

Date: 20181128

Files: 566-02-11193 and 11194

Citation: 2018 FPSLREB 88

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



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

BETWEEN

DAVID PUCCINI

Grievor

and

**DEPUTY HEAD
(Parole Board of Canada)**

Respondent

Indexed as
Puccini v. Deputy Head (Parole Board of Canada)

In the matter of individual grievances referred to adjudication

Before: Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Kim Patenaude, counsel

For the Respondent: Joshua Alcock, counsel

Heard at Ottawa, Ontario,
November 30 to December 3, 2015, and June 20 to 24, 2016.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] David Puccini (“the grievor”) was at the relevant time employed by the respondent Parole Board of Canada (“the employer” or “PBC”) as a mailroom messenger clerk.

[2] By letter dated September 12, 2014, the employer’s departmental security officer (DSO) informed the grievor that his security screening level of reliability status was suspended with immediate effect, pending a review, for allegedly having intercepted a team meeting conversation.

[3] In a second letter of the same date, the employer advised the grievor that as a valid reliability status was a condition of employment and that since that status was the lowest level of security standard, no reassignment or appointment to a less-sensitive position at an equivalent or lower level of security standard was possible, and he was suspended without pay until a review for cause of his reliability status was completed.

[4] By letter dated November 7, 2014, the DSO informed the grievor that his reliability status had been revoked. That letter reads in part as follows:

...

This is to inform you that your Parole Board of Canada Reliability Status has been revoked.

As Departmental Security Officer, I have reviewed the circumstances which led me to conduct an Assessment of your Reliability Status in accordance with Section 2.1 of the Policy on Government Security’s Standard on Security Screening, pertaining to the allegation of the interception of a team meeting conversation. I understand as well that you have attempted to penetrate restricted and critical areas within the Parole Board of Canada well in excess of 50 times for which no authorization had been provided. Furthermore, you were involved in a confrontation with the commissionaire at 410 Laurier West, after you refused to show your identification card to gain access to the office.

Given that these actions pose security concerns, I have found sufficient cause to revoke your security screening effective September 12, 2014. You never availed yourself of the opportunity to provide a rebuttal on the administrative investigation. You were offered numerous opportunities to do so during the administrative investigation that began on May 21st 2014; letters were sent inviting you to participate in an interview. Having not received any response from you, this

interview did not take place. On October 7th, and on November 4th 2014, you were provided other opportunities to respond to identified security concerns. During your review for cause, we invited you to participate in the process through a subject interview. Once again, we received no response from you. Your actions raise serious concerns regarding your honesty, integrity and trustworthiness.

As a result of the security concerns initially identified, combined with additional information gathered from your Personal File and Security file and due to your lack of participation in this security review process, be advised that this security assessment is now complete. In accordance with Appendix D, para 19 of the Standard on Security Screening titled "Revocation", I have decided to revoke your Reliability Status. With respect to condition of employment issues, this decision has been shared with the applicable human resources/labour relations/ contract authorities.

...

[Emphasis in the original]

[5] In a separate letter dated November 7, 2014, the employer terminated the grievor's employment effective September 12, 2014, based on s. 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; FAA), as a result of the revocation of his reliability status based on an administrative investigation. That letter also stated that no reassignment of appointment to a less-sensitive position at an equivalent or lower level of security standard was possible. Section 12(1)(e) provides as follows:

***12 (1)** Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*

...

(e) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, of persons employed in the public service for reasons other than breaches of discipline or misconduct

[6] Section 12(3) of the FAA reads as follows:

***12 (3)** Disciplinary action against, or the termination of employment or the demotion of, any person under paragraph (1)(c),(d) or (e) or (2)(c) or (d) may only be for cause.*

[7] Section 2(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the Act”) states that the term “core public administration” has the same meaning as in s. 11(1) of the *FAA*, which defines “core public administration” as “... the departments named in Schedule I and the other portions of the federal public administration named in Schedule IV.” The PBC is named in Schedule IV to the *FAA*.

[8] On October 27, 2014, the grievor filed a grievance against the suspension in the following terms: “I grieve the letter of suspension dated September 12, 2014, however not received until October 8, 2014 signed by Eric McMullen, Department Security Officer.” As corrective action, he requested the withdrawal of the suspension letter and reinstatement without loss of pay and benefits (File No. 566-02-11193).

[9] On December 12, 2014, the grievor filed a grievance against the termination of his employment and as remedy requested reinstatement without loss of pay and benefits (File No. 566-02-11194).

[10] The grievances were denied during the grievance procedure and were referred to adjudication on May 22, 2015, under ss. 209(1)(b) (disciplinary action resulting in termination, demotion, suspension, or financial penalty) and 209(1)(c)(i) (demotion or termination under s. 12(1)(d) of the *FAA* for unsatisfactory performance or under s. 12(1)(e) of the *FAA* for any other reason that does not relate to a breach of discipline or misconduct) of the *Act*.

[11] The parties agreed that they would deal only with the termination grievance, as the termination of the grievor’s employment was made retroactive to the date of his suspension.

[12] For the reasons set out in this decision, I conclude that the grievances must be dismissed.

II. Legislative amendments

[13] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into

force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

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

III. Objection to jurisdiction

[15] In correspondence to the Board dated June 29 and August 12, 2015, and as reiterated at the outset of the hearing, the employer raised an objection to the Board's jurisdiction to hear these matters. Its position is that since the grievor's suspension and subsequent termination of employment due to the revocation of his reliability status were administrative measures taken under s. 12(1)(e) of the *FAA*, it is not open to an adjudicator appointed under the *Act* to examine the merits of those decisions unless they are found to constitute disguised discipline.

[16] Both parties referred to numerous decisions dealing with the Board's jurisdiction in matters concerning the revocation of an employee's reliability status, including the following: *Bergey v. Treasury Board (Royal Canadian Mounted Police) and Deputy Head (Royal Canadian Mounted Police)*, 2013 PSLRB 80; *Bergey v. Canada (Attorney General)*, 2015 FC 617; *Heyser v. Deputy Head (Department of Employment and Social Development) and Treasury Board (Department of Employment and Social Development)*, 2015 PSLREB 70; and *Féthière v. Deputy Head (Royal Canadian Mounted Police)*, 2016 PSLREB 16.

[17] In *Heyser*, the grievor's employment was terminated pursuant to paragraph 12(1)(e) of the *FAA* as a result of the revocation of her reliability status based on an

administrative investigation, which had determined that the grievor had falsified a medical document and had submitted it to the employer for the purpose of extending an existing teleworking agreement. The employer became aware of the fraudulent medical certificate on April 27, 2011. The grievor was on medical leave from that date until her return to work on October 18, 2011. She remained at work until the termination of her employment on April 27, 2012. During that period, the employer had not expressed any concerns about the grievor's reliability nor did it restrict her duties or movements in the office.

[18] The employer objected to an adjudicator's jurisdiction to consider the grievor's challenge to the revocation of her reliability status and the consequent termination of her employment because the termination was an administrative measure and not a disciplinary action. The employer submitted that an adjudicator's jurisdiction over terminations is limited under section 209 of the Act to those resulting from disciplinary actions under paragraph 209(1)(b) or those prescribed under paragraph 209(1)(c). However, according to the employer, the Board could take jurisdiction over the grievor's termination only if it found that it constituted disguised discipline.

[19] At paragraphs 134 to 136 of *Heyser*, the adjudicator dealt as follows with the objection to jurisdiction:

134 An adjudicator clearly has jurisdiction under paragraph 209(1)(b) of the PSLRA over a disciplinary action resulting in termination. Similarly, an adjudicator clearly has jurisdiction under paragraph 209(1)(c) of the PSLRA over the termination of an employee in the core public administration under paragraph 12(1)(d) of the FAA for unsatisfactory performance or under paragraph 12(1)(e) of the FAA for any other reason that does not relate to a breach of discipline or misconduct. As the grievor was an employee in the core public administration, it therefore follows that an adjudicator has jurisdiction under paragraphs 209(1)(b) and (c) of the PSLRA over her termination whether it resulted from a disciplinary action, from unsatisfactory performance or from any other reason that did not relate to a breach of discipline or misconduct. Although subsection 208(2) and paragraph 211(a) of the PSLRA provide for specific exceptions to an adjudicator's jurisdiction with respect to terminations, those exceptions do not apply in the grievor's case. Accordingly, an adjudicator has full jurisdiction over the grievor's termination.

135 In this case, as in most termination cases in the federal public service, the employer bore the burden of proving that the termination was for cause. At the hearing, it submitted that the requirements of subsection 12(3) of the FAA applied to the grievor's termination. The requirement to prove cause meant that the grievor's termination had to be justified by a legitimate employment-related reason. The reason referred to in the letter of termination that was provided to the grievor on April 27, 2012, reads as follows:

...

The Departmental Security Officer, in accordance with his delegation of authority, has revoked your Reliability Status.

Since employment with the Department requires a valid Reliability Status, and given that you no longer meet this condition of employment, I hereby inform you of my decision to terminate your employment with Human Resources and Skills Development Canada pursuant to Section 12(1)(e) of the Financial Administrative [sic] Act. This decision is effective immediately.

...

136 According to the employer, if I am satisfied that the grievor's termination was based on the revocation of her reliability status, then my review of the employer's actions must end there. I do not agree. The employer cannot escape a review of its decision to revoke the grievor's reliability status in a case in which her termination was based solely on that decision, she squarely challenged that decision and an adjudicator has full jurisdiction over her termination. In those circumstances, therefore, my task is to determine whether the revocation of her reliability status constituted a legitimate cause for terminating her employment.

[20] In applying this reasoning, I conclude that the Board has full jurisdiction to deal on their merits with matters concerning terminations of employment resulting from revocations of reliability status in the federal public sector, whether disciplinary or non-disciplinary, and to determine whether the non-disciplinary termination was made for cause. Although ss. 208(2) and 211(a) of the Act provide for specific exceptions to the Board's jurisdiction with respect to terminations of employment, as in *Heyser*, those exceptions do not apply in this grievor's case. Accordingly, the employer's objection to jurisdiction is dismissed.

[21] I am comforted in this conclusion by the subsequent decision of the Federal Court of Appeal in *Canada (Attorney General) v. Heyser*, 2017 FCA 113 (“*Heyser FCA*”), which upheld the Board’s decision in *Heyser*. I would add that in *Canada (Procureur général) c. Féthière*, 2017 CAF 66, the Court affirmed the Board’s jurisdiction to hear and determine the merits of the employer’s decision to revoke the grievor’s reliability status.

[22] In *Heyser FCA*, Nadon J.A. for the Court stated the following:

...

[73] *First of all, there can be no doubt, on the basis of our decisions in Bergey and Féthière, that the Board has jurisdiction, pursuant to paragraph 209(1)(c) of the Act and paragraph 12(1)(e) and subsection 12(3) of the FAA, to hear and determine, on their merits, decisions made by an employer revoking an employee’s reliability status. In my respectful view, in the light of the legislative changes brought about since 1993, as explained by Madam Justice Gleason in Bergey, the view taken by the Attorney General in these proceedings is not supported by the legislation.*

[74] *I would go further and say that this line of jurisprudence, which Madam Justice Gleason in Bergey (at paragraph 45) and Mr. Justice Boivin in Féthière (at paragraph 23) referred to, is no longer valid as it is based on an unreasonable interpretation of the relevant statutory provisions.*

[75] *Although I am bound by the Court’s clear pronouncement on that issue in Féthière, I wish to make it clear that I agree entirely with the opinion expressed by Mr. Justice Boivin. In other words, in dealing with terminations which result from non-disciplinary grounds, it is no longer necessary for the Board to resort to the concept of disguised discipline to assert its jurisdiction under paragraph 209(1)(b) since the Board has full jurisdiction under paragraph 209(1)(c) to deal with non-disciplinary terminations. Consequently, the view of the matter expressed by the adjudicator at paragraph 134 of the Board’s reasons (and reproduced above at paragraph 17 of these reasons) is the only reasonable approach to be taken in dealing with terminations under both disciplinary and non-disciplinary matters.*

[76] *Thus, in circumstances similar to those that gave rise to this litigation, it is up to the Board to determine whether the non-disciplinary termination is for cause. Consequently, the Board must, on the basis of the relevant facts*

surrounding the revocation and in the light of the relevant policies enacted by Treasury Board as the employer, determine whether the termination is for cause, which means inquiring into whether the revocation is based on proper and legitimate grounds.

[77] It is my view that if the revocation is justified on the basis of the relevant policies then the resulting termination was for cause. In other words, as is the situation here, when the employer terminates an employee on non-disciplinary grounds, i.e. because the employee has lost his or her reliability status, the Board must determine whether the revocation leading to the termination is justified. If so, the employer has shown that the termination was made for cause. If the employer is unsuccessful in demonstrating that the revocation was based on legitimate grounds, then there is no cause for the termination and the employee, as the adjudicator so ordered in this matter, must be reinstated.

...

[79] In my view, paragraphs 209(1)(b) and (c) of the Act are free-standing provisions which allow the Board to deal, on their merits, with both disciplinary and non-disciplinary terminations. As part of its mandate under these provisions, the Board has full jurisdiction to determine whether the termination at issue has been made for cause. Consequently, the concept of disguised discipline, used by the Board to assume jurisdiction over terminations resulting from revocations of reliability status, is no longer necessary. By that I mean that in regard to non-disciplinary terminations, the Board has full jurisdiction to inquire into the circumstances of the termination and into the revocation which led to the termination. Thus, if the Board determines that there was no cause for the termination (i.e. that the revocation was not made on legitimate grounds) it becomes irrelevant what the specific reason for the revocation was. In other words, whether the revocation is the result of disguised discipline or some other non-legitimate ground, the result is that the Board will set aside the termination and may order the reinstatement of the employee. In that sense, it is my view that in the current legislative context the concept of disguised discipline no longer has the importance that it had under the previous case law.

...

IV. Summary of the evidence

[23] The employer called the following witnesses to testify: Eric McMullen, PBC director, corporate services division, and DSO; David Temple, courier; Abdi Sadiq,

commissionaire; Denis Constant, independent investigator; Francis Guay, PBC personnel security officer; Sheila Ouellette, the employer's acting director of performance measurement and member of the Security Review Committee (SRC); Alexandre Charette, PBC physical security officer; and Richard Clair, executive director general, who signed the letter terminating the grievor's employment. The grievor testified on his own behalf.

[24] I begin this summary with an overview of the evidence.

[25] The employer's premises are located on the fifth, sixth, and seventh floors of 410 Laurier Avenue West in Ottawa, Ontario ("410 Laurier"). Mr. McMullen had convened a meeting for May 21, 2014, at 11:00 a.m. in boardroom 651 on the sixth floor to discuss changes to the configuration of the employer's mailroom, which is located on the same floor. The boardroom reservation was made by Mr. McMullen's administrative assistant electronically on a platform available to employees to view its availability. The invitees were Sandrine Leblanc, manager, information management services, and the grievor's supervisor; Cynthia Massimiliano, supervisor, information management and mailroom services; the grievor; and another mailroom messenger clerk, Derek Brennan.

[26] I was informed that Mr. Brennan had passed away between the time of the occurrence of the events in question and the hearing.

[27] Mr. McMullen, Ms. Leblanc, and Ms. Massimiliano all arrived at the boardroom at about the same time, 11:00 a.m., and found the grievor already seated at the conference table. Mr. Brennan arrived approximately 5 to 10 minutes after the beginning of the meeting, as he had to take delivery of a package on the building's main floor. The wall behind the grievor's seat contained cabinets six feet high. During the meeting, Mr. McMullen observed a tape recorder on one of the cabinets. Approximately 20 minutes into the meeting, he stated that the first part had been completed and that the remainder would deal with management issues. The grievor and Mr. Brennan were excused, and Mr. McMullen and the two managers remained in the room.

[28] Mr. McMullen retrieved the tape recorder and observed that it was active, with the play and record buttons being held down with tape used for packing. He said that the packing tape would have prevented the recorder from making a sound when the

tape ended and the play and record buttons released. He removed the packing tape to stop the recording, rewound the tape several seconds, and heard that the recording was of the meeting then in progress. He then briefly listened to the other side of the tape and heard the grievor's voice in a personal exchange with a female voice that Mr. McMullen did not immediately recognize but that eventually was determined to be that of the grievor's ex-wife. Neither Mr. McMullen nor the two other managers had placed the tape recorder in the meeting room.

[29] Mr. McMullen testified that the recorder in question was not standard equipment for the organization. Recorders were used only by security personnel who would place one on the table during an interview and would then provide copies of the recording to the parties involved.

[30] He then called Mr. Guay and asked him to attend the meeting room with his supervisor, Patricia Simms, the manager of the security and administration section.

[31] At Mr. McMullen's direction, Mr. Guay prepared a fact-finding preliminary report dated May 26, 2014 (Exhibit E-1, Tab 4), which he provided to Mr. McMullen. Mr. Guay listened to the tape and confirmed that the meeting had been recorded on one side of the tape ("side A") and that the other side ("side B") contained a recording of a conversation between the grievor and a female believed to be the grievor's ex-wife. The tape was of 60 minutes' duration, 30 minutes per side. The recordings were copied to a compact disc, which was played at the hearing and was entered as evidence (Exhibit E-4). The grievor acknowledged that his voice was on side B of the tape. Mr. Guay also confirmed that another meeting had been scheduled on that day in that boardroom from 10:00 to 11:00 a.m. but had been cancelled at the last minute.

[32] The preliminary report recommended that an administrative investigation be initiated. If the actions of the individual concerned constituted misconduct, discipline could be justified. Depending on the results of the administrative investigation, a review for cause of the reliability status of the person in question should be conducted.

[33] In a memo dated May 26, 2014 (Exhibit E-1, Tab 5), Mr. McMullen initiated an administrative investigation to be carried out by an independent investigator and Mr. Guay. The employer retained Mr. Constant as the investigator. He is a retired Royal Canadian Mounted Police (RCMP) senior officer with broad investigatory experience.

He had previously performed work for the federal government. Mr. McMullen signed the mandate for the administrative investigation on June 20, 2014, which was included in the administrative investigation report (Exhibit E-1, Tab 29).

[34] By letter dated June 23, 2014, the grievor was advised of the administrative investigation into the recording of the meeting and was advised that he would be provided an opportunity to present an explanation (Exhibit E-1, Tab 6). When it was read to him by Ms. Leblanc that day in the presence of Mr. Constant and Mr. Guay, the grievor refused to sign the acknowledgement of receipt of the letter. Mr. Constant noted on the letter that the grievor had refused to sign it; he dated it and provided him with a copy.

[35] Mr. Constant and Mr. Guay met with Mr. Charette on June 21, 2014. Mr. Charette informed them that a new platform for the employer's card-reader access system had been installed in late September 2013 and that between then and May 2014, on multiple occasions, the grievor and Mr. Brennan had attempted to penetrate restricted areas that they were not authorized to access and that they had not been authorized to access under the old system. Based on this information, Mr. Constant and Mr. Guay sought an additional mandate to conduct an administrative investigation into those access attempts, which Mr. McMullen authorized on June 27, 2014 (Exhibit E-1, Tab 7).

[36] On June 27, 2014, at approximately 2:30 p.m., Mr. Brennan was convened to room 640, where Mr. Constant, in the presence of Mr. Guay, informed him of the additional mandate to investigate his alleged access attempts to restricted areas. Mr. Constant presented the notice to him, and Mr. Brennan signed it, acknowledging receipt.

[37] The grievor was convened to room 640 at approximately 3:00 p.m. the same day. Mr. Constant presented the notice to him and requested his signature. The grievor stated that he would not sign it until he had retained counsel. These notices were not filed in evidence. According to the employer, they have been lost but would have been similar to the notice to the grievor dated June 23, 2014 (Exhibit E-1, Tab 6). However, the service of the notices to Mr. Brennan and the grievor is referred to in the notes of Mr. Constant (Exhibit E-1, Tab 30) and of Mr. Guay (Exhibit E-1, Tab 31).

[38] Several minutes after this encounter, Mr. Constant went to the grievor's mailroom office and informed him that the investigators were contemplating obtaining

his version of the facts during the week of July 7, 2014. The grievor immediately replied that his lawyer was not available that week.

[39] The administrative investigation report, dated July 29, 2014 (Exhibit E-1, Tab 29), included, among other appendices, a copy of the access card security log for the period bracketing the meeting in boardroom 651 on May 21, 2014. The log is a record of all employees who access doors through the card reader system; it records the employees' access card numbers, the specific doors entered, and whether access was denied.

[40] The administrative investigation report, at pages 10 and 11, sets out as follows the investigators' reconstruction of the grievor's movements before and after the May 21, 2014, meeting, based on the tape recording and the security log:

...

- ... Mr. Puccini entered the south door located beside Boardroom #651 at 10:55 hrs but immediately exited since he was recorded re-entering the mailroom at 10:57 hrs.
- It is suspected that Mr. Puccini was attempting to ascertain if the previous meeting held in Boardroom #651 from 10:00 hrs to 11:00 hrs was concluded.
- Based on the length of time that the tape recorder was activated for which no conversation was recorded, we can conclude that the recorder was activated on May 21, 2014, at approximately 10:57 hrs.
- That at the beginning of the recording, there are obvious cracklings recorded that are similar to tape (packaging tape) being applied to the recorder.
- That the noise being generated on the recorder would suggest that the recorder had been dissimulated in a pocket.
- That friction resulting from what is believed to be clothing material over the recorder could be heard with every step being taken by the individual.
- That music originating from a radio in close proximity could be heard in the background.
- That Corporate Services Employees are well aware that a radio from the mailroom that harbours the general office

of Mr. Derek Brennan and Mr. David Puccini could be heard from a distance.

- That the individual carrying the recorder is heard walking for a very short period of time upon exiting a squeaking door.*
- That employees working within the Corporate Services Division are very familiar with a squeaking door that provides access from the mailroom to the hallway and going around the elevator.*
- That approximately 20-25 seconds is counted from the moment we can hear the squeaking door action and the laying of the tape recorder on the top of the cabinet.*
- That the period of 20-25 seconds is consistent with the necessary time to cover the distance between the mailroom squeaking door and Boardroom #651.*
- All information gathered between 10:57 hrs and 10:59 hrs, would coincide with the movement and activity of Mr. Puccini since he was recorded accessing the south door just beside Boardroom #651 at 10:59 hrs.*
- That, the tape recorder is laid to rest where no noise could be heard for approximately 14 seconds on the recording which would suggest that the individual carrying the tape recorder has remained in the room.*
- That based on the absence of noise recorded, nobody came into Boardroom #651 until the arrival of Mr. McMullen, Ms. Leblanc and Ms. Massimiliano.*
- That after 14 seconds elapsed from the tape being dropped on the top of the cabinet, Mr. Eric McMullen, Ms. Sandrine Leblanc and Cynthia Massimiliano could be heard on the recorder arriving at Boardroom #651 together.*
- That upon their arrival, they all observed Mr. David Puccini seating [sic] down in Boardroom #651.*
- That upon entering the Boardroom #651 on May 21, at 11:00 hrs, Ms. Leblanc acknowledged Mr. Puccini's presence (her voice could be heard on the tape).*

...

[41] As stated, the grievor and Mr. Brennan were excused from the meeting after approximately 20 minutes. The administrative investigation report at page 12 refers as follows to the grievor's subsequent movements:

...

- *That the card access system confirmed that Mr. Puccini did in fact return to the mailroom at 11:23 hrs.*
- *That at 11:27 hrs, the access card system indicated that Mr. Puccini gained access to the south door of the sixth floor which is next to the Boardroom where the meeting was held.*
- *It is highly suspected that this latest visit to the boardroom by Mr. Puccini was an attempt to retrieve the tape recorder immediately after the meeting was concluded.*
- *That at 11:28 hrs, the access card system reflects that Mr. Puccini re-entered the mailroom.*

...

- *That at 11:40 hrs, the access card system indicates that Mr. Puccini gained access to the south door of the sixth floor next to Boardroom #651.*
- *That it is highly suspected that Mr. Puccini discovered at this approximate time that the tape recorder he had placed on top of the cabinet was no longer there since his access to the south door was limited to one instance for the rest of the day.*

...

[42] Earlier on May 21, 2014, the grievor had an altercation with Mr. Sadiq, a commissionaire who at that point had been posted at 410 Laurier for five years. His duties included access control and checking employee passes. Mr. Sadiq testified that at approximately 9:50 a.m., the grievor accessed the building through the back entrance. When Mr. Sadiq asked him to produce his pass, the grievor walked toward him. As recorded in the incident report, which Mr. Sadiq testified he wrote the same day (Exhibit E-1, Tab 34), the grievor stated as follows:

...

... "don't get up, did you read the federal RCMP mandate that specifies that facial recognition supersedes that of verifying my departmental Id" ... I will print the directives and bring them to you" ... "The reason why facial recognition supersedes showing my Id is because you see my face 10 000 times a day."...

...

[43] Mr. Sadiq testified that he had seen the grievor a number of times and that when he came down to the lobby from the sixth floor, he did not ask him for his ID. However, when the grievor entered the building from the outside, he would ask for his ID, which he did of all employees, according to policy.

[44] In his incident report, Mr. Sadiq referred to two previous occasions on which the grievor had started to argue when requested to show his ID, namely, September 20 and 26, 2013. Mr. Sadiq had recorded those incidents in his personal notes but had not written an incident report. When he was asked why not, he replied that the first two incidents were of lesser gravity than the one on May 21, 2014. When the gravity of an incident crosses the line, he writes an incident report.

[45] With respect to the grievor's multiple attempts to access restricted areas of the employer's premises, the history (Exhibit E-1, Tab 32) shows that they were made from October 2013 through January 2014. The rooms he attempted to penetrate were the sixth-floor records room (room 600), the sixth-floor archives room (room 665), the communications closets on the sixth and seventh floors, and the seventh-floor storage room (room 701).

[46] Mr. Charette testified that he became aware of these access attempts in the first or second week of November 2013 when reviewing the access logs upon his return from leave. He informed his manager, Ms. Simms, who asked him to advise the grievor's management and to speak with the grievor. Around the same time, Mr. Charette spoke with the grievor and Mr. Brennan, who had also made similar attempts to access restricted areas and requested that they stop it.

[47] After the Christmas holidays, Mr. Charette noted that the grievor had made further unauthorized access attempts, and he again informed Ms. Simms. He also informed Ms. Massimiliano, the grievor's new supervisor, of the previous attempts and that they were continuing, and asked her to speak with the grievor. On February 10, 2014, Ms. Massimiliano sent the following email to the grievor and Mr. Brennan (Exhibit E-1, Tab 33):

...

Following the discussion we had last week, I would like to remind you that Security regularly monitors the access to restricted areas. Please be mindful of this, as repeated

attempts to access areas to which employees do not have access is a behaviour that is not tolerated by Security and could result in a disciplinary measure.

If you have any questions or concerns regarding your access, please let me know.

...

[48] Following this email, Mr. Charette noted that the grievor's attempts to access the restricted areas ceased.

[49] As stated earlier in this decision, on June 27, 2014, the investigators informed Mr. Puccini that they were planning to obtain his version of the facts during the week of July 7, 2014. Mr. Constant testified that on July 7, 2014, he and Mr. Guay went to the grievor's office at 9:15 a.m. and informed him that they planned to speak with him the next day, July 8, 2014. The grievor said that his counsel was not available that day, after which Mr. Constant said that it was an administrative investigation, not a criminal process. The grievor replied, "If you think my lawyer will wait for you in his limo downstairs, you're mistaken." Mr. Constant responded that the grievor's counsel did not have to wait in his limo, as he would be invited into the office.

[50] Mr. Constant said that the grievor became confrontational and that he asked what Mr. Constant was doing, barging in and being arrogant. He replied that he was trying to give the grievor an opportunity to provide an explanation about a specific incident. The grievor then said that unless he was given a specific time and date, he would not meet with the investigators, as he required the presence of counsel. Mr. Constant stated that the meeting would take place the next day, July 8, at 10:45 a.m., in room 640. The grievor said that he would get back to Mr. Constant in due time.

[51] At that point, Mr. Brennan arrived, and Mr. Constant took the opportunity to speak with him to schedule a meeting. Before Mr. Brennan could answer, the grievor said that Mr. Brennan would not speak to the investigators until he had retained counsel. Mr. Constant then gave the grievor a paper with his name and cell phone number on it so that he could reach him about the next day's meeting.

[52] On July 8, Mr. Constant was in room 640 all day working on the investigation with Mr. Guay. He was not contacted by the grievor, and the interview did not take

place. On the same day, Mr. Guay sent an email to the grievor (Exhibit E-1, Tab 8) with the subject line "Information", offering him another opportunity to present his version of the tape recorder incident and seeking his availability and that of his representative from July 9 to 16, 2014.

[53] Since the investigators had not heard from the grievor, on July 15, 2014, at 8:40 a.m., Mr. Guay sent an email to him with the subject line "Information Reminder" (Exhibit E-1, Tab 9), the contents of which were identical to the email of July 8. The grievor replied at 3:25 p.m. on the same day as follows:

...

On July 7, 2014 Mr. Constant and I spoke regarding meeting [sic] on July 8, 2014. You and Derek Brennan were also present. Mr. Constant said he needed to meet on July 8, 2014 although he was unable to provide a time to meet. I had a representative waiting most of the day across the street in order to facilitate his inability to schedule a time. I have not heard back from him regarding missing the meeting. My council [sic] is in discovery this week and he is not available.

...

[54] On July 16, 2014, at 8:37 a.m., Mr. Guay sent the following email to the grievor (Exhibit E-1, Tab 10):

...

Thank you for responding to our second email request for an interview. Although your recollection of the facts differ from the conversation that took place on July 7, 2014, we would like to provide you with a final opportunity to respond to the allegation. As we have informed you, this administrative process provide you with an opportunity to be accompanied during the interview.

Considering the need to bring the Administrative Investigation to a conclusion, we would like to extend a final invitation to you. July 17-18 are the dates that have been selected. Anytime during these two days, investigators will accommodate you at your leisure. If you choose not to meet with investigators during these days, this will constitute a refusal on your part to participate in the current Administrative Investigation.

We will await for your reply.

...

[Sic throughout]

[55] The grievor replied to Mr. Guay by email on July 18, 2014, at 3:42 p.m., as follows (Exhibit E-1, Tab 10):

...

You were not involved in the conversation; you were merely a bystander who had his back to us. Mr. Brenna [sic], Mr. Constant and I were conversing. Mr. Constant clearly arranged a meeting with myself for July 8, 2014 and clearly did not attend the meeting. I still have not been contacted by him. Nonetheless, as I previously stated my representative is occupied during these 2 days.

I would caution you in denying me my right to representation. We look forward to meeting.

...

[56] The administrative investigation report was submitted to Mr. McMullen on July 29, 2014 (Exhibit E-1, Tab 11). In the absence of the grievor's version, it concluded that he had placed the tape recorder in boardroom 651 on May 21, 2014.

[57] As indicated in the grievor's leave of absence summary (Exhibit E-1, Tab 35), he was on vacation from July 28 to August 21, 2014. On August 22, 2014, Mr. McMullen gave the administrative investigation report to the grievor by hand together with a letter inviting him to a meeting to be held on September 4, 2014, at 9:00 a.m., at which he could present any clarifications or extenuating circumstances that he felt had not been addressed in the course of the investigation. The letter further informed the grievor that this was not a disciplinary meeting and that he could be accompanied by a person of his choice. The grievor acknowledged receipt of the letter and the investigation report by signing an "X".

[58] In a letter dated August 28, 2014 (Exhibit E-1, Tab 14), Mr. McMullen informed the grievor that the date of the meeting had been changed to September 5, 2014. Mr. McMullen testified that he changed it because of a family related obligation scheduled on September 4, 2014.

[59] In an email to Mr. McMullen on September 5, 2014, at 7:38 a.m. (Exhibit E-1, Tab 15), the grievor stated he was unable to attend the meeting that day and suggested that it be rescheduled. Mr. McMullen responded by email at 8:53 a.m., reiterating that the meeting would take place at 9:00 a.m. and that if the grievor did not attend, management would make a decision based on the

information in the investigation report. The grievor did not attend the meeting.

[60] In the absence of information from the grievor, Mr. McMullen decided to convene the departmental SRC. Its mandate, as set out in its terms of reference (Exhibit E-1, Tab 16), was to review and assess information to make recommendations to the DSO concerning suspensions, revocations, or reinstatements of reliability status screenings for existing employees. The SRC was composed of legal counsel, the director of the operations sector, a manager of the human resources branch, a manager of security and administration, and an individual external to the corporate services division.

[61] The SRC met on September 10, 2014, to consider the grievor's case. In attendance were Mr. McMullen, Mr. Guay as the coordinator, Mr. Constant, who briefed the SRC members, Ms. Simms, Ms. Ouellette as the external member, and Jacques Lemire, a human resources manager. Legal counsel was not present but was available as required. Mr. Guay and Mr. Constant were not SRC members.

[62] The SRC members were provided with copies of the administration investigation report that had been submitted to management (Exhibit E-1, Tab 11), while Mr. Constant had the report with appendices (Exhibit E-1, Tab 29). Mr. McMullen testified that as the only information available at the time related to the tape recorder incident, the SRC members were asked for their advice concerning the grievor's honesty, integrity, and trustworthiness. The SRC's recommendation was to suspend the grievor's reliability status, as he presented a risk to the organization, and to conduct a review for cause of his reliability status.

[63] Ms. Ouellette testified that the SRC's recommendation was made in view of the serious nature of the incident and the absence of an explanation by the grievor. She said that he had demonstrated dishonesty by secretly recording conversations. Ms. Ouellette said that he had access to everything incoming to and outgoing from the employer, and since his motive was unknown with respect to what use would be made of the recording, it was a breach of trust that posed a serious risk to the organization. The grievor's lack of participation in the investigation meant that there were no mitigating or extenuating circumstances to explain his motive. The SRC recommended suspending his reliability status, to give him an opportunity to respond and to provide an explanation.

[64] On September 12, 2014, Mr. McMullen convened a meeting with the grievor, with Mr. Lemire in attendance. At about 10:00 a.m., Mr. Guay went to get the grievor, who refused to attend and wanted a representative. When informed of this, at 10:20 a.m., Mr. McMullen ordered the grievor to attend in the next five minutes. He showed up at 10:25 a.m., accompanied by Mr. Brennan as his witness.

[65] At the outset of the meeting, Mr. McMullen requested that the grievor hand over his access cards and BlackBerry device; the grievor replied that they were in his office. Mr. McMullen said that he would retrieve them after the meeting.

[66] Mr. McMullen intended to hand the grievor two letters, both dated September 12, 2014 (Exhibit E-1, Tab 18). The first, which he signed as the DSO, informed the grievor of the suspension of his reliability status due to the tape recorder allegation and prohibited his access to the employer's premises, assets, and information systems. The letter also stated that before a final decision would be rendered, the grievor would be afforded an opportunity for an interview to provide any additional information. He was given 14 days to provide information for the DSO's consideration, which could have been extended at the grievor's request. The second letter, signed by the Acting Executive Director General, informed the grievor that he was suspended without pay until the review for cause of his reliability status was completed.

[67] Mr. McMullen testified that as he began reading the first letter, the grievor left the room while refusing to accept the letters. Mr. McMullen told the grievor to leave the premises and that he would be escorted outside the building. While walking, Mr. McMullen attempted to give the letters to the grievor, who told Mr. McMullen not to touch him. Mr. McMullen told the grievor that he could either take the letters or they would be sent to him.

[68] Upon returning to the sixth floor at about 10:40 a.m., Mr. Guay and Mr. McMullen looked for the grievor's access cards and BlackBerry in his office. Just then, the phone rang, and the grievor's name and BlackBerry number appeared on the display screen. Mr. McMullen answered and asked if he was the grievor; he confirmed that he was. He asked the grievor several times if he had the BlackBerry, given that he had stated that he did not have it, and received no reply. Mr. McMullen recorded notes of the events of September 12, 2014, on that day (Exhibit E-1, Tab 17).

[69] In another letter addressed to the grievor and dated September 12, 2014, Mr. McMullen demanded that he return to Mr. Guay, by September 19, 2014, all government assets and information in his possession, including the access cards and BlackBerry. According to the affidavit of service of a process server (Exhibit E-1, Tab 18), an unsuccessful attempt to serve the letter on the grievor was made on September 14, 2014, but on September 16, it was successfully served on an adult member of the grievor's household. The items were returned to the employer on October 1, 2014.

[70] In a letter addressed to the grievor and dated September 26, 2014 (Exhibit E-1, Tab 19), Mr. McMullen informed him that as a result of the administrative investigation into the allegations of recording meeting discussions, a review for cause of his reliability status was being conducted, in accordance with the Treasury Board Secretariat *Policy on Government Security* (Exhibit E-1, Tab 37) and the *Personnel Security Standard*.

[71] The letter set out extracts of the *Personnel Security Standard*. It further informed the grievor that Mr. McMullen wished to interview him, to review security concerns identified in the administrative investigation report, and that it was scheduled for October 7, 2014, at 9:00 a.m. The letter requested that the grievor confirm whether he would attend the interview by October 3, 2014, and that should he choose not to participate, the decision on whether to recommend the revocation of his reliability status would be based on the information acquired during the review for cause.

[72] The letter was given to Mr. Temple on Friday, September 26, 2014, for delivery to the grievor. Upon arriving at the address indicated on the envelope, Mr. Temple recognized the grievor, who was on the porch, as on multiple occasions he had delivered envelopes to 410 Laurier addressed to the employer, which the grievor had signed for. Mr. Temple testified that when he attempted to deliver the letter, the grievor said, "That person doesn't live here." Mr. Temple then returned the envelope to 410 Laurier.

[73] On a document dated September 29, 2014, bearing a copy of the grievor's PBC photo ID card, Mr. Temple signed the following statement: "This is the person who refused to sign for a letter addressed to David Puccini," (Exhibit E-1, Tab 20).

[74] On September 26, 2014, the letter was sent to the grievor by registered mail. It was delivered to him and he signed for it on September 29, 2014 (Exhibit E-1, Tab 21).

[75] On October 2, 2014, the grievor emailed his union representative, Marsha Willard, but with the salutation and message addressed to Mr. McMullen (Exhibit E-1, Tab 22). The email stated that the grievor did not have the letters dated September 12, 2014, and authorized Mr. McMullen to submit them together with any other documentation to Ms. Willard. The email also stated that the grievor had given such authorization twice before, without any result. This referred to two notes he had handwritten, both dated September 25, 2014, requesting that “all documentation” be provided to Ms. Willard (Exhibit E-1, Tab 22). The letters were provided to Ms. Willard on October 2, 2014.

[76] Mr. Guay testified that the grievor did not attend the review for cause interview scheduled for October 7, 2014. He said that the grievor did not contact him before that date to inform him whether he would attend or to reschedule the interview.

[77] Mr. McMullen testified that since the grievor failed to attend the October 7, 2014, meeting, he reconvened the SRC on October 15, 2014, to share more information with it and to determine whether it had a different recommendation to make before a decision was made. Except for Mr. Constant’s absence, the same people attended as at the first SRC meeting. The only new document presented to the SRC was a report prepared by Mr. Guay (Exhibit E-1, Tab 23).

[78] The SRC was asked to consider the circumstances of the matter and to assess the grievor’s conduct against the standards of honesty, integrity, and trustworthiness set out in the SRC’s terms of reference. It recommended revoking his reliability status.

[79] Ms. Ouellette testified that the SRC was provided with the same documents as at the first meeting, with the addition of Mr. Guay’s report. She said that the SRC recommended the revocation as there had been no change since the September 10, 2014, meeting, and the grievor had not participated in the investigation process.

[80] In cross-examination, Ms. Ouellette was referred to incidents in the grievor’s employment history set out in the administrative investigation report (Exhibit E-1, Tab

11) and stated that while they were not included in the report provided to the SRC, his past conduct was raised at its meeting. Ms. Ouellette stated that those incidents were not considered in the SRC's recommendation and that it was very clear that the SRC had concentrated only on the incident involving the tape recorder.

[81] Mr. McMullen stated that revoking reliability status is a serious matter, as it constitutes a final decision that impacts peoples' lives. He wanted to provide the grievor another opportunity to meet with Mr. Guay to discuss the findings of the administrative investigation report and to present his version and any explanation.

[82] In a letter to the grievor dated October 28, 2014 (Exhibit E-1, Tab 24), Mr. McMullen stated that it was a follow-up to the letter of September 26, 2014, to which the grievor had not responded, and invited him to participate in an interview on November 4, 2014, at 9:00 a.m. The letter further informed the grievor that should he fail to attend, Mr. McMullen would have to decide whether to revoke or reinstate his reliability status based on the grievor's personnel and security file and on information acquired during the administrative investigation and the review for cause.

[83] In an email to Mr. McMullen on November 4, 2014, at 6:53 a.m. (Exhibit E-1, Tab 25), the grievor wrote, "We are unable to meet today as I have an ailment. My apologies."

[84] Mr. McMullen testified that when he received the grievor's email, he reviewed his options. He did not consider offering the grievor yet another opportunity to be interviewed, as he had already been provided with several opportunities. He had never given reasons for not meeting; nor had he provided an explanation for his conduct. In addition, Mr. McMullen did not receive any communication from the grievor's bargaining agent.

[85] Mr. McMullen asked Mr. Guay to analyze the available information and to make a recommendation on the grievor's reliability status. Mr. Guay's report recommended revoking it (Exhibit E-1, Tab 26). Mr. McMullen stated that as he had the delegated authority, it was his decision whether to act on Mr. Guay's recommendation. However, he sought input from others who might have viewed the matter differently.

[86] In deciding to revoke the grievor's reliability status, Mr. McMullen relied on the final administrative investigation report with its appendices (Exhibit E-1, Tab 29).

He based his decision solely on the facts set out in the report, namely, that the grievor had placed the tape recorder in boardroom 651 and had intercepted a private conversation, had attempted to penetrate restricted areas, and had been involved in the incident with the commissionaire. This conduct had put into doubt his honesty, integrity, and trustworthiness with respect to the PBC and the federal government.

[87] Mr. McMullen stated that certain sections of the investigation report had no influence whatever on his decision, as he considered them to consist of speculation by or the opinions of the investigators. In this respect, he referred to the first four bullets on page 17 of the report, the first two bullets on page 19, the last bullet on page 20, and the second paragraph on page 24. Concerning the chart on page 22, he considered only the last two boxes, relating to the grievor's attempts at unauthorized access and the incident with the commissionaire, as they concerned the grievor's integrity and trustworthiness.

[88] Concerning the recording of meeting, Mr. McMullen stated that it represented a security risk because all employees are advised of the rules on transmitting information, and it is not government policy to record employees. Mr. McMullen did not know the grievor's motive for recording the first part of the meeting or the part with his managers alone and could not trust him.

[89] With respect to the grievor's multiple attempts to access restricted areas, Mr. McMullen stated that such access requires authorization, yet the grievor gave no reason for his access attempts. Mr. McMullen relied on these attempts even though the grievor ceased them after being warned to by his manager. Similarly, in his confrontation with the commissionaire, the grievor was attempting to breach the security system. All employees have identification cards to ensure that people and information are protected. Taken together, these incidents formed part of a pattern of the grievor's violations of security procedures and provided an indicator of his trustworthiness.

[90] When he was asked why the letter revoking the grievor's reliability status referred to information gathered from his personal file and security file, Mr. McMullen said that he wanted to be aware of mitigating and aggravating factors to ensure that he would have all relevant information before making a decision. Based on the factors available to him, he concluded that the grievor lacked honesty and that he was

not trustworthy.

[91] Mr. McMullen said that he was not in a position to reinstate the grievor's reliability status in view of the grievor's lack of cooperation with the investigation, which deprived Mr. McMullen of information that he could have used to view matters from another angle or to make a different decision.

[92] In cross-examination, Mr. McMullen said that the cabinets in boardroom 651 were more than six feet tall because he had to reach to retrieve the tape recorder. He saw it while seated at about the midpoint of the meeting; as there were other items on top of the cabinets, it was not apparent that the tape recorder had been placed in a manner to be readily seen. The PBC's security service used a tape recorder but a type smaller than the one in question. Mr. McMullen said that the packing tape used on the tape recorder was of the type used in the mailroom. When he was asked why he did not stop the meeting of May 21, 2014, upon noticing the tape recorder, Mr. McMullen said that he had been uncertain as to what it was.

[93] Concerning the two recommendations of Mr. Guay's preliminary fact-finding report (Exhibit E-1, Tab 4), Mr. McMullen viewed them as recommending an administrative investigation, which he decided to launch. At that time, while it was strongly suspected that the grievor could have placed the tape recorder in the meeting room, Mr. McMullen said that since there was no certainty, he did not remove the grievor from the workplace; nor did he impose restrictions additional to the controls normally in place.

[94] Mr. McMullen was asked a series of questions about the different versions of the administrative investigation reports (Exhibit E-1, Tabs 11, 13, and 29). The one at Tab 13 was provided to the grievor, while that at Tab 11 was for management. It was pointed out that the report given to the grievor did not include the table at pages 20 and 21 of Tab 11. When he was asked about who decided that the table should not be included in the grievor's copy, Mr. McMullen replied that two reports were submitted and that the one intended for management contained a section not found in the grievor's copy.

[95] When it was also pointed out that on page 19 of the report at Tab 29, the first four bullets were repeated in the next four bullets, and it was suggested that that version contained certain information that was not in the one at Tab 11, Mr. McMullen

said that any such information was not added at his request. He also said that the cover letter addressed to him at Tab 11 should have been placed with the report at Tab 29.

[96] When he was asked why the incident with the commissionaire was not included in the grievor's copy of the administrative investigation report, Mr. McMullen said that the mandate concerned the tape recorder. He acknowledged that at the time, the grievor had not been advised that Mr. McMullen had questions about that incident. At the suggestion that the grievor was never given the opportunity to explain that incident, Mr. McMullen said that it would have occurred in the review for cause interview.

[97] Mr. McMullen agreed that the section of the investigation report at Tab 29 titled "Incidents involving Person of Interest" was not included in the copy of the report given to the grievor, probably as a result of discussions with the investigators. However, Mr. McMullen's focus at that time was on the tape recorder incident.

[98] When it was suggested that at its October 15, 2014, meeting, the SRC considered only the tape recorder incident, Mr. McMullen replied that all the other information had been presented to the SRC, including the summary prepared by Mr. Guay (Exhibit E-1, Tab 23).

[99] Mr. McMullen stated that he considered the final administrative investigation report (Exhibit E-1, Tab 29) when making his final decision. He acknowledged that the appendices to that report were not included in the report provided to the grievor. While agreeing that the grievor did not see the witness statements before the hearing, Mr. McMullen added that the grievor had never responded to requests to meet.

[100] On August 22, 2014, Mr. McMullen handed the grievor his copy of the administrative investigation report (Exhibit E-1, Tab 13). He asked the grievor to read it and to provide information he thought would help and said that he could do so in writing.

[101] Mr. McMullen did not know who gave the grievor the letter dated August 28, 2014 (Exhibit E-1, Tab 14), or when the grievor received it, informing him that the September 4, 2014, meeting had been rescheduled to September 5. The final summary prepared by Mr. Guay (Exhibit E-1, Tab 26) indicated that the letter was given

to the grievor on September 4, 2014.

[102] In an email to Mr. McMullen sent September 5, 2014, at 7:38 a.m. (Exhibit E-1, Tab 15), the grievor stated that he was unable to attend the meeting that day and suggested that it be rescheduled, which Mr. McMullen refused to do. When he was asked whether he would have postponed the meeting had the grievor told him that he had a court appearance scheduled on that day, Mr. McMullen replied in the affirmative, adding that the grievor had been at work on September 5 and that no absence had been recorded. When he was asked whether it was possible that the grievor had been absent from work part of that day but had not sought authorization, Mr. McMullen said that employees are expected to report their absences. Mr. McMullen said that while he had seen the grievor at work between September 5 and 12, 2014, to his knowledge, the grievor did not request that the meeting be rescheduled.

[103] Concerning the meeting of September 12, 2014, it was suggested that the grievor requested the presence of a union representative. Mr. McMullen stated that the grievor did not specify a union representative. First, Mr. Guay asked him to attend Mr. McMullen's office, which he refused. Mr. McMullen emailed the grievor's BlackBerry, telling him to come to Mr. McMullen's office, and he arrived with Mr. Brennan. He never requested a union representative. The grievor then left. When he was asked whether he grabbed the grievor by the arm, Mr. McMullen said that in the hallway, he touched the grievor with the letters that he wanted to hand to him. He denied that the grievor asked him to bring him the letters as he was downstairs.

[104] When he was asked who was authorized to cancel employee access cards, Mr. McMullen replied that it was the security personnel, Mr. Charette and Mr. Guay. Asked whether they had the authority to do that without his decision, Mr. McMullen said it depended on circumstances and that if there was a threat, they would not await his decision.

[105] With respect to the grievor's access to various locations before the tape recorder incident, Mr. McMullen said that the grievor was denied access as of October 31, 2013, as after a discussion with management, it was decided to increase security measures. When counsel for the grievor suggested that the denial of the grievor's access was coincidental to the grievor's email dated October 30, 2014 (Exhibit G-3), refusing to sign a replacement letter of offer (Exhibit G-2), Mr. McMullen replied that that was

counsel's statement.

[106] Concerning the areas to which the grievor was not authorized to access, when asked whether room 600 (the records room) had a microwave and refrigerator that were purchased by employees, Mr. McMullen said that at the time, there was a refrigerator, but he could not confirm if there was a microwave or who had purchased the appliances.

[107] Around October 2, 2014, Mr. McMullen had a conversation with Ms. Willard, who was seeking documentation concerning the grievor. The only documents not yet provided at that time were the letters to the grievor dated September 12, 2014. They were provided to her on October 2, 2014.

[108] The September 26, 2014, letter advising the grievor of the review for cause of his reliability status and scheduling the October 7, 2014, interview was sent by courier and by registered mail. The grievor signed for it on September 29, 2014. It was then suggested that as the letters had been given to Ms. Willard on October 2, 2014, the grievor had had only five days to prepare for the interview. Mr. McMullen replied that the grievor had received the investigation report in August and that since then, the grievor had not communicated with him to meet up or to provide any clarification or explanation.

[109] In re-examination, Mr. McMullen stated that he had seen the grievor's email refusing to sign the replacement letter of offer for the first time when it was presented to him at the hearing during cross-examination. He stated that he was not aware of the grievor's concern about signing the replacement letter until it was mentioned in the cross-examination.

[110] I turn now to a review of relevant testimonies not addressed earlier in this decision.

A. Mr. Constant

[111] Mr. Constant said that he listened to side B of the tape on July 7, 2014, as indicated in his notes of that day. He noted that side B contained two separate conversations, one of which was a discussion between the grievor and his ex-wife about their children.

[112] In cross-examination, Mr. Constant said that he had previously carried out 3 investigations for the PBC, the most recent having been 10 to 12 months before the investigation at issue.

[113] In reference to the extract of the card history log appended to the final administrative investigation report, which indicates “page 127 of 162”, when he was asked whether all those pages pertained to the grievor, Mr. Constant replied that the report included both the grievor and Mr. Brennan.

[114] When he was asked whether he had verified the grievor’s accesses earlier than the first entry on the card log at 10:55 a.m. for the sixth-floor south door, Mr. Constant said that he had done so. He could not recall whether he verified access to the sixth-floor door.

[115] Concerning the investigators’ reconstruction of the grievor’s movements on May 21, 2014, Mr. Constant acknowledged that the PBC’s card reader system recorded only access to a restricted zone but not egress from it. He further acknowledged that the investigators’ supposition that between 10:55 and 10:57 a.m., the grievor attempted to ascertain whether the meeting previously scheduled in boardroom 651 from 10:00 to 11:00 a.m. had concluded, was in fact unknown.

[116] Mr. Constant said that while the entire perimeter of the sixth floor was a restricted zone, he did not think there was a card reader from office 662 to the mailroom or from that office to the corridor. He agreed that it was possible that to remain undetected, a person could simply access the corridor from office 662 and then to boardroom 651 and that the distance to the boardroom was similar to the distance when leaving via the mailroom.

[117] When he was shown a tape recorder and was asked whether it was the one removed from boardroom 651, Mr. Constant said that it was similar. He confirmed that he tested the theory that the recorder makes a sound when the tape stops. He said that he ran the tape to the end and that the device popped open. When that was tested at the hearing, it did not occur.

[118] Concerning the sound of a radio in the background of the recording, Mr. Constant said that Mr. McMullen, Ms. Leblanc, Ms. Massimiliano, and a former mailroom supervisor told him that it was common knowledge that there was a radio in

the mailroom. Mr. Constant said that when he asked whether there was a radio on the sixth floor, they immediately said that a radio in the mailroom played all the time. He did not ask whether there were other radios on the floor or if other employees had radios. During his time at the PBC in office 640, Mr. Constant did not hear a radio from other offices.

[119] Mr. Constant asserted that he tested the mailroom door and verified if it squeaked. He tested other doors on the sixth floor, but as he did not test all of them, he agreed that it was possible there were other squeaky doors at the PBC.

[120] Concerning the grievor's refusal to sign documents, Mr. Constant said that on June 23, 2014, the grievor refused to sign the notice informing him of the administrative investigation. After he was handed a copy, the grievor then claimed he had not refused to sign it.

[121] On June 27, 2014, Mr. Constant informed the grievor of the additional mandate to investigate his alleged attempts to access restricted areas and requested that he sign the notice, acknowledging his receipt of it. The grievor refused to until he had retained counsel. Mr. Constant agreed that it had not been unreasonable for the grievor to seek counsel. When Mr. Constant informed the grievor that the interview would occur during the week of July 7, 2014, Mr. Constant said that the grievor immediately replied that his counsel was unavailable.

[122] When he was asked whether he called the grievor when he did not show up for the interview on July 8, 2014, Mr. Constant replied that on July 7, he had given the grievor a paper with his name and cell phone number on it. The grievor had said that he would check with his counsel and then call Mr. Constant. The grievor also had the time, date, and room number for the interview. Mr. Constant did not check if the grievor was in the office that day. I note that the leave of absence summary does not indicate that the grievor was absent from work on July 8, 2014.

[123] Mr. Constant said that it is possible that if two colleagues walk together and one swipes an access card to enter an area, the other could enter without swiping a card.

[124] Concerning the administrative investigation reports, Mr. Constant said that he drafted two of them, including the final report (Exhibit E-1, Tab 29). When he created the first draft, he shared it with Mr. Guay, who made generic comments. The only

difference is that the final report includes a chapter that refers to the grievor's history at the PBC. Since the grievor was aware of those facts, they were not included in the report given to him (Exhibit E-1, Tab 13). When he was asked if the attachments to the final report were provided to the grievor, Mr. Constant said that he was unaware if they were.

[125] Concerning the incident with the commissionaire in the final report that was excluded from the report given to the grievor, when he was asked whether he or the PBC had removed it, Mr. Constant stated that he could not recall.

[126] In re-examination, Mr. Constant could not recall whether the commissionaire incident was added between July 27 and 29, 2014. He remembered that it was added near the end of the investigation. He said that no one other than himself made physical changes to the report.

[127] Concerning the packing tape, Mr. Constant did not see it on the recorder buttons, but based on the information provided to him, it was the particular tape used in the mailroom.

B. Mr. Guay

[128] Mr. Guay was the employer's personnel security officer from 2008 until his retirement in July 2015. His duties included handling investigations and security clearances as well as physical security, such as the card access system, electric system, and key register and their maintenance. He gained his investigatory experience while serving with military police from 1984 to 2005.

[129] When shown the tape recorder, Mr. Guay identified it as the one handed to him by Mr. McMullen on May 21, 2014 that he kept in his possession. As the PBC did not have an official register of evidence, he kept the device in an inter-office envelope stored in a locked cabinet to which only he had access. He recorded on the envelope each time the recorder was removed and added his signature when he returned it to the cabinet (Exhibit E-5). At no time did he provide the tape recorder to anyone for listening while he was not present. The entry for July 7, 2014, mentions Mr. Constant because both he and Mr. Guay listened to the tape together on that day.

[130] The grievor admitted at the hearing that the tape has not been modified since it came into Mr. Guay's possession on May 21, 2014.

[131] On July 8, 2014, Mr. Guay emailed the grievor (Exhibit E-1, Tab 8), offering him another opportunity to present his version of the tape recorder incident and seeking his availability and that of his representative from July 9 to 16, 2014. Mr. Guay said that the grievor did not indicate a date on which he would be available. When he was asked why he emailed the grievor again on July 15, 2014 (Exhibit E-1, Tab 9), inviting him to an interview, Mr. Guay responded that since the grievor did not attend on July 8, he let some time pass to give the grievor a chance to present his version.

[132] As the grievor did not make himself available, Mr. Guay offered him yet another opportunity by email dated July 16, 2014 (Exhibit E-1, Tab 10).

[133] Concerning the undated summary he prepared (Exhibit E-1, Tab 23), Mr. Guay stated that he wrote it between October 8 and 10, 2014. He said that he wrote the final summary recommending the revocation of the grievor's reliability status (Exhibit E-1, Tab 26) on or about November 5, 2014.

[134] Mr. Guay said that as indicated in the September 26, 2014, letter to the grievor (Exhibit E-1, Tab 19), he was supposed to hold a review for cause interview with the grievor on October 7, 2014. The grievor did not show up and did not contact Mr. Guay to reschedule the interview.

[135] When he was referred to the grievor's replacement letter of offer (Exhibit G-2) and the grievor's refusal to sign it (Exhibit G-3), Mr. Guay said he had not seen those documents before the hearing; nor had he been aware of the grievor's concerns about signing the letter.

[136] In cross-examination, when he was referred to the letter from Mr. McMullen to the grievor dated August 28, 2014, changing the interview date from September 4 to September 5, 2014 (Exhibit E-1, Tab 14), Mr. Guay asserted that he gave the letter to the grievor early in the morning of September 4, 2014. Mr. McMullen had given him the letter on September 4, and to his knowledge, no attempt was made to give the grievor the letter before that date.

[137] Mr. Guay stated that Ms. Leblanc directed him to cancel the grievor's access to the records room (room 600) and the archives room (room 665). On occasion, Ms. Simms had directed him to cancel the grievor's access. Mr. Guay stated that those decisions rested with the supervisors.

C. Mr. Charette

[138] Mr. Charette was the physical security officer with the PBC from November 2009 to September 2014. Since then, he has been a physical security coordinator with the Privy Council Office. His duties at the PBC included controlling the access of employees and contractors, anti-theft measures, key control, and security awareness briefings.

[139] Mr. Charette said that the access control log (Exhibit E-1, Tab 32) records all access attempts made at all PBC access points. That system was installed in September 2013. Before then, access to restricted areas such as the records room, archives room, the sixth- and seventh-floor communications closets, and the storage room was via hard keys kept by security personnel. To his knowledge, the grievor would not have had keys to those areas as his duties did not require him to enter those rooms.

[140] On the access control log, “893” indicates the number of the grievor’s access card. The entry “Valid Card” means that he entered an area to which he had access. The entry “Card Not Found” indicates that his card did not allow him access to a particular entry point.

[141] Mr. Charette stated that to allow access, the card must be placed very close to the reader. When he was asked how likely a card would trigger access by walking by it, Mr. Charette said that it would be very unlikely, as it was difficult to trigger a reader in error. He could not assert that it could not happen but stated that it would be hard to believe that a reader was triggered by error multiple times, and he stated that he did not know if that was even possible.

[142] Mr. Charette said that restricted access depends on several elements, such as the individual’s security clearance level, the contents of the room in question, and a need to know. That is, even if someone has the proper clearance, access may not be required to perform his or her job duties. The records room contains sensitive information, the archives room houses documents that must be retained, and the storage room contains government property such as office furniture and other objects for office use. The communications closets contain system access controls, the anti-theft system, and certain information technology equipment for the Correctional Service of Canada (CSC). A manager decides whether to grant access to certain areas.

[143] When he was asked if he was aware of the period during which the grievor had

access to the archives and records rooms, Mr. Charette replied that he had noted it in the logs. If access had been granted, it had been done at management's request. Mr. Charette believed that at the time, the grievor did not have the required security clearance because the files there contained secret information.

[144] In cross-examination, Mr. Charette said that the software system that was in place before the new system was installed in September 2013 still existed. He did not verify the former system for access by the grievor, as he had not been requested to. He was concerned with the grievor's repeated attempts to penetrate restricted areas for which he had no access and for which he had not previously had keys.

[145] Mr. Charette confirmed that in September 2013, there was a refrigerator in the records room and added that there were other refrigerators on the sixth floor.

[146] When he was asked if the storage room was used as an office for the grievor, Mr. Charette said that he himself was not there at the time and that as the renovation of the mailroom had not begun, it was functioning as usual.

[147] Mr. Charette stated that he was authorized to grant or cancel access to restricted areas but only at a manager's request. He said that on only one occasion was he asked to cancel the grievor's access; it was when Ms. Leblanc requested that his access to the records and archives rooms be cancelled.

D. Mr. Clair

[148] Mr. Clair was the PBC's executive director general from January 2012 to February 2016. He was responsible for 5 regions, approximately 450 employees, and 10 directors. His duties included handling policies, programs, and other responsibilities, except for finance and administration.

[149] His role in the process that led to terminating the grievor's employment was primarily of being informed. The DSO, Mr. McMullen, told him that an incident had occurred and that an investigation was taking place. Mr. Clair said that he asked questions to ensure that the employee was treated fairly, as he used to carry out investigations for the CSC. As Mr. Clair was on holiday for a while, his replacement made certain decisions of which he was apprised on his return.

[150] Mr. McMullen informed Mr. Clair that the grievor's reliability status had been

revoked and that the matter had been discussed at the SRC. Mr. Clair appreciated that Mr. McMullen had sounded out his colleagues about the matter.

[151] Mr. Clair knows that without reliability status, an employee does not meet an essential condition of employment; thus, he had no option but to terminate the grievor's employment. When he was asked whether he had considered finding an alternate position for the grievor, Mr. Clair said that since every PBC employee requires reliability status as they deal with sensitive material, even in the mailroom, there was no other position available.

[152] In cross-examination, Mr. Clair acknowledged that he was informed of the tape recorder incident, that the grievor was the main suspect, and that the grievor continued to work during the investigation. When he was asked whether he thought that the grievor's duties could have been restricted, Mr. Clair agreed that that step could have been taken.

[153] Mr. Clair said that when he decided to terminate the grievor's employment, he was aware that the grievor did not attend the final review for cause meeting and that he had been given many opportunities to be interviewed but had failed to attend.

E. Mr. Puccini

[154] The grievor assumed his mailroom position on April 1, 2007. His duties included receiving mail from couriers either in the lobby or at the loading dock of 410 Laurier. Upon bringing the mail to the mailroom, he would scan it for safety reasons, both visually and mechanically. At times, he would personally deliver or pick up mail to or from other departments and agencies. He said that any correspondence could be important and that it had to be delivered to the proper place. His duties involved going up and down stairs or taking the elevator multiple times daily. Initially, his work hours were from 7:00 a.m. to 3:00 p.m., but later, they changed to 7:30 a.m. to 3:30 p.m.

[155] The grievor did not recall the incident with the commissioner on May 21, 2014. He saw the incident report for the first time at the hearing. He did recall the other incidents mentioned in that report. He recalled coming downstairs by elevator, which was about five feet from the commissioner's post. The grievor turned around, and the commissioner, who had known him for years, asked for his pass.

He told the commissioner that personal recognition supersedes the pass. He turned and showed him the pass, which was on his left hip. He often signed for the delivery of correspondence on the commissioner's desk. The two other incidents occurred within the six months before May 21, 2014.

[156] The grievor addressed the areas that he was not authorized to access. The records room contained files relating to all sections of the PBC, including on personnel, finance, pardons, and secretariat and board members. He asserted that he had access to the records room for most of his employment because it contained the in and out baskets for files to be actioned. He would place items in that room and look for incoming items several times per day. He said that throughout the day, he would pick up correspondence from the floors, some of which was destined for the records room. He said that the records room contained a coffeemaker, refrigerator, and microwave. When he was told not to go to his team's lunchroom, he went to one across the hall.

[157] When he was asked how he entered his work location when his access to the records room was denied, the grievor said there were often records classifiers working in the records room, and the door had been open for years. If his pass did not work, he would wait for someone to come along. When he began in 2007, the records room door was open all day and occasionally at night. Several employees were responsible for ensuring the door was closed. The grievor said that he had held that responsibility for a while.

[158] The grievor stated that on numerous occasions, his access card would not work. If his pass would not open the sixth-floor south door, he would walk to the sixth-floor north door. He said that all employees had that problem sometimes at some doors. He said that he reported the problem to his supervisor and manager on different occasions. In this respect, he referred to an email dated October 31, 2013, to his then-supervisor, Michèle Laverdière (Exhibit G-4), which reads as follows:

...

... although I did have access for a certain period, I do not have access this morning to the two file rooms. I was trying to assemble the 'Protected Waste'. I find it odd that my pass will open certain doors one day and then won't the next day. This happens far too much. Thank you.

[159] Concerning the archives room, the grievor said that he was responsible for

bringing discarded waste there, putting it in boxes, and bringing it to the loading dock for disposal every two weeks. After his access to the archives room was restricted in February 2014, he would ask another employee to open the door. His door was perpendicular to the archives room door. He would put the waste boxes on the floor, and the employees would bring them in.

[160] Concerning his attempts to access the seventh-floor communications closet, the grievor acknowledged that he had had no work-related reason to be in that room. He said that he never intentionally tried to access it and that he did not have a specific recollection of trying to get in. He then said that perhaps the card reader had picked up his card. Concerning his attempts to penetrate other locations on different floors, the grievor said that perhaps he had not realized the floor he had been on. He acknowledged that at the beginning of his employment, he was told that the PBC kept records of employees' accesses to entry points.

[161] With respect to the seventh-floor storage room, the grievor said that during the last five or six months of 2014, there was construction in the mailroom and that the mailroom equipment and his office were moved there. Previously, the storage room had held broken chairs and lamps as well as standard one-cubic-foot boxes. He said that he had had access to the storage room on-and-off over seven years, when boxes were kept there.

[162] The grievor said that the meeting held on May 21, 2014, was part of such meetings scheduled every quarter and that the mailroom supervisor and managers attended it. Mr. McMullen scheduled it via email six months in advance. Its purpose was to discuss the office reconfiguration. It lasted about 15 minutes, which was normal.

[163] The grievor first learned of the administrative investigation on June 23, 2014. He was asked to appear in an office on the sixth floor. Mr. Guay and Ms. Leblanc were present, as well as Mr. Constant, who was introduced as an RCMP officer, but the grievor did not know why he was there. Ms. Leblanc read the letter informing the grievor of the investigation. As she read it, it was not clear what was happening. When Mr. Constant asked him to sign the letter, the grievor said that he would not sign it unless his counsel had reviewed it. Mr. Constant wrote the date on the letter and noted that the grievor had refused to sign it, and he asked Mr. Guay to make a copy and give

it to the grievor. Ms. Leblanc left without saying anything. When the grievor said to the other two, "That's it?", they replied in the affirmative, and he returned to his office. He then read the letter and did not do much, as he was dumbfounded.

[164] The grievor stated that he had no knowledge of the recording of a private conversation. He asserted that he did not place the tape recorder in boardroom 651, and he had no explanation of how it had ended up there.

[165] When the tape recorder was shown to the grievor during the hearing, he said he recognized it only from having seen it six months before then and that it was not his. When he was asked to explain how an audio tape of a private conversation with his ex-wife was on a recording of the meeting of May 21, 2014, the grievor stated that eight or nine years before, his ex-wife had wanted a copy of their wedding videocassette. His intention had been to make two copies, one audio, and one video. He said that on side B of the tape, which had his conversation with his ex-wife, part of the recording was of their wedding ceremony, as he had been thinking of making an audio copy.

[166] When he was asked how the tape had made it into the recorder, the grievor said that he did not know. He said that he knew his ex-wife had a tape recorder and that he had returned it to her about four years before. He thought that the cassette could have been in the recorder when he returned it to her. He thought that the recorder was in the contents of a box of his ex-wife's items that he found in the basement of his home.

[167] When he was asked about his relationship with his ex-wife, the grievor replied that it was contentious and that he had been awarded custody of their children.

[168] When asked how his conversation with his ex-wife had ended up on the same tape as the recording of the meeting, the grievor replied that he was not sure. He stated that it might have been something nefarious on his ex-wife's part or on the part of someone acting in concert with her.

[169] On June 27, 2014, Mr. Guay came to get the grievor at his office, and they attended at the same office where he had received the previous letter. The grievor said that the same three people were present: Mr. Guay, Ms. Leblanc, and Mr. Constant. He said that Ms. Leblanc read from the letter, which was similar to the first letter he had received, except that it mentioned accessing doors. Mr. Constant asked Mr. Guay to

make copies of the letter. Ms. Leblanc got up and left without saying anything, and then the grievor left.

[170] As mentioned earlier in this decision, the employer stated that the notice to the grievor dated June 27, 2014, had been lost, but it would have been similar to the notice to the grievor dated June 23, 2014 (Exhibit E-1, Tab 6).

[171] The grievor was next contacted about the investigation on July 7, 2014, when Mr. Constant and Mr. Guay came to his office. Mr. Brennan was also present. When Mr. Constant asked the grievor to meet with him the next day, Mr. Constant said that he would come by the grievor's office sometime that day. The grievor said that he needed a specific time so that his work could be covered. He said that Mr. Constant repeated that he would come by the next day and left it at that.

[172] The grievor said that on July 8, 2014, he was at work and that he had an acquaintance waiting across the street all day. Neither Mr. Guay nor Mr. Constant came by his office; no note was left on his desk, and no message was left with a co-worker. The grievor did not try to contact Mr. Constant. He walked by the office assigned to Mr. Constant, did not see him there, and assumed he was not present.

[173] Concerning Mr. Guay's email to the grievor on July 8, 2014 (Exhibit E-1, Tab 8), offering him another opportunity to present his version of the tape recorder incident and seeking his availability and that of his representative from July 9 to 16, 2014, the grievor said that he did not meet with Mr. Guay because his counsel had been in discovery every day for two weeks. (Examination for discovery is a legal proceeding, which enables a party to a civil action to examine another person orally and before trial). When he was asked whether he had advised the employer that his counsel was unavailable, the grievor guessed that he had with his email of July 15, 2014, in reply to Mr. Guay's email of that same date (Exhibit E-1, Tab 9).

[174] While the grievor referred to his counsel by name, that individual did not testify, nor were any documents bearing that person's name entered into evidence. As mentioning that individual's name would be of no benefit to this decision, I have anonymized their name as "Mr. B".

[175] In an email to the grievor on July 16, 2014 (Exhibit E-1, Tab 10), Mr. Guay invited him to an interview on July 17 or 18, 2014. The grievor said he did not attend as he

had previously stated that his representative was unavailable on those days.

[176] When he was asked why in his reply to Mr. Guay, the grievor cautioned him against denying his right to representation, the grievor replied that he was to go on vacation beginning on the same weekend in July as he had for the previous 15 years, and as the allegation was quite serious, he felt the need to be represented by a professional. When he was asked if he had thought about contacting his union, the grievor said that Mr. B was his counsel at the time.

[177] The grievor received the investigation report (Exhibit E-1, Tab 13) from Mr. McMullen on August 22, 2014. Their meeting was brief, and the grievor did not recall Mr. McMullen reading the letter. He wanted the grievor to review it. The grievor was to be given a chance to respond to the report. He did not recall signing the letter with an "X" but did not deny doing so.

[178] The grievor stated that early on September 5, 2014, he received the letter dated August 28, 2014, notifying him of the change to the interview date from September 4 to September 5, 2014 (Exhibit E-1, Tab 14). He said that it had been left on one of his desks, as he had two offices at the time.

[179] The grievor said that on September 4, he passed by Mr. McMullen's office just before the meeting started and again about one half-hour later. The office door was closed; through the window, he saw that no one was there. He did not inquire if Mr. McMullen was there.

[180] The grievor said that he emailed Mr. McMullen on September 5, 2014, shortly after receiving the letter, informing Mr. McMullen that he could not attend. When he was asked whether he advised Mr. McMullen of the reason he could not attend, the grievor said that he could not recall. He said that he was in court on September 5, 2014, as indicated in the court records (Exhibit G-5).

[181] When he was asked why he did not tell Mr. McMullen about his court appearance, the grievor replied that he saw Mr. McMullen very early the following week when they crossed in a hallway. He told Mr. McMullen that they had to meet; he replied that it would happen. The grievor said that he did not go into specifics about his court appearance.

[182] At this point, the employer raised an objection to this evidence, since the grievor's alleged hallway encounter with Mr. McMullen was not put to Mr. McMullen in cross-examination. I took the objection under reserve and will address it later in this decision.

[183] Concerning the events of September 12, 2014, the grievor said that in the morning, he received a call from Mr. McMullen asking him to come to his office. The grievor replied that he would find a representative and then attend. He said that Mr. McMullen told him that whatever trouble he was in, he would be in more trouble for refusing to attend his office and ordered him to come, saying that it concerned nothing for which he would require a representative.

[184] As he could not immediately secure a representative, the grievor asked Mr. Brennan to be his witness, as he was worried about false allegations. They went to Mr. McMullen's office; Mr. Lemire was there. The grievor said that Mr. Brennan was not acting for him but was a witness.

[185] When Mr. McMullen began reading the letter, the grievor said it required a representative. Mr. McMullen asked for the grievor's BlackBerry and access cards. The grievor stood, and Mr. McMullen told him that he would have to leave the premises. The stairway was to the left, and the grievor's office was to the right. The grievor said that Mr. McMullen grabbed his upper arm and pushed him against the wall at the door. When the grievor told him the following: "Get your f_____ hands off me", he did.

[186] The grievor walked six flights downstairs, as did Mr. Brennan, Mr. Lemire, and Mr. McMullen. The grievor told Mr. McMullen that he would take the letter, but Mr. McMullen said that he would mail it. The grievor called his office from his BlackBerry, and Mr. McMullen answered. He told Mr. McMullen that he wanted the letter, and the grievor was told that it would be sent by courier.

[187] When Mr. Temple attempted to deliver the letter, the grievor was on the porch at his parents' house in Ottawa, where he had lived in the 1980s. He did not live there when working for the PBC. He had informed the PBC of his new address in Ottawa in 2003 (Exhibit G-7). The grievor saw Mr. Temple approaching. He had seen him numerous times over the years at work and downtown on his bicycle. Mr. Temple had a clipboard with the letter bearing the grievor's name and his parents' address. The grievor said that he told Mr. Temple that he did not have the correct address.

Mr. Temple then said that he would return the envelope to the PBC.

[188] When he was asked why he did not accept the letter even if the address was wrong, the grievor said that it happened quickly and that he did not see the letter because it was on a clipboard and Mr. Temple had returned to his bicycle.

[189] Referring to his exchange of emails with Ms. Willard (Exhibit G-6), the grievor said that he believed that he had received the letters dated September 12, 2014, from her on October 3, 2014. He explained that the exchange indicated his daughter's email address because his PBC account had been disconnected, and for a couple of weeks, he had used his daughter's email account.

[190] The grievor said that he received the September 26, 2014, letter inviting him to a review for cause interview scheduled for October 7, 2014 (Exhibit E-1, Tab 19) before he received the September 12, 2014, letters. As he did not know the whole story, he emailed Mr. McMullen, stating that he could not attend.

[191] He did not attend the November 4, 2014, meeting because he had a stomach ailment and could not leave home. When he was asked whether he had seen a doctor, the grievor stated that he could not recall.

[192] The grievor did not reschedule the meeting. He had intended to, but when he heard from employees a couple of days later that Mr. McMullen had told them that he had been fired, he saw no point in rescheduling it.

[193] The grievor said that he did not know how or when he received the letters dated November 7, 2014 (Exhibit E-1, Tabs 27 and 28). He was certain that he did not receive them on that day.

[194] In cross-examination, the grievor stated that he did not recall the incident with the commissionaire on May 21, 2014. When he was asked whether he denied it, the grievor replied that he thought that the commissionaire had been mistaken on the facts and the date, and the grievor was fairly certain that he was not mistaken. He saw the incident report for the first time at the hearing.

[195] The grievor did not recall meeting with Ms. Leblanc on May 23, 2014, concerning the incident with the commissionaire. He was then shown an email sent to him from Mr. Charette and dated May 23, 2014 (Exhibit E-6), referring to the grievor's discussion

that morning with Ms. Leblanc. The email reiterated that all government employees working at 410 Laurier were required to show identification to the commissionaires in the lobby before taking the stairs or elevators to their offices. The email ended with the following: "I trust that you will fully comply in [sic] these requirements and that this issue will not resurface in the future."

[196] The grievor did not specifically recall receiving or seeing the email on the day it was sent but did not deny receiving it. When he was asked why he would have received it, he said that it was probably because of his interaction with the commissionaire, but he questioned whether that had occurred on May 21, 2014. He then denied that the incident described in the incident report happened on that day.

[197] When he was asked whether after receiving the June 23, 2014, letter informing him that he was the subject of an administrative investigation, he sought assistance from his union or counsel on that day, the grievor replied that he did not on that day.

[198] When he was asked the same question concerning the June 27, 2014, letter about the investigation into his attempts to penetrate restricted areas, the grievor said that he had spoken to several counsel. When he was asked who in particular, he mentioned Mr. B, who was a friend of his. When he was asked when he met Mr. B, the grievor said that he had met him in person, although he was unsure of the date, and that he had spoken with him on the phone at least once.

[199] When he was asked whether he had an invoice from Mr. B, the grievor replied that he was a family friend who had said not to worry about an invoice. It was clear to the grievor that he would obtain advice without being invoiced. The grievor also spoke with Mr. B's assistant once or twice but did not recall the dates of those conversations.

[200] It was put to the grievor that he had stated that his counsel was in discovery on July 8 and 9 to 16, 2014. The grievor replied that Mr. B's assistant had told him that Mr. B would be in discovery for two weeks, which to his understanding covered that period and a few days more. He did not try to find a different representative because at the time, Mr. B was his counsel.

[201] The grievor said that he did not have a written contract or any other signed document with Mr. B. He said that he contacted his office on July 9 or 10 or toward the end of that week. When he was asked whether he had followed up with an email to the

employer, the grievor said that he was not clear if any emails were sent about that other than his of July 15, 2014 (Exhibit E-1, Tab 9).

[202] When he was asked whether he had told Mr. B's assistant that the matter of the investigation was urgent, the grievor said that he had told her that it was important. When he was asked whether he followed up with Mr. B, the grievor stated that he believed that he followed up with his assistant the next week. The assistant told him that Mr. B was tied up all day, and the grievor said that Mr. B did not call him in the evening. When he was asked whether he told the assistant of the specifics of the issue, the grievor stated that she knew about them from when he had set up an appointment.

[203] When he was asked whether he asked Mr. B to send a letter to the employer informing it that he was the grievor's representative, the grievor replied that they had discussed it but that he did not instruct Mr. B to do it. The grievor was not aware that anyone from Mr. B's office had contacted the employer. As Mr. B's assistant had said that Mr. B would be busy for two weeks, the grievor had the impression that Mr. B would have some time after that, and so the grievor was the intermediary with Mr. Constant.

[204] The grievor agreed that in his July 15, 2014, email, he did not propose an alternate meeting date for when his representative would be available and that it would have been a useful thing to do. When he was asked whether he had thought it important to meet, the grievor said he had realized that it was serious. He acknowledged that he did not name his representative in the email.

[205] Concerning his July 18, 2014 (Exhibit E-1, Tab 10), email, the grievor acknowledged that he did not offer alternate meeting dates or indicate that Mr. B was his representative. He did not ask Mr. B to send the employer a letter on his behalf because as Mr. B was in discovery, he could not speak with him.

[206] The grievor said that he called Mr. B's office once to schedule a meeting, once to check his availability, and once to follow up during that period. He did not schedule a meeting with Mr. B after the discovery ended.

[207] When he was asked whether he realized from the second paragraph of Mr. Guay's July 16, 2014, email that the investigation was about to conclude, the grievor said that he responded that his representative was busy on July 17

and 18, 2014. When he was asked whether he had considered a different representative, as he could not speak with Mr. B, the grievor replied that he stuck with Mr. B at that point.

[208] When he was asked whether he felt that the best approach was responding at the end of his shift three days later on Friday, July 18, 2014, the grievor said that he had reiterated that Mr. B was unavailable and that as his workdays had been busy, he had not often sat down to read emails. When he was asked what steps he took during those three days to facilitate a meeting, the grievor said that he would have called to see if Mr. B was available. When the grievor was asked if he called on or before July 15, 2014, he replied that he had called and had learned that Mr. B was unavailable for two weeks and that he had called once after that but was unsure of the date. He guessed that it was between July 15 and 18, 2014.

[209] When he was referred to his testimony that he was concerned about his right to representation because he was about to leave on vacation, the grievor said that his concern was not just because he was going on vacation. When he was asked whether he indicated to the investigators that he was going on vacation, the grievor said that he was under the impression that they knew, as it had been booked several months before then.

[210] When the grievor was referred to his leave of absence summary (Exhibit E-1, Tab 35), indicating that he had been on vacation from July 28 to August 21, 2014, and not on the week before then, the grievor asserted that although it was not indicated, he had been on vacation the week before. He had no documents, such as a plane ticket or hotel bill, to show that he had been on vacation the previous week.

[211] The grievor was referred to his testimony that on September 5, 2014, he had received the letter changing the meeting from September 4 to September 5, 2014. He said that he thought the meeting was on for September 4 and that he passed by Mr. McMullen's office at 9:00 a.m., but he was not there. He did not recall seeing Mr. McMullen's assistant. The grievor did not email Mr. McMullen to say that he had passed by Mr. McMullen's office, as he was confused by Mr. McMullen's absence. He had passed by Mr. McMullen's office earlier that morning and had not seen him, so he was not surprised when Mr. McMullen was absent at 9:00 a.m.

[212] The grievor said that he showed up for the meeting without a representative, although Mr. B still represented him. When he was asked whether he had spoken with Mr. B, the grievor replied that he had. He was then referred to his testimony that he had had two conversations with Mr. B, one in person and one on the phone, both before July 8, 2014. The grievor then said that he believed that another conversation took place, in August 2014, during which Mr. B discussed his fee for taking on the matter. The grievor then decided to meet Mr. McMullen on his own. The grievor then said that Mr. B told him that he was available at any time.

[213] When he was asked whether following September 4, 2014, he had reached an agreement with Mr. B to represent him, the grievor replied, "Not yet." When reminded that he was now at adjudication, the grievor replied that he did not retain Mr. B's services; nor had he asked him to represent him at the October 7 and November 4, 2014, meetings. The grievor said that he arranged to have Ms. Willard represent him at those meetings. She was informed about the situation and was able to represent him.

[214] The grievor said that on September 29, 2014, he received the letter dated September 26, 2014, inviting him to the October 7, 2014, meeting and that he understood that it was related to the administrative investigation report. He said that he felt that he needed the September 12, 2014, letters before attending the meeting because something was missing, and he thought he needed to understand the situation. When he was asked why he failed to attend the October 7 meeting after receiving the September 12 letters from Ms. Willard on October 4, the grievor replied that as there was much to digest and prepare, he was not ready for a meeting at that time.

[215] The grievor disagreed that on September 12, 2014, he was told that he was suspended. Although he was asked to leave the workplace, he said that in the past, when things had become heated, his colleagues had been asked to leave too. The grievor was told to leave immediately. He did not know the situation exactly, but he knew that there was a real problem. He did not know that his reliability status had been revoked.

[216] After the first couple of days, the grievor realized that he would not return to the workplace. He heard of his suspension through the grapevine. In a later pay period,

he realized he was not being paid. When he was asked whether he contacted the employer about his status, he said that when he did not receive the letters Mr. McMullen said he would send by courier, he contacted Ms. Willard.

[217] The grievor was asked, since he had the September 12, 2014, letter setting out the allegations as well as the administrative investigation report, what was so new and surprising in the September 26, 2014, letter such that he could not attend the October 7, 2014, meeting. The September 26 letter mentioned his reliability status being reviewed and the potential consequences on his employment. He replied that at the time, he did not know that his reliability status was suspended or the full scope of the situation, and there was insufficient time to prepare. When he was asked why he did not write to the employer and inform it that he needed more time, as he had just received the documents, the grievor replied that he believed he had emails Ms. Willard had sent to Mr. McMullen about that. Although the employer requested the production of those emails, they were not entered into evidence.

[218] Concerning the November 4, 2014, meeting that the employer had proposed, it was put to the grievor that he must have understood that the situation was serious, since he had been suspended without pay. He told the employer that he could not meet as he was ill, yet he did not see a doctor to obtain an independent confirmation of his illness. He said it did not cross his mind to book an appointment with a doctor. He did not tell the employer that he had wished to attend but had been too ill, and he said that he could have elaborated in his email. The grievor said that he did not follow up with the employer on September 5, 2014, because he was still ill and that as for September 6, he said that he had no proof of any attempt to correspond with the employer on those days.

[219] When he was asked whether he notified Ms. Willard about not attending the meeting, the grievor said that he believed that he informed her after the meeting. He said that he did not speak with her on November 4, 2014. They were aware of the review for cause meeting and had spoken in October 2014. The grievor said that he had several meetings with Ms. Willard to prepare for the meeting. He spoke with her on October 4, 2014, but did not have the dates of when he next met with her. When he was asked whether Ms. Willard had been available for the October 7, 2014 meeting, he replied that he had told her the meeting would not take place as he did not have the documents.

[220] The grievor then said that he met with Ms. Willard on October 22, 2014, to prepare for the review for cause meeting. It was put to him that as of October 20, 2014, no meeting had yet been scheduled for November. He said that he and Ms. Willard knew that a review for cause meeting would be scheduled because Ms. Willard was communicating with Mr. Guay. When he was asked to produce communications to that effect, the grievor said that they were in his daughter's email account.

[221] The grievor acknowledged that he recorded his conversation with his ex-wife on side B of the tape recording. He said that his ex-wife had wanted an audio copy of their wedding, which he said was in the background of the conversation. When it was put to him that there was no wedding on side B and that it sounded like the recording was made during a telephone conversation, the grievor said that he assumed that he had made the recording. When it was pointed out that he did not tell his ex-wife on the tape that he was recording the call, the grievor stated that he did not recall whether he had done so.

[222] The second recording on side B was made at a bus stop. The grievor said that he speculated that it might have been made while disembarking a bus on his daughter's first day of school. When he was asked whether that day had been in January, he replied that perhaps it had been a special occasion at the school.

[223] When he was asked to identify his representative who had waited throughout the day on July 8, 2014, the grievor provided his name and explained that he was a retired acquaintance of his who had once been involved with the union.

V. Summary of the arguments

A. For the employer

[224] The employer submitted that terminating the grievor's employment had been an administrative decision that had flowed inextricably from the revocation of his reliability status by the DSO, Mr. McMullen. As reliability status is the lowest level of security standard required of all PBC employees, there was no other position available in which to place the grievor.

[225] Mr. McMullen's reasons for revoking the grievor's reliability status were the tape recorder incident of May 21, 2014, the incident with the commissionaire on the same

date, the grievor's multiple attempts to access parts of the PBC's premises, for which he had no valid authorization, and his failure to participate in the investigative process and the review for cause. The employer submitted that setting aside his lack of cooperation, each of the other three grounds it relied on, standing alone, warranted revoking his reliability status.

[226] The employer advanced that none of the three incidents can be viewed in isolation from the others and that they were consistent indicators of security concerns. Of the three incidents, the tape recorder was the most significant. As Mr. McMullen did not know the grievor's motive or purpose in recording the meeting or how he would deal with the recorded information, the grievor's actions brought his honesty and integrity into doubt.

[227] Concerning the grievor's attempts to access areas for which he was not authorized, the employer argued that possessing reliability status does not permit the holder access to locations or information unless there is a need to know. The grievor ceased these attempts after he was spoken to by management in February 2014. However, Mr. McMullen had to consider those attempts in light of the subsequent tape recorder incident.

[228] In the incident with the commissionaire at 410 Laurier, the grievor entered the building through a back door and initially did not show his pass, which led to the confrontation. He said that facial recognition supersedes showing the pass. Building access control is the first link in the security chain, and showing an identity card is important and required of all employees. This incident was another example of the grievor attempting to find a flaw in the building's security system.

[229] Due to the grievor's lack of cooperation, the employer was unable to obtain an explanation for his conduct, which meant that it had to make decisions without that information. Accordingly, it proceeded cautiously and demonstrated good faith in seeking the SRC's input. Ms. Ouellette testified that the SRC's concern was the security breach, and in the absence of information from the grievor, at its meeting of September 10, 2014, the SRC felt that it had no option but to recommend suspending his reliability status. The other option was to recommend revoking it, but the SRC wanted to give him an opportunity to respond and explain.

[230] At its October 15, 2014, meeting, the SRC recommended revoking his reliability status, as there had been no change since the September 10 meeting, and the grievor had not participated in the investigation process.

[231] Mr. McMullen did not immediately revoke the grievor's reliability status as he realized the implication for the grievor's employment and wished to give him one more opportunity to explain his actions. When the grievor did not appear at the November 4, 2014, meeting, Mr. McMullen then decided to revoke it. The employer submitted that this demonstrates that it did not try to show the grievor the door.

[232] The employer referred to the *Standard on Security Screening* (Exhibit E-1, Tab 38), cited in the November 7, 2014, letter revoking the grievor's reliability status. It submitted that while that policy, which replaced the *Personnel Security Standard*, became effective on October 20, 2014, the legal considerations remained unchanged. The employer pointed to sections 5.2.2 and 5.2.4, under the title "Expected Results", which read as follows:

5.2.2 Security screening practices provide reasonable assurance that individuals can be trusted to safeguard government information, assets and facilities, and to reliably fulfil their duties...

...

5.2.4 Individuals have an opportunity to explain adverse information before a decision is reached

[Emphasis in the original]

[233] The employer submitted that when for unknown reasons an employee surreptitiously tape records a meeting, makes numerous attempts at unauthorized access, and has an altercation with a commissionaire, the employee cannot be trusted, under section 5.2.2. Furthermore, the grievor did not avail himself of the opportunity to provide an explanation as set out in section 5.2.4.

[234] In Appendix A, "Definitions", of the *Standard on Security Screening*, "Reliability status" is defined as follows:

The minimum standard of security screening for positions requiring unsupervised access to Government of Canada protected information, assets, facilities or information technology systems. Security screening for reliability status appraises an individual's honesty and whether he or she can

be trusted to protect the employer's interests... Reliability status may also be referred to herein as a security status.

[235] The employer submitted that its concerns about the grievor's honesty were founded.

[236] The employer cited the following extracts from Appendix C of the *Standard on Security Screening*, under the title, "6. Non-Consent or Failure to Provide Information":

...

When an individual's security status or clearance is being updated or upgraded and the person refuses to provide consent or the required information, the person's existing security status or clearance must be suspended and reviewed for cause and the human resources unit should be consulted.

Consequences to individuals for not providing consent or for failing to provide information can include administrative cancellation of their security status or clearance. This administrative cancellation will result in the individual no longer meeting the condition of employment and could result in termination of employment or cancellation of a contract.

[Emphasis in the original]

[237] The employer referred to section 2 of Appendix D of the *Standard on Security Screening*, titled "Analysis and Evaluation". That section provides that for the purposes of a security screening decision, among the criteria to be considered in assessing adverse information concerning someone are his or her willingness to participate and whether he or she has been open about the information and has resolved or appears likely to resolve the concerns to which it gives rise. The employer submitted that the grievor failed to participate in the investigative process, was not willing to participate, and was not open about information concerning his conduct.

[238] Section 6 of Appendix D, titled "Adverse Information", includes the following:

...

When adverse information reflects a recent or recurring pattern of questionable judgment that may negatively affect the performance of duties or that may lead to an inability or unwillingness to safeguard sensitive information, assets or facilities, a review for cause of the security status or clearance previously granted to the individual must be conducted.

...

[239] In addressing the fact that the grievor was not immediately suspended after the tape recorder incident on May 21, 2014, when management thought he was a likely suspect, the employer submitted that while in retrospect, it would have made a clearer case, what makes a clearer case does not lead to a better decision. Mr. McMullen stated that he wanted to give the grievor the benefit of the doubt to offer a reasonable explanation. There was no indication the employer did not take the matter seriously, and the investigation was quick and thorough.

[240] The grievor was suspended on September 12, 2014, and was out of the office for three weeks. During that period, the employer waited for an explanation from him, which never came, so its hand was forced. It argued that it would be a mistake to punish it for giving him the benefit of the doubt. Furthermore, at the time of the tape recorder incident, Mr. McMullen did not have all the information. While it was highly probable that the grievor had placed the tape recorder in the room, it was not yet certain. Mr. McMullen's consideration was the motive for putting the tape recorder there.

[241] In addressing the issue of procedural fairness, the employer argued that there was no merit to the position that at every point, the grievor had legitimate reasons not to participate in the investigative process. His version of events is laced with contradictions and feeble explanations unsupported by the evidence.

[242] The employer pointed out that on June 27, 2014, Mr. Constant informed the grievor that an interview would be scheduled during the week of July 7, 2014. The grievor immediately responded that his counsel was not available that week.

[243] On July 7, 2014, Mr. Constant offered to meet with the grievor the next day. He said that his counsel was unavailable. Mr. Constant gave the grievor a paper with his name and cell phone number on it. Although Mr. Constant was in room 640 all day on July 8, the grievor did not show up; nor did he contact Mr. Constant.

[244] On July 8, 2014, Mr. Guay sent the grievor an email seeking his availability and that of his representative during the week of July 9 to 16, 2014. The grievor did not respond until Mr. Guay sent a reminder email on July 15, 2014, at 8:40 a.m. There was no email from Mr. B to make meeting arrangements. The grievor replied the same day at 3:25 p.m. that his counsel was unavailable that week. In that email and in his testimony, the grievor stated that on July 8, he had an acquaintance waiting across the

street all day for the meeting. He testified that on July 8 he passed by room 640 and that no one was there.

[245] The employer argued that while the grievor had maintained that he would meet with the employer only if accompanied by his counsel and that he had spoken with Mr. B in late June and early July, on July 8, he was willing to meet with it accompanied by an acquaintance of his. The grievor gave no explanation for this change.

[246] On Wednesday, July 16, 2014, at 8:37 a.m., Mr. Guay emailed the grievor, inviting him to an interview on July 17 or 18. The grievor did not respond until Friday, July 18, at 3:42 p.m., when he said that his representative was unavailable on those two days. He did not say that his counsel was available the following week or that he would be on vacation for four weeks beginning on July 28. The employer argued that this was inconsistent with taking the matter seriously.

[247] The grievor testified he was ready to meet with the employer on September 4, 2014, without his acquaintance or Mr. B, but he did not see Mr. McMullen that day.

[248] On September 5, 2014, at 7:38 a.m., the grievor emailed Mr. McMullen, stating that he was unavailable for the meeting that day, without explaining why. While the court record shows that the grievor was not at work, he did not request leave to attend court as indicated on the absence report. Mr. McMullen said that the grievor was at work and that he had no information to the contrary.

[249] The grievor was offered an opportunity to meet on October 7, 2014, but did not appear and did not communicate with the employer. His explanation during his testimony was that he did not have all the information to prepare for the meeting. The employer pointed out that the grievor had had the administrative investigation report since August 22, 2014, and that since September 29, 2014, he had had the letter dated September 26, 2014, setting out the reasons for the review for cause. Since October 4, 2014, two full days before the October 7, 2014, meeting, the grievor had had the letters dated September 12, 2014, which Mr. McMullen had attempted to give him on that same day. As the grievor had not been at work for one month without pay, it was clear that he had been suspended. Furthermore, the substance of the information was in the investigation report.

[250] Concerning the meeting scheduled for November 4, 2014, at 9:00 a.m., the grievor emailed Mr. McMullen at 6:53 a.m. that day, stating that he was ill. The employer emphasized that his assertion that he was ill was unsupported by any evidence other than his own testimony. He did not communicate further with the employer on that day or on November 5, 6, or 7, 2014. The employer submitted that the grievor consistently made excuses not to attend meetings.

[251] The employer listed the following dates on which it had made attempts to meet with the grievor: July 7, 8, 16, and 18, 2014; August 22, for September 4, and August 28, for September 5, 2014; and September 26, for October 7, and October 28, for November 4, 2014. All these requests to meet were rebuffed by the grievor without him making a counter-offer. In the employer's submission, the inescapable conclusion is that he did not want to meet.

[252] Concerning the grievor's lack of cooperation with the investigative process, the employer cited *Hughes and Titcomb v. Parks Canada Agency*, 2015 PSLRB 75 at paras. 142 and 143; and *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*, 2009 CanLII 1363 at para. 70. The employer submitted that although the grievor provided some explanations during the hearing, he did not offer them to it during the investigative process.

[253] In reference to assessing the credibility of witnesses, the employer cited *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.). It submitted that credibility is an important consideration in this matter and that I must decide whether the grievor was truthful. The most significant incident was that of the tape recorder, and the grievor knows whether he placed it in boardroom 651. While he denied it, I must decide whether to believe him. The employer submitted that in applying the principles in *Faryna*, I must conclude that the grievor did not tell the truth.

[254] The employer referred to the grievor's movements to and from boardroom 651 shortly before the meeting and afterwards, as indicated on the card reader system. The audio tape captured the music from the mailroom radio and the squeaking mailroom door. Side B of the tape contained a private conversation between the grievor and his ex-wife. When Mr. McMullen, Ms. Leblanc, and Ms. Massimiliano arrived together at boardroom 651, the grievor was the only person there. The employer submitted that all this evidence points to him having placed the tape recorder in the meeting room.

[255] The employer referred to the grievor's evidence that his conversation with his ex-wife on the tape might have been due to something nefarious on his ex-wife's part or on the part of someone acting in concert with her. The employer submitted that the grievor did not provide any explanation of how his ex-wife could have known about the May 21, 2014, meeting, how she could have accessed boardroom 651 to place the tape recorder there, or how she conspired with someone at the PBC to do it. In the employer's submission, this demonstrates that the grievor could not tell the truth under oath and that he could not be trusted. The employer cannot be said to have made an error in judgment when it concluded that he was not trustworthy.

[256] Concerning the scheduling of the July 8, 2014, meeting, the employer pointed out that Mr. Constant and Mr. Guay went to the grievor's office on July 7, 2014, to set up a meeting for the next day. When the grievor demanded a specific time, Mr. Constant replied that the meeting would be on July 8 at 10:45 a.m. in room 640. That is supported by the personal notes of both Mr. Constant and Mr. Guay. The grievor testified that he twice asked Mr. Constant for a specific time and that he was refused both times. However, neither Mr. Guay nor Mr. Constant was cross-examined on the grievor's version of those facts. The employer submitted that if Mr. Constant and Mr. Guay both went to see the grievor about scheduling a meeting, it does not make sense that they would not have suggested a time for it.

[257] Referring to the events of September 12, 2014, the employer stated that when Mr. McMullen began reading the letter of suspension of the grievor's reliability status, the grievor got up and left. He testified that he was not informed of the suspension and that at the building exit, he asked for the letter, and that Mr. McMullen refused to give it to him. The employer submitted that the grievor's version was not put to Mr. McMullen in cross-examination. Mr. McMullen said the letter was to be delivered, which is why he retained a bailiff.

[258] Concerning the incident with the commissionaire, the grievor denied that it occurred. However, the commissionaire's report was filed on the same date as the incident occurred. While the report referred to two previous incidents involving the grievor, they were not described. The employer pointed out that Mr. Sadiq was not an interested party and that he had nothing to gain by the outcome of the matter.

[259] The employer submitted that another contradiction in testimony was that of

Mr. Temple and the grievor concerning the address on the letters to the grievor. Mr. Temple testified that the grievor began by saying, "That person doesn't live here", while the grievor stated he told Mr. Temple the correct address. There was no indication that the grievor wanted to accept the letter.

[260] The employer pointed to the different testimonies concerning the letter postponing the meeting of September 4, 2014, to September 5. Mr. Guay testified in cross-examination that he delivered the letter to the grievor by hand on September 4, while the grievor said that he received it on his office chair on September 5.

[261] The employer summarized that there were too many contradictions, inconsistencies, and instances of pure illogic in the grievor's testimony to find it credible. Its conclusion that the grievor was untrustworthy was well founded.

B. For the grievor

[262] The grievor submitted that the employer had not had reasonable cause to revoke his reliability status and that the revocation process had been procedurally unfair.

[263] The grievor's submissions concerning the alleged lack of procedural fairness were twofold. First, he was not provided with the complete investigation report with attachments (Exhibit E-1, Tab 29) but only the report itself (Exhibit E-1, Tab 13); second, despite the immediate focus on him during the investigation, he continued to work without restriction, while he could have been placed on paid suspension or have been assigned modified duties.

[264] The grievor addressed in turn the employer's stated reasons to revoke his reliability status, namely, the recording of the May 21, 2014 meeting, his attempts at unauthorized access, the incident with the commissionaire on May 21, 2014, and the grievor's lack of cooperation with the investigation and his failure to participate in the process.

[265] Concerning the tape recording of the meeting, the grievor testified under oath that he believed that he had returned the tape together with the recorder to his ex-wife a number of years before the incident. Their relationship had been contentious, and he had been awarded custody of their children. He testified that the recording might have been something nefarious on his ex-wife's part or on the part of someone

unknown acting in concert with her.

[266] The grievor submitted that there was no direct evidence about the tape recorder and no witness to it being placed in the room. Mr. McMullen was the only witness to the discovery of the tape recorder. The grievor's position is that the reconstruction of the events by the investigators, which involved listening to the tape, was circumstantial. The tape is of poor quality, and it is unclear what is occurring when it is played.

[267] The grievor pointed out that while Mr. Constant compared the grievor's access log to the tape, he did not verify the access log for other days. Furthermore, other PBC employees have radios, and Mr. Constant admitted that it was possible there were other squeaky doors at the PBC. In addition, during the investigation, the investigators tested their theory that the reason for the packing tape on the recorder's play and record buttons was to suppress a noise when the tape reached the end. However, when tested at the hearing, the tape did not make any noise when it reached the end.

[268] Concerning the grievor's attempts at unauthorized access, he testified that he had reasons to be in the records room. He would pick up files in PBC offices and bring them to the records room for filing. There was a coffee maker and a microwave in the records room for employees working there.

[269] The grievor had reason to access the seventh-floor storage room, as boxes were stored there. He also had reason to access the archives room because protected waste was kept there to be packaged for disposal. He testified that in the past, he had had access to the records and archives rooms, as indicated on the access control log (Exhibit E-1, Tab 32) and his email to Ms. Laverdière in October 2013 (Exhibit G-4). As for his attempts to access the communications room, he testified he did not access it and that the card reader had detected his card as he walked by.

[270] Once the grievor was told to stop his unauthorized access attempts via Ms. Massimiliano's February 10, 2014 (Exhibit E-1, Tab 33), email, Mr. Charette said that no further attempts were made. The grievor submitted that the employer gave no weight to him ceasing his attempts when it made its decision to revoke his reliability status.

[271] As for the incident with the commissionaire, while the grievor admitted to the

two earlier incidents concerning presenting identification cards, he questioned whether the incident of May 21, 2014, occurred on that date. He testified that he believed that personal facial recognition superseded the identification card.

[272] In addressing his alleged lack of cooperation with the investigation and failure to participate in the process, the grievor submitted that he had had reasonable explanations not to meet with the investigators. He was prepared to meet on July 8, 2014, when his acquaintance was ready to act as a witness.

[273] The grievor pointed to a dispute in the evidence concerning his exchange with Mr. Constant on July 7, 2014. He submitted that he was not given a specific time and date for a meeting, as supported by the email exchanges with Mr. Guay on July 15 (Exhibit E-1, Tab 9) and July 16 and 18, 2014 (Exhibit E-1, Tab 10). The grievor said that the only witness to the July 7 exchange was Mr. Brennan. The grievor submitted that there is sufficient information to make a determination on this issue.

[274] Concerning the other dates offered by the investigators, the grievor said that he chose to be represented by Mr. B, who was not available at the suggested times because he was in discovery. Given the seriousness of the allegations against him, the grievor submitted it had not been unreasonable to want a representative of his choice.

[275] As for the meeting scheduled for September 4, 2014, which Mr. McMullen changed to September 5, there is a dispute as to when and how the August 28, 2014, letter was presented to the grievor, which was on either the day of or the day following the meeting. The letter contains no acknowledgement of receipt by the grievor, via either a signature or an “X” mark.

[276] The grievor said that he had been prepared to meet with Mr. McMullen on September 4, 2014, but that Mr. McMullen was absent. The grievor had a legitimate reason for missing the September 5, 2014, meeting — he was in court. The evidence is disputed as to whether he attempted to reschedule it. When he was asked in examination-in-chief whether the grievor had attempted to reschedule the meeting after September 5, 2014, Mr. McMullen replied, “Never”.

[277] The grievor testified that he encountered Mr. McMullen in a hallway the following week and asked him about rescheduling the meeting. According to the grievor, he replied, “It will happen.” While the grievor acknowledged that this was not

put to Mr. McMullen in cross-examination, he submitted that I have sufficient information to decide this point and referred to his email to Mr. McMullen on the morning of September 5, 2014, in which he suggested that the meeting be rescheduled (Exhibit E-1, Tab 15).

[278] Concerning the review for cause, the grievor submitted that it had been unreasonable for the employer to expect him to be ready for the October 7, 2014, meeting when he had just received the letters dated September 12, 2014, on October 4. The grievor submitted that on that basis alone, the employer's decision to revoke his reliability status was unreasonable. Furthermore, he argued that he provided a reasonable explanation for all four allegations in the revocation letter and that he does not pose a risk to the organization. As remedy, the grievor requested that his grievances be allowed and that he be reinstated without loss.

[279] The grievor submitted an alternative argument, which is that the circumstances of the revocation of his reliability status amount to disguised discipline. I need not consider this argument, as I have already concluded that the Board has full jurisdiction to determine whether the employer had cause to revoke the grievor's reliability status.

C. The employer's reply argument

[280] The grievor testified that he had returned the tape recorder to his ex-wife. At first, he said that he did not recognize it. The employer questioned how he could have returned the recorder to his ex-wife if he did not recognize it.

[281] Concerning the grievor's unauthorized access attempts, his access to two of the rooms ceased on October 31, 2013, as indicated in his email of that date to his then-supervisor, Ms. Laverdière (Exhibit G-4). Within a week or two, Mr. Charette spoke to him and told him that he was making those attempts. He was again warned about access attempts by Ms. Massimiliano in February 2014. The grievor did not make just one but several attempts. He did not communicate to the employer any reason that he required access to rooms that he was not authorized to enter.

[282] The employer pointed out that another indicator of the grievor's untrustworthiness occurred at the September 12, 2014, meeting, when Mr. McMullen asked him for his access cards and BlackBerry device. The grievor told him that they were in his office, but in fact, he left the premises with them.

VI. Reasons

[283] This case turns in large part on the credibility of the witnesses. In addressing this issue, I will be guided by the following oft-cited test set out by the British Columbia Court of Appeal in *Faryna*, at pages 356 and 357:

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

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....

[284] I propose to examine each of the four grounds relied upon by the employer to revoke the grievor's reliability status.

A. The tape recorder incident

[285] I will deal first with the tape recorder incident.

[286] The grievor denied that he placed the tape recorder in boardroom 651. Side A of the tape includes a recording of the meeting in progress on May 21, 2014. Side B contains two conversations, one between the grievor and his ex-wife, and the second between him and his child.

[287] The investigators' reconstruction of the events was based on the noises heard on side A of the tape, such as the application of packing tape, the noise of the radio in the mailroom, and the squeaky mailroom door. While the investigators did not check the other offices on the sixth floor for a radio, Mr. Constant testified that he was told by Mr. McMullen, Ms. Leblanc, Ms. Massimiliano, and a former mailroom supervisor that it was common knowledge that there was a radio in the mailroom.

[288] Mr. Constant testified that he tested the mailroom door and that he confirmed that it squeaked. He did acknowledge that he did not similarly test other doors on the sixth floor. However, based on the tape, Mr. Constant determined that the elapsed time from the noise of the mailroom door squeaking to the placing of the tape recorder on the cabinet was 20 to 25 seconds, which was consistent with the time required to cover the distance between the two locations.

[289] In the absence of evidence indicating that the preparation of the tape recorder and its placement in boardroom 651 originated from a location other than the mailroom, I find that those events began in the mailroom. That one element points to the grievor.

[290] The grievor's movements between the mailroom and boardroom 651 were recorded with his name and access card number as follows on the security log: he entered the south door beside the boardroom at 10:55 a.m. and entered the mailroom at 10:57 a.m.; he again accessed the south door at 10:59 a.m. When Mr. McMullen, Ms. Leblanc, and Ms. Massimiliano arrived at the boardroom at 11:00 a.m., the grievor was seated at the table.

[291] Mr. McMullen completed the first part of the meeting, about the mailroom reconfiguration, after 20 minutes and then excused the grievor and Mr. Brennan. The security log recorded the grievor entering the mailroom at 11:23 a.m. His subsequent movements were accessing the south door at 11:27 a.m., the mailroom at 11:28 a.m., the south door at 11:40 a.m., and the mailroom at 11:41 a.m. His only other access to the sixth floor south door on May 21, 2014, was at 1:48 p.m.

[292] Mr. Constant testified that the PBC's card reader system recorded only access to, not egress from, a restricted zone. He said that while the entire perimeter of the sixth floor was a restricted zone, he did not think that a card reader needed to be used when moving from office 662 to the mailroom or from that office to the corridor.

He agreed that it was possible that to remain undetected, a person could simply access the corridor from office 662 and then boardroom 651 and that the distance to the boardroom was similar to the distance from the mailroom.

[293] However, the grievor did not testify that he went to boardroom 651 through office 662. He did not deny his movements as recorded by the south door and mailroom card readers; nor did he challenge the accuracy of those recordings. He did not suggest that he had lent his access card to another employee at the relevant time. The evidence is clear that the movements recorded on the security log were his.

[294] During examination-in-chief, when he was shown the tape recorder, the grievor said that it was not his and that he recognized it only from having seen it six months before. He said that eight or nine years earlier, his ex-wife had wanted a videocassette of their wedding, and he had decided to make a video copy and an audio copy. He said that part of side B of the tape was a recording of their wedding ceremony. When he was asked how the tape had made its way into the recorder, he stated that he did not know. He thought that the recorder was his ex-wife's and that it had been in a box of his ex-wife's items that he had returned to her; he thought the tape had been in it at the time. The grievor acknowledged that he had recorded the conversation with his wife during a telephone discussion with her.

[295] When he was asked how the conversation with his ex-wife was on the same tape as the recording of the meeting, the grievor replied that it might have been something nefarious on his ex-wife's part or that it might have been done by someone acting in concert with her. He presented not a tittle of evidence to support such a patently preposterous proposition. He did not explain how his ex-wife might have accessed the PBC's premises to place the tape recorder in boardroom 651 or who of the PBC's employees could or would have facilitated her access or assisted her in any other manner.

[296] In weighing the grievor's denial of placing the tape recorder in the boardroom against the evidence, in my view, the most telling indicator pointing to him is the recording of his conversations with his ex-wife and child on side B of the tape. He provided no plausible explanation as to how the tape could possibly belong to anyone else but him or if the tape was not his, how those conversations came to be recorded on the same tape as the recording of the meeting in progress on side A.

[297] In assessing the whole of the evidence concerning the tape recorder incident, I find that on a balance of probabilities, the grievor placed the tape recorder in boardroom 651.

B. Attempts at unauthorized access

[298] With respect to the grievor's multiple attempts to access restricted areas of the employer's premises, the access control log (Exhibit E-1, Tab 32) shows that they were made from October 2013 through January 2014. The premises he attempted to penetrate were the sixth-floor records room (room 600), the sixth-floor archives room (room 665), the communications closets on the sixth and seventh floors, and the seventh-floor storage room (room 701).

[299] The extract of the log for the records room, which begins on October 22, 2013, indicates that the grievor was authorized to enter that room from that date until October 31, 2013, after which his access to the room was cancelled. Mr. McMullen testified that it resulted from a discussion with management in which it was decided to increase the room's security level.

[300] The log extract for the archives room covers the period from September 27, 2013, to February 7, 2014. It indicates that during that period, the grievor had access to the archives room on October 18 and 21 and from October 22 to 29, 2013. It also shows that he attempted unauthorized access twice in September 2013, 12 times in October, 21 times in November, 30 times in December, 23 times in January 2014, and twice in February. Where the log shows several attempts on the same date at the same time, I have counted them as one attempt.

[301] Concerning the communications closets, according to the access control log, the grievor attempted entry to the sixth-floor communications closet on five occasions in 2013 — September 30, October 29, and November 4, 6, and 22. He made a single attempt to access the seventh-floor communications closet on October 1, 2013.

[302] The log extract for the seventh-floor storage room is from October 1, 2013, to January 29, 2014. The grievor attempted unauthorized access three times in October 2013, four times in November 2013, and once in January 2014.

[303] The grievor testified that for most of the period of his employment, he had access to the records room because it contained in and out baskets for items to be

actioned, and some of the correspondence he picked up throughout the day was destined for that room. This was not challenged by the employer.

[304] The employer did not dispute the grievor's testimony that he was responsible for bringing waste to the archives room, assembling it in boxes, and bringing it to the loading dock every two weeks for disposal. When his access was cancelled, he would leave the boxes on the floor, and other employees would bring them in.

[305] The grievor acknowledged that he had had no work-related reason to access the communications closets. He testified that he never intentionally tried to access them and that he did not have a specific recollection of trying to get in. He then said that perhaps the reader had picked up his card.

[306] Mr. Charette's testimony was that to allow access, the card must be placed very close to the reader, and that it is unlikely that a card would trigger access simply by someone carrying one walking by the reader. While he could not assert that that could not occur, he said that it is difficult to believe that a reader could be triggered by error multiple times.

[307] The seventh-floor storage room contained government property, such as office furniture and other objects for office use. The grievor said that during the last five or six months of 2014, his office and mailroom equipment were moved to there because of construction in the mailroom. However, his attempts at access were made in October and November 2013 and in January 2014, which predated the construction period.

[308] While the grievor had access to the records and archives rooms at certain times, it was cancelled, effective October 31, 2013. The evidence is indisputable that on multiple occasions, he attempted to access restricted areas in the PBC's premises before and after that date. In the first couple of weeks of November 2013, Mr. Charette spoke to him about this activity and asked him to stop it. Nevertheless, he continued until he received an email concerning the matter from Ms. Massimiliano on February 10, 2014 (Exhibit E-1, Tab 33). He did not provide a reasonable explanation for his attempts at unauthorized access.

C. The commissionaire incident

[309] Concerning the incident with the commissionaire, the grievor testified that he

did not recall it and that the commissionaire was likely mistaken with respect to the date and the facts. The incident report is dated May 21, 2014, and the commissionaire, Mr. Sadiq, testified that he wrote the report on that day. Mr. Sadiq is not an interested party in this matter, and I have no reason to question his testimony.

[310] Furthermore, on May 23, 2014, Mr. Charette emailed the grievor (Exhibit E-6), referring to his discussion that morning with Ms. Leblanc. The email reiterated that all government employees working at 410 Laurier were required to show identification to the commissionaires in the lobby before taking the stairs or elevators to their offices. The grievor acknowledged that he probably received the email because of his interaction with the commissionaire, but he questioned whether it happened on May 21, 2014.

[311] Based on the evidence, I find that the incident with the commissionaire did occur on May 21, 2014.

D. The grievor's lack of cooperation with the investigatory process

[312] In *Hughes and Titcomb*, the grievors, employees of Parks Canada Agency, were terminated for illegally entering the Cave and Basin National Historic Site after hours and swimming in a cave pool that was closed under Parks Canada regulations to protect an endangered snail species and its habitat. The adjudicator stated the following concerning the grievors' lack of cooperation with the investigation:

...

142 I found it very disturbing that the grievors chose not to cooperate during the investigation in that they refused to answer whether they swam in the cave pool and that they admitted it only at the hearing. While the circumstances are obviously different, I agree with the following principles, set out in the Oliver v. Canada Customs and Revenue Agency, 2003 PSSRB 43, and Brazeau decisions:

103 The recognition of culpability or some responsibility for his or her actions is a critical factor in assessing the appropriateness of the discipline. This is because the rehabilitative potential of the grievor is built on a foundation of trust, and trust starts with the truth. If a grievor has misled his employer, failed to cooperate with the legitimate investigation of allegations of conflict of interest, and refuses to admit any responsibility in the face of evidence showing wrongdoing, then re-establishing the trust necessary for an employment

relationship is impossible.

[Oliver, at para 103]

...

[313] In the letter revoking the grievor's reliability status, Mr. McMullen relied on the three grounds described earlier in this decision and added the following in the last paragraph: "... combined with additional information ... and due to your lack of participation in the security review process ...". The employer argued that even leaving aside the grievor's lack of participation, each of the three grounds, standing alone, warranted the revocation of his reliability status.

[314] The consequence of the grievor's lack of cooperation in this matter is that it deprived the employer of information from him that it could have considered in the decision-making process. Mr. McMullen testified that had the grievor provided an explanation, he might have viewed the matter from a different angle or might have made a different decision. Ms. Ouellette testified that the absence of information from the grievor was a factor that the SRC considered in first recommending suspending his reliability status at its September 10, 2014, meeting and then recommending revoking it at the October 15 meeting.

[315] The grievor argued that he had reasonable explanations for not meeting with the investigators. In examining that submission, again, the relevant chronology must be referenced.

[316] On June 23, 2014, the grievor was advised of the administrative investigation into the tape recorder incident and was given a letter about it. He refused to sign the acknowledgement of receiving the letter.

[317] On June 27, 2014, in room 640, in the presence of Mr. Guay, Mr. Constant informed the grievor of the additional mandate to investigate his alleged attempts to access restricted areas. The grievor refused to sign the notice until he had retained counsel. Shortly afterward, Mr. Constant and Mr. Guay went to the grievor's mailroom office and told him that the investigators would obtain his version of the facts during

the week of July 7, 2014, at which point the grievor replied that his lawyer was not available that week. His reply was curious, to say the least, as there is no evidence that he had forewarning of the time frame during which the investigators planned to meet

with him.

[318] On July 7, 2014, at 9:15 a.m., Mr. Guay and Mr. Constant went to the grievor's office and informed him that they planned to meet with him the next day. He first said that his counsel was not available and then demanded a specific time and date on which to meet, to which Mr. Constant replied July 8 at 10:45 a.m. in room 640. He gave the grievor his name and cell phone number written on a slip of paper. Mr. Constant waited in room 640 with Mr. Guay all day. The grievor did not appear; nor did he contact Mr. Constant. The grievor testified that he was at work on July 8 and that neither Mr. Guay nor Mr. Constant came by his office. He received no message, and no note was left on his desk. He walked by the office assigned to Mr. Constant, did not see him there, and assumed that he was not present.

[319] The grievor disputed that he was given a specific time and date for the July 8 meeting. The evidence shows that there is no doubt that Mr. Constant set the meeting for July 8. In his email to Mr. Guay on July 15, 2014 (Exhibit E-1, Tab 9), the grievor states that Mr. Constant had said that he "... needed to meet on July 8, 2014 although he was unable to provide a time to meet." In the next sentence, the grievor wrote that he had had a representative waiting across the street most of the day. In cross-examination, the grievor said that the representative was his acquaintance, who did not testify.

[320] Concerning the time of the July 8 meeting, the personal notes of both Mr. Constant and Mr. Guay for July 7, 2014, indicate that the grievor was informed that the meeting would take place the next day at 10:45 a.m. As neither Mr. Constant nor Mr. Guay was confronted with the grievor's version in cross-examination, I conclude that on July 7, 2014, the grievor was informed of the time of the meeting set for July 8, 2014.

[321] The grievor also argued that on July 7, Mr. Brennan was the only witness to his exchange with Mr. Constant. Not only do Mr. Guay's notes indicate that he was present, but also, the grievor's email to him on July 18, 2014, reads in part as follows: "You were not involved in the conversation; you were merely a bystander who had his back to us." Again, the grievor did not confront Mr. Guay in cross-examination about his physical presence in the grievor's office during the exchange.

[322] By email to the grievor at 8:37 a.m. on July 16, 2014, Mr. Guay offered him a

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

final opportunity for an interview at any time on July 17 and 18, 2014. The grievor did not meet with the investigators on either of those two days. He replied at the end of his shift at 3:42 p.m. on July 18, 2014, stating that he had already said that his representative was not available.

[323] On August 22, 2014, Mr. McMullen handed the grievor a copy of the administrative investigation report and a letter scheduling a meeting for September 4, 2014. In a letter dated August 28, 2014, Mr. McMullen informed the grievor that the meeting had been changed to September 5, 2014, at 9:00 a.m. The parties dispute when the grievor received the August 28 letter. The employer referred to Mr. Guay's testimony in cross-examination that he delivered the letter to the grievor by hand early on September 4, 2014, and that he noted as much in his final summary (Exhibit E-1, Tab 26). The grievor stated that he found it in his office on September 5, 2014.

[324] Even were I persuaded by the grievor's evidence on this point, which I am not, according to his version, he became aware of the change of the meeting to September 5, 2014, at 9:00 a.m., in the early morning of that day. He emailed Mr. McMullen at 7:37 a.m. on that day, stating that he was unable to attend. The grievor left his workplace without authorization to attend a court appearance. He did not inform Mr. McMullen of the reason he could not attend the meeting either before or after September 5, 2014. The grievor's absence was not recorded on the absence summary. Mr. McMullen testified that had the grievor told him of his court appearance, he would have rescheduled the meeting. I retain of this part of the evidence that it is yet another indication of the grievor's refusal to cooperate in the investigation.

[325] The grievor testified that he encountered Mr. McMullen in a hallway the following week, that he told him that they had to meet, and that Mr. McMullen replied that it would happen. The employer objected to that evidence, as it was not put to Mr. McMullen in cross-examination. The grievor had the opportunity to confront Mr. McMullen with his version of events but did not. Accordingly, I will disregard that evidence.

[326] By letter dated September 26, 2014, Mr. McMullen advised the grievor that the employer would conduct a review for cause of his reliability status and scheduled an interview for October 7, 2014, at 9:00 a.m. Leaving aside the grievor's refusal to take

delivery of the letter from Mr. Temple on September 26, 2014, the grievor received it by registered mail on September 29, 2014. He did not attend the October 7, 2014, meeting and did not contact Mr. Guay to reschedule it.

[327] The grievor testified that his failure to attend the October 7 meeting was due to receiving the September 12, 2014, letters suspending his reliability status and his employment only on October 3 or 4, 2014, from Ms. Willard, who had received them from the employer on October 2. Until then, he felt that he did not have the whole story. He claimed that he needed more time to prepare for the meeting, but he did not seek an extension of time from the employer.

[328] In my view, the grievor's explanation rings hollow. He had ample time to prepare for the interview. He had had the investigation report since August 22, 2014. The September 26 letter clearly stated that the purpose of the October 7 interview was "... to review the security concerns identified in the investigation report and which may negatively reflect on your Reliability Status." It mentioned that the grievor's reliability status was being reviewed and the potential consequences to his employment.

[329] The grievor testified that he had arranged to have Ms. Willard represent him at the October 7 and November 4 meetings, but he was generally vague as to dates and times of meetings and discussions with her. She did not testify.

[330] In a letter to the grievor dated October 28, 2014, Mr. McMullen again invited him to a review for cause interview, on November 4, 2014, at 9:00 a.m., to discuss the findings of the investigation report pertaining to the tape recording.

[331] In an email to Mr. McMullen dated November 4, 2014, at 6:53 a.m., the grievor stated that he could not attend the meeting as he had an ailment. He did not see a doctor to obtain an independent confirmation of his illness. When he was asked during examination-in-chief whether he had seen a doctor, he stated that he did not recall. In cross-examination, he said that it did not cross his mind to book an appointment with a doctor. He did not follow up further with the employer on November 4 or on the following days.

[332] The grievor's conduct in this respect flies in the face of the action an employee would normally be expected to take when faced with the imminent loss of

employment. If indeed the grievor had a stomach ailment, he could have contacted the employer to postpone the meeting. The employer had demonstrated that it was willing to reschedule every time the grievor had failed to attend a meeting. Throughout, the grievor never proposed alternate dates to the employer to present his version of events set out in the administrative investigation report. Unfortunately for him, his failure to attend on November 4 or to contact the employer to reschedule had catastrophic consequences.

[333] A final element of the grievor's lack of cooperation in the investigatory process relates to his insistence that his representative throughout was Mr. B. He continually used Mr. B's alleged unavailability to justify his failure to attend meetings with the employer. However, his testimony indicates that his professional relationship with Mr. B did not rise to the level he attempted to portray.

[334] At first, he described Mr. B as a family friend who told him not to be concerned about fees. The grievor believed he had a conversation with Mr. B in August 2014 during which Mr. B discussed his fee for taking on the matter. He did not have a written contract or any other signed document with Mr. B. At no time did the grievor advise the employer that Mr. B was his representative.

[335] When the grievor was asked in cross-examination whether he asked Mr. B to send a letter to the employer informing it that he was the grievor's representative, he replied that they had discussed it but that he did not instruct Mr. B to do so. Nor was the grievor aware that anyone from Mr. B's office had contacted the employer. He said that he did not retain Mr. B's services or ask Mr. B to represent him at the October 7 and November 4, 2014, meetings.

[336] The grievor's recollection about his alleged contacts with Mr. B or his assistant was vague. He testified to having two conversations with Mr. B, one in person and one by telephone, both before July 8, 2014. He acknowledged that Mr. B never contacted him, either during the day or in the evening. The grievor's references to Mr. B appear to have been used as slowing tactics concerning the investigatory process.

[337] Based on the evidence, I conclude that the employer substantiated each of the four grounds it relied upon to revoke the grievor's reliability status. Nevertheless, I will disregard the commissionaire incident, as it was not included in the version of the administrative investigation report given to the grievor. Mr. McMullen testified that

that incident would have been addressed in the review for cause interview had the grievor attended. In my view, for the grievor to have been prepared to address that event, the employer should have provided prior notice to him as part of the investigation report.

[338] Concerning the grievor's lack of cooperation with the investigation, section 6 of Appendix C of the *Standard on Security Screening* cited earlier in this decision states that among other things, when an individual's security status is being updated, if he or she refuses to provide information, the consequences can include the administrative cancellation of his or her security status. As stated earlier in this decision, in the circumstances of this matter, a consequence of the grievor's lack of cooperation was that it deprived the employer of information to be considered in the decision-making process.

[339] I turn now to the grievor's arguments concerning procedural unfairness.

[340] The grievor submitted that the revocation process was procedurally unfair on two grounds. First, he was not provided with the complete investigation report with attachments (Exhibit E-1, Tab 29) that had been prepared for management, only the report itself (Exhibit E-1, Tab 13). Second, despite the immediate focus on him during the investigation, he continued to work without restriction, but he could have been placed on paid suspension or assigned modified duties.

[341] The investigation report prepared for management contained the following 10 attachments: the fact-finding report; Mr. McMullen's response to the fact finding; a letter confirming an administrative investigation; a mandate letter; an investigation plan; a letter informing the grievor of the allegations; some statements obtained from witnesses; a statement obtained from the grievor's supervisor before January 1, 2014 (Ms. Laverdière); some information obtained from Mr. Charette; and a printout from the card access system.

[342] Both versions of the investigation report include the list of potential witnesses who were interviewed and whose statements were attached to the investigation report prepared for management. Those witnesses were Mr. McMullen, Ms. Leblanc, Ms. Massimiliano, Ms. Laverdière, Mr. Brennan, and Mr. Charette. The essence of the interviews of the first three of these witnesses concerned the events of the meeting in boardroom 651 on May 21, 2014. Those details are fully set out in the summary of

events in both versions of the investigation report. The statement of Ms. Laverdière, who supervised the grievor from October 2009 to January 2014, does not address the events at issue in this matter.

[343] Mr. Brennan's statement covers his attendance at the meeting in boardroom 651 and his confirmation that there was a radio in the mailroom, that a tape recorder was not required for mailroom duties, and that he had never requested a tape recorder; nor had one been issued to him. The event summaries in both versions of the investigation report refer to a radio in the mailroom, state that a tape recorder is not a necessary tool for a mailroom messenger clerk, and note that the PBC did not issue tape recorders to mailroom employees.

[344] Mr. Charette's statement includes certain incidents involving the grievor that are not relevant to this matter. It also refers to the grievor's unauthorized access attempts, which are also referred to in both versions of the investigation report.

[345] The attachment consisting of the printout of the PBC card access system logs the grievor's movements on May 21, 2014, which are set out in detail in both versions of the investigation report.

[346] I find that the investigation report given to the grievor on August 22, 2014, contained sufficient information to allow him to prepare for an interview with the investigators and to explain his conduct concerning the events, about which the employer sought his version. Furthermore, it was open to him to ask the employer to clarify any aspect of the investigation report, but he did not. Therefore, I reject his argument that the absence of the statements attached to the investigation report prepared for management in the version given to him was procedurally unfair.

[347] With respect to the grievor's argument that the fact that he was not immediately suspended from his employment was procedurally unfair, I do not view that submission as one of procedural unfairness. Rather, I consider that argument as having been advanced to undermine the employer's position that the grievor was untrustworthy, and I will deal with it in that framework.

[348] In reviewing the salient chronology, the incident that triggered the investigation occurred on May 21, 2014. On May 26, Mr. McMullen initiated an administrative investigation (Exhibit E-1, Tab 5) into it. On June 23, the grievor was informed of the

investigation. On June 27, Mr. McMullen issued a mandate for an administrative investigation into attempts by the grievor and Mr. Brennan to access PBC restricted areas between September 2013 and May 2014. The employer made several attempts to meet with the grievor during July 2014. The investigation report dated July 27 was submitted to Mr. McMullen on July 29. The grievor was on vacation from July 28 to August 21. He was given a copy of the investigation report on his return on August 22, together with a letter inviting him to an interview on September 4, which subsequently was changed to September 5. He was placed on an unpaid suspension effective September 12.

[349] Mr. McMullen testified that he received Mr. Guay's preliminary fact-finding report dated May 26, 2014 (Exhibit E-1, Tab 4), on that day. While at that time, it was strongly suspected that the grievor could have placed the tape recorder, Mr. McMullen said that there was no certainty. Indeed, in his report, one of Mr. Guay's recommendations was as follows: "Initiate an administrative investigation whose [sic] purpose is to determine whether the behavior [sic] or actions of the unknown person were inappropriate ..." (emphasis added). As a result, Mr. McMullen did not remove the grievor from the workplace; nor did he impose more restrictions other than the controls normally in place.

[350] From the time the employer informed the grievor of the administrative investigation on June 23, 2014, it attempted unsuccessfully to obtain his version of the events in question. Had he cooperated, he might have offered a reasonable explanation for the actions that the employer had attributed to him. In the absence of an explanation, the investigators proceeded with preparing their report based on the results of the investigation.

[351] The grievor was in the workplace for three weeks from his return from vacation to his suspension, during which period the employer again attempted to obtain his version of events. I am not persuaded by his submission that his presence in the workplace demonstrates that he was trustworthy.

[352] The employer has maintained that the most significant of the grounds it relied upon to revoke the grievor's reliability status, which caused Mr. McMullen to launch the initial investigation, was placing the tape recorder in boardroom 651 and surreptitiously recording the meeting. There is no evidence that since the event, he

attempted again to record PBC meetings. Furthermore, his attempts to access restricted areas ceased in February 2014.

[353] The evidence shows that while conducting the investigation expeditiously, the employer was willing throughout to give the grievor the benefit of the doubt. In the circumstances of this matter, the fact that the employer continued in good faith to try to obtain his explanation while he was on the PBC's premises during that period in my view did not clothe him with trustworthiness to a degree as to inoculate him against the potential revocation of his reliability status.

[354] As referred to earlier in this decision, the definition of "Reliability status" in Appendix A of the *Standard on Security Screening* provides that security screening for reliability status appraises an individual's honesty and whether he or she can be trusted to protect the employer's interests.

[355] In my view, the grievor's surreptitious recording of the meeting of May 21, 2014, involving three members of PBC management and his colleague, Mr. Brennan, and his multiple attempts at accessing areas for which he was not authorized amply demonstrate that he cannot be trusted to protect the PBC's interests. His motive for recording the meeting is unknown, as is the use he intended to make of the tape. It was his responsibility to provide a reasonable explanation. His failure to do so cannot be held against the employer, which provided him several opportunities to give one.

[356] That an employee would secretly record a meeting in the workplace without the knowledge of its participants is not only dishonest but also anathema to harmonious employer-employee relations.

[357] In the circumstances of this matter, I find that the employer had cause to revoke the grievor's reliability status and to terminate his employment.

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

(The Order appears on the next page)

VI. Order

[359] In file 566-02-11193, the grievance is dismissed.

[360] In file 566-02-11194, the grievance is dismissed.

November 28, 2018.

**Steven B. Katkin,
a panel of the Federal Public Sector
Labour Relations and Employment Board**