

**Date:** 20170829

**File:** 566-02-10103

**Citation:** 2017 FPSLREB 23

*Federal Public Sector  
Labour Relations and  
Employment Board Act  
and Federal Public Sector  
Labour Relations Act*



Before a panel of the  
Federal Public Sector  
Labour Relations and  
Employment Board

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BETWEEN

**TEVIN OLIVIER-JOB**

Grievor

and

**DEPUTY HEAD  
(Canada Border Services Agency)**

Respondent

Indexed as

*Olivier-Job v. Deputy Head (Canada Border Services Agency)*

In the matter of an individual grievance referred to adjudication

**Before:** John G. Jaworski, a panel of the Federal Public Sector Labour Relations and  
Employment Board

**For the Grievor:** Michael Fisher, counsel

**For the Respondent:** Karen Clifford, counsel

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Heard at Winnipeg, Manitoba,  
July 28 to 31, 2015, and January 19 to 22, 2016.

## REASONS FOR DECISION

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### **I. Individual grievance referred to adjudication**

[1] Tevin Olivier-Job (“the grievor”) worked for the Canada Border Services Agency (CBSA or “the employer”) as an inland enforcement officer (IEO) in the General Technical Group at the FB-03 group and level. At the relevant time, his position was in the CBSA’s Inland Enforcement Division (IED), which was part of its Winnipeg and Northwest Territories (NWT) District.

[2] On September 27, 2013, the grievor was terminated from his employment, effective that day. On September 30, 2013, a grievance was signed and submitted on his behalf, which stated as follows:

*Grievance details:*

*Tevin Olivier-Job was unjustly and without due cause was terminated by CBSA on or about September 27, 2013.*

*Corrective action requested:*

*Full reinstatement with no loss of wages, pension, seniority and all entitled benefits.*

[3] On August 27, 2014, the grievance was denied at the final level of the grievance process, and on October 3, 2014, it was referred to the former Public Service Labour Relations Board (PSLRB) for adjudication, under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*).

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former 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.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9), received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board and the *PSLRA* to, *Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

respectively, the Federal Public Service Labour Relations and Employment Board (“the Board”) and the *Federal Public Sector Labour Relations Act* (“the Act”).

[6] This matter was scheduled to be heard in Winnipeg, Manitoba, from July 28 to 31, 2015.

[7] On July 17, 2015, the grievor filed with the Board a Form 24 - “Notice to the Canadian Human Rights Commission” (CHRC) under what were then named the *Public Service Labour Relations Board Regulations* (SOR/2005-79; “the *PSLRB Regulations*”), alleging that the CBSA had discriminated against him on the basis of his race and ethnic origin. As corrective action, in addition to the relief already sought in his grievance, he sought compensation for pain and suffering.

[8] The hearing started on July 28 and proceeded until July 31, 2015. At the outset of the hearing, the employer objected to the grievor raising the discrimination allegation. I determined that I would hear all the evidence and representations and that I would rule on the objection in this decision.

[9] On August 4, 2015, the CHRC filed a Form 25 response to the Board under the *PSLRB Regulations*, stating that it did not intend to make submissions on the issues set out in the grievor’s Form 24.

[10] The hearing concluded after another sitting from January 19 to 22, 2016.

## **II. Document production request**

[11] On July 15, 2015, the grievor requested the production of the following documents:

- copies of all fleet vehicle trip logs from January 2010 to March 2014;
- copies of each IEO’s time and activity records from January 2010 to March 2014; and
- copies of all completed duty officer (“D.O.”) call-out sheets (“call-out sheets”) from January 2010 to March 2014.

[12] The CBSA refused to produce these documents when the grievor requested them, and in response to his request to the Board, it objected to producing them. I denied his request on July 17, 2015. The parties' submissions on this issue and my reasons are set out later in this decision.

### **III. Summary of the evidence**

[13] By letter dated September 27, 2013, Lauren Delgaty, the CBSA's regional director general for its Prairie Region, terminated the grievor's employment, effective that day. The relevant portions of the letter state as follows:

*On September 09, 2013 you were provided with a copy of the final report to review prior to the pre-disciplinary hearing. At the pre-disciplinary hearing on September 16, 2013 you were given the opportunity to comment on the contents of the report and present any clarifications or extenuating circumstances that you feel have not been addressed in the course of the investigation.*

*Based on the report and the evidence gathered, you were found to have been involved in several acts of misconduct. On September 08, 2012 you received a photo radar ticket for travelling 65km/h in a zone where the maximum speed is 50km/h while using a CBSA fleet vehicle. After receiving the ticket you attempted to use your position as an Inland Enforcement Officer in order to have the fine reduced where there was no justification to do so and you failed to report the ticket to management in a timely manner. In addition, you created two documents on CBSA letterhead and used the CBSA computer equipment in an attempt to have the fine reduced when you had no authority to do so.*

*During the investigation, you claimed to have had no recollection of where you were travelling in the fleet vehicle on September 08, 2012. Later that same day you purchased \$85.47 worth of fuel for the CBSA fleet vehicle at a service station in Dugald, Manitoba. When asked by the investigator about your purpose for travelling to Dugald, you were unable to recall why you were there and did not provide any evidence to support that you were there for a business purpose. In addition, you could not recall why you drove 215 kilometers in the CBSA fleet vehicle on September 08, 2012 and why you drove 152 kilometers on September 01, 2012. During the pre-disciplinary meeting, you recalled that you were likely in the Dugald area for a flag football game.*

*Considering this, the investigation concluded that you were using the vehicle for personal use. You also admitted to having on multiple occasions, unauthorized passengers in*

*the vehicle who were not CBSA employees. I find this to be very serious as it exposed the CBSA to unnecessary risk and liability had there been an accident.*

*I have carefully reviewed all facts and circumstances, based on the available information. I have concluded that you violated the CBSA's Code of Conduct and the Treasury Board Secretariat Guide to Fleet Management.*

*This is the third incident of misconduct in less than three years where you have abused the trust placed in you concerning the care, use and control of government assets and where you have behaved in a manner irreconcilable with the nature of your position.*

*Considering your active disciplinary record and once again your failure to demonstrate any remorse and/or recognize the seriousness of your actions, you have permanently undermined your credibility, and have caused serious and permanent doubt as to any reliance that can be placed on you. As such, you have irreparably and permanently breached the trust necessary for your continued employment. Accordingly, under the authority granted to me by the CBSA, I am terminating your employment effective the close of business on **Friday, September 27, 2013** for disciplinary reasons under section 12(1)(c) of the Financial Administration Act.*

*In determining an appropriate disciplinary measure, I have taken into account your actions and all mitigating and aggravating factors including, but not limited to the seriousness of the misconduct, the number of violations, your years of service with the federal government, your prior disciplinary record, your failure to demonstrate remorse, that you were not forthright during the investigation, your failure to take responsibility for your actions, and the length of the investigation.*

...

[Sic throughout]

[Emphasis in the original]

[14] The grievor was born in Trinidad and Tobago. He identified himself as black and stated that he was brought up in a strong Caribbean culture. He has a bachelor's degree in sociology and French from Memorial University in St. John's, Newfoundland. He joined the CBSA's predecessor in the summer of 2000 as a student immigration officer working at the Winnipeg airport, a position he held while continuing

his studies.

[15] On August 19, 2005, the grievor was offered a one-year term position with the CBSA as a citizenship and immigration officer classified at the PM-03 group and level in the CBSA's Winnipeg and NWT District at the Winnipeg airport, which he accepted. His term position was extended several times, until March 31, 2007. On March 22, 2007 his position became a border services officer (BSO) position. His term was extended again, until June 29, 2007.

[16] The grievor's BSO term position was extended until September 17, 2007, when he was made an indeterminate BSO classified at the FB-03 group and level at the Winnipeg airport. He remained in that position until December 14, 2009, when he was offered a full-time indeterminate position as an IEO with the IED.

[17] When the grievor was offered his term positions, his letters of offer stipulated that as part of the terms and conditions of his employment, he was bound by the *Values and Ethics Code for the Public Service* ("the V&E Code"), which he accepted.

[18] When the grievor was offered his full-time indeterminate position with the CBSA, his letter of offer, dated September 17, 2007, stipulated that as a term and condition of his employment, he would continue to be bound by the V&E Code and the CBSA's "Code of Conduct" ("the CBSA Code"). The letter of offer provided links to both codes.

[19] In accepting the offer, the grievor acknowledged that he was bound by both codes. When he was offered the full-time indeterminate position with the IED, his letter of offer, dated December 14, 2009, stipulated that as a term and condition of his employment, he would continue to be bound by both codes. That letter also provided him with links to both codes. He acknowledged that he was bound by them both.

[20] Introduced into evidence were copies of the CBSA Code that was in force effective September 5, 2012 ("the 2012 Code"), and the CBSA Code that was in effect before September 5, 2012 ("the pre-2012 Code").

[21] The sections in the pre-2012 Code relevant to the matters in this case state as follows:

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**Expected Standards of Conduct**

...

**b) Care and Use of Government Property and Valuables**

*You must not use property, equipment, materials, vehicles or facilities purchased, used or leased by the CBSA for other than official purposes, unless you have received proper management authorization. This includes, but is not restricted to, vehicles . . .*

*You cannot transport anyone in a government-owned or leased vehicle, aircraft, or vessel unless that person's presence is connected with an official assignment, authorized by management, or it is in the best interests of the CBSA.*

...

**Badges, official identification and officer or office stamps**

...

*You are prohibited from using your job title, badge or any other official identification to obtain or appear to obtain any privilege, favour for yourself or others, or to do anything that is illegal, improper or against the best interests of the CBSA. Such infractions will be considered serious and will result in disciplinary action.*

...

**(m) Off-duty Conduct****General**

...

*. . . You must report a traffic violation or highway code ticket received during the use of a government-owned or leased vehicle.*

...

[22] The portions of the 2012 Code that are relevant to these proceedings are as follows:

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## **Chapter 1: Our Values and Expected Standards of Conduct**

...

### **A. Our Values**

...

#### **Professionalism**

...

#### **Our Values in Action**

We use resources responsibly by:

- *ensuring the use of CBSA's resources is efficient, effective, approved and accounted for;*
- *avoiding waste and misuse of the Agency's money, property and resources;*

...

### **B. Accountability and Professional Conduct**

...

*We recognize that CBSA's policies, standards, procedures and practices provide the boundaries within which we demonstrate professional conduct with respect and integrity. Additionally, we ensure that our conduct does not violate the Criminal Code, the CBSA Act or any of the laws, rules and regulations administered by the Agency. As professionals, we protect the Agency's reputation and its internal and external stakeholder and law enforcement partner relationships in our decisions and actions. **We understand that an action or inaction on our part that is not in keeping with these laws, rules and regulations, Codes, and the Policy is considered misconduct and will entail CBSA disciplinary measures up to and including termination of employment.***

...

### **D. Expected Standards of Conduct**

...

## **4. Private, Off-Duty Conduct and Outside Activities**

...



**CAUTION:** We are not permitted to do anything illegal or contrary to the Criminal Code, the CBSA Act, or any legislation or regulation enforced by the Agency. **In the unlikely event of being arrested, detained or charged** - in Canada or outside Canada - with a violation of laws or regulations, we will **immediately report this incident to our manager**. This includes minor incidents, such as a traffic violation or highway code violation ticket received while using government-owned or leased vehicle. . . .

. . .

## **7. Care and Use of Government Property and Assets**

Our CBSA value of **Professionalism** encompasses our effective and efficient use of the Agency's property and assets when conducting official duties. As professionals we demonstrate our CBSA value of **Integrity** by using government property and assets only in our official duties and never for personal gain or use.

We seek authorization from management before we use property, equipment, materials, vehicles or facilities purchased, used or leased by the Agency for reasons other than official purposes. This includes, but is not restricted to: vehicles . . .

. . .

**Clarification:** When on travel status, it is assumed that Agency owned or leased vehicles will be used for reasonable personal purposes e.g. shopping, dining out, evening entertainment.

. . .

### **7.1 Badges, Official Identification and Officer or Office Stamps**

. . .

We do not use our job title, official identification, badge or any other official document (whether on or off-duty, personally or professionally, or when engaging in social media activities) for a purpose that is illegal, improper or against the best interests of the CBSA.

. . .

Examples of misconduct:

. . .

- *Using our official title to obtain a personal discount in an online store.*
- *Using a government vehicle to move privately-owned furniture.*

...

[Emphasis in the original]

[23] Introduced into evidence was a copy of the V&E Code, in effect as of April 2, 2012, the relevant portions of which are as follows:

...

### ***Objectives***

*This Code outlines the values and expected behaviours that guide public servants in all activities related to their professional duties. By committing to these values and adhering to the expected behaviours, public servants strengthen the ethical culture of the public sector and contribute to public confidence in the integrity of all public institutions.*

...

### ***Integrity***

*Integrity is the cornerstone of good governance and democracy. By upholding the highest ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector.*

...

### ***Expected Behaviours***

*Federal public servants are expected to conduct themselves in accordance with the values of the public sector and these expected behaviours.*

...

### ***3. Integrity***

- *Public servants shall serve the public interest by:*
- *3.1 Acting at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting*

*within the law.*

- *3.2 Never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.*
- *3.3 Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest.*
- *3.4 Acting in such a way as to maintain their employer's trust.*

...

### ***Application***

*Acceptance of these values and adherence to the expected behaviours is a condition of employment for every public servant in the federal public sector, regardless of their level or position. A breach of these values or behaviours may result in disciplinary measures being taken, up to and including termination of employment.*

...

### ***Appendix***

#### ***Duties and Obligations***

##### ***Public Servants***

*Public Servants are expected to abide by this Code and demonstrate the values of the public sector in their actions and behaviour. Furthermore, public servants must also adhere to the behavioural expectations set out in their respective organizational codes of conduct. If a public servant does not abide by these values and expectations, he or she may be subject to administrative or disciplinary measures up to and including termination of employment.*

...

[24] The grievor confirmed in cross-examination that he was bound by the V&E Code and the CBSA's Codes.

[25] On May 22, 2007, the grievor signed a solemn affirmation that stated as follows:

*I solemnly affirm that I will faithfully and honestly fulfil the duties that devolve on me by reason of my employment in the public service of Canada and that I will not, without due*

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*authority, disclose or make known any matter that comes to my knowledge by reason of such employment.*

[26] IEOs are also governed by collective agreements entered into between the Treasury Board and the Public Service Alliance of Canada (PSAC) for the Border Services Group (all employees). The one relevant to this decision was signed on January 29, 2009, and expired on June 20, 2011 (“the collective agreement”).

[27] At the time of the hearing and since October of 2012, Allan Johns was the regional program manager for the CBSA’s Enforcement and Intelligence Operations Division in Saskatchewan. Between October of 2008 and September of 2012, he was the manager of regional programs, IED, in Winnipeg. He joined the federal public service in 1990 and has been with either Citizenship and Immigration Canada (CIC) or the CBSA since 1993.

[28] All IEOs in the IED’s Winnipeg office reported to the manager of regional programs, IED, who in turn reported to the director of regional programs for the CBSA’s Prairie Region, who was, until February of 2013, Kim Fussey. In February of 2013, Ms. Fussey was replaced by Andrew Klatt.

[29] Mr. Johns testified that when he was away, someone was assigned to act in his place. Three IEOs had been trained and had the appropriate delegations.

[30] Mr. Johns left his position with the IED in Winnipeg on September 9, 2012. The evidence disclosed that either Janet Nortey or Patrick McEvoy replaced him in an acting capacity between September 9 and November 10, 2012, at which point Doug Tisdale replaced him permanently.

[31] At the time he testified, Mr. Tisdale was the manager of regional programs for the CBSA in its Winnipeg and NWT District. From November of 2012 to June of 2015, he was with the IED in Winnipeg. At the time he gave his evidence, he had 24 years of service with the federal public service.

[32] The IEO work description was entered into evidence. IEOs are peace officers; they have delegated powers under the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27; *IRPA*). Their duties include carrying out investigations, which can lead to the arrest, detention, and potential removal of persons from Canada. The investigations can be “desk investigations”, which are largely carried out in the

office using administrative resources such as computers, phones, data services, the Internet, and fax machines, or they can be “tactical investigations”, which require the IEOs to leave the office and conduct investigations at residences, at business locations, and in public areas and to visit police departments.

[33] Whether carrying out a desk or a tactical investigation or a combination of the two, the IEO collects evidence and effects arrests under the appropriate legislation and may be required to transport an individual either to or from a detention centre outside the country. IEOs work closely with local, regional, national, and foreign law-enforcement agencies.

[34] The evidence disclosed that while they have a desk and an office location, IEOs are often required to work independently and are unsupervised. Mr. Johns stated that trust is crucial with respect to the working relationship between managers and the IEOs given the work that they do. They often have to do the following:

- take custody of a foreign national;
- interact with foreign law-enforcement agencies; and
- interact with airline personnel while transporting foreign nationals out of Canada.

[35] Mr. Johns testified that while managers assign work and files to IEOs and review their work, the IEOs are often away and on their own and are reporting in to their managers.

[36] The IED’s offices are co-located with CIC’s offices on the fourth floor of a building in downtown Winnipeg in an area known as the Forks, on Forks Market Road. There is no public access to the offices; however, CIC manages a public waiting area there. Employees are issued a swipe card so that they can enter. The office was described as “L”-shaped and of an open concept in which the IEOs have their desks and office area. There are two detention cells, an enclosed meeting room, and an enclosed manager’s office.

[37] Mr. Johns stated that he had an open-door policy under which IEOs were free to come in to discuss work and cases, and they could update him on the status of their cases. He said that a whiteboard in his office had all the active cases listed on it.

When IEOs left the premises, by default, they had to pass by his office. All the IEOs had computers at their assigned desks, and as the manager, he carried a Blackberry.

[38] Ms. Fussey's office, which became Mr. Klatt's, was located one floor below the IED's offices.

[39] The IED is equipped with two specially equipped vehicles ("the fleet vehicles") that are designed and equipped to safely transport a detainee. Each is similar to a police vehicle. The front seat area is like a mobile office and contains communications equipment and documentation that an IEO may need while away from the office. The rear seat area is caged to ensure that a detainee cannot escape.

[40] The vehicles do not carry computers; they are unmarked and are not identifiable as CBSA vehicles. They could be used for surveillance at a residence, place of business, or other public location, as well as for transporting a detainee to or from detention or to the United States.

[41] The IED's normal working hours are from 8:00 a.m. to 8:00 p.m., during which the fleet vehicles are available for use if and when a need arises. After 8:00 p.m. and before 8:00 a.m., a fleet vehicle is assigned to an IEO who is identified as the D.O. For seven consecutive days, the D.O. is responsible for all after-hours calls that may come in to the IED. The D.O. duty is rotated through the IEOs in the office. The changeover day is Tuesday of each week, on which a meeting is held that the outgoing D.O., the incoming D.O., and (at the relevant time) Mr. Johns attend. At the meeting, Mr. Johns briefs the D.O. activities.

[42] A log was kept for the fleet vehicles. A typical travel log was entered into evidence. In addition to identifying the vehicle and the time frame covered, the log required the D.O. responsible for the vehicle to record the following information for each day:

- who drove the vehicle;
- whether it carried any passengers;
- the start and end mileage;
- the total kilometres travelled;

- where the vehicle went; and
- costs or purchases associated with using it (gas, oil, etc.).

[43] A code (identified as being the numbers 1 through 8) was to be used in the log to identify the type of trip or use for the vehicle. Mr. Johns testified that he instructed the IEOs to use code “8” in the log, which meant “other”. He stated that he did so because it was vague and did not actually identify a location or whether the vehicle was being used for surveillance or detainee transport. According to Mr. Johns, inputting such identifying information could have impinged privacy rights as the logs could have been subject to an access to information request and then disclosure. He also stated that while there was a space for a detailed explanation for the vehicle’s use, again, it was left blank, for reasons of privacy and officer safety.

[44] The fleet vehicles could travel anywhere in Manitoba or to the United States. Each vehicle came with a credit card to pay for fuel and maintenance.

[45] Mr. Johns explained the D.O.’s duties and responsibilities, which include responding to calls by law-enforcement agencies about individuals subject to the *IRPA* (who usually are in the country illegally). This may require the D.O. to go to a police station, detention centre, residence, or business to pick up and transport a person or to deliver documentation. An after-hours call may require the D.O. to pick up another IEO if more than one officer is required (depending on the circumstances) or to go into the IED’s offices to pick up documentation or equipment. Mr. Johns did clarify that not every after-hours call requires the D.O. to go somewhere; sometimes, the D.O. can fulfill his or her duties and responsibilities from where he or she is at a given moment, using only a telephone.

[46] Mr. Johns stated that given that the D.O. is on standby and may be required to respond to a call, he or she is permitted to bring a fleet vehicle home such that if a call is made and his or her presence is required, the D.O. can leave from home. The D.O. is also given a mobile telephone (“the IED mobile phone”), which has voicemail. The D.O. is expected to have the phone with him or her at all times after hours. Mr. Johns said that the D.O. is not a first responder; the police are, and the D.O. supports them. The police have the authority to make arrests and detain individuals under the *IRPA*.

[47] Mr. Johns testified that despite having a fleet vehicle for use after hours, a D.O. is not permitted to use it for personal purposes. The expectation is that a D.O. can be reached after hours and that he or she has transportation if needed to pick up and transport an individual safely and securely. He stated that he explained to the IEOs that the fleet vehicles were not for personal use. He testified that he made it clear to them that only CBSA employees or detainees were allowed in the vehicles, the reason being liability, as the federal government is self-insured and therefore liable with respect to the use of the vehicles.

[48] Mr. Johns testified that he did not review the fleet vehicles' logs and stated that he did not feel doing so was necessary, as he trusted his IEOs and believed that they followed the guidelines for using the fleet vehicles.

[49] The IEOs complete a time and activity record ("time sheet") every week that identifies the employee, the week, and the time worked each day. The days of the week are identified by both their names (in short form) and a number (1 for Saturday, 7 for Friday, etc.). The time sheet contains different codes for different types of work, identifies if the IEO used any form of leave (sick, family related, vacation, etc.). If he or she is the D.O., he or she is compensated under the collective agreement article on standby pay. If the D.O. receives a call while on standby, then that time is also recorded on the time sheet and is paid as overtime (OT). The time sheet has a spot on it for each IEO to sign, to verify that the information submitted for additional pay is accurate, and there is a spot for the manager to sign and confirm that OT and standby have been paid. The time sheets do not go into any detail as to what specific file or files an IED may be working on in a given day or days nor what specific work was being done. It merely records hours per specific day and if there is overtime or leave.

[50] Mr. Johns testified that when he managed the IED's office in Winnipeg, the time sheets were submitted to him for his review and approval. He stated that he did not cross-reference the time sheets and the fleet vehicles' logs.

[51] In addition to filling out a weekly time sheet, a D.O. who is called after hours is required to complete a call-out sheet for each call that sets out its details and how it was handled.



**A. The speeding ticket**

[52] From Saturday, September 1, until Tuesday, September 11, 2012, the grievor was the D.O. At 12:39 p.m. on Saturday, September 8, 2012, he was driving a fleet vehicle. A City of Winnipeg photo-radar apparatus captured it travelling 65 kilometres per hour (“kph”) in a 50 kph zone. A speeding ticket (“the ticket”), for \$241.25 and dated September 20, 2012, with a payment due date of November 4, 2012, was issued by the Winnipeg Police Service and was mailed to the CBSA.

[53] The ticket contained the following:

- a long view and a close-up photo of the fleet vehicle and its rear licence plate;
- a cut-away sheet to be enclosed with a mailed payment, which contained instructions on how to mail the payment; and
- an area for other response options.

[54] The cut-away sheet enclosed for a mailed payment contained the following information and instructions:

- the amount of the fine (\$241.25);
- the payment due date (November 4, 2012);
- a barcode;
- the address where the payment was to be sent;
- a statement that the cheque or money order was to be made payable to the Minister of Finance;
- an instruction that the cut-away sheet was to be included with the payment;
- an instruction to not send cash in the mail;
- a statement that a voluntary payment would be considered a guilty plea; and

- a statement that \$50.00 would be added if the payment or a response were not received by the due date.

[55] The rear or second page of the ticket listed the following response options:

- paying by telephone, 24 hours per day, which permitted paying by credit card; a payment would be considered a guilty plea;
- appearing in person at the courthouse on Broadway Avenue in Winnipeg or at any Provincial Court Office in Manitoba to pay, plead guilty, request more time to pay, or arrange a date on which to plead not guilty and proceed to trial; this section referred to authorizing someone to appear on the ticketed person's behalf, for which a section on the ticket was to be completed; and
- responding in writing, which would allow the ticketed person to state whether he or she was the registered owner of the vehicle or the authorized representative of the company named on the ticket and to state that he or she is arranging a date on which to plead not guilty and proceed to trial.

[56] The grievor testified that he became aware of the ticket when an administrative assistant brought it to his attention. He stated that she gave it to him to take care of. He did not specify exactly when that happened. He stated that he had never received a speeding ticket before in the course of his employment, so he asked the administrative assistant what he was supposed to do. He stated that she told him that the IEOs usually pay the tickets. He said that he spoke to other IEOs and that the consensus was that the IEOs pay tickets but that sometimes CBSA management may deal with them.

[57] The grievor went on to testify about one occasion, on which he saw Mr. Johns and another IEO (whom he did not identify) take care of a ticket. The grievor did not elaborate on what he meant by seeing them take care of a ticket, although he did state that they told him that the ticket had been obtained during a surveillance. He then stated that he wanted to clarify if he was being treated the same way as he had seen other IEOs treated in the past. He did not state when that occasion occurred. He did not discuss it with Mr. Johns, and it was not put to Mr. Johns in cross-examination.

[58] The grievor stated that on October 16, 2012, he made and signed a statutory declaration (“the October 16 Stat Dec”), which set out his badge number and stated as follows:

...

***In the matter of the Immigration and Refugee Protection Act and***

***The Immigration and Refugee Protection Regulations***

***In the matter of:***

***Image Capturing Enforcement System Offence Notice***

***Photo Enforcement Ticket #70705101***

*I, Tevin Olivier-Job an Immigration Enforcement Officer appointed in accordance with Section 6 of the Immigration and Refugee Protection Act, hereby declare the following information to be true and correct:*

*On 08 September 2012 while operating as Immigration Enforcement Duty Officer, driving vehicle license plate FGC 756 FORD GREY did travel at the stated speed of 65 km/h in a zone posted as 50km/h. I did so during the course of my 24hr Duty Officer shift. I was not en route to an emergency situation, nor am I exempt from abiding by all Federal and Provincial Motor Vehicle laws while on active duty.*

...

[59] The grievor testified that he created the October 16 Stat Dec because he was going to pay the ticket and no manager was available. He said that he knew from his experience of dealing with tickets that if a ticket is not in the person’s name, then that person must identify herself or himself to the courts administration service. He stated that as he had a badge and a business card, he believed he had authority to act on the CBSA’s behalf and deal with the ticket.

[60] The grievor said that he had not received any formal training on preparing a statutory declaration; he prepared his based on a template and on having seen other IEOs write them in the past. He said that his intention behind preparing the October 16 Stat Dec was to provide the magistrate with any information she or he would need with respect to the date and time of the ticket. He testified that it was his way of taking responsibility for the ticket and of providing the person with as much information as

he or she would need so that he could pay it.

[61] The grievor stated that he went to the Provincial Court. When he was called in front of the Magistrate, he brought her the ticket, the October 16 Stat Dec, and his business card. He stated that she asked him what he wanted to do. When he replied that he wanted to pay the ticket, she looked at it and said that it belonged to the CBSA. She asked him if he was a manager or a supervisor. He replied that he was not and stated that he was an employee and that he had been directed to come to the court and take care of it. He said she asked what he meant by “take care of it”. He said that he told her that he had never received one before, so he was there to pay it. The grievor said that the Magistrate told him that he could not pay the ticket because it did not belong to him. He said that she told him that the ticket provided the option of pleading guilty, not guilty, or guilty with an explanation.

[62] The grievor said that he asked the Magistrate for more information. She told him to speak to his supervisor and to get the ticket released to him so that he could act on it as a private citizen and enter a plea. He said she told him that he could receive a reduced fine or work out a payment plan. He said that she asked him if he needed more time. He replied that he did not, because he thought he would have the matter dealt with quickly.

[63] The grievor stated that after he left the courthouse on October 16, 2012, he returned to the office and intended to speak with management. He stated that he took the ticket, the October 16 Stat Dec, and his business card, stapled them together and kept them at his desk, assuming he would see Mr. Johns or another manager. The grievor then said that he could not recall if he had put them in Mr. Johns’ mail slot that day.

[64] In cross-examination, it was put to the grievor that he prepared the October 16 Stat Dec so that he could go to the courthouse and plead guilty with an explanation and receive a reduced fine. He replied, “Absolutely not.” The follow-up question was counsel’s suggestion that that action would have been wrong. The grievor did not answer.

[65] In cross-examination, the grievor stated that he prepared the October 16 Stat Dec so that he would be allowed to pay the ticket. However, when it was pointed out to him that a section on the ticket could have been filled in that would have allowed him

to pay the ticket on the CBSA's behalf, he stated that it was the first ticket he had received and that no one had told him what to do. Then he stated that he asked the administrative assistant who had given him the ticket about it, as well as other IEOs (whom he did not identify). They told him to pay the ticket.

[66] Counsel for the CBSA pointed out to the grievor that he had stated that while other officers had paid tickets, he had seen Mr. Johns and another officer (who had received a ticket for going through a red light while conducting surveillance) attempt to have a fine reduced. He agreed. He was then told that he had said that he had wanted to see if his situation warranted any special treatment, but he never did contact Mr. Johns. He agreed that he never did. He was then told that he never did make that contact, despite having Mr. Johns' mobile phone number and an ability to email him. Again, he agreed. Finally, it was put to the grievor that despite Ms. Fussey being present until November 2, 2012, the grievor never contacted her about the ticket and fine. He agreed again.

[67] When it was put to the grievor again that he had created the October 16 Stat Dec to obtain a reduced fine, he stated that he absolutely had not. The follow-up to that was a suggestion by CBSA counsel that trying to obtain a financial benefit from his position would be wrong, to which the grievor stated: "Yes; that is why it never entered my mind."

[68] In cross-examination, the grievor was brought to the notes from a meeting he had with Mr. Tisdale on January 17, 2013 ("the January 18 notes"), to where they state that the grievor had indicated to him that he was dissatisfied that he had not been given the opportunity to take responsibility for the ticket by being allowed to plead guilty. When it was put to him that it did not dawn on him to plead guilty with an explanation until he spoke with the Magistrate, he answered that this was correct.

[69] The grievor admitted that having looked at the ticket, he knew that if it were not paid by November 4, 2012, an additional \$50 would be added to the fine.

[70] In cross-examination, the grievor stated that from September 21 to October 16, 2012, the ticket was in his inbox. He was brought to his email to Mr. Tisdale dated January 17, 2013, in which the grievor stated the following in the last paragraph: "My only option should not have been to pay. Especially, since I tried to take care of this months ago when it was less expensive and I had more options."

[71] The grievor was asked if from October 16, 2012, to the date of the email (January 17, 2013) he had had his debit card in hand and had been ready to pay, to which he answered, "As of that time, I had acquired a lot more information."

[72] When it was pointed out to the grievor that he did not contact Mr. Johns or Ms. Fussey or have the form filled out, the grievor stated that he had been waiting for direction from management. At another point in the cross-examination, he stated that he was not aware of the form attached to the ticket that would have provided him with the authorization to pay it.

[73] The grievor stated in cross-examination that on October 16, 2012, the Magistrate at the courthouse told him to have his manager prepare a letter to release the ticket to him. When asked if he had specifically asked either of the two IEOs who were acting in Mr. Johns' position before Mr. Tisdale arrived to prepare that letter, he stated, "No."

[74] When the grievor was asked if at any time between October 16, 2012, and the conversation he had with Mr. Tisdale in mid-December 2012 he made any inquiries up the management chain and asked anyone to prepare and sign a letter as suggested by the Magistrate, the grievor stated the following: "I asked them to release the ticket to me. I had no idea how they would release the ticket to me. I said I needed something to release the ticket. I didn't say I need you to write a letter. I expected everybody would know what I meant."

[75] Mr. Tisdale testified that a tray inside the IED manager's office was identified as an inbox. He stated that the IEOs who had acted as the manager before him would have had access to the office and the inbox. If the office was locked, they had the keys.

[76] On November 12, 2012, a default conviction notice was issued with respect to the ticket, which identified a conviction date of November 12, 2012, an increase in the fine to \$291.25, and a payment due date of December 12, 2012. The notice entered into evidence was date-stamped as received by the CBSA on November 28, 2012. The grievor stated that the same administrative assistant who had originally given him the ticket gave him a copy of the notice.

[77] Attached to the default conviction notice were response options similar to those set out in the original ticket along with some additional responses, including requesting a new hearing. It also identified a new payment option, online by credit card. The notice also contained a warning, as follows:

*Failure to pay the full amount due, or respond to this notice before the due date, will result in enforcement actions being taken. These include:*

- *having a hold placed on the renewal of your driver's license and/or your vehicle registration. You will be charged \$40.00 if a hold is placed on your driver's license. Guaranteed funds will be required to remove the hold (i.e. cash, certified cheque or money order)*
- *having your wages or bank account garnished. You will be charged \$50.00 for each garnishment order*
- *having your personal property seized by the Sheriff (i.e. car, computer, electronic equipment, etc.). You will be charged \$374.50 plus towing and storage costs if this action is taken*
- *having a lien placed against your home or other real property. You will be charged \$37.00 if this action is taken*
- *having your account transferred to a collection agency which will affect your credit rating*

*Any or all of the above actions may be taken without further notice.*

[78] The grievor was asked what he did when he received the default conviction notice, to which he stated the following: "I took everything and put it with everything to investigate." He stated that during this time frame, he did the following:

*I was doing my job duties; this was set aside until I could speak with a manager about it. I was not told that there was no manager around to discuss this. It wasn't until this default notice came around when a manager comes into the office and I can show them what the magistrate said.*

[79] The grievor stated that after he received the default conviction notice, he spoke with the two IEOs who were acting as managers, Ms. Nortey and Mr. McEvoy. He stated that he told them what he had done on October 16, 2012, and what the Magistrate had said to him. He said that Ms. Nortey stated that she would not "action" it as she was

not the manager. It was out of her scope as the acting manager, and she did not want to become involved with it. The grievor did not testify as to what was discussed with Mr. McEvoy.

[80] While testifying about speaking with Ms. Nortey and Mr. McEvoy, the grievor went on to state that the discussions had been informal, that management had not been available, and that the IEOs were tired of acting and stated they would not instruct him going forward. He stated that at this point, it had been 30 days since he had gone to court. He said that he saw no reason to push the panic button; in his eyes a manager would soon arrive. He stated that he wanted everyone to be aware so that everyone would know that he had done his due diligence with respect to the ticket.

[81] The administrative assistant who gave the grievor the original ticket and the default notice did not testify; nor did Ms. Nortey or Mr. McEvoy.

[82] Entered into evidence was a second statutory declaration that had the October 16 Stat Dec attached and that the grievor had prepared and signed. It also indicated his badge number and was dated December 18, 2012 (“the December 18 Stat Dec”). He stated that he wrote it because he wanted everyone to pay particular attention to its second paragraph. He wanted it to be formal enough. He said that he wanted to ensure that he did his due diligence in dealing with the ticket. He then said that no IEO’s had had to deal with a ticket in the past. The December 18 Stat Dec states as follows:

...

***In the matter of the Immigration and Refugee Protection  
Act and***

***The Immigration and Refugee Protection Regulations***

***In the matter of:***

***Image Capturing Enforcement System Offence Notice***

***Photo Enforcement Ticket #70705101***

*I, Tevin Olivier-Job an Immigration Enforcement Officer  
appointed in accordance with Section 6 of the Immigration  
and Refugee Protection Act, hereby declare the following  
information to be true and correct:*



*On 16 OCTOBER 2012 writer attended the Provincial Court located at 373 Broadway Winnipeg, Manitoba in order to render a plea on the above notated Photo Enforcement ticket and was provided with the following direction by the magistrate on duty at the time:*

*-In order for writer to render a plea in this matter it would require that I be issued a letter of authorization from the Department of Canada Border Services Agency. Without this letter of authorization I would not be able to render a plea on the Agency's behalf because the assigned photo radar ticket is in the name of the agency and not in the name of the writer.*

*-It was my intention to plead "Guilty with explanation" and provide the court with the attached statutory declaration so that I may receive a "reduced fine" that would be at the discretion of the Magistrate. As a fellow law enforcement partner I believe that I would have been successful had I been able to proceed.*

...

[Sic throughout]

[83] In reference to the reduced fine statement in the last paragraph, the grievor said that the Magistrate had told him that that option made the most sense.

[84] The grievor stated that he used the CBSA's letterhead because his understanding, which he had learned from other IEOs, was that if an IEO wanted to swear an affidavit or affirm something with his or her law-enforcement designation, then that IEO should use the CBSA's letterhead. He then went on to state that he never received any formal training or direction from management with respect to using a statutory declaration. He continued by stating that it was his first ticket and that the only direction he received was to pay it.

[85] In reference to the statement of "... as a fellow law enforcement partner ... ." in the last paragraph of the December 18 Stat Dec, the grievor said that the Magistrate had used that wording. He stated the following:

*In speaking with the magistrate that was the wording she used; as a fellow law enforcement partner; the totality of the situation including that account of the ticket was realised to me would be taken into an account but nothing considered until I returned with the proper documentation.*

[Sic throughout]

[86] Mr. Johns testified that CBSA letterhead was to be used only for business purposes. He never authorized its use for personal reasons.

[87] Mr. Tisdale testified that the ticket, the default conviction notice, the October 16 Stat Dec, and the December 18 Stat Dec came to his attention on December 18, 2012, when the grievor brought them to him. He said that the grievor told him that he had been ticketed while using one of the fleet vehicles as the D.O. He said that the grievor told him that he went to the Magistrate with the intent of pleading guilty with an explanation and that she told him that since the ticket was in the CBSA's name, he needed a letter of authorization from the CBSA allowing him to plead guilty with an explanation. When asked for his reaction when he saw the documents, Mr. Tisdale stated that he was surprised because in his view, the grievor was using his title and position with the CBSA to attempt to reduce the amount of the fine, which was an abuse of his authority and a breach of the CBSA Code.

[88] Mr. Tisdale stated that once the ticket and default conviction notice were brought to his attention, he contacted Mr. Johns to see how such things had been dealt with in the past. He said that through his discussion with Mr. Johns, he learned that tickets were dealt with on a case-by-case basis. Mr. Tisdale said that he and Mr. Johns concluded that paying the ticket was the grievor's responsibility because he had been speeding in a playground zone. Given that he had been trained in driving and collision-avoidance skills as well as surveillance, he should have known what was expected of him when using a fleet vehicle.

[89] Mr. Tisdale said that his impression from his discussion with the grievor was that the grievor was on duty at the time he was ticketed. He said that after speaking with Mr. Johns, he took steps to determine if the grievor was performing any duties when the offence was committed. He said that he reviewed the grievor's time sheets because if he had been on a duty call as the D.O., it would have been reflected in the time sheets, and a call-out sheet would have been attached to the time sheets. He said that he also checked the fleet vehicle's log.

[90] The following were entered into evidence:

- the log for the fleet vehicle in the grievor's possession from September 1 to 16, 2012;

- the grievor's time sheets for the weeks of September 1 to 7 and 8 to 14, 2012;
- the call-out sheets filled out for the grievor for any D.O. calls made between September 1 and 14, 2012; and
- an accounting of the CBSA corporate credit card used for fuel purchases for the fleet vehicle.

[91] Mr. Tisdale testified that the grievor's time sheets and the fleet vehicle's log that cover the time in which the speeding offence was committed did not disclose that the grievor was on a call. He said that he concluded as much because the time sheet for that day did not show any OT being claimed; nor was a call-out sheet attached. The fleet vehicle's log showed that it had travelled 215 km that day and that 70.1 litres of fuel totalling \$85.47 were purchased from a Petro Canada service station at Highways 1 and 207 in Dugald, Manitoba (a community just east of Winnipeg).

[92] The CBSA received a final notice to pay the fine associated with the ticket in the last week of December of 2012 with a payment due date of January 8, 2013. The fine remained at \$291.25. Mr. Tisdale said that he discussed with Ms. Fussey the ticket and the grievor being responsible for paying it and that she instructed him to speak to the CBSA's Labour Relations (LR) section.

[93] Mr. Tisdale stated that the CBSA paid the ticket on January 7, 2013.

[94] Mr. Tisdale stated that after his discussion with Ms. Fussey, he spoke with LR, which advised him to speak to the grievor and find out what happened. Mr. Tisdale said that he did so on January 17, 2013, and that the next day, he made the January 18 notes of their discussion. They were entered into evidence and state as follows:

...

*I asked Tevin what he was doing with the vehicle at the time of the ticket. He responded that the ticket was issued around noon so it was the middle of the day and he could have been doing a number of duties which require him to use the vehicle since he was the duty officer that week. I advised him that it since it was a Saturday I looked at his time sheet to see what was on the duty officer call out sheets that officers file but there were not sheets included with his time sheet. I also*

asked him if he came down to the office to pick up the vehicle. Tevin responded that as per procedures he takes the vehicle for the entire week when he is duty officer. This includes taking the vehicle home all week. He says another officer in the office also does this. Tevin then responded to my question that he may have been filling it up with gas but that since it was so long ago he doesn't remember exactly what he was doing. I advised him that there was no overtime claimed on his time sheet. He said there wouldn't be if he wasn't out on a call.

...

Tevin is angry that the Agency would not give him the opportunity to take responsibility for the ticket and sign it over to him so he can plead guilty with an explanation. I explained to Tevin that he has taken responsibility for the ticket by bringing it to management's attention and explaining the situation as well as providing statutory declarations regarding the incident. Tevin still feels he should be given the opportunity to defend himself. I reiterated that he has been given the opportunity with management. Tevin brought up the example of another officer who is going to court to fight a speeding ticket he received by a police officer. I explained that every situation is different and that I can't comment on a situation when I'm not aware of the circumstances.

...

Tevin also feels that the ticket would have been reduced because he is law enforcement and received the ticket during the course of his duties. He used the example of a WPS member receiving a similar ticket and that these tickets are simply taken care of. The WPS member would not be responsible for paying the ticket. I explained to Tevin that he does not know what the outcome of his plea would be and that the sitting magistrate would consider all the facts of the case which would include the fact that he is law enforcement and has received specialized training on how to drive while conducting government business, the fact that as federal government law enforcement officials we are held to a higher standard than the general public, the fact that he was not out on a duty call and that the ticket was issued for speeding in a playground zone.

We talked at length about what is reasonable and what is reasonably expected from individuals. Tevin used the example that he was really only 4 kph over the threshold for receiving a ticket and that he was not driving dangerously nor was he "tearing" through the area and being reckless. He

also said that all the officers require guidelines as to when the Agency will support them when they receive a ticket during the course of their duties and when they will be expected to pay for these themselves. He also stated that if this is the Agency's stance than in the future when he is called on duty he may take his own vehicle so if he is in this situation again, at least he has a chance to take responsibility and defend his actions. He also stated that he will be in this situation again because he is human and humans make mistakes. I advised that employees are expected to abide by all laws and legislation while conducting Agency and government business. I also advised that the speed limit in this zone is 50 kph for a reason and that it has been decided that this is the appropriate speed limit to ensure public safety through this particular playground zone. This is reality whether Tevin or I or anyone else agrees with it. I also stated that since the established speed limit is 50 kph and he was going 65 kph it could be argued that he was driving dangerously since the speed limit is established to ensure public safety.

Tevin also pointed to inconsistencies with the way the Agency deals with employees driving infractions. He used the example of an accident he had while on duty with an Agency vehicle. He backed into another vehicle in a parking lot. He came back to the office, reported the accident and took responsibility for the accident admitting he was at fault and that he simply didn't see the other vehicle. The result was that he did not have to pay for this accident. He doesn't understand why he has to pay in this incident. I said that I don't know the circumstances of how the accident incident was dealt with but I offered my opinion saying that because that in that instance it was property damage for which the Agency had insurance as opposed to a traffic violation, this may play into the decision. I reiterated that I can't offer a definitive reason.

Tevin expressed his disappointment and dissatisfaction that the Agency never supports its employees in these instances and it always find a way of hiding behind legalities. Tevin also feels that it doesn't matter if he is on a duty call or not, when he is the officer on call he feels that he is always on duty and conducting government business. He says the Agency will not deal with the people aspect. Tevin expected the Agency to support him by allowing him to take responsibility by signing the ticket over to him or going to the magistrate with him to enter a plea with an explanation. Tevin feels that since he has done so many good things during the course of his employment with the Agency and since this is his first traffic ticket that the Agency should pay the ticket and explain to him that they are supporting him in this instance based on his good record but that he should

*understand what he did wrong and strive not to do this in the future.*

*Tevin indicated that he would like to see the Agency's policy that states it is an employee's responsibility to pay for tickets they receive while on duty. He would also like an answer on why the Agency won't release a ticket that is issued to the Agency to the employee to allow the employee to make a plea with the magistrate. I advised I will look into these issues for him.*

*I advised Tevin that the ticket has been paid so it wouldn't go into default after Jan 8th but that he is responsible for reimbursing the Agency. He doesn't feel it is fair that he has to pay the late fee of \$50 since he was unable to bring it to management's attention because there was no manager during much of the fall. He says he brought it to my attention in a timely manner.*

*I asked if he advised Kim Fussey about the ticket and he says he did an email that was supposed to be sent to our admin but is not sure if he sent it. I advised him to look for the email and send it to me if he finds it. This will help provide a timeline on what was actioned and when.*

*At the beginning of the meeting Tevin emphasized that the issue here was the money because it is a lot of money and he feels he would have had the fine reduced. Near the end of the meeting Tevin said it's not about the money. It's about principle because he is not being given the chance to take responsibility for the ticket with the magistrate and that the Agency will not support him and that the Agency never supports its employees.*

*Meeting ended at 16:50.*

*[Sic throughout]*

[95] Mr. Tisdale's evidence was that he had been surprised by the grievor's responses during their meeting. He stated that the grievor had not been on a duty call and that the comment about getting gas made no sense given the location of the ticket and where the fuel was purchased (at least 30 km outside the city).

[96] Mr. Tisdale was also surprised by the grievor's comment about why he had not brought the speeding ticket to management's attention before bringing it to Mr. Tisdale's attention, which was that there had been no managers. Mr. Tisdale said that that was odd given that after Mr. Johns had left, there had been acting managers, and Ms. Fussey had been on-site.

[97] During the meeting, the grievor referred to an email. Shortly after the meeting, he emailed Mr. Tisdale about it, stating as follows:

...

*The stat dec was written as opposed to email. There was no manager in place to make a decision so it sat waiting to be attended to. There was no way for me to have predicted that something so routine would become such a long overly drawn out issue. I tried to act on this months ago and was prevented by the fact that I had to wait for a manager to be put in place. I acted responsibly and promptly, my efforts are documented. I do not feel like I should be held responsible, yet again, for management not having attended to something they should have.*

*I understand I have been asked to pay the FULL approx. \$292.00 amount of the ticket. Before doing so I would like the following provided to me in writing.*

*With respect to tickets...*

- 1. Where does it state that CBSA can force an employee to pay for an issued ticket that the Agency would not permit him to take legal responsibility for?*
- 2. Where does it state that employees of CBSA must pay for issued tickets that are not legally their responsibility?*
- 3. What authority does CBSA have to force employees to pay even though they refuse to release responsibility of the ticket to the person accepting responsibility?*

*This whole occurrence does not appear to be fair. I have made several inquiries in the past as to the conduct of CBSA, in terms of perception of fairness. I believe this to be another example. My only option should not have been to pay. Especially, since I tried to take care of this months ago when it was less expensive and I had more options. I believe at the very least CBSA should have released the responsibility of the ticket to me so that I may have handled it in my own manner as a private individual.*

...

[Sic throughout]

[98] Mr. Tisdale was asked about the sentence in the January 17, 2013, email in which the grievor said the following: "The stat dec [sic] was written as opposed to email." Mr. Tisdale said that that comment did not make sense; the grievor said he

wrote it to explain why he had written the statutory declarations, but if what he wrote was not given to anyone, then it does not make sense.

[99] At the time he gave his evidence, Mr. Klatt was the acting assistant director of the IED for the CBSA's Prairie Region. He had been in that position since February of 2013. He was responsible for all IED operations in the CBSA's Manitoba and NWT, Saskatchewan, and Alberta regions, with offices in Winnipeg, Edmonton, Calgary, Regina, and Saskatoon. He had been with the CBSA or its predecessor for 20 years.

[100] Mr. Klatt convened a fact-finding investigation into the ticket and the grievor's use of the fleet vehicle. He appointed Robin Jarvis, a superintendent with the CBSA's Winnipeg Land Commercial Operations Office, to conduct the investigation. At the time of her testimony, she had 25 years of service as a BSO, mostly at the Winnipeg airport.

[101] Ms. Jarvis stated that as part of her investigation, she spoke to Mr. Tisdale, corresponded with Mr. Johns, interviewed the grievor, and gathered documentation. She wrote and submitted to Mr. Klatt a fact-finding report dated August 15, 2013 ("the report"), which was entered into evidence. It identifies five separate allegations of misconduct against the grievor, as follows:

- 1) he was not using the fleet vehicle for a work-related purpose on Saturday, September 1, 2012, when he travelled 152 km;
- 2) he was not using the fleet vehicle for a work-related purpose on Saturday, September 8, 2012, when he travelled 215 km;
- 3) he disobeyed a traffic law when he travelled 65 kph in a playground zone, where the posted speed limit was 50 kph, in the fleet vehicle on Saturday, September 8, 2012;
- 4) he failed to report to CBSA management his traffic violation incurred while using the CBSA fleet vehicle on September 8, 2012; and
- 5) he used his IEO position to attempt to receive a reduced fine for the traffic violation, without justification.



[102] Ms. Jarvis interviewed the grievor on May 31, 2013. Chuck Desjarlais was also present. He attended with the grievor, and Superintendent JP Savoie attended with Ms. Jarvis.

## **B. The report**

### **1. The grievor was not using the fleet vehicle for a work-related purpose on Saturday, September 1, 2012, when he travelled 152 km**

[103] According to Ms. Jarvis, the grievor told her that it was his practice, as well as that of other IEOs, to take a fleet vehicle home when he was the D.O. She said that with respect to September 1, 2012, the grievor could not recall where he travelled or what he used the vehicle for, and he could not explain why the mileage was so high for that day. She said that he told her that anything he was doing was related to his duties as the D.O. because he felt that being on call meant representing the CBSA 24/7, whether or not he was working.

[104] Ms. Jarvis asked him if this also meant using the fleet vehicle for personal errands. She said that he replied with “Yes” and that he stated that for anything he did when he was the D.O., he used the fleet vehicle, including going to the grocery store or the movies, as it was all related to being the D.O. According to Ms. Jarvis, he said that since he was carrying the duty phone and had to be available for work, it meant that he was always on duty. She stated in the report that he also told her that he routinely transported persons in fleet vehicles who were not with the CBSA.

[105] Ms. Jarvis concluded that the grievor had not been using the fleet vehicle for a work-related purpose on Saturday, September 1, 2012, when he drove 152 km.

### **2. The grievor was not using the fleet vehicle for a work-related purpose on Saturday, September 8, 2012, when he travelled 215 km**

[106] Ms. Jarvis set out that the grievor told her that the mileage for that day might not have been accurate, which suggested that sometimes, he did not fill out the mileage for Thursdays, Fridays, Saturdays, and Sundays. However, it did not matter, because whatever he was doing, he was doing while he was the D.O.

[107] The report indicated that Ms. Jarvis produced the fleet vehicle’s log and that she identified to the grievor that mileage had been entered for Thursday, September 6; Saturday, September 8; Sunday, September 9; and Monday, September 10. It indicated

that the grievor told her that a trip might have been made to Emerson, Manitoba, on one of the days. He was asked to review his documents to see if in fact that trip had occurred. According to the report, if a trip had been made there or to any other port, there would have been OT on his time sheet, but none had been recorded. Again according to the report, the grievor did not provide her any proof that he had attended any work-related location outside Winnipeg that would account for the high mileage.

[108] According to the report, Ms. Jarvis showed the grievor the gas receipt for fuel purchased for the fleet vehicle on Saturday, September 8, 2012, at the Petro-Canada at Highways 1 and 207 in Dugald. The report indicates that he said that he had no recollection of why he would have been there or why he would have filled up with gas at that station, although he did not dispute stopping there and filling up. The report states that he reiterated that he would have been the D.O. and as such would have been on call. He would have been representing the CBSA and therefore could have used the fleet vehicle, although he did acknowledge that no call outs occurred on September 8, 2012.

[109] Ms. Jarvis concluded that the grievor had not been using the fleet vehicle for work-related purposes on Saturday, September 8, 2012, when he drove 215 km.

**3. The grievor disobeyed a traffic law when he travelled 65 kph in a playground zone, where the posted speed limit was 50 kph, in the fleet vehicle on Saturday, September 8, 2012**

[110] The report disclosed that the grievor took responsibility for the traffic violations.

**4. The grievor failed to report to CBSA management his traffic violation incurred while using the CBSA fleet vehicle on September 8, 2012**

[111] The report stated that an administrative assistant gave the ticket to the grievor, management was not aware of it, and he took responsibility for it and wrote the October 16 Stat Dec that he presented to a magistrate at provincial court. The report indicated that the Court would not accept his plea because the vehicle was registered to the CBSA.

[112] According to the report, the grievor said that he was looking for direction from management as to whether he or the CBSA had to pay the ticket. The report states that he said that since no management was present, he chose to “set it aside”.

[113] The report goes on to state that the grievor said the following: “I thought I would tell Doug [Tisdale] when I had the opportunity but it sat forever because nobody was around.” According to the report, the grievor was asked if he went to an acting manager. He replied as follows: “An actor doesn’t want to have to deal with it. There is a relevant question that we feel entitled to an answer on. I’m searching for direction and did not get it.”

[114] The report goes on to state that the grievor said that he left the ticket in the management inbox and that he explained to the administrative assistant what he had done. According to the report, he said he wanted the following: “[To] force management to give me direction. I should be allowed to plea if I have to deal with it. Give me the authority or here, deal with it. I have an issue with not being able to plea but simply pay.”

[115] The report states that the grievor told Ms. Jarvis that he made Mr. Tisdale aware of the ticket before a deadline and agreed that December 18, 2012, was probably that date.

[116] The report finds that the grievor failed to report his traffic violation to management in a timely fashion.

#### **5. The grievor used his IEO position to attempt to receive a reduced fine for the traffic violation, without justification**

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[117] The report sets out that the grievor wrote two statutory declarations and that he attempted to show the October 16 Stat Dec to a Magistrate at a Court. According to the report, he told Ms. Jarvis that the December 18 Stat Dec was written to explain to his manager why the ticket did not get paid.

[118] The report finds that the grievor wrote the statutory declarations in an attempt to obtain a reduced fine. With respect to the December 18 Stat Dec, there appears to be no plausible explanation for this statement: a “. . . ‘reduced fine’ . . . [a]s a fellow law enforcement partner . . .”. The grievor should not have attempted to use his position to gain a favour.

[119] Ms. Jarvis testified that she made notes of her interview of the grievor on May 31, 2013 (“the May 31 notes”), which were entered into evidence. She said that he was given a copy of them but that he provided no comments to her about them. They contain the following questions and answers:

...

[Note: “RJ” is Ms. Jarvis, and “TJ” is the grievor.]

*RJ - Are non CBSA employees in the vehicle with you?*

*TJ - There can be, not always just me, if we're going to my girlfriend's parents, then I'll take her with me because I know she can get a ride home if I get called out and have to leave.*

...

*RJ - Read 2nd allegation - 215 km on Sept 8th*

*RJ - Any idea what you were doing on that date?*

*TJ - Other than being D.O., I can't remember that far back. Oh . . . Okay, I don't believe the mileage is accurate because if I don't fill the book out Thurs, Fri, Sat & Sunday, I might not put the mileage in until Monday . . . whatever I was doing doesn't matter any ways, because I was D.O.*

*RJ - Mileage was entered on Thurs. the 6th, Sat. the 8th & Mon. the 10th.*

*TJ - If I went to Emerson I would put it in the log, typically for me, I could have gone down on regular hours, continue after work and not put mileage down until sat. But Sept. 8th, I would be surprised if it was a trip to Emerson, best guess.*

*RJ - Could mileage have occurred on the Friday?*

*TJ - Could have occurred the 6th, 7th or 8th, May be together with the other mileage count.*

*RJ - Do you have any records of trips to Emerson?*

*TJ - I'd have to check my e-mails for time frames for a notice of Arrest for example.*

*RJ - If you'd gone down on a Sat. you would have put in the OT?*

TJ - Yes, none keyed in on the first ?

RJ - Yes, 3 on the first, 22 minutes to Brandon Police, but nothing on the 8th.

...

RJ - Explain how you found out about the ticket?

TJ - The assistant looked at the book, saw it was me and put it on my desk, I saw it there. I verified it was me. I deal with things as they come. Ultimately, I asked that it be looked at to be paid for. I presented it to, and wrote a stat dec and attempted to go to Broadway, trying to plead the ticket. I was told by the magistrate that I was not allowed to plea as the ticket was CBSA responsibility, not mine. There was no mgt present so I set it aside.

RJ - No one acting?

TJ - Al was in Regina, acting until Doug came in. no I did not go to Al, the ticket sat. There was a due date and the magistrate asked if I wanted an extension, I said no as I passed it on to Bobbie (assistant) before that date for Mgt to look at.

...

RJ - Any one acting?

TJ - An actor doesn't want to have to deal with it. There is a relevant question that we feel entitled to an answer on. Doug has said it's a grey area. I'm searching direction and did not get it. My experience with Doug, if I understand him, was if I get a ticket, I should just pay for it. I can't plead because CBSA is on the ticket not me, I don't have the option to plead, but should I not be allowed to plea if I'm responsible for paying. It's about how the Agency looks is what I gather from the conversation. If it's just paid, there's no admission of guilt on the Agencies behalf.

...

RJ - Because you wre D.O., you felt it was okay to write up a stat dec on CBSA letterhead?

TJ - It was my way of taking responsibility. As D.O. I've been told I am not allowed to appeal, but was actually working, not going to a call, no emergency, simply operating under my duties of being on call as D.O. I had no intent to gain advantage, but to take responsibility and indicate what had happened.

...

[Sic throughout]

[120] On June 13, 2013, Ms. Jarvis emailed Mr. Johns about the use of the fleet vehicle. He responded that same day as follows:

[Note: the text not in bold comprises Ms. Jarvis's questions, and the bold text comprises Mr. Johns' answers.]

*Is it the policy that the Duty Officers are allowed to take the vehicles home and to use them for whatever personal errands they might have to run during their days of rest? **No, the purpose of the use of the vehicle and having it at home is to support the officer in performing their work related activities like investigations, detentions, removals and duty officer. I don't or didn't approve the use of any government vehicle for personal trips, I do understand that during the course of an officers duties they may take a break, lunch, coffee extra which creates odd situations like running to the bank at the same time for some personal business but it shouldn't be out of the way, basically these situations didn't concern me as it is during the course of their duties, but the vehicle is not to be used for personnel use. I have spoken to staff in the Winnipeg IE about the use of the vehicle and I will check emails to see if anything was provided to them in writing.***

*Were you aware that this was taking place with some officers and not with others? **No, but the issue concerning Tevin and a traffic ticket was brought to my attention by Doug Tisdale as he was the manager at the time.***

*Were you aware that some officers may have transported some family members or friends in the CBSA vehicles? **No.***

*Would they have authorization to do this? **No.***

...

[Sic throughout]

[121] The grievor confirmed that he received a copy of the May 31 notes in an email from Ms. Jarvis on June 12, 2013, which requested that he review them, provide her with any additions or corrections, and confirm that he had read them and either concurred with them or would provide her his remarks. He confirmed that he did not provide her any additions, corrections, or remarks.

[122] The grievor's time sheets for the weeks of September 1 to 14, 2012, disclosed the following information:

- his regular work schedule was Monday through Friday, 7:30 a.m. to 3:30 p.m.;
- he was the D.O. from September 1 through 11, 2012, and received standby pay for those dates, as per the collective agreement; and
- he claimed OT as the D.O. and was paid the minimum OT of 3.0 hours for Saturday, September 1; Tuesday, September 4; Wednesday, September 5; and Sunday, September 9.

[123] The call-out sheets for September 1, 4, 5, and 9, disclosed the following information:

- **September 1, 2012:** A for your information ("FYI") telephone call from the Brandon Police which telephone call inquiry was logged as lasting twenty minutes between 4:10 p.m. and 4:30 p.m.
- **September 4, 2012:** A FYI telephone call, which was logged as lasting fifteen minutes between 3:45 a.m. and 4:00 a.m.
- **September 5, 2012:** A FYI telephone call, from the Winnipeg Police Service, which call was logged as lasting fifteen minutes between 12:35 and 12:50
- **September 9, 2012:** Two telephone calls were made, from another CBSA location with respect to an arrest; the total time of the calls being 9 minutes. During the second call it was determined that the call should have been made to the British Columbia IED not the Winnipeg office.

[124] The fleet vehicle's log disclosed the following information with respect to its use by the grievor between September 1 and 11 while he was the D.O.:

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<u>Date</u>	<u>Total km travelled</u>	<u>Start km</u>	<u>End km</u>	<u>Associated Costs</u>
Sep. 1	152	71586	71738	
Sep. 2	12	71738	71750	\$82.01 of fuel
Sep. 3	18	71750	71768	
Sep. 4	89	71768	71857	
Sep. 5	73	71857	71930	
Sep. 6	11	71930	71941	
Sep. 8	215	71941	72156	\$85.47 of fuel
Sep. 10	42	72156	72198	
Sep. 11	34	72198	72232	

[125] The grievor stated that in 2012 he lived at two residences, one in downtown Winnipeg on Waterfront Drive, which he stated was about a 5-minute drive (or a 20-minute walk) to the IED's offices. The other was an address in Winnipeg's north end. Entered into evidence was a Google map that displayed three routes from the grievor's north-end address to the IED's offices. Depending on the option, the three routes show distances of 12.4 km, 11.8 km, and 11.4 km respectively, which would be round trips of between 24 and 26 km.

[126] On September 9, 2013, Mr. Klatt sent the grievor a copy of the report, invited him to comment on it and to provide any clarifications or mitigating circumstances, and invited him to a pre-disciplinary hearing to speak about the misconduct set out in the report.

[127] The pre-disciplinary hearing took place on September 16, 2013. Mr. Klatt was accompanied by Scott Hazlitt, who took notes that were entered into evidence. Mr. Klatt testified that those notes accurately reflect the discussion that took place.

[128] Mr. Klatt said that at the meeting, the grievor was confrontational. He stated that he did not feel that he had done anything wrong, and he did not apologize. Mr. Klatt said that the grievor did not seem to appreciate the severity of the misconduct. He blamed others and did not take ownership for his actions. Mr. Klatt said that it was important for him to see that the grievor understood that what he had



done was wrong and that he demonstrate remorse, as that would have gone to his integrity, trust, and values and ethics in his position. Mr. Klatt stated that he saw none of those in the grievor.

[129] As for the September 8, 2012, use of the fleet vehicle, Mr. Klatt stated that the grievor told him that he might have used it to attend a flag football event near Dugald. The grievor also confirmed that he had transported persons not of the CBSA in the fleet vehicle, which he did not view as wrong or as a breach of the CBSA's Codes.

[130] Mr. Klatt stated that the grievor did take ownership of the ticket. With respect to the allegation that the grievor did not disclose it to management, Mr. Klatt said that the CBSA Code requires that employees do such things. The grievor could have brought it to the attention of managers, acting managers, or Ms. Fussey.

[131] Mr. Klatt said that he found unusual the statutory declarations and the grievor's comments that he had made them to take ownership of the ticket. He said that the grievor had been trained with respect to driving and to obey all traffic laws, yet he was caught speeding in a playground area and then tried to reduce or mitigate the amount of the ticket.

[132] Mr. Klatt testified that he was concerned about the grievor's values, ethics, and integrity. IEOs conduct investigations and remove people from the country. They work for a large part autonomously and with very little supervision, and the CBSA trusts that they will abide by the CBSA Code and that they will demonstrate values and ethics in their work.

[133] The grievor testified that when he started at the IED, he was not given any formal training with respect to the use of the fleet vehicles. He stated that he understood from Mr. Johns that the fleet vehicles were to be used the same as they were at the airport. He stated that other IEOs trained him for about six or seven weeks by having him shadow them. He said that Mr. Johns told him how to fill out a fleet vehicle's log. He stated that he did not look at any of the policies; nor did he ask for anything in writing.

[134] When the grievor was asked in his evidence-in-chief how he was to use a fleet vehicle when he was on standby and the D.O., he stated the following: "There was a culture. Every officer I was with during the first 6 to 10 weeks had their own way of

operating the vehicle, what they would do with the vehicle, and what they would put in the log.” He went on to say: “Some did what they were supposed to; to cover their own ass, followed policy to the letter.”

[135] His representative again asked him how he used the fleet vehicle while on standby and as the D.O. He stated that he did not know how to use it when he started. His representative asked him the same question a third time. He then replied that during the first 6 to 10 weeks, he used the fleet vehicle the same way as he did at the airport. He said it stayed at the office, and if he received a call, he would go to the office, pick up the fleet vehicle, drive it, and return it, leaving his car at the office.

[136] The grievor stated that after those first 6 to 10 weeks, during an informal discussion with another IEO, he was told that being the D.O. required him to respond immediately to an emergency, which could occur when any other law-enforcement agency requires a response from the CBSA that has to be immediate and timely. So, the fleet vehicle is with the D.O. so that he or she can accomplish that task.

[137] He stated that he told that IEO that he had several activities outside of work and that he asked the IEO how he could use the fleet vehicle for those activities, since at the port of entry (POE), they would never use a vehicle that way. The IEO laughed and told him: “You are in the big leagues now, Tevin; that is not how we use the vehicle in this environment!”

[138] The grievor stated that he referred the IEO to the policy and asked him if they had a different policy than at the POE. He said that the IEO told him that in their business line, there was a grey area, and that it was his belief that if an IEO’s use of a fleet vehicle was challenged, then that grey area would need to be addressed, and management would provide a clear direction. The grievor said that the IEO provided an example of his use of the fleet vehicle in which he took it to his cabin because if a call came in, he would have to respond immediately. The grievor stated that this was well known among those in the office, including Mr. Johns and other IEOs.

[139] The grievor stated that Mr. Johns overheard his discussion with the other IEO about using the fleet vehicle and that Mr. Johns joined in. The grievor said that he did not have to probe Mr. Johns for his verbal rationale for what the IEO had said and stated that Mr. Johns said that his rationale was the “Globe and Mail test”; if an IEO had to explain his or her use of a fleet vehicle, the question to ask would be whether

that use would pass the public's perception of what is reasonable.

[140] The grievor then stated the following: "As he stated to me, the use of the vehicle by the D.O. is so that you can respond to police emergencies immediately — it is not so you can run personal errands or in my situation coach soccer and play soccer." The grievor stated that he sought further clarification from Mr. Johns, who told him the following: "With respect to my outside activities, I am not to use the vehicle to do those activities; I am to use the vehicle for police emergencies, however in my life there may be things I need to do."

[141] The grievor then stated that Mr. Johns told him the following: "You have a life. You are preparing for or potentially required to go on a call at any time on any day and this [the fleet vehicle] is a tool. Getting receipts, putting in mileage is cumbersome; this is why things are what they are." The grievor said that he was satisfied with this explanation and that it made sense to him.

[142] The grievor's representative then asked him again how he used the fleet vehicle, to which he replied exactly as the conversation he had had with Mr. Johns after the other IEO had gone. He said as follows: "When I was D.O., anywhere I was required to go on CBSA business I would use the vehicle; if it was my own business, I used the vehicle for my business in anticipation of a call." He stated that he always filled in the logbook. He said that he never asked for instructions in writing on the use of the fleet vehicles.

[143] When the grievor was asked about the other IEOs' practice with respect to the use of fleet vehicles, he responded as follows: "They all used it differently. Some refused to use it unless it was daytime. Some refused to use it unless it was on an arrest. Some D.O.s took it home due to having to do a removal." When he was asked how many IEOs used it like he did, he said that there were one or two but then stated that they ". . . were not consistent in using it in this manner."

[144] When the grievor was asked about the IEOs who used the fleet vehicles the same way he did, he stated that Mr. Johns chaired weekly IED meetings and that all the IEOs attended them. He stated that they all discussed in that meeting what they did, that they spoke openly and casually, and that they would often discuss what they did over the weekend, but he said that they ". . . would never ask each other if we used the vehicle to do these things because we all knew what others used the vehicle in

what manner.” He said that Mr. Johns was well aware of the comments and the use because he was present, and the IEOs all spoke candidly.

[145] The grievor was brought to the report that had attached a copy of the email Ms. Jarvis sent to Mr. Johns inquiring about the ticket and the use of the fleet vehicle. She posed the following question: “Is it the policy that the Duty Officers are allowed to take the vehicles home and to use them for whatever personal errands they might have to run during their days of rest?”

[146] Mr. Johns responded as follows:

*No, the purpose of the use of the vehicle and having it at home is to support the officer in performing their work related activities like investigations, detentions, removals and duty officer [sic]. I don't or didn't approve the use of any government vehicle for personal trips . . . .*

[147] When brought to this exchange, the grievor was asked when Mr. Johns' explanation was ever brought to his attention. He replied that it was when he had his discussion with Mr. Johns and the other IEO.

[148] He then stated that he believes that how someone is asked a question leads to how he or she responds to it. He suggested that Ms. Jarvis's specific question led to Mr. Johns' response to the email. The grievor went on to state that had Ms. Jarvis asked the question differently, perhaps Mr. Johns would have provided a different response.

[149] The grievor was brought to the CBSA Code that sets out the appropriate use of vehicles and was asked how he squared his use of the fleet vehicle with it. He responded by stating that the IEOs' used it in a way that was contrary to policy. He added the following: “As I was told by management it is a grey area; management was confident that the Globe and Mail test would successfully articulate that our use was in the best interest of the public.”

[150] The grievor was asked why he believed he was on duty when he was on standby. He stated as follows: “I was under the impression that it was a pay thing; whatever, accounting. Practically thinking I am working. I am in the Agency vehicle.” He said that when he was the D.O., he was working all the time. He said that he was highly visible, and always on duty and that his life was “CBSA business 24/7”. Standby is a measure of pay and accounting and not a measure of duties.

[151] The grievor stated in his evidence-in-chief and confirmed in cross-examination that he and all the IEOs were serious about emergency calls and the responses to them. He admitted in cross-examination that when he was the D.O., he was required to carry the IED mobile phone, which he stated he did, and that his understanding was that so did all the IEOs when they acted as the D.O.

[152] With respect to the IEO who the grievor suggested took the fleet vehicle to his cabin when he was the D.O., the grievor agreed in cross-examination that that IEO was experienced and that the grievor acknowledged him as being viewed as a good IEO. He also confirmed that his perception was that that IEO was serious about responding to any emergency calls. He further confirmed that if that IEO's cabin, to which he allegedly took the fleet vehicle while he was the D.O., was in an area without mobile phone service, then that IEO would have been unable to receive or respond to calls via the IED mobile phone.

[153] In his evidence-in-chief, the grievor was brought to the log of the fleet vehicle he had used on September 1, 2012, and was asked about the 152 km he had travelled. He answered by stating that when Ms. Jarvis had asked him the same question, he had been unable to recall, as some time had passed. He then said that in a later conversation, he had felt that he had to provide her with a better explanation, so he told her he had been going to a flag football game. He stated that there is a facility at Milner Ridge, which he could have visited, and then he suggested that he could have gone through Dugald to get to Milner Ridge. He then stated again that he told Ms. Jarvis that he had had a flag football game in Dugald. Later, his counsel showed him the receipt for the fuel purchase on September 8, 2012, in Dugald. He responded that he could not say with 100% accuracy what he had been doing on that day.

[154] The grievor's counsel then pointed out that the grievor had told Ms. Jarvis that he did not know where Dugald was and that she had remarked to him that it was strange for someone from Winnipeg to not know where Dugald was. He replied that he was directionally challenged. He went on to speculate about Ms. Jarvis's perception and stated that he had filled up in Dugald because the fuel was low. He then suggested that it could have been because he was on CBSA business. He then stated the following: "The only Dugald I am familiar with is Dugald Avenue in Winnipeg. I would only know it if I Google mapped it or GPS'd [*sic*] it. I have no idea where Dugald is."

[155] The grievor's counsel asked him, if he had been in Dugald for a flag football game, then why would he have filled up the fleet vehicle with fuel? The grievor responded as follows:

*I would not get gas for a flag football game. The tank was low as a result of work related duties **and personal items; the gas tank was low; I got gas at that location enroute [sic] to business or as a by-product of business which was personal.***

[Emphasis added]

[156] Counsel for the CBSA cross-examined the grievor on his interview with Ms. Jarvis about Dugald, the fuel purchase, and flag football. She started with putting the October 16 Stat Dec to him and having him agree that it was important that he had been accurate with the information he had put in it. She then got him to agree that before creating the October 16 Stat Dec, he reviewed the fleet vehicle's log as well as his time sheets and call-out sheet to ensure that he was being accurate with his information to the court. The October 16 Stat Dec stated that he was not on his way to any emergency on that day but that he was the D.O.

[157] The grievor further admitted to counsel for the CBSA that had he been responding to a call or an emergency, it would have been recorded somewhere, which it was not. He agreed that when he completed the October 16 Stat Dec, he had refreshed his memory as to his activities on September 8, 2012.

[158] The grievor admitted to CBSA counsel that in 2012, he played in a flag football league, confirmed the team's name, and stated that sometimes they played at the Buhler Recreational Complex on Murdock Road, which is close to Dugald Road. He then admitted that he had driven the fleet vehicle to Dugald when he had been the D.O. but that he had not been responding to a call. After some prodding by counsel, he stated that he had gone to Dugald for the flag football game and not for a work-related reason.

[159] The grievor was brought to his answer as follows to the question in the May 31 notes with respect to his use of the fleet vehicles as the D.O. for other than official CBSA business ("RJ" refers to Ms. Jarvis, and "TJ" to the grievor):

*RJ - There's no call out shown, what if you are heading to the lake or something?*

*TJ - Me, personally, it's within the city limits. Officers don't want to go to the lake or something like that because it ruins your weekend. You're expected to respond. I believe we all have the same understanding; if you're D.O. 24/7, you're operating with work as the # 1 priority [sic], you're getting paid.*

[160] When the grievor was brought to that exchange with Ms. Jarvis, it was suggested to him that if an IEO was to be away at a lake or cabin, he or she would not be the D.O. The grievor stated that that was not correct.

[161] Mr. Johns was asked questions about using a fleet vehicle other than as the D.O. He provided as an example an IEO taking a fleet vehicle home since he or she has to pick someone up in the early morning at a detention centre, and it would be more convenient or efficient for the IEO to have the vehicle at home and to travel directly from there. That could happen possibly because of flight timing or of travelling to the United States. Some removals to the United States are carried out via fleet vehicle, and as such, the IEO would have to travel to a detention centre, pick up the individual, and then deliver him or her somewhere and return. Mr. Johns determines these uses on a case-by-case basis.

[162] In cross-examination, Mr. Johns was walked through several fact scenarios of what would or would not be an appropriate use of the fleet vehicle by an IEO or the D.O. He stated that if an IEO was using a fleet vehicle and parked it while getting lunch or while fuelling it and then went to a bank, it would be okay. He stated that if a D.O. was on the way home with a fleet vehicle and stopped for groceries, it was not okay. He stated that one could not drop his or her spouse off on the way back to the office from home as the D.O. Mr. Johns stated that he would not and could not authorize or condone personal use of CBSA assets, including a fleet vehicle. If he did, he would also be held responsible.

[163] Mr. Johns specifically stated that he was not aware of any IEO (other than the grievor) using fleet vehicles inappropriately. He was asked specifically about the grievor's allegation that an IEO had brought a fleet vehicle to his cabin or cottage. He replied that he did not recall that happening.

[164] Mr. Johns did testify to a specific situation involving an IEO in south Saskatchewan who asked if he could bring a fleet vehicle to his cottage for a weekend since he was on call for retrieving firearms at the ports along the United States border in Saskatchewan. He stated that he brought that specific situation up to his boss, and it was approved on the understanding that the officer would bring all his work equipment with him and would have a place to secure his duty weapon. The reason it was approved was that the cottage was actually closer to the POEs that he would be called to. It was also approved on the understanding that only the officer would be in the vehicle and that unless he was called to duty, it would sit at the cottage. The officer's family had to find its own way to and from the cottage.

[165] The grievor was asked about the following comments attributed to him in the January 18 notes:

*Tevin also pointed to inconsistencies with the way the Agency deals with employees driving infractions. He used the example of an accident he had while on duty with an agency vehicle. He backed into another vehicle in a parking lot. He came back to the office, reported the accident and took responsibility for the accident admitting he was at fault and that he simply didn't see the other vehicle. The result was that he did not have to pay for this accident. He doesn't understand why he has to pay in this incident.*

[Sic throughout]

[166] When brought to the comments, the grievor stated that on September 1, 2012, he was attending a wedding of a family friend, and while he was parking the fleet vehicle, he backed it into something, damaging it. He said he reported it to the administrative assistant, provided pictures, and asked what to do. He said he was provided with paperwork to fill out and that he had to write a statement. He said that he gave all this material to the administrative assistant and that Ms. Fussey was also involved. He went on to state that he had been the D.O. at the time of both the accident and the ticket and that no one in management addressed the inconsistency.

[167] The comments in the January 18 notes with respect to the alleged accident with the fleet vehicle at a wedding were never put to Mr. Tisdale, Mr. Johns, or Ms. Jarvis in cross-examination.

[168] No documents with respect to this accident were put into evidence.



[169] In his evidence-in-chief and again in cross-examination, the grievor stated that until a year before the investigation, he did not know that he could not have his mother with him in a fleet vehicle.

[170] In cross-examination, the grievor admitted that his university studies would have required him to read and to use research skills to complete assignments. He also admitted that he had to analyze and synthesize information to write papers. He admitted to working as an immigration officer and to reading and interpreting both the *IRPA* and its regulations.

[171] It was suggested to the grievor that as a university graduate and as someone who had to read and interpret legislation as part of his job, he could understand clear instructions, to which he stated that he did not agree.

[172] I asked the grievor if in September of 2012 he owned a vehicle. He replied as follows: “There was a time I did not have my own vehicle; I did not have a vehicle that could drive legally on the roadway.” He indicated that in September of 2012, he was renting accommodations and was living in the Waterfront Drive location. He stated on the subject of receiving the speeding ticket in September of 2012 that he had received some in the past. He stated that he had once received a photo-radar ticket and that he had paid it.

[173] No other IEO was called as a witness.

### **C. Previous discipline**

[174] Before the investigation into the ticket and the grievor’s fleet vehicle use, the CBSA had disciplined him as follows:

- 1) with a written reprimand on December 3, 2010, with respect to misusing his CBSA-issued American Express travel credit card (“the AMEX card”); and
- 2) with a 20-day suspension issued on June 20, 2012, with respect to misusing his AMEX card.

## 1. The written reprimand

[175] On December 3, 2010, the grievor received a written reprimand after it was determined that he was using his AMEX card for personal purchases unrelated to his work. It stated that he acknowledged that between June 2 and October 8, 2010, he used the AMEX card for personal purchases not related to business.

[176] The grievor did not grieve this discipline.

[177] As an IEO, the grievor was required on occasion to travel both within Canada and outside it, much of which involved accompanying people who were being removed from Canada (“removals”). This travel would often necessitate spending for transportation (airfare, taxis, and rental cars), accommodations (hotels and motels), food, and other sundry items that might arise when carrying out the CBSA’s business away from home.

[178] Guidelines were issued with the AMEX card. However, despite them, the grievor appeared to use it for purchases not related to work. Entered into evidence was an email from Ms. Fussey to him dated June 9, 2010, at 5:17 p.m., the relevant portions of which state as follows:

*I believe this matter may have been brought to your attention by Richard Huntley who was acting for me on June 3, 2010. However, I am following up to verify the status of your account and to address the issue of your card appearing to have been used for non-government purchases (Safeway, car repairs, Paypal, Winners, Walmart and liquor store purchases.*

*Please review the attached memo and advise whether your account has now been paid in full and date paid. Thanks*

*If your account is still outstanding, please provide reason - if for example you have submitted your claim (provide date) and have not yet received payment then I will have the claim tracked to see where it is in processing.*

*Depending on the reason for the delay in payment . . . our AMEX Card Co-coordinator, [name omitted], may be asked to advise AMEX of the reason for the delay in paying the balance outstanding.*

*In the event of departmental error/delay, [name omitted], may be able to request that interest not be assessed. In the event that you are charged interest, you can submit your*

*AMEX statement as a receipt for the interest expense you incurred. This receipt can be attached to a travel claim and processed in your local office.*

*In addition, I have asked your manager to discuss with you the apparent purchases of a personal nature and to advise me of the results.*

*F.Y.I. I have attached the most recent message from the RDG dated April 26, 2010 "Message from Regional Director General re Government Designated Travel Cards" which outlines that "The AMEX Designated Travel Card is a corporate resource provided for the purchase/payment of authorized business travel expenses as defined by the Treasury Board Travel Directive."*

...

[Sic throughout]

[179] On July 6, 2010, at 8:37 a.m., the grievor replied in email to Ms. Fussey, copying Mr. Johns and one other person. The relevant portion reads as follows:

...

*Here are the details of my AMEX card as per phone conversation with AMEX representative*

*30 days - \$1089.93*

*60 days - \$531.02*

*90 days - \$673.74*

*Full Balance - \$3744.47*

*As per conversation I had with Al last week in regards to the AMEX cardholder guidelines . . . I am now fully aware of the card requirements to CLEAR balances AND to NOT use the card for anything other than outlined. My understanding previously was that the card could be used for justifiable business purposes and/or purchases in general . . . just as long as balance was cleared. The use of the card was previously an oversight on my part. Since having this clarification of the use of the card with Al last week (June 28, 2010) I am fully aware of card requirements and justifiable use.*

*Furthermore, in regards to the current balance . . . I believe all but \$500 remaining on this card is due to outstanding travel claim for Beirut, Lebanon and Thompson MB. I will have the 60 day balance taken care of by the end of*

*the week.*

...

[180] The attachment to the email that Ms. Fussey sent to the grievor on June 9, 2010, was an email sent on April 26, 2010, at 11:05 a.m., from Mike Styre to all CBSA employees in its Prairie Region under the subject line: "Message from Regional Director General re Government Designated Travel Cards". In cross-examination, the grievor confirmed he received the April 26, 2010, email on June 9, 2010. The relevant portions of it stated as follows:

**RE: USE OF GOVERNMENT DESIGNATED TRAVEL CARDS**

...

*Whether you are an experienced travel card user, or have recently received a card, I would like to remind you of the responsibility that goes along with the card, and rules we all must adhere to when using the Gov't travel card.*

*The AMEX Designated Travel Card is a corporate resource provided for the purchase/payment of authorized business travel expenses as defined by the Treasury Board Travel Directive. Use of this card entails recognition and acceptance of certain responsibilities that include but are not limited to the following:*

...

*Cash advances are not permitted for the purchase of personal items.*

*Use of the travel card is not permitted for the purchase of personal items.*

*Limited personal use is permitted only when purchases compliment the travel undertaken. i.e.*

- 1) A spouse accompanies an employee on travel status, the meals are all charged to the Government Designated Card however the government traveller only requests reimbursement for employee meal allowance (no meals for spouse are claimed).*
- 2) Hotel charges on the AMEX card are double occupancy because the spouse accompanied the employee however the traveller claims only single occupancy rates on the travel claim.*

*The cardholder is liable to AMEX for payment of all legitimate charges made with the card, including any incremental costs (i.e., accrued interest, administrative charges, etc.) as a result of an unpaid account.*

*Failure to settle accounts will result in CBSA initiating collection action against any monies owed to the employee, including salary.*

*All purchases made using the Government Designated Travel Card are subject to monitoring. Misuse of the card may result in disciplinary action up to and including dismissal of the cardholder.*

...

*When in doubt about acceptable use of the AMEX card, please seek advice from your supervisor.*

...

[Sic throughout]

[181] The grievor was asked in his examination-in-chief when he first received the AMEX card. He stated that it was before he went to Chilliwack, British Columbia. However, he did not elaborate on when he went there. He was asked why he needed it for that trip, to which he stated that he did not think he needed it but that he had been told that it would make things easier. He said that he was not told it was required but was told that it was a convenience because he would be travelling.

[182] The grievor was then asked if he had a discussion with Mr. Johns about not having an AMEX card, to which he said he told Mr. Johns he did not have one. The grievor was then asked if he had a personal credit card. He stated that he did and added that no one had asked him if he had a credit card. He was then asked if he ever had a discussion with Mr. Johns about his credit card. He replied that that discussion did not take place until the AMEX card had become an issue (at the time the written reprimand was made), and he advised Mr. Johns that he did not have his own credit card.

[183] The grievor was asked if he had any further discussions with Mr. Johns about his personal credit card. He replied that (when the second discipline was imposed with respect to the AMEX card in June of 2012), "Al knew I didn't have a personal credit card and shared that with Kim Fussey." The grievor then stated that he told Mr. Johns that he had a personal credit card and that he would like to be assessed with respect to

that card, to continue with the removals function of his job.

[184] In October of 2010, an investigation took place with respect to the grievor's use of his AMEX card. As part of it, on October 28, 2010, Mr. Johns interviewed the grievor; his notes of that meeting were entered into evidence and disclosed that the following documents were provided to the grievor at that time:

- a copy of the V&E Code;
- a copy of the pre-2012 CBSA Code;
- a copy of the letter of offer of employment dated December 14, 2009;
- a copy of the *Directive on Travel Cards and Travellers Cheques*;
- a copy of the application for the grievor's AMEX card;
- a copy of the agreement between the grievor and the Government of Canada;
- a copy of Mr. Styre's April 26, 2010, email, entitled "Message from Regional Director General re Government Designated Travel Cards"; and
- a series of emails with respect to the grievor's overdue AMEX card account.

[185] Mr. Johns testified that he went through the AMEX card statements with the grievor and that he asked the grievor about certain charges. He said that based on the grievor's job, it was obvious that many of the charges were related to work and were appropriate; however, some stood out and raised questions. A specific example was for clothing purchased at a store in San Francisco, California, in the amount of over \$400. As well, Mr. Johns identified account charges and charges for personal travel (airfare and hotels).

[186] Mr. Johns stated that part of the purpose of the October 28, 2010, meeting was to make sure that the grievor was clear on the use of the AMEX card. He stated that he had had a discussion with the grievor at the time the AMEX card was first issued to him because the grievor was to travel for training and would then be doing removals

and would need the card.

[187] Mr. Johns stated that at some point after the grievor began with the IED and had obtained an AMEX card, Mr. Johns was alerted by the CBSA's finance unit that the grievor's AMEX card account had become delinquent and that some expenses had been charged to it that did not correspond to business travel. He said that he spoke to the grievor about this, explained to him the policy, and outlined the intent of the AMEX card and his obligations.

[188] He went on to state that he wanted to find out why the grievor was not meeting his financial obligations because as an employee, if he were in financial difficulty, it could have impacted his work, and it could have resulted from delays processing travel claims. Mr. Johns continued by saying that he went over the parameters of using the AMEX card with the grievor at that time. He said that with respect to this incident, he did not levy any discipline; he treated it as coaching.

[189] Mr. Johns testified that after this first incident with the delinquent AMEX account, he advised the grievor that the account would likely be monitored.

[190] The grievor's counsel asked him about how confident he was in October of 2010 that he understood the travel policies. He replied that he did not understand that the AMEX card was a travel card; he said he thought it was a business card. He stated that his understanding was that if he worked an 8:00 a.m. to 4:00 p.m. shift and had lunch, he could pay for it with the AMEX card.

[191] However, the grievor confirmed in cross-examination that on June 28, 2010, he discussed with Mr. Johns the use of the AMEX card and that at that point, he did not have any further questions about its use.

[192] Mr. Johns' evidence was that after December 3, 2010, the grievor was again allowed to use the AMEX card, yet shortly after that, the account was once again delinquent. Again, there were expenditures inconsistent with business travel that had occurred when the grievor was either on vacation or on sick leave. He said that he requested from the grievor a written explanation but that the grievor was reluctant to provide one.

[193] Mr. Johns stated that the director is the delegated authority with respect to AMEX cards. He said that no other IEO had any problems with an AMEX card or account. Mr. Johns stated that he did not treat the grievor any differently because of his race with respect to the AMEX card.

[194] Mr. Johns testified that he had a discussion with the grievor about whether he had a personal credit card. He said that the grievor told him that he did not have one.

[195] In cross-examination, it was suggested to Mr. Johns that before the AMEX card was issued to the grievor, the grievor had asked if he could use travel advances and was told that he could not because it was inconvenient. Mr. Johns confirmed that the grievor had asked for travel advances, which had been turned down not because of inconvenience but because the CBSA was moving away from travel advances and had adopted the credit card for travel expenses.

[196] In cross-examination, the grievor stated that he read the letter of discipline dated December 3, 2010, about his misuse of the AMEX card and that he agreed that he took it seriously.

## **2. 20-day (150-hour) suspension without pay**

[197] On June 20, 2012, the grievor received a 20-day suspension for misconduct, again for personal purchases not related to work that he had made with his AMEX Card. The letter of that date advising him of the discipline stated as follows:

*This letter is further to the pre-disciplinary meeting held on June 1, 2012 with respect to the allegation that you contravened the Treasury Board Secretariat (TBS) Directive on Travel Cards and Travellers Cheques when you used your American Express (AMEX) Designated Travel Card for personal purchases and personal advances. As you are aware, the investigation determined that you contravened the TBS Directive on Travel Cards and Travellers Cheques.*

...

*Your misconduct is serious, considering that you have been disciplined previously on December 3, 2010 for using your AMEX Designated Travel Card for personal purchases. At the disciplinary meeting on December 3, 2010 you acknowledged that the card is provided for the purchase and payment of authorized business travel expenses. However, you continued to use the card for personal purchases and personal advances following this date up to the date that your card*



was cancelled on September 9, 2011.

...

*The CBSA issued the AMEX Designated Travel Card to you in the event that you were required to travel as part of your duties as an Inland Enforcement Officer. All purchases and cash withdrawals made using the credit card are subject to monitoring and limited personal use is permitted only when purchases compliment [sic] the travel undertaken. The card is a resource provided to you for the purchase/payment of authorized business travel expenses as defined by the National Joint Council Travel [sic]. In the future, you must ensure that you comply with all CBSA and Treasury Board policies, procedures and directions. Failure to comply may result in disciplinary action, up to and including termination of employment.*

...

[198] Mr. Johns testified about the facts that gave rise to the suspension.

[199] In April of 2011, the CBSA was notified that the grievor's AMEX card account had fallen into arrears. In cross-examination, the grievor confirmed that he received emails from Ms. Fussey on April 5, 2011 (that had attached an email from CBSA Finance, Prairie Region), and a follow-up to them from Mr. Johns on November 11, 2011, with respect to his overdue AMEX card account. The emails were as follows:

[Email from Audrey Carr to Ms. Fussey dated April 5, 2011, at 11:30 a.m.]

*Subject: Olivier-Job - Employee AMEX - Overdue > 60 days - April 2011*

*Hello Kim,*

*We have been notified that Tevin Olivier-Job's AMEX card is more than 60 days overdue.*

*Please sign and date the attached letter and forward an original to the employee and a copy to my attention.*

*Feel free to contact me if you have any questions.*

...

[Email from Ms. Fussey to grievor dated April 5, 2011, at 5:59 p.m., forwarding the email just quoted]

*Hi Tevin. Please review the attached memo and advise whether your account has now been paid in full and date paid. Thanks*

*If your account is still outstanding, please provide reason - if for example you have submitted your claim (provide date) and have not yet received payment then I will have the claim tracked to see where it is in processing.*

*Depending on the reason for the delay in payment (for example, in the case the departmental error/delay) our AMEX Card Co-coordinator, [name omitted], may be asked to advise AMEX of the reason for the delay in paying the balance outstanding.*

*In the event of departmental error/delay, [name omitted], may be able to request that interest not be assessed. In the event that you are charged interest, you can submit your AMEX statement as a receipt for the interest expense you incurred. This receipt can be attached to a travel claim and processed in your local office.*

...

[Email from Al Johns to the grievor on November 7, 2011, at 2:11 p.m., forwarding the email just quoted]

*Hi Tevin, the Director advised me today that the balance on your AMEX account is still outstanding and has asked me to meet with you about your options for payment of the outstanding balance. I received some information from finance about those options so come see me either at the end of today or first thing tomorrow morning and I can share that with you.*

...

[Sic throughout]

[200] The grievor confirmed in cross-examination that his AMEX card account was 60 days in arrears in April of 2011 and that in November of 2011, not only was it still in arrears, but also the CBSA had to pay the balance and recover the sum of \$1900 from him.

[201] On September 9, 2011, at 11:53 a.m., Ms. Fussey emailed the grievor (copying Mr. Johns) and advised him that it had come to her attention that he had again used his AMEX card to purchase personal items not related to government travel and that the appropriate use of the AMEX card had been discussed with him on three previous occasions. She advised him that his AMEX card was being cancelled administratively

and that it would remain cancelled pending the outcome of a fact-finding investigation being conducted by Mr. Johns. She further advised the grievor that he would not be approved for escort assignments (removals) as he would not have a travel credit card, and travel advances would not be issued for escort work.

[202] On September 12, 2011, Mr. Johns emailed the grievor. He was following up on Ms. Fussey's recent email. He provided the grievor with copies of his AMEX card account statement and asked him to explain every transaction. On September 15, 2011, the grievor responded to Mr. Johns. He addressed four transactions on the statement and advised that all the other transactions were attributable to removals.

[203] Mr. Johns emailed the grievor on September 21, 2011, at 4:30 p.m., and stated as follows:

*Thanks for responding Tevin. I have reviewed the enclosed document you provided on September 15th with written explanations for the four transactions (enclosed). I still require an explanation for the remaining transactions identified in the attached documents concerning your card activity and AMEX statement. Once I have received your written explanation for all the transactions listed on these statements, I can arrange with you a date for a Fact Finding interview.*

...

[204] On September 22, 2011, at 10:00 a.m., the grievor replied by email and stated as follows:

*I have provided a written explanation for the charges on my AMEX statement. I stated that all other charges that were not further explained can be attributed directly to Removals. Since the card is cancelled I do not see a reason to provide any further statements.*

*This card was cancelled before the "fact finding" process. Seems to me a conclusion has already been drawn by Management that I should not be allowed access to this card. I have been compliant thus far with all requests. Aside from the explanations provided I do not feel that anything further is warranted.*

...

[205] The grievor stated that he never wanted the AMEX card and that if he had been listened to, he would never have obtained one.

[206] The grievor admitted in cross-examination that from the time he started at the IED until October of 2011, he did not have a personal credit card. He went on to admit that before he joined the IED, he had had a personal credit card but that he had cancelled it because he had had trouble with the interest rate and the credit limit. He testified that the personal credit card that he obtained in October of 2011 had an approved limit of \$10 000.

[207] Mr. Johns stated that he recalled the grievor during the investigation asking about using his personal credit card with respect to removals and that he recalled asking the grievor if he could see the credit card and for the grievor to provide specifics about the card type and the credit limit.

[208] When pushed on whether he did anything more about the grievor using his personal credit card, Mr. Johns stated that he concurred with Ms. Fussey and her concerns. He that said he found the grievor's request questionable given his personal use of the AMEX card and his failure to make timely payments on that card. He said that he questioned the grievor's ability to manage a personal credit card. If the grievor was having difficulties with finances and if he was out of the country on a removal and was without a CBSA-issued card, given the previous problems, there was a concern about him not having funds if he needed them.

[209] A meeting of the grievor, Ms. Fussey, and Mr. Johns took place on Friday, November 11, 2011. Ms. Fussey summarized it in an email sent to the grievor and copied to Mr. Johns dated Monday, November 14, 2011, which stated in part as follows:

*This will confirm your meeting with Al and myself Fri morning approx 9:10 to 10:45 and my response to your request to be allowed to use your personal credit card for escorted overseas removals.*

*Your concerns with the actions taken by management regarding the cancellation of your AMEX card and your removal from the conduct of escorted overseas removals are noted and although not exhaustive or verbatim include:*

*Not being treated fairly with removal from escorts seen as punitive.*

...

*Not being given the benefit of the doubt prior to your AMEX card being cancelled and not being called prior to the e-mail being sent advising of the action to be taken;*

*Not being given the option of using your own credit card for removals (as other officers use) and/or using a DBA;*

...

*Although advised you have the right to discuss with your union representative or seek their assistance, you are not interested in involving and/or speaking to your union representative*

*Managements actions against you are seen as personal, is it harassment? and you may possibly be going to Human Rights;*

*Managements actions would not pass the Globe and Mail test;*

...

*Tevin, as confirmed during our meeting the cancellation of your government travel card was due solely to information received indicating that you had again inappropriately utilized the card for the purchase of personal items not related to government travel, which indicated that you as the cardholder were not respecting the signed acknowledgement of responsibility and obligations. As management had discussed appropriate use of the government travel card with you on three previous occasions, I requested your card be cancelled pending the outcome of an administrative fact finding investigation to be conducted by Manager Al Johns.*

...

*At issue is your ability to respect the responsibility and obligations of your government credit card. As a result your request to use your personal credit card for government travel; specifically for escorted overseas removals, will not be considered until the conclusion and findings of the administrative investigation.*

...

[Sic throughout]

[210] When the grievor was asked directly in cross-examination if it was wrong or discriminatory for the CBSA not to allow him to use his personal credit card for removals, he responded that he was told from the beginning that he had to have an

AMEX card but that other IEOs had told him that he did not need one.

[211] The grievor confirmed that he had no idea if other IEOs had had unpaid amounts on their CBSA-issued AMEX cards or on their personal credit cards. He did not know if other IEOs had had their CBSA-issued AMEX cards suspended or cancelled; nor did he know if the CBSA had had to pay other IEOs' outstanding overdue AMEX card accounts. He also could not say if any IEOs had had difficulty paying their AMEX accounts due to financial difficulties.

[212] The grievor stated that he heard from other IEOs that they did receive emails about their AMEX card accounts. However, he stated that their accounts had gone into 30- and 60-day arrears due to errors the CBSA's finance department made processing claims and not due to any errors on their parts.

[213] When the grievor was asked in cross-examination if his position was that despite the information from managers and emails and meetings with Mr. Johns as well as reminders about the use of the AMEX card, he understood the credit card policy only after he took the removals training in April of 2012, the grievor said that that was not his position.

[214] Mr. Johns stated that as far as he knew, while he was the manager of the Winnipeg IED, no other IEO had an unpaid balance on a CBSA-issued AMEX card that was overdue in excess of 60 or 90 days, and no other IEO had ever had a CBSA AMEX card cancelled. He stated that if an IEO had had a card cancelled, he would have known. Mr. Johns stated that he had no recollection of any other IEOs having personal charges on their CBSA-issued AMEX card; only the grievor had some.

[215] The grievor did not grieve the 20-day suspension.

#### **D. The termination of employment**

[216] Ms. Delgaty was retired at the time she gave evidence. Her last position in the federal public service was as the CBSA's regional director general for its Prairie Region, which she held from January 2011 until April 27, 2014. Her career in customs started in 1979, and she testified that she had held a variety of positions with the CBSA and its predecessor, the Canada Customs and Revenue Agency, and that she had also worked at Service Canada.

[217] Ms. Delgaty testified that she became aware of the conduct involving the grievor's use of fleet vehicles when Mr. Klatt briefed her in December of 2012 or January of 2013. She said that whenever there was the potential of misconduct by an employee within her organizational structure, she was to be briefed. She stated that her recollection was that the briefing was oral and that she would have consulted with LR and CBSA's Professional Standards branch to determine if an investigation was warranted and, if so, who would carry it out.

[218] Ms. Delgaty stated that she received a copy of the report and details about Mr. Tisdale's discussion with the grievor. She did not elaborate on exactly what she was told. After reviewing the report and having discussions with LR and the CBSA's Human Resources section, she stated that it was determined that discipline was appropriate and that a pre-disciplinary hearing would be held, which took place in September of 2013 and was attended by the grievor and Mr. Klatt. She testified that she received and reviewed a copy of Mr. Hazlitt's notes of the pre-disciplinary hearing. Ms. Delgaty said that upon reviewing the report and the pre-disciplinary hearing notes, she became concerned about the grievor's ability to do his job vis-à-vis the CBSA Code and the V&E Code. In addition, she stated that when she considered them along with Mr. Tisdale's meeting with the grievor, she found inconsistencies in the grievor's account.

[219] Ms. Delgaty said that she was concerned about the grievor's use of the fleet vehicle, the misrepresentation of being on duty when using it, and the speeding issue. She also stated that she was concerned about his use of the phrase "fellow law enforcement partner", finding it dishonest, unprofessional, showing a lack of judgement, and unethical. She also stated that she was concerned about the grievor's less-than-forthrightness during the investigation and his claims at times that he did not know what he was doing.

[220] Ms. Delgaty confirmed that she was aware of the grievor's previous discipline with respect to misusing his AMEX card.

[221] Ms. Delgaty determined that terminating the grievor's employment was the appropriate discipline to impose, based on the following factors:

- he received a speeding ticket;

- he attempted to obtain a reduced fine based on his position as a law-enforcement officer;
- he failed to report the speeding ticket;
- he prepared statutory declarations on CBSA letterhead and used government equipment, without authority;
- his explanation with respect to the December 18 Stat Dec made no sense;
- he admitted to using the fleet vehicle to attend the flag football game only at the pre-disciplinary hearing;
- he suggested a call to Emerson as an excuse; however, there was no evidence of such a call;
- he used the fleet vehicles for personal matters and at times transported people not of the CBSA in it;
- he showed no remorse;
- he was not forthcoming; and
- he had already been disciplined twice.

[222] Ms. Delgaty stated that the grievor's actions of using the CBSA letterhead and of using his badge and IEO position with the Magistrate breached the CBSA Code value of integrity, which states as follows: "Integrity is the cornerstone of good governance and democracy. By upholding the highest ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector."

[223] Ms. Delgaty stated that the grievor's actions of using the fleet vehicle on September 1 and 8, 2012, breached the CBSA Code value of professionalism, which states as follows: "We use resources responsibly by: ensuring the use of CBSA's resources is efficient, effective, approved and accounted for; avoiding waste and misuse of the Agency's money, property and resources . . .".



[224] Ms. Delgaty stated that those uses of the fleet vehicle and the grievor's discussion with his manager about them breached the CBSA Code under "Accountability and Professional Conduct", where it states the following: "We recognize that CBSA's policies, standards, procedures and practices provide the boundaries within which we demonstrate professional conduct with respect and integrity."

[225] Ms. Delgaty stated that those uses of the fleet vehicle and the grievor's use of the October 16 Stat Dec with the magistrate at the provincial court could have negatively impacted the CBSA and thus breached the CBSA Code, "Expected Standards of Conduct", No. 4, "Private, Off-Duty Conduct and Outside Activities" where it states the following: "We avoid such activities, which may include those that: reflect negatively on the Agency, its employees (including its managers) or its programs...".

[226] Ms. Delgaty stated that those uses of the fleet vehicle by the grievor breached the CBSA Code, specifically the "Expected Standards of Conduct", No. 7, "Care and Use of Government Property and Assets", which states as follows:

*. . . [employees are to use] government property and assets only in [their] official duties and never for personal gain or use.*

*[They] seek authorization from management before [they] use property, equipment, materials, vehicles or facilities purchased . . . for reasons other than official purposes. This includes, but is not restricted to: vehicles . . . .*

[227] Ms. Delgaty stated that using his IEO position when the grievor dealt with the ticket with the Magistrate breached the CBSA Code, "Expected Standards of Conduct", No. 7.1, "Badges, Official Identification and Officer or Office Stamps", where it states the following: "We do not use our job title, official identification, badge or any other official document (whether on or off-duty, personally or professionally, or when engaging in social media activities) for a purpose that is illegal, improper or against the best interests of the CBSA."

[228] Ms. Delgaty stated that the grievor did not uphold the values of an honest and trustworthy professional; nor did he exercise good judgement. He showed a lack of understanding that what he was doing was wrong and a lack of remorse. She stated that she believed that discipline is to be corrective; however, it was clear

that the 20-day suspension with respect to the AMEX card misuse did not bring about the desired change. Due to the nature of the grievor's work, she felt that the bond of trust between him and the employer was broken and that terminating his employment was appropriate.

[229] Ms. Delgaty stated that given that the investigation process could be long, she determined that she would not suspend the grievor pending its completion.

#### **E. Post-termination activity**

[230] Entered into evidence was a security incident report that Ms. Jarvis filed and that was dated October 2, 2013, which identified a potential threat from the grievor. That report indicates and Ms. Jarvis testified that after the grievor had been terminated from his CBSA position, she received a call from a BSO who was his relative and who had had a conversation with him through Facebook. According to the incident report and Ms. Jarvis' testimony, the discussion that this BSO and the grievor had included a discussion about his job status with the CBSA. The BSO advised Ms. Jarvis that when she asked the grievor about his employment and learned that he had been terminated, he had told her the following: "Ask Robin Jarvis."

[231] Ms. Jarvis also testified that that BSO advised her that the grievor had also posted the following on a Facebook account under the name of Shemar Olivier: "I wonder if a book publisher would be interested in all the government secrets I've acquired in my 10yr [sic] career. More importantly, I wonder what public interest would be like?. [sic]"

[232] According to the incident report and her testimony, Ms. Jarvis stated that that Facebook account was the grievor's. She also said that several other CBSA employees brought the Facebook post to her attention. She stated that it concerned and appalled her because the grievor had worked for the CBSA for 10 years and had a security clearance, meaning that he had had access to documents and information.

[233] In cross-examination, Ms. Jarvis was asked if she had taken the grievor's post and comment to his relative as a personal threat. She replied that she had not.

[234] The grievor stated that Shemar Olivier is a news media page he is a part of but that it is not his personal Facebook account. He apologized at the hearing for posting the comment. He said that it could be interpreted a thousand different ways. He said

that when he posted it, he was experiencing many different emotions, and the comment was the result. He stated that nothing in the post identifies the CBSA. He said that he knew that his comment would generate some talk but that he did not realize that the CBSA would use it against him in his case. He said that the comment was up for about a day. He took the comment down after a discussion with the same relative that had contacted Ms. Jarvis.

[235] The grievor stated that he was not angry at Ms. Jarvis. He referred his relative to Ms. Jarvis because he knew that they knew one another, and he did not want to explain his job loss to his relative on Facebook. When asked why he did not just tell his relative what had happened, he said that he was emotional and that he was under the impression that his relative and Ms. Jarvis spoke to each other.

[236] The grievor stated that there was a perception that he is angry. He stated that he speaks with passion, which comes from his cultural background and that people interpret it as anger. He went on to state that people lecture everyone on cultural diversity and then stated that perhaps he would not be angry and that perhaps his perception towards people in authority over him would be different if there were more visible minority representation in the authority ranks. He said all people who have spoken have shown none. He said that he has no reason to be angry, that he loved his job, and that he cannot control authority figures and how they perceive his actions. He stated that this was an example of how he was treated from his arrival at the IED. He said that he received no training, only discipline, discipline, discipline.

[237] In cross-examination, it was put to the grievor that posting the comment on Facebook was bad judgement. He said that he would agree with that if he was still bound by the policies when he made it but that he would not agree if he was not bound by them. When counsel for the CBSA confirmed that he stated that posting it was fine if he was not bound by the policies, he stated, "No."

[238] On October 8, 2013, Mr. Tisdale sent an email that forwarded a memo from Mike Skappak, the director of the Enforcement and Intelligence Operations Division of the CBSA's Prairie Region, who did not testify. The memo states as follows:

*Due to several recent events I am sending the following message to staff as a reminder of our responsibilities as it relates to the CBSA's Code of Conduct, the expectation of employees receiving stand-by [sic] pay per the FB Collective*

Agreement as well as the Treasury Board policies surrounding the proper use of CBSA assets including but not limited to fleet vehicles. I have attached a word document which provides the relevant links as well as additional background information including more common Q&A's.

The CBSA's Code of Conduct was updated in 2012 to reflect the CBSA's continued evolution as a law enforcement agency and with it the high expectations of Canadians as it relates to our conduct both on and off duty. It is incumbent on all CBSA employees to be fully aware and adhere to the Code and to approach management if they require clarification. The link to the CBSA's Code of Conduct is embedded in the attachment.

As you are aware several EIOD employees are required to perform Standby Duty functions. Per the FB Collective Agreement, an employee who agrees to be on Standby Duty must be available to report during his or her period of standby at a known telephone number and be available to return to duty as quickly as possible if called. It is important to note that employees on Standby are receiving remuneration to be readily available to perform work. This is an important factor for all employees to consider in making appropriate personal plans when receiving remuneration while on Standby. The attachment also provides additional information as it related to the FB Collective Agreement surrounding Standby.

Being in care and control of CBSA assets while performing work is a significant responsibility. All CBSA employees are required to seek authorization from management before we use property, equipment, materials, vehicles or facilities purchased, used or leased by the Agency for reasons other than official purposes. This includes, but is not restricted to: vehicles, buildings, space, premises, facilities, uniforms, files and documents, office equipment and supplies, computers, software, video equipment, telecommunications devices such as smart phones, government credit cards, telephone calling cards and defensive equipment like pepper spray, handcuffs, batons and duty firearms. In the attachment you will find additional information as it relates to the CBSA's Code of Conduct, specifically the Care and Use of Government Property and Assets. You will also find the Treasury Board Policies related to Fleet Management as well as the CBSA Directive regarding Taxable Benefits on personal use of CBSA vehicles.

I encourage all EIOD employees to approach their managers should they require clarification on the contents of this message.

[239] Mr. Skappak did not testify.

[240] In cross-examination, Mr. Tisdale agreed that the reference to “recent events” in the memo attached to the October 8, 2013, email was likely the termination of the grievor’s employment based on the issues that arose from the use of the fleet vehicle.

[241] On December 4, 2013, Mr. Tisdale emailed Messrs. McEvoy and Klatt with respect to a conversation that apparently had taken place on December 3, 2013. The email stated as follows:

*Further to our conversation regarding responding while acting as duty officer, I thought I would summarize our conversation in this email to ensure we’re both on the same page.*

*As you took over the duty phone yesterday, you asked me for clarification regarding expenses the Agency will cover while responding to calls.*

*Your recollection of our October 30th staff meeting is that Andrew approved mileage and or cab fare reimbursement to attend the office in response to a duty call. This included mileage or cab fare to return home from a third location and to go from home to the office and back home.*

*I stated that I don’t recall this decision but I advised you that Director Skappak’s recent decision is that the officer will be reimbursed for mileage or cab fare from home to the office and from the office to home which is consistent with the collective agreement. It is the officer’s responsibility to be available to attend to the office if required in response to a duty call.*

*You also stated that the officers are ready and available to respond but they are not covered for the expenses to return home to get any required items such as badge and building access card prior to attending to the office. I advised that as duty officer you are already receiving pay for being on call and that your expenses to the office will be covered. I also stated that at some point in time you would return home from the third location if you did not receive a duty call so the Agency is not responsible for paying your expenses to return home.*

*I also advised you that I will approve the reimbursement of mileage or cab fare from your location to the office when you receive a duty call. eg. if you are at a restaurant and you receive a call, I will approve reimbursement for mileage or cab fare from the restaurant to the office. If you choose to*

*return home first then you will receive reimbursement from your residence to the office. We did not discuss this next point but this 3rd location must be within a reasonable distance to allow you to respond within a reasonable time frame. i.e. this would not include a cottage or another location that is considerably further in distance than your residence to the office.*

*You are still approved to take a fleet vehicle home to have at your disposal for business related purposes while on call as the duty officer.*

*I also advised that I will send an email to all officers providing additional clarification regarding fleet vehicle usage. This email will follow under separate cover.*

*Please respond via email to acknowledge we are in agreement of our understanding of these parameters or to request clarification.*

[Sic throughout]

[242] The email referred to another email on fleet vehicle usage, which was not produced at the hearing.

[243] The email was introduced in the cross-examination of Mr. Tisdale. He stated that it had been sent because of a conversation at a staff meeting about what was or was not covered. He was brought specifically to the paragraph about taking a fleet vehicle home and was asked why it was set out. He replied that some confusion had occurred at the staff meeting and that there was an impression that staff could not bring a fleet vehicle home, which was not the case. He stated that he clarified it in the email. Counsel for the grievor asked him what had caused the confusion; he replied that he was not sure.

[244] In cross-examination, that email was put to Mr. Klatt. It was suggested to him that it was fair to say there had been confusion. He replied that he could not speak to the IEOs' intent.

#### **F. Alleged human rights violations**

[245] The grievor testified that as an IEO, he was trained to read legislation, policies, and rights and to gather evidence and interpret it to determine if, reasonably, there were sufficient grounds to move forward with allegations.

[246] After he was terminated, the grievor contacted the CHRC. He testified that he was adamant that he believed his rights had been violated. He stated that he knew that he had a year to make a complaint, so he took a few months to evaluate the information he had before contacting the CHRC, which he did by telephone. Entered into evidence was a copy of a letter from the CHRC to the grievor dated July 25, 2014, a copy of which was sent to the CBSA, which referenced the grievor's inquiry of July 15, 2014, and stated in part as follows:

...

*In a conversation with Commission staff, you agreed that we could share this information with your employer. We are therefore sending a copy of this letter to your employer to let it know that you intend to pursue allegations of discrimination, as follows:*

*The complainant alleges that the respondent discriminated against him on the grounds of age, colour, national or ethnic origin and race by treating him in an adverse differential manner and terminating his employment, contrary to section 7 of the Canadian Human Rights Act.*

*Please note that under section 41(1)(a) of the Canadian Human Rights Act, the Commission may refuse to deal with your complaint unless you have exhausted the grievance process. As an employee in the public service, you need to file a grievance under the Public Service Labour Relations Act first. We suggest you contact your union representative as soon as possible.*

...

[247] In his evidence, the grievor stated that he felt strongly that in the past, his human rights had been violated on multiple occasions. He stated that he made his initial call to the CHRC sometime before July 15, 2014. He said that a further telephone interview with a CHRC representative took place on July 15, 2014, in which he provided information about his allegations and evidence to support his claim. He said that the CHRC representative told him that he had done everything he had to do before the deadline and that as far as the CHRC was concerned, it was an active claim. He stated that he was told that the CHRC complaint would piggyback on his termination grievance.

[248] The grievor was asked in his evidence-in-chief about his experience of racism and discrimination in the past. His response was as follows: “Direct racism, discrimination, none. I feel my generation experiences it indirectly.” He went on to make a number of statements about how he felt, suggesting that when he was with the IED, he was pulled aside an atrocious number of times to be asked questions and that his co-workers noted to him that management always needed to discuss matters with him.

[249] The grievor was asked what made him feel that he had been discriminated against. He replied that for years, he had been treated differently than others in the IED had been. They had received training. He had not, receiving only discipline. He stated that he had been singled out over and over again.

[250] While the grievor’s training record was entered into evidence, there was no evidence whatsoever about what training other IEOs had received and whether they had received more, less, or the same amount of training as the grievor had received.

[251] The grievor related a conversation he had with an administrative assistant whom he said he went for coffee with on several occasions. He stated that she asked him the following: “Why is it always you?”

[252] The administrative assistant that the grievor stated made these comments to him did not testify.

[253] The grievor stated that during two of his three years at the IED, lack of training was never identified as a factor in any of his previous discipline.

[254] The grievor stated that at the IED, at “the power level”, there is no diversity. He stated that every time he had to deal with “the power structure”, he was not trained before having to and that he was never provided such training. He stated that when he finally received training, after two years, he was able to see how diverse the rest of the CBSA appeared to be. He stated that this is why he holds a strong belief that management singled him out on grounds of colour, national or ethnic origin, race, and age. He stated that he is constantly being judged by individuals who have no background or experience in all the things that he is made up of (his colour, ethnic origin, race, and age). He stated that in 2014, he felt that it had been demonstrated time and again that that was not acceptable. He stated “it happens” in Winnipeg, based



on his experience.

[255] In cross-examination, the grievor was asked if he believed he had been unfairly targeted for his use of the AMEX card; he answered, “No.” When counsel for the CBSA then stated to the grievor that she must have misunderstood his evidence, he stated that she had.

[256] When counsel for the CBSA asked the grievor if he had stated that there was a lack of diversity at the IED, he stated “No,” and added that there was a lack of diversity at the “power level”.

[257] The grievor admitted that in 2012, of the seven IEOs, one, who was acting in Mr. Johns’ position after he left in September of 2012, was a woman of colour of African descent, while at least two other IEOs were visible minorities, and a third could identify as a member of the lesbian, bisexual, gay, and transgender community.

[258] Mr. Johns was asked what if any effect did the grievor being a visible minority have on him being allowed to use his personal credit card, to which he said there was none.

[259] Mr. Johns was asked to what extent, if at all, he treated the grievor differently from any other IEO. He stated that he treated all his IEOs the same way.

[260] Mr. Johns testified that before the grievor was hired into the IED, Mr. Johns set out the parameters of the person he wanted to fill the vacancy. The grievor was in a pool of qualified candidates. In fact, he fit those parameters. Mr. Johns stated that one of the parameters was that he wanted a visible minority, specifically because of the unit’s work. He said that the people the IED deals with come from many different backgrounds, and he felt that having a diverse IED strengthened its ability to fulfil its functions. It helps the IEO understand different cultures. He said that having a diverse group of employees is valuable.

[261] Both counsel agreed to the facts with respect to the grievance process and when and how the matter of discrimination arose. The parties agreed that only four weeks after the final-level grievance hearing was the discrimination issue raised, on August 13, 2014. A document was entered into evidence, which the parties agreed contained the speaking notes of the bargaining agent representative, Ms. Randall, from a meeting with the CBSA’s LR representative, Matthew Yaworski, who took no notes.

Ms. Randall indicates in her notes that the grievor wished to amend the grievance to include discrimination allegations. Mr. Yaworski disagreed but heard her submissions. The notes reflecting her comments on discrimination state as follows:

*Follow up [sic] with the Labour Relations Advisor on August 13:*

*The grievor was discriminated against based on his race. He was treated in a manner that was different than his co-workers who are not visible minorities. Prior to commencing work in Inland Enforcement the grievor has [sic] a clean disciplinary record.*

*He was informed of the duty officer use of vehicles and acted in a manner similar to other officers, yet he was investigated. When he pointed out the discriminatory treatment the employer did not investigate to see if his claims were true. He was not told the rules by the employer, but rather by co-workers. He followed the policies in a manner consistent with others in his office.*

*He sought direction and clarification from the employer on policies and was ignored.*

*He was marginalized when he was not permitted to use his personal credit card. Others were allowed to use their cards. Management did not discuss concerns with the grievor, rather concerns were sent straight to fact finding investigations. To his knowledge, no other officer was treated in this manner. This was another example of the discrimination.*

*He was singled out. The investigations were completed with bias and without procedural fairness.*

*He is a visible minority in the workplace and unbeknownst to him, he was reprimanded and treated in a manner different than others who trained him to do the very things that led to his termination. No other employees were interviewed despite the gravity of the allegations he was facing. The manner in which the employer dealt with the situation was excessive and based on the definition of workplace discrimination. He believes he was discriminated against.*

*The grievor seeks remedies available under the Canadian Human Rights Act.*

[262] Mr. Yaworski did not take any further steps because the credit card issue was not germane to the termination grievance.

[263] The referral of the grievance did not contain an allegation of a breach of the collective agreement or a notice to the CHRC under s. 92(1) of the *PSLRB Regulations*. That notice was sent to the Board on Friday, July 17, 2015.

[264] The final-level grievance decision did not in any way refer to the discrimination issue.

### **G. Training**

[265] The grievor's formal training record with the public service was entered into evidence. Between April 26, 2006, and May 12, 2012, he received 590 hours of training (roughly 78.5 days, based on a 7.5-hour workday). He moved to the IED in December of 2009 and became an IEO. From the time of that appointment to May 12, 2012, he received 205 hours of training (roughly 27 days, based on a 7.5-hour workday).

[266] The grievor was brought to his training record in cross-examination and to the course he stated he needed, which was a 3-day, 22.5-hour course called "Inland Enforcement Removals". It was recorded that he took that course from April 24 to 26, 2012. He confirmed that he did not believe it was discriminatory that it took over two years for him to have this training, conceding that he understood that it was difficult to register for it. He agreed that he had not been singled out by having to wait to take it.

[267] The grievor attended a driving course on October 20 and 21, 2011, which was facilitated by the Winnipeg Police Service, and a surveillance course from October 24 to November 1, 2011, which was facilitated by CBSA instructors.

## **IV. Summary of the arguments**

### **A. Document production request**

#### **1. For the grievor**

[268] The grievor submitted that the documents requested relate to his belief that he was following accepted practice and that the CBSA's differential treatment of him was based on his race. He submitted that the IEOs were required to record all their vehicle uses in a trip log and that if they received a call while on standby, they were entitled to OT. When an IEO is called, he or she fills out a call-out sheet. A review of the IEOs' time sheets and call-out sheets and the vehicle logs will indicate the extent to which they, including the grievor, used the fleet vehicles for personal purposes and that

doing so was openly reported.

[269] In support of his position, the grievor referred me to *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46, which states that the only requirement is that the documents are arguably or seemingly relevant to the issue at hand.

[270] The grievor's request was made at 4:31 p.m. on Wednesday, July 15, 2015, and asked that the documents be produced by the close of business on Tuesday, July 21, 2015.

## **2. For the CBSA**

[271] The CBSA responded to the request on Thursday, July 16, 2015, at 2:20 p.m.

[272] The CBSA submitted that the grievance was about discipline that took place in September of 2013 that related to misconduct that took place in September of 2012, at which time the grievor already had discipline on his file.

[273] The grievor requested the vehicles' logs, time sheets, and call-out sheets for other IEOs for two years before and two years after the alleged misconduct took place. The CBSA opposed the request on the bases of a lack of relevancy and of insufficient time to determine if the material was even available.

[274] The CBSA conceded that although the test for the relevancy of pre-hearing disclosure as set out in *Zhang* is broad, it is still grounded in relevance as per the discretion to order pre-hearing disclosure under s. 226(1) of the *PSLRA*. In assessing what may be relevant in the context of this case, the CBSA submitted as follows:

- The grievor's request for the material appeared founded on a suggestion that he was singled out for disparate treatment. This would be relevant if other IEOs were using the fleet vehicles for personal purposes and were transporting persons not of the CBSA for reasons not related to work and if management had been aware of it.
- The grievor and the bargaining agent have been provided with the manager's statement that before the grievor's offence of speeding in the fleet vehicle, the manager had not been aware of any wrongdoing by the grievor or by any other employees as he did not sanction the personal use of fleet vehicles; nor was he aware of family members or

friends being transported in it. Therefore, even if it were true and it could be proved that other IEOs were misusing the fleet vehicles, if management had not been aware, arguably, it would not be relevant.

- At no point was any suggestion raised in the grievance proceeding that the grievor was discriminated against on the basis of race; it was inappropriate and erroneous for the bargaining agent to suggest otherwise in an attempt to broaden the relevancy context. The CBSA has a diverse and varied workforce. The grievance before the Board was not referred on the basis of discrimination; nor was any referral made to the CHRC. Those avenues were open to the bargaining agent if at any point the grievor had wished to suggest that there had been discrimination against him.
- While the bargaining agent suggested that producing the documents requested would help establish that disparate treatment occurred, it would not be the case unless its members (the other IEOs) were prepared to provide full details of their home and personal living situations over the time in question (four years) as there is no dispute that the D.O. was allowed to take a fleet vehicle home when on call. This would require making accounting adjustments to the mileage and cross-referencing work calls over four full years. The request would not serve the purpose claimed unless the hearing were delayed by a number of months for the cross-referencing, assuming the information is available.

[275] The CBSA also submitted that it is unknown if the documents are available or accessible.

[276] The CBSA submitted in the alternative that if the Board were inclined to make a disclosure order, rather than require the CBSA to embark on a wild goose chase, the bargaining agent should provide the following specifics:

- the names of the other IEOs who used the fleet vehicles for personal purposes;
- the approximate dates of that wrongdoing; and

- the identities of the managers who were aware of the wrongdoing.

[277] More specific information would permit the CBSA to focus its resources and to determine what documents exist, if any.

## **B. The grievance**

### **1. For the employer**

[278] Two questions must be answered. First, was there misconduct? And second, if there was misconduct, was the penalty of discharge appropriate?

[279] The employer's witnesses were candid and credible. The employer has established that misconduct occurred.

#### **a. The speeding ticket and related issues**

[280] The grievor was speeding in a fleet vehicle, which was contrary to the law. He was trained in using vehicles and in driving techniques, and he knew better. He attempted to minimize his behaviour and had a selective memory. While he could not state why he was driving in the area where he received the speeding ticket, he could specifically recall that no children were around.

[281] The grievor failed to report receiving the speeding ticket in a timely manner.

[282] The grievor attempted to use his position as an IEO with the CBSA to have the speeding ticket fine reduced. According to Mr. Tisdale's evidence, from his conversation with the grievor, from Ms. Jarvis during her investigation, and from Mr. Klatt's pre-disciplinary hearing discussion with the grievor, he intended to plead guilty with an explanation to get the fine reduced. That intent is also stated in the December 18 Stat Dec. However, in his evidence, he suggested that everyone had got it wrong. His evidence consisted of inconsistencies layered upon inconsistencies.

[283] The grievor's evidence about what he did with the ticket also does not make sense. First, he stated that he went to the courthouse to deal with it. When the Magistrate asked him if he needed extra time, he said that he did not and that he had time to deal with it, knowing he had until November 1. Yet, he clearly had an issue with the amount of the fine.

[284] The grievor's alleged actions were inconsistent as he then just let the documents sit on his desk, after which he then stated he put them in the manager's inbox. Later, in cross-examination, when pushed on this issue, he stated that he gave the materials to the executive assistant.

[285] The grievor's story then changed to one of management having to deal with the ticket and failing to, yet he did nothing to bring it to management's attention. He did not speak to any acting managers. He admitted in cross-examination that he was told to follow the CBSA Code many times, yet there is no evidence that he brought the ticket to any manager's attention.

[286] The grievor's rendition of what he did is just bizarre. He said he was told that he could get the ticket signed over to him but that he did not know what that meant and did not ask. He did not act like someone dealing with a ticket.

[287] The other thread to the grievor's story is that since he wanted to pay the ticket, he created the October 16 Stat Dec. However, he then suggested that he was too busy to pay it, which does not make sense as there are options set out on the ticket, including a default notice that it can be paid, if the person receiving the ticket is too busy to go to the courthouse, by credit card or by mailing a cheque.

[288] The story then changed again. This time, he said that he wanted to pay the ticket but that he knew other IEOs who had convinced managers to go with them, resulting in a reduced fine. That suggests that he wanted to see if his situation warranted some special treatment. However, the Magistrate would not have suggested that to him on October 18. The grievor then told Ms. Jarvis that he was looking for direction, which again would not have flowed from what the Magistrate told him.

[289] The grievor's story changed again when he met with Mr. Tisdale in January of 2013, when he asked Mr. Tisdale to show him the policy that stated that he had to pay the ticket. That was not congruent with someone who always intended to pay it. The grievor did not state that the Magistrate told him to go to the office and find out about the employer's policy. At the end of the day, he never did pay the ticket.

[290] The overwhelming inference from what happened is that the grievor always wanted to have the fine reduced; to do this, he used his CBSA position, which is the reason behind the October 16 Stat Dec.

**b. Inappropriate use of the fleet vehicle**

[291] On both Saturday, September 1, and Saturday, September 8, 2012, the grievor used the fleet vehicle for personal purposes. His suggestion that he was always on duty when he was the D.O. and therefore had to use the vehicle is nonsense. While he might have been the D.O., had he been required to respond to a call, there would have been evidence of it. An OT sheet would have been filled out, as would have been a call-out sheet. There was no evidence, and there were no sheets. The grievor admitted that if he had received a call, he would have filled out the appropriate forms.

[292] The evidence disclosed that the fleet vehicles could not be used for personal purposes. The CBSA Code specifies the restrictions on their use, and Mr. Johns explained the appropriate use of the vehicles to the IEOs, including the grievor. Mr. Johns stated that he would not authorize using a fleet vehicle for purposes not related to work.

[293] The grievor suggested that an IEO took a fleet vehicle to his cottage when that IEO was the D.O. However, the grievor also suggested that there was no mobile phone reception at this IEO's cottage; it would be contradictory to bring the vehicle to a cottage as the D.O. and to be unable to be reached on the IEO's mobile phone.

[294] The grievor purchased fuel for the fleet vehicle on September 8, 2012, in or near Dugald. When Mr. Tisdale asked him where he was going and what he was doing on that date that caused him to receive the speeding ticket and later fill up with fuel in Dugald, the grievor stated that he could not remember. During the investigation, he also told Ms. Jarvis that he could not remember. However, at the pre-disciplinary hearing with Mr. Klatt, the grievor stated that he might have been at a flag football game in Dugald that day.

[295] The grievor had transported people in fleet vehicles who were not of the CBSA, which was also against policy. He said that he did not know that doing so was wrong, yet at the same time, he stated that on many occasions, he reviewed the CBSA Code. He was given it a number of times and was instructed to review and follow it.

[296] The grievor has shown no remorse. While he stated that he has apologized, which the employer does not agree with, he has not shown any remorse. He has shown no insight into understanding that what he did was wrong or into taking responsibility



for his actions so that they will not recur. People can say that they are sorry they did something wrong, or they can say that they are sorry that someone perceived that they did something wrong; those two things are not the same. The grievor has done the latter. He did not acknowledge that his use of the fleet vehicles was wrong; nor did he acknowledge that his actions dealing with the speeding ticket were wrong.

[297] The grievor does not understand that his behaviour was wrong. The termination of employment was not the first time he was disciplined; he had discipline on his file. In June of 2012, he received a 20-day suspension for misusing his CBSA AMEX card, which was imposed on the heels of earlier discipline for the same behaviour.

[298] Heard in the grievor's testimony about the AMEX card was that he just does not take responsibility for his actions. He would state that he did not know and that he did not receive training, which was contrary to the documentary evidence.

[299] The IEOs operate without direct supervision; they are often on the road and even out of the country. They do not sit in cubicles with someone watching over them. With so little supervision, trust is fundamental.

[300] The employer referred me to paragraph 117 of *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53, which stands for the proposition that an adjudicator must reduce a disciplinary penalty imposed by management only if it is clearly wrong.

[301] The employer referred me to Brown and Beatty, *Canadian Labour Arbitration* (4th ed.), at para. 7:4312, entitled "The final incident", which sets out that when progressive discipline is being applied, the employer must prove the existence of a final culminating incident that is deserving of discipline. Some offences may be trivial and may not satisfy this principle.

[302] *Reid-Moncrieffe v. Deputy Head (Department of Citizenship and Immigration)*, 2014 PSLRB 25, states that the final incident need not be something that when considered in isolation would warrant a severe penalty such as discharge from employment. However, based on the principle of a final incident or progressive discipline, a termination of employment may be warranted if a discipline history justifies an employer escalating the disciplinary sanctions. This concept was also followed in *Canada Post Corporation v. Canadian Union of Postal Workers*, [2011]

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C.L.A.D. No. 406 (QL), *Northwest Territories Power Corp. v. Union of Northern Workers*, [2004] N.W.T.L.A.A. No. 4 (QL), and *Weyerhaeuser Co. (Drayton Valley Operations) v. United Steelworkers Local 1-207*, [2007] A.G.A.A. No. 14 (QL).

[303] *Pagé v. Deputy Head (Service Canada)*, 2009 PSLRB 26, was a decision in which a grievor was discharged from her employment for committing fraud against her employer. Ms. Pagé had a lengthy and unblemished discipline-free employment history with her employer. Despite it, the adjudicator upheld her termination of employment, stating at paragraph 180 that the very nature of her position was an important element as it afforded her a very high level of autonomy, significant latitude, and substantial authority. The employer in this case submitted that the grievor was in a similar position as an IEO and when he was the D.O. He often worked alone and without supervision and was afforded a high level of autonomy and trust.

[304] In *Gangasingh v. Deputy Head (Canadian Dairy Commission)*, 2012 PSLRB 113, the adjudicator held that while the grievor eventually did take responsibility for her actions, she did so only after she was confronted with explicit evidence. Her failure to take responsibility for her conduct until late in the process was an aggravating factor considered against her.

[305] At paragraph 131 of *McEwan*, the adjudicator states that a lack of remorse and failure to recognize the seriousness of actions is an aggravating factor that has to be considered. *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, also holds that recognizing culpability or responsibility is critical to assessing the appropriateness of discipline. The employer in this case submitted that remorse is not just saying sorry for getting into trouble; it is recognizing that what was done was wrong, showing genuine insight into the wrongdoing, and understanding that it was wrong, and why.

[306] *Bradley v. Treasury Board (Revenue Canada, Customs and Excise)*, 2000 PSSRB 82, involved a customs inspector who used another inspector's stamp to clear goods across the border (which ought not to have been cleared) and subsequently caused the loss of documentation for those goods. The grievor in *Bradley* was in a position of trust and despite 27 years of service, his termination was upheld.

[307] *Copp v. Canada Customs and Revenue Agency*, 2003 PSSRB 8 at para. 124, discusses the importance of integrity in positions such as those of BSOs.

[308] The employer also referred me to *Rivard v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2002 PSSRB 75, *Murdoch v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 21, *F.H. v. McDougall*, 2008 SCC 53, and *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

### **c. Post-employment action - Facebook posting**

[309] Subsequent to his termination, the grievor posted a message on Facebook. The employer's position was that this action could be taken into account. Normally, evidence post-discipline, and specifically, post-discharge, is seen in two types of cases. The first is when the employer does not learn of the facts until after the discipline or discharge, and the second is when a positive defence is raised, such as treatment for a substance abuse that was linked to the discipline.

[310] On that point, the employer referred me to *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 S.C.R. 1095, *The Board of Education for the City of Toronto v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487, *Walerius v. McDiarmid Lumber Ltd.*, 2000 MBCA 18, *Gillespie v. 1200333 Alberta Ltd.*, 2012 ABQB 105, *University of Manitoba v. Canadian Auto Workers Union, Local 3007* (2003), 124 L.A.C. (4th) 208, *Lake Ontario Portland Cement Company Limited v. Groner*, [1961] S.C.R. 553, and *Sutherland v. Advance Furniture Distribution Inc.*, 2010 NSLST 12.

## **2. For the grievor**

### **a. Objection to jurisdiction on the discrimination allegations**

[311] The discrimination is the single most important aspect for the grievor. While he was terminated in September of 2013, he had raised the discrimination issue in the workplace when his AMEX card was cancelled.

[312] The grievance filed on the grievor's behalf merely states that the termination was unjust and without cause; therefore, if discrimination was a factor, it would be unjust and without cause. He conceded that the grievance does not raise a discrimination allegation.

[313] The final-level grievance hearing was held on July 10, 2014. The bargaining agent representative made submissions with respect to the termination. In the meantime, the grievor had contacted the CHRC to inquire about making a complaint. It wrote back to him, copying the CBSA, on July 25, 2014, and told him that he had to follow the grievance process and that his grievance should cover the discrimination allegation.

[314] The evidence as agreed by the parties disclosed that on August 13, 2014, a month after the final-level grievance hearing, the grievor's bargaining agent representative and the CBSA representative had a discussion, and the bargaining agent representative made representations, which are set out in her typewritten notes. The final-level grievance reply was issued on August 27, 2014.

[315] While the notice to the CHRC was not filed until immediately before the hearing (on July 17, 2015), it does not alter the fact that the employer did have notice of the grievor alleging discrimination as part of his termination grievance. As such, the principle set out in *Burchill v. Canada*, [1981] 1 F.C. 109 (C.A.) has no application. On that point, the grievor referred me to *Perron v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 109, *McMullen v. Canada Revenue Agency*, 2013 PSLRB 64, *Leclaire v. Treasury Board (Department of National Defence)*, 2010 PSLRB 82, *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56, and *Nadeau v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 82.

[316] The CBSA did not suggest that it had been prejudiced; it tried to keep the grievor from raising a human rights issue based on a technicality. The facts do not change; the grievance is not any different.

[317] The grievor's position was that there is jurisdiction to hear the grievance, including the discrimination allegations.

[318] The grievor requested that if I determine that I am without jurisdiction, I refrain from making any findings *in obiter* with respect to the discrimination issue.

#### **b. Merits of the grievance**

[319] The grievor joined the CBSA in August of 2005, became indeterminate in 2007, and joined the IED in 2009. He had no significant problems until he joined the IED, from which he was suspended and then terminated in a very short time.

[320] The grievor apologized for the parts he played in the events that took place, and he expressed remorse.

[321] The grievor strongly believed that more was going on.

[322] The grievor explained how and why he used the fleet vehicles as he did and stated that he did so in the way he had been directed to. He said to management to ask his colleagues how they used the fleet vehicles, and management did not. The grievor felt singled out. He felt that he learned from others, and he did what he felt was correct.

[323] All the employer's witnesses were asked if they discriminated due to race, and they all answered, "No." That is not how racism or discrimination occurs. Discrimination is subtle and covert; it can be affected by someone's actions without him or her realizing it. The grievor referred me to *Sinclair v. Corporation of the City of London*, 2008 HRTO 48, and to *Knoll North America Corp. v. Adams*, 2010 ONSC 3005.

[324] While the discrimination allegation with respect to the AMEX card may be out of time, the facts can still be circumstances to consider in the totality of the case. The grievor cannot ask for a remedy for the discrimination involving the AMEX card, but the facts surrounding the AMEX card discrimination can be considered.

[325] The grievor is often misinterpreted due to the way he acts and due to his mannerisms. Because of them, he is misjudged as angry or upset and is perceived in a particular manner. There are references in the documents to "Tevin being angry", and "Caught off guard- anger directed at her."

[326] The grievor did not overtly call anyone a racist; there are perceptions about him that are inaccurate and that caused management to jump to conclusions about him. His position was that management was wrong; it did not listen to him and heard only what it wanted to hear.

[327] According to the grievor, there are subtle scents that are indicators of discrimination that cause him to feel that he is being treated differently because of his race. He submitted that I should consider these indicators, and he referred me to *Maillet v. Attorney General of Canada (representing the Royal Canadian Mounted Police)*, 2005 CHRT 48.

[328] With respect to the use of the fleet vehicle, the grievor filled out the paperwork as directed by Mr. Johns, including vague details because of sensitive information. That made it difficult to know exactly what was being done with the vehicle. When the vehicle log form is read months later, it is difficult to determine what was going on. It was clear from the grievor's evidence that he could not remember what he had been doing, when he was asked about it.

[329] Mr. Johns said that he did not routinely check the fleet vehicles' logs, did not monitor if the vehicles were being used for personal purposes, and acknowledged that he could have looked to see if there was widespread misuse. The grievor's view was that he was not misusing the fleet vehicles; he said that his use was the same as that of the other IEOs, yet no one thought it prudent to look into their use. The grievor believed that that was because of his race. He believed that he was being singled out.

[330] Mr. Johns stated that while there were no instructions in writing, the IEOs would have known what was authorized because of conversations that had taken place. According to him, his expectations were crystal clear; however, the same expectations were not crystal clear to the grievor, who stated that he used the fleet vehicles the way he saw other IEOs using them and that he applied the Globe and Mail test.

[331] The circumstances surrounding the AMEX card's cancellation were a significant issue for the grievor. He wanted to be assessed so he could use his own card. He submitted that he was not adamant that he could or would use it, but he wanted to be assessed as to whether he had the means required for travel. He felt that the decisions with respect to the AMEX card were made on past assumptions of him. He let the matter go and did not grieve it, but the same feelings came up with respect to his termination, which is why the information related to the AMEX card is important.

[332] The grievor stated that he received training on using the AMEX card, that he responded to that training, and that there were no further issues. The grievor stated he responds to training and discipline.

[333] Mr. Tisdale first met with the grievor on December 18, 2012, to discuss the ticket. At that meeting, the grievor explained to him his understanding of the meaning of "standby".

[334] The grievor asked for clarification when no one gave it to him. He stated that he always wanted to deal with the ticket but that he never received clarification, which was frustrating for him.

[335] The January 18 notes do not adequately capture the grievor's explanation. Mr. Tisdale stated that the grievor was angry, which he denied.

[336] The grievor submitted that the October 8, 2013, email to all staff, sent less than two weeks after he was terminated from his job, the fact that it had to be sent, and Mr. Tisdale's email to another IEO about the D.O. together indicate that other IEOs were using the fleet vehicles the same way the grievor did.

[337] The grievor carried on his ordinary duties during the investigation, without any concerns.

[338] Mr. Klatt's involvement was limited. He submitted that the grievor did not show remorse. Mr. Klatt stated that his notes were accurate, yet they do not reflect the manner in which the grievor gave his evidence. Mr. Klatt stated that the grievor was confrontational. The grievor comes from a Caribbean culture, which he described as being passionate. It could be mistaken for being confrontational and angry. He stated that people often misjudged him.

[339] Neither Mr. Tisdale, Mr. Klatt, nor Ms. Jarvis looked into the grievor's allegation that other IED members used the fleet vehicles in the same manner as he did, which was a practice that he stated had been going on openly for years. He submitted that as a matter of prudence, Ms. Jarvis could have looked into his allegation.

[340] The grievor received discipline twice for misusing the AMEX card. He did not grieve it and felt that with the additional information he received, he understood the guidelines. He testified that he felt that had he had more formal training, he would not have fallen into the problem he did with the card.

[341] The grievor used the fleet vehicles in the same way as the other IEOs did. When he was on standby, as the D.O., he could use a fleet vehicle for personal matters as he had to respond to calls, and he said that he saw other IEOs doing the same thing. He did not hide the fact that he used the vehicles that way; he dutifully recorded the mileage at all times, which was not what someone trying to cover something up would do.

[342] The grievor admitted that he should not speed. The administrative assistant handed him the ticket. He assumed that management knew about it, and he attempted to deal with it by paying it. He created the October 16 Stat Dec so he could explain his actions to the court. He acknowledged what he did wrong. But at the courthouse, he found out that he did not have to pay the ticket and that he had other options, including that he could plead guilty with an explanation. He did not hide the October 16 Stat Dec from management.

[343] The grievor produced the December 18 Stat Dec to explain to management the direction he received from the Magistrate at the courthouse. He stated that he wanted the ticket released to him so that he could pay it. He needed a mechanism to pay it. However, from December 18, 2012, until January 17, 2013, he did not receive this mechanism.

[344] The grievor acknowledged that he should not have had people other than CBSA personnel and detainees in the fleet vehicles. Once he was told he was not supposed to do that, he stopped doing it.

[345] The grievor referred me to *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. LRBR 1, which sets out that the questions to be determined in cases of misconduct are first, whether there was conduct deserving of discipline, and second, if so, and the employee was disciplined, whether the type and amount of discipline imposed was appropriate in the circumstances.

[346] *Wm. Scott & Company Ltd.* also discusses the mitigating factors that should be taken into account. The list of them it sets out is not necessarily exhaustive, but it includes determining whether the employee was singled out, whether there was intent, and whether the action was a result of a momentary lapse.

[347] *Andrews v. Deputy Head (Department of Citizenship and Immigration)*, 2011 PSLRB 100, stands for the proposition that the assessment of rehabilitative potential should be considered as a factor that would serve to mitigate a disciplinary penalty, along with those such as the nature of the offence and the grievor's length of service, performance record, disciplinary record, remorse, and forthrightness or credibility.



[348] *Canadian Office and Professional Employees Union v. Yellow Pages Group Co.*, 2012 ONCA 448, addresses the principle of proportionality; i.e., whether the severity of a penalty was proportionate to the misconduct. It reflects the acknowledgement of importance of work to a person's life and identity. The grievor in this case spoke about how important the job was to him.

[349] *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30, holds that even employees who require significant managing are entitled to be treated appropriately by their employers and may be terminated only for just cause. The adjudicator in that case held that all the factors that the employer relied upon to justify the grievor's discharge were not proved, so she reinstated the grievor.

[350] *Leadbetter v. Treasury Board (Solicitor General Canada - Correctional Service)*, [1999] C.P.S.S.R.B. No. 59 (QL), was a case in which a workplace culture conditioned and condoned the grievor's behaviour. In addition, the grievor in that case was charged with and convicted of theft under \$5000.

[351] The grievor also referred me to *Niedermeiser v. Treasury Board (Revenue Canada - Customs and Excise)*, [1997] C.P.S.S.R.B. No. 111 (QL), *Hampton v. Treasury Board (Revenue Canada - Taxation)*, [1998] C.P.S.S.R.B. No. 101 (QL), and *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58.

[352] The grievor is of the view that race played a role in the decision-making process. There was no diversity in the power structure. Just because there might have been diversity in the office did not mean that unconscious stereotypical beliefs did not exist or come into play and permeate the office culture.

[353] The allegations that led to the discharge were the ticket (something that someone does not lose his or her job over), the grievor allegedly using his position to obtain a benefit (something he denies doing), and his personal use of the fleet vehicles (there was no intent to breach the CBSA Code, and he did only what he was directed to do and thought he could do). His lack of intent to breach the CBSA's Codes is a mitigating factor, and the grievor did not do anything for personal gain.

[354] The grievor admitted that the ticket and having people other than of the CBSA in the fleet vehicles should have warranted discipline but that discharging him from his position was not justified.

[355] The grievor submitted that s. 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) was violated. The employer's actions adversely impacted him, which he alleged was due to race. He suggested that there were negative connotations about him. The employer singled him out with respect to the AMEX card and the fleet vehicles. It did not look into the option of a personal credit card and did not ask other officers if their vehicle use was the same as his. The grievor submitted that the employer discriminated against him.

[356] The grievor requested that if I do find that I have jurisdiction with respect to the issues arising out of the *CHRA* and that there was discrimination, I reconvene the hearing to address the issue of a remedy for the discrimination. In the absence of jurisdiction or a finding that there was discrimination, he still submitted that the discipline was not appropriate and that a lesser penalty should be substituted.

[357] With respect to the Facebook posting, the grievor submits it was clearly a lack of judgement on his part and an emotional aberration. It was done on the spur of the moment, and in the end, he removed it very quickly. There is no indication that he ever intended to divulge secrets. He apologized, however, submitted that the Facebook posting is irrelevant to the proceedings.

### **3. The employer's reply**

[358] The grievor's perception of standby does not make sense. It does not mean what he said it means.

[359] The cases the grievor submitted are all fact specific. A number of them involve employees with lengthy discipline-free service with their employers.

[360] In *Andrews*, the grievor had 27 years of service, with no previous discipline. The adjudicator found the grievor credible. In *Kinsey*, the adjudicator found that that grievor was a credible witness. The CBSA submitted that the grievor in this case is not credible.

[361] In *Canadian Office and Professional Employees Union*, the grievor had a lengthy and unblemished career. While the principle of proportionality exists, there is no doubt that a federal public service job was important to the grievor as such jobs pay well. This must be weighed against an employer's entitlement to expect that its employees will follow the rules.

[362] In *Kinsey*, the employer's policy was somewhat murky, and the facts were not quite as they were suggested to be. In the grievor's case, the rules (the policy and the CBSA's Codes) are clear, and the facts are also clear. In *Kinsey*, the adjudicator found that there was no criminal intent, that the grievor had learned his lesson, and that the grievor would not act in that manner again. The CBSA does not believe that the grievor in this case has learned his lesson or will follow the rules.

[363] The decisions in *Niedermeiser* and *Turner* are fact situations that involved single instances of misconduct. In *Turner*, the grievor, a BSO, thought that a detained individual had ingested drugs and as such forcefully administered ipecac to that person to induce vomiting.

[364] The CBSA submitted that the grievor did receive personal gain. He used the fleet vehicles to transport people, whom he would otherwise have had to incur costs to transport. He operated the vehicles at taxpayers' expense instead of incurring the related costs. He wanted to pay less for the speeding ticket, which was motivated by personal gain.

[365] The grievor submitted that the ticket would not justify terminating his employment; nor would having personnel in the fleet vehicles who were not of the CBSA. However, he was terminated for more than those reasons. There was the behaviour of not reporting the ticket as well as the attempt to gain an advantage from his position. He submitted that he did not deliberately avoid bringing it to management's attention, but that is not the same as being compliant by reporting it. In addition, he also had a live disciplinary record.

[366] The CBSA did not suspend the grievor during the investigation. Had it done so, he would have stated that the employer should not have done so, and had it not done so, he would have suggested that it would weigh in favour of a lesser penalty.

[367] Much of what Mr. Tisdale did not recall did not relate to the facts of the meeting or what the grievor did or did not say but to how the question was framed. Counsel for the grievor suggested that the grievor would testify that Mr. Tisdale stated that he had done it. It is perhaps semantics, but how the question was put to Mr. Tisdale did not suggest that he did not recall a particular topic, issue, or fact but that he might not have recalled only a part of one, which is not the same as not recalling. It is also not a failed recollection when the event never took place.

[368] The grievor's submissions about what he did with the fleet vehicles and what he saw the other IEOs doing with them did not match the evidence. He did not actually provide any evidence about seeing other IEOs using the fleet vehicles for personal purposes. His evidence was that he had discussed using it with another, senior IEO, which is not evidence that it actually happened.

[369] The grievor also spoke about job shadowing with respect to using the fleet vehicles. Job shadowing is not about learning the peculiarities of an IEO's job; the grievor would and should have already known the CBSA's Codes and the V&E Code as he had already been a BSO.

**a. Discrimination allegations**

[370] The discrimination allegations somewhat shifted. The referral to adjudication was about the grievor's termination. However, he tried to link actions relating to the AMEX card usage to the termination.

[371] The grievor attempted to advance his discrimination claim by using stereotypes as its basis. He attempted to cast management as seeing him as the stereotypical angry black man; it found him angry when he was not because of his race, which was a stereotype. He was terminated from his job, which therefore was discrimination.

[372] That does not work because there is a gap. He was not disciplined for his alleged anger or his confrontations, which happened in the cases the grievor cited. There has to be a nexus between the alleged discriminatory behavior being complained of and the action taken. His logic suggests that the CBSA disciplines only black male employees for breaches of its codes. The other thing that arose from the cases he submitted was that he had to prove that one of the factors used in disciplining him was his race, which the CBSA submitted he has not established.

**V. Reasons**

**A. Document production**

[373] The grievor's document production request came on the eve of the hearing on July 15, 2015, despite that he was terminated on September 27, 2013, and that the investigation into his conduct involving the fleet vehicle dated to early 2013.

[374] On Friday, July 17, 2015, at 9:53 a.m., the Board's registry advised the parties that the grievor's document production request was denied. Later that same day via email, at 1:12 p.m., the Board received the Form 24 notice that advised the CHRC that the grievor was putting forward an issue involving the interpretation or application of the *CHRA* with respect to an alleged discriminatory practice or policy. The bargaining agent representative signed it on July 17, 2015.

[375] In the production request, the grievor stated that the documents requested were relevant to support his position that he was following accepted practice and that the employer treated him differently in this regard. By treating the grievor differently from his coworkers, he alleged that he had been singled out for discipline due to his race for his personal use of the fleet vehicles. His position was that other IEOs did the same thing and that the documents were relevant both in respect to the allegations against the grievor on the issue of just cause and mitigating circumstances.

[376] Until the Form 24 notice was delivered, no indication had been made in either the grievance or the grievance responses filed with the Board that an issue involving the *CHRA* was being advanced. Before the production request, no indication had been made in the relevant material that the grievor had been subject to disparate treatment; nor was any allegation made that the discipline was due to his race.

[377] To have a complete picture of the fleet vehicles' usage and whether any other IEO was misusing it would require an exhaustive review of not just who the D.O. was but also of whether he or she logged any OT while being the D.O. and of the mileage recorded in the vehicles' logs. A complete review and breakdown of all the work of all the IEOs over the requested time (four years), as well as of all the work carried out, would have required determining if abuse took place, because the fleet vehicles were not necessarily static when not with a D.O. In addition, the IEOs' home addresses would have had to have been requested and disclosed. None of this information was requested.

[378] The fleet vehicles' logs and copies of call-out sheets and time sheets for the requested time would provide only a partial picture of the fleet vehicle usage by IEOs and the IED. Without more, the everyday use of the fleet vehicles and the everyday duties of every IEO would not support the grievor's contention that other IEOs used the fleet vehicles as he did and that management knew it, turned a blind eye to it, and

singled out the grievor for discipline.

[379] However, a request for documentation can and does remain an open and fluid part of the hearing process. As evidence is disclosed through testimony, requests for documentation can be asserted or reasserted (as the case may be) and re-evaluated, depending on what the evidence before the tribunal discloses.

[380] The hearing proceeded for four days, from July 28 through July 31, 2015. At no time during that part of the hearing did the grievor again request the production of documents. The hearing adjourned on July 31, 2015, pending the scheduling of further hearing days. It continued five-and-a-half months later from January 16 to 22, 2016. At no other time was any further request made for documents.

[381] That being said, it became clear during the course of the evidence that the documents the grievor requested would not have helped me consider his position. The employer's witnesses, specifically Mr. Johns (who was the grievor's supervisor throughout the period in which the events relating to the use of the fleet vehicle took place), did not review any vehicle logs to consider how any IEO, including the grievor, used the fleet vehicles as the D.O. If not for the ticket, the grievor's use of the fleet vehicles the way he did might have never been noticed.

#### **B. Jurisdiction over the racial discrimination allegations**

[382] The Board has jurisdiction to deal with alleged violations of the *CHRA* in the workplace (see s. 226(2) of the *PSLRA*). Further, clause 19.01 of the collective agreement states that “[t]here shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the [PSAC], marital status, or a conviction for which a pardon has been granted.”

[383] The CBSA's objection was that the grievance was not referred to the Board as an alleged breach of the collective agreement and that nowhere in the grievance does it suggest that the discipline was based in some way on discrimination due to the grievor's race and ethnic origin. The CBSA relied on *Burchill*, which provides that a grievor cannot pursue at adjudication something different from what was grieved.

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*Burchill* stands for the proposition that a responding party is entitled to go into adjudication knowing the case it must meet. It protects a responding party from being faced with a case different from the one presented in the grievance process.

[384] The grievance is against the termination of employment. That is the case that the employer had to meet. It submitted that at the last moment, the grievor changed the essence of the grievance, so I should not consider the discrimination allegations.

[385] Based on the facts, I am satisfied that the principles established in *Burchill* have not been breached. While the grievor did not specifically use the term “discrimination” or make specific allegations alluding to disparate treatment due to his race in his grievance, before the final-level decision was made, his bargaining agent representative did make written representations of allegations of disparate treatment and discrimination due to the grievor’s race and ethnic origin. As the employer had yet to issue a final-level decision, it could have taken those submissions into account before rendering it. It would appear from the facts provided to me that it did not.

[386] I also suspect that the grievor or his representatives were not as diligent with respect to this position since the discrimination allegations due to race and national origin were not put forward in the grievance process until after the final-level grievance hearing had been completed, and the Form 24 notice was not filed until July 17, 2015. The CHRC did not respond until August of 2015, after the first week of the hearing had been completed. These actions certainly did appear to confuse the parties and the Board. However, they did not somehow act to negate the Board’s jurisdiction to assess the discrimination issue in so far as it relates to the discipline.

[387] As the CBSA was aware of the grievor’s position during the grievance process, it certainly should not have been taken by surprise by his position at the hearing. Therefore, I am not prepared to allow to the CBSA’s objection with respect to addressing the discrimination issue at the hearing.

### **C. Credibility**

[388] Credibility is a key factor in determining the evidence to be accepted. The test for credibility is articulated in *Faryna* which states as follows:

...

*If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility. . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*

*The credibility of interested witness [sic], particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. 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. . . .*

...

[389] With respect to the discipline that gave rise to the grievor's termination of employment, the witnesses that the employer called to testify set out facts that were largely static, such as the employer's organizational structure; the IED's structure; the grievor's job; the rules, policies, and procedures governing the workplace; and the work environment.

[390] The fact scenarios surrounding the grievor's conduct that gave rise to the discipline were almost exclusively communicated by the grievor. He recounted several events in discussions he had on the ticket and on the use of the fleet vehicle to Ms. Jarvis and Messrs. Tisdale and Klatt. Those renditions of what occurred were recorded in documents (sometimes by him and sometimes by others) that were entered into evidence, recounted by the witnesses who participated in the discussions with the grievor, and testified to by the grievor.



[391] With respect to the facts involving the AMEX card, again, the static facts were set out by the employer's witnesses, largely Mr. Johns, while the grievor's actual use of the AMEX card was again recounted by him either through emails, notes of discussions he had with others, and again in his testimony before me.

[392] During the grievor's testimony, he was often asked simple straightforward and direct questions, which he would not answer. Instead, he would talk about what he perceived people were thinking or what he believed were their motives. He would speculate on why he thought someone did something or why something had happened rather than answer the questions put to him. He often did not actually answer questions put to him.

[393] As explained in more detail in the sections of this decision that follow, the grievor's evidence on key points was not believable and not credible and often did not make any sense. It is not just what he said but also how he phrased it, what he did not say, and how his recounting of a given event was inconsistent with the other times he had conveyed it, as recorded when he had recounted it those other times or in his documents.

#### **D. Policies**

[394] The grievor's evidence on policies was contradictory.

[395] He testified that he did not look at any policies. That being said, the multiple letters that either offered him employment or extended his employment terms set out that he was bound by the CBSA Code in effect at the relevant times. In addition, when he first got into trouble in 2010 with his use of the AMEX card, he had been given the pre-2012 Code and the V&E Code (which he acknowledged receiving).

#### **E. Policy and the fleet vehicles**

[396] The CBSA's Codes (either the pre-2012 Code or the 2012 Code) clearly state in simple terms the appropriate use of CBSA (government) assets. They specifically speak about vehicles and state that they are not to be used for purposes other than official business, unless authorized by management. They also specifically state that no one may be transported in a government (CBSA)-owned or -leased vehicle unless that person is connected to an official assignment or is authorized by management or the transport is in the CBSA's best interests.

[397] The grievor also testified about a discussion he said he had with another IEO, after his first 6 to 10 weeks at the IED. He said that the IEO told him that being the D.O. required responding immediately to any emergency. An “emergency” was defined as occurring when any other law-enforcement agency might require an immediate and timely response from the CBSA. As such, the fleet vehicle is with the D.O. so that he or she can accomplish that task.

[398] He stated that during their discussion, he told the IEO that he had several activities outside work and that he asked the IEO how he could use the vehicle for those activities, stating that at the POE, BSO’s would never use a vehicle like that. He stated that the IEO laughed and told him the following: “You are in the big leagues now, Tevin; that is not how we use the vehicle in this environment!” The grievor stated that he “. . . referred [this IEO] back to the policy and asked him if they had a different policy than at the POE.” The grievor stated on one hand that he did not look at policies, yet when relating this discussion about the use of the fleet vehicles, he stated that he referred the IEO to the policy, which would suggest that the grievor knew what the policy was.

[399] The grievor stated that his discussion with the other IEO about the use of the fleet vehicles was not only overheard by Mr. Johns but also that Mr. Johns inserted himself into it. He stated that Mr. Johns told him that he used the Globe and Mail test with respect to the use of the fleet vehicles. According to the grievor, this meant that if the IED or an IEO had to explain its or his or her use of a fleet vehicle, the question was whether that use would pass the public’s perception of what is reasonable (if it was made public in the media). The grievor stated that Mr. Johns said that the D.O. uses a vehicle so that he or she can respond to police emergencies immediately. He stated that Mr. Johns told him that “. . . it is not so you can run personal errands or, in my situation, coach soccer and play soccer.”

[400] The grievor stated that he sought further clarification from Mr. Johns and that Mr. Johns told him the following about his outside activities: “I am not to use the vehicle to do those activities; I am to use the vehicle for police emergencies.”

[401] The grievor then made a comment that I can only assume, based on the way he made it, he was attributing to Mr. Johns. The comment suggested that the grievor has a life but that IEOs prepare for or will be potentially required to go on a call at any time

on any day and that the fleet vehicles are tools. He said he was satisfied with that explanation and that it made sense to him.

[402] When conveying the conversation he attributed to Mr. Johns and the other IEO about using a fleet vehicle when an IEO was the D.O., the grievor attributed contradictory statements to Mr. Johns. He first stated that Mr. Johns specifically told him twice during that discussion that the fleet vehicles were not to be used for personal purposes, going so far as to provide specifics like playing or coaching soccer or running personal errands. The grievor then suggested by his comments that he has a life and therefore that it is okay for an IEO to take the fleet vehicle wherever he or she goes whenever that IEO is the D.O. This makes absolutely no sense.

[403] It is not just that the grievor's rendition makes no sense, it is also the way he conveyed the conversation. He did not actually come out and say that Mr. Johns said it was okay to use fleet vehicles for personal purposes. In fact, the comments that the grievor specifically attributed to Mr. Johns are the exact opposite; IEOs were not supposed to use fleet vehicles for personal purposes. The grievor then tacked on to this conversation a suggestion that he appears to attribute to Mr. Johns' comment that the grievor "has a life", inferring therefore that it was okay to use fleet vehicles in the manner that the grievor did.

[404] Mr. Johns testified twice, once before the grievor and once in reply evidence. The grievor was present throughout Mr. Johns' initial testimony about the use of the fleet vehicles and the policy. None of the alleged discussion that the grievor testified about, between himself, the other IEO, and Mr. Johns, was ever put to Mr. Johns when he gave his evidence, which was clearly a breach of the rule in *Browne v. Dunn*, (1893) 6 R. 67 (H.L.).

[405] It was not that the topic and issue were a surprise, as Mr. Johns was asked in both chief and cross-examination about what he told the IEOs on the use of the fleet vehicles. He stated that he told them that they were not to be used for personal purposes when they were the D.O. He said that unless they were called out for work, the fleet vehicle was to remain at their residences when they were the D.O. He did state that there was some grey area, and he gave examples of stopping for coffee or lunch while otherwise engaged in official duties and while using the fleet vehicle. He said that doing so would not be inappropriate; nor would it violate the pre-2012 Code,

the 2012 Code, or the V&E Code.

[406] I also find it difficult to believe that the grievor, who has a university degree and who also testified that he has been trained to read statutes and regulations when enforcing the *IRPA*, did not review the policies and directions, especially when he had been disciplined not once but twice for misusing the employer's assets, and the sections of the pre-2012 Code dealing with using employer assets is the same for both the AMEX card and the fleet vehicle.

**F. September 8, 2012; Dugald, Manitoba; and flag football**

[407] Eventually all three of the items in the subheading above this paragraph became synonymous with one another.

[408] The evidence disclosed that the grievor filled the fleet vehicle with fuel at a service station just outside Winnipeg, in or about Dugald, the same day he received the ticket.

[409] The grievor told Ms. Jarvis he did not know where Dugald was; and, he never told her about the flag football game on September 8, 2012. According to the report and the May 31 notes, he alluded to perhaps being in Emerson on that date. Another version of his rendition of what happened on this day was that he had gone to Milner Ridge. No evidence was provided to the CBSA either before the grievor was terminated or at the hearing that a trip to Emerson or Milner Ridge took place.

[410] The flag football game came into play during the grievor's discussion with Mr. Klatt at the pre-disciplinary hearing on September 16, 2013.

[411] At the hearing, the grievor's evidence about a flag football game changed. At one point, he suggested it was held on September 1, 2012, not on September 8.

[412] In cross-examination, he admitted that he played on a flag football team and that the team played its games at a recreational facility in or near Dugald.

**G. September 1, 2012, the wedding, and the accident**

[413] In his evidence, the grievor spoke about how he got into an accident with the fleet vehicle on September 1, 2012, while at a wedding. He gave that evidence to contrast how he was treated when he had the accident as opposed to when he had

been ticketed. There are several difficulties and inconsistencies with this evidence, as follows:

- In his discussion with Mr. Tisdale on January 17, 2013, he had mentioned an accident in passing; however, nothing in the January 18 notes suggests that the grievor was using the fleet vehicle while not on CBSA business when he got into the accident.
- Nothing in the January 18 notes suggests that he was at a wedding at the time.
- Nothing in the January 18 notes provides particulars of that accident or states that it happened on September 1, 2012.
- The report does not refer to the alleged accident; nor do the May 31 notes indicate that the grievor told Ms. Jarvis about it.
- The accident and the details that it allegedly occurred on September 1, 2012, when the grievor was at a wedding were never put to Mr. Johns (who was still his manager and in Winnipeg at that time), Mr. Tisdale, or Ms. Jarvis.
- No documents were presented into evidence that in any way reflected that an accident occurred on September 1, 2012, or on any weekend or weeknight when the grievor was the D.O. or that an accident occurred when he drove the fleet vehicle to a wedding.
- Mr. Tisdale testified before the grievor, who was present during his testimony. The meeting of January 17, 2013, and the January 18 notes were discussed in that testimony. Nothing about the accident occurring while at a wedding on September 1, 2012, was put to Mr. Tisdale in cross-examination.

#### **H. Evidentiary omissions**

[414] It was odd that the grievor, who testified for close to four days, failed to tell the hearing that during the period in question, when he was using the fleet vehicle, he did not have a vehicle for part of that time. Only when I asked him this question after all

the examination-in-chief, cross-examination, and re-examination was completed did he admit to it.

[415] Despite the amount of evidence about the use of the fleet vehicle and the grievor's use of it, when I asked him about whether he had a vehicle during the time frame at issue, his answer was far from fulsome; it was vague, and it left it up to me to speculate whether he ever had a working personal vehicle while he was an IEO or for a small portion of that time or most of it.

[416] The grievor's omission in disclosing his vehicle ownership was strikingly similar to his omission in evidence about having a personal credit card and the earlier difficulties that led to his prior discipline with respect to his use of the CBSA-issued AMEX card.

[417] The evidence disclosed that the grievor ran into difficulties with his CBSA-issued AMEX card on three occasions. The first time it occurred, Mr. Johns testified that he merely had a discussion with the grievor and that no discipline was imposed. The second resulted in the written reprimand (December 2010) and the third in the 20-day suspension (June 2012). The evidence disclosed that the grievor gave a number of reasons for using the AMEX card for inappropriate personal purchases (including clothing, airfare, and hotels) and that he intimated that at least some of the charges were potentially administrative mistakes that others had made when making bookings for him. He alluded to errors made by the organization that accepted the booking in error using his AMEX card, the excuse being that it had the card number on file.

[418] Considering the removals work the grievor did, he would have booked hotels and airfares with the AMEX card for business, and as such, it was a plausible explanation that when he was booking personal travel, a booking organization asking or confirming that it had his credit card number could have in error put it on the AMEX card. However, that potential and plausible error on the part of third-party organizations loses all credibility when on cross-examination, it was put to the grievor that during all the time he was getting into trouble with the CBSA AMEX card by making personal purchases, including booking personal travel and hotels, he did not have a personal credit card.

[419] When testifying in his evidence-in-chief, the grievor spoke about the potential errors he attributed to outside organizations with respect to booking hotels and air travel and complained about not being able to use his personal credit card. He alluded to the fact that this was part of the discrimination against him because other IEOs were permitted to use their personal credit cards when on CBSA business.

[420] The difficulty is that when he was inappropriately using the AMEX card, he did not have a personal credit card. Therefore, he would obviously have known when booking personal travel, airfare, or hotels that if a booking organization said it had his card on file, the only possible card was the CBSA AMEX card. What he neglected to tell the hearing until it was put to him in cross-examination was that at no time until October of 2011 did he have a personal credit card.

[421] Based on these examples and other discrepancies in the grievor's evidence, which will be referred to later in these reasons, I am satisfied that the grievor is not credible. His evidence was suspect and unreliable. His renditions of the facts often changed. He omitted relevant information, admitting it only when he was found out.

[422] The grievor's evidence simply does not withstand the test set out in *Faryna*, which is that "... 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."

[423] Quite frankly, it was difficult to accept almost anything the grievor said, unless there was some other reason to accept it as accurate.

### **I. The grievance**

[424] The usual basis for adjudicating discipline issues is by considering the following three questions (see *Wm. Scott & Company Ltd.*): 1) Was there misconduct by the grievor? 2) If so, was the discipline imposed by the employer an appropriate penalty in the circumstances? 3) If not, what alternate penalty is just and equitable in the circumstances?

## 1. Was there misconduct by the grievor?

[425] The 2012 Code and the pre-2012 Code both address the use of government property and assets and state as follows:

[From the 2012 Code]

### ***D. Expected Standards of Conduct***

...

#### ***4. Private, Off-Duty Conduct and Outside Activities***

...

***CAUTION:*** We are not permitted to do anything illegal or contrary to the Criminal Code, the CBSA Act, or any legislation or regulation enforced by the Agency. ***In the unlikely event of being arrested, detained or charged*** - in Canada or outside Canada - with a violation of laws or regulations, we will ***immediately report this incident to our manager***. This includes minor incidents, such as a traffic violation or highway code violation ticket received while using a government-owned or leased vehicle.

...

#### ***7. Care and Use of Government Property and Assets***

Our CBSA value of ***Professionalism*** encompasses our effective and efficient use of the Agency's property and assets when conducting official duties. As professionals we demonstrate our CBSA value of ***Integrity*** by using government property and assets only in our official duties and never for personal gain or use.

We seek authorization from management before we use property, equipment, materials, vehicles or facilities purchased, used or leased by the Agency for reasons other than official purposes. This includes, but is not restricted to: vehicles. . . .

...

##### ***7.1 Badges, Official Identification and Officer or Office Stamps***

...



*We do not use our job title, official identification, badge or any other official document (whether on or off-duty, personally or professionally, or when engaging in social media activities) for a purpose that is illegal, improper or against the best interests of the CBSA.*

...

*Examples of misconduct:*

...

*Using our official title to obtain a personal discount in an online store.*

*Using a government vehicle to move privately-owned furniture.*

...

[From the pre-2012 Code]

### ***Expected Standards of Conduct***

...

#### ***(b) Care and Use of Government Property and Valuables***

*You must not use property, equipment, materials, vehicles or facilities purchased, used or leased by the CBSA for other than official purposes, unless you have received proper management authorization. This includes, but is not restricted to, vehicles. . . .*

*You cannot transport anyone in a government-owned or leased vehicle, aircraft or vessel unless that person's presence is connected with an official assignment, authorized by management, or it is in the best interests of the CBSA.*

...

#### ***Badges, official identification and officer or office stamps***

...

*You are prohibited from using your job title, badge or any other official identification to obtain or appear to obtain any privilege, favour for yourself or others, or to do anything that is illegal, improper or against the best interests of the CBSA. Such infractions will be considered serious and will result in disciplinary action.*

...

**(m) Off-duty Conduct****General**

...

*You must report a traffic violation or highway code ticket received during the use of a government-owned or leased vehicle.*

[426] The V&E Code states in part as follows:

...

**Appendix****Duties and Obligations****Public Servants**

*Public Servants are expected to abide by this Code and demonstrate the values of the public sector in their actions and behaviour. Furthermore, public servants must also adhere to the behavioural expectations set out in their respective organizational codes of conduct. If a public servant does not abide by these values and expectations, he or she may be subject to administrative or disciplinary measures up to and including termination of employment.*

...

[427] As set out earlier in this decision, the grievor had been told that the terms and conditions of his employment included adhering to the CBSA's Codes and the V&E Code, which was set out in several letters either offering him employment or extending his employment terms. When he received the written reprimand with respect to misusing his CBSA-issued AMEX card, Mr. Johns gave him copies of both the pre-2012 Code and the V&E Code.

[428] While the sections might have changed, along with the wording changing a little, for all intents and purposes, the pre-2012 Code and the 2012 Code state the same thing about the appropriate use of government assets, specifically vehicles. The grievor either knew what was expected of him or certainly ought to have known it.

[429] The misconduct attributed to the grievor included using fleet vehicles for purposes not related to work. The evidence disclosed that when he was the D.O., he would take a fleet vehicle wherever he was required to be (outside of walking

distance), such that if a call came, he had the vehicle with him, and if he was required to go somewhere for work, he would have it with him and could leave immediately.

[430] On Saturday September 1, 2012, the fleet vehicle's log shows that it travelled 152 km. The call-out sheet that the grievor completed disclosed that between 4:10 p.m. and 4:30 p.m. that day, he took a telephone call from the Brandon Police Service in Brandon, Manitoba, which was for his information. The call-out sheet does not indicate that he was required to actually travel anywhere related to the call. His time sheet for that week indicates that he was paid OT for that day, assumedly for the telephone call.

[431] The grievor did not state, either in his May 31, 2013, investigation interview with Ms. Jarvis or in the discussions with Messrs. Tisdale or Klatt, what he was doing on September 1, 2012. At one point during the hearing, the grievor stated that the flag football game was held that day in Dugald, but later in his evidence, he recounted having a fender bender while at a wedding on that day.

[432] Despite the grievor's conflicting evidence, there was no evidence that he was required to travel anywhere to conduct CBSA business on that day. As such, I am satisfied that the CBSA has established that there was no work-related purpose for the grievor to drive the fleet vehicle on that day.

[433] On Saturday September 8, 2012, the fleet vehicle's log shows that it travelled 215 km and that \$85.47 of fuel was purchased in Dugald. There is no call-out sheet for the grievor for that day, and his time sheet recorded no OT for that day. His evidence suggests that it is likely that on that day, he was at a flag football game. I am satisfied that the CBSA has established that there was no work-related purpose for the grievor to drive the fleet vehicle on that day.

[434] The other misconduct attributed to the grievor included the following:

- he transported a persons or persons not of the CBSA and in a manner not related to CBSA business in the fleet vehicles;
- he exceeded a posted speed limit such that a ticket was issued by a law-enforcement agency;
- he did not report the speeding ticket to management in a timely manner; and

- he used his CBSA position (including the CBSA's letterhead) to gain the advantage of a reduced fine for the speeding ticket.

[435] The grievor admitted in the course of the investigation and in his evidence that he had done the following:

- transported persons not employed by the CBSA in a manner not related to CBSA business in the fleet vehicles; and
- exceeded a posted speed limit such that a ticket was issued by a law-enforcement agency.

[436] Using a fleet vehicle as a personal vehicle, including transporting persons in it who are not of the CBSA and not for work-related reasons, and speeding while using it in a manner such that the CBSA is issued a ticket, all breach the pre-2012 Code and the 2012 Code.

[437] The grievor testified about what he did after the ticket was initially brought to his attention by the administrative assistant. He stated that he wrote the October 16 Stat Dec, went to the courthouse, spoke to a Magistrate, and then returned to the office and kept the ticket and the October 16 Stat Dec at his desk.

[438] He also stated that he raised the issue of the ticket with two colleagues, Ms. Nortey and Mr. McEvoy, who were acting for Mr. Johns in his absence. However, he alleged that Ms. Nortey did not want to become involved, and he did not provide any information about his alleged discussion with Mr. McEvoy. There is no evidence that he emailed either Ms. Nortey or Mr. McEvoy or asked for instructions or noted the time and date of this discussion.

[439] The grievor also did not advise Ms. Fussey (Mr. Johns' and later Mr. Tisdale's superior) of the ticket, despite that her office was one floor below him and despite that he had her email address and had exchanged emails with her in the past.

[440] The grievor was given a copy of the default conviction on the ticket by the same administrative assistant in early December of 2012, at which point he said he wrote the December 18 Stat Dec and provided it together with the October 16 Stat Dec and other material related to the ticket to Mr. Tisdale, on or about December 18, 2012.

[441] Ms. Jarvis interviewed the grievor, and the May 31 notes form part of the report. They were provided to him to review and comment upon and, if necessary, to correct. He provided no comments or corrections. The notes make no mention of the grievor bringing the ticket to the attention of Ms. Northey or Mr. McEvoy or to anyone who acted for Mr. Johns. The grievor's ("TJ") exchange with Ms. Jarvis ("RJ") on this point was as follows:

...

*RJ - Explain how you found out about the ticket?*

*TJ - The assistant looked at the book, saw it was me and put it on my desk, I saw it there. I verified it was me. I deal with things as they come. Ultimately, I asked that it be looked at to be paid for. I presented it to, and wrote a stat dec and attempted to go to Broadway, trying to plead the ticket. I was told by the magistrate that I was not allowed to plea as the ticket was CBSA responsibility, not mine. There was no mgt present so I set it aside.*

*RJ - No one acting?*

*TJ - Al was in Regina, acting until Doug came in. no I did not go to Al, the ticket sat. There was a due date and the magistrate asked if I wanted an extension, I said no as I passed it on to Bobbie (assistant) before that date for Mgt to look at.*

*RJ - Before Doug was here?*

*TJ - In the middle of his transition.*

...

[Sic throughout]

[442] The January 18 notes reflect the following about the ticket being brought to management's attention:

...

*I advised Tevin that the ticket has been paid so it wouldn't go into default after Jan 8th but that he is responsible for reimbursing the Agency. He doesn't feel it is fair that he has to pay the late fee of \$50 since he was unable to bring it to management's attention because there was no manager during much of the fall. He says he brought it to my attention in a timely manner.*

*I asked if he advised Kim Fussey about the ticket and he says he did an email that was supposed to be sent to our admin but is not sure if he sent it. I advised him to look for the email and send it to me if he finds it. This will help provide a timeline on what was actioned and when.*

...

[443] Mr. Hazlitt's notes of the pre-disciplinary meeting between the grievor and Mr. Klatt disclose the following about the ticket being brought to management's attention: "Following the meeting with magistrate [sic], he made a statutory declaration on CBSA letter head [sic] and put the whole package in the manager's (Al Johns) inbox."

[444] From the evidence, there appeared to be different versions of what, if any, steps the grievor took to inform management of the ticket. The versions all vary; none seem to be the same. One version is that he told no one but that he put the material in Mr. Johns' mailbox; in another version, he kept all the material on his desk. Another version was that there was no one to inform and that the acting managers did not want to be bothered. In the May 31 notes, he states that he returned the ticket to the administrative assistant to alert management. Finally, he allegedly mentioned it to Ms. Nortey and Mr. McEvoy.

[445] The version the grievor gave in evidence of what he did to alert management to the ticket differed from his version to Ms. Jarvis and what is reflected in the discussions with Mr. Tisdale and Mr. Klatt. I am left wondering what really happened; perhaps none of the versions happened.

[446] Given the variety of versions of what happened and my finding on the grievor's credibility, I am satisfied that the CBSA has established that he did not bring the ticket to management's attention in a timely manner. I am satisfied that his failure to do that until he gave it to Mr. Tisdale on or about December 18, 2012, breached the 2012 Code, the pre-2012 Code, and the V&E Code.

[447] The final misconduct attributed to the grievor was that he attempted to gain an advantage from his position as a CBSA employee.

[448] The December 18 Stat Dec stated the following:

...

*-In order for writer to render a plea in this matter it would require that I be issued a letter of authorization from the Department of Canada Border Services Agency. Without this letter of authorization I would not be able to render a plea on the Agency's behalf because the assigned photo radar ticket is in the name of the agency and not in the name of the writer.*

*-It was my intention to plead "Guilty with explanation" and provide the court with the attached statutory declaration so that I may receive a "reduced fine" that would be at the discretion of the Magistrate. As a fellow law enforcement partner I believe that I would have been successful had I been able to proceed.*

...

[Sic throughout]

[449] It is difficult to accept that the grievor was not attempting to gain an advantage by virtue of his position given what he had written in his December 18 Stat Dec, which states that he wanted to plead guilty with an explanation, provide the court with the October 16 Stat Dec, and receive a reduced fine specifically because he was "a fellow law enforcement partner".

[450] The October 16 Stat Dec identifies the grievor as an IEO with the CBSA. It alludes to the fact that when he was driving the fleet vehicle (and speeding), he was carrying out his IEO duties. His words in the December 18 Stat Dec make it crystal clear that he intended to obtain a lesser or reduced fine because of his law-enforcement position as an IEO with the CBSA.

[451] The grievor testified that he created the December 18 Stat Dec to explain to management what had happened, which makes no sense whatsoever. Why would he have needed to write a statutory declaration to tell his manager what had happened? According to the grievor, he told Ms. Northey and Mr. McEvoy about the ticket in their capacities as acting manager in Mr. Johns' stead. He did not produce any statutory declaration to explain the matter to them. It does not really matter if his rendition of why he created the statutory declaration makes sense or not because of what he said in it. That is, in the December 18 Stat Dec the grievor admits that in creating the October 16 Stat Dec and appearing before the court in October of 2012, his intention was to receive a reduced fine due to his position.

[452] I am satisfied that the alleged misconduct of attempting to gain an advantage due to his position, which breached the 2012 Code, the pre-2012 Code, and the V&E Code, has been established.

[453] Therefore, the CBSA has satisfied the first portion of the test in *Wm. Scott & Company Ltd.*, which is that the behaviour attributed to the grievor in the report and in the termination letter constituted misconduct.

## **2. Alleged condonation and discrimination**

[454] Normally, the next question to be answered is whether the penalty for the misconduct was appropriate. However, the grievor raised the defence of condonation. He stated that his use of fleet vehicles for purposes not related to the CBSA's work was no different from what the other IEOs did; as such, his use could not be considered misconduct. However, he went further and alleged that the CBSA condoned every other IEO's use of fleet vehicles for purposes unrelated to its work except for his, which singled him out and was racially motivated.

[455] However, a condonation defence is arguable only for some of the misconduct. That is, as stated by this Board in *Chopra v. Deputy Head (Department of Health)*, 2016 PSLREB 89 at para. 83 (see also *Chopra v. Canada (Attorney General)*, 2014 FC 246 at paras. 109-110, aff'd 2015 FCA 205) the principle of condonation requires an employer to decide whether to discipline an employee when it becomes aware of what it considers undesirable behaviour. The failure to do so in a timely manner can constitute condonation of the misconduct. Once the behaviour has been condoned, the employer may not then rely on that same conduct to justify discipline. The failure to impose discipline in a timely manner may lead an employee to assume that his or her previous conduct was tolerated by the employer. The grievor's speeding, the issuance of the speeding ticket, the failure to notify management of it, and his attempt to obtain an advantage with respect to the fine attached to the ticket by virtue of his CBSA position do not appear to fall under his defence of condonation or of disparate treatment.

[456] There was no evidence that other IEOs had received speeding tickets or that they had been treated differently. While the grievor did allude to a situation of another officer having attended court with Mr. Johns, it was for a ticket received for running a red light while on surveillance.



[457] There was no evidence that other IEOs had failed to report speeding tickets or other highway traffic violations or that they had been treated differently than the grievor had been.

[458] There was no evidence that other IEOs had attempted to use their positions to obtain an advantage. Again, while another officer received a ticket for running a red light while on surveillance, the evidence was that Mr. Johns and that officer went to court to explain the situation. In that case, it is clear that CBSA management was aware of the infraction as it had been reported and that it had taken a position with respect to that situation. The final result of that situation was never put into evidence.

[459] For the reasons that follow, I am not prepared to accept the grievor's position that his personal use of a fleet vehicle while he was the D.O. was the norm within the IED; nor am I prepared to accept that he was subject to disparate treatment due to his race.

[460] As set out earlier in this decision, I found the grievor's evidence unreliable, suspect, and not credible and at times that it did not make any sense. As also set out earlier, it is not just what he testified to or how he phrased it but also what he did not say, how what he said was inconsistent with the other times on which he had conveyed facts, and how he gave his evidence. His condonation defence was based almost entirely on evidence he had put forward. His testimony lasted four days, and it became obvious during it that his rendition of the facts often changed.

[461] The grievor's position was that the other IEOs, when being the D.O., used the fleet vehicles as he did. His evidence was that when he was the D.O., if he had to leave his residence and travel somewhere that required a vehicle, he would use the fleet vehicle.

[462] The grievor said that there was a culture that every IEO he was with during the first 6 to 10 weeks had their own ways of operating the fleet vehicles and of doing what they would do with the vehicles and of putting what they would put in the log. He said that some did what they were supposed to ". . . to cover their own ass, followed policy to the letter." He said that during those first 6 to 10 weeks, he would use a fleet vehicle the same way as he did at the airport, which was that it stayed at the office, and if he received a call, he would go to the office and pick it up, drive it, and return it, leaving his car at the office.

[463] I already set out earlier in this decision the discussions the grievor conveyed that he had with another IEO and Mr. Johns with respect to the use of the fleet vehicles after his first 6 to 10 weeks at the IED and my findings on it.

[464] From the evidence, at least six or seven IEOs worked in the Winnipeg office. When the question was asked specifically about how other IEOs used the fleet vehicles, the grievor actually said that they all used it differently; some refused to use it unless it was daytime, some refused to use it unless it was for an arrest, and some D.O.s took it home due to having to do a removal. When he was asked how many IEOs used it the way he did, he said one or two but then stated that they did not consistently use it that way.

[465] The grievor did not say what he actually saw any of them do when they were the D.O.; nor did he state that he was ever with them while they were the D.O. and that he saw them using the fleet vehicles the way he did. In fact, except for a vague suggestion that one IEO brought a fleet vehicle to his cottage, the grievor provided no examples of other IEOs misusing the fleet vehicles as the D.O., let alone specific details whatsoever about which IEOs used them and in what manner.

[466] The grievor then stated that weekly IED meetings were held that Mr. Johns chaired and that all the IEOs attended. He stated that they all discussed what they had been doing at those meetings and that they spoke openly and casually and would often discuss what they did over the weekend. He said that they would never ask each other if they used the fleet vehicles to do these things because they all knew which others used the vehicles in what manner. He said that Mr. Johns was well aware of the comments and the use because he was present, and the IEOs all spoke candidly.

[467] The grievor was asked about taking a fleet vehicle to a cottage in his interview on May 31, 2013, with Ms. Jarvis. The May 31 notes, a copy of which was sent to the grievor to review and comment upon and amend if necessary, disclosed that he said the following:

*. . . Officers don't want to go to the lake or something like that because it ruins your weekend. You're expected to respond. I believe we all have the same understanding; if you're D.O. 24/7, you're operating with work as the # 1 priority [sic], you're getting paid.*

[468] Again, that contradicts his suggestion that another IEO took a fleet vehicle to his cottage. While he made that suggestion on one hand, on the other, he suggested that none of the IEOs would do that because doing so ruins a weekend due to the expectation to respond to calls.

[469] As set out earlier in this decision, in Mr. Johns' evidence, he stated that he conveyed to the IEOs that they could not use the fleet vehicles for personal purposes and that when they were the D.O., unless they were called out for work, the vehicle was to remain at their residences.

[470] The grievor testified after Mr. Johns. The alleged discussion that the grievor said he had with another IEO in which he said that Mr. Johns stepped in was never put to Mr. Johns in cross-examination during his initial testimony. This was clearly a breach of the rule in *Browne*, and it makes the grievor's related evidence suspect. In addition, the questions put to Mr. Johns did not reflect the discussion that the grievor set out in his testimony or specifically the wording that he attributed to Mr. Johns. In fact, the questions were phrased in a manner that suggested that the grievor understood from discussions that he could use the fleet vehicles in a particular manner.

[471] When Mr. Johns was called in reply after the grievor testified, it was specifically put to him that one IEO brought a fleet vehicle to his cottage. Mr. Johns said that he did not recall being told that. However, he did testify about a different situation involving CBSA officers, within his line authority in Saskatchewan, taking a fleet vehicle to their cottage but only under very specific circumstances and only after it was authorized by Mr. Johns, his superior.

[472] Overall, there is insufficient evidence to support the grievor's assertion that the employer condoned any of his actions that were found to constitute misconduct and, specifically, the personal use of the fleet vehicle(s). The grievor's testimony with respect to other IEOs' use of the fleet vehicle(s) while D.O. provided no evidence that other IEOs were misusing the fleet vehicle(s) while D.O. While the grievor made allegations, they were limited and vague. Given the findings I have made with respect to the grievor's credibility I am not prepared to accept his very limited testimony in this regard. As such, I am not prepared to accept the grievor's assertion that the employer condoned the misuse of the fleet vehicle(s) because other IEOs used them the same way as him and this defence cannot stand.

[473] With respect to the allegations of discrimination, the evidence disclosed that of the six or seven IEOs in the Winnipeg IED, including the grievor, five could self-identify under employment equity guidelines as being a member of a visible minority group. Indeed, the grievor, who identified himself as a black person of Caribbean heritage, was not the only IEO who could identify as a visible minority and black.

[474] The CBSA has established that the behaviour the grievor exhibited was misconduct and that it warranted discipline. For him to maintain that he should not have been disciplined and that he was disciplined only because of the colour of his skin or his ethnic background requires some nexus between the CBSA's actions and the prohibited ground upon which he alleged that discrimination occurred.

[475] It was insufficient for the grievor to just come forward and state that he fell under one of the prohibited grounds of discrimination because of the colour of his skin or his ethnic background and that he was disciplined. There had to be more. The grievor had to establish that the colour of his skin and/or his ethnic background was a factor in the employer's decision to discipline him (see *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33).

[476] If the IED's workforce was not diverse and was perhaps of all one racial background, except for the grievor, and everyone breached certain rules, which only the grievor was disciplined for, then that would certainly appear to be discriminatory discipline. However, the grievor's work unit was very small and diverse; indeed, the grievor was not the only person who identified with the same skin colour as he did.

[477] There is just no evidence linking the grievor's allegations and the discipline.

[478] The grievor suggested that there had been a history of discrimination, but he never filed any grievances or complaints about it, nor was evidence presented to support this claim.

[479] The grievor intimated that the treatment of not allowing him to use his personal credit card to carry out removals after his AMEX card had been suspended (September 2011, leading to the June 2012 discipline) amounted to discrimination.

[480] The evidence disclosed that as part of his job, the grievor removed persons who were not supposed to be in Canada. The alleged discrimination was based on other IEOs being allowed to use their personal credit cards while carrying out removals.

[481] While there are several problems with the grievor's position, the most glaring is that other than his allegation and testimony, there is no real evidence of anything other than him stating that other IEOs were allowed to use their personal credit cards, and he was not.

[482] The evidence was that the IEOs, including the grievor, were required to have an AMEX card. They travelled to foreign countries and had to be able to pay for things; that was the purpose of the AMEX card. Using their personal cards was not necessarily an issue, but they had AMEX cards specifically for travel and for paying for it and the related expenses while on CBSA business.

[483] The evidence disclosed that the grievor misused his AMEX card by purchasing personal items with it and that he had let it go into significant arrears, which would not have happened had he submitted his expenses from his travel in a timely manner. There was no evidence that suggested that the CBSA did not reimburse the grievor his travel expenses in a timely manner; nor did he allege that that was an issue.

[484] The grievor's evidence disclosed that until at least October 2011, he did not have a personal credit card. Other than saying that he had one (after October of 2011), he provided no proof. Mr. Johns, his immediate supervisor who investigated the grievor's misuse of the AMEX card, doubted that the grievor had a personal credit card. Mr. Johns stated that he believed he actually asked to see it.

[485] However, the grievor demonstrated from the time he joined the IED on December 14, 2009, to November of 2011 (just under two years) on more than one occasion not only that he could not be trusted to not misuse the AMEX card but also that he clearly had money management problems, as he failed to pay the balance on the AMEX card and allowed it to go into arrears, which led to its cancellation.

[486] While I am mindful that evidence of discrimination is not necessarily direct and obvious and that it is likely found by piecing together different fragments of circumstantial evidence, the grievor has provided no evidence of it, either direct or circumstantial. He made a number of allegations. However, nothing leads me to find that he was treated inappropriately, and there was no evidence that he was treated any differently than his colleagues were, whether or not in a manner that would be prohibited by the *CHRA*.

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**3. Was the discipline imposed by the employer an appropriate penalty in the circumstances?**

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[487] This leaves the final question set out in *Wm. Scott & Company Ltd.*, which is whether the penalty was appropriate in the circumstances.

[488] In addressing the penalty, both mitigating and aggravating circumstances should be taken into account. There appear to be very few mitigating factors in the grievor's favour.

[489] The grievor joined the federal public service in 2000 as a student. In 2005, he became full-time (albeit as a term employee) until 2007, when he became indeterminate. He spent roughly two years as a full-time indeterminate BSO before he moved to the IED in late 2009. When he was terminated from his employment in the fall of 2013, he had worked roughly eight years as a full-time employee. The time he spent as either a citizenship and immigration officer or a BSO appears discipline-free.

[490] The grievor's time at the IED was more problematic. Before the issues arose that led to the discipline that is the subject matter of this hearing, he had run into the same difficulty with his AMEX card on three occasions, two of which had resulted in discipline. The conduct that led to the grievor's troubles, be it with the fleet vehicle or with respect to the AMEX card, arose from the breach of the same rule and principle, namely, do not misuse the employer's assets.

[491] Given my findings with respect to the grievor's credibility, I have difficulty believing that he is remorseful for his behaviour or that he will change it. With respect to the misuse of the AMEX card, he attempted to blame his superiors for not being sent on appropriate training. I find these comments particularly disingenuous when at the same time a significant amount of discussion and instruction took place, and he testified that he knew the rules "100%".

[492] I was referred to *Canadian Office and Professional Employees Union*, which speaks of the principle of proportionality as well the importance of work to a person's life and identity. In the circumstances, the grievor has shown a pattern of disregard with respect to the employer's standards of conduct about using its assets, be it a fleet vehicle or an AMEX card. The principle behind the rules for using those assets is the same. It appears from the evidence that the grievor disregarded those rules.

[493] It is trite to state that employment is important to most persons, as few people are wealthy enough to go without earning a living. The concept of the importance of work to a person's life and identity in and of itself cannot stand to mean that despite misbehaviour, employees can never lose their jobs because they are important to them, and they identify with the positions they hold.

[494] Given all the circumstances, I am not prepared to alter the penalty of discharge from employment.

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

*(The Order appears on the next page)*

**VI. Order**

[496] The grievance is dismissed.

August 29, 2017.

**John G. Jaworski,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**