Files: 161-2-858
161-2-860

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

SHIV CHOPRA ET AL

Complainants

and

ALAN NYMARK

Respondent

RE: Complaint under section 23 of the Public Service Staff Relations Act

Before: Yvon Tarte, Chairperson

For the Complainants: Judith Allen, counsel

For the Respondent: Ronald Snyder, counsel

Heard at Ottawa,
15 and 16 September 1998.

This decision deals with two separate complaints filed by the complainants against Mr. Alan Nymark, Associate Deputy Minister, Health Canada. A third complaint contained in Board file 161-2-856 and involving similar issues was withdrawn at the commencement of hearings in these matters.

The parties agreed during the hearing that the two outstanding complaints would be dealt with in one decision on the basis of the evidence adduced on September 15 and 16, 1998. Four witnesses testified for the complainants and one for the respondent.

The first complaint submitted by S. Chopra, M. Haydon, C. Basudde, G. Lambert, R. Sharma and A. Vilim (Board file 161-2-858) alleges that Drs. G. Lambert, R.M. Sharma and A. Vilim were moved from one division of the Bureau of Veterinary Drugs (BVD) to another as retaliation by management against certain employees who have brought to light irregularities concerning the assessment of drugs at the BVD.

The second complaint, submitted only by Dr. Chopra alleges that the respondent has failed to properly deal with several grievances and complaints lodged by Dr. Chopra in the past. It is alleged that management's conduct constitutes a divisive act designed to compel Dr. Chopra to refrain from exercising his rights under the *Public Service Staff Relations Act* (PSSRA) as well as discrimination and intimidation against the complainant Chopra, contrary to the prohibitions contained in the PSSRA.

The Evidence

For the complainants

Dr. Margaret Haydon presently works as a drug evaluator in the Pharmaceutical Assessment Division (PAD) of the BVD, Health Protection Branch at Health Canada.

The PAD is the result of the amalgamation of what used to be, prior to 1997, the Central Nervous System, Endocrine and Antiparasitic Drugs Division and the Antimicrobial Drugs Division.

In her curriculum vitae (Exhibit C-1, Tab 3), Dr. Haydon indicates that since 1983 her work at the BVD has consisted of:

> *Regulatory responsibilities for evaluation of veterinary drug research data received from the pharmaceutical industry to determine compliance with the pertinent Sections of the Food and Drugs Act and Regulations before new drugs may be permitted for sale in Canada. The specific areas of data evaluation pertain to safety in the intended species, efficacy of the drugs as per their draft label claims, label review, and coordination of the Human Safety Division recommendations and Manufacturing and Quality Control recommendations. In addition, evaluation of, and recommendations pertaining to Experimental Studies applications and Emergency Drug Release responsibilities as delegated to me.*

Exhibit C-2, Tab 6, contains an organizational chart which shows that the BVD falls under the Food Directorate headed by Dr. Paterson, its Director General. The BVD, whose Director is Dr. Lachance, is composed of two divisions and a business office. In addition to the PAD, already referred to, there is a Human Safety Division (HSD), headed by Dr. Yong. Drs. R.M. Sharma, Vilim, Basudde, Lambert and Chopra work as drug evaluators in the HSD.

Drs. V.D. Sharma, Malik, Breton, Lobo, Alexander, Barrett, Haydon and Blanchard work as drug evaluators in the PAD which is headed by Dr. Landry.

Drugs intended for food producing animals are submitted to the BVD by their manufacturers for assessment and approval. The BVD has operated on a cost recovery basis since 1 April 1996.

Backlogs in the PAD have occurred at different times in the past. Overtime has been used on some occasions to eliminate backlog situations. The BVD has been criticized in two independent studies for its delays in approving drugs.

The first such study was conducted by Price Waterhouse in 1992 (Exhibit C-2, Tab 5). The second study was conducted by KPMG in early 1998 (Exhibit C-2, Tab 5).

In January 1998, Drs. Vilim, R.M. Sharma and Lambert were temporarily assigned to the PAD to reduce a backlog (exhibit C-2, Tab 6). In his memoranda to the three doctors concerned, Dr. Paterson wrote:

> *<u>Submission Backlog</u>*
>
> *As discussed at the BVD staff meeting of November 27, 1997, there are significant backlogs in the Pharmaceutical Assessment Division.*

> *I had requested volunteers from the Human Safety Division to assist, on a temporary basis, in reducing the backlog. There were no volunteers. Consequently, effective January 5, 1998, I am assigning you to assist the Pharmaceutical Assessment Division in handling their backlog. I have asked Dr. Landry to meet with you individually with respect to your specific work assignments.*
>
> *I hope that, with a concerted effort, this arrangement will only be of short duration in reducing the backlog to a more manageable situation.*
>
> *Thank you in advance for your assistance.*

According to Dr. Haydon, the temporary assignments of Drs. Sharma and Vilim (which ended in March 1998) and Dr. Lambert (which ended in July of 1998) did not help in reducing the backlog in the PAD.

The KPMG study referred to earlier was conducted during the period of assignment of Dr. Sharma, Vilim and Lambert from the HSD to the PAD. Since Dr. Haydon had already filed her complaint against the transfer, she refused to participate in the employer's study being conducted by KPMG. The witness further testified that she disagreed with the KPMG finding that the BVD was faced with interpersonal problems. This position, already taken by the respondent in his replies to grievances (Exhibit C-1, Tab 2), did not take into account the serious divergence of scientific view between the drug evaluators and their managers.

Dr. Haydon further testified that she had been pressured by management to approve drugs of questionable safety and that on at least four occasions was told she could be sued by the manufacturers. She was then told by Dr. Landry that she could be charged with insubordination for raising certain concerns about a specific drug.

In cross-examination Dr. Haydon recognized that Dr. Paterson had discussed the backlogs in both the PAD and HSD at a staff meeting held 27 November 1997. She also indicated that the possibility of legal action was raised in the context of a discussion of a letter written to the BVD by the lawyer of a drug manufacturer.

The next witness to testify was Dr. Shiv Chopra who has worked for Health Canada since 1969. He holds a bachelor's degree in veterinary science from the Punjab

Veterinary College and both a master's and doctorate degree in microbiology from the University of McGill in Montreal (see Exhibit C-1, Tab 3).

Dr. Chopra testified at length about his work and some of the drugs he has been asked to evaluate. He indicated that he has often felt that he was being harassed by Dr. Landry who continuously pushed him and his colleagues to meet the artificial deadlines set by the department for the approval of drugs. He gave, as an example of Dr. Landry's interference, the fact that the approval of a drug (Revalor-H) which had been part of his workload was given to another evaluator to expedite matters and by-pass his concerns.

Dr. Chopra believes that management has tried to isolate him from his colleagues to weaken his desire to uphold the legislation and protect the Canadian public. His complaints, he says, were considered frivolous by management and in some cases when he was successful in his grievances he did not obtain adequate redress. Dr. Chopra also believes that his September 1997 grievance (Exhibit C-1, Tab 2) was not dealt with in its entirety. Dr. Chopra also expressed concern that the respondent in his reply to the grievance was setting up an independent review of an incident which had occurred during a meeting between Health Canada staff and industry representatives on January 30, 1997, when in fact he had been assured that the matter was closed.

The witness was part of a review team to look at Nutrilac, a genetically engineered bovine growth hormone, technically called recombinant bovine somatotropin or rBST. The report produced by the review team called the "GAPS ANALYSIS REPORT" was prepared in April 1998 (Exhibit C-1, Tab 4). The report was severely criticized by Drs. Lachance (the Director of the BVD), Landry and Yong who demanded that it be changed.

Dr. Chopra did not participate in the KPMG study which he believes was established to deal with interpersonal conflicts which he maintains do not exist. The witness attended a staff meeting in May 1998 to discuss the KPMG "Workplace Assessment Review" report. At that meeting Dr. Lachance advised all present that employees who did not understand that the BVD was now operating in partnership with its clients on a cost recovery basis would have to come to grips with that fact and

change their views. Dr. Lachance also indicated at that meeting, that employees who did not change could be transferred to a place where they would not be heard of again.

Finally, Dr. Chopra recalled the meeting in November 1997, during which volunteers were asked for to deal with the backlog in the PAD.

In cross-examination Dr. Chopra recognized that there had been in the past, other temporary assignments from one division of the BVD to the other.

Dr. Cris Basudde testified next. Dr. Basudde holds a degree in veterinary medicine from the University of Nairobi, Kenya and both a master's degree in pharmacology and a doctorate in toxicology from the University of London, England.

Dr. Basudde has worked as a drug evaluator for Health Canada since 1990. The witness indicated that he had scientific concerns similar to those raised by Drs. Haydon and Chopra. He believes that these concerns have not been properly dealt with by management. Dr. Basudde participated in the KPMG study and was interviewed by a Michael Dandeneau for approximately 1 1/2 hour on 25 February 1998.

When Drs. Sharma, Vilim and Lambert were temporarily assigned to the PAD, he was left alone to perform the work of the HSD where a backlog now exists.

Dr. Gérard Lambert testified next. Dr. Lambert holds a degree in veterinary medicine, a master's degree and a doctorate degree in pharmacology from the University of Montreal. He has worked as a drug evaluator for the Health Canada BVD since 1973.

Dr. Lambert testified that he participated in the Price Waterhouse review but not in the KPMG study. His concerns are those of the pervious witnesses.

The witness indicated that his temporary assignment to the PAD commenced on 5 January 1998 and ended in July 1998 when he returned to the HSD as Acting Chief at Dr. Yong's request. Dr. Lambert does not believe that the temporary assignment of the three evaluators from HSD to PAD significantly reduced the backlog in PAD.

In cross-examination Dr. Lambert acknowledged that he had attended a meeting on 14 January 1998 (Exhibit R-3) during which Dr. Paterson had tried to explain the temporary reassignments.

For the respondent

Dr. Paterson has been Director General of the Food Directorate at Health Canada since 1996. In that capacity he is responsible for the BVD.

Dr. Paterson testified that temporary assignments between divisions have taken place before. In this particular case, before deciding to temporarily reassign Drs. Sharma, Vilim and Lambert he considered other alternatives such as contracting out, the use of overtime and the redistribution of workload.

The witness discussed these possibilities with his Management Committee (composed of Director Lachance and the three division chiefs). The temporary assignment solution was favoured because of the BVD's severe budgetary restraints.

Drs. Sharma and Lambert were chosen for the temporary assignment because of their prior experience in the PAD. Dr. Vilim's selection for the temporary assignment project was based simply on availability. Dr. Chopra could not be moved because of his participation in the BST review. Finally Dr. Basudde was involved in a major HSD submission.

Dr. Paterson stated that no grievance or complaint played a part in his decision to assign temporarily Drs. Sharma, Vilmin and Lambert to the PAD.

Dr. Paterson testified that he has never personally or on behalf of management made any comment or threat to anybody to seek to have them refrain from exercising any right contained in the PSSRA.

Arguments

The parties were required to present written arguments in this matter. What follows are the pleadings submitted.

For the complainants

In summary, it is the position of PIPSC that, contrary to section 8(2)(c)(ii) of the Public Service Staff Relations Act, R.S.C. 1985, c.P-35, as amended, the manner in which the Respondent Health Canada dealt with substantive scientific concerns raised by the complainants through grievance mechanisms available under the Act was designed to intimidate, threaten and penalize the complainants in order to compel them to refrain from continuing to exercise their rights under the Act. In particular, PIPSC submits that the Respondent sought to undermine the credibility of the complainants within the Bureau of Veterinary Drugs ("the Bureau") by characterizing their grievances as being matters of "interpersonal problems" and, through the KPMG Report, to demean the complainants and target them as "troublemakers". Moreover, PIPSC submits that the reassignment of three of the complainants to duties within the Pharmaceutical Assessment Division ("PAD") of the Bureau was designed to emphasize to the complainants, through the exercise of its management rights, that the Respondent could, and would, reassign the complainants "so they would never be heard from again" should they continue to bring forward grievances raising similar issues to those in the present case.

The Context of the Complaints

1. PIPSC accepts that it has the burden of establishing that the employer's conduct is contrary to the prohibitions set out in section 8(2)(c)(ii) of the Act for the purposes of the present complaints and acknowledges the serious nature of an allegation that this section of the Act has been breached.

2. In assessing the conduct of the employer under s. 8 of the Act, PIPSC submits that it is essential that the Board appreciate the importance of the subject matter in issue in determining whether the Act has been breached by the actions of the Respondent, Health Canada, in the present case. In so doing, the Board must have regard to the vital role played by the complainants as public service employees and scientists who ensure the safety of the food produced by food producing animals and consumed by the Canadian public. In particular, the complainants are required, pursuant to the Food and Drugs Act, R.S.C. 1985, c.F-27, as amended, s.6 and the Food and Drugs Act Regulations, Part C, Division 8, to ensure that new veterinary drugs meet the strict standards imposed by authority of the Parliament of Canada. In addressing the issue of the Bureau's obligations concerning public safety, the Bureau of Veterinary Drugs Overview 1993-1994 states:

> *Drugs intended for use in food producing animals must be carefully assessed for their potential to leave harmful drug residues in meat, milk, eggs, fish or*

> *honey. Toxicity and metabolism studies of veterinary drugs are submitted by manufacturers and are used to identify such potential hazards as mutagenicity, carcinogenicity, reproductive and developmental toxicity, and other specific effects. The data obtained from these studies are assessed carefully for potential adverse effects in humans through the ingestion of residues in food (emphasis added).*
>
> *Bureau of Veterinary Drugs Overview, 1993-1994, PIPSC Book of Documents, C-2, Tab 5 at page 462(g)*

3. In this regard, PIPSC refers the Board to the Respondent's evidence, through Dr. Paterson, that the testimony of Dr. Chopra and Dr. Haydon regarding the serious safety and efficacy issues raised by use of the drugs rBST and Revalor H was fair and accurate.

4. Further, it is essential that the Board take into consideration the fact that the reply of the Respondent to the grievances presented in this case is final and binding for all purposes under the Act. By their grievances, the complainants raised scientific concerns regarding pressure by management within the Bureau of Veterinary Drugs to approve new veterinary drugs of questionable safety. The only formal internal mechanism available to the complainants in which to bring these concerns forward is through a non-adjudicable grievance pursuant to section 90 of the Act. PIPSC submits that in order to assess whether the Respondent's response to the grievances, and its decision to reassign work on the pretense of a critical backlog, was contrary to s.8(2)(c)(ii) of the Act the Board must take into account the limited avenues available to the complainants to bring these concerns to the attention of management and of the complainants legitimate expectation that these matters would be accorded serious consideration.

> *Canada (Treasury Board) v.Burke (May 5, 1988) F.C.J. No. 416 (Fed.C.A.) (QL)*

The Final Level Reply to the Grievances and the KPMG Review

The Nature of the Concerns Raised

5. The complainants, through their grievances, brought forward serious scientific concerns regarding irregularities with respect to approvals for new veterinary drugs for food producing animals and interference by management of the Respondent and industry in the scientific data evaluation process. While the details of these concerns may be long-standing and complex, PIPSC submits that the concerns raised through the documentary evidence provided to the

Respondent in support of these grievances are relevant, therefore, to the extent that they establish the tenor of the scientific concerns being raised by the complainants. These concerns can be summarized as follows:

i. *The manner in which management at the Bureau ignored concerns raised regarding the insufficiency of the data to establish the safety of the drug rBST (or Bovine Growth Hormone). Further, the manner in which Dr. Haydon was pressured into approving a Conditional Notice of Compliance for rBST in 1992 and, as a result of her continuing concerns with the data, her removal from any further review of this drug;*

   PIPSC Book of Documents, C-1, Tab 4 at pages 198-422

ii. *The approval of the drug Revalor H despite the refusal to support a notice of compliance by three separate evaluators, including the complainants Dr. Chopra and Dr. Haydon. In addition, the complainants were concerned with the pressure from the drug manufacturer to get the submission approved and the response to the manufacturer from Dr. Landry to the effect that "I told him I would make up for the rough time he's had with Revalor-H when we review his next submission" with Dr. Paterson's handwritten comment stating "Don. Thanks for resolving the issue. Hope you didn't promise him the moon though"; and*

   Documents concerning the Revalor-H submissions, PIPSC Book of Documents, supra, at pages 118-187

   Memo from Dr. Landry to Ruth Swinimer for Dr. Paterson's attention, dated April 30, 1997, PIPSC Book of Documents, supra, at page 185(b)

iii. *Dr. Haydon's testimony, which was uncontradicted by the Respondent, was that she felt threatened and intimidated when Dr. Landry told Dr. Haydon that if she did not change the content of her scientific review of the Revalor H submissions, she could be sued; and*

iv. *Dr. Haydon testified that she was told that she could be charged with insubordination when she raised issues of fraud concerning the Revalor H review. The Respondent presented no evidence to refute this testimony.*

The History of the Grievances

6. As appears from the documentary and viva voce evidence, the concerns raised regarding approvals for veterinary drugs and interference were first raised by the complainants as early as December 19, 1996 when an internal complaint was filed by Drs. Vilim, Sharma, Basudde and Lambert. Ten months of mediation followed the filing of this complaint and included the addition of Dr. Chopra to the process at the invitation of Dr. Landry, Acting Director of the Bureau. When the mediation process failed to resolve matters, grievances were filed as follows:

i. A grievance was filed by Dr. Haydon, dated May 9, 1997;

Grievance of Dr. Haydon, dated May 9, 1997, Book of Documents of PIPSC, Binder C-1, Tab 2 at 78-79

ii. A grievance was filed by Dr. Chopra, dated September 2, 1997; and

Grievance of Dr. Chopra, dated September 2, 1997, Book of Documents of PIPSC, Binder C-1, Tab 2 at 19-35

iii. A grievance was filed by Drs. Chopra, Basudde, Lambert, Vilim and Sharma, dated October 10, 1997.

Grievance of Drs. Chopra, Basudde, Lambert, Vilim and Sharma ("the Group Grievance"), dated October 10, 1997, Book of Documents of PIPSC, Binder C-1, Tab 2 at 45-48

7. Of particular importance to the present case, the Group Grievance summarizes the focus of that grievance as follows:

> *The context in which this grievance is filed is due to long standing issues due to management's attempts to demean and deprofessionalize the duties and functions as provided in job descriptions of the grievors to implement the Human Safety requirements of the Food and Drugs Act and Regulations (emphasis added).*
>
> *The grievors involved are highly qualified scientists in the relevant field of the safety and effectiveness of veterinary drugs. All of them have a long and unblemished record of employment in this division and the department.*
>
> *Group Grievance, supra, at p.47*

The Focus of the Final Level Reply to the Grievances - Targeting the Grievors as "Troublemakers"

8. In the final level reply to the group grievance, the Associate Deputy Minister of Health Canada, Mr. Alan Nymark, wrote:

> *After having carefully considered the grievance and the accompanying documentation, including the concerns you raised therein, I find your allegation of harassment is not supported.*
>
> *Notwithstanding the above, it is clear to me that the interpersonal relationships among staff in the Bureau of Veterinary Drugs are a concern and I have therefore asked for an independent workplace assessment to examine this issue (emphasis added).*
>
> *Final Level Reply of Alan Nymark, dated December 19, 1997, PIPSC Book of Documents, C-1, Tab 2 at page 63-64*

9. It was the viva voce evidence of Dr. Paterson, Director General of the Food Directorate for Health Canada, that he provided Mr. Nymark advice in drafting the final level reply, above, and suggested to him that the grievances were matters of interpersonal problems, referring Mr. Nymark to various internal Departmental reviews including the Price Waterhouse Report and the mediation process.

10. Several internal reviews have been conducted within the Bureau which have sought to review the drug approval system and performance levels within the Bureau. In particular, PIPSC refers the Board to the following:

i. The "Gagnon Report", entitled "Working Partnerships... Drug Review for the Future", which is a review of the Canadian Drug Approval System, dated July 1992;

The Gagnon Report, PIPSC Book of Documents, C-2, Tab 5 at pages 423-451

ii. The Bureau of Veterinary Drugs Overview, 1993-1994;

PIPSC Book of Documents, C-2, Tab 5 at pages 462(b)-462(g)

iii. The Canadian Animal Health Institute's "Performance Audit Pilot Project: Tracking Review Performance of the Bureau of Veterinary Drugs", dated June 3, 1997; and

CAHI Report, PIPSC Book of Documents, C-2, Tab 5 at pages 463-470

iv. *The Price Waterhouse Strategic Review for the Bureau of Veterinary Drugs, dated August 1, 1996.*

Price Waterhouse Review, PIPSC Book of Documents, C-2, Tab 5 at pages 471-541.

11. PIPSC submits that it is telling that, in the course of the foregoing intensive reviews of the Bureau, there is no mention of "interpersonal problems". In fact, according to the Gagnon Report, the Bureau was singled out as being a very efficient and "model" Bureau.

12. As a result of the grievances, management commissioned the KPMG "Workplace Assessment Report" which was finalized on May 12, 1998. Relevant to the present complaints, the KPMG Review makes the following recommendations:

i. *"New director must act to deal with poor performance and inappropriate behaviour. There are no consequences for poor performance, absenteeism, inappropriate/unprofessional behaviour." In particular, KPMG recommended that the Bureau "include behavioural competencies in performance expectations as a measure of performance (i.e. how one goes about doing one's job is just as important as what one knows and is able to do");*

KPMG Review, PIPSC Book of Documents, C-2, Tab 6 at page 574

ii. *The Review concludes that the working climate is "poisoned, stifling, stressful and unhealthy" and finds that "staff for the most part say they are tired of what they perceive as childish behavior by a 'clique' of troublemakers who spend all their time plotting, complaining, nursing their grudges, boycotting every new initiative and 'stirring things up'".*

13. The KPMG Review was the result of interviews with members of the Bureau staff. All the complainants, save and except an initial 1½ hour interview with Dr. Basudde, did not participate in the KPMG process. According to Dr. Haydon's uncontradicted testimony, only approximately 50% of the members of the Bureau participated in the review including Bureau Chiefs, Dr. Yong and Dr. Landry.

14. Further, Dr. Basudde objected to the questions raised by the KPMG interviewer and, in particular, objected to the reference to "what do you people want". PIPSC submits that it is evident from the KPMG process itself that the complainants were being targeted as a group of troublemakers.

> *Letter from Dr. Basudde to Dr. Paterson, dated March 6, 1998, Exhibit C-3*

15. By the present complaints, confirmed by the viva voce testimony of Drs. Haydon, Chopra, Basudde and Lambert, the complainants felt targeted by management within the Bureau through the KPMG Review and were being labelled "troublemakers" as a way to retaliate against them for bringing forward grievances raising scientific concerns and issues of interference in the drug evaluation process. Further, when concerns were raised with Dr. Lachance regarding the tone of the Review, Dr. Chopra's uncontradicted testimony was that Dr. Lachance stated "you could be sent off from where you will never be heard of again".

16. PIPSC submits that the commissioning of the KPMG Review constitutes reprisal against the complainants for bringing forward their grievances. The Review was designed to target them as being "troublemakers" and to undermine their credibility within the Bureau and to undermine the importance of the issues raised in their grievances. PIPSC submits that this "targeting" was exacerbated by management's decision to table this Review before the entire Bureau at a special meeting held May 26, 1998 at the Conference Centre and introduced by KPMG staff as potentially "uncomfortable". PIPSC notes that Dr. Chopra's testimony regarding this meeting was uncontradicted and unchallenged by the Respondent.

Specific Retaliation Against Dr. Chopra

17. Further, in the final level reply to Dr. Chopra's grievance, Mr. Nymark denied the grievance and provided the same response with regard to interpersonal problems. In addition, Mr. Nymark stated:

> *Notwithstanding the above, I agree that complaints about personal conduct arising from a meeting between Health Canada and industry representatives on January 30, 1997 warrant further examination. I have asked that this matter be reviewed independently and I will then determine what action should be taken in respect of these complaints.*

> *Final Level Reply of Alan Nymark, dated December 19, 1997, PIPSC Book of Documents, C-1, Tab 2 at page 64(b)*

18. By this letter, Mr. Nymark is referring to an incident with industry representative from Elanco. Dr. Chopra provided uncontradicted testimony before the Board that he had received assurances from management that the particular incident referred to in Mr. Nymark's letter was closed. Despite this, and fully 11 months after the incident occurred, the matter is reopened for investigation through the response to Dr. Chopra's grievance.

19. PIPSC submits that the reopening of an investigation into the Elanco incident constituted a penalty and intimidation against Dr. Chopra for raising management and industry interference issues in both his personal and the group grievance. Further, PIPSC submits that it is telling that the Respondent has raised no evidence to refute the complainants position.

Conclusion

20. On this ground alone, therefore, it is the respectful submission of PIPSC that the complaints be allowed on the basis that the KPMG Review, the characterization of the issues raised as being of an "interpersonal" nature and the decision to reopen an investigation into the Elanco incident were designed to retaliate against the complainants for bringing their concerns forward through the grievance process. In particular, it is PIPSC position that the Respondent's conduct was designed to target the complainants and diminish their credibility within the Bureau and within industry in order to minimize the important scientific concerns raised.

The Backlog and Reassignment of Drs. Vilim, Sharma and Lambert

21. It is not the position of PIPSC that Health Canada and, in particular, management within the Bureau do not have the authority to assign work within the Bureau or to identify and address a bona fide backlog. However, it is PIPSC's position that management did not exercise these rights in circumstances which support such a bona fide exercise of management rights. Rather, in light of the timing and the ineffectiveness of the decision to transfer three scientists in the Human Safety Division of the Bureau, management sought to exercise these rights in order to intimidate and coerce these scientists into ceasing to file complaints concerning irregularities in the drug assessment and approval system within the Bureau. In particular, it is PIPSC's position that management sought to demonstrate to all the

complainants that the content, quality and efficiency of their work could be unilaterally altered by management in a manner which would effectively undermine their ability to continue to act together to bring these matters to management's attention.

How a Backlog is Created

22. The uncontradicted evidence before the Board is that all the requirements for compliance with the Food and Drugs Act and Regulations within the three divisions of the Bureau, being the Human Safety Division (HSD), the Pharmaceutical Assessment Division (PAD) and the Manufacturing Unit within PAD must be met in order to approve a new drug which is to be administered to food producing animals. Requests for approval for a new drug can be obtained through several different mechanisms, being through New Drug Submissions (NDS), Supplemental New Drug Submissions (SNDS), Investigative New Drug Submissions (INDS), Experimental Studies Applications (ESA) and Emergency Drug Releases (EDR).

23. Moreover, each of these different types of submission is subject to administrative time frames which dictate the time allowed between the filing of the submission with the Bureau and the final decision to issue a Notice of Compliance or a requirement for additional data in support of the safety of the drug. For example, NDS and SNDS submissions are to be completed within 180 days, INDS submissions are to be completed within 60 days, ESC submissions are to be completed within 60 days and EDR's are to be completed within 24 hours.

24. Further, it is evident from the uncontradicted viva voce testimony of Dr. Haydon that the term "backlog" refers simply to the fact that, owing to the lack of availability of a drug evaluator, a submission will be placed in a "line up", to be delegated to evaluators as they become available and in accordance with the length of time the submission has been awaiting processing (and, of course, in accordance with the approaching administrative time frame deadlines).

25. Finally, it is clear that the existence of a backlog, whether in PAD or another division, is not a new phenomena within the Bureau.

> *Price Waterhouse Review, PIPSC Book of Documents, C-2, Tab 5 at pages 435 and 442-443*

The Timing of the Present Backlog

26. As is evident from the testimony of Dr. Paterson, Director General for the Food Directorate, Health Canada, a

backlog in the PAD division of the Bureau was identified at a management committee meeting in October of 1997. At that meeting, Ms Joy MacAulay provided Dr. Paterson, Dr. Landry, and Dr. Yong information regarding details of this backlog.

Report of J. MacAulay regarding the Backlog in PAD, Exhibit R-1

27. PIPSC submits that it is significant that the information available at that time was that 18 submissions were already overdue and 12 more would become due by the end of November, 1997. The other submissions which were to become overdue, forecast to March, 1998, were significantly smaller in number being 8 for December, 6 for January, 9 for February and 2 for March.

Report of J. MacAulay, supra, at page 1

28. Fully one month later, on November 27, 1997, Ms MacAulay presented the same information to a meeting at which of all the evaluators within the Bureau, including the complainants, were in attendance. At that meeting, evaluators were asked to volunteer their assistance with the backlog by December 1, 1997, failing which evaluators would be assigned to assist in PAD on a temporary basis (see for example, Exhibit R-2 at paragraph 3). In this regard, PIPSC refers the Board to the organizational chart which shows that the only individuals outside the PAD were the complainants (excluding Dr. Haydon who was already in PAD) and the one staff member in the manufacturing division. PIPSC submits, therefore, that the reassignment, whether on a voluntary or involuntary basis, could only have been directed to the complainants.

Organizational Chart, PIPSC Book of Documents, C-2 Tab 6 at page 662

29. Finally, PIPSC refers the Board to Dr. Lambert's uncontradicted testimony to the effect that the last time he was reassigned to assist with a backlog, the reassignment lasted six years. It is evident that the extension of the present "temporary" reassignment was a concern to Dr. Lambert as it was clearly raised in the meeting held between Drs. Lambert, Vilim, Sharma, Paterson and Yong, dated January 14, 1998.

Minutes, dated January 14, 1998, Exhibit R-3 at page 3

30. On December 12, 1997, Drs. Lambert, Vilim and Sharma were informed by Dr. Paterson that they would be reassigned to the PAD in order to deal with the backlog of drug submissions. This reassignment was to be effective January 5, 1998 (see Exhibit C-2, pages 655-657), at least

21/2 months after Ms MacAulay first presented her information on the backlog to the management committee.

> *Letter from Dr. Paterson, dated December 12, 1997, PIPSC Book of Documents, C-2 at pages 655-657*

31. In light of the administrative time frames required for evaluating drug submissions, PIPSC respectfully submits that the length of time between the formal identification of a backlog to management, being October 1997 and the actual assignment of the 3 complainants to the PAD, being January 5, 1998, raises serious doubt as to the "critical" nature of the backlog. In this respect, PIPSC submits that the timing of the transfers to coincide with the rejection of the complainants grievances is sufficient, in itself, to uphold the present complainants.

The Duties Actually Assigned to the Complainants in Support of the Backlog

32. In the alternative, it is the position of PIPSC that the duties actually performed as a result of the reassignment of Drs. Vilim, Lambert and Sharma to the PAD were not directed toward alleviating the backlog in PAD and, considered together with the timing set out above, the bona fides of the reassignment are in doubt. In particular, PIPSC submits that the following evidence supports the complainants attack on the bona fides of the reassignment:

Dr. Vilim

33. As a result of the reassignment, Dr. Vilim was assigned the task of completing final label reviews (being cross checking the final printed labels and contraindications with the information in the file) within PAD. PIPSC submits that it is telling that the information provided by Ms MacAulay (Exhibit R-1) indicates that the backlog identified did not include final label reviews. Further, in the Minutes to a meeting, dated January 14, 1998, between Drs. Lambert, Vilim and Sharma and Dr. Paterson (Exhibit R-3), Dr. Vilim pointed out that assigning him Final Label Reviews was below his professional expertise and, PIPSC submits, contradicts Dr. Paterson's testimony that Dr. Vilim was reassigned because of his expertise as a chemist.

Dr. Sharma

34. As is evident from the uncontradicted testimony of Dr. Haydon, Dr. Sharma performed duties in support of a special project, entitled the "Good Manufacturing Practices" project in addition to PAD work. This project was also not identified on the backlog which was identified by Ms MacAulay and set out in Exhibit R-1.

Dr. Lambert

35. As is evident from the uncontradicted testimony of Dr. Lambert, he was reassigned to PAD to assist with the backlog identified by Ms MacAulay but was also assigned on a full-time basis to the internal rBST "GAPS ANALYSIS" review committee and was asked to complete a submission within HSD.

*36. Dr. Lambert testified, and his evidence is uncontradicted, that only **one** of the submissions identified on the backlog list provided by Ms MacAulay (Exhibit R-1) was completed as a result of the transfer of the three evaluators from HSD.*

Dr. Basudde

37. Finally, Dr. Basudde, the only evaluator remaining in HSD after the reassignment, indicated that the backlog situation in HSD became so critical as a result of the reassignments that Drs. Vilim and Sharma had to be returned to HSD in order to deal with an emergency INDS submission which was coming due.

38. PIPSC submits that it is telling that the Respondent has introduced no evidence indicating that the backlog in PAD has been addressed in any manner despite the fact that the documentation apparently exists. The Respondent introduced only two exhibits: the first dealing with the backlog situation in October, 1997, (Exhibit R-1) and the second dealing with the situation from August 1998 to September 1998 (Exhibit R-5). The Respondent failed to adduce any evidence for the period of the reassignment from January to March, 1998.

Conclusion

39. In light of the foregoing, PIPSC respectfully submits that the Respondent's decision to effect a reassignment at the same time that the complainants' grievances were rejected, the fact that the Respondent's decision to identify a backlog and act upon it during the period that the complainants' grievances were being considered and subsequently rejected, and the fact that the actual duties to which the complainants were assigned were not targeted toward alleviating that backlog are sufficient to establish that the reassignment was to penalize and retaliate against the complainants for exercising their rights under the Act. Specifically, the spectre of being broken up and moved away never to be heard from again was the intended effect of the Respondent's actions.

Admissibility and Relevance of the Documents Submitted in Support of these Complaints

40. During the course of the hearing before the Board, the Respondent raised general objections concerning the relevance of the documents presented by the complainants in support of their complaints.

41. It is the position of PIPSC that all of the documents provided to the Board, being Exhibits C-1, C-2 and C-3 are relevant and admissible. PIPSC notes that the majority of the documents presented by the complainants were received from the Respondent itself through an Access to Information Request and through a subpoena duces tecum. At no time did the Respondent raise any issue with respect to the admissibility or relevance of the documents presented and, it is PIPSC position that it is inappropriate for the Respondent to now object to the documents' relevance before the Board.

42. In the alternative, it is PIPSC position that the following documents, specifically referred to by witnesses at the hearing, are clearly relevant and admissible:

i. All the documents at Tab 1 of Exhibit C-1 detail the complainants section 23 complaints and are clearly relevant;

ii. All the documents at Tab 2 of Exhibit C-1 detail the grievances and supporting documents filed by the complainants which are alleged to have precipitated the Respondent's violation of the complainants s.8(2)(c)(ii) rights under the Act. On this basis, they are clearly relevant;

iii. The curriculum vitae at Tab 3 of Exhibit C-1 establish the professional qualifications of the complainants and are clearly relevant;

iv. The documents at Tab 4 of Exhibit C-1 detail the specific content of the scientific concerns raised by the complainants and alleged to have precipitated the Respondent's violation of the complainants s.8(2)(c)(ii) rights under the Act. It is PIPSC position that these documents are not submitted for the truth of their allegations. PIPSC submits that these documents are relevant to the extent that they catalogue the nature of the specific scientific concerns which have been raised by the complainants through the grievance process available under the Act. Further, PIPSC submits that they are also relevant insofar as they establish the degree to which the Respondent's reply to the grievances presented by the complainants were ignored by the Respondent;

v. *As is evident from the testimony of Dr. Paterson, the documents at Tab 5 of Exhibit C-2, being numerous internal reviews of the Bureau of Veterinary Drugs, are clearly relevant as they were specifically relied upon by Dr. Paterson in his advice to Mr. Alan Nymark concerning the content of the final level reply to the grievances of the complainants; and*

vi. *The documents at Tab 5 of Exhibit C-2 are clearly relevant in that they concern documents specifically related to the reassignment of three of the complainants to the PAD Division of the Bureau of Veterinary Drugs.*

43. Moreover, PIPSC is unaware of the specific nature of the Respondent's objections. As a result, PIPSC reserves the right to make additional submissions in Reply in response to any formal objections raised by Mr. Snyder concerning those documents.

Conclusion

44. PIPSC submits that the Respondent, through its final reply to the complainants' grievances, sought to undermine the credibility of the complainants both within the Bureau and to industry by characterizing their grievances as matters of "interpersonal problems". The tone and recommendations of the KPMG Review, the manner in which it was presented before the Bureau with caveats that it may be "uncomfortable" for certain individuals, and its clear irrelevance to the substantive issues raised by the complainants' grievances had the effect of marginalizing and demeaning the complainants to the extent that they would think twice before filing a similar grievance in the future.

45. In addition, PIPSC submits that the decision to reopen an investigation into the incident with Elanco was solely designed to penalize and isolate Dr. Chopra in particular for filing both his personal and the group grievance.

46. Moreover, PIPSC submits that the timing of the identification of a backlog in PAD; the decision to assign the three complainants to the PAD; and the fact that the duties assigned to the complainants did not relate to submissions identified as being in the backlog, all serve to support the complainants allegation that the reassignment was simply a means of intimidating and penalizing the complainants for filing grievances. Significantly, PIPSC relies on the fact that the Respondent has provided no evidence to suggest that the backlog was any more critical during the Fall of 1997, or was resolved or even lessened by the Spring of 1998, such as to

substantiate its submissions that the reassignment was simply a bona fide exercise of management's prerogative to reassign work.

47. Finally, PIPSC reaffirms its earlier submission that in assessing the conduct of the Respondent in the present case, due regard must be had to the important and vital public interest role played by the complainants, as scientists and public service employees, in evaluating the safety of drugs administered to food producing animals. The Respondent's conduct must also be assessed in light of the final and binding nature of the final level reply in a non-adjudicable grievance of the type brought by the complainants.

48. In all the circumstances, therefore, PIPSC submits that the complainants have established, on the balance of probabilities, that the manner in which the Respondent dealt with the complainants grievances and the reassignment of three of the complainants to the PAD were designed to intimidate, threaten and penalize the complainants in order to compel them to refrain from continuing to exercise their rights under the Act, contrary to s.8(2)(c)(ii) of the Act.

49. PIPSC respectfully requests that the Board:

(a) Issue an Order declaring that the Respondent's have acted in violation of section 8(2)(c)(ii) of the Act; and

(b) Issue an Order directing that the Respondent cease and desist in such and similar activity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

For the respondent

PART I

PRELIMINARY CONCERNS

OVERVIEW

1. The Complainants had filed two complaints before the Public Service Staff Relations Board (herein the "Board") alleging that the Respondent had violated their rights under the Public Service Staff Relations Act (herein the "Act").

2. In particular, the Complainants maintained that the Respondent had breached sections 8(1) and 8(2)(c)(ii) of the Act, which read as follows:

8(1) No person who occupies a managerial or confidential position, whether or not the

> *person is acting on behalf of the employer, shall participate in or interfere with the formation or administration of an employee organization or the representation of employees by such an organization.*
>
> *8(2)(c)(ii) No person shall seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee to refrain from exercising any other right under this Act.*
>
> ***Public Service Staff Relations Act**, 1985, c.P-35 (as amended)*

3. *The sole narrow issue before the Board was to determine whether the aforementioned sections had been breached.*

4. *It is submitted that the allegations made were without foundation, having regard to the totality of the Complainants' evidence.*

5. *The Complainants' under oath, neither directly nor indirectly stated, alleged nor otherwise inferred that the Respondent compelled them to refrain from exercising any right under the Act nor did they ever suggest, hint or imply that their representational rights had been transgressed. For Counsel in her submissions to have suggested otherwise, was to have completely ignored the substance of their testimonies.*

   ***Complainants' Written Submissions**, para. 48*

6. *In view of the Complainants' complete and total failure to directly or indirectly address the specific section 8 violations as alleged, was in and of itself, clear evidence that the whole of their complaints was unsupportable and their concern in respect of these matters was non-existent.*

7. *Rather, it was readily apparent from the commencement of the hearing, that the Complainants' intent was to access a public forum for the sole purpose to impugn the Health Protection Branch's (HPB's) drug approval process and its transparency to the public. Such intention was reinforced by Counsel's own submission that the Board had to "take into account the limited avenues available to the Complainants to bring these concerns to the attention of management".*

Complainants' Written Submissions, *para.4*

8. *It is submitted that the inappropriateness of the Complainants' conduct in having accessed and abused the Board's complaint procedure to advance their personal agenda, brought this administrative process into disrepute.*

9. *Notwithstanding this inappropriateness, Counsel had the temerity to repeatedly suggest that the Respondent's failure to present evidence to refute the Complainants' allegations of Departmental lack of concern for public safety in the drug approval process, arm-twisting and closed-mouthed operations, was indicative of its truthfulness.*

Complainants' Written Submissions
paras. 5(iv), 15, 16 & 19

10. *In view of the foregoing, the Respondent is compelled to briefly respond as follows.*

11. *Contrary to the Complainants' belief, the purpose of this hearing was not to address their concerns respecting the drug approval process in HPB, nor was it to debate the Branch's demonstrated level of openness with the public, nor was the purpose to review the content of workplace assessment reports or of the Complainants' dissatisfaction with the content of grievance replies, nor was it to discuss the Respondent's rationale for commencing an investigation in respect of S. Chopra's interaction with industry representatives (ie. Elanco incident).*

12. *As previously stated, the purpose of this hearing and the sole focus of the Respondent was to address the Complainants' allegations that their section 8 rights had been violated. The Board had no jurisdiction to consider any other matter before it. The Respondent's necessity or requirement to rebut such evidence was non-existent.*

DRUG APPROVAL CONCERNS - WORKPLACE ASSESSMENTS

13. *Had the section 8 legislation not been so restrictive as to its purpose, the Respondent would have put forth evidence related to HPB's drug approval process and the transparency of its operations, to rebut the unfounded allegations made by the Complainants.*

14. *The Complainants' agenda to undermine the integrity of the HPB in the eyes of the public at this hearing was noticeably apparent in view of the complete lack of*

balance or reference to existing safeguards, including the availability of internal scientific panels and the existence of expert advisory panels composed of nationally and internationally renowned scientists to review products and processes. Furthermore, the Complainants noticeably failed to make reference to the existence of the highly publicized Canada-wide three-year consultation process currently taking place to address health protection concerns and the renewal of 22 pieces of legislation governing the HPB.

15. *Such an unbalanced presentation of evidence in a forum not constituted to address such matters, was but a demonstrated act of recklessness on the part of the Complainants, given the wide-spread coverage of this hearing.*

16. *It is to be noted that the Respondent had objected on numerous occasions to the relevance of the vast portion of documentary evidence tendered by the Complainants in Exhibits C-1 and C-2, comprising mainly of drug-approval related matters and Departmental assessment studies. The Respondent additionally objected, on a regular basis, to the relevance of the viva voce evidence surrounding these issues. In view of the immateriality of the foregoing as concerning the specific section 8 allegations, there was no necessity to have responded in kind, and indeed, the Respondent did not do so.*

17. *Furthermore, the Complainants' noticeable failure to address directly or indirectly what rights under the Act they were refraining from exercising or how their representational rights had been transgressed, only confirmed the irrelevance of the aforementioned documentation and associated testimony as relating to the section 23 complaints. As a result, the Respondent's position vis-à-vis the irrelevance of this evidence to these proceedings was further reinforced.*

Complainants' Written Submissions
paras. 5, 12, 15, 16, 19, 20, 44 & 45

18. *Notwithstanding the Respondent's position that the aforesaid documentation was neither tangentially nor collaterally related to the central issue before the Board, the latter, in any event, admitted into evidence those documents contained in Exhibits C-1 and C-2 which were specifically referred to and identified during the hearing. As a result, it is the position of the Respondent that such evidence should be given no weight.*

19. *Finally, it is to be further recalled that the Respondent had objected on numerous occasions to the admissibility*

of the said documentation and many aspects of the Complainants' oral evidence relating to the issues therein on the basis that they regularly offended the principles of hearsay and double-hearsay.

20. *As Counsel correctly acknowledged, it was the Complainants who had the burden of establishing that the Respondent's conduct was contrary to the prohibitions set out in section 8 of the Act.*

***Complainants' Written Submission**, para.1*

21. *The substantiation of the Complainants' case should not be predicated upon evidence, which falls below the threshold of reliability and accuracy.*

22. *Counsel failed to call the necessary witnesses to confirm the hearsay and double-hearsay statements arising out of the Complainants' testimony concerning alleged Departmental threats, arm-twisting, improprieties surrounding workplace operations and lack of concern for public safety in the drug approval process. In view of the apparent shortcomings in its case related to these areas, the Respondent was neither compelled nor obligated to call any evidence to rebut same.*

23. *Notwithstanding the foregoing, the Respondent would be remiss if it didn't address for the record, some of the incredulous claims made by the Complainants in their submissions.*

24. *More particularly and because it had constituted a major aspect of the Complainants' case, the Respondent is compelled to comment on the allegations relating to the KPMG report.*

KPMG REPORT

25. *Most notable was the suggestion that the Bureau's commissioning of the KPMG Review constituted a reprisal against the Complainants for bringing forward their grievances. It was argued that the Review was designed to "target them as troublemakers, to undermine their credibility within the Bureau and to undermine the importance of the issues raised in their grievances".*

***Complainants' Written Submissions**, paras.15, 16 & 20*

26. *It is remarkable that the Complainants were capable of arriving at these conclusions, notwithstanding the clear stated purpose of the study which was to "explore the concerns and needs of management and staff within the*

Bureau of Veterinary Drugs (BVD)". This study was in furtherance to a communiqué from the Director General to BVD staff, who specifically indicated that the purpose of the workplace assessment "was to determine and improve the health of the organization by focusing upon employee concerns about the workplace and the organizational climate".

***KPMG Report, Exhibit C-2**, p.546*

27. *The Complainants' inferences that an ulterior motive existed for the conduct of the study was premised upon nothing more than supposition and speculation. To have substantiated such an allegation, would have required the calling of a member of the independent consulting group who carried out the investigation, or at the very least, a management representative who was involved in the initiation of the study, neither of which was done.*

28. *Furthermore, the Complainants' attempt to portray themselves as persecuted employees whose concerns were allegedly treated with indifference by management fell far short of any reliable evidence to substantiate same.*

28. *Firstly, it is relevant to note that all but one of the Complainants refused to participate in the study, which would have provided them with an opportunity to express their opinions and views on the functioning of the Bureau.*

***Complainants' Written Submissions**, para. 13*

29. *Secondly, while the consistent theme of the Complainants' testimony was that the KPMG Report labelled them as "troublemakers", the Report did not, at any point, label any individual in the Bureau as a troublemaker, though it did determine that there were problems in general relating to employee interaction.*

***KPMG Report, Exhibit C-2**, pp.548, 549-50*

30. *Finally, to address the Complainants' assertion that the Report had the effect of "marginalizing and demeaning [them] to the extent that they would think twice before filing a similar grievance in the future", such allegation is belied by the absence of any such testimony by the Complainants. This constituted yet another example of submissions having been made without foundation.*

***Complainants' Written Submissions**, para. 44*

CONCLUSION

31. *For all of the foregoing reasons, it is submitted that all documentation and viva voce evidence surrounding the drug approval concerns and the various internal work assessments reports, was completely irrelevant to the validation of the section 23 complaints, and ought to be given no weight.*

PART II

SUBSTANCE OF THE SECTION 23 COMPLAINTS

BACKGROUND

32. *The Board must determine the validity of two complaints filed by the Complainants, bearing file numbers 161-2-858 and 161-2-860, which were consolidated for the purposes of the hearing.*

33. *The complaints alleged a breach of sections 8(1) (ie. interference by management in the representation of employees) and 8(2)(c)(ii) (refrained from exercising any other right under the Act).*

34. *The specific factual allegations identified in the complaints were essentially three-fold in nature:*

    (a) That the Respondent failed to properly address the various complaints and grievances previously filed by the Complainants concerning issues of alleged harassment and coercion to approve products of questionable safety and the alleged refusal to properly investigate the complaints and grievances;

    (b) That the Respondent provided an unsatisfactory final level reply in respect of the said grievances; and

    (c) That the Respondent, as an act of retaliation, reassigned three of the Complainants to work in the Pharmaceutical Assessment Division (PAD).

THRESHOLD OF PROOF

35. *Allegations of employer violations under section 8 of the Act "are serious".*

    Barzotto v. Makuch *(November 16, 1988) 161-2-520*

36. *As stated by former Board Chairperson J. Finkelman, Q.C., it is "to be borne in mind that a complaint under section 8 of the Act has quasi-criminal qualities", and that the grounds for establishing such a complaint must be substantial.*

Gennings v. Milani *(August 9, 1971) 161-2-87*

37. *It is therefore submitted that although the threshold of proof to establish section 8 violations is the "balance of probabilities", the evidence must nevertheless be "clear and cogent".*

Murray v. Treasury Board *(August 10, 1993) 166-2-23654*

SECTION 8(1) VIOLATION

38. *The Complainants alleged that the Respondent had interfered with their representation rights pursuant to section 8(1) of the Act.*

39. *There was a complete absence of any evidence to find, suggest or otherwise infer that such a violation had occurred.*

40. *The absence of such evidence, coupled with the fact that Counsel, in her submissions, never suggested or otherwise argued that such a breach had occurred, is indicative of the frivolous nature of this aspect of the Complainants' complaints.*

41. *It is therefore submitted that there can be no finding of a section 8(1) violation.*

FAILURE TO ADDRESS PAST GRIEVANCES AND COMPLAINTS

42. *It is alleged that a section 8(2)(c)(ii) violation occurred by virtue of the Respondent's failure to properly address the various complaints and grievances previously filed by the Complainants concerning issues of alleged harassment and coercion to approve products of questionable safety and the alleged refusal to properly investigate the complaints and grievances.*

43. *Firstly, it is submitted that these issues do not constitute a proper ground for the filing of a section 23 complaint, for reasons described in Part I of the Respondent's submissions.*

44. *Secondly, and in any event, the Complainants under oath, neither directly nor indirectly stated, alleged or otherwise inferred that in spite of their foregoing concern in respect of these matters, that the Respondent had compelled them to refrain from exercising any right under the Act nor did they ever suggest, hint or imply that they were reluctant to take advantage of any other right under the Act, including the filing of future grievances.*

45. *In light of the irrelevance of these issues as pertaining to section 8 complaints and in view of the paucity of evidence put forth by the Complainants to substantiate that they refrained from exercising their rights under the Act, this allegation ought to be dismissed.*

DISSATISFACTION WITH GRIEVANCE REPLIES

46. *Complainant S. Chopra alleged that his section 8 rights were violated by virtue of the Respondent having provided an unsatisfactory final level reply in respect of a grievance formerly filed by him.*

47. *More particularly, he asserted that the Respondent had provided a "false" reply in having stated that S. Chopra's harassment and coercion allegations had been dealt with "through previous grievances or other redress mechanisms". The Complainant further delineated that the Department had "done nothing to resolve [his] grievances and professional concerns".*

48. *Firstly, even on its face, the foregoing allegation, if true (which the Respondent denies), is not tantamount to a section 8 violation, and therefore did not constitute an appropriate basis for the filing of a section 23 complaint. No viva voce evidence was tendered by the Complainant to indicate that his dissatisfaction with the grievance reply compelled him to refrain from exercising any other right under the Act, including the filing of future grievances.*

49. *Secondly, section 92 of the Act specifically identifies certain topics of concern which may be referred to adjudication, where a grievance of an employee has not been dealt with to his or her satisfaction in the grievance procedure.*

***Public Service Staff Relations Act**, 1985, c.P-35, s.92*

50. *In restricting the topics of concern which are referable to adjudication, Parliament acknowledged the possibility of employees being dissatisfied with the content of their grievance replies, but that no further remedy would be availed to them.*

51. *The Complainant recognized the "final and binding nature of the final level reply in [his] non-adjudicable grievance".*

***Complainants' Written Submissions**, para.47*

52. *It is evident that the Complainant had disregarded the will of Parliament by seeking further redress to his*

> *grievance in the nature of a section 23 complaint. This blatant misuse of the section 23 process for the sole purpose of demonstrating his dissatisfaction with the reply, is apparent in the Complainants' own submissions:*
>
> > *PIPSC submits that in order to asses whether the Respondent's response to the grievances .was contrary to s.8(2)(c)(ii) of the Act, the Board must take into account the limited avenues available to the Complainants to bring these concerns to the attention of management and of the complainants' legitimate expectation that these matters would be accorded serious consideration.*
> >
> > ***Complainants' Written Submissions**, para. 4*

53. *It is submitted that dissatisfaction with one's grievance reply does not constitute a legitimate and appropriate basis for filing a s.23 complaint and the Complainant, recognizing as much, ought to be admonished for such conduct.*

54. *In any event, the uncontradictory evidence as tendered by Dr. Paterson, indicated that serious consideration was given to the content of the said reply, wherein the Respondent sought input from a number of individuals in HPB, including Dr. Paterson himself and human resource personnel, before its release.*

55. *For these reasons, this aspect of the Complainant's complaint ought to be dismissed.*

REASSIGNMENT OF THREE COMPLAINANTS

56. *The Complainants allege that in its decision to transfer three scientists in the Human Safety Division (HSD) to the Pharmaceutical Assessment Division (PAD), "management sought to exercise these rights in order to intimidate and coerce these scientists into ceasing to file complaints concerning irregularities in the drug assessment and approval system within the Bureau".*

***Complainants' Written Submissions**, para. 21*

57. *It is submitted that there was a complete absence of any evidence to support this allegation and in any event, no evidence was tendered by the Complainants, either directly or indirectly, that their section 8(2)(c)(ii) rights had been violated as a result.*

58. *Nor did the Complainants tender any evidence to demonstrate that Respondent Nymark was directly*

involved or was even aware of the temporary reassignments.

59. *This aspect of the Complainants' allegations must therefore be dismissed.*

60. *In any event, it was clearly within the prerogative of Dr. Paterson to reassign three of the Complainants to PAD for a temporary period, pursuant to Section 7 of the Act which states as follows:*

> *Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.*
>
> ***Public Service Staff Relations Act**, 1985, c.P-35, s.7*

61. *The unequivocal evidence tendered, confirmed the following:*

(a) *That there had been a departmental policy requiring that new drug submission evaluations had to be completed within a 180 day period (Exhibit C-2, Tab 5, p.462(e));*

(b) *That there had been a history of temporary reassignments of scientists from HSD to PAD and vice-versa to address backlog concerns. As recognized by the Complainants, "the existence of a backlog, whether in PAD or another division, is not a new phenomena within the Bureau" (Complainants" Written Submissions, para 25);*

(c) *That as of November 1997, the backlog of new drug submissions in PAD was 12 times the size of the backlog in HSD (Exhibit R-1);*

(d) *That the backlog of new drug submissions in PAD at the end of the 1997-98 fiscal year was projected to be 55 versus 7 in HSD (Exhibit R-1);*

(e) *That at a November 27, 1997 staff meeting, the Complainants, among others, were advised of the said backlogs, and in fact, were provided with an identifiable list of existing and projected backlogs to the end of the fiscal year (Exhibit R-1);*

(f) *That Dr. Paterson had requested volunteers from HSD to assist in the reduction of PAD's backlog. Not one of the Complainants was singled out at that time for purposes of being reassigned (Exhibit R-2).*

(g) That Dr. Paterson indicated that if no volunteers were forthcoming by December 1, 1997, he would assign staff according to operational requirements (Exhibit R-2);

(h) That in light of the absence of volunteers, Dr. Paterson, on December 12, 1997, temporarily reassigned Drs. Vilim, Lambert and Sharma to PAD effectively January 5, 1998 (Exhibit C-2, Tab 6, pp. 655-57);

(i) That Dr. Paterson provided a rationale as to why he specifically selected these scientists for reassignment, which was never rebutted.

(j) That at a January 14, 1998 meeting, Dr. Paterson "stressed that the assignments [were] not intended to punish the three evaluators because they [had] filed grievances" and no statements were made by the Complainants at the said meeting to suggest otherwise (Exhibit R-3);

(k) That the reassignments did not result in any change of work location for the three reassigned Complainants. They continued to work at the same desk they had always been working at, prior to the reassignment;

(l) That the temporary reassignments for Drs. Sharma and Vilim were terminated on March 19, 1998 (Exhibit R-4) and that Dr. Lambert's reassignment concluded in July, 1998.

62. Counsel submitted that in view of the length of time between the formal identification of a backlog and the actual assignment of the three Complainants to PAD "raised serious doubt as to the critical nature of the backlog". Counsel further submitted that the "actual duties to which the complainants were assigned, were not targeted toward alleviating that backlog". Finally, she argued that these concerns, coupled with the fact that the reassignments were made during the period when the Complainants had filed grievances, was sufficient for the Board to conclude that the purpose of the reassignments was to "penalize and retaliate against the Complainants for exercising their rights under the Act".

***Complainants' Written Submissions**, paras. 31 & 39*

63. As is the case, in general, with the whole of the Complainants' submissions, these allegations are founded on suspicion, conjecture and distrust, but on no substantive evidentiary basis.

64. *It is to be noted that although Counsel now raises such allegations to substantiate her case, at no time during her cross-examination of Dr. Paterson did she ever request an explanation for the time lag in the assignment of the relevant Complainants.*

65. *It is to be further noted that while the relevant three Complainants may not have been working exclusively on PAD projects during their reassignment, not one of them gave direct evidence denying that they had worked on some aspect of the backlog in PAD as identified in Exhibit R-1.*

66. *In addition, and contrary to Counsel's submissions, Dr. Paterson provided uncontroverted evidence that the backlog in PAD, as a result of these temporary reassignments, was reduced, but not to the extent he desired.*

67. *Finally, to take Counsel's foregoing submission to its irrational conclusion, where employees have active and ongoing grievances and complaints against a particular manager, said manager would be precluded from reassigning such employees on a "business as usual" basis, for fear of being subject to further repercussions.*

68. *In conclusion, it is submitted that based upon the evidence tendered, not only did Dr. Paterson have the authority to temporarily reassign the relevant Complainants to PAD, but further, it was done in a bona fide manner.*

69. *The allegations relating to the reassignment of the Complainants ought to be dismissed.*

CONCLUSION

70. *Not only was there a complete and total absence of clear and cogent evidence to support the Complainants' allegations that their section 8 rights were violated, but further, there was no evidence at all.*

71. *It is therefore requested that the two complaints be dismissed.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Reply

For the complainants

1. *With respect to paragraphs 8 - 12 of Mr. Snyder's response, we simply note that Dr. Patterson testified in*

answer to a question from Mr. Snyder that Drs. Chopra and Haydon's testimony regarding the serious safety and efficacy issues raised by use of the drugs rBST and Revalor H was fair and accurate. Mr. Snyder chose to adduce that confirmatory evidence from his own witness. Mr. Snyder chose not to have Dr. Patterson limit or qualify that evidence. In our respectful submission the Board is entitled to consider that evidence in the context of whether or not the employer embarked on a campaign to re-characterize serious scientific and safety concerns as interpersonal problems that would be dealt with in a review intended and designed to undermine, marginalize and otherwise discredit the scientists. In our respectful submission, the above fits within the ambit of "intimidation", "any other kind of threat" and "any other means" to discourage employees from filing grievances.

2. *With respect to paragraphs 13 - 20 of Mr. Snyder's response, we would adopt Mr. Snyder's terminology and submit that it is "inappropriate" of him to have the "temerity" to actually attempt to adduce new evidence in his submissions that he chose not to call during the hearing. Paragraphs 13 - 15 are to be ignored in their entirety. While we appreciate that the Board has a broad discretion to admit evidence that might not be admissible in a Court, the Board has no discretion to consider new evidence presented in legal argument which boils down to "this is the evidence we would have called if we had appreciated that the Board might give some weight to the evidence adduced by the complainants".*

3. *With respect to paragraph 19, Mr. Snyder mischaracterizes the Board's ruling. While the Board reserved on the issue of relevance of the documentary evidence, Mr. Snyder's hearsay objection was overruled. Specifically, Mr. Snyder objected to Dr. Chopra's testimony that Dr. Lachance stated to all of the complainants "you could be sent off from where you will never be heard from again" on the basis that it was hearsay. My notes reflect that the Board told Mr. Snyder that it was not hearsay (it was something Dr. Chopra heard himself) and admitted the evidence. I can find no other references to hearsay objections.*

4. *In any event, it may be of interest to Mr. Snyder to learn that the hearsay rule has been reduced to a test of necessity and reliability in Court matters, including criminal matters, as a result of the Supreme Court of Canada's decisions in R. v. Smith (1992), 94 D.L.R. (4th) 590 and R. v. Khan (1990), 41 O.A.C. 353. Again, we note that the Board has a broad discretion to consider evidence that would be inadmissible in a Court. However, it would*

be improper to render inadmissible, evidence that would otherwise be admissible in a Court.

5. *With respect to paragraph 22 of Mr. Snyder's response, we note that as a result of Mr. Snyder's express request, the witnesses that followed Drs. Chopra and Haydon specifically adopted their testimony and by so doing corroborated it. Again, with respect, at both the suggestion from the Board and Mr. Snyder, the documentary evidence that was properly identified and arguably relevant was admitted and the complainants were advised that they did not have to read the documentary evidence into the record.*

6. *With respect to paragraph 26 of Mr. Snyder's response, we simply note that Dr. Patterson testified that he was responsible for the references to interpersonal problems in Mr. Nymark's final level grievance reply. At the outset, it was the desire of the Department to deal with interpersonal problems -- not employee concerns. The complainants decided to not participate in the interviews as a result of Dr. Basudde's interview where he was specifically asked "what do you people intend to do next". Targeting may be more blatant in an industrial setting. In our respectful submission, the targeting was sufficiently blatant for a group of scientists to conclude that they were being set up...that "any other means" were being employed to discourage them from filing grievances.*

7. *With respect to paragraphs 42 to 55 of Mr. Snyder's response, we respectfully submit that the PIPSC complaint (Board File No. 161-2-856) was withdrawn at the outset of the hearing and the afore-mentioned submissions do not relate to an issue that was before the Board.*

8. *The complainants submit that the re-characterization of serious scientific and safety concerns as an interpersonal problem constituted the ground work for reprisal. It is not the complainants' position in the matters that are before the Board that the employer's response was inadequate. Mr. Snyder appears to be attempting to obtain a ruling on a question that is not before the Board. We would therefore request that the Board disregard paragraphs 42 to 55 of Mr. Snyder's response. (As an aside, we would note that in our experience, when disputes are not dealt with thoroughly and effectively at the outset, they tend to fester and mushroom. We therefore do not approve of employers that utilize a strategy of deferral, avoidance and superficial acknowledgment. In other words, such strategies are contrary to labour relations policy and should not be encouraged.) In any event, the issue of the adequacy of*

the grievance reply is not before this tribunal. The fact that the strategy for reprisal is laid out in the grievance reply is before this tribunal -- which issue is not addressed in paragraphs 42 to 55.

9. *We do note, however, with great interest, Mr. Snyder's suggestion in paragraph 53 of his response that he feels the complainant should be "admonished" for filing a section 23 complaint. It is not clear whether Mr. Snyder is referring to PIPSC, Dr. Chopra or all of the complainants. We do view the suggestion that complainants should be penalized for filing section 23 complaints as a rather self-defeating response to a complaint alleging a breach of section 8.*

10. *With respect to paragraphs 56 to 69 of Mr. Snyder's response, we submit that the only example of a previous "re-assignment" was that of Dr. Lambert, who was temporarily re-assigned for six years. It is open to the Board to conclude that given Dr. Lambert's previous experience with re-assignment; the timing of the re-assignments in relation to the grievance replies; the fact that the re-assignments did not appear to result in any approvals getting out quicker but did contribute to a new backlog in HSD; the fact that the employer adduced evidence of backlog in October, 1997 and declined to adduce the best evidence available, i.e., the monthly reports, during the time the complainants were re-assigned and immediately thereafter (i.e., January, 1997 to March, 1997); and the subsequent statement of Dr. Lachance that complainants could be sent off and never heard of again, constitute a strategy (an "other means") to intimidate the complainants.*

11. *By way of a general reply to Mr. Snyder's response, he has no grounds (as has already been indicated to him by the Board) to suggest that there was no evidence before the Board of any breach of the Act. Mr. Snyder might characterize the complaint as premature or perhaps anticipatory since the full impact of the employer's strategy did not become clear until after the KPMG report was released and Dr. Lachance made his comment to the complainants. However, in our submission, the complainants are not obliged to wait until all reprisals have been completely implemented before they file a complaint.*

12. *Finally, we trust it was inadvertence that caused Mr. Snyder to refer to all of the complainants as "Dr.", except for Dr. Chopra, throughout his response.*

Reasons for Decision

The complainants have alleged that the respondent Alan Nymark, associate Deputy Minister, Health Canada, has sought by intimidation, threat, the imposition of penalty or by any other means to compel them to refrain from exercising their rights under the PSSRA. The relevant provisions of the PSSRA read as follow:

> ***23.*** *(1) The Board shall examine and inquire into any complaint made to it that the employer or an employee organization, or any person acting on behalf of the employer or employee organization, has failed*
>
> *(a) to observe any prohibition contained in section 8, 9 or 10;*
>
> *...*
>
> *(2) Where, under subsection (1), the Board determines that the employer, an employee organization or a person has failed in any manner described in that subsection, the Board may make an order directing the employer, employee organization or person to observe the prohibition, give effect to the provision or decision or comply with the regulation, as the case may be, or take such action as may be required in that behalf within such specified period as the Board may consider appropriate.*
>
> *(3) An order under subsection (2) directed to a person shall*
>
> *(a) where that person has acted or purported to act on behalf of the employer, be directed as well*
>
> *(i) in the case of a separate employer, to the chief executive officer thereof, and*
>
> *(ii) in any other case, to the Secretary of the Treasury Board; and*
>
> *(b) where that person has acted or purported to act on behalf of an employee organization, be directed as well to the chief officer of that employee organization.*
>
> *8. (2) Subject to subsection (3), no person shall*
>
> *(a) refuse to employ, to continue to employ, or otherwise discriminate against any person in regard to employment or to any term or condition of employment, because the person is a member of an employee organization or was or is exercising any right under this Act;*
>
> *... or*

> *(c) seek by intimidation, threat of dismissal or any other kind of threat, by the imposition of a pecuniary or any other penalty or by any other means to compel an employee*
>
> *...*
>
> *(ii) to refrain from exercising any other right under this Act.*
>
> *(3) No person shall be deemed to have contravened subsection (2) by reason of any act or thing done or omitted in relation to a person who occupies, or is proposed to occupy, a managerial or confidential position.*

Although somewhat disconcerting, the evidence adduced by the complainants does not substantiate the complaints filed. In particular the evidence presented does not show that the various studies commissioned by management, and in particular the KPMG review, were in fact undertaken by Health Canada for any nefarious purpose. There is no evidence that Drs. Vilim, Lambert and Sharma were temporarily transferred from one division of the BVD to the other as retaliation for filing various complaints and grievances. Quite the contrary, the evidence shows that management exercized its authority and responsibilities in this regard in an acceptable and appropriate manner. Finally the evidence does not prove Dr. Chopra's allegation that the respondent's replies to his grievances or the respondent's desire to look more deeply into incidents between Health Canada staff and Elanco representatives several months before constituted a penalty or intimidation.

The evidence does show the presence of troubling scientific and interpersonal conflict in the BVD workplace but does not prove that any action taken by the respondent or by a person or persons acting on his behalf, violates the prohibitions contained in section 8 of the PSSRA.

The Public Service Staff Relations Board has no authority to examine and assess the scientific concerns raised by the various witnesses who testified at the hearing in these matters. These complaints are therefore dismissed.

Yvon Tarte
Chairperson

OTTAWA, December 21, 1998.