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Citation: 2017 PSLREB 40

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

KEVEN KNOX

Grievor

and

DEPUTY HEAD
(Canadian Food Inspection Agency)

Respondent

Indexed as
Knox v. Treasury Board (Canadian Food Inspection Agency)

In the matter of individual grievances referred to adjudication

Before: Bryan R. Gray, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Michael Fisher, counsel

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Ottawa, Ontario,
September 28 to October 2 and October 22 and 23, 2015.

I. Summary

[1] Keven Knox ("the grievor") enjoyed 27 years of service with the federal government, where he worked in a shipping-and-receiving position. However, his career came to an end when his employer, the Canadian Food Inspection Agency CFIA (the employer), found him responsible for the chlorine bleach contamination of an office drinking water cooler. Shortly after the contamination was discovered, the grievor was suspended with pay, and a week later, the suspension was extended, without pay. His employment was then terminated for cause after an approximately nine-month investigation. The contamination led to him being charged with a criminal offence for which he was acquitted at trial.

[2] The grievor filed two grievances, the first about his suspension, which was presented in November 2011, and the second about his subsequent dismissal, which was filed in July 2012. The employer denied both grievances and the grievor referred them to the Public Service Labour Relations and Employment Board ("the Board") for adjudication on December 22, 2014, pursuant to s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). This provision allows for grievances to be referred to adjudication when disciplinary action was taken that resulted in a termination, demotion, suspension, or financial penalty.

[3] The employer disputes the Board's jurisdiction to hear the suspension grievance, contending that the suspension was not a disciplinary action as required by the *Act* for the Board to have jurisdiction. There was no objection to my jurisdiction to hear the termination grievance.

[4] As I explain in the following decision, based on evidence that included several days' testimony, security camera video footage of the grievor's workplace, and the grievor's own admissions, I find that there is clear and convincing evidence that he caused the contamination.

[5] Having determined that the grievor was responsible for the contamination, I then explore the preliminary issue of whether the Board has jurisdiction to adjudicate his suspension. I ultimately determine that the suspension was not disciplinary and dismiss the first grievance. In dealing with the termination, I find that it was reasonable in the circumstances to discipline the grievor and that the termination was not excessive given my finding that his actions have caused irreparable harm to

employer-grievor relationship. Accordingly, I dismiss the second grievance as well.

II. Relevant facts

A. The grievor's employment history

[6] The grievor joined the federal public service in 1984 in a farm labourer position with Agriculture Canada, working at the Woodroffe Farm in Ottawa. Through a departmental reorganization, he was able to transfer to the employer's Carling Lab in 1997 after the Woodroffe Farm was closed. He worked in the shipping-and-receiving office at the Carling Lab continually since starting there.

[7] The grievor stated that he enjoyed his work as he interacted with people he met each day delivering and picking up packages and because he was active there. He also stated that he took pride in knowing that he had a good job that allowed him to support his family during his work career and after that with a good pension.

[8] The grievor usually arrived at work around 6:30 a.m. and finished his workday at 2:45 p.m., once the final courier packages were shipped. He worked alongside and was supervised in the shipping-and-receiving loading room for many years by Daniel Simard, who began working there in 1991.

B. The office

[9] The shipping-and-receiving loading dock is a large room located in the basement of the Carling Lab building. Another large room for chemical storage is located through a door just off the loading dock room. The outdoor loading area is reached through large doors from the main shipping-and-receiving room. A large garbage dumpster is located on the edge of the outdoor loading area, which is also accessible through a door from the chemical storage room.

[10] On the day of the events in question, September 12, 2011, the grievor testified he was in the process of moving his office from a small single office located across the hallway from the loading dock to an office located through a door off the loading dock directly opposite the doorway to the chemical storage room. His office was composed of typical business office items, namely: a desk and chair, a phone, a desktop computer and a printer, some file cabinets, a small fridge, and a cooler that dispensed purified water from large jugs.

[11] Located outside the door, to the right of the grievor's new office and overlooking the main shipping-and-receiving room, is a stationary security video camera. It is triggered to record when motion is detected in the shipping-and-receiving room. The camera is pointed away from the door of the grievor's new office, but its view clearly shows people coming and going from that office.

[12] Both the grievor and Mr. Simard testified that they worked well together and that they had no problems or hostility. No other staff worked in shipping and receiving with them; however, they worked in close proximity with Guillaume Gagnon and Sol Despres. Both of them work near the shipping-and-receiving area and are sample processing technicians. They are the staff at the facility who first handle shipments and prepare them for analysis in the food labs, located upstairs. The Carling Lab receives food and other related samples from across the country and performs scientific analyses to ensure the health and safety of Canada's food supply.

C. <u>Surveillance video related to the events in question</u>

[13] Much of the relevant testimony given by the witnesses at the hearing was aided to varying extents by viewing video from the stationary camera. Before the hearing, the grievor's counsel was given access to its video files. No objection was made to using the video in the hearing in the manner I have noted.

[14] Copies of the video files were not available at the time of the hearing to be tendered as an exhibit, but the employer subsequently provided them to the grievor and the Board's registry. They include approximately 45 days of video footage leading to the incident in question.

[15] The parties examined other documentary evidence to ensure the accuracy of the times and dates of the video files. Based upon computer records of access to and egress from the loading dock room, cross-referenced with the date and time stamps on the video files, it became apparent that a discrepancy of approximately four minutes existed on the videos' time-of-day display. After a discussion, no objections were made as to the date and time stamps on the files, given the approximately four-minute discrepancy.

[16] On the day at issue, the video files show the following events occurring, at the given times:

- 8:04.20 The grievor exits his office with an empty water cooler jug.

- 8:04.34 He enters the chemical storage room.

- 8:04.59 He leaves the chemical storage room and walks back to his office with a chlorine bleach jug in his hand.

- 8:05.01 He places his hand on the cap of the chlorine bleach jug as he enters his office.

- 8:05.12 He exits his office with the chlorine bleach jug in his hand.

- 8:12.05 He returns to his office with a full jug of water for the cooler.

D. <u>Discovery of chlorine bleach in the cooler's drinking water</u>

[17] Later that same morning sometime between 10:00 a.m. and 12:00 noon, Mr. Gagnon filled his water bottle from the cooler in the grievor's office and upon attempting to drink it, found it had what he described as a "strong chlorine smell". He further described the water as having a "very hard taste". On cross-examination, Mr. Gagnon stated that the chlorine in his water bottle seemed no stronger than swimming pool water.

[18] Immediately after that, Mr. Gagnon went to his supervisor, Louise Lavoie, to inform her of his discovery of chlorine in his water. His testimony and her statement, in the "Administrative Investigation Report" ("the report"), that the employer would later prepare, both indicate that she confirmed that a chlorine smell was coming from the water bottle but that she did nothing else at that time. The evidence shows that she had this information for at least two hours and that she took no action.

[19] Sebastian Legault, an investigator assisting with the employer's administrative investigation of this matter, testified that Mr. Despres heard talk of the contaminated water incident and that he expressed his concern that Ms. Lavoie might not pursue it. He further stated that Mr. Despres approached Ms. Lavoie to inquire about the incident.

[20] In her statement to investigators, documented in the report, Ms. Lavoie is reported as saying that it was afternoon when she told Mr. Despres about the water and asked if he had tasted it. She stated that he replied "No," so she told him to get the bottle from Mr. Gagnon's desk and try it. She then stated that "… he automatically took the water bottle and took it to Stephen (Acting Director) Norman." In her statement, she added: "I know there's a conflict between Keven and Sol [Despres] and that's all I know."

[21] Acting Director Stephen Norman stated to the report investigators that Mr. Despres brought him a 500 ml drinking water bottle that had originally contained water from a store but that had been re-used and told him that the water had come from Mr. Gagnon, who had filled his bottle approximately two hours earlier from the water cooler in the grievor's office. Mr. Despres told Mr. Norman that the water was contaminated with chlorine and that he thought the chlorine was intended for him and for the purpose of "sending a message." Mr. Norman stated that he smelled the water in the bottle, observed a "strong smell of chlorine", and thought he smelt "Javex bleach".

[22] Mr. Norman explained that upon hearing of Mr. Despres' allegations, he immediately walked to the grievor's office and asked him if he had put chlorine in the drinking water cooler or had been cleaning with chlorine. The grievor replied, "No." Mr. Norman then stated that he and the grievor tasted a sample of water from the water cooler and that he observed it having a "very faint" taste of chlorine.

[23] Mr. Norman also stated that later that day he felt a "bit queasy" and assumed that the chlorine in the water had caused it. He took the water bottle home with him after work and said that at some time that evening, he had the idea to test for chlorine concentration by using a home swimming pool test strip that he had for use with the pool in his yard. The test strips change colour when they contact chlorine; they become darker with higher concentrations. Mr. Norman indicated that his pool test strip showed a very dark colour, which in his opinion indicated a chlorine level of 10 ppm or higher, which was the highest level the test strip was designed to indicate according to the scale on its package.

[24] Mr. Norman stated he carried out another test the next morning, September 13, 2011, with his pool test strips and got the same result. He testified that he then went

and took another water sample from the water cooler in the grievor's office, which showed no indication of chlorine.

[25] The investigators also interviewed Mr. Simard. According to the report, he told them that on September 13, 2011, he was told by other employees about the presence of chlorine in the water. He went to the cooler and observed that there were only 3 or 4 inches of water left in the bottle. He then drained the water, wiped the cooler with a clean paper towel, and replaced the bottle with a new one. He ran some water through the spout to rinse it.

[26] Despite the grievor repeatedly and without hesitation denying taking any water out of his office, the evidence of Mr. Simard, who was absent on the day of incident, clearly showed that upon his return to the office the next morning, he found at most three or four inches of water remaining in the water jug on the cooler in the grievor's office. He stated that it normally took one or two weeks to empty a new jug and that nobody used water from the cooler for cleaning purposes.

[27] Mr. Simard was asked about the amount of water in the cooler again in cross-examination and again repeated, without hesitation, that three or four inches at most remained in the bottom of the jug the morning after the incident. He stated that the jugs were purchased from a local water bottling company and that in the past, there had never been a problem or taste of chlorine in the water.

[28] Mr. Norman elaborated in his testimony about his concern for the safety of the staff in his building and stated that ensuring that the water contamination did not happen again was driving his interest to find out the source of the chlorine in the water, which he believed could have arisen from several different variables. While he stated that he did not think the exact level of concentration was important, he remained curious, and either late on September 13th or on September 14th, he decided to perform a dilution test on the contaminated water with another pool test strip, which gave a reading of 50 ppm. Mr. Norman testified in cross-examination that despite all these events unfolding in a national science testing laboratory for food contamination, he did not want to use his department's scarce resources to carry out a scientific test of the water.

[29] According to the report, on the morning of September 14, 2011, Mr. Norman viewed the security camera recordings and noted the grievor's movements as has been

previously described. Mr. Després then spoke to Mr. Norman and told him that he was convinced the chlorine was intended for him. Mr. Després explained that he ordinarily used that water to make coffee for himself every morning, but on September 12th, he had brought coffee from home. Mr. Després also pointed out that Mr. Simard had to change the bottle the following day as it was almost empty. He questioned how that could be given that the grievor had replaced the bottle the previous day. Mr. Després suspected that the grievor had drained the cooler after the chlorine had been discovered in order to flush the chlorine.

[30] After his meeting with Mr. Després, Mr. Norman informed CFIA's Corporate Security office of the incident, which in turn notified the Ottawa Police Service. The police said they would conduct an investigation but recommended that the grievor be sent home and not return to work pending the outcome of the police investigation. In response on this point, the employer pointed out that the report (at Tab 10) contains a paper entitled, "HOIR 2011-06 Chlorine in B15A Water Cooler", "Sequence of Events leading to accident". At page 4, it states that the Occupational Safety and Health Committee, Ottawa Laboratory (Carling), held an ad-hoc meeting on September 16, 2011.

[31] Mr. Norman testified that he co-chaired this committee out of his concern for the well-being of all the employees at the workplace. The committee meeting notes state that the planned corrective and preventative measures arising from the chlorine bleach incident included a request for additional security from the employer's Corporate Security Branch and a request for an assessment of building security.

[32] Mr. Norman stated that during the two days after the contaminated drinking water was discovered, he thought that a number of variables could have produced the chlorine in the water and stated that he was very concerned about employee safety. He explained that upon seeing the surveillance video, he could not imagine why the grievor would have taken chlorine bleach into his office. He stated that when he asked the grievor if he had been cleaning with chlorine bleach, the grievor replied, "No."

[33] Mr. Norman further testified that the corporate services office told him to call the police if he was concerned for the safety of the others in the office. He testified that he launched an administrative investigation to search for all relevant activities with respect to any potential means by which chlorine bleach could have gotten into

the drinking water. And finally, with the grievor's repeated denials of having any knowledge of the water contamination, he stated that he decided it was in the best interests of the safety of the staff in the office to keep the grievor away from the office, as recommended by the police.

[34] On the morning of September 15, 2011, Mr. Norman met with the grievor and informed him that based on the results of the investigation by the Occupational Health and Safety Committee's hazardous occurrence investigation to that point, it had been concluded that he had intentionally added chlorine to the water cooler. The grievor denied doing it, adding that he and many others drink from the machine. He explained that he does occasionally use chlorine in the workplace to reduce the smell emanating from the dumpster situated on the loading dock, including on September 12.

[35] Mr. Norman then informed the grievor that given the health and safety related issue involved and the advice of the police, he would need to leave work until the investigation would be completed in full. Mr. Norman accompanied him back to his desk where he collected some personal items and was then escorted out of the building. His office keys and access card were retained. He was advised of his right to grieve the decision and of the availability of the Employee Assistance Program. The grievor stated that he understood the decision and cooperated.

E. Administrative investigation report and termination of employment

[36] On September 20, 2011, Mr. Norman and the Agency's Security Officer authorized the conduct of an internal administrative investigation into the matter. Several persons were interviewed for the investigation, including the grievor. The investigation's final report was issued on March 7, 2012. It concluded that on the balance of probabilities, there was presence of chlorine in the water cooler and that the grievor was the only individual who had the opportunity to pour chlorine into the machine.

[37] On April 24, 2012, a copy of the report was forwarded to the grievor and he was asked to attend a disciplinary hearing to take place on May 9, 2012, where he would have the opportunity to address any concerns or present any extenuating circumstances that he may have felt had not been addressed. He was advised that he was entitled to be accompanied by a union representative in accordance with the collective agreement. Alternatively, he was told that he could provide his feedback in

writing.

[38] The grievor did not appear at the disciplinary hearing nor did he submit any written feedback. Consequently, on June 25, 2012, the employer informed the grievor in writing that his employment was terminated effective that date. He was advised of his right to grieve against this decision.

III. Analysis

Issue 1 – Did the grievor cause the contamination?

1. The grievor's response to the allegation of involvement in the contamination

[39] Both in his responses at the time of the incident as well as in his testimony at the hearing, the grievor denied having caused the contamination of the water cooler.

[40] In his first signed statement made to departmental investigators on October 11, 2011, about the September 12 incident, the grievor stated that he began his workday by checking messages and emails. At about 8:00 a.m. he went to his existing office (room B22) to take shelves apart to prepare them to be moved to his new office (B15A). Then around 9:00 a.m., courier deliveries started to arrive. He then retrieved a bottle of chlorine bleach from the chemical storage room and a pail of water from the grinding room to clean the side of the fridge, which had grown mould. He put the jug of chlorine bleach back in the chemical storage room. He washed down the sides of the fridge and microwave and then emptied the pail in the sink of the grinding room. He took a break at 10:30 a.m. for 15 minutes and then ate an apple in room B22. He noticed that the jug on the water cooler was empty and that its cover was on the filing cabinet. He took the empty jug off the cooler and went to the third floor lunchroom to get a new bottle. He came back, put it on the cooler, and added the cover.

[41] Between 10:30 a.m. and noon, the grievor went back and forth between rooms B15A and B22 but was mainly in room B22 because he was taking the shelves apart. He also stated that upon being questioned that same afternoon by Mr. Norman about the incident, he told Mr. Norman that he had "changed the bottle this morning."

[42] In addition to his first statement, the grievor agreed to a second interview in October, which was recorded and for which a transcript was typed. He never did return to the office to sign the transcript but adopted the document, which is found in Exhibit E-1, as authentic during his testimony before me. In the second interview statement, he

states that he took a pail from the receiving area to get water from the grinding room for use in washing down the fridge. He states three times that it all took place before his morning break at 10:30 a.m.

[43] With respect to his use of chlorine bleach, the grievor states as follows:

> *Put a delivery in the hall then I had a bit of a break so then I got the Javex bottle from the chemical storage room and a pail of water from the grinding room, not a full pail just enough to wash down. Brought that back in B15 where the fridge is in the office. Then I took the Javex bottle back out and into the chemical storage room. I washed down the fridge and the microwave on the sides. After I had that finished, at about 10:30 A.M. or so, I had an apple and I ate the apple in B22. After the break I emptied the pail in the grinding room.*

[44] When asked if he had anything to add to his statement, the grievor stated the following: "The only other thing, I didn't put anything in the water. I drink that water myself."

[45] In his testimony at the hearing, the grievor stated that at approximately 8:04 a.m., he noticed that the water cooler bottle was empty, so he removed it and went to the chemical storage room to pick up a new water bottle. Upon finding none there, he stated that he decided "to save some footsteps" and instead take a bottle of chlorine bleach back to his office, where he poured two cups of it, in his words, "for use later in the day when I was cleaning." He pointed to photos 3 and 4 of his office in Exhibit E-1 and indicated a spot on the edge of a bookshelf that is very close to the water cooler where he filled the cups with chlorine bleach. He explained that he intended to use the chlorine bleach to pour into the dumpster to kill its odour and for use to clean shelves that were being moved. He said he used a pail to get water from the sink in the grinding room just opposite the shipping-and-receiving area from his new office.

[46] The grievor then explained that less than a minute later, he left his office with the chlorine bleach and gave the exact location in the chemical storage room where he returned it to, providing details as to the exact shelf it was put on since it was then an open jug.

[47] The grievor stated that approximately five minutes later, he then took one of the cups of chlorine bleach from his office to room B20, where he would later use it in a

pail of water to clean shelves. He explained that despite other cleaning products being available for his use, such as Pledge and Windex, he preferred using chlorine bleach to clean accumulated dust off the shelves in the storage room as he found it does not leave a residue. Then approximately two minutes later in the video, the grievor returns. He said he is carrying a full water bottle that he obtained from the upstairs lunchroom. He stated that he then came and went from his office, taking tools to the storage room for use in moving, and that at approximately 8:51 a.m., he took the other cup of chlorine bleach from his office to throw in the dumpster.

[48] The grievor explained that he used a cup to throw chlorine bleach into the dumpster rather than the bleach jug because it had once splashed onto his pants and ruined them, so he began using a cup, to avoid this problem repeating itself. He explained that chlorine bleach is thrown in the dumpster in warm weather to clean it since strong foul odours emanate from it over time and after it is emptied as some food and other waste from lab analyses accumulates there.

[49] At approximately 12:55 p.m., the grievor entered his office carrying a pail that he stated contained water that he used to "wipe things off". He explained that the pail had warm water in it that he had obtained from the sink in the grinding room. He said he was not sure how many pails of water he used that day but said that if the water became dirty from cleaning, he would replace it and add more chlorine bleach. He said he used the water and chlorine bleach to wipe off his computer tower, to clean his microwave oven, and to clean mould off the outside of his fridge.

[50] From around 2:00 p.m. to approximately 2:25 p.m., the grievor is seen on the video entering and exiting his office with a paper towel and then with a cup of liquid and a large pail. He explained that he used the paper towel to wipe something up and that he had a cup of what was likely drinking water and a pail with water for more cleaning. When his counsel asked him why he brought a pail into his office a second time, he replied that he must not have been done cleaning. When he was asked if he was taking water out of the office in the pail, the grievor replied, "No, there's no tap in there." To a follow-up question from his counsel, the grievor replied in the negative when asked if he was taking water from the water cooler out of the office in the pail.

[51] The grievor's counsel then began to ask him about whether his statements were consistent with what he said at his criminal trial about getting water from the grinding

room to clean his office. A copy of the judgement from his criminal trial was then tabled to be accepted as an exhibit. Upon an objection by the employer, I declined to accept the judgement on the basis of it not being relevant. Counsel for the grievor stated that he wished to enter it based upon questions that he expected the employer's counsel to ask the grievor in cross-examination. I ruled that this was not acceptable as the grievor's counsel would need to tender the judgement as an exhibit if and when he wished to question the grievor on a prior inconsistent statement or any other matter arising from one.

[52] When asked by his counsel about the statements he gave to the administrative investigation, the grievor stated that a month had passed since the incident but that he did his best to write up what had happened. When asked about his level of confidence in the times of the events he described to the investigators, the grievor stated that the investigators told him it did not really matter and to do his best. As to the second interview statement, the grievor told the hearing: "This was just off the cuff; I told them I wasn't sure of some of the timing."

[53] The grievor's counsel also asked him if it was possible that he accidently spilled chlorine bleach into the water cooler. The grievor replied "No," and added that he did not put anything into the water.

[54] The grievor took issue with several of the investigative findings in the report and argued that the following are unfair and prejudicial:

> - The observation in the report (at page 7) that Mr. Despres voiced concern that the chlorine bleach in the drinking water was intended for him and that he had previously complained that the grievor had sabotaged his motorcycle while it was parked at the office, in an effort to harm him.
>
> - The grievor's supervisor, Mr. Simard, is reported (at page 8) as stating that the grievor submitted a leave form and that he left work to go home around noon (presumably on September 14, 2011). The report further notes that Mr. Simard did not feel safe and that he wondered what might happen next. It also reports him saying that he wondered what would have happened had the grievor put acid or bacteria into the water instead of chlorine bleach.

- It states (on page 8) that a single open bottle of chlorine bleach was in the chemical storage room and that it was weighed and found to be missing approximately 1150 ml.

- It finds (on page 13) that the surveillance video recording does not corroborate the grievor's claim that he used chlorine bleach during the morning of September 12, 2011, to eliminate an odour in the dumpster. This assertion is repeated at the end of the conclusion section, where it states that the grievor offered different versions of his use of chlorine bleach on the morning of September 12, 2011, and that the video recording and photos did not "corroborate Mr. Knox's claims". However, in cross-examination, Mr. Legault admitted that the surveillance video from a camera overlooking the outdoor loading ramp does show what appears to be the grievor emptying a cup into the garbage dumpster at approximately 8:51 a.m. on the same morning the problem with the water was discovered. In his direct examination, the grievor testified that he administered chlorine bleach to the dumpster for odour control.

- It notes comments (at Tab 3 - Q.6) from Mr. Gagnon that "… people in the basement don't really like each other", according to feedback from others in the basement.

- It notes comments (at Tab 7) by Mr. Simard made to Mr. Norman that the grievor left work around noon on September 14 and that "Keven shot his neighbour's dog with a rifle." Mr. Simard then told Mr. Norman that he was "… concerned what might be the next thing." The report does not indicate when Mr. Simard believed the dog was shot but includes it in his recital of the September 14, 2011, events.

- Mr. Norman's statement to the investigation (at page four of four) indicates that after escorting the grievor out of the building and placing him on leave, he searched the grievor's office later that morning and found two large empty rifle shell casings and estimates that they might have been .50 calibre. He also advised that Mr. Simard said that they had been there for years.

- The "Security Incident Report" filed on September 14, 2011, which

> triggered the report, notes these previously mentioned concerns and adds that Mr. Simard informed the Acting Director that not only did he feel threatened but others did as well and that (unspecified) "previous incidents are the same pattern" but that "… the evidence has never been strong enough to prove."

[55] In addition to these passages from the report, the grievor pointed to Mr. Norman's testimony to argue that the employer jumped to a hasty and biased conclusion that the grievor intentionally caused the contamination of the drinking water. In cross-examination, Mr. Norman stated that before suspending the grievor, he asked him if he put chlorine into the water, and the grievor replied that he "couldn't understand why anyone would think this." When asked if seeing the surveillance video and hearing this answer from the grievor caused to him to think the water was contaminated on purpose, Mr. Norman replied that he did think that the grievor had intentionally done it.

[56] The grievor pointed out the many unsubstantiated allegations noted earlier that cast aspersions on his character as well as the erroneous finding that he did not use chlorine bleach to douse the odour in the dumpster on the day in question. He also noted the fact that a third person, a Ms. Bosley, entered his office immediately after he exited with the chlorine bleach, yet the report does not contain a statement from her. In his testimony on this point, Mr. Legault, the contributing investigator in the file, stated that she was indeed interviewed about the incident but that she had nothing to report.

[57] The grievor submitted that the evidence noted earlier of such inflammatory allegations undoubtedly influenced Mr. Norman and contributed to what the grievor argued was a hasty and biased decision, made within two days of the incident, that the contamination was deliberate.

[58] In fact, he said that it was only at the criminal trial that he first heard of Mr. Despres's allegations that the chlorine bleach was intentionally added to harm him.

[59] In support of his case, the grievor proposed Dr. Arthur Kraut, PhD, as an expert witness in the field of toxicology to provide opinions on the effects of chlorine on the human body and the scientific reliability of Mr. Norman's testing method. Dr. Kraut had a lengthy career providing toxicology reports to criminal trials in matters related

to drugs and alcohol. The parties consented, and I allowed Dr. Kraut to participate via telephone from his office in Winnipeg, Manitoba.

[60] After receiving submissions from counsel, I qualified Dr. Kraut as an expert in the general field of biochemistry. The grievor tabled Dr. Kraut's written report, which I accepted (Exhibit BA-4). The employer objected to its acceptance on the grounds that it was lacking both reliability and relevance because it was based solely upon speculation or theory.

[61] Dr. Kraut was not able to offer informed opinions on the facts before the hearing as he had no physical evidence to examine related to the grievance. Rather, he answered theoretical questions about chlorine and opined that by their nature, swimming pool test strips would confirm the presence of chlorine but would not provide reliable scientific information for verifying its concentration. His report states that the strong odour in the water was sufficient to indicate the presence of bleach. It also notes that the reliability of the pool test strips can be affected by their storage conditions and their best-before dates. In cross-examination, Dr. Kraut agreed that a pool test strip would normally confirm the presence of chlorine.

[62] The grievor apparently sought to rely on Dr. Kraut's evidence to call into question one of the observations in the report – that a single open bottle of chlorine bleach was found in the chemical storage room and it had 1150 ml of liquid missing. Dr. Kraut's report suggests that if Mr. Norman's 50 ppm test results were accurate, then 0.65 fl. oz. or 28 ml of liquid bleach (of 6% chlorine) would have been added to the water, assuming the jug held 18.9 litres. However, I do not accept this as a probable scenario based on the facts before me as the contamination would almost certainly have been introduced into the water reservoir that holds the jug. No evidence was presented or made available to Dr. Kraut to indicate the size of this reservoir or the amount of water that would have vacated a new jug and entered the reservoir, thus diluting the chlorine bleach. Furthermore, just because the bottle in the storage room was missing 1150 ml does not necessarily mean that the entire missing amount was used by the grievor. It is possible that the volume of liquid in the bottle had already been reduced before the grievor picked it up.

[63] While I appreciate the grievor's efforts to bring expert testimony to bear upon this important aspect of the hearing, I place no weight on Dr. Kraut's evidence as his

opinions were ultimately limited to broad generalities.

2. <u>The employer's response to the complainant's position</u>

[64] The employer pointed to several contradictions and incongruities in the evidence to demonstrate that the facts are not as the grievor now suggests.

[65] As earlier mentioned, Mr. Norman, acting upon the advice of the police, who had launched a criminal investigation, informed the grievor that he was being put on leave immediately and that he would need to gather his personal effects, return his identification and keys, and go home. Mr. Norman advised him of the investigation, suggested that he might have put the chlorine into the water, and asked him again if he had done it. The grievor denied it.

[66] On two further occasions, the employer met with the grievor to take investigative statements from him. He testified that his criminal lawyer had advised him not to say anything further to his employer about the incident. Before being notified of his dismissal, the grievor was invited to one last meeting to explain his version of the events. He and his bargaining agent declined the invitation. The grievor's counsel argued at the hearing that I should not draw an adverse inference from him accepting the advice of his legal counsel at the time and declining this invitation to explain his version of the events.

[67] Mr. Norman further testified that after viewing the security video on the second day after the incident and seeing the grievor on the video entering his office with a jug of chlorine bleach, he could not imagine why the grievor had taken chlorine bleach into his office as the grievor had told him that he had not been cleaning with chlorine bleach and that he had no idea how it got into the water cooler.

[68] In cross-examination, the grievor stated that when Mr. Norman, asked about the contaminated water, he did not explain the fact that he had poured chlorine bleach into cups in close proximity to the open cooler because, in his words, "I never thought of it," and, "He never asked me."

[69] When asked by his counsel to explain why Mr. Norman had testified that the grievor had told Mr. Norman that he had changed the water at noon, the grievor replied: "I was busy that day; I guess I was mistaken on the time."

[70] The grievor also confirmed that he carried a bottle of Windex into his office to clean a window and his computer monitor.

[71] The employer raised issues with several other specific instances of contradictions or incongruity, discussed below.

a. The dumpster

[72] The employer suggested it was odd for the grievor to take chlorine bleach into his office for use in other places, especially given that these other places were closer to where the bleach was stored. The employer also called into question the grievor's statement that he went to the chemical storage room for a water jug but finding none decided to "save a few steps" and instead take a jug of chlorine bleach to his office.

[73] He explained that he kept paper cups in his office and therefore that he took the chlorine bleach there to pour it. And yet, the grievor admitted that the cups of bleach were to be used in the dumpster, which was accessible directly through a door from the chemical room, where the chlorine bleach was kept. The other stated purpose for pouring it into cups was to clean shelves in the storage room. The chlorine bleach was to be added to warm water, which the grievor stated was obtained in the grinding room.

[74] In direct examination, the grievor stated that he used cups to douse the dumpster with chlorine bleach for odour control rather than pouring directly from the jug because once, the jug had splashed and had ruined his pants. On cross-examination, he was shown video of the outdoor loading dock and dumpster area, and he admitted to using a jug of chlorine bleach with no cup to douse the dumpster on July 27 and again on August 9, 2011. When asked to explain his using the jug of chlorine bleach on those occasions, the grievor stated there must not have been any cups handy.

b. The proximity of pouring the chlorine bleach to the cleaning work

[75] The grievor stated in direct examination that his intended cleaning work for the day was to include the small office fridge located in his new office, where he poured the chlorine bleach, and dusty shelves in the storage room of the office basement.

[76] In the chronological sequence of his explanations, the grievor first neglected to

share the detail of his use of chlorine bleach in his office for cleaning when Mr. Norman asked him about it three times before suspending the grievor. In his first statement to investigators on October 11, approximately one month after the incident, the grievor stated that he used the chlorine bleach and a pail of water from the grinding room to clean his office fridge and microwave oven before his morning break at 10:30 a.m.

[77] He repeated this sequence and timing of events upon giving his second statement on October 14, confirming twice in it that he had gathered chlorine bleach and water and had cleaned his fridge before his 10:30 a.m. break. In his direct examination, the grievor stated he was cleaning elsewhere in the basement shortly after 8:00 a.m. and that he did not clean his office fridge until approximately 1:00 p.m., when he started coming and going from his office with a pail. In cross-examination, he admitted that at no time on that day did he bring a pail into his office before 1:00 p.m.

[78] The grievor stated in direct examination that on viewing the video, at 8:10 a.m., he left his office carrying a cup that he said contained chlorine bleach for mixing with water in the grinding room in a pail to clean shelves in the storage room. Given the fact that he also stated in direct examination that he used the other cup of chlorine bleach to douse the dumpster at 8:51 a.m., his claim to have washed his fridge with a pail of water and bleach before his morning break must be erroneous.

[79] This fact also supports the employer's assertion that it makes no sense for the grievor to have taken chlorine bleach into his office for use elsewhere. It also leaves unexplained how later, around 1:00 p.m., he used the bleach to clean his fridge when by his own admission there was no chlorine bleach left in the two cups he had poured there for that purpose.

[80] The grievor testified in direct examination that he used several pails of water that day as when each pail got dirty, he would get fresh water in the grinding room and add more chlorine bleach. He also stated in direct examination that when he took the cup of chlorine bleach out of his office at 8:10 a.m. to mix in a pail and clean in the storage room, he would not have used the full cup of bleach and that he would have put it on the shelves in the storage room.

[81] On cross-examination, when asked if he needed to get more chlorine bleach during the day for his cleaning after he had poured the two cups in his office, the

grievor replied: "No, not for my own use," which again suggests that pouring two cups of chlorine bleach in his office in the morning was very odd and out of sequence for what he did later in the day for his cleaning. By his own admission, he poured cups in one place then carried them back and forth throughout the different rooms in which he was working, which makes no sense when he could have simply left the chlorine bleach in the grinding room at the sink where he had to refill his washing pail.

[82] Different versions of the grievor's story emerged as to when he did his fridge cleaning, which again was unusual, in that he would pour a cup of chlorine bleach in his office shortly after 8:00 a.m. for use in cleaning several hours later and for dousing the outdoor dumpster at 8:51 a.m.

c. Dusting and cleaning with chlorine bleach

[83] The grievor stated in direct examination that he uses chlorine bleach to clean as it "does not leave a residue". He explained there was no soap available for him and that while Pledge and Windex were available for window cleaning, he did not use them to clean shelves. He added in cross-examination that he did not use Windex for cleaning as it "sometimes left a residue". Despite Mr. Simard testifying that the shelves did not need to be cleaned, the grievor testified that he thought they might be reused and that they should be cleaned, so he took it upon himself to clean them.

[84] The grievor explained in cross-examination that when he was disassembling the shelves, his hands would get so dirty they would become black and that he did not want to have to clean them every two minutes, thus taking it upon himself to clean the shelves with chlorine bleach. He explained his choice of chlorine bleach for the cleaning as there was heavy dirt on the shelves. When he was shown video of himself on the Friday of the previous week carrying a bottle of Windex, he explained that he was cleaning windows and that the shelves were much dirtier and that they needed chlorine bleach.

d. The cups

[85] In direct examination, the grievor specifically stated that he used white styrofoam cups in his office into which to pour chlorine bleach for use later in the dumpster and for cleaning elsewhere in the office. He maintained his adamant testimony on this point long after it was contradicted by the video, which showed him,

at 8:51 a.m., carrying a brown cup and very quickly tossing its contents into the dumpster. He was asked if it could have been coffee or hot chocolate as he had stated earlier that he used white cups for chlorine bleach. He also testified that he often brings hot chocolate from a Tim Horton's coffee shop to work.

[86] The grievor stated that if the liquid at issue was old coffee, he would have just thrown it, and the video shows him doing just that, throwing the liquid into the dumpster, which he admitted to. This was contrary to two other occasions on the video, for which he observed himself taking at least two or three seconds to pour what he said was a cup of chlorine bleach into the dumpster. He repeated his assertion that he poured chlorine bleach into the dumpster at 8:51 a.m. then at 8:52 a.m. on the video, he leaves his office with yet another cup. In cross-examination, he stated that the third cup also contained chlorine bleach, contradicting his earlier statements that he had poured two cups of bleach in his office.

[87] When confronted in cross-examination with the fact that that would have been a third cup of chlorine bleach, the grievor said, "Well maybe this is just water then." He repeated that the cup he took out of his office at 8:10 a.m. was chlorine bleach for use in cleaning the basement storage room.

e. <u>Pails taken in and out of the office in the afternoon</u>

[88] The employer gave close scrutiny to the video showing the grievor taking a pail in and out of his office in the afternoon of the day on which the contamination was discovered. In direct examination on this point, the grievor stated that he took a pail of water into his office to "wipe down" his computer tower, fridge, and microwave oven at 12:55 p.m. in the video. He then leaves his office with a pail approximately 2 minutes and 30 seconds later. The video shows him carrying a large pail into his office again, at 2:14 p.m. He exits with the pail approximately 10 minutes later.

[89] In cross-examination, counsel for the employer asked the grievor what he was doing with the pail in his office the second time that afternoon. He replied that he was "wiping something up" and that he might have obtained fresh water because he wasn't done cleaning something in his new office. He was then asked if he agreed that it appeared as if the pail was empty on his way into his office and full when he left 10 minutes later. The employer's counsel drew attention to what it suggested was a slight lean to his body and to his arm holding the pail firmly with no swing on his exit from

the office as compared to how he had walked and held the pail on entering. Counsel suggested to the grievor that his arm carrying the pail while entering his office had been swinging slightly. The grievor denied taking any water from the cooler out of his office in the pail.

[90] When challenged in cross-examination about his claim that he cleaned his fridge in only 2 minutes and 30 seconds, the grievor said that he might have been mistaken as to when he washed his fridge and that he might have actually washed it later at approximately 2:15 p.m., when he re-entered his office with the pail. He exited his office with the pail 9 minutes and 30 seconds later. Again, he was asked in cross-examination if he agreed that he appears to be carrying an empty pail on the way into his office and a full pail on the way out.

f. Testimony of Mr. Simard

[91] Mr. Simard worked alongside the grievor and supervised him in the shipping-and-receiving area of the lab. He testified that he never saw anyone use chlorine bleach for cleaning purposes and specifically that he never saw the grievor use chlorine bleach other than for the dumpster odour. He further testified that he did not ask the grievor to clean the shelves, which made no sense in his view, as they we being dismantled to be taken out of the building. He also stated that they were not dirty and that he never saw the grievor use a cup to pour chlorine bleach into the dumpster. Finally, he confirmed that water from the cooler was used only for drinking and that it had never been used for cleaning purposes.

2. Findings of evidence and credibility

[92] Given the hours of testimony I heard on the matters noted, I find that the events and related testimony point undeniably to a lack of credibility in the grievor's testimony.

[93] In *Faryna v. Chorny*, [1951] B.C.J. No. 152 (QL), the British Columbia Court of Appeal provided guidance for determining contested facts and assessing witness credibility. The Court determined that the credibility of an interested witness must be tested by reasonably subjecting the story to an examination of its consistency with the probabilities that surround the currently existing conditions. The real test of the truth of a witness's story must be its harmony with the preponderance of the probabilities

that a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[94] The grievor's many actions, as witnessed on the video and as described in his testimony, when taken together simply defy logic and do not make sense. Choosing to leave the water cooler reservoir open and then going out of his way to pour cups of chlorine bleach for use elsewhere in the office hours later is unusual. His rationale for pouring cups of chlorine bleach into the dumpster to avoid staining his clothes while at the same time choosing to dust shelves with that chlorine bleach when Windex, a product made specifically for cleaning surfaces, was available was strange. The grievor stated his hands got very dirty from cleaning shelves thus confirming he did not use gloves yet, he says he preferred to use chlorine bleach to dust the same shelves, despite it being well-known as corrosive to human skin. His plan to pour cups of chlorine bleach to douse the dumpster on the day in question despite the video showing him several days earlier simply using a jug to douse the dumpster casts doubt on his testimony. The fact that he went out of his way to pour cups of chlorine bleach in his office (after removing the jug from the water cooler) when he had a work sink closer to where he would use the bleach for cleaning is illogical and lacks credibility.

[95] The grievor gave highly detailed testimony of his actions that exposed the reservoir in the cooler and then of bringing in chlorine bleach. His memory was so detailed that he pointed to a diagram of his office and showed me exactly where he placed two cups to fill with chlorine bleach. His recollection was so clear in fact that he argued as to the colour of the cups he used to hold the chlorine bleach he claimed to have poured. Unfortunately, his clear and adamant recollection of the colour of the cups he used was proven incorrect in cross-examination. Despite being shown video that the cup he was carrying was of one colour, the grievor was adamant that he had used a differently coloured cup. Only after a break did he respond to a leading question in redirect examination by his counsel to correct his version of the events as to the colour of cup he used.

[96] By his own admission then, and with the help of a diagram of his new office, the grievor testified that he placed two cups in very close proximity to the open reservoir of his water cooler and in a space of 11 seconds entered his office, removed the cap from a chlorine bleach jug, poured bleach into the two cups, and then exited with the chlorine bleach jug. Photos 3 and 4 at Tab 1 of the report show the grievor's office as it

was furnished on the day in question. With the help of the grievor pointing to the photos at the hearing, the location of the two cups was situated very close to the exposed water cooler reservoir.

[97] Despite his counsel reviewing the surveillance video and cross-examining the witnesses called by the employer, no alternate theories of how the contamination arose emerged. When asked repeatedly if the contamination could have been the result of an accidental spill or splash from pouring chlorine bleach into the two cups, the grievor replied each time with a quick and firm "No."

[98] Despite this testimony, the grievor's counsel argued that, in fact, the contamination could have been caused by an accidental splash from the grievor filling the cups with chlorine bleach. The grievor's counsel also argued that when the grievor told Mr. Norman, "I didn't do it," he said so in response to the allegation that he had purposely contaminated the water. Thus, the grievor's reply meant that he did not do it on purpose but left open the possibility that despite his repeated claims to the contrary in testimony before me, he might have in fact accidently contaminated the water.

[99] Given the uncontradicted testimony of two witnesses that the water cooler jug was nearly empty the morning after the incident and the fact that one jug would normally last one or two weeks of normal use, I am left with no doubt that the grievor used pails the previous afternoon to flush the water cooler. The hearing received no evidence or alternate theory that contradicts my finding on this fact other than the grievor's denials of using a pail to drain the water cooler. When asked in cross-examination if he took water out of his office in the pails, the grievor replied "No, there's no tap in there," which is evasive to the point of the question. As such, I find that the grievor removed water from the cooler on the afternoon of the day on which the contamination was discovered.

[100] As noted, it concerns me that the grievor's replies to Mr. Norman's questions, his statements made during the employer's investigation, and his testimony before me showed an evolution in his willingness to share details. What I find particularly troubling are his statements in cross-examination, when he was asked why he did not give Mr. Norman, when he asked the grievor about the contamination, the same detailed story he provided at the hearing about pouring cups of chlorine bleach beside

the water cooler. The grievor replied, "I never thought if it," "He never asked me," and "It slipped my mind." More than any of the other noted unusual aspects of the grievor's testimony, I find that these answers belie his credibility as a witness.

[101] Given the grievor's testimony as to his use of chlorine bleach in his office in the immediate proximity of his water cooler, which he had left uncovered, I cannot accept his explanation that these things "slipped [his] mind". I also find it disingenuous for him to suggest in testimony that Mr. Norman did not ask precisely the right question to merit an honest and fulsome answer.

[102] In addition, I find it highly unlikely that the grievor set out to clean dusty shelves in another part of the office using chlorine bleach and water solution that he mixed at his office desk. As the employer argued, chlorine bleach is not known as a good cleaning agent for dusty shelves. Windex, which is intended for cleaning surfaces of dust, was available in the office and had been used by the grievor for other cleaning of surfaces.

[103] Given how the grievor's purported recollection of events improved so drastically over time, and the many findings of fact I have just noted, I conclude that it is more probable than not that the grievor caused the contamination of the water.

Issue 2 - Was the suspension administrative or disciplinary?

[104] The suspension grievance was referred to adjudication under s. 209(1)(b) of the *Act*, namely, due to a termination, demotion, suspension, or financial penalty resulting from a disciplinary action. Accordingly, for me to hear this grievance, I must find on the evidence presented at the hearing that on the balance of probabilities, the suspension without pay was in fact disciplinary. In considering this question I shall make an objective assessment of all the relevant circumstances including the employer's stated intent, whether there is evidence of bad faith on its part, and also the impact of the decision upon the grievor and his career prospects.

[105] The grievor was initially suspended with pay on September 15, 2011, which was converted to a suspension without pay on October 11, 2011, and it continued uninterrupted until the termination of employment letter was issued on June 25, 2012. The grievance against the suspension without pay was filed on October 26, 2011. The grievor submitted that the termination was not administrative, that it was unduly long,

and that it became disciplinary over the passage of time, if not from the outset.

[106] The grievor also argued that the suspension without pay was unfair. He alleged that he was not given a proper opportunity to see the evidence against him. His counsel suggested that he was busy moving his office the day of the incident and that he might have forgotten his relevant activities, explaining why he carried chlorine bleach into his office at the same time as he had left the water cooler uncovered.

1. <u>The authorities cited by the grievor</u>

[107] The grievor cited *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70, reversed on unrelated grounds, 2010 FCA 24, in support of his argument that the suspension without pay was in fact disciplinary and unjust. In *Basra*, the grievor was a correctional officer arrested for an off-duty sexual assault. The employer suspended him for 18 months after the alleged crime was committed after finding that he had not been forthright in dealing with the police, that he had not reported the criminal charge to the employer, and that he posed a safety risk to staff at his workplace as well as a risk to the employer's integrity. At no time did the police recommend to the grievor's employer that he be removed from the workplace.

[108] The Federal Court of Appeal found that adjudicator had in fact properly taken into account the intent of the employer in the finding that the suspension became punitive beyond the middle initial 30 day period as the employer awaited the outcome of the criminal prosecution. The Court of Appeal also noted, at paragraph 14, that the fact that a suspension is without pay may be sufficient in itself to allow for the conclusion that a measure is disciplinary in nature, as the withholding of pay is *prima facie* disciplinary since it deprives the employee of the salary to which he or she is otherwise entitled.

[109] The suspension in that case became protracted during the wait for the trial of the criminal charge. The adjudicator noted that he was unsure as to how the employer could have come to any reasonable risk assessment with respect to the grievor remaining in the workplace given the extremely limited material before it (at paragraph 105). The adjudicator found that he had jurisdiction to hear the grievance on the grounds that the suspension was at least partly disciplinary and that the assessment of the risk to the grievor's co-workers had been exaggerated.

[110] The grievor also cited *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9, for its five criteria, which are used to consider whether an indefinite suspension was administrative or disciplinary. *Larson* also involved a grievor who was suspended pending the outcome of a criminal proceeding arising from being charged with arson and breach of probation. Neither offence was alleged to have involved his work or his employer. Unlike the facts before me, the adjudicator in *Larson* found (at paragraph 163) that the employer presented no evidence that Mr. Larson's presence at his workplace could be considered to present a reasonably serious and immediate risk to the employer's legitimate concerns. Mr. Larson's alleged criminal activity took place away from the workplace and was not alleged to have involved persons from there. As such, the case considered allegations that the employer had incomplete information when it deliberated as to whether to suspend the grievor.

2. <u>The grievor's claim that he was denied the right to a prompt hearing</u>

[111] The grievor claims that the employer's failure to promptly convene a formal hearing rendered the suspension disciplinary. The evidence shows, however, that Mr. Norman stated that he asked the grievor three times between September 12 and 15 if he knew anything about the discovery of chlorine bleach in the drinking water cooler located in his office. Shortly after the problem was reported, and on the same day, Mr. Norman testified that he asked the grievor if he put chlorine bleach in the water or if he had been cleaning the water cooler. The grievor's reply was that he had not done it, and he responded in the negative to the question of whether he had been cleaning.

[112] Mr. Norman stated that the next morning, he asked the grievor again if he knew how chlorine bleach might have gotten into the water. The grievor replied that he had not put it in the water and that he did not know how it got there.

[113] Two days after chlorine was reported in the water, the security video was discovered, prompting Mr. Norman to testify as follows: "I couldn't imagine why Keven took Javex bleach into his office. He told me he was not cleaning and he told me he had no idea how chlorine got into the drinking water."

[114] On the third morning after the incident, Mr. Norman informed the grievor that

an investigation suggested that he might have put chlorine bleach into the drinking water. He replied that he did not do it and that he did not know how it could have gotten there. At this point, the grievor also informed Mr. Norman that the last time he had used chlorine bleach was "was on the previous Monday morning" to douse the odour in the dumpster.

[115] In cross-examination, Mr. Norman also stated that when he asked the grievor, "Did you do it?", the grievor replied that he "couldn't see why anyone would think this." Mr. Norman then advised him that he was being suspended at the recommendation of the police, who were investigating the incident.

[116] The grievor relies upon the finding in *Larson*, at para. 171, which faulted the employer for not convening a formal disciplinary hearing. Having reviewed the jurisprudence the adjudicator states the test for the employer to justify a suspension based upon risk includes:

> - whether the employee's presence could be considered to present a reasonably serious and immediate risk to the employer's legitimate concerns;
>
> - the onus is on the employer to show the existence of such a risk;
>
> - the employer must show that it investigated the substance of the criminal charge to genuinely assess the risk of continued employment (the adjudicator notes the burden on the employer will be significantly lighter when police have investigated the matter and acquired evidence to lay the charge);
>
> - the employer must show that it has taken reasonable steps to ascertain whether the risk of continued employment might be mitigatable through things like closer supervision or a transfer to another workplace; and
>
> - there is a continuing onus on the employer throughout the period of the suspension to consider reinstatement in light of new facts or circumstances that may come to its attention and that may be viewed in the context of whether a reasonable risk exists to its legitimate interests.

[117] The context within which the five steps in *Larson* were considered was an

indefinite suspension for alleged criminal behavior away from the workplace in which the employer had no direct contact with the employee to inquire as to the facts. Mr. Larson's counsel in fact argued (at paragraph 148) that "[t]here is no evidence" that Mr. Larson presented a danger to inmates or work colleagues.

[118] To the contrary, in the facts in the case before me, the grievor was observed on security video pursuing a course of actions in the workplace that implicated him in an incident that jeopardized the health and safety of his co-workers.

C. Disclosure of evidence upon suspension

[119] The grievor argued that he should have been presented with the evidence in the employer's possession to have been able to fully reply. The case of *Manning v. Treasury Board (Revenue Canada - Taxation)*, PSSRB File Nos. 166-02-17709 and 17768 (19881205) at 35, [1988] C.P.S.S.R.B. No. 346 (QL), was cited as authority for the proposition that it would have been reasonable for the employer in that case to show the grievor the evidence that had been gathered to support the allegations of wrongdoing, to allow the grievor an opportunity to explain himself. In *Manning*, the grievor assessed personal tax returns. His manager found that some tax returns were being sent to another branch of the department without first being assessed and that files were being put into the garbage. An effort was undertaken to mark files taken by the grievor, which were later found discarded or sent unassessed to the other branch. At adjudication, he said he had no knowledge of the files in question and denied any wrongdoing. The grievance was upheld, citing the lack of reliable evidence linking the grievor to the files in question.

[120] I distinguish Manning on its facts and reject any notion that the employer had a duty to show the grievor the video evidence linking him to the chlorine bleach in his office that somehow found its way into the water cooler.

[121] Unlike *Manning*, in which the adjudicator found no clear evidence linking the grievor in that case to the files in question, the grievor before me appears on video carrying chlorine bleach into his office when the drinking water cooler reservoir is uncovered. In his testimony, he further admitted it and explained taking chlorine bleach into his office and pouring it in the vicinity of the uncovered water cooler. Only the grievor knows for sure what happened with the chlorine bleach in his hands. In such an instance, with him being the only person who could possibly know what

caused the chlorine bleach contamination, he had a duty to be forthright in explaining his actions to his employer.

[122] My finding on this matter is consistent with the argument of the employer, which relied upon *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61, upheld in 2015 FC 1175, for the proposition that grievors may not necessarily need to be given an opportunity to examine the evidence against them when the employer asks them to explain their actions. In that case, the grievor was found to have improperly used employer computer equipment for personal web searches and was found to have emailed confidential documents from his work computer to his personal email account. The adjudicator found it proven on a balance of probabilities by other means that these things had in fact occurred and that sharing evidence with the grievor at the time of his removal from the workplace was not necessary (at paragraph 88).

[123] The employer also cited *Canada Safeway Ltd. v. United Food and Commercial Workers Union, Local 401*, [2008] A.G.A.A. No. 14 at para. 99 (QL), for the proposition that an employee caught in suspicious circumstances has an obligation to provide a satisfactory explanation capable of allaying the suspicions.

D. Dilatory nature of the investigation

[124] The grievor argued that the duration of the administrative investigation was unduly long thereby rendering it disciplinary (as has been discussed previously in *Basra*). The "Scope and Authority" document that launched the investigation was signed on September 20, 2011. Before that, the employer conducted a fact-finding investigation to prepare that document, according to Mr. Legault. The grievor was notified, by a letter signed by Mr. Norman and dated September 20, 2011, that the investigation was being launched and that as of that day, he was being placed on administrative leave with pay. This letter further advised him that upon the completion of the investigation, he would be given the opportunity to present any clarifications or additional information. Mr. Norman further adds in this letter as follows: "It is management's intent that this investigation be exhaustive and swift." The final report is dated March 6, 2011. The grievor was invited by a letter dated April 24, 2012, to a meeting on May 9, 2012, to discuss the outcome of the report and to respond.

[125] This means that an approximately five-month period passed during which the employer conducted an investigation into the incident and invited the grievor to meet

to discuss it. When neither the grievor nor his representative attended the May 9 meeting, another approximately seven weeks passed before the employer notified the grievor in writing of his dismissal from employment.

[126] The evidence of what took place in this approximately seven-month period is limited to what is in the report, which was largely written in the fall of 2011 and to what Mr. Norman described as a series of management meetings held through the winter of 2012 to consult with Human Resources and counsel on the report and the grievor's status.

[127] The grievor also cited *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127, as authority for me finding that the suspension period was excessive. Ms. Baptiste was a nurse performing medical duties for inmates at a federal facility and was accused of improperly administering prescription medications, causing injury to an inmate, and of falsifying inmate medical records. She was suspended for approximately eight months pending the outcome of an investigation (at paragraph 219).

[128] In his factual finding on the issue, he states at paragraph 327 that the Warden chose not to reassign the grievor because the reported incidents raised a serious question of trust with her and that her continued presence in the institution posed a significant risk.

[129] He then notes at paragraph 327 that "… the suspension had a punitive effect and … was [in response] … to something the grievor allegedly did, rather than being driven by circumstances unrelated to any fault on her part …". Upon making this finding, the adjudicator then accepts jurisdiction for the suspension grievance and finds that the grievor suffered "prejudice" from the undue length of the suspension (at paragraph 331) and upholds her grievance in part. The adjudicator found that the employer continued the suspension after the point at which it had all the relevant facts needed to make a decision about the alleged wrongdoing.

[130] The employer pointed to *Petrovic v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 16, as a supporting authority for its submission that the suspension without pay was administrative in nature. In *Petrovic*, Adjudicator Katkin found that he had no jurisdiction to hear a grievance about a suspension without pay since the grievor was a correctional officer and had been found to have made

unauthorized access to and use of inmate files. The employer was concerned about potential risks to inmate safety arising from what were then unknown reasons for the files being accessed.

[131] After several weeks of investigation, the employer ruled out criminal intent for the unauthorized access to inmate files but continued the grievor's suspension without pay, citing insufficient information. Mr. Petrovic's suspension began on November 6, 2012, and he returned to work on January 18, 2013. Despite evidence showing that the police investigation found no criminal intent and that a departmental investigation found no risk to inmate safety arising from the unauthorized access to inmate files, the adjudicator found the testimony of the employer's witness on this point "sincere and convincing" (at paragraph 137), which led to a finding that the suspension without pay was for valid administrative reasons.

[132] Mr. Norman testified that his initial decision to suspend the grievor was his and that he based it upon the advice of the police to keep the grievor away from the workplace. Mr. Norman stated that the video was strong circumstantial evidence and that the reports of concerns from other co-workers were a factor. Mr. Norman continued, stating that upon questioning the grievor about the chlorine bleach and about any problems with co-workers, he replied in the negative, so Mr. Norman felt that a suspension was necessary out of concern for a potential ongoing risk to others at the workplace.

[133] In my examination of the employer's decision to suspend the grievor in the evidence before me, I accept Mr. Norman's clear and compelling evidence that he feared for the safety of his staff at the Carling Lab. Given his role as the co-chair of the workplace health and safety committee and the police's direction to the same effect to keep the grievor away, I find that the decision to suspend the grievor and to extend the suspension without pay was reasonable for the full duration of the suspension, especially considering the discovery of chlorine bleach in the drinking water, the video footage of the grievor taking chlorine bleach into his office, and his less-than-forthright answer when he was asked initially if he knew anything about it.

[134] On a final note on this point, the evidence of both the grievor and Mr. Norman indicates that upon the grievor's arrest and release from custody, he was given a bail condition that included not contacting CFIA staff and attending the Carling Lab.

[135] The impact of the suspension upon the grievor was no doubt difficult. He described it as "devastating for both himself and his family." He explained that the suspension and eventual loss of employment deprived him of his ability to support his family. The grievor's testimony, on its own, does not convert an administrative suspension into a disciplinary one, (See *King v. Deputy Head* (CSC) 2011 PSLRB 45 at para. 59, citing the Federal Court in *Canada (Attorney General) v. Frazee*, 2007 FC 1176). In considering the impact of the suspension upon the grievor's career, I received no testimony regarding what might have been the consequences of the suspension had the grievor been allowed to return to work, but I presume he could have resumed his duties in shipping and receiving otherwise unhindered. His suspension was not intended in any way to cause correction to his behaviour.

I find that based upon the evidence before me, the employer's suspension of the grievor without pay was a justified administrative act directed to the safety of workplace staff. Therefore, I have no jurisdiction under s. 209(1)(b) of the *Act* to hear this grievance.

Issue 3 - Was there just and reasonable cause for discipline and if so, was the termination of employment excessive?

[136] The Board frequently cites the arbitral decision in *Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL)("*Scott*"), for determining whether there was just and reasonable cause for termination. *Scott* finds that for a dismissal for cause to be considered just, firstly, the employer must consider whether the employee has given it just and reasonable cause for some form of discipline. Secondly, it must be determined whether the decision to dismiss the employee was an excessive response in all the circumstances. And thirdly, if the adjudicator considers that the dismissal was excessive, then he or she must determine the measures that should be substituted as just and equitable (*Scott*, at para. 13).

[137] For the first two elements, *Scott* considers the seriousness of the offence, whether it was premeditated or spontaneous, whether the employee had a long-standing and good record of service, whether progressive discipline was attempted, and finally, whether the discharge was consistent with the employer's established policies or whether the employee was singled out for harsh treatment (at paragraph 14).

1. Was there just and reasonable cause for discipline?

[138] The grievor applied *Scott* to the facts before the hearing and stated that there was no direct evidence proving that he administered the chlorine bleach to the water cooler. Counsel for the grievor also submitted that contrary to his client's testimony, the grievor might have accidently caused the chlorine bleach contamination. The grievor argued that several problems exist with the report, which biased the employer's decisions. And finally, he pointed to his 27-year record of good service with the employer when he argued that termination was an excessive response to the incident.

[139] The employer argued that based upon the evidence, the grievor is the only person who had the opportunity to cause the chlorine bleach to enter the drinking water. The employer pointed to statements he made that cast doubt on his credibility and argued that they are further proof of him being responsible.

[140] As I explained earlier in this decision, I find that the grievor was responsible for introducing chlorine bleach into the drinking water cooler. Therefore, I find that there was just cause to discipline the grievor. The first step of the *Scott* analysis is met.

2. Was the dismissal an excessive response, given all the circumstances?

[141] In the second step of the *Scott* analysis, I must consider the many factors surrounding the grievor and the contamination to determine if his dismissal was justified. The parties pointed to evidence of both aggravating and mitigating factors supporting their submissions.

[142] The employer suggested that I did not need to make a finding of motive behind the contamination to uphold the dismissal. It further submitted that the grievor's actions after the discovery of the contaminated water showed either a guilty mind attempting to conceal its wrongful actions or a person who should have cooperated more honestly and forthrightly.

[143] Based upon the employer's conclusion that the grievor was responsible for the contamination and that he then was dishonest or at least not forthright in answering questions about it, the employer argued that the bond of trust in their relationship was irreparably harmed, thus justifying the dismissal. The employer also argued that in light of the drinking water contamination, the grievor must not be returned to the

workplace, to ensure the safety of all employees there.

[144] The grievor replied that there is no clear evidence of any wrongdoing and that his simple denials of purposely contaminating the water were a reasonable response given his argument that the contamination might have been accidental. He submitted that inaccurate and unproven allegations in the report and the Acting Director jumping to a quick determination of his guilt all point to the decision to dismiss being biased and unjust. The grievor noted that his record of 27 years of good service with the employer supported him being worthy of leniency in the administration of progressive discipline rather than being worthy of dismissal from his employment.

[145] As discussed earlier in this decision, the employer pointed to five different occasions on which the grievor denied any knowledge, when asked if he knew anything about the water contamination, as evidence of his lack of forthrightness and honesty.

[146] The employer drew my attention to *Laplante v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 104, upheld in 2008 FC 1036. It pointed out the similarity of the grievor in *Laplante*, who was dismissed based upon circumstantial and speculative evidence of assisting family members who were smuggling cocaine across the border. In dismissing the grievance, the adjudicator noted the lack of direct evidence arising from a police investigation but also found inconsistencies in the grievor's testimony that led him to believe that the grievor was in fact involved in the criminal activity. In upholding the decision on judicial review, the Federal Court reviewed the adjudicator's findings and found them reasonable, citing the need to be deferential in matters of findings of fact and credibility.

[147] The employer also cited *Canada Post Corporation v. Association of Postal Officials of Canada* (1996), 56 L.A.C (4th) 353 at para. 47. The arbitrator in that case found that when a *prima facie* case of employment misconduct has been made, the employee is obliged to explain his or her conduct. Lacking such forthrightness, the arbitrator found that the grievor's story of the events was not in harmony with the preponderance of probabilities and that his failure to offer an explanation to police after his arrest weighed heavily against his credibility and the believability of his story. The grievance was denied.

[148] The grievor cited *York Region District School Board v. Elementary Teachers' Federation of Ontario, York Region*, [2014] O.L.A.A. No. 462 at 97, 122, and 123 (QL).

The employee in that case was terminated from his employment after being been found guilty of the sexual abuse of a child. After an extensive review of all the relevant evidence, the arbitrator found that the employee had indeed engaged in inappropriate behavior with the child but that sexual abuse had not been proven on the balance of probabilities. The arbitrator relied in part upon the decision in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, which states that evidence must be clear, cogent, and convincing for a finding that sexual abuse occurred, on a balance of probabilities.

[149] The grievor also cited *Sandy Bay Ojibway First Nation v. Manitoba Government and General Employees' Union*, [2012] M.G.A.D. No. 11 (QL) (at paras. 51 to 54). The arbitrator in that case of alleged computer espionage found that there were certainly grounds for suspicion but was not convinced of it due to a lack of clear, cogent, convincing, substantial, and reliable evidence, given the fact the grievor's reputation and job were at stake. The arbitrator upheld the grievance and quashed the dismissal but chose not to order any retroactive payment of wages or benefits.

[150] The grievor cited *Unit Park Holdings Inc. v. Laborers' International Union of North America, Local 183*, [2013] O.L.A.A. No. 283 at paras. 77 and 78 (QL), which is about a termination due to an alleged theft. The arbitrator was not convinced that the evidence proved the theft allegation and instead ordered the grievor reinstated to his job but with no compensation.

[151] The grievor also cited *Jalal v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-27992 (19990421) at 29, [1999] C.P.S.S.R.B. No. 52 (QL) at paras. 110 and 111, which considers a termination grievance for a correctional officer who was found guilty of a "not premeditated" theft of goods from a retail store. The adjudicator found that the grievor's testimony did not make sense but still found that his termination was not justified. The grievor's failure to admit his mistake was not seen as another offence; instead, the adjudicator found it relevant to assessing the appropriate penalty under the circumstances. The adjudicator ordered a 20-month suspension without pay substituted for the termination.

[152] The grievor also cited *Lloyd v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-16102 and 16103 (19861031), [1986] C.P.S.S.R.B. No. 277 (QL), as support for his argument that an employee should not be found guilty of a serious offence (theft in that case) based upon purely circumstantial evidence when the employee has

a long record of conscientiously performing his or her duties.

[153] As previously described in detail, I have found clear and convincing evidence that the grievor is responsible for the chlorine bleach contamination of the office drinking water cooler. When it was discovered, he repeatedly denied having any knowledge of it. Upon being presented with the security video that showed him using chlorine bleach in his office, he denied using it for cleaning. Approximately four years later, he gave highly detailed testimony before me, including minute details of using chlorine bleach for cleaning. Much of his explanation was contradicted, either by his previous statements or by other facts. In total, the long story he provided at the hearing was simply not credible.

[154] The grievor drew my attention to several investigatory findings in the administrative report that he argues were unfair and which biased the decision maker. While I find the impugned findings in many cases to be nothing more than unhelpful and unsubstantiated gossip, I do not find evidence that supports a finding of their having played a role in the suspension and termination of the grievor. To the contrary, the evidence before me is that the grievor, by his own actions in answering to Mr. Norman, was responsible for his fate. The evidence I have outlined leads me to find on a balance of probabilities that the employer was not motivated or biased to any material extent by the various matters contained in the reports as pointed out by the grievor and argued to be unfair and prejudicial.

[155] I am most persuaded in my decision to dismiss the termination grievance by the fact that this entire matter deals with workplace safety for the many employees of the Carling Lab. Few matters could ever be more important in a grievance arbitration or adjudication than workplace safety. Despite clear and convincing evidence of him being responsible for the contamination, the grievor has accepted no responsibility and has shown no remorse.

[156] Given the grievor's testimony of his detailed plan to pour chlorine bleach into two cups sitting beside the open water cooler reservoir for later use, he should have shared these facts with Mr. Norman when he was asked. Mr. Norman testified that when he asked the grievor the second time if he knew how the contamination might have happened, he was still concerned that "a number of variables might have

produced the chlorine in the water cooler" and that he was concerned for workplace safety and wished to thoroughly investigate the manner to resolve what had happened.

[157] Adjudicator Shannon, in her recent decision in *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121 at para. 83, considered whether the employer-employee relationship had been irreparably harmed and noted the critical role accepting responsibility plays in this assessment. She found that when determining whether a grievor may engage in future misconduct, a critical issue is whether he or she has accepted responsibility for his or her actions and whether he or she understands the impact this has on the employment relationship.

[158] In the matter before me, the actions and decisions throughout this entire chain of events taken by the Acting Director were motivated out of concern for the safety of all employees at the workplace. The level of mistruths and evasiveness displayed by the employee, as well as his failure to take responsibility for his actions, irreparably harmed the employee-employer relationship. Therefore, I find that the employer has established that it had just and reasonable cause to terminate the grievor's employment. The discipline imposed was not excessive.

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

(The Order appears on the next page)

VIII. Order

[160] Both grievances are dismissed.

April 21, 2017.

Bryan R. Gray,
a panel of the Public Service Labour Relations and Employment Board