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*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

RYAN HYSLOP

Grievor

and

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

Respondent

Indexed as

Hyslop v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Saint John, New Brunswick,
May 2 to 3, 2017.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Ryan Hyslop (“the grievor”) is employed by the Treasury Board (“TB” or “the employer”) at the Canada Border Services Agency (“CBSA”) as a border services officer (“BSO”) in the General Technical Group classified at the FB-03 group and level. His job is located in Saint John, New Brunswick.

[2] By letter dated November 8, 2013 (“the November 8 letter”), the grievor was suspended for 20-days (150 hours) without pay for misconduct. On December 13, 2013, he grieved the discipline and requested that the suspension be reversed, the discipline be removed from his file, all other remedies appropriate in such circumstances be granted, and that he be made whole.

[3] The grievor referred the grievance to the Public Service Labour Relations and Employment Board (“PSLREB”) under s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) on December 16, 2014.

[4] 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 PSLREB and the titles of the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) 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*, and the *Federal Public Sector Labour Relations Act* (“the Act”).

[5] For the reasons set out below, the grievance was allowed in part, and the penalty has been substituted for a lesser amount.

II. Summary of the evidence

[6] The relevant portions of the November 8 letter state as follows:

...

This letter is a follow-up to the pre-disciplinary hearing held on October 7, 2013. During our meeting, it was confirmed that on August 10, 2013 you showed your badge, while off duty, to United States Customs and Border Protection Officers at the Port of Entry in Calais, Maine. You were travelling with others and “flashed” your badge to vouch for individuals who were undergoing a secondary examination. This constitutes misconduct.

In accordance with the principles of natural justice, procedural fairness and the CBSA Discipline Policy & Guidelines, you were given the opportunity, at this hearing, to provide a rationale and/or mitigating factors for your actions.

I have thoroughly reviewed all the evidence and the circumstances pertaining to your conduct and have determined that you [sic] actions were / are in contravention of the CBSA Code of Conduct.

Therefore, in accordance with the delegated authority provided to me under Section 12(1)(c) of the Financial Administration Act (FAA), I have determined that disciplinary action in the form of a twenty (20) day suspension, equivalent to one hundred and fifty hours (150), without pay, is appropriate. . . .

. . .

[7] The grievor joined the CBSA's predecessor in 2000 as a citizenship and immigration officer working at the Port of Entry ("POE") in St. Stephen (Ferry Point Bridge), N.B. With the CBSA's creation, his position was converted to BSO, and he became indeterminate in 2007. After completing his training in late 2007 at the CBSA College at Rigaud, Quebec, his first posting was at St. Stephen. In 2008, he moved to Saint John.

A. CBSA policies

[8] The CBSA's "Code of Conduct" as of August of 2013 appears to have come into force on September 5, 2012 ("the 2012 Code"), and appears to have been sent to all CBSA employees via a mass email on that day from the office of the CBSA's president. It replaced an earlier version that had come into force in late November of 2006 ("the 2006 Code").

[9] In his evidence, the grievor acknowledged receiving and likely reviewing the 2006 Code. But he could not recall receiving and reviewing the 2012 Code, although when shown the mass email, he did acknowledge that he probably did receive it. Its relevant portions state as follows:

Chapter 1: Our Values and Expected Standards of Conduct

. . .

A. Our Values

...

Our Public Sector Values

Integrity

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

Our CBSA Values

Integrity

We exercise our authority in an honest, open and fair manner.

We accept responsibility for our actions in order to build and maintain a reputation of trustworthiness and accountability.

Our Values in Action

We serve the public interest by:

- making decisions and behaving in ways that maintain public confidence and preserve the CBSA's reputation in light of its high visibility;*
- refraining from using our official roles, the Agency's property or assets, and non-publicly accessible information to gain personal advantage or to advantage or disadvantage others;*
- ensuring that our off-duty and private activities and our private financial affairs do not conflict with our official duties; and*
- refraining from making derogatory comments regarding the Agency, its employees (including its managers) or the Government of Canada, especially in public spaces.*

...

D. Expected Standards of Conduct

...

4. Private, Off-Duty Conduct and Outside Activities

Our CBSA values of **Respect, Integrity and Professionalism** guide us throughout our work day. They can also extend to our private time. This is especially true in terms of engaging in outside activities on social media fora, outside employment, and political activities.

We understand that our outside activities and off-duty conduct are usually private matters. They could become work-related matters, however, if they have negative consequences on the Agency. **We avoid such activities, which may include those that:**

- reflect negatively on the Agency, its employees (including its managers) or its programs;
- render us unable to perform a requirement of our duties;
- lead other employees to refuse, be reluctant or be unable to work with us;
- renders us guilty of a breach of the Criminal Code; and
- make it difficult for the Agency to manage its operations efficiently and/or to direct its workforce.

We also avoid activities that place us or the Agency at risk by knowingly associating, outside of our official duties, with individuals or groups who are believed or suspected to be connected with criminal activities.

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

...

7. Care and Use of Government Property and Assets

...

7.1. Badges, Official Identification and Officer or Office Stamps

...

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

...

Examples of misconduct:

- *Flashing an official badge at the border to gain a personal advantage.*

...

[Emphasis in the original]

[10] Also entered into evidence was a copy of the CBSA's "Badge Policy", which was in force as of July 1, 2012, although there was no evidence that the grievor had ever been provided with a copy of it. The relevant portions of it state as follows:

...

2. Application

The Badge Policy applies to Canada Border Services Agency (CBSA) personnel and their managers, working in a qualified badge holder position listed in Section 5 of this policy, as it relates to all matters pertaining to the issuance, safeguarding, control and wearing of the CBSA badge. Roles and responsibilities of all implicated personnel are to be observed.

...

7. Wearing of the Badge

...

7.1 Exceptions

...

3. *Badge holders must not carry their badge as a matter of routine while off duty and will not carry it with them while on leave. It is recognized that there will be occasions when a badge holder will be required to carry their badge with them when they are off duty. For example, an officer who is on standby and may be required to report to work.*

...

8. Roles and Responsibilities

...

8.2 Badge holders

...

11. Complying with the CBSA Code of Conduct which stipulates:

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

...

[Emphasis in the original]

B. Weekend of August 9 to 11, 2013

[11] The International Homecoming Festival (“the Festival”) takes place every year and is co-hosted by the towns of St. Stephen, N.B., and Calais, Maine, which are on either side of the Canada-US border, which is the St. Croix River. In 2013, the Festival took place over the August 9 to 11 weekend. The evidence disclosed that a considerable amount of cross-border traffic between the two towns (largely on foot) occurs, with events and parties held in both towns. The grievor testified that his plan had been to spend that weekend in St. Stephen.

[12] He said that on Friday, August 9, 2013, he was asked to work an overtime shift at the airport POE in Charlottetown, Prince Edward Island. He packed an overnight bag and travelled there in a CBSA vehicle. He said that as his duties were completed at about 1:00 a.m., on Saturday, August 10, 2013, he remained in Charlottetown and returned to Saint John later that morning, at which point he returned the vehicle to the CBSA premises and stowed his gear at the Saint John CBSA facility where he was based. He said that after doing that, he did not return to his home in Saint John but travelled directly to St. Stephen. In the evening of August 10, 2013, he and some acquaintances crossed the border there as part of the Festival.

[13] For the Festival, the United States Customs and Border Patrol (“USCBP”),

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in addition to its usual operations at the Calais POE, had set up tables with computers outside its building under the vehicle canopy to allow for more efficient processing of the high volume of foot traffic. While waiting to be processed at the outdoor entry point, the grievor and five others were directed to enter the building.

[14] As of the hearing, Corey McPhee was the assistant port director at the Houlton, Maine, POE for the USCBP, which is part of the United States Department of Homeland Security. Mr. McPhee has been with the USCBP since 2000, first as an officer, later as a supervisor, and finally as an assistant port director. In August of 2013, he was a supervisor at the Calais POE. He was working on the evening of August 10 when the grievor arrived at that POE.

[15] Mr. McPhee testified that there was steady traffic across the border to the Calais POE but that there were no lines. He stated that he was outside overseeing the temporary primary inspection lines for foot traffic. He said that he was stationed away from them so that he could observe the people on foot as they approached to be processed. He said that when the grievor and those around him passed by, he noticed a strong odour of marijuana. He determined, given the potential presence of marijuana, that a number of individuals would be brought inside the building for processing.

[16] The grievor testified that he was standing in a primary inspection line when he was tapped on the back and instructed to enter the building, which he did.

[17] Darren Morrison is a USCBP officer who worked at the Calais POE both in August of 2013 and as of the hearing. He has been one since 2007.

[18] On August 10, 2013, Mr. Morrison worked as a secondary inspection officer inside the USCBP building at the Calais POE when the grievor and five others were directed inside for processing. Working with Mr. Morrison that evening was another USCBP officer, John Papke, who is now deceased.

[19] Mr. Morrison testified that when the group entered the building, he smelled the odour of marijuana within it. He testified that the individuals were brought inside after computer checks were done. He said that given the odour (which was the reason for individuals being referred inside) it was determined that they would have the individuals empty their pockets. He stated that when they were going to do this, the grievor removed a badge from his pocket and showed it to him and Mr. Papke. Mr. Morrison stated that upon seeing the badge, he asked the grievor who he worked

for, and the grievor told him it was the CBSA. He said that the grievor told him, "You don't have to worry about these guys, they are all right." Mr. Morrison stated that he and the grievor had no other discussion.

[20] In cross-examination, Mr. Morrison said that he asked the group if they had any marijuana on their persons, to which he was told they did not. He confirmed that no marijuana was found on any of the individuals including the grievor.

[21] Mr. Morrison's evidence was that once the search turned up negative, his involvement with the individuals ended. He said that Mr. Papke went and got Mr. McPhee, who came inside. He said that he was not privy to discussions between Mr. Papke and Mr. McPhee, or to Mr. McPhee's discussion with the individuals.

[22] In cross-examination, Mr. Morrison stated that marijuana odour sticks to clothing and that if the grievor and the others had been in a room in which it had been smoked, the odour could have clung to their clothes. When he was asked if they had advised him that they had come from a house party at which marijuana had been smoked, Mr. Morrison stated that that was possible. When he was asked if he had directed his inquiries to the individuals or to the group, Mr. Morrison stated that the questions had been directed to the group. When he was asked if the grievor had been asked to dump his pockets, Mr. Morrison said that he could not recall.

[23] Mr. McPhee testified that after he directed the group inside the building for processing, he remained outside. He said that Mr. Papke briefed him and told him that the grievor had produced his CBSA badge, had identified himself as a CBSA officer, and had said, "I can vouch for the good character of the people in my group."

[24] Mr. McPhee said that he went back inside and had discussions with two members of the group, in addition to the grievor. He said that two of them eventually admitted to him that they had smoked marijuana. Mr. McPhee stated that the other four, including the grievor, were allowed to enter the United States, and that the two who had admitted to smoking the marijuana were not permitted entry.

[25] Before the grievor left the building, Mr. McPhee said that he took him aside and had a discussion with him. Mr. McPhee stated that he told the grievor that he should be more circumspect with the people he vouched for given that they had just smoked marijuana before entering the United States.

[26] Mr. McPhee said that he did not appreciate what the grievor said because, at the

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time, marijuana was illegal in Maine and if someone is doing something illegal, a fellow law enforcement officer should not be vouching for them; it is deceitful, it is unlawful and it is disrespectful. Mr. McPhee stated that the grievor did not say much, that it was more of a one-way conversation.

[27] In cross-examination, Mr. McPhee was asked if USCBP officers ask to see the badges of law-enforcement officers. He stated that sometimes, people are asked what they do for a living and could be asked where they work. If someone works for a law-enforcement agency, he stated that the officers will ask to see a badge.

[28] Mr. Morrison authored an undated memo that stated as follows:

On Saturday, August 10, 2013 at approximately 21:36 hours during the International Festival a group of six individuals applied for admission using the Pedestrian Lane. While inspecting this group the primary officer could smell the odor of Marijuana coming collectively from the group. The group of six were then escorted inside for further inspection.

In Secondary, the group was met by CBPO'S Morrison and Papke. When the group was questioned about the odor of the Marijuana, the group stated they were just coming from a party where Marijuana may have been smoked. A couple of the subjects stated they didn't know what the big deal was because everybody in Canada smokes it. When conducting pocket dumps on the first subject, Ryan Hyslop who was seated at the time, reached into his pocket and presented his badge and stated "I can vouch for these guys, you don't have to worry about these guys I know them really well. CBPO Morrison then asked Hyslop who he worked for. Hyslop stated "CBSA".

[Sic throughout]

[29] On August 18, 2013, Mr. Papke wrote a memo that states as follows:

On Saturday August 10, 2013 six individuals approached the outside Pedestrian lane that was set up to process foot traffic for the International Festival. The Primary Officer could smell the presence of Marijuana coming collectively from the group. The six people were told to report inside to the passenger secondary lobby. CBPO Morrison conducted IBIS queries on the subjects with negative findings. When the group was questioned by CBPO Papke/Morrison about the odor of marijuana the group collectively stated they had been at a residence where it may have been smoked. A couple of the subjects stated that it is just part of the culture that a lot of Canadians smoke marijuana. When pockets of the first individual were being emptied the subject on the end

identified as Ryan Hyslop removed his wallet [from his] front pocket of his shorts and opened the flap producing his badge to both CBPO Papke/Morrison and stated he could personally vouch for each of the individuals. CPBO Morrison inquired of which agency Ryan Hyslop worked and he stated CBSA. When asked by CBPO Papke why as a law enforcement officer he would be present at a location where the possession and use of a controlled substance was being used Hyslop had no verbal response. It was noticed in the interaction by the CBPO with the travelers that only three of the subject [sic] had a very strong odor of marijuana on their clothing and personal effects found in their pockets. As a simple courtesy Ryan Hyslop was not made to empty the contents of his pockets.

...

[30] Mr. McPhee testified that within 15 minutes of speaking with the grievor, he called the St. Stephen POE and told the CBSA that he did not appreciate the grievor vouching. He stated that he believed he spoke with Shaleigh Anthony-Lank.

[31] As of the hearing, Ms. Anthony-Lank was a CBSA superintendent posted at the Campobello, N.B., POE. She began her CBSA career in 2006, starting as a BSO at St. Stephen. She moved to Campobello in 2008. On August 10, 2013, she was an acting superintendent and worked an overtime shift at the St. Stephen Ferry Point Bridge POE.

[32] Ms. Anthony-Lank stated that on August 10, 2013, at about 8:00 or 8:30 p.m., she took a call from Mr. McPhee at the Calais POE. She stated that Mr. McPhee reported:

- concerns about the grievor, stating that he had crossed over as a pedestrian with five or six others and that they had been referred to secondary inspection;
- there was an odour of marijuana on the individuals with the grievor;
- based on the odour the USCBP decided to carry out a pocket search;
- when the pocket search began, the grievor took out his badge and said that he could vouch for the others; and
- that he was upset by the grievor's behaviour and believed that it had been unprofessional.

[33] As of the hearing, Charlene Haughn was a CBSA superintendent. She had been with its predecessor since 1994. In August of 2013, she was the acting chief for

southern N.B. and P.E.I.

[34] Ms. Haughn testified that she became aware of the matter involving the grievor at the Calais POE via an email from Ms. Anthony-Lank at 8:41 p.m. on August 10, 2013, which stated as follows:

...

While working at Ferry Point tonight at approximately 21:10 I received a call from USCBP Supervisor, McPhee.

He reported that this evening (approximately 20:30) they had 6 pedestrians report inwards. All 6 were advised to go to the office for clearance

McPhee reported that when the group of 6 entered the Ferry Point USCBP office, all officers reported smelling a distinct odor of marijuana. He reported that due to this indicator, they began doing pocket searches of all individuals.

McPhee reported that while looking into a cigarette pack one of the pedestrians, Ryan Hyslop "badged" the officer doing the examination and said something to the effect of "I can vouch for these guys, they are okay" while holding his CBSA badge to the USCBP officer. McPhee reported that although the pocket examination was non-resultant, the officers believed that due to the smell of the individuals as well as the smell of two cigarette packs it was believed that they were smoking marijuana just prior to crossing the border.

McPhee reported that he was troubled by Hyslop's choice in "badging" the USCBP officer, his "vouching" for 5 other people who they suspected of potential marijuana and that his behaviour was unprofessional. McPhee reported that he found Hyslop's behaviour very "disconcerting" and that if it was one of his officers, he would definitely want to know.

...

[35] Ms. Haughn received both memos, by Messrs. Morrison and Papke, sometime between August 10 and 21, 2013, because she emailed them to the grievor on August 21 and invited him to a fact-finding meeting scheduled for the next day.

[36] They met for that fact finding the next day. He did not bring a bargaining agent representative, although Ms. Haughn indicated that he had been welcome to have one present and had chosen not to. Her meeting notes were entered into evidence. The grievor had been given an opportunity to review and sign them. The relevant portion of them states as follows:

- the grievor did not want bargaining agent representation;
- he stated that he had exercised a ridiculous amount of poor judgment;
- he said that he had never done anything like that before;
- he said that once when he had crossed the border into the United States, the USCBP Officer had asked him what he did for a living, and when he replied that he was a BSO for the CBSA, he was asked for his credentials, and when he said that he did not have them, he was asked why and was told that he should always have them with him when crossing the border;
- he said that he was “95% sure” that the USCBP Officer who told him to always bring his credentials with him was one of the USCBP officers who interviewed the group at issue on August 10, 2013;
- the grievor said that the USCBP Officer spoke with the individuals and suggested to them that they had “just smoked one”, referring to marijuana, before crossing the border;
- the grievor said that when the USCBP Officer went down the line checking pockets and said that the group had just smoked one before arriving at United States Customs, the grievor took out his badge and said that he could “vouch for the fact that they had not just smoked one”;
- he apologized for any embarrassment he had caused the CBSA and his co-workers;
- he stated that he had never read the Badge Policy but agreed that it made sense;
- he would not have produced his CBSA identification had the USCBP officer not told him to the last time that he crossed;
- he would not produce his badge again; and
- the group consisted of more than six people, but the USCBP selected only six for examination.

[37] Ms. Haughn issued an undated report, which appears to be a typewritten summary of the interview, the relevant portions of which state as follows:

...

I asked him if he wanted Union Representation to be present. He stated that he did not.

When he first entered the office before we even started a discussion he stated that he exercised a ridiculous amount of poor judgement.

I asked if he had ever showed his badge while off duty before. He stated that he had never.

He stated that on a previous occasion he went to a Phish concert with three others and is 95% sure that the same officer was on duty as during this incident.

The CBPO was going to examine their vehicle and asked what they did for a living. When Ryan stated that he worked for Canada Border Services Agency (CBSA) the US CBPO asked to see his credentials. When Ryan could not produce any the CPO stated that he should have it with him the next time that he crossed.

Ryan stated that he never carried his badge before this incident and had never previously shown his badge when off duty.

During this incident Ryan felt that it was the same CPO working and when the CPOs were going down the line checking the pockets of his friends, the CPO stated that the group had just smoked one before arriving at Customs. This is when Ryan pulled out his badge and stating that he could vouch for the fact that they had not just smoked one as he was with them.

...

Summary

- *Ryan HYSLOP, by his own admission, did present his badge vouching for the five other people who were selected for examination.*
- *He felt that he should present his badge and identify himself based on a previous situation with the USCPO.*
- *Ryan HYSLOP showed remorse for his actions and vowed never to repeat this behaviour.*

...

[Sic throughout]

[38] Ms. Haughn stated that after the meeting on August 22, 2013, she typed up the meeting notes and sent them to labour relations (LR), which told her that in a case like this, a 20-day suspension was appropriate. She stated that it had been her first disciplinary action, and she had wanted to be fair to the grievor. She said that she was told that he was a good BSO.

[39] On October 4, 2013, she emailed the grievor, inviting him to a pre-disciplinary hearing set for October 17, 2013. She said that he replied and stated that he thought she had mistyped October 17 for October 7. When she confirmed that it was October 17, to give him enough time to secure bargaining agent representation, she said that he said that he did not want to wait. So the hearing took place on October 7, 2013.

[40] Ms. Haughn said that at that hearing, the grievor apologized again and said that he would never do it again.

[41] Ms. Haughn stated that at that time, she was new to the job, that she did not know the proper range for the suspension, and that LR had told her that it was from 20 to 25 days. She said that after reviewing all the facts, she went with the lower end of the range.

[42] She stated that the grievor had purposely brought his badge with him. She said that he had tried to influence a USCBP officer. The CBSA has a working relationship with the USCBP. The grievor had travelled with five others, and his behaviour had reflected poorly on the CBSA. Reviewing the Badge Policy, Ms. Haughn stated that he used his badge to curry favour from another law-enforcement group. She stated that the badge was used to avoid examination.

[43] In cross-examination, Ms. Haughn confirmed that the grievor was perceived as a good team member and a positive officer and that she had received good reports from his supervisors. She confirmed that he was cooperative and remorseful and that he apologized and told her that he would never do it again. She confirmed that he showed integrity throughout the interview. She said that she believed him.

[44] In cross-examination, Ms. Haughn was asked what she understood the grievor had vouched for, to which she said that they (the group of people he was with) had not smoked one (marijuana) with him. When she was asked if she understood that he was

vouching for the other persons' character, she said no.

[45] In cross-examination, Ms. Haughn was asked if the grievor had explained that he brought his credentials with him on the night in August because of his interaction with the USCBP when he had crossed the border for a concert in Bangor, Maine, in July. She said that he had done so.

[46] The grievor testified that on August 10, large events were held in both St. Stephen and Calais, and there was significant pedestrian traffic between the two towns. He stated that when he crossed the border, it was with a group of about 12 to 15 people, of whom he would consider 3 or 4 friends.

[47] He said that as he waited in line, he was part of a group of six that was steered inside. He stated that no one suggested to him that he smelled of marijuana. He stated that as he walked over the bridge, no one smoked marijuana, and that when he was shown the reference to him vouching for people, he said that he had vouched for the fact that he and his group had not smoked marijuana while walking over the bridge.

[48] He stated that while they were inside the USCBP building, the USCBP officers had them empty their pockets and suggested adamantly that they had smoked marijuana while coming up to the border.

[49] The grievor stated that the USCBP officers did not speak directly to him or anyone else but to the group of six as whole. He said that they were adamant in their questioning that marijuana had been smoked as the group had walked up to the border crossing. He said that he told the officers, "I don't know if this helps. I walked down with them and didn't see them smoke." He said that after he said it, Mr. Morrison asked him where he worked. He replied that it was with the CBSA.

[50] The grievor testified that just before the border crossing at issue in August, in July, he crossed the border by car on his way to the concert in Bangor and was the driver. He said that he was asked a number of questions, including where he worked. When he said it was the CBSA, he was asked for his badge identification. He replied that he did not have it, and he was encouraged to bring it with him next time. Another passenger, also a BSO, had his badge, and the grievor stated that the USCBP Officer told him that that badge was the reason they would not be referred to secondary screening.

[51] In his evidence, the grievor said that immediately after producing his badge,

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he realized that he had made a mistake. He felt sheepish and realized that he had likely placed himself in a bind. He explained why he felt and expressed remorse for doing what he did and for putting the CBSA in a difficult position.

[52] In cross-examination, the grievor stated that he knew the five others who were inside the USCBP building with him although he would consider only one of them a friend.

[53] No one had suggested that the grievor smelled of marijuana; nor was it suggested that he had smoked marijuana.

III. Summary of the arguments

A. For the employer

[54] The grievor acted in a way at the Calais POE that caused the USCBP Supervisor on duty to call the CBSA and complain.

[55] The questions to be answered are: Was there misconduct? If so, was the 20-day suspension appropriate in the circumstances?

[56] The grievor is not only a public servant but also a peace officer. As such, he is held to a higher standard. In this respect, the employer referred me to *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24.

[57] Mr. McPhee found the grievor's behaviour of producing his badge to the USCBP officers unprofessional. It went to the very core of the CBSA's business, which made it serious. It could be interpreted that by producing the badge, the person believes that he or she is above the law.

[58] A BSO who acts like the grievor did cannot be given the benefit of the doubt.

[59] The grievor produced his badge during a secondary search, something he is familiar with as a BSO. As such, he should have known what is and what is not acceptable. Indeed, he admitted that he should have known better; Mr. McPhee stated as much.

[60] The employer submitted that the grievor's conduct raised questions about how he sees and performs his job, the public's perception, and the CBSA's integrity. His behaviour was unacceptable, and it gave the impression that that is how the CBSA and its employees operate. It is a matter of reputation, trust, and credibility.

[61] The facts disclose that a group was inside the USCBP office at the Calais POE. When the first person in the group was searched, the grievor produced his badge to USCBP officers Morrison and Papke. Mr. Morrison was not challenged on that evidence.

[62] Mr. Papke's statement, in an email, also referred to the grievor removing his wallet, producing his badge, and stating that he was personally vouching for those with him. Mr. Morrison also stated in his evidence and in his statement that the grievor stated: ". . . you don't have to worry about these guy's [*sic*] I know them really well."

[63] The USCBP officer's statement should be compared with the grievor's first suggestion that the search of the others was well underway when he produced his badge and his second statement, which was that he had not vouched for the others but only that no one in the group had smoked any marijuana while walking to and across the border.

[64] When Ms. Haughn interviewed the grievor, he had copies of the written statements of both Messrs. Morrison and Papke. He was given copies of them twice, once before the interview with Ms. Haughn and once after it, at a pre-disciplinary hearing. The employer submitted that he had two opportunities to clarify the difference in timing of when he produced his badge and what he said to the USCBP officers.

[65] The employer submitted that I should not accept the grievor's account of what he said he was vouching for when he produced his badge to the USCBP officers, as it is not in line with their written statements or with what was reported to Ms. Anthony-Lank and set out in her email after she received the call from Mr. McPhee.

[66] The employer submitted that Ms. Haughn stated that the grievor did not report what he had done. Had he been embarrassed by his conduct, he should have called. She felt that he did not fully understand the gravity of what he had done. When he was asked why he felt remorse, he stated that some people might not understand what he had done and might feel that it was unacceptable behaviour. This is not really accepting responsibility or demonstrating remorse.

[67] The grievor stated that he intervened because in his eyes, the process did not proceed the way he felt it should have. He knew this because he is a BSO. Therefore, he knowingly interfered, to help his friends.

[68] The employer's position is also that the grievor did not fully cooperate.

[69] The employer referred me to Brown & Beatty, *Canadian Labour Arbitration* (4th ed.) at para. 7:3330, entitled, “Unethical conduct”, which it submitted goes directly to the core of the behaviour.

[70] The employer submitted that *Stokaluk, Mercer v. Deputy Head (Department of Human Resources and Skills Development)*, 2016 PSLREB 11, and *Labadie v. Deputy Head (Correctional Service of Canada)*, 2008 PSLRB 85, all stand for the proposition that not being familiar with the provisions of the employer’s rules or policies is no excuse. It is common sense that the grievor should have known not to use his badge.

[71] The employer also referred me to *Pike v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 1, and *Blair-Markland v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-28988, (1991103), [1999] C.P.S.S.R.B. No.123 (QL).

[72] The employer also pointed me to *Mercer* and to *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106, which address mitigating circumstances when addressing the issue of the penalty in discipline cases.

B. For the grievor

[73] The grievor submitted that a 20-day (150-hour) suspension was severe for the misconduct and suggested that a more appropriate penalty would be something between a written reprimand and a 5-day (37.5-hour) suspension.

[74] The grievor submitted that in her testimony, Ms. Haughn referred to a number of aggravating factors that she considered when determining whether a 20-day suspension was appropriate as opposed to a 25-day suspension. They were as follows:

- seven people saw the grievor produced his badge (the two USCBP officers and the five others in the Calais POE office);
- the badge was produced while the two USCBP officers were inspecting the group for marijuana;
- he is a representative of Canada in its dealings with the United States;
- the action of producing his badge to the two USCBP officers would not withstand public scrutiny;

- he knew that he should not have produced it;
- he produced it to influence the two USCBP officers; and
- producing his badge to influence them was a premeditated act.

[75] When asked about mitigating factors, Ms. Haughn stated that she considered the following:

- his years of service;
- his positive service and that he did a good job; and
- his contributions to a positive work environment.

[76] Ms. Haughn stated that given the mitigating factors, she opted for a 20-day suspension, based on the range of 20 to 25 days advised by LR.

[77] The grievor submitted that when Ms. Haughn was asked if he had cooperated with the investigation, if he was remorseful for his conduct, if he had apologized for it, and if he stated that he would never produce his badge again, she replied “Yes” to all four questions.

[78] The grievor had never before been disciplined.

[79] The grievor referred me to *Davidson v. Deputy Head (Canada Border Services Agency)*, 2017 PSLREB 42, *Stewart, Gatien v. Deputy Head (Department of Human Resources and Skills Development)*, 2013 PSLRB 101, and *King v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 31.

[80] In *Gatien*, the grievor, a manager, received a 10-day suspension for barricading some offices in her work unit using cardboard boxes and tape. The Adjudicator found that she was a 35-year employee with a discipline-free record who readily admitted to her conduct, expressed remorse, and stated that it would not occur again. But she was met with a severe disciplinary response. The Adjudicator found, “If the purpose of discipline is corrective . . . imposing a 10-day suspension was excessive.” The 10-day discipline was set aside, and an oral reprimand was substituted. A claim for monetary damages above and beyond the 10 days of wages and benefits lost due to the suspension was denied.

[81] In *King*, the grievor, a BSO with the CBSA and a local union president, was given a 20-day suspension for writing an email to the then Minister of Public Safety, with copies to the Prime Minister, the President of the TB, the Toronto Star, and Global News. The email was deemed to have constituted misconduct as it contained unsubstantiated allegations critical of the employer. At paragraph 280 of the decision, the Adjudicator addressed the appropriateness of the penalty and reduced it from a 20-day to a 10-day suspension, consistent with the progressive discipline model.

C. The employer's reply

[82] Ms. Haughn's inexperience should not be used against her; she took steps and asked a number of questions.

[83] The facts in *Gatien* are distinguishable.

[84] *King* involved a breach of the duty of loyalty. The grievor's misconduct in this case deserved more than the 10 days given to Mr. King.

[85] An oral reprimand would not demonstrate the importance and seriousness of the misconduct.

IV. Reasons

[86] Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the employer. Any issues with respect to the investigation of the facts that led to disciplining the grievor were remedied by the hearing *de novo* before me.

[87] The usual basis for adjudicating discipline issues involves considering the following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 (QL)): Has the employee given reasonable cause for some sort of discipline by the employer (i.e. was there misconduct by the grievor)? If so, was the discipline the employer imposed an excessive penalty in the circumstances? If it was excessive, what alternate measure should be substituted that is just and equitable in the circumstances?

[88] At the outset of the hearing, the grievor did not dispute that his conduct had constituted misconduct. His position was that the amount of the discipline had been excessive.

[89] The facts are largely not in dispute. However, there appears to be some disagreement as to the interpretation of some of those facts, their context, and whether some of them should go to the question of the severity of the penalty imposed.

A. What was the misconduct?

[90] The first question I must answer involves determining the misconduct.

[91] It appears undisputed that on Saturday, August 10, 2013, after working an overtime shift in Charlottetown until approximately 1:00 a.m., the grievor returned to his normal work location, dropped off the CBSA vehicle he had used to travel to Charlottetown from Saint John, stored his equipment, and continued on to St. Stephen. Later that same day, in the evening, along with some others, he crossed into the United States on foot and was in line outside the Calais POE USCBP building awaiting processing to enter the United States when he was asked to proceed inside.

[92] It is undisputed that the grievor was asked to go inside because it appeared to USCBP Supervisor McPhee that when the group passed by, the grievor appeared either to be walking with or in the vicinity of what carried the distinct odour of recently smoked marijuana. The grievor, as well as five others, proceeded inside as a group and were dealt with by USCBP officers Morrison and Papke.

[93] It is also undisputed that at some point while inside the USCBP building, the grievor produced his CBSA badge and showed it to USCBP officers Morrison and Papke. He was asked where he worked, and he identified himself as a BSO with the CBSA.

[94] No marijuana was found on anyone. According to Mr. McPhee, he cleared four of the group to enter the United States. He testified that because two of them admitted to smoking marijuana, he denied them entry.

[95] No suggestion was made that the grievor had smoked, possessed, or even smelled of marijuana.

[96] I have no evidence as to the other 5 in the group or of their relationship with the grievor except for his admission in his evidence that he knew all of them but considered only 1 a friend. The grievor also stated that a much larger group of 12 to 15 had walked together and crossed the border to Calais. This evidence is undisputed. Mr. McPhee's evidence was that he was outside, overseeing the processing

of visitors at the POE. An inspection point had been set up outside to handle the high volume of foot traffic. He stated that he smelled marijuana and determined that certain people would be sent into the USCBP building for further scrutiny.

[97] While Mr. McPhee stated that he spoke to the grievor, he acknowledged that the grievor did not say much. In fact, there is no evidence that the grievor said anything to Mr. McPhee, who called the CBSA and spoke to Ms. Anthony-Lank to complain. In turn, she merely passed Mr. McPhee's concerns on to Ms. Haughn. Mr. McPhee's account of events was based on the information that Mr. Papke had provided to him. While Mr. Papke did write a memo some eight days later, he had died by the time the hearing was held and so could not be cross-examined.

[98] Only the grievor and Mr. Morrison, both of whom testified, were present when the grievor produced his CBSA identification and spoke. Mr. Morrison stated in his evidence that the grievor told him, "You don't have to worry about these guys, they are all right." In his undated memo, Mr. Morrison stated that the grievor said, "I can vouch for these guys, you don't have to worry about these guy's [sic] I know them really well." Both in his evidence before me and in his memo, Mr. Morrison stated that he asked the grievor where he worked, and the grievor replied that it was the CBSA.

[99] The grievor's rendition of what he said to Mr. Morrison was somewhat different. He stated that he vouched for the people he was with but only that they had not smoked marijuana either as they had crossed the border or on their walk to it.

[100] Mr. Morrison also stated that the grievor pulled out his badge, of which much has been made. Not lost on me is the fact that the grievor removed his badge from his pocket when he was in secondary examination and Messrs. Morrison and Papke were in the process of carrying out a pocket search on the group of six. In cross-examination, Mr. Morrison stated that he did not recall if the grievor had been asked to dump his pockets specifically but did state that all six had emptied their pockets. The simple fact of the matter is that the badge was going to come out of his pocket and be produced, and the USCBP would know his identity as a BSO. This was a foregone conclusion because of the process the USCBP officers carried out.

[101] Mr. McPhee stated that Mr. Papke told him that the grievor had said that he could personally vouch for the good character of the people in his group. However, Mr. Papke's August 18 memo suggested that the grievor had stated that he could personally vouch for each person in the group. The two alleged comments, albeit

similar, have a subtle difference. Indeed, another difference in the evidence is that in his memo, Mr. Papke stated that the grievor had not been required to empty his pockets, yet the evidence of Mr. Morrison was that all six persons had been required to empty their pockets and that the search had turned up nothing.

[102] The employer submitted that I should not accept the grievor's rendition of what he said he had vouched for. This is surprising and somewhat disconcerting since Ms. Haughn, who both conducted the investigation by interviewing the grievor and imposed the discipline, stated in her evidence that she believed that the grievor had vouched that the people he had walked with had not smoked marijuana on the way to the border. She also stated that she did not believe that he had vouched for the characters of those singled out by Mr. McPhee for secondary screening.

[103] This brings me back to the November 8 letter, which stated that the discipline was imposed because the grievor had "flashed" his CBSA badge "... to vouch for individuals who were undergoing a secondary examination."

[104] If I accept the evidence of Ms. Haughn, who as of her investigation and the hearing had been prepared to accept that what the grievor had told her was true, the grievor stated a fact about the group of people he was walking with in response to questions being put to that group about smoking marijuana as they approached the border. The difficulty lay in the use of the word "vouch".

[105] The *Canadian Oxford Dictionary*, 2nd Ed., defines "vouch" as follows: "1. To take responsibility for or express confidence in (a person or thing); guarantee the reliability of. . . 2. Confirm or verify the truth or existence of something by providing proof or assurance".

[106] Based on the meaning of "vouch", the grievor's use of it in his position as a BSO while crossing the border could certainly be seen as holding out a guarantee or confirming or verifying the truth or existence of something, which, in the context of being identified as a BSO, would be a breach of the 2012 Code under the section entitled, "Our Values and Expected Standards of Conduct", which states as follows:

- serve the public interest by making decisions and behaving in ways that maintain public confidence and preserve the CBSA's reputation in light of its high visibility; and
- refrain from using the official role or the CBSA's property or assets to

gain personal advantage or to advantage or disadvantage others.

[107] The grievor's use of "vouch" in the context presented could also be seen as breaching the 2012 Code under the section entitled "Expected Standards of Conduct; Private, Off-Duty Conduct and Outside Activities", in which it states that outside activities and off-duty conduct are usually private matters, but they could become work-related if they have negative consequences on the CBSA. While I have some doubt as to the exact nature of the exchange between the grievor and Messrs. Morrison and Papke, based on the evidence, there is no doubt that the grievor's conduct on the evening of August 10, 2013, did not reflect positively on him or on the CBSA, as evidenced by the reactions of the USCBP supervisor at the time, Mr. McPhee.

[108] Finally, it is clear that the grievor used the word "vouch" after he had been identified as a BSO and after producing his identification, which breached both the 2012 Code and Badge Policy, both of which forbid using a job title, official identification, and badge for a purpose that is illegal, improper, or against the CBSA's best interests. At the very least, having his CBSA badge and identification on him and stating that he vouched for the others, even to simply state that they had not smoked marijuana while crossing the border, went against the CBSA's best interests.

[109] These undisputed facts establish that the grievor breached both the 2012 Code and the Badge Policy. While there was no evidence that he had actually ever seen or reviewed the Badge Policy, the references to the possession and use of the CBSA badge and identification in the 2012 Code and Badge Policy are strikingly similar.

B. Was the penalty excessive?

[110] The grievor was suspended for 20 days (150 hours) or, had he worked a regular Monday-to-Friday job, the equivalent of 4 weeks.

[111] With respect to the amount of the penalty, Ms. Haughn stated that LR informed her that a 20- to 25-day suspension was appropriate. She also admitted that this had been her first foray into discipline.

[112] In *Davidson*, the grievor received a 3-shift (30-hour) suspension for insubordination related to a direct order, which was that grievor unlawfully arresting and detaining a Canadian citizen at the border. The Board upheld the penalty. In *Stewart*, the grievor received a 75-hour suspension for soliciting and accepting tickets to an Elton John concert when clearing the singer's entourage upon his arrival

at the Lethbridge, Alberta, airport. This penalty was also upheld. In the recent decision of *Brown v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLR 2, the grievor was given a 3-shift (25.71-hour) suspension for neglect of duty, which the Board did not reduce. She had allowed a visitor to Canada after he had lied to her about bringing firearms into the country and been arrested, she failed to address the arrest and his inadmissibility into the country, and allowed him to unload his own vehicle (at times unsupervised) to locate the firearms. She then unilaterally reduced the related fine and released him into the country without addressing his inadmissibility. In *King*, the grievor had written a highly derisive email to the Minister of Public Safety with copies to the Prime Minister, the President of the TB, the Toronto Star, and Global News. The grievor received a 20-day suspension, which was reduced to a 10-day suspension.

[113] All of *Davidson*, *Stewart*, *Brown*, and *King* involved BSO employees of the TB who worked at the CBSA. The misconduct of Ms. Davidson, Ms. Brown, and Mr. Stewart all occurred in the course of their duties.

[114] The employer referred me to *Pike*, at para. 27, where the Adjudicator stated the following:

[27] In determining whether a disciplinary measure is proper, the adjudicator must consider two things: whether the employer has established the alleged misconduct, and if so, whether the disciplinary measure is proportional to the wrong committed.

[115] Discipline is meant to be corrective, not punitive. But in some circumstances, the conduct is so egregious that the only appropriate discipline is termination of employment.

[116] When I view the grievor's misconduct and gauge it against misconduct that other BSOs have committed both within and outside the course of their duties (see *Davidson*, *Stewart*, *Brown*, and *King*), I do not find it is as serious as the misconduct that was attributed to those BSOs.

[117] In addition, the grievor had a discipline-free record and was well-liked by his co-workers and supervisors. He cooperated with the investigation of Ms. Haughn, admitted what he had done, and apologized for his conduct. Ms. Haughn believed he expressed genuine remorse, and so do I.

[118] I therefore find the 20-day suspension was an excessive penalty. A suspension

of one day (7.5 hours) without pay would be just and equitable.

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

(The Order appears on the next page)

V. Order

[120] The grievance is allowed in part in that the 20-day (150-hour) suspension without pay is replaced with a 1 day (7.5-hour) suspension without pay.

[121] The grievor's pay and benefits shall be adjusted accordingly.

March 6, 2019.

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