Date: 20170526

Files: 566-02-7089, 8142, and 10209

Citation: 2017 PSLREB 58

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

TEVIN APENTENG

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

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

In the matter of individual grievances referred to adjudication

Before: Michael F. McNamara, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Pierre Ouellet, Professional Institute of the Public Service of Canada

For the Respondent: Joshua Alcock, counsel

Heard at Ottawa, Ontario,
November 17 to 19, 2014.

I. Grievances referred to adjudication

[1] I am seized with three grievances filed by Tevin Apenteng ("the grievor") against a 30-day suspension (file 566-02-10209), an indefinite suspension without pay pending an investigation (file 566-02-7089), and his subsequent termination from employment (file 566-02-8142).

[2] On October 2, 2012, the Canada Border Services Agency ("the respondent") advised the Board that it considered the indefinite suspension moot given the fact that the grievor's subsequent termination was made retroactive to the first day of his suspension, December 19, 2011. Furthermore, in a letter dated February 19, 2013, counsel for the respondent raised an objection on the adjudicability of the indefinite suspension. The respondent claimed that the suspension pending the investigation was administrative in nature and that it fell outside the realm of adjudicable measures under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*). Counsel for the respondent also reiterated his contention that the indefinite suspension was moot on its face and that it should be dismissed.

[3] The grievor's representative took the opposite view and responded that the indefinite suspension is adjudicable and is not moot. The representative submitted that the respondent took an inordinate amount of time to make its final decision on the grievor's employment, although it knew all the facts well before the termination date.

[4] These preliminary points were taken under reserve and were deferred to the hearing, to be dealt with at that time.

[5] The three grievances were joined to be heard in common and to be dealt with together. The grievance against the 30-day suspension was filed at the appropriate level of the respondent's grievance procedure on March 10, 2014, well outside the time limits prescribed by the applicable collective agreement. This is explained by the fact that the grievor's application for an extension of time to present his grievance was granted by the (then) Acting Chairperson of the Public Service Labour Relations Board (PSLRB) on February 20, 2014 (see *Apenteng v. Treasury Board (Canada Border Services Agency)*, 2014 PSLRB 19). Consequently, I am validly seized of the reference to adjudication of that grievance.

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

[7] Furthermore, pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

II. Summary of the facts

A. The 30-day suspension

[8] At the material times, the grievor was employed by the Canada Border Services Agency (CBSA) as an employee in its Computer Systems Group, classified at the CS-02 level. He had been so employed since April of 2002.

[9] On June 2, 2011, the grievor was suspended without pay for 30 days on the ground that he had submitted a fraudulent medical certificate to justify his absence from work from April 18 to 29, 2011.

[10] The disciplinary letter by which the respondent imposed the suspension sets out the grounds behind it and reads, in part, as follows:

> *Further to the disciplinary hearing held on May 26, 2011, the following is to advise you that you are being disciplined for the submission of a fraudulent medical certificate.*
>
> *In the hearing, it was discussed that you submitted a medical certificate to substantiate your family related absence from the workplace from April 18, 2011 to April 29, 2011. It was confirmed by the office of Dr. Davis R. Lindsay, that in fact their records do not show that the letter was created by their office.*

> *As a result of the disciplinary hearing, I have determined that your actions constitute serious misconduct, call your judgment into question; furthermore, your actions constitute a serious breach of the CBSA Code of Conduct and the Values and Ethics Code for the Public Service.*
>
> …

[11] The evidence adduced at the hearing established that the grievor took family related leave from April 18 to 29, 2011. He testified that he received an email from his director, Pierre Pitre, of the CBSA's Commercial Systems and Production Support Division, which he understood required him to present a doctor's note, under a provision of the relevant collective agreement, upon his return to work.

[12] Mr. Pitre introduced several emails exchanged with the grievor setting out the respondent's expectations of his leave usage and, in light of his leave pattern, the requirement that he provide a medical certificate for all his future absences due to illness.

[13] The evidence adduced at the hearing also showed that Mr. Apenteng informed the respondent of his absence on a day-to-day basis and that at one point, he was informed that he was considered on unauthorized absence without pay until proper explanations were provided to justify his absence. Mr. Pitre testified that he required more information as to the reasons for the grievor's absence.

[14] On his return to work on May 3, 2011, the grievor presented a medical note purporting to justify his absence, which was inserted in a sealed CBSA envelope and left with Mr. Pitre's assistant. The note purports to be signed by a Dr. David R. Lindsay and states that Mr. Apenteng's spouse had been under Dr. Lindsay's care at the St-Joseph Health Centre in Toronto from April 17 to 29, 2011, for medical treatment.

[15] As this situation was about family related leave and not sick leave, Mr. Pitre was somewhat surprised to receive a medical certificate concerning Mrs. Apenteng. He reviewed it and became suspicious. On April 15, 2011, Mr. Apenteng had requested family related leave to bring his child to a medical appointment and did not mention anything about his wife undergoing a physician's care and about him needing more family related leave just a few days later. He also noted that the letterhead of the certificate "looked strange", as if it had been photocopied and the text had been added by typing it in.

[16] Mr. Pitre decided to verify the certificate's authenticity with the St-Joseph Health Centre. On May 6, 2011, its medical administrator informed him that it had not created the certificate and that Dr. Lindsay had not treated that patient during the period mentioned in it. That information was confirmed in writing on the same day. The respondent introduced a genuine medical note signed by that same physician, which refers to a follow-up visit at the Health Centre on May 2, 2011, the day before the grievor returned to work.

[17] On May 20, 2011, Pierre Ferland, who at the material time was the director general of the respondent's Solutions Directorate in its Information, Science and Technology Branch, convened Mr. Apenteng to a disciplinary meeting to provide him with an opportunity to respond to the findings.

[18] The meeting took place on May 26, 2011. Mr. Apenteng did not deny the facts presented to him. He stated that he was under stress from work and other issues in his life, that his wife did see the doctor, that the dates on the medical note were wrong, and that he was sorry for what happened.

[19] Mr. Ferland testified that he considered that the fabricating and submitting of a false medical certificate by the grievor to justify his absence from work constituted a serious offence and breach of trust for which termination was seriously considered. However, he also considered the fact that the grievor had no previous disciplinary record and that he had expressed remorse for his actions at the meeting. He was also sensitive to representations that the grievor's shop steward made about Mr. Apenteng experiencing financial duress. As such, he concluded that a 30-day suspension was a harsh sanction that considered the grievor's contrition and his commitment to re-establishing the bond of trust with his respondent.

[20] At the hearing, Mr. Apenteng testified that his wife had indeed had surgery and that he had taken care of their children while she recovered. She provided him with the medical note after he told her he needed one to justify his absence. She gave it to him in a sealed envelope. He stated that he did not review it; he simply brought it to work and left it with Mr. Pitre's assistant. Mrs. Apenteng did not testify at the hearing.

B. <u>Indefinite suspension and termination</u>

[21] The grievor was suspended indefinitely without pay on December 22, 2011, on

the grounds set out in the suspension letter signed by Mr. Ferland, which reads in part as follows:

> *This is further to the fact finding meeting of December 19, 2011 with CBSA management. This meeting was for the purpose of obtaining your input and explanation for certain inappropriate dealings conducted by you that also involved your use of the CBSA's electronic systems.*
>
> *This letter is to advise you that CBSA has decided to conduct a more thorough administrative investigation into your business dealings including your use of CBSA's electronic systems in the conduct of business with but not limited to the following:*
>
> *I- MacDoff Logistics Company of Ghana;*
>
> *II- RosePark Telecom Company;*
>
> *III- RosePark Foods and beverages Limited of Ghana;*
>
> *IV- The Forex group Limited; and*
>
> *V- The Embassy of Gabon and your telecom business proposals.*
>
> *Furthermore, given the circumstances relating to the above-noted allegations, management has determined that your continued presence in the workplace presents a reasonably serious and immediate risk to the legitimate concerns of the Agency and as such, you are hereby suspended indefinitely without pay as of December 19, 2011 pending the outcome of the investigation.*
>
> …
>
> *… If it is determined that the allegations against you are unfounded, you will be reintegrated into the workplace and compensated accordingly for the period that you were suspended.*

[22] The grievor's employment was subsequently terminated. The grounds, which are set out in a letter signed by Mr. Ferland and dated July 23, 2012, read as follows:

> *I have carefully reviewed the investigation report including your statements. Based on this information, I am convinced that you violated the Agency's Policy on the Use of Electronic Resources both in terms of the volume and nature of the personal business dealings you conducted; you failed to report personal business dealings that could constitute a conflict of interest and breach of the Code of Conduct; and you misled the Agency regarding the details of your business activities.*

> *Before reaching this decision I have considered mitigating and aggravating factors including your length of service and previous disciplinary record, and of significance, that you did not demonstrate any remorse for your actions.*
>
> *As such, I have concluded that by the nature of your conduct, you have irreparably broken the bond of trust that is essential for you to continue as an employee of the Canada Border Services Agency.*
>
> *In view of the above and in accordance with Section 12(1)(c) of the Public Service Labour Relations Act, I hereby terminate your employment for cause effective December 19, 2011.*

[23] The respondent's case against the grievor in support of the indefinite suspension and the termination was introduced in evidence mainly with Mr. Ferland's testimony but also with that of Mr. Pitre.

[24] Mr. Pitre explained that at the time of the events relating to presenting the false medical certificate, he had a "productivity and timeline concern" with Mr. Apenteng, which caused him to write a letter, dated May 24, 2011, setting out employer's expectations on a number of issues with his work performance. In addition to addressing Mr. Apenteng's hours of work, leave usage, and reporting, the letter refers to the CBSA's *Code of Conduct* and the *Values and Ethics Code for the Public Service* ("the Ethics Code"), which were appended to the letter. Mr. Apenteng was expected to review and comply with them. Mr. Pitre testified that he met with the grievor to discuss those expectations and that he specifically mentioned that if Mr. Apenteng had any side business, it should be declared to the respondent in a "Confidential Declaration". Mr. Apenteng replied that he had no questions, that he was not involved in any businesses, and that there was no need for further discussion.

[25] Mr. Pitre testified that he became suspicious that Mr. Apenteng might be carrying on outside business activities and that he was using the CBSA's email system for them. At his request, CBSA security personnel conducted a review of recent email traffic on Mr. Apenteng's account. It identified a number of email exchanges he had that had no relation to his duties. It raised the possibility that he was conducting business activities during working hours using the CBSA's email system.

[26] Mr. Pitre convened Mr. Apenteng to a meeting on December 19, 2011, to obtain his responses and any clarification of the alleged activities. The questions asked of Mr. Apenteng and his answers are reflected in a transcript that Mr. Pitre introduced in

evidence and that the grievor did not dispute the accuracy of in his testimony. The questions touched on Mr. Apenteng's activities with respect to the five situations outlined in the December 22, 2011, letter of indefinite suspension, quoted earlier in this decision. The grievor was evasive in the first part of the interview, often responding by stating that he did not remember and that he had to "check his emails", but he denied having any business activities with the individuals and companies at issue.

[27] It was noted that the meeting took place on a day on which the grievor returned from annual leave. However, after Mr. Pitre explained the scope and purpose of the meeting, the grievor and his bargaining agent representative were given approximately one hour to consult.

[28] Mr. Pitre and the management representatives present at the meeting asked Mr. Apenteng to remain in the room while they considered the information that he had provided and determined their next steps. When they returned to the room, the grievor indicated that he had clarifications to add to what he had stated earlier. He stated that contrary to what he had said earlier, he knew of MacDoff Logistics Ghana Ltd. ("MacDoff") because its owner was his friend, but that he had no business link with that company, and he denied having any role in it. He had loaned money to the owner as a friend.

[29] When asked about his role in the RosePark Telecom Company ("RosePark Telecom"), he replied that it belonged to his wife. He was named as an administrator because she needed at least two people involved to make it a corporation. The company sells phone cards and provides mobility services, and he stated that "he helps her out" at times.

[30] When asked about RosePark Food and Beverages Ltd. ("RosePark Food"), he answered that it was a new business in Ghana, which had not yet started operations, and stated that he did not think he had to declare it. He denied having done any business with a Mr. Mbingt, other than linking him with a telecom company in Gabon. His dealings with that individual were purely social, and he did not think that Mr. Mbingt was acting on behalf of the nation of Gabon.

[31] At the end of the meeting, Mr. Pitre informed the grievor that a further investigation was required to determine the full extent of his involvement in outside commercial activities, and after consulting with Mr. Ferland, he informed the grievor that he was being placed on indefinite suspension without pay during the investigation.

[32] Mr. Ferland testified that the facts raised at least an appearance of conflict of interest and that the grievor's responses had raised a lack of trust, especially since the respondent did not yet know the extent of his business activities and who else was involved. The CBSA collects very sensitive information from importers, brokers, forwarders, carriers, truckers, boaters, etc., on goods entering the country. That information is used to measure macroeconomic indicators.

[33] As a CBSA employee, Mr. Apenteng had access to significant government resources, and his CBSA badge provided him with access to hundreds of buildings and attracted a level of trust. Specifically, Mr. Ferland was troubled with the grievor having an investment in MacDoff, a logistics company that dealt with the CBSA.

[34] Mr. Ferland explained that the grievor, as a senior programmer analyst within the Commercial Systems and Production Support Division, had access to the Administrative Monetary Penalty System (AMPS), which allows imposing monetary penalties to all commercial clients, including importers and exporters, and noting contraventions. He was very concerned that Mr. Apenteng was placing the CBSA at risk and that he was causing a serious security breach by conducting personal business with a foreign company in the business of shipping goods across borders. In some cases, programmers have access to the AMPS and the capacity to reverse fines. Mr. Ferland agreed that there was no evidence that MacDoff benefited from the grievor's position at the CBSA.

[35] The investigation by the respondent's Security and Professional Standards Directorate commenced shortly after that. On March 20, 2012, Mr. Ferland received the investigation report dated March 12, 2012. The report and an extensive number of copies of emails taken from Mr. Apenteng's account from between 2004 and 2011 were introduced in evidence.

[36] In summary, the investigators concluded that Mr. Apenteng conducted personal business during working hours using CBSA resources. The report established that he was the owner, founder, and operator of RosePark Telecom and that he was listed in the Ontario Business Information System as a director of that company, along with his wife. Five-hundred thirty email exchanges with his wife, clients, and agents of RosePark Telecom were found in his email account, which revealed that he directed the business activities of that company. His spouse helped because she was in Toronto, Ontario, where most of his client base was located and where he operated a small storefront.

[37] The emails reviewed in his account revealed that he became involved in several other related business relationships, including with Cardservice International (an Internet-payment-processing service provider), Colourfast Printing (for calling card printing), the Ghanaian Canadian Association of Ontario (which supplied phone cards), Mobilicity (a cellphone service provider), SpoofCard (a calling card provider), and several others.

[38] The investigators also concluded that the grievor invested $5000 in MacDoff. His email folder clearly demonstrated that he conducted business related to MacDoff on his desktop computer at work, using the CBSA's network. Contrary to Mr. Apenteng's claim, he did not simply loan money to the owner but rather invested it, and he was considered a shareholder. He and the owner signed a business agreement, and the email exchanges suggest that he was looking after hosting, telecom, website, and several technical issues for that business.

[39] One exchange indicates that the grievor was trying to rent office space in Ghana, and in that exchange, he solicits the owner of MacDoff to find and visit possible locations on his behalf. Email exchanges also reveal that in 2011, the business relationship between Mr. Apenteng and MacDoff appeared to deteriorate after he asked to be named a director of the company. The owner reminded him that he was only an investor, which prompted Mr. Apenteng to demand a return of his investment ($5000), plus interest.

[40] In an email dated March 11, 2008, and bearing the CBSA's logo and the grievor's formal title with the respondent, he claims a refund of his initial investment with MacDoff with interest at a rate of 35%, for a total of over $17 000. The report states

that approximately 180 email exchanges took place on MacDoff's business.

[41] Lastly, the review clearly indicated the existence of some type of business relationship between the grievor and Mr. Mbingt, as the emails are about discussions of changes to terms, meetings, and prices, and show Mr. Apenteng expressing his interest in calling cards and other telecom businesses in Gabon. When the email exchanges were made in 2006, Mr. Mbingt was working at the Embassy of Gabon in Ottawa, Ontario, as a representative of the Gabon government.

[42] On April 16, 2012, Mr. Ferland convened Mr. Apenteng to a meeting, to provide him with the opportunity to explain the report's findings, of which Mr. Apenteng was provided a copy. The meeting was set for May 8, 2012, then was rescheduled to the next day.

[43] On May 9, 2012, the grievor's representative informed the respondent's representatives present in the meeting room that the grievor would not attend.

[44] Mr. Ferland wrote to the grievor on May 25, 2012, and asked him to choose between three options for the meeting, which had been rescheduled for June 4, 2012. He could participate in person, by teleconference, or by providing written submissions. On May 30, 2012, Mr. Apenteng replied that he wished to proceed by teleconference, which eventually took place on June 13, 2012. A summary of the discussion that took place during the teleconference was introduced in evidence.

[45] Mr. Apenteng informed the respondent that he refused to answer questions on the report and that he agreed only to provide his concerns with it. In summary, Mr. Apenteng's response was that he had always done his work well and that he had not done anything illegal or criminal. He has the right to seek income and wondered how RosePark Food and the telecom held with the employee of the Gabon embassy could have risked the CBSA's security. He stated that he was not a director of MacDoff and reiterated that he had only loaned money to a friend. He also mentioned that any "tax issues or communications" with his wife and the Canada Revenue Agency, which the report alludes to, were personal and were not to be discussed.

[46] He stated that the only wrong thing he did was to use the CBSA's platform for his communications and that there was nothing illegal about doing so, but he apologized for it. When Mr. Ferland referred to the grievor's earlier statement about 20

emails being involved and the record showing that there had been several hundreds, the grievor responded that MacDoff was in Ghana, that its activities were not related to his work activities, that he did not have access to "production data", and that he never gave the companies at issue any information that he was privy to and that could have benefitted them. Mr. Apenteng asked Mr. Ferland to write to the embassy of Gabon and to the general governor to clarify the investigation and to rebuild his reputation. Neither of these institutions was contacted during the investigation.

[47] In its essential aspects, the grievor's testimony at the hearing mirrored the comments he made in the teleconference. He understood that the restrictions on outside activities applied only to situations in which he would compete with the CBSA; selling phone cards is not one of them. He added that he did not break any rules and that he could not see how he put the CBSA at risk or endangered the security of its information.

[48] It was also established in evidence that over the course of his CBSA career, Mr. Apenteng was informed on several occasions (in 2002, 2004, 2005, 2007, and 2011) of his obligations under the *Code of Conduct* and the Ethics Code with respect to, among other things, declaring outside business activities and not placing himself in a conflict of interest.

III. Summary of the arguments

A. The 30-day suspension

1. For the respondent

[49] Counsel for the respondent submitted that the grounds supporting the 30-day suspension have clearly been established in the evidence. The respondent has proven that the grievor submitted a false medical note to justify his absence from work, which constituted a fraudulent act that could have attracted severe discipline.

[50] Counsel for the respondent submitted that the grievor's explanation that he was unaware of the medical note's contents because it had been placed in a sealed envelope by his spouse completely lacked credibility and was clearly an attempt to put the responsibility on someone else. No reasons were provided that would explain why his wife would have done what he described.

[51] Counsel for the respondent noted that at the May 26 meeting, no mention was made that Mrs. Apenteng was involved. Since it is central to the grievor's culpable intention, such a defence should normally have been offered at the earliest opportunity. Counsel invited me to find that the grievor's explanations were untenable and that he knowingly submitted a falsified medical note to cover his absence, which was very serious misconduct.

[52] Counsel for the respondent cited the following authorities: Gorsky et al., *Evidence and Procedure in Canadian Labour Arbitration*, Carswell, 2014, at page 9-26; *Kelly v. Treasury Board (Correctional Service Canada)*, 2002 PSLRB 74 at paras. 98 to 100; *Beaudry v. Treasury Board (National Defence),* PSSRB File No. 166-02-25448 (19950329), [1995] C.P.S.S.R.B. No. 33 (QL); *Forrester v. Treasury Board (Post Office Department)* (1981), 2 L.A.C. (3rd) 182; and *Canada Post Corp. v. A.P.O.C.* (1990), 12 L.A.C. (4th) 210.

[53] Counsel for the respondent referred to a number of cases showing that a 30-day suspension was a reasonable disciplinary response to such misconduct and that it should not be altered. In fact, the respondent considered termination, which could have been justified in the circumstances. The following cases were cited: *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26; *Kohler Ltd. v. Hytec Employees Assn*, [2007] B.C.C.A.A.A. No. 246 (QL); *Morrow v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 43; *Plank v. Federal Express Canada Ltd.*, [2006] C.L.A.D. No. 510 (QL); *TDS Automotive v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222*, [2002] C.L.A.D. No. 384 (QL); *Canada Post Corp.*; *Sauvageau v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-14870 (19850129), [1985] C.P.S.S.R.B. No. 55 (QL); and *Forrester*.

2. <u>For the grievor</u>

[54] The grievor's representative argued that the 30-day suspension was too harsh, if all the circumstances are considered.

[55] The grievor's representative pointed out that the grievor never denied the lack of authenticity of the medical note he submitted on May 3, 2011. The representative noted that the grievor provided a medical certificate to the respondent even though he was not required to but that he understood that Mr. Pitre required him to.

[56] The grievor's representative invited me to accept Mr. Apenteng's explanation; namely, he was unaware that the medical note that his wife had placed in the envelope and that he had handed to his employer had been falsified. When confronted with that fact, he immediately apologized. He did not want to raise the issue of his spouse's role in this matter.

[57] The grievor's representative further submitted that the severity of the suspension should be judged against the fact that Mr. Apenteng did not know he had submitted a falsified medical note, which reduces the seriousness of his conduct and his level of responsibility. The representative also noted that the grievor apologized immediately and that he accepted responsibility for submitting the false note. Finally, this was the grievor's first offence, and the penalty should be reduced to a more reasonable sanction to reflect the principle that discipline should be progressive and corrective.

B. Indefinite suspension and termination

1. For the respondent

[58] Counsel for the respondent submitted that the grievor agreed with the allegation that he used the CBSA's electronic systems for personal business activities related to MacDoff, RosePark Telecom, and other entities, which constituted a clear violation of the respondent's "Policy on the Use of Electronic Resources". Mr. Apenteng contravened that policy extensively during his working hours, as evidenced by the large volume of email contained in the binders the respondent introduced in evidence, which makes one wonder how much time Mr. Apenteng dedicated to his duties while at the workplace (see *Telus Communications Inc. v. Telecommunications Workers Union* (2005), 143 L.A.C. (4th) 299); and *Ontario Power Generation v. Power Workers' Union*, [2004] O.L.A.A. No. 76 (QL)).

[59] Counsel for the respondent pointed to the amount of emails exchanged over a number of years signed with Mr. Apenteng's electronic signature and under the CBSA logo. This was very prejudicial to the respondent, particularly since one of the companies involved, MacDoff, indicates on its website that it ships goods to Canada, which makes it a client of the CBSA. Adjudicators have treated such situations very harshly; see *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61; and *Reid-Moncrieffe v. Deputy Head (Department of Citizenship and Immigration)*, 2014

PSLRB 25).

[60] Counsel for the respondent further submitted that conflicts of interest are also a matter of perception. The purpose of disclosure required by the *Code of Conduct* and the Ethics Code is to allow the respondent to assess whether an outside business activity is compatible with the employee's duties and responsibilities. It is not for the employee to make that determination.

[61] The evidence is clear that the grievor never filled out any report. He displayed an attitude of arrogance throughout the process and was dismissive of the importance the respondent placed on the need to avoid conflicts of interest, either real or perceived. He was not forthright and truthful in his explanations, and he was evasive. He claimed that his supervisor knew about his activities, but when the Director asked him whether he had side businesses, he replied that he did not. The grievor consistently denied having any business dealings with MacDoff, yet the evidence is clear that he did.

[62] Mr. Apenteng never accepted his responsibilities and to this date still does not see anything problematic with his outside activities, which makes reinstatement inappropriate (see *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; and *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62.

[63] As for the indefinite suspension, counsel for the respondent submitted that it was warranted in the circumstances and that the time the respondent took to inform the grievor of its conclusions was not unreasonable (see *Basra v. Canada (Attorney General)*, 2010 FCA 24; and *Finlay v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 59). Counsel reiterated that it became moot given that the effective date of the termination was the first day of the suspension. That conclusion is supported by *Gravelle*, *Shaver*, and *Brazeau*.

2. <u>For the grievor</u>

[64] The grievor's representative submitted that the indefinite suspension imposed on the grievor on December 22, 2011, was clearly disciplinary, and thus, an adjudicator may review it.

[65] The representative submitted that the respondent had everything in hand at the time of the suspension to make its decision and that indeed it had already decided to terminate Mr. Apenteng. Therefore, the indefinite suspension pending the investigation was unnecessary and punitive.

[66] The representative referred to internal correspondence introduced in evidence in which respondent representatives expressed the view that four months for the investigation was too long and that a reasonable timeline was two months. The respondent knew the facts well before the December 19, 2011, meeting, which makes the period of approximately eight months to inform the grievor of its final decision clearly excessive. Employees should not be left in limbo, without pay, for such long periods.

[67] The grievor's representative submitted that the respondent had no valid reason to suspend the grievor without pay during the investigation, as Mr. Apenteng's presence at work did not constitute a risk to the CBSA and it was not demonstrated that he was unable to perform his duties in such a context (see *Tobin v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 26; and *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70).

[68] The grievor's representative further argued that the respondent did not establish that it had suffered any kind of prejudice as a result of the grievor's activities. He never sought or received a benefit or advantage from his actions, and no one with whom he had dealings ever received a benefit or advantage. The respondent's concerns are based solely on a perceived conflict of interest. The representative acknowledged the importance of the obligations set out in the *Code of Conduct* on conflict of interest, but the grievor clearly had to intent to gain any kind of benefit from his dealings, in relation to his duties for the respondent. The representative cited the following cases, which support imposing a lesser penalty in this case: *Brecht v. Treasury Board (Human Resources Development Canada)*, 2003 PSSRB 36; *Welsh v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 29; *Bellavance v. Treasury Board (Human Resources Development Canada)*, PSSRB File Nos. 166-02-28380 and 28381 (19990205), [1999] C.P.S.S.R.B. No. 21 (QL); *Easton v. Canada Customs and Revenue Agency*, 2001 PSSRB 95; and *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32).

[69] The grievor's representative also submitted that the grievor had not been adequately notified of the December 19, 2011, meeting, which took place immediately upon his return from annual leave (see *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2002 PSSRB 62; *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133; and *Larson v. Treasury Board (Solicitor General Canada - Correctional service)*, 2002 PSSRB 9). This lack of proper notice caused him to be anxious and unprepared, which explains his answers in the first part of the meeting. However, after he had time to reflect, he retracted some of his answers and provided credible and consistent explanations, which were repeated at the hearing of his grievance against the indefinite suspension, at the June 9, 2012, meeting, and at this hearing.

[70] The representative suggested that the respondent was not open to listening to Mr. Apenteng's explanations and that it had made up its mind. The grievor expressed his recognition of culpability and acknowledgement of wrongdoing early in the process and not as a last-minute attempt to bring sympathy, and as such, it should be viewed as a mitigating factor; see *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127 at paras. 209 to 211; and *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43).

[71] The grievor's representative urged me to find that the termination was excessive in the circumstances and that it should be quashed and reduced to a more reasonable penalty.

3. <u>Respondent's reply</u>

[72] Counsel for the respondent replied that the grievor's representative took the references in the internal correspondence to the investigation timeline out of context. The timeline mentioned in that correspondence refers to the length of the investigation, not the indefinite suspension. Thousands of emails had to be gone through, which went as far back as 2002.

[73] Counsel for the respondent also pointed out that part of the time the respondent needed to inform the grievor of its final decision is attributable to his refusal to participate in the meetings between May 9 and July 23, 2012, which were intended to give him the opportunity to respond to the report's findings.

IV. Reasons

A. The 30-day suspension

[74] I am satisfied that the respondent established the grounds in support of the 30-day suspension.

[75] The evidence established without a doubt that Mr. Apenteng submitted a falsified medical note to the respondent to justify his family related absence from work between April 18 and 29, 2011. The only issue is whether he submitted the note knowing it was false and with the intent to deceive the respondent.

[76] It was argued that the grievor was never required to submit such a medical note. It remains that he understood that his superior, Mr. Pitre, required one from him. In other words, I am satisfied that Mr. Apenteng acted on the assumption that the certificate would satisfy the respondent's need for a further explanation of the *bona fides* of his absence.

[77] The grievor's lack of knowledge that the note was false rested on his testimony that his wife had placed the falsified note in an envelope and had sealed it, such that he did not see it before he handed it to Mr. Pitre's assistant.

[78] I find that the grievor's account of events completely lacks credibility. That explanation was not offered when the respondent met with him on May 26, 2011, and one would think that a "defence" so fundamental to the grievor's intention to deceive should have been raised at the very first opportunity. Furthermore, the medical note was placed in a CBSA envelope. The grievor's explanations would imply that he had a supply of those envelopes and that his wife had used one for the note.

[79] If the grievor is to be believed, a number of questions remain unanswered. Why would his wife have taken the initiative of falsifying a medical note reflecting his precise dates of absence, without his knowledge or consent and without telling him about it? Why did she seal the envelope before giving it to him? Why did he not raise this explanation at the very first opportunity?

[80] The grievor's spouse did not testify. In my view, her corroboration of this rather unlikely scenario was required before I could give it any weight.

[81] When determining the credibility of the grievor's explanation, I referred to the following test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at page 357 of the judgement: "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

[82] The scenario the grievor presented defies any reasonable expectation of normal human behaviour in the circumstances at hand and simply lacks credibility. I am more inclined to prefer the scenario in which he knowingly placed the falsified note in a CBSA envelope upon his return to work on May 3, 2011, and that he, or his spouse acting on his behalf, used the genuine medical note dated May 2, 2011, as a "model" to create the false document. That said, I find that the grievor was aware of its contents and that he deliberately submitted a fraudulent medical note for the purpose of satisfying what he believed was the respondent's requirement to justify his absence so that he would not be subject to a sanction for the unauthorized absence.

[83] I find this very serious misconduct deserving of a significant disciplinary response. The respondent considered the fact that Mr. Apenteng had a clean disciplinary record and was apologetic and remorseful when confronted with the allegation that he had submitted a falsified medical note. He was not so forthright at the hearing.

[84] Since I find that the explanation that he offered in his testimony was simply untenable in the circumstances and that it was designed to help him escape responsibility for his actions, I have no reason to interfere with the 30-day suspension. I consider that it fell within the range of acceptable disciplinary responses to the grievor's misconduct in the circumstances.

[85] It is my conclusion that the 30-day suspension is well founded. Therefore, the grievance does not succeed.

B. Indefinite suspension and termination

1. Indefinite suspension

[86] The grievor challenged the suspension without pay pending an investigation, which the respondent imposed on him on December 22, 2011, on the basis that it was

not justified because his presence in the workplace did not present a risk to the respondent. He also submitted that the length of the suspension was excessive and unreasonable.

[87] The respondent responded that the suspension was administrative, that it was not disciplinary, that it was warranted in the circumstances, and that in any event, it is moot because the grievor was terminated effective the first day of the suspension.

[88] Firstly, I will first deal with the issue of my jurisdiction over the grievance on the suspension without pay imposed on the grievor on December 22, 2011.

[89] Paragraph 209(1)(b) of the *PSLRA* provides that an employee may refer to adjudication a grievance related to "… a disciplinary action resulting in termination, demotion, suspension or financial penalty …".

[90] I am of the view that the indefinite suspension has a disciplinary character and that it falls within the purview of s. 209(1)(b) of the *PSLRA*, which allows me to review the suspension at adjudication. The respondent was investigating suspected misconduct by the grievor with respect to using its email system to conduct private business and to possible violations of the conflict of interest provisions of the *Code of Conduct* and the Ethics Code. The respondent had in hand *prima facia* evidence of the grievor engaging in those activities and of a problem there.

[91] In applying the principles in *Basra v. Canada (Attorney General)*, 2010 FCA 24, the purpose of the investigation was to obtain more information on the nature and extent of the outside activities that emails taken from the grievor's account had revealed, which had caused the respondent concern. In such a context, the suspension pending a further investigation clearly had disciplinary overtones. Therefore, I am of the view that the grievance against the indefinite suspension is adjudicable.

[92] Secondly, I find that the respondent had just cause to suspend the grievor without pay pending its investigation into his conduct. I am satisfied that the respondent had enough of a legitimate concern about his activities to suspend him pending a more in-depth examination of his private business dealings while he worked for the CBSA.

[93] The evidence established that the respondent found out that the grievor was named as an administrator of RosePark Telecom and that he had not declared this business interest to the respondent. He was also involved in MacDoff, in a way that established that he was a shareholder, in spite of his denial that he was involved in such a manner. His explanation that the business belonged to a friend he had lent money to and with whom he had no business arrangements was highly questionable and hardly credible, in light of some of the emails retrieved from his account.

[94] I agree with Mr. Ferland that the grievor's responses raised a serious trust issue. His status as a CBSA employee gave him access to a considerable amount of resources available only to employees, including AMPS, and management's concern with his continued presence in the workplace was well founded, in my view.

[95] I am of the view that the respondent was rightfully concerned by these facts, particularly the exchange in which Mr. Apenteng sought to recover his investment with MacDoff in an email that had his signature block with his title and the CBSA's logo. It is reasonable to believe that the email could have been seen as intimidating and that it could have misled the recipient into believing that the CBSA was after him in relation to MacDoff's freight-forwarding activities.

[96] The respondent also established that it had asked Mr. Apenteng about any side business activities as recently as May 26, 2011, and that he had clearly responded that he had none. The evidence the respondent gathered showed that he had several business interests and that some could have conflicted with his CBSA employment, namely, MacDoff's freight-forwarding activities.

[97] I also find that Mr. Apenteng's answers to the respondent's queries on December 19, 2011, rightfully caused the respondent concerns about his side businesses. He was anything but forthright in the first part of the meeting. The fact that he came in cold to the meeting after an annual leave does not excuse his lack of cooperation and frankness. In that context, the respondent was justified in doubting the veracity of the explanations he provided in the second part of the meeting and with determining that it needed to carry out a more in-depth analysis of his email account to fully measure the extent of his outside business activities.

[98] Finally, I consider the length of the suspension (approximately six months) reasonable in the circumstances. The investigation team reviewed a considerable number of emails exchanged over the course of nearly 10 years as well as peripheral research on background information relating to companies and individuals whose names had come up in these exchanges. This time frame is explained in part by the difficulties setting up a meeting with the grievor to obtain his side of the story, which were attributable to him. Consequently, the indefinite suspension was justified and reasonable in the circumstances.

[99] In any event, if I have erred in my assessment, I agree with the argument that the grievance against the indefinite suspension is moot, and I subscribe to the adjudicator's comments in *Gravelle*. The grievor's termination was made retroactive to December 22, 2011, the first day of the indefinite suspension. The suspension letter clearly mentions that in the event that the allegations against the grievor were unfounded, he would be reintegrated and compensated accordingly for the period of the suspension. At paragraphs 101 and 102 of *Gravelle*, the adjudicator states as follows:

> *[101] Even though the employer's approach regarding the February 8, 2011 suspension is questionable, the jurisprudence cited earlier leads me to conclude that the suspension grievance is moot because the termination was effective retroactively to the first day of the suspension. In acting the way it did, the employer rendered the suspension pending the investigation and the termination into a unique and single disciplinary measure. As the adjudicator in* Shaver *stated, it is opened [sic] to me to annul the suspension together with the termination in the event that I conclude that there was no just cause for discipline against the grievor. I would then have the ability to order remedies retroactively to February 8, 2011. In that sense, contrary to what the grievor argued, he is not deprived of his right to argue the suspension grievance that he filed on February 8, 2011.*
>
> *[102] I found no federal public service jurisprudence supporting an argument that, in a case like this, the employer cannot backdate the termination. However, that does not mean that an adjudicator is without jurisdiction to examine such a suspension. In fact, adjudicators have that power since the suspension period becomes part of the termination.*
>
> [Emphasis added]

[100] Other adjudicators reached the same conclusion on that issue in the following decisions: *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62; *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; and *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107.

[101] For the above reasons, the grievance against the indefinite suspension is dismissed.

2. Termination

[102] I must now determine whether the grievor committed the alleged misconduct and if so, assess the appropriateness of the penalty.

[103] The first ground invoked by the respondent was that the grievor violated its "Policy on the Use of Electronic Resources", both in terms of the volume and nature of the personal business dealings he conducted.

[104] I find that the respondent's evidence established this ground. There is no question that Mr. Apenteng used its email system on a regular and frequent basis to carry out personal business dealings that were unrelated to performing his duties. He did not and could not contest the substantial amount of evidence adduced at the hearing that established that fact.

[105] The respondent introduced several versions of its "Policy on the Use of Electronic Resources" in evidence. All versions of it include the following statements:

> ***9. Acceptable Use of Electronic Resources***
>
> *Electronic resources shall be used for official business to carry out the mandate and mission of CBSA. Authorized individuals must use only Agency-authorized applications, hardware and software installed by CBSA/CRA authorized IT staff.*
>
> *CBSA's electronic resources are to be used for approved purposes, namely:*
>
> *a) Conducting government business, such as:*
>
> *Communicating and sharing information with colleagues, other government departments and the private sector in the performance of CBSA functions and activities;*

> *Conducting research for Agency purposes;*
>
> *Gathering information relevant to a user's duties;*
>
> *Developing expertise in using electronic resources effectively and efficiently; and*
>
> *Undertaking professional development activities that are job related.*
>
> *b) Limited personal use (during lunch break, periods of rest or before or after work as specified in the CBSA Code of Conduct), such as:*
>
> *Communicating with family, friends and other persons for non-official purposes;*
>
> *Accessing acceptable news and other information sources that are not prohibited or restricted by law or policy;*
>
> *Conducting routine personal banking transactions; and*
>
> *Any union activity or business specifically pre-authorized by your manager.*
>
> …
>
> ***15. Disciplinary Measures***
>
> …
>
> *CBSA will take disciplinary measures in cases of unlawful, criminal or unacceptable use of its electronic resources. Disciplinary measures will be commensurate with the seriousness and circumstances of the incident.*
>
> …
>
> ***Annex C***
>
> ***Unacceptable Activity that is Not Necessarily Unlawful but that Violates Treasury Board and/or CBSA Policies***
>
> *(Non-Exhaustive List of Examples)*
>
> …
>
> ***f. Using the government's electronic networks for private business, personal gain or political activity***
>
> …
>
> [Emphasis in the original]

[106] The grievor did not deny being aware of the obligations set out in that policy. The respondent's evidence shows that he used the CBSA's electronic resources to conduct private business activities consistently over a long period, which can hardly be characterized as occasional. That violated the respondent's established rules, and it

clearly constituted misconduct that could have attracted discipline.

[107] The second ground the respondent invoked to justify the grievor's termination was that he failed to report business dealings that could constitute a conflict of interest. I am also of the view that this ground has been established in evidence. He failed to report his several business activities over the course of a number of years during his CBSA employment.

[108] The provisions of the Ethics Code had been brought to the grievor's attention many times between 2004 and 2011. As recently as May 26, 2011, his director reminded him of his obligations under it. In fact, Mr. Pitre's evidence was that he specifically asked the grievor if he had any side businesses, to which he replied that he did not. His contention that he had none was clearly contradicted by the evidence presented at the hearing.

[109] The Ethics Code sets out as follows public servants' obligation about their involvement in personal activities that may be seen to conflict with their public service responsibilities:

> …
>
> ***Objectives of this Code***
>
> *The* Values and Ethics Code for the Public Service *sets forth the values and ethics of public service to guide and support public servants in all their professional activities. It will serve to maintain and enhance public confidence in the integrity of the Public Service. The Code will also serve to strengthen respect for, and appreciation of, the role played by the Public Service within Canadian democracy.*
>
> …
>
> ***Chapter 2: Conflict of Interest Measures***
>
> …
>
> ***Methods of Compliance***
>
> *For a public servant to comply with these measures, it will usually be sufficient to submit a Confidential Report to the Deputy Head. The Confidential Report outlines the public servant's ownership of assets, receipt of gifts, hospitality or other benefits, or participation in any outside employment or activities that could give rise to a conflict of interest.*
>
> …

> ***Outside Employment or Activities***
>
> *Public servants may engage in employment outside the Public Service and take part in outside activities unless the employment or activities are likely to give rise to a conflict of interest or in any way undermine the neutrality of the Public Service.*
>
> *Where outside employment or activities might subject public servants to demands incompatible with their official duties, or cast doubt on their ability to perform their duties in a completely objective manner, they shall submit a Confidential Report to their Deputy Head. The Deputy Head may require that the outside activities be curtailed, modified or terminated if it is determined that real, apparent or potential conflict of interest exists.*
>
> …
>
> [Emphasis added]

[110] I am of the view that the activities that the grievor engaged in could have given rise to a potential conflict of interest and ought to have been disclosed. The purpose of disclosure is to trigger a discussion with the respondent as to whether the activities in question are acceptable with respect to the employee's duties and responsibilities for the respondent. It is not for employees to decide unilaterally that their personal activities do not place them in a conflict of interest.

[111] The extent of Mr. Apenteng's involvement in RosePark Telecom, as demonstrated in the evidence, was such that the activity should have been disclosed. As the grievor claimed, the nature of that business, on its face, might not have conflicted with his duties. However, the number of emails and the amount of time he spent on RosePark business dealings raise serious questions as to a possible conflict between his level of commitment to his work and looking after his private business interests during working hours.

[112] Lastly, I am also of the view that the grievor should have reported his dealings with the representative of the Gabon government at the Embassy of Gabon in Ottawa about opportunities in that country for his telecom business.

[113] In all these events, the respondent had a legitimate concern that it be made aware of the grievor's activities so that at the very least, it would have an opportunity to engage in discussions as to the propriety of such activities and whether they had the potential of placing Mr. Apenteng in a real or perceived conflict of interest.

[114] Finally, the respondent alleged that the grievor misled it with respect to the details of his business activities. I find that this ground was also established in the evidence adduced at the hearing. The evidence shows that he was not forthcoming on any of the issues that the respondent raised when he was confronted with the facts.

[115] In the first part of the December 22, 2011, meeting, the grievor was evasive and uncooperative. He denied knowing of MacDoff and denied having any role with RosePark Telecom, claiming that it was his wife's company, and he frequently answered the respondent's direct and simple questions with, "I don't remember."

[116] In the second part of the meeting, his memory seemed to return, but I find that he clearly minimized the extent and nature of his business activities, as I recounted earlier. For example, he persisted in denying any agreement with MacDoff, maintaining that he simply lent money to the owner, who was a friend, and that he attempted to get it back, and nothing more. He admitted that his name appears as one of the two directors of RosePark Telecom but stated that it was his wife's company, that she needed a second name for incorporation purposes, and that, although he stated that he "helps her at times", he had no role in its operations. The trail of emails retrieved from his account proved otherwise.

[117] At the June 13, 2012, meeting, the evidence the respondent adduced established that Mr. Apenteng was confrontational and dismissive of its concerns with his business activities. He notified the respondent that he would not answer any questions and that he simply wished to make comments on the investigation report's findings.

[118] He first apologized for using the CBSA's electronic systems in his business dealings. However, Mr. Ferland pointed out that although the grievor had mentioned in an earlier conversation with him that approximately 20 emails were involved, the record shows that hundreds were involved over the course of many years. He asked the respondent to contact the Embassy of Gabon to rebuild his reputation that according to him, had been tarnished by the respondent's investigation.

[119] Clearly, the grievor has not been forthright on the extent and nature of his personal business dealings. Other than offering an apology for having used the respondent's email system to conduct these activities, he showed no understanding or recognition that he had done anything wrong by not disclosing his personal business dealings with the companies at issue. It was no answer for him to state that he did not

commit any criminal act and that his business dealings did not conflict with his duties and therefore did not concern the CBSA. I find that overall, he persisted in his previous explanations and did not show any credible signs of contrition.

[120] The grievor's representative submitted that the respondent has never proven that the grievor had placed himself in a real conflict of interest in which he or someone with whom he had a business relationship had received a benefit of advantage from the situation or that he had accessed or disclosed privileged information for the benefit of his businesses. I do not disagree with this contention, other than to point out that Mr. Apenteng certainly benefited from a regular and substantial use of the respondent's email system during working hours to conduct his personal business dealings. However, I do not agree that it reduces the grievor's responsibility for his conduct. Had he gained a financial or other benefit from his actions, this case would clearly enter the realm of criminal misconduct. I note that, considering the Values and Ethics Code for the Public Service, the grievor's neutrality was seriously compromised by these activities.

[121] In light of all that, I am of the view that the respondent established just cause to terminate the grievor's employment. The extent and nature of his business activities and his failure to disclose them in compliance with the Ethics Code shows a lack of appreciation of the importance to maintain the utmost perception of integrity of the public service and a complete disregard for his responsibilities as a public servant. Those obligations were brought to his attention several times over the course of his career with the respondent. He had no excuse not to comply.

[122] The respondent took into account the grievor's disciplinary record when determining an appropriate penalty in the circumstances, and I am so authorized as well. His record is blemished since he served a 30-day suspension for submitting a false medical note to the respondent to justify a 10-day absence from work a few months before the events occurred that led to his suspension. I determined that that discipline was warranted.

[123] I have no reason to believe that the grievor has learned from these events, and I consider his conduct serious and injurious to the respondent. I see little evidence of a potential for rehabilitation. Honesty and trust are a cornerstone of a viable employer-employee relationship, and I see no ground upon which I would disagree with the

employer that, in the circumstances, the bond of trust with Mr. Apenteng has been irreparably broken.

[124] Accordingly, Mr. Apenteng's grievance against his termination of employment is denied.

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

(The Order appears on the next page)

V. Order

[126] The grievance against the 30-day suspension is denied.

[127] The grievances against the indefinite suspension and the termination of employment are denied.

May 26, 2017.

Michael F. McNamara,
a panel of the Public Service Labour Relations and Employment Board