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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

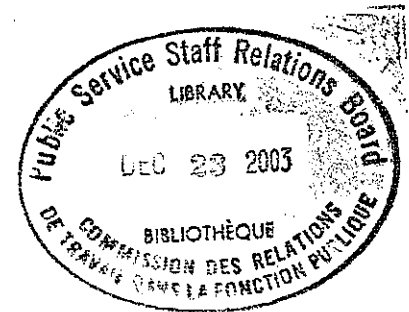
SHIV CHOPRA

Grievor

and

TREASURY BOARD  
(Health Canada)

Employer



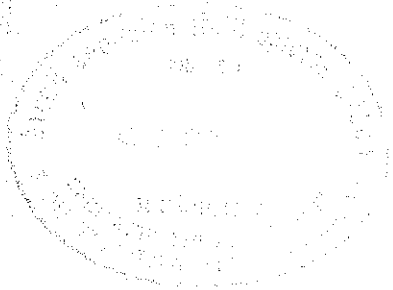
**Before:** Yvon Tarte, Chairperson

**For the Grievor:** David Yazbeck, counsel

**For the Employer:** Richard Fader, counsel  
Hasna Farah, articling student

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Heard at Ottawa, Ontario,  
September 30 and October 1, 2003.



## DECISION

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[1] This reference to adjudication deals with a grievance filed by Shiv Chopra contesting a five-day suspension imposed on him by his supervisor, Diane Kirkpatrick, on March 25, 2002.

[2] The events which gave rise to the disciplinary sanction imposed on the grievor occurred shortly after the unfortunate incidents of September 11, 2001 (9/11).

[3] The employer is concerned about certain comments made by Mr. Chopra to the print and electronic media dealing with the decision made at that time by the Government of Canada to stockpile antibiotics and smallpox vaccine.

[4] The letter of discipline sets the context for this matter. It reads in full as follows (Exhibit E-2):

*This letter is further to our meetings in October, 2001 together with your union representative and our written exchanges in November 2001. While I had intended to communicate with you on this matter earlier, I postponed this action out of respect for the holiday season and your subsequent extended vacation leave to travel out of the country. I felt that this delay would also afford you a better opportunity to review the assessment and conclusions contained herein.*

*The first meeting was held on October 12, 2001 concerning your statements published in an article of the Winnipeg Free Press dated October 12, 2001. The second meeting held on October 23, 2001 was with regard to your TV interview on CJOH, on Monday, October 15, 2001. The written correspondence (my e-mail of November 16, 2001 to you and your e-mail reply of November 23, 2001) were in follow-up to articles in the Montreal Gazette (Friday, October 26, 2001) and in the Calgary Herald (Tuesday, November 6, 2001) that contained comments attributed to you.*

*The article in the Winnipeg Free Press, "Panic Over Anthrax Attack Unfounded, Experts Advise" quoted you saying "Stockpiling of antibiotics only looks good for the minister of health (\*Allan\*\*Rock) to say: 'We are prepared'". In the CJOH interview you stated: "You don't need to stockpile antibiotics". The article in the Montreal Gazette quoted you saying "I hear as a citizen there's going to be stockpiling of antibiotics. And I know as a scientist it is completely unnecessary." Similarly, in the Calgary Herald, with respect to stockpiling of smallpox vaccine, you are quoted as saying "There's no need for it."*

*In the newspaper articles, as well as during the TV interview, you were portrayed as a Health Canada representative. In these interviews, you commented on the public concern surrounding anthrax's use as a weapon of bioterrorism and were critical of the government's decision to stockpile antibiotics. You also categorically stated that there was no need to stockpile smallpox vaccine. You had no knowledge of the department's position with respect to these matters.*

*During the fact finding meetings in October 2001, and via the written exchanges in November 2001, you were provided the opportunity to explain the circumstances surrounding your decision to speak to the media and to bring forward any information or evidence on this subject.*

*You indicated that you spoke to the media as a Canadian citizen, as a knowledgeable microbiologist, but provided no evidence in support of your statements. You took no other action to preclude nor correct afterwards, the association with Health Canada. You acknowledged this association and you also acknowledged the possibility for statements made to the media to be misquoted. Nevertheless, you still spoke with the media and you did not deny the accuracy of the quotes. You did not provide any information or evidence in support of your statements.*

*You have not provided me with any information to allow me to find that your action was appropriate speech by a public servant within the meaning of the law. You have provided no information or evidence to indicate that you were speaking out on a matter that would jeopardize the life, health or safety of Canadians. Indeed, your statements in the media suggest that jeopardy to health is not the issue. Also, you are a Health Canada scientist. The nature of your position as a drug evaluator with the Human Safety Division of the Veterinary Drugs Directorate involves matters that are important and sensitive. Your position is what made your remarks newsworthy. Notwithstanding the fact that you were not involved in the government's decision and were speaking about a subject outside of your area of expertise as a drug evaluator, your comments to the media leave the impression with the public that you have special knowledge because of your position. Your action impacts negatively on your ability to perform impartially and effectively the duties of drug evaluator in the public service and on the public perception of that.*

*You made no attempts to raise or deal with your perspective internally. There are means in place for hearing and debating analyses in decision-making in scientific and regulatory matters. For example, I have on a number of occasions, through meetings with staff, highlighted my*

receptivity to hearing from staff in regards to any concerns or issues they may have. Employees can also raise matters with their managers who can, in turn, bring these matters to various committees for discussion and resolution. You should have raised any view internally and with management so that the matter could be discussed.

You did not avail yourself of any of the existing mechanisms prior to speaking to the media. Indeed, you indicated that this was not necessary given your understanding of anthrax and smallpox as an informed microbiologist and given that the issue did not impinge on the Veterinary Drugs Directorate mandate.

You indicated that you spoke to the media to allay fears but my concern is that comments denouncing the government's action (in this case, the decision to stockpile) and the negative reference to the Minister's motivation to do so, undermine the efforts of the government to safeguard the health of Canadians.

You presented no evidence that stockpiling as a public health measure was in any way detrimental to health.

Notwithstanding your knowledge of anthrax as a microbiologist, you were not part of the government emergency response team dealing with this and other public health threats and hence you were not privy to all the evidence upon which decisions to stockpile were made. To draw the conclusion that you espoused publically [sic] (i.e. that stockpiling is unnecessary) without all the facts lacks objectivity and is disrespectful of those charged with assessing and managing these matters. To do so when the government of Canada and other governments are dealing with an international terrorism crisis and our citizens are apprehensive, lacks judgement. To do so repeatedly after I had raised my concerns orally with you seriously erodes our working relationship.

You are aware of the government communication policy and the restriction placed on designated spokespersons to discuss matters of fact on subjects in their area of expertise. You have not been designated by management as a spokesperson on this subject. As a public servant in the Department, you have disregarded the department's policy.

As you know, the duty of loyalty owed by public servants to their employer was recognized by the Supreme Court of Canada in *Fraser v. P.S.S.R.B.* and was recently confirmed by the Federal Court in *Chopra v. Canada*; *Haydon v. Canada*. Those decisions discuss the balance to be struck between the maintenance of an impartial and effective public service and employees' freedom of speech,

and identify the circumstances in which public criticism of the employer might be acceptable. I do not believe that your comments to the media come within any of the exceptional circumstances.

Furthermore, in a recent decision of the Public Service Staff Relations Board, the Vice-Chairperson concluded that an attempt to resolve an issue internally is a prerequisite to public comment. As indicated, you made no attempt to raise or deal with your views internally prior to speaking to the media.

After a review of this matter, and having taken into account your representations on October 12, October 23, and November 23, this is to formally indicate that I find your conduct unacceptable. This criticism of a Government decision at a time of international crisis lacked objectivity and your action was inconsistent with your responsibility as an employee in the public service. It erodes the necessary employer/employee relationship and is in disregard of your duty of loyalty.

This letter is to advise you that you will be suspended without pay for a period of 5 working days. This suspension is to be served from Thursday, April 4, 2002, to Wednesday, April 10, 2002, inclusive.

A copy of this letter will be placed on your personnel file for a period of two years. Your length of service and the lack of a previous history of disciplinary actions have contributed in mitigating this disciplinary action.

I sincerely hope that this disciplinary sanction impresses on you the seriousness with which management views this type of behavior and the need to refrain from this type of misconduct in the future. Failure to do so will result in more severe disciplinary action up to and including termination.

[5] Two witnesses testified, Diane Kirkpatrick for the employer and Shiv Chopra on his own behalf.

#### The Evidence

##### For the Employer

[6] Diane Kirkpatrick is the Director General of the Veterinary Drugs Directorate, Health Products and Food Branch at Health Canada (HC). She has held this position since late 2000. Her expertise and experience is in risk assessment and evaluation.

[7] Several senior managers report directly to her, including the Director of the Human Safety Division, in whose sector Mr. Chopra works. Ms. Kirkpatrick in turn reports directly to the Assistant Deputy Minister for the Food Safety Branch. Her directorate is responsible principally for drug evaluation and human and animal safety.

[8] In 2001, Mr. Chopra, whose specialty is in microbiology, was a senior scientist working on a team responsible for the evaluation of drugs and the safety of food. The grievor had no responsibility to act as the spokesperson for the department.

[9] When differences arise concerning scientific and departmental issues, individuals should attempt to resolve them 1) within their team, 2) with their managers, 3) by referring the matter to special committees struck to assess disagreements on data, 4) by referring the matter to the directorate which consults outside resources and finally, 5) by referring the matter to the sciences review committee which the witness chairs.

[10] In the world of science where disagreements often arise, the best conclusions are always those that are drawn after extensive consultation and discussion. Scientific debate within the various sections and teams at HC must be encouraged to ensure that the best decisions are always made. Scientific issues are rarely black and white, which is why team work and internal discussions are actively promoted.

[11] In October 2000, the Department issued a message from the Deputy Minister to all employees concerning scientific debate and decision-making at Health Canada (Exhibit E-5). The document reads in part:

*Recently, the Federal Court of Canada rendered a decision relating to freedom of expression and the need for an impartial and effective Public Service. The Court confirmed the duty of loyalty owed by public servants, as set-out in the earlier Supreme Court of Canada case of Fraser v. Public Service Staff Relations Board, and the restrictions that this may place on the making of public statements. The Federal Court, in its recent decision, indicated that the public servants involved had endeavoured on several occasions to have their concerns addressed internally and that, generally, public criticism (as described in the Fraser case - for example dealing with policies that jeopardize life, health or safety) will be justified where reasonable attempts have been made to resolve the matter internally and without success.*

[12] In October 2001, Ms. Kirkpatrick became aware that the grievor was slated to participate in Montreal in a symposium entitled "Silent Killers" on Thursday, October 25, 2001. The witness wrote to Mr. Chopra on October 22, 2001, as follows (Exhibit E-6):

*I have become aware of this Symposium (as per info below) and would like to ask you about the circumstances surrounding your presentation given that you have no responsibility related to the regulation and control of pesticides within the department. In this regard, I note that your affiliation with Health Canada is not indicated on this notice and on this basis, I presume you are speaking as a private citizen. If you are speaking as a private citizen, you should explicitly state so in being introduced and/or in response to any media questions.*

*Notwithstanding this, given that the subject of your presentation relates to an area that falls within the department's responsibility, I would like to remind you of the need to ensure the accuracy of your presentation and to this end you can contact Geraldine Graham (736-3660) in PMRA. I would also like to take this opportunity to remind you of your responsibility as a public servant and employee of this department. Should you have any concerns about actions or positions of the department on this subject, these should be raised internally before going public. I would be pleased to assist you in this latter regard.*

[13] In the days and weeks which followed the events of 9/11, the environment at HC was tense and apprehensive. The department focussed its effort to have in place the necessary mechanisms to avoid and counter bioterrorism. The witness was a member of a team that met weekly or as necessary to deal with urgent issues.

[14] Following 9/11, several anthrax attacks in the United States, some resulting in deaths, were reported. A decision was made at HC to stockpile antibiotics in the event that their use in an emergency became necessary. This decision to stockpile antibiotics and smallpox vaccines was made by the Emergency Response Team (ERT) at HC. Neither Ms. Kirkpatrick nor Mr. Chopra was a member of the ERT, since their directorate had no direct responsibility for infectious diseases.

[15] Prior to October 12, 2001, the witness had not been aware of any concerns that the grievor might have concerning the departmental decision to stockpile antibiotics and vaccines, nor had Mr. Chopra voiced his concerns through the internal processes referred to earlier.



[16] On October 12, 2001, an article appeared in the Winnipeg Free Press which read in part as follows (Exhibit E-8):

*Panic over anthrax attack unfounded, experts advise*

*CP Wire Helen Branswell TORONTO - If anyone needs proof about how much of a bogeyman the disease anthrax has become since the Sept. 11 terrorist attacks, World Vision Canada can provide it. The charity recently sent packets or seeds to 800,000 homes as part of its annual "harvest pack" fund-raising campaign. Instead of opening their pocketbooks, skittish recipients called 911.*

*Once known as the Black Bane, anthrax has become the suspect of first resort when suspicious packages arrive in tense mail rooms or unmarked containers are abandoned on subway platforms.*

*But much of the hysteria surrounding anthrax's use as a weapon of bioterrorism is not well founded, experts say.*

*"This has been going on since the days of Hitler, where they were looking at the possibilities of creating biological weapons. So far, no biological weapon has worked," Shiv Chopra, a microbiologist with Health Canada's bureau of veterinary drugs, says flatly.*

*Chopra is highly critical of Health Canada's decision to stockpile antibiotics against a possible bioterrorist attack, calling it a public relations gesture.*

*"Stockpiling of antibiotics only looks good for the minister of health (\*Allan\* \*Rock\*) to say: 'We are prepared.'*

*"I think it's just a media hype and unnecessarily scaring people, saying: 'Oh, something is coming.' Nothing is coming."*

*While other experts are not so categorical, they nonetheless believe the threat of a terrorist attack using anthrax has been vastly overestimated in the weeks since widescale terrorism slammed into the North American consciousness on Sept. 11.*

...

*Which is not to say it cannot happen. An accidental explosion at a military facility in Sverdlovsk, Russia, in 1979 propelled a cloud of anthrax spores downwind, causing at least 79 cases of the disease and 68 deaths.*

[17] Ms. Kirkpatrick was shocked and taken aback by the grievor's reported comments. She could not understand why Mr. Chopra was talking to the press about issues for which he had no responsibility at a time when the department was trying to ensure public safety.

[18] A recorded fact-finding meeting (Exhibit E-9) was convened by Ms. Kirkpatrick. Mr. Chopra and his union representative attended. The grievor indicated that he had been contacted by the media and spoke as a concerned citizen. He did not deny making the comments attributed to him but suggested they were only part of a 20-minute conversation and had been taken out of context. At the end of the meeting Mr. Chopra said:

*I want to reiterate that from my perspective, there is no intention, never was, never is now to even imply or insinuate anything derogatory or less than respectful to the Minister. Things can be taken out of context and my opinion, if you look at the overall thing, it is well balanced, it is more in favour of safety of the public, responsible statements, calming things down, greater message to the media to be calming things rather than saying the Minister is not doing enough, and from my point of view, it is thoroughly balanced.*

[19] Throughout the discussion, Mr. Chopra asserted his right, as a Canadian citizen, to speak freely and publicly.

[20] On October 18, 2001, CJOH TV in Ottawa broadcast an item (Exhibit E-10) which included an interview of Mr. Chopra an extract of which is repeated verbatim below:

*Dr. Shiv Chopra, a microbiologist with Health Canada agrees with the university medical professor that the hysteria surrounding the use of anthrax as a weapon of bio terrorism is not well founded.*

*DR. SHIV CHOPRA (HEALTH CANADA): Any organism can be used a (sic) crime, but from the terrorist point of view, what you want is organism that will infect and then spread by itself. It should be contagious. Anthrax is not contagious. So it is not going to happen. You don't need to stockpile antibiotics. You don't need to take them. You don't need to take them for prevention. Just keep calm.*

*GREENWELL: Why would the government then be stockpiling these things?*

*CHOPRA: Well it puzzles me.*

[21] Given the meeting with the grievor on October 12, Ms. Kirkpatrick was surprised to see that Mr. Chopra again chose to publish his views on stockpiling antibiotics.

[22] A second fact-finding meeting with the grievor took place on October 23, 2001, to discuss the CJOH interview. The meeting was recorded and a transcript produced (Exhibit E-11). Again, the grievor professed his right to speak out as a concerned citizen while Ms. Kirkpatrick discussed the need for balance between an employee's freedom of expression and his duty of loyalty to the employer.

[23] Three days later on October 26, 2001, an article written by Lyle Stewart appeared in the *Montreal Gazette* (Exhibit E-12). The whole article, including its headline, read as follows:

*Crisis? What crisis?: Government is using baseless anthrax scare to justify attack on liberties.*

*There's perhaps no better example of our government's psy-ops campaign against our civil liberties than the completely baseless anthrax scare that is turning our nation into a screeching gaggle of Cassandras. Even without getting into the completely unnecessary Bayer vs. Apotex farce, let's first review a few simple facts:*

- *There has never been a recorded case of human anthrax in Canada.*
- *The chances anthrax will occur are very low.*
- *Even if it does occur, it is easily treated with cheap penicillin.*
- *Stockpiling expensive patented antibiotics such as ciprofloxacin is simply another way to pump up corporate profits.*
- *Anthrax is naturally occurring and is not contagious.*

*These are some of the things Health Canada scientist Shiv Chopra tried to publicly point out last week when the anthrax scare went into overdrive. The media and government hype over anthrax was scaring Canadians for no good reason. For his efforts, he was twice called on the carpet by Health Canada managers, who he says suggested he use more "balance" in his public statements. A Health Canada spokesman also said the media will no longer be permitted to interview federal scientists about the anthrax scare.*

*"The department feels encouraged by the war," Chopra explains in an interview. "Now is the time to hit at people they think are vulnerable."*

*Chopra, of course, has long been in trouble with Health Canada management over his refusal to compromise his science and approve drugs - especially antibiotics - without proper testing. This summer, the Canadian Human Rights Tribunal ruled the department discriminated against Chopra by refusing him promotions over his 30-year career because of his ethnic background. The department also tried to shut him up in the past with a gag order that was overturned in Federal Court.*

*Says Chopra: "I hear as a citizen there's going to be a stockpiling of antibiotics. And I know as a scientist it is completely unnecessary. How do I deal with that as a knowledgeable scientist who is also a father and a member of the community? Don't I have any right to express my opinion or concern?"*

*"The federal court has ruled that I have a duty to the public. But they're saying no, a balance has to be struck. What balance? The balance they think is right? Or the one that in my judgment is right?"*

*His judgment comes from training as a veterinarian. "I've handled anthrax with my own hands," he notes. "I have myself made anthrax vaccines with it. I know what precautions to take. But the language (Health Canada managers) used was that 'There are people dying. There's a war on.' They said I was interfering in their management of the crisis."*

*Crisis? What crisis? It takes a massive and intentional dose of anthrax spores for the disease to take hold. As Chopra points out, we come into contact with spores all the time. We touch spores working in the garden and while preparing uncooked food. "But people don't come down with anthrax," he says. "Our body cures itself."*

*Yesterday, Chopra was to take part in a McGill University symposium on pesticides titled, "Silent Killers: How our Health, Fertility and Brain Function Are Being Threatened." But this week, he received a threatening letter from senior Health Canada manager Dianne Kirkpatrick suggesting his participation in the symposium should be vetted by the department.*

*So with a pending departmental investigation into his anthrax comments, Chopra decided he would be better off not compounding his difficulties. He cancelled yesterday's appearance at the McGill symposium.*

*"I'm concerned for my job," he says. "I'm fearful for what they might do. This is putting me into a very dangerous situation."*

*Score another one for our government's war on free speech. Hysteria continues to trump reason and simple logic, much to our government's delight. And in this case, Chopra's comments also unintentionally compromised Allan Rock's already dubious efforts to appear heroic and get a leg up in the incipient Liberal leadership contest. Obviously, in the twisted thinking that now presides in Ottawa, he must pay a price.*

[24] Following publication of this article, Ms. Kirkpatrick was incredulous. It was her view that Mr. Chopra was ignoring her direction to use the various internal mechanisms available to obtain all the facts used to reach the decision to stockpile and to which neither he nor she had been privy.

[25] On November 6, 2001, an article was published in the *Calgary Herald* with the headline: "Bioterrorism fears begin to diminish: Canadian public more informed" (Exhibit E-13). The last few paragraphs of the article read:

*The issue wasn't raised in the House of Commons on Monday -- a big change from a couple of weeks ago when Health Minister Allan Rock was furiously attacked for alleged inadequate preparations.*

*At that time, Rock talked about stockpiling 30 million doses of smallpox vaccine, but there is some question about whether the vaccine is needed.*

*"We are looking at various options, no firm decisions have been taken yet," a spokesman for Rock said Monday.*

*Shiv Chopra, a microbiologist with Health Canada, said it would be a waste of money to stockpile smallpox vaccine for the entire population.*

*"There's no need for it," he said, explaining that 80 per cent of the population in Canada has already been vaccinated against smallpox, and that is enough to ensure against an epidemic.*

*"The vaccine is good for life. Even if it does wear off in an individual here and there, it doesn't make any difference because if 80 per cent of the population is immune, the virus cannot spread."*

[26] Given that two previous fact-finding sessions had not convinced Mr. Chopra to cease his media comments, Ms. Kirkpatrick forwarded a series of written questions to be answered by the grievor concerning both the *Montreal Gazette* and *Calgary Herald* articles (Exhibit E-14). Mr. Chopra's answers are found in the same exhibit.

[27] In the aftermath of these events, Ms. Kirkpatrick believed that the repeated comments made by Mr. Chopra had had significant impacts. First, her relationship with the grievor had been detrimentally affected. Second, there was an impact on colleagues and supervisors whose decisions and expertise were called into question by Mr. Chopra's comments. Third, the credibility of the Minister and the department was negatively affected. Fourth, the comments impeached the trust that Canadians must have in the work of their Health Department. Finally, fifth, the grievor's ability to do his own job was hampered by his unfounded comments.

[28] Mr. Chopra made public comments without first verifying and obtaining all the facts, which goes against the basic tenets of his job as a scientist. In the final analysis, the grievor presented no evidence to show that stockpiling of antibiotics or vaccines would adversely affect the population.

[29] The reasons for imposing discipline in this case are clearly set out in Exhibit E-2 dated March 25, 2002. The imposition of discipline was delayed until March 2002 for various reasons including the holiday season, an extended vacation taken by the grievor and Ms. Kirkpatrick not wanting to rush her evaluation of the events. She also had extensive discussions with human resources and legal experts concerning her assessment of the situation.

[30] Although Ms. Kirkpatrick never directed Mr. Chopra not to talk to the media, it is clear to her, from a reading of Exhibit E-12, that the grievor understood he was not to continue to do so.

[31] Ms. Kirkpatrick is of the opinion that Mr. Chopra's comments created apprehension rather than quelled fears, since they eroded the public's trust in government and attacked its credibility.

[32] As of October 2001, Mr. Chopra had no existing disciplinary record.

[33] It was the grievor's conclusions and criticisms that made his comments newsworthy. His views were inconsistent with decisions made by his department and

were critical of the integrity of the Minister. Mr. Chopra indicated in Exhibit E-11 that he did not care that he was not privy to certain information since he had a right to speak out as a Canadian citizen.

[34] The fact that Mr. Chopra was not a spokesperson for the Department and the fact that he did not raise his concerns internally, at least initially, were factors taken into account in deciding whether to impose discipline.

[35] The grievor has spoken publicly on several instances (Exhibit G-4) without being disciplined. Ms. Kirkpatrick explains this fact by looking at the nature of the matters raised in Exhibit G-4, which are within the mandate of her directorate, and the comments in this case, which are not.

For the grievor

[36] The only other witness to testify was the grievor. Mr. Chopra, whose curriculum vitae was filed as exhibit G-5, has studied in both India and Canada. He holds both a Master's and a Doctorate degree in microbiology from McGill University in Montréal. Mr. Chopra has worked at HC in various positions since 1969.

[37] Very quickly into his testimony, Mr. Chopra indicated that anthrax is a disease which is often found in the soil. Although it is generally dangerous for animals, it is usually not harmful to humans. When the disease is found in one animal, the herd to which it belongs is usually destroyed, the barn is burned and carcasses are buried 8 feet below ground. Some anthrax can turn into spores and be inhaled by humans. Antibiotics such as penicillin can, however, take care of any related problems.

[38] When incidents related to anthrax occurred in the United States and a decision was made to stockpile antibiotics, a reporter from the Canadian Press reached Mr. Chopra to obtain his views.

[39] Mr. Chopra quickly told the reporter that this was "complete bull shit" since the disease cannot spread. He tried to refer the reporter to other authorities but was told that they didn't want to answer his questions. Mr. Chopra testified he next told the reporter: "Then I can educate you as a private citizen."

[40] The grievor wanted to explain that antibiotics should not be used frivolously and that their overuse leads to their eventual ineffectiveness. He also wanted to explain that stockpiling does not work.

[41] Mr. Chopra wondered, at the hearing, if special tests using anthrax were being conducted in the United States since he believed that special spores were responsible for the reported incidents there.

[42] When the government tells its citizens not to worry because it has antibiotics, then the grievor starts to worry. The antibiotic that was being stockpiled following 9/11, Ciprofloxin or Cypro, is contra-indicated for young children.

[43] Mr. Chopra admitted saying the words attributed to him in Exhibit E-8 to the effect that stockpiling antibiotics only looked good for the Minister, who could then claim that the government is prepared. The grievor recognized that he had no idea who actually made the decision to stockpile and that his comments concerning the Minister were hypothetical and not based on any actual knowledge of the situation.

[44] The atmosphere at the October 12, 2001, fact-finding meeting was strained. Mr. Chopra felt he was being targeted and that Ms. Kirkpatrick wanted "to get him one way or another."

[45] Mr. Chopra admits to probably saying the various lines that are in quotation marks in the different articles. Anything else, however, he believes can only be considered a journalistic interpretation of what he said. For example, he did say in Exhibit E-12 "I'm concerned for my job", "I'm fearful for what they might do. This is putting me into a very dangerous situation" but did not tell the reporter that he had "received a threatening letter from senior Health Canada manager Diane Kirkpatrick suggesting his participation in the symposium should be vetted by the department" since those words were not in quotation marks in the article. The grievor added he did not know where the reporter had obtained that information.

[46] In all of this, Mr. Chopra did not seek out the media to say that what his department and the Minister were doing was wrong, even though he strongly believed it was. However, given that "his business is safety", he felt he had an obligation to talk as a knowledgeable private citizen.



[47] The grievor believes that he should be given credit for calming things down. He never meant to criticize the department or the Minister. At no time was he directly told not to comment to the media.

[48] Mr. Chopra did not use internal discussion processes in this case since he was not personally involved in the files, had no idea who was responsible for the decisions made and did not know whom to talk to. In any event, when a reporter phones out of the blue to enquire about stockpiling, a decision which affects him personally, his family and the public, Mr. Chopra believes he has a right to speak out.

[49] The comments made in the various articles and news clip were not made by Mr. Chopra with malice, nor were they intended to create mischief or cast "aspersions" on political or departmental leaders.

[50] Throughout the period in question, nobody told him how his comments might affect the performance of his duties.

### Arguments

#### For the employer

[51] In the aftermath of 9/11, HC was forced to respond in a dynamic way to serious challenges. Given the crisis in which it was operating, it obviously did not need to respond to inaccurate attacks on its *bona fide* by a senior employee, especially when internal discussion mechanisms were not used.

[52] The most important case for situations such as this one is *Fraser v. Canada (PSSRB)*, [1985] 2 S.C.R. 455, a Supreme Court of Canada decision which has since been found to conform to the *Canadian Charter of Rights and Freedoms (Constitution Act 1982)*. In *Haydon v. Canada*, [2001] 2 F.C. 82, Justice Tremblay-Lamer concluded that "the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed in the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter."

[53] The doctrine concerning public speech by public servants stated in *Fraser* and subsequent cases contains three facets. They are:

- 1) Public opposition to the policies of a government would be appropriate if the government was engaged in illegal acts, or if its policies jeopardized the life,

health or safety of public servants or others, or if the criticism had no impact on their ability to perform effectively their duties or on the public perception of that ability;

- 2) Opposition and criticism should initially be voiced internally using appropriate mechanisms; and
- 3) Any public comments made by public servants that criticises their employer should be true or reasonably sustainable.

[54] Given that the decisions publicly criticized by Mr. Chopra in this case were not illegal and did not affect the public safety, the grievor had an obligation to raise his concerns internally. This grievance must be denied on the simple fact that Mr. Chopra failed to do so.

[55] With respect to facet one, the conduct of Mr. Chopra fails to meet the *Fraser* test. The grievor was not exposing wrongdoing or illegal acts. He was merely concerned that the decisions made by HC and the Minister were unnecessary. Furthermore, the grievor's comments clearly had an impact on his ability to perform his duties as a public servant.

[56] The *Haydon* case (*supra*) stands for the principle that public criticism in situations other than those covered by the *Fraser* exceptions can only be justified where reasonable attempts to resolve the matter internally have been unsuccessful. Mr. Chopra made absolutely no effort to raise his concerns through appropriate departmental channels. The case is identical to *Haydon and Treasury Board* (2002 PSSRB 10), in which Vice-Chairperson Potter stated that the first step in the process in cases such as this one is to raise any concern internally.

[57] The third facet or branch of the doctrine requires that public statements made be true or reasonably sustainable. The grievor never established that stockpiling was unnecessary or that the Minister was grandstanding. It is clear when reading the transcript of the October 23, 2001 fact-finding meeting (Exhibit E-11) that Mr. Chopra did not really care about the veracity of his comments; he was more concerned about his right to make a point.

[58] Mr. Chopra has shown no remorse for the inappropriate comments he made in a time of crisis. The 5-day suspension was warranted and should be upheld.

[59] In support of its case, the employer referred to the following:

1. *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.)
2. *Gannon v. Treasury Board (National Defence)*, (2002 PSSRB 32), application to Federal Court for judicial review is pending
3. *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)
4. *Robert Goyette et al.*, (Board file 166-2-2914 and 2915)
5. *Arthur J. Stewart v. Public Service Staff Relations Board*, [1978] 1 F.C. 133 (C.A.)
6. *Re Ministry of Attorney-General, Corrections Branch v. British Columbia Government Employees' Union* (1981), 3 L.A.C. (3d) 140
7. *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455
8. *Forgie v. Treasury Board (Immigration Appeal Board)*, (Board file 166-2-15843); *aff'd* [1987] F.C.J. No. 541 (C.A.)
9. *Grahn v. Canada (Treasury Board)*, [1987] F.C.J. No. 36 (C.A.)
10. *Laboucane v. Treasury Board (Indian and Northern Affairs Canada)*, (Board file 166-2-16086 to 16088)
11. *Haydon v. Canada*, [2001] 2 F.C. 82 (T.D.)
12. *Haydon v. Treasury Board (Health Canada)*, (2002 PSSRB 10)
13. *Chopra v. Treasury Board (Health Canada)*, (2001 PSSRB 23)
14. *Scott v. Canada Customs and Revenue Agency*, (2001 PSSRB 82)
15. *Canadian Union of Public Employees, Local 5 v. The Corporation of the City of Hamilton*, [1993] OLRB REP. NOVEMBER, 1214, and
16. *Evidence and Procedure in Canadian Labour Arbitration* by Gorsky, Usprich and Brandt, published by Carswell, 1994.

For the grievor

[60] In this case, the employer bears a very heavy onus since it has disciplined Mr. Chopra for exercising his constitutional right of free speech. The employer's arguments must be measured against the Charter. In order to conclude that discipline was warranted in this case, the employer must show that the various comments attributed to the grievor should not have been made.

[61] The employer's interpretation of *Fraser* and *Haydon (supra)* is wrong and should not be accepted. Neither case makes it mandatory to use internal discussion mechanisms.

[62] The grievor's evidence was not seriously challenged. Mr. Chopra, at all times, acted in good faith, without malice and with the public interest always in mind.

[63] The real issue in this case is whether a free and democratic society can "handle" the comments made by Mr. Chopra. The essence of democracy is to allow free expression and debate.

[64] Mr. Chopra is an expert in microbiology whose public comments on the whole were scientific assertions, which have not been contradicted. Furthermore, the views expressed by the grievor were similar to the views expressed by other experts.

[65] The employer has produced no evidence to show that Mr. Chopra's comments had any impact on Canadians, on his colleagues or on his relationship with his supervisor. There was no evidence that the comments caused apprehension or that colleagues refused to work with the grievor or that his ability to perform his duties was affected, just the assertion of Ms. Kirkpatrick that Mr. Chopra's public comments had negative impacts.

[66] If any of the comments were having the impact suggested by Ms. Kirkpatrick, she would surely have made a more timely decision in this case and would have told the grievor at the earliest opportunity to stop.

[67] As stated earlier, there is no legal requirement or internal directive that states that employees must always first use internal discussion mechanisms. The bottom line is that freedom of speech is of fundamental importance in our society. Nor does the case law require that an employee who speaks publicly prove the truth or

reasonable sustainability of his or her comments. To hold otherwise on either ground would create an unacceptable chilling effect.

[68] The doctrine of legitimate public concern was enunciated in *Chopra v. Treasury Board, supra*). Pursuant to this doctrine, issues of public concern may be discussed publicly by federal employees without first using internal discussion mechanisms. The comments made by Mr. Chopra in this case dealt with legitimate public concerns, as well as matters of public health and safety. Given these facts, the grievor was entitled to say that one cannot risk the health of Canadians for political gain.

[69] The exceptions to free speech contained in *Fraser* and *Haydon* and subsequent cases cannot be applied strictly. The Charter requires a liberal interpretation as it was intended to provide broad protection for all of the rights which it guarantees.

[70] Even though there is no requirement on Mr. Chopra to prove the truth of his comments, the fact remains that they were true or reasonably sustainable. The employer has adduced no evidence to the contrary.

[71] The fact that Mr. Chopra was identified as an employee of HC by the media was not his decision to make and should not be used to silence the grievor. Mr. Chopra has been critical of HC previously. The employer has condoned this type of conduct by not sanctioning the grievor in the past.

[72] There was no rational basis for discipline in this case. Any reasonable person would deem the grievor's comments to be appropriate.

[73] If, however, a decision is reached that discipline was warranted in this case, it should be more in the nature of a reprimand. Given Mr. Chopra's clean disciplinary record, his years of service, the fact that he was contacted by the media and tried to redirect them, that his comments were not controversial, and that he acted in good faith, without malice, in an honest attempt to educate, the 5-day suspension is excessive.

[74] The grievance should, therefore, be allowed.

[75] In support of his case, the grievor referred to the following:

1. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11*
2. *Alberta Union of Provincial Employees v. Alberta*, [2002] A.J. No. 1086
3. *Biggs v. Village of Dupo*, 892 F.2d 1298, [1990] CA7-QL 11 No. 88-1995
4. *Canada (Treasury Board - Health Canada) and Chopra* (2001), 96 L.A.C. (4<sup>th</sup>) 367 (2001 PSSRB 23)
5. *Corporal Robert Read and Commanding Officer, "C" Division RCMP*, Sept. 10, 2003, File No.: 2000-02-004 (D-81)
6. *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455
7. *Haydon v. Canada*, [2001] 2 F.C. 82 (T.D.)
8. *Haydon v. Treasury Board (Health Canada)*, (2002 PSSRB 10)
9. *Irwin Toy Ltd. V. Quebec (Attorney General)*, [1989] 1 S.C.R. 927
10. *Laboucane and Treasury Board (Indian and Northern Affairs Canada)*, (166-2-16086 to 16088)
11. *Lewicki v. Treasury Board (Canadian Grain Commission)*, (2002 PSSRB 37)
12. *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69
13. *Pickering v. Board of Education*, 391 U.S. 563 (S.Ct. 1968)
14. *Public Service Alliance of Canada v. Canada Customs and Revenue Agency*, (2001 PSSRB 105)
15. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8
16. *Re Ministry of Attorney General and British Columbia Government Employees Union* (1981), 3 L.A.C. (3d) 140
17. *Re Park 'n' Fly* (2000), 90 L.A.C. (4<sup>th</sup>) 276
18. *Re Snow Lake School District No. 2309*, [2001] M.G.A.D. No. 66

19. *Re Wainwright School Division No. 32 and Canadian Union of Public Employees, Local 1606 (1984), 15 L.A.C. (3d) 344*
20. *Simard v. Canadian Security Intelligence Service, (2002 PSSRB 52)*
21. *Windsor Star (1992), 26 L.A.C. (4<sup>th</sup>) 129*
22. *Federal Employment Law in Canada (Toronto: Carswell, 1990)*
23. *Stephen M. Kohn, Concepts and Procedures in Whistleblower Law (Westport: Quorum Books, 2001)*

### Reply

[76] Although free speech is important to democracy, so is a fair, effective and impartial public service. Important interests have to be balanced.

[77] The evidence contradicts the grievor's position that he was not told to stop. Various e-mails and the minutes of the fact-finding sessions clearly indicate otherwise (Exhibits E-5, E-6, E-9 and E-11).

[78] The grievor's public comments in prior situations were of a different nature and in different circumstances. There has never been anything to suggest that Mr. Chopra was free to challenge the Minister's motives.

[79] Throughout this case, Mr. Chopra has failed to abide by the code of common sense. He must now pay the price for his inappropriate conduct.

### Reasons for Decision

[80] This case once again raises the ever-important but difficult issue surrounding the balance that must exist between the constitutionally protected right of free expression and the duty of a federal public servant to ensure that the public service to which he/she owes a duty of loyalty is impartial and effective.

[81] It has long been recognized that federal employees must be careful and show restraint in their public criticism of government policy. In our society, the right of free speech for public servants carries with it some obligations.

[82] The starting point for discussion on this issue is the Supreme Court of Canada (SCC) decision in *Fraser (supra)*. Mr. Fraser, who was a public servant, had been

disciplined for publicly criticizing the Government's policy on metric conversion. The case itself did not give rise to a discussion of Charter rights and freedoms since the events it was concerned with occurred prior to the proclamation of the Charter in 1982. The matter was referred to adjudication before the PSSRB and eventually made its way to the SCC.

[83] The SCC upheld the view espoused by the adjudicator that "a public servant simply cannot be allowed under the rubric of free speech to cultivate distrust of the employer amongst members of the constituency whom he is obliged to serve."

[84] Positions in the public service have "two dimensions, one relating to the employee's tasks and how he or she performs them, the other relating to the perception of a job held by the public" (p. 469, *Fraser supra*).

[85] Even though the position held by Mr. Fraser was not concerned with metrification, the Court concluded that his comments about metric conversion were job related "because of the importance and necessity of an impartial and effective public service."

[86] The SCC went on to say at p. 470:

*The federal public service in Canada is part of the executive branch of Government. As such, its fundamental task is to administer and implement policy. In order to do this well, the public service must employ people with certain important characteristics. Knowledge is one, fairness another, integrity a third.*

*As the Adjudicator indicated, a further characteristic is loyalty. As a general rule, federal public servants should be loyal to their employer, the Government of Canada. The loyalty owed is to the Government of Canada, not the political party in power at any one time. A public servant need not vote for the governing party. Nor need he or she publicly espouse its policies. And indeed, in some circumstances a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on major*



*Government policies. In conducting himself in this way the appellant, in my view, displayed a lack of loyalty to the Government that was inconsistent with his duties as an employee of the Government.*

*As the Adjudicator pointed out, there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service.*

[87] Finally, the SCC discussed the question of impairment in the following manner (pages 472, 473):

*... As to impairment to perform the specific job, I think the general rule should be that direct evidence of impairment is required. However, this rule is not absolute. When, as here, the nature of the public servant's occupation is both important and sensitive and when, as here, the substance, form and context of the public servant's criticism is extreme, then an inference of impairment can be drawn. In this case the inference drawn by the Adjudicator, namely that Mr. Fraser's conduct could or would give rise to public concern, unease and distrust of his ability to perform his employment duties, was not an unreasonable one for him to take.*

*Turning to impairment in the wider sense, I am of the opinion that direct evidence is not necessarily required. The traditions and contemporary standards of the public service can be matters of direct evidence. But they can also be matters of study, of written and oral argument, of general knowledge on the part of experienced public sector adjudicators, and ultimately, of reasonable inference by those adjudicators. It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of Mr. Fraser's criticism of government policy.*

*On this point, the Adjudicator found the evidence overwhelming. The substantive criticism was of two major and, at the time, divisive policies - the metric conversion program and the Charter. In form, the criticism was prolonged and, as the national media focussed its attention on Mr. Fraser, increasingly derogatory in tone. As events developed, his criticism went beyond the two policies mentioned above. He began to impugn and attack the character of the Prime Minister and the integrity of the*

*Government. He did this on a local, then a national, and finally an international basis.*

[88] The *Fraser* decision was followed by *Forgie (supra)*, in which an adjudicator of the PSSRB found that there exists a duty on federal employees to attempt to resolve issues internally before resorting to public criticism of government policy. Deputy Chairperson Bendel wrote at page 24 of his decision:

*However, in my opinion, there is a heavy onus on an employee who makes public criticisms of questionable practices to establish that he has done everything reasonable to resolve the issue internally. This is a facet of the loyalty owed by him to his employer. It is not enough for an employee to claim that he doubted the internal avenues would lead to a successful resolution of the question. It is up to the employee to establish that he made reasonable attempts to bring his criticisms to the attention of a responsible level within his organization.*

[89] In keeping with *Fraser (supra)*, I believe that this principle, which inexorably flows from the obligation of restraint incumbent on public servants in political matters, must be followed in all cases except where the situation is urgent and it would be impossible or inappropriate to use internal discussion mechanisms.

[90] In *Haydon v. Canada*, [2001] 2 F.C. 82, in which Mr. Chopra was an applicant, the Court confirmed the principle that public servants who wish to criticize government policies publicly should as a general rule make reasonable attempts to resolve the matter internally (see paragraph 112 of the decision).

[91] Finally, the truth or sustainability of critical public comments made by a public servant should be supported by evidence. Mr. Justice Hugessen in *Grahn (supra, p. 2)* wrote:

*The fact remains, however, that having chosen the drastic course of publicly accusing his superiors of illegalities, it was up to the applicant to prove his allegations if he wished to avoid the otherwise natural consequences of his actions.*

[92] Applying the jurisprudence to the facts of this case, I must conclude that the 5-day suspension imposed on Mr. Chopra was justified.

[93] The grievor's continued and at times aggressive comments in opposition to his employer's policies were unacceptable. Mr. Chopra contends that he was merely trying

to calm down media hype in a period of international crisis. He argues that his comments dealt with public health and safety issues and are protected by the Charter.

[94] Although one can readily accept that the overuse of antibiotics can lead to their ineffectiveness and that they may be contra-indicated for small children, the fact remains that, in cases of emergency, a government might be called upon to administer massive quantities of antibiotics and vaccines. This position is echoed in an article submitted by the grievor's representative as part of Exhibit E-7, tab 7. The journalist wrote:

*Certainly, Ottawa is wise to make sure there's enough medication on hand in the very remote possibility masses of Canadians became ill with anthrax or smallpox.*

[95] In such cases, one presumes that the government would weigh the advantages and disadvantages of mass inoculations. In order to be in a position to make those decisions, the government must have at its disposal the necessary resources, whether they are antibiotics or vaccines.

[96] Mr. Chopra's categorical assertions that the stockpiling of antibiotics or vaccines was unnecessary is not supported by evidence. His attack on the motives of the Minister of Health, regardless of his explanation at the hearing that he meant no harm, was completely unwarranted. The grievor admitted that he had no specific knowledge to justify this statement, which clearly impugned the integrity and motives of the Minister in charge of his department.

[97] Mr. Chopra's comments to Lyle Stewart of the *Montreal Gazette* (Exhibit E-12) show that the grievor was more interested in criticizing and attacking his department than in calming things down. Comments such as "The department feels encouraged by the war" and "Now is the time to hit at people they think are vulnerable" are theatrical in tone, derogatory and unproven in substance.

[98] Throughout his testimony, Mr. Chopra attempted to distance himself from some comments attributed to him when they were presented in the various written articles without quotation marks. Though I accept as fact that the media may sometimes misinterpret or misrepresent one's comments, that possibility cannot be used by the grievor in his own defence. It is not sufficient to say that certain words are not in quotation marks, therefore the employer cannot prove that I said them. Given

Mr. Chopra's testimony, I find that the comments attributed to him reflect closely the discussions he chose to have with various journalists. Furthermore, Mr. Chopra's repeated contacts with the media lead me to conclude that he was not concerned that his views and comments on previous occasions had been misinterpreted.

[99] Of particular significance in this regard are the following lines in Exhibit E-12:

*Yesterday, Chopra was to take part in a McGill University symposium on pesticides titled, "Silent Killers: How our Health, Fertility and Brain Function Are Being Threatened." But this week, he received a threatening letter from senior Health Canada manager Dianne Kirkpatrick suggesting his participation in the symposium should be vetted by the department.*

*So with a pending departmental investigation into his anthrax comments, Chopra decided he would be better off not compounding his difficulties. He cancelled yesterday's appearance at the McGill symposium.*

*"I'm concerned for my job," he says. "I'm fearful for what they might do. This is putting me into a very dangerous situation."*

[100] The grievor agreed he had said the words attributed to him in quotation. He denied, however, having discussed the contents of the note sent to him by Ms. Kirkpatrick concerning the Montréal symposium (Exhibit E-6). I simply cannot believe Mr. Chopra on this matter. Mr. Chopra defies credulity when he says that he does not know where the journalist obtained information about an internal memo, a seminar he was to attend and his supervisor's name. Since the grievor admitted at the hearing to saying that he was concerned about his job, that he was fearful about what his employer might do and that "this" was "putting him into a very dangerous situation", there had to be a discussion about Exhibit E-6 during which he disclosed Ms. Kirkpatrick's name.

[101] The grievor can also be faulted in this case for not using internal review and discussion mechanisms. I simply cannot accept Mr. Chopra's feeble excuse that he did not know whom to talk to. He knew or should have known that he could raise the issue with his immediate supervisor and obtain from her the names of other contacts within the department. That is exactly what Ms. Kirkpatrick did in Exhibit E-6 when she suggested to the grievor "the need to ensure the accuracy of your presentation and to this end you can contact Geraldine Graham... in PMRA."

[102] Mr. Chopra has not shown that the situation post-9/11 required bypassing normal internal discussion venues. The merits and disadvantages of stockpiling antibiotics and vaccines were being discussed publicly during the same time period by other scientists not employed by HC. There was no criminal activity being committed, nor was there immediate danger to the health or safety of Canadians which might have justified some of the comments made by Mr. Chopra.

[103] I should add that even if Mr. Chopra had unsuccessfully attempted to discuss and resolve his concerns internally, some of the comments, in particular those dealing with the Minister's motives as well as the comments alleging a gag order, would remain inappropriate.

[104] There is in this case evidence of impairment on both levels referred to by the SCC in *Fraser (supra)*. First, Ms. Kirkpatrick testified that the grievor's public criticism of the Department and Minister had detrimentally affected her relationship with the grievor. That fact was confirmed by Mr. Chopra when he testified that his relationship with his supervisor was tense. The tension between Ms. Kirkpatrick and Mr. Chopra, resulting from these incidents, is evident from a reading of the transcripts of the two fact-finding meetings (Exhibits E-9 and E-11). There is no doubt that this tension would create an impediment to the grievor's ability to perform his work.

[105] Second, I conclude that Mr. Chopra's repeated comments, which went beyond the realm of acceptable scientific debate, impaired his usefulness as a public servant. His attacks on the Minister, his department and his supervisor were repeated and derogatory. There is no doubt in my mind that Mr. Chopra's conduct in this case seriously impaired his usefulness as a public servant.

[106] Counsel for the grievor suggested that I reduce the penalty imposed to a reprimand if I were to conclude that discipline was warranted. Given what precedes, I believe that the 5-day suspension imposed on Mr. Chopra was well within the parameters of appropriate discipline.

[107] For all of these reasons, the grievance is denied.

**Yvon Tarte,  
Chairperson**

OTTAWA, December 17, 2003.

