct, no opportunity to do so, and no warning. The decision did not take into account the grievor's past performance, it did not take into account her exculpatory statements nor her stated intention to comply with whatever directive the respondent would give her. Finally, the SRC has no particular security expertise.

[135] Moreover, the decision was founded on a deficient inquiry. I concur with the grievor that the investigation process was deeply flawed and procedurally unfair. She was given no access to the work tools (e.g., her logs, her email, etc.) that would have enabled her to properly respond to the respondent's allegations. The vetted report was incomplete to the point of being at times incomprehensible. The respondent and the SRC did not take any of her explanations into account. Damaging information provided by the witness statements that was finally discounted by the respondent, according to what was stated at the hearing, was nevertheless left in the report and was not corrected for the purpose of the second SRC review.

[136] I also agree with the grievor that the damaging report makes sense only if viewed in light of the other major investigation into allegations concerning the former chief. Allegations from that report found their way into the report that supposedly concerned the grievor. The confounding of the two reports is disturbing, to say the least.

[137] On the basis of the evidence, the respondent has not demonstrated that the revocation of the grievor's reliability status was reasonably necessary to ensure the

CBSA's security as an organization. Therefore, revoking her reliability status, which necessarily led to her termination, was unreasonable. It cannot be said that the revocation of the grievor's reliability status is a legitimate cause for her dismissal.

C. <u>Analysis under s. 209(1)(b): the reliability status revocation and suspension were disguised discipline</u>

[138] Under s. 209(1)(b), the Board has jurisdiction if I find that the revocation and suspension of the grievor's reliability status were in fact disciplinary measures. This has been stated in a number of decisions of the former Board: *Braun v. Deputy Head (Royal Canadian Mounted Police)*, 2010 PSLRB 63 at paras. 135-140; *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80, at para. 814; and *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61, at para. 103. I do find that the suspension and revocation of the grievor's reliability status were disciplinary measures.

[139] After 13 years as an employee with an impeccable record and after being promoted on an acting basis and then on a permanent basis to the position of superintendent, the grievor was dismissed, based on a report detailing several instances of misconduct entirely related to the *Code of Conduct*. As stated earlier, the *Code of Conduct* provides for disciplinary sanctions in cases of misconduct at Chapter 2, Section G, "Consequences", as follows: "If we do not comply with the requirements set out in this chapter we may be subject to disciplinary measures, up to and including termination of employment."

[140] On the evidence, what the respondent is concerned about is not security, it is misconduct: inappropriate language, misuse of the CBSA email account, disclosing third-party information, and an apparent conflict of interest. I have difficulty understanding why those behaviours were never brought to the grievor's attention, to allow her to correct them. Instead, she was supposed to respond to the vetted report without access to her work email to counter the allegations. Her explanations were discounted, as were her promises to modify her behaviour in order to comply with the respondent's directions. Damaging information was left in the report, despite being unsupported. No one who worked directly with the grievor was involved in deciding the sanctions that should be imposed.

[141] The respondent argued that in the absence of any disciplinary intent, a measure

cannot be considered disciplinary. That would be the sense of decisions such as *Canada (Attorney General) v. Grover*, 2007 FC 28, or *Canada (Attorney General) v. Frazee*, 2007 FC 1176. However, as was also noted in *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70, the notion of discipline arises in a context in which the punitive effect of a measure outweighs its initial administrative intent. The adjudicator found that a suspension that had begun as an administrative measure became a disciplinary measure when the suspension exceeded a month. This finding was upheld by the Federal Court of Appeal, in *Basra v. Canada (Attorney General)*, 2010 FCA 24, which ruled that it was open to the adjudicator to find that the suspension had become disciplinary for its punitive nature; based on the legal presumption that one intends the consequences of one's acts, it could be implied that the respondent intended to punish with a prolonged suspension.

[142] Following the same reasoning in this case, it can be implied that the respondent relied on the reliability status process to deal with discipline. Indeed, when Mr. Comerford was asked at the hearing why no discipline had been imposed, he replied that the suspension with pay imposed on June 10, 2014, was the beginning of the disciplinary process, but that it had been overtaken by the security process.

[143] The decision to revoke the grievor's reliability status was based entirely on a report that concluded that misconduct had occurred. The sanction for misconduct should be discipline, as stated in the *Code of Conduct*.

[144] As noted in *Grover*, quoted earlier, replacing discipline by an administrative process leads to very different results: if the suspension and revocation of reliability status are administrative measures, then the employee has no recourse to adjudication (at least according to the respondent's position). If the same measures are considered disciplinary, the employee does have recourse to adjudication. What is striking in this case is the total lack of opportunity given to the grievor to correct her behaviour. The absence of discipline, when it would be the appropriate response, can be an indicator of a disciplinary situation camouflaged to appear administrative.

[145] Progressive discipline developed in labour arbitration jurisprudence on the basis of equitable reasoning. It is unfair to dismiss an employee without giving him or her fair warning that his or her behaviour is unacceptable. In this case, in the same way, it was unfair to dismiss the grievor without fair warning.

[146] The main reason for revoking her reliability status, according to the DSO, Mr. Giguère, was her lack of insight into the conflict of interest in which she found herself. She responded that she did not see the conflict of interest as she had never used her position to obtain any advantage, and all information or help she gave would have been given to any member of the public.

[147] Under "Avoidance of Preferential Treatment" in the "Conflict of Interest During Employment" section of the *Code of Conduct*, one reads the following sentence: "Providing information that is publicly accessible is not considered preferential treatment".

[148] The grievor's former supervisor testified to the fact that BSOs are constantly answering questions from their friends and families about the rules at the border. The former supervisor saw nothing wrong with answering them provided the answers were correct.

[149] There is no evidence to show that the grievor provided incorrect information or that she allowed otherwise inadmissible persons entry into Canada. On a number of occasions, she referred her friends to other BSOs or provided the email and fax information of other POEs.

[150] The respondent is certainly entitled to ensure certain protocols are in place to avoid all appearances of conflicts of interest. The respondent was entitled to give clear direction to the grievor that she should not deal with personal acquaintances at the border, to avoid any appearance of conflict of interest. The respondent never stated this clearly. The direction the grievor got from her supervisor was that as long as the information was correct, she could provide it to anyone, stranger, friend or family.

[151] The revocation of the grievor's reliability status came down to a matter of trustworthiness. It seems completely unfair and completely out of proportion to dismiss an employee for suspected friendships. The respondent could easily have intervened and forbidden all contact at the border with country music groups.

[152] Discipline was the proper response to misconduct. Instead, the respondent proceeded by way of a security exercise with people who did not know the grievor, her work, or the process at the FE POE, and, in the case of the SRC's members, who did not have any security training or expertise. The suspension and revocation of her reliability

status were based on impressions of grave misconduct. Their effect was harshly punitive. I find they were in fact disguised discipline.

[153] The suspension of her reliability status and her consequent suspension without pay were the respondent's direct and immediate reactions on being apprised of the investigation's conclusions. It was motivated much less by a security concern than by a reaction to the perceived misconduct. Mr. Comerford stated that he was "shocked" by the investigation's allegations; Mr. Giguère stated that he doubted the grievor's trustworthiness because she did not seem to understand the conflict of interest. The intent to punish was not explicitly stated but was expressed through the respondent's actions of imposing punitive measures without warning.

[154] The report is dated June 9, 2012. Mr. Comerford ordered the grievor suspended with pay on June 10. The SRC met on June 12, and the grievor's reliability status was suspended on June 13. The SRC recommended the suspension without hearing from the grievor.

[155] She responded to the report on June 24. The SRC met again on August 12. It had the same report, the rebuttal, and the PSPSD's response. In the notes of the SRC meeting, one of the factors held against the grievor is the fact that she had not responded fully to the allegations. No mention is made of the fact that she had not seen several emails and that she was provided with a vetted report.

D. Conclusion

[156] The stated cause for termination is not the real cause. The revocation of reliability status was a sham. Consequently, the respondent has not established it had cause for termination. The suspension without pay was punitive, and its cause, the suspension of reliability status, was a reaction to perceived misconduct, not to security concerns. The suspension without pay was unwarranted since the disciplinary process started in fact with a suspension with pay. No reason was given to explain why the grievor's reliability status should be suspended following a report on misconduct; a reprimand would have sufficed to stop the behaviour. In fact, the grievor continued to work long after the allegations surfaced and long after the PSI interview. As she argued, that is an additional reason to find the respondent's security argument rather suspect.

[157] The suspension and revocation of the grievor's reliability status were disciplinary measures. They were based on misconduct, not on a true evaluation of the grievor's reliability. They will be annulled. The suspension without pay and the termination of employment are consequently also annulled.

E. Remedy

[158] In its written submissions following the hearing, the respondent proposed that the remedy be dealt with later, after the Board had decided on the merits of the grievances. In the course of writing these reasons, I asked the parties for submissions on the remedy.

[159] In response, the respondent stated that the grievor had asked for the issues to be bifurcated. It then stated that in the event the grievances were allowed, the parties should be given 60 days to negotiate a settlement, failing which it requested being allowed to present further evidence on the issue of remedy.

[160] The grievor did provide submissions on remedy, and requested the following:

- Immediate reinstatement at the superintendent level, without loss of seniority.
- Removal from the grievor's employment record of any mention of the investigation, the report, the suspension and revocation of reliability status, the suspensions with and without pay, and the termination of employment.
- All lost salary and benefits to be paid, including lost overtime opportunities, from the date of suspension without pay, with applicable interest.
- General damages for distress, moral, aggravated, or punitive damages.
- Legal costs.

In reply, the respondent submitted that reinstatement, and nothing more, was the proper remedy if the grievances were allowed, with a consideration for the mitigation of damages. No additional factors would warrant general, aggravated, or punitive damages, and the Board does not have jurisdiction to award costs.

F. Remedy analysis

[161] Having considered both parties' submissions, I conclude that no further evidence is necessary to decide the proper remedy. When a dismissal is without cause, the usual remedy is reinstatement as the termination has been voided. In this case, I can see no reason why that should not be the remedy, and in fact, both parties submitted that it was the proper remedy were the grievances allowed. From the grievor's evidence, I have no reason to doubt that she can successfully reintegrate into her workplace. The respondent provided no evidence to the contrary.

[162] I accept the evidence that the grievor presented at the hearing as to the difficult job search that followed her termination, complicated by the revocation of her reliability status. This evidence was not contradicted. By successfully finding another job with Canada Post, I find that she has mitigated her damages. The grievor undertook in her submissions to provide the respondent with a full disclosure of all earnings.

[163] The grievor is to be reinstated with full salary, pension benefits and employee benefits, starting from June 13, 2014, with no loss of seniority. Employee benefits are non-tangible. As in *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2010 PSLRB 83 (paragraphs 301-302), I find that it is fair to reimburse to the grievor the benefits she would have been entitled to had she remained employed. The amount for employee benefits was established at 15 percent of the salary in *Tipple* and I would apply the same percentage in this case.

[164] The respondent disputes whether there were any lost overtime opportunities. Calculating lost overtime opportunities is necessarily speculative. The best measure in the circumstances is past experience. Lost overtime opportunities are to be calculated by taking an average of overtime hours the grievor worked in the three years preceding June 13, 2014.

[165] Under section 226(2(c) of the *PSLRA*, the Board may award interest in the case of a grievance involving a termination. Interest will be added to the award for loss of salary, benefits and overtime.

[166] There have been few cases of the Board and the former Board where interest has been awarded. In *Tipple*, the adjudicator cited *Canada (Attorney General) v. Morgan*),

[1992] 2 F.C. 401 (C.A.), where the Federal Court of Appeal stated that the appropriate interest rate is that of the posted rate for Canada Savings Bonds for the years at issue. I find this an acceptable basis for the award of interest. It will be simple interest calculated on a yearly basis at the applicable Canada Savings Bond rate for the period from June 13, 2014, to the date of this decision.

[167] Any earnings from June 13, 2014, to the date of this decision will be deducted from the monetary award.

[168] Despite the generous wording of s. 228(2) of the *PSLRA* ("… make the order that the adjudicator or the Board consider appropriate in the circumstances …"), the Board does not have jurisdiction to award costs, following the reasoning in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53. It is an unfortunate situation, since the grievor, being unrepresented, had to assume all representation costs. The former Board did award some costs on one occasion, in *Tipple*, which the Federal Court of Appeal upheld in *Tipple v. Canada (Attorney General)*, 2012 FCA 158. In that case, partial costs were awarded because an obstruction of justice had occurred. In its decision, the Federal Court of Appeal reiterated that the *PSLRA* does not grant the Board the authority to award costs (see paragraphs 20 to 31). Costs for an obstruction of justice are on a "different legal footing" (at paragraph 27).

[169] Following the reasoning in *Honda Canada Inc. v. Keays*, 2008 SCC 39, I do not believe that a separate tort is involved that would warrant damages. The grievor relied on *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70, upheld in *Canada (Attorney General) v. Robitaille*, 2011 FC 1218, to show that damages can be awarded in the case of wrongdoing by an employer. In *Robitaille*, the facts revealed bad faith on the part of the employer. In the words of the Federal Court, there was "… an independent wrong, that is, 'malice by the employer'" (at paragraph 56). I do not find an independent wrong in this case. I have no doubt that the grievor has suffered in her personal life because of the termination, but from the evidence, nothing in the manner of termination caused harm additional to the very real harm of losing one's employment.

[170] I have allowed all the grievances and ordered reinstatement and remedies for the grievor to be made whole. I believe this sends the proper message to the

respondent. I do not believe there was bad faith on the part of the respondent, but errors were made. I believe reinstating the grievor with full salary and benefits corrects those errors.

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

(The Order appears on the next page)

V. Order

[172] The grievances are allowed.

[173] The grievor is reinstated with full salary and benefits, effective June 13, 2014, with no loss of seniority.

[174] Lost overtime opportunities are to be calculated by taking an average of overtime hours worked by the grievor in the three years preceding June 13, 2014.

[175] Simple interest calculated on a yearly basis at the applicable Canada Savings Bond rate is to be added to the salary, benefits and overtime amount for the period from June 13, 2014 to the date of this decision.

[176] Any earnings since June 13, 2014, will be deducted from the monetary award.

[177] The Deputy Head shall remove from the grievor's employment record any and all documents or references relating to the Professional Standards Investigation, suspension and revocation of her reliability status and the suspension and termination of employment.

[178] I remain seized for sixty days for the purpose of implementing this Order.

April 29, 2016.

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