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Citation: 2019 FPSLREB 113

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

TERRY KOWAL

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Kowal v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: James R. Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Erin Sandberg, counsel

For the Respondent: Alexandre Toso, counsel

Heard at Montreal, Quebec,
September 24 and 25, 2019.

REASONS FOR DECISION

I. Summary of the events giving rise to the grievance

[1] Terry Kowal ("the grievor") is employed by the Treasury Board at the Canada Border Services Agency ("CBSA" or "the respondent") in the Border Services Officer ("BSO") Group. His job is located at the Canada United States (U.S.) border crossing at Noyan, Quebec.

[2] For very many years, the Kaiser family has run a farming operation near Noyan, Quebec, approximately 3 kilometres from the Canada - U.S. border. Occasionally, the farming operation obtains supplies from the U.S. On July 20, 2010, Mathias Kaiser attempted to return to Canada from the U.S. at the Noyan border crossing with supplies, including 6 gallons of permethrin, a type of insecticide ("the goods").

[3] Due to the nature of permethrin, a Health Canada permit was required to import the goods into Canada, which Mr. Kaiser did not have. The BSO on duty at the time, Mr. "F" (name anonymized for privacy reasons), who did not testify, seized the goods and advised Mr. Kaiser that they would be held for 40 days or until a permit was obtained.

[4] On July 20, 2010, Mr. F issued Mr. Kaiser a CBSA form entitled, "Non-Monetary General Receipt" ("K-24"). It signified the seizure of the goods pending a permit.

[5] Three days later, on July 23, 2010, the grievor, also a BSO, was on duty at the Noyan border crossing when Mr. Kaiser returned and informed the grievor he had chosen not to bother seeking a Health Canada permit. Rather, he would simply return the goods to the U.S.

[6] When he released the goods to Mr. Kaiser, the grievor signed the K-24, indicating that the goods had been exported on July 23, 2010. The grievor did not supervise the export of the goods to the U.S.

[7] Mr. Kaiser did not immediately return his goods to the U.S. Instead, he drove directly back to the family farm. He had his son return the goods to the U.S. distributor on July 27, 2010. When CBSA management learned of the events of July 23, 2010, a disciplinary investigation was conducted. A disciplinary hearing was held on

July 15, 2011, at which time the grievor acknowledged his misconduct and expressed remorse for his actions.

[8] On September 10, 2011, the grievor was informed of his sanction, a one-day suspension without pay, to be served on September 15, 2011.

[9] The grievance was filed on September 17, 2011, and was denied at every level.

[10] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) 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. 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that Act read immediately before that day.

[11] 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 *PSLREBA* 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*.

[12] The grievance was referred to adjudication, and I heard it on September 24 and 25, 2019, in Montreal, Quebec. For the reasons that follow, I dismiss the grievance. The one-day suspension that was initially imposed was a fair and just sanction for the misconduct at issue and will remain in place.

II. Summary of the evidence

[13] The grievor's BSO work description contains the following narrative:

…

> *As Officers [sic] with law enforcement responsibilities provides border control for the protection of Canadian society and economy*

> *through the facilitation of legitimate cross-border traffic and the prevention of the entry of people and goods that pose a potential risk to Canada.*
>
> …

[14] The same document contains the following passage concerning the BSO's responsibilities:

> …
>
> *Based on observation, questioning and analysis of data, decides whether to release goods into Canada, to admit, allow to leave or refuse entry to individuals and to initiate the arrest or removal of individuals who fail to comply with Canadian laws or who pose a risk to Canada. During enforcement activities applies various levels of sanction including warnings, monetary penalties, seizure of goods, documents and/or conveyances, detention or arrest, imposing conditions on individuals for entry, removal and refusal. Decisions are based on the application of legislation and guidelines. Discretion is often used to render a decision that is balanced and fair and will withstand a legal challenge.*
>
> …

[15] None of the individuals directly involved in any of the events at the Noyan border crossing took the witness stand — not the grievor, the BSOs, or any member of the Kaiser family.

[16] Two witnesses testified, both on behalf of the respondent. The grievor called no evidence. He relied on the information provided by the respondent's witnesses to make his case.

[17] The internal investigator, Hervé Dominique, and the grievor's immediate supervisor, Mélanie Dinarzo, each testified. Each introduced a number of documents into evidence. Each testified from memory and from time to time relied on Mr. Dominique's investigation report, along with other documents.

[18] Ms. Dinarzo was absent on leave from October 8 to December 7, 2010. Mr. "G" (name anonymized for privacy reasons) was the acting superintendent in her absence.

[19] Mr. Dominique testified as to how the internal investigation was initiated. The introduction to his investigation report reads, in part, as follows:

> …
>
> 5. *In November, 2010,* [Mr. G] *was acting superintendent at the Clarenceville and Noyan offices. In a report submitted to*

> *management on November 18, 2010, he indicated that three inspectors of the Noyan office who wished to remain anonymous had informed him of an incident that took place in July 2010 and that involved misconduct by* [the grievor]. *The story revealed that, initially, on July 20, 2010, BSO* [Mr. F] *had detained six gallons of herbicides imported by FERME IMPÉRIALE, using an official CBSA form* [K-24]. *The goods were not compliant with Health Canada regulations, and an import permit was required for them to be admissible. The report stated that, a few days later,* [the grievor] *released the goods to the importer without having the latter satisfy the Canadian import requirements and that the importer brought inadmissible goods into Canada.* [Mr. G] *therefore examined the K-24 and noticed that, on July 23, 2010,* [the grievor] *had authorized the export of goods to the United States.…*
>
> …

[20] The internal investigation mandate was formalized on November 26, 2010, assigning Mr. Dominique, assigned to the CBSA's Professional Standards unit at the time, who conducted it.

[21] At that time, a separate and independent investigation was also ordered into certain aspects of the grievor's private business interests because of a concern over a real or perceived conflict of interest. Mr. Dominique conducted this investigation as well. The conflict-of-interest allegations were fully investigated and were determined unfounded, and resulted in no disciplinary action of any kind.

[22] On December 7, 2010, Ms. Dinarzo returned to the office after her leave, at which time Mr. G told her about what he had heard around the office concerning the events of July 23, 2010. She immediately asked the grievor for his side of the story. He provided her with a note dated December 15, 2010, which reads as follows:

> *As per your request for me to respond to "rumeurs that the goods held on - K24# A066168 - were not exported".*
>
> *On July/23/2010, Mr. Kaiser presented himself to our counter in Noyan to ask if his goods were still to be held by us. I explained that he would need the OK from other gov. dept. or agencies to import them, ex: import permit from ARLA. Mr. Kaiser understood and decided to export them. I signed + dated the K24 and stapled it in our book. Mr. Kaiser understood that the goods must be exported + left with them, returning to his vehicle. I went on with the daily routine in our office. Today and in the past I have no reason to believe that the goods were not exported.*
>
> [*Sic* throughout]

[23] Ms. Dinarzo forwarded the note to Mr. Dominique, who read it on February 8, 2011. On February 11, 2011, he emailed the grievor to schedule an interview with him. The grievor informed Mr. Dominique that in August of 2010, he had obtained from the Kaiser family a commercial invoice proving that the goods had been exported and had stapled it to the book of K-24 forms. The grievor provided Mr. Dominique with a copy of the invoice, which is date-stamped, "July 27 2010 Rouses Point, NY".

[24] An agreed statement of facts (ASF) submitted by the parties in advance of the hearing indicates that Mathias Kaiser had attempted to enter Canada with the goods on July 20, 2010, and returned to the Noyan border crossing office on July 23, 2010, and spoke with the grievor about them.

[25] According to Mr. Dominique's notes of his interview of Mr. Kaiser, on July 23, 2010, Mr. Kaiser told the grievor that he had decided not to bother with obtaining an import permit and that he would simply return the goods to the U.S. distributor for a refund. The invoice indicated a purchase price of $119.70 for the six gallons of permethrin.

[26] Mr. Kaiser told Mr. Dominique that the grievor handed him the box containing the permethrin, along with clear instructions to export the goods. Mr. Kaiser fully intended to, but as it happened, he apparently received a call that he was needed back at the farm. Instead of driving the goods back to the U.S., he put them in his truck and drove straight to the farm.

[27] Mr. Kaiser told Mr. Dominique that he had thought there might have been a bit of leeway in the instructions the grievor provided. Mr. Kaiser was not under the impression he had to return them to the U.S. right away, which is why he decided to attend to family business at the farm instead of going directly to the U.S. with the permethrin.

[28] Mr. Kaiser told Mr. Dominique that while it was at the farm, the permethrin was never removed from the truck. It stayed there for four days, at which time Mr. Kaiser instructed his son, Nathan Kaiser, to take it back to the U.S. distributor and obtain a refund. On July 27, 2010, the younger Mr. Kaiser did as his father asked, but not by way of the Noyan border crossing. He went through Rouses Point, NY, which is about 10 km away.

[29] Ms. Dinarzo and Mr. Dominique testified that they were not aware of any member of the Kaiser family (or any aspect of the Kaiser family farming operation) ever having been implicated in any suspicious cross-border activity in the past. By all accounts, the Kaisers are "frequent fliers" at the border, with an unimpeachable record. No enforcement measure was ever taken against any of them or their farm as a result of the events of July 23, 2010.

[30] Mr. Dominique testified to receiving information from Mr. G to the effect that some of the BSOs at the Noyan office had viewed a video showing Mr. Kaiser driving the truck carrying the goods in question straight into Canada on July 23, 2010, instead of making the two left turns required to drive directly back into the U.S.

[31] Mr. Dominique did not view the video footage in question because it had been erased. Recordings are kept for only 60 days.

[32] Mr. Dominique interviewed the grievor on February 18, 2011, at which time the grievor admitted to having certified, by way of the K-24, the export of the goods to the U.S. The grievor emphasized to Mr. Dominique that he had had no reason to suspect that Mr. Kaiser would not export them, per his instructions. He admitted he did not observe Mr. Kaiser's departure because the telephone rang, and he answered the phone instead.

[33] The grievor added that a closed-circuit camera is in place for viewing the movement of vehicles, but at the relevant time, the viewing monitor was not located in the work area. The monitor was in a side room away from the counter, so the grievor was unable to view it. He simply trusted Mr. Kaiser to follow instructions and export the goods. The grievor told Mr. Dominique that Mr. Kaiser is a "low-risk individual" who is well known and trusted in the Noyan office.

[34] Ms. Dinarzo, the decision maker for the disciplinary matter, reviewed the investigation report and decided to hold a disciplinary hearing.

[35] The disciplinary hearing was held on July 15, 2011. Ms. Dinarzo testified that at the hearing, the grievor offered a complete admission to the allegation. He said he told Mr. Kaiser the goods could not enter Canada and had to be exported. He acknowledged to Ms. Dinarzo that although he signed the K-24 indicating the goods had been exported, he did not actually see them being returned to the U.S. He acknowledged that

doing so was part of his duty but he chose to answer the telephone instead, which is also part of his duty. The grievor told Ms. Dinarzo he knows and trusts Mr. Kaiser and had no reason to suspect that this trusted individual would not immediately follow his instructions. Ms. Dinarzo testified to the grievor's clear expression of remorse at the disciplinary hearing, and she counted it as a significant mitigating factor.

[36] According to Ms. Dinarzo, other mitigating factors were the grievor's lengthy service with the CBSA and his discipline-free record. She accepted the incident as an isolated event and completely out of character for him.

[37] According to Ms. Dinarzo, the aggravating factors were twofold. First, the grievor was less than completely forthcoming when the July 23, 2010, incident was brought to light. As early as August of 2010, he could have indicated the existence of the commercial invoice showing the eventual export of the goods on July 27, 2010. Instead, he waited until much later to disclose it. Nor did he provide a full and frank account of his actions in the December 15, 2010, message to Ms. Dinarzo, and he did not "come clean", as she put it, until his disciplinary hearing on July 15, 2011.

[38] The second aggravating factor, according to Ms. Dinarzo, had to do with the nature of the goods in question that the grievor had allowed into the country. Permethrin requires an import permit because it constitutes an environmental and/or health risk. There was no control over how the goods were stored once they left the Noyan border crossing office. There was also no proof (other than circumstantial) that the chemicals returned were the same, in terms of quantity or composition, as the chemicals that left the Noyan border crossing.

[39] Ms. Dinarzo consulted others in management and familiarized herself with similar disciplinary cases in an effort to arrive at what she felt was a fair and just sanction. She felt that a range of two or three days' suspension without pay was in order, but she decided on a single day because of the weight of the mitigating factors.

[40] On September 10, 2011, the grievor was informed of his sanction, consisting of a one-day suspension without pay, to be served on September 15, 2011. Two days later, the grievance was filed.

III. Summary of the arguments

A. For the employer

[41] *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL) ("*Scott*"), provides the framework for the analysis that must be conducted. First, was there a factual basis for imposing discipline? If so, was the disciplinary measure imposed excessive? If so, what should the appropriate measure consist of?

[42] The employer submitted that there was a factual basis for imposing discipline, that the sanction was not excessive and should not be altered. An employer is entitled to impose discipline for an employee's failure to follow procedures and for carelessness in performing duties, as illustrated by the following cases:

- *Brown v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 2;
- *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37;
- *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106;
- *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-02-15583 (19870331), [1987] C.P.S.S.R.B. No. 85 (QL);
- *Mercer v. Deputy Head (Department of Human Resources and Skills Development)*, 2016 PSLREB 11; and
- *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72.

[43] *Mercer*, at para. 55, suggests that "… an adjudicator should reduce a disciplinary penalty only if it is clearly unreasonable or wrong." According to the respondent, this is consistent with *Scott* in that determining whether a penalty is excessive is equivalent to determining whether it falls into the range of reasonableness or is clearly unreasonable or wrong.

[44] There are good reasons to give the respondent leeway in terms of determining the proper disciplinary penalty in any given circumstances. As stated in *Rolland Inc. v. Canadian Paperworkers Union, Local 310*, [1983] O.L.A.A. No. 75 (QL) at para. 30:

> ***30*** *In all of the circumstances, we are not inclined to interfere with the penalty which the employer has chosen. As a general rule, we do not believe that it is desirable for a board of arbitration to attempt to "fine tune" a managerial decision respecting discipline which is not in itself unreasonable or excessive. To do otherwise*

> *would merely encourage costly litigation as grievors, hoping for perhaps minor gains (whatever the over-all [sic] cost) press their bargaining agents to carry every discipline matter forward to arbitration….*

[45] The respondent knows the context of the workplace best. The discipline imposed may be tied to specific goals or stances that it is attempting to enforce. In this case, one of the prime considerations was to impress upon all BSOs the importance of properly carrying out one of their main duties.

[46] The respondent addressed one of the aggravating factors identified by Ms. Dinarzo, namely, the grievor's failure to fully disclose all the details of the July 23, 2010, transaction when he had the opportunity. He was not deliberately dishonest, but he was certainly less than forthcoming, which should be taken into account as an aggravating factor.

[47] According to the respondent, given all the circumstances of this case, the discipline was properly imposed for a clear policy violation and was not excessive. The grievance should be dismissed.

B. For the grievor

[48] The grievor submitted there is no factual basis for imposing discipline in this case. His exercise of discretion of not keeping Mr. Kaiser in his line of sight to ensure the immediate export of the goods did not amount to misconduct.

[49] With his 25 years of experience, the grievor knows Mr. Kaiser very well, and he properly evaluated the risk associated with the situation. He trusted Mr. Kaiser to do as instructed and then continued with his duties, which included answering the telephone.

[50] The respondent provided no reasons for not following up and imposing some sort of sanction upon Mr. Kaiser for improperly importing the goods.

[51] There was no closed-circuit monitor at the front workstation that would have permitted the grievor to answer the telephone and watch the movement of Mr. Kaiser's truck at the same time. It is interesting to note that after this event, monitors were installed in the Noyan border crossing office to address this shortcoming.

[52] The grievor's suspension letter states only that he "… acted in violation of the policies and procedure listed in the *Memorandum D* and in the *CBSA People Processing Manual*" as well as the CBSA's *Code of Conduct*. This text is overreaching and vague and offers no information as to precisely which actions were disciplined. No articulation is made of the aggravating and mitigating factors considered or the weight assigned to each one; it states only that they were taken "into consideration".

[53] In fact, the vagueness of this suspension letter is such that the grievor only became aware at this hearing that he was not being disciplined for the conflict-of-interest allegation. The investigation report clearly delineates two separate and distinct areas of misconduct under investigation. Ms. Dinarzo's interview template, for the July 15, 2011, disciplinary hearing, clearly also contained questions for the grievor on the conflict-of-interest issues. Management never formally advised him that no action would be forthcoming on the conflict of interest. The first he heard of this particular development was at the hearing, from Ms. Dinarzo, on the witness stand.

[54] Despite the respondent's assertion that the grievor was less than transparent in his actions, the grievor maintained he cooperated fully. Why else would he voluntarily provide proof of export in the form of a copy of the commercial invoice showing the return of the goods? He not only stapled the invoice to the book of K-24s but also provided a copy to the investigator when he was asked for it.

[55] Indeed, at paragraph 46 of his investigative report, Mr. Dominique concludes as follows: "The information gathered does not allow for a conclusion that, on July 23, 2010, [the grievor] acted deliberately when Mathias KAISER temporarily imported goods into Canada."

[56] Furthermore, the grievor maintained that the incredibly long delays between the alleged misconduct and the investigation and suspension indicate an incoherence in the respondent's claim that the July 23, 2010, events justified discipline. It could not possibly have been an urgent situation since nothing was done to ensure that these events could not happen again, especially given the frequency with which the Kaiser family crosses the border in the furtherance of its farming operations.

[57] The investigation into the July 23, 2010, incident was formally mandated on November 25, 2010. Interviews took place in February of 2011, and the final report was delivered to management on May 25, 2011. It is a long-standing principle that

employers must sanction individuals in a reasonably expeditious fashion. The grievor submitted that this case was not expeditious, and the unreasonable delay undermined the respondent's claim that border integrity was threatened.

[58] In *Heyser v. Deputy Head (Department of Employment and Social Development)*, 2015 PSLREB 70, an employee suspected of having deliberately falsified documents was allowed to remain on the job, which indicated that she posed no risk to the organization's operations. Similarly, in the present matter, the lack of enforcement action against Mr. Kaiser and the length of time it took to bring the matter forward undermine the respondent's claim that the grievor's actions threatened the integrity of the Canadian border.

[59] Thus, maintained the grievor, there was no basis for imposing discipline in the first place, as per the three-part test articulated in *Scott*.

[60] Should the grievor not be successful in this argument, he maintained that the one-day suspension was excessive and that it should be replaced by a written reprimand, owing to the absence of aggravating factors and the presence of three strong mitigating factors, namely, a 25-year discipline-free career, his cooperation with the investigation, and the unreasonable delay in imposing discipline in the first place.

[61] The grievor referred to *Desjarlais v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 88, to demonstrate an adjudicator's ability to replace an overly punitive disciplinary measure with one that is more reasonable under the circumstances.

IV. Analysis and reasons

[62] John Sopinka, QC, was a Justice on the Supreme Court of Canada. His book, *The Law of Evidence in Canada*, (2nd ed., Toronto, Butterworths) is still a leading authority in this area of the law. He has this to say about hearsay, at page 173:

> *Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or proof of assertions implicit therein.*

[63] The best evidence comes from the person who can provide a first-hand account of the events and can thus be subjected to cross-examination. Communication

overheard and subsequently repeated is subject to interpretation by the person who heard it, which can affect the quality of the message.

[64] Proceedings at the Board have a much lower threshold for the admissibility of hearsay evidence than, say, proceedings in a criminal court, but the same concerns about the potential pitfalls of hearsay evidence can still arise.

[65] This hearing was characterized almost entirely by way of hearsay evidence, which was, at times, impressively layered. Take, for example, the discussions surrounding the CBSA video footage of the Kaiser's farm truck. The footage purportedly depicted the truck leaving the Noyan border crossing site for Canada, instead of turning around and heading for the U.S.

[66] One or more of the grievor's colleagues, who initially wanted to remain anonymous, viewed the footage, accepted what it depicted as being true, and told Mr. G (the temporary acting supervisor in the Noyan office) about it. Mr. G did not view the video himself, but he told the internal investigator of its brief existence (erased after 60 days) and of its potential significance vis-à-vis the grievor's culpability. Mr. Dominique made notes about the content of the video footage, documented them in his investigation report, and testified to the video's temporary existence as well as its potential significance to the allegation against the grievor.

[67] My first-year professor for the Law of Evidence would have literally salivated at the multiple-hearsay implications of this fact pattern, which, had he conceived of it, would most surely have made its way onto my final exam. I can only hope I would have answered the problem then as I address it now. I cannot accept the phantom video footage for the truth of its contents. I include this example only to demonstrate the depth and breadth of some of the hearsay issues present in this hearing.

[68] The only witnesses, Mr. Dominique and Ms. Dinarzo, based their testimonies on what they had heard other people say. Most if not all of the time, I think they got it right, especially when their testimonies were corroborated by other documents, such as the commercial invoice or the K-24. At one point, briefly, the facts were a bit foggy. There was a moment of "which particular member of the Kaiser family did what" with the goods, until the ASF stepped in to provide clarity.

[69] At no point in the hearing was I ever invited to entertain an objection concerning hearsay evidence.

[70] Nor was any issue made of the credibility of either witness. Both of them provided forthright, credible, and truthful testimony. Mr. Dominique's one-time Kaiser-family-member confusion aside, I find that any vagueness or uncertainty about details was due solely to the passage of time and not to any bias or vested interest in the outcome.

[71] Ms. Dinarzo testified that at the July 15, 2011, disciplinary hearing, the grievor fully admitted to having knowingly neglected his duty to properly supervise the export of the goods on July 23, 2010. This is classic hearsay; an out-of-court statement being introduced for the truth of its contents. However, it was a statement against interest made by the grievor, which he had the opportunity to rebut by way of oral testimony and did not. Ms. Dinarzo had no apparent or imaginable reason to embellish this aspect of the case or to misrepresent the truth of what happened at the disciplinary hearing. Therefore, I accept as true her characterization of what the grievor said. This is an important aspect of my decision to establish the allegation of misconduct.

[72] I also accept as true Ms. Dinarzo's sincere account of the expressions of remorse and regret offered by the grievor at his disciplinary hearing. According to Ms. Dinarzo, the grievor knew what he did was wrong, and he said he sincerely regretted it. I accept this expression of remorse as a significant mitigating factor.

[73] The grievor chose not to testify, even though he was present throughout the testimonies of both of the respondent's witnesses. This does not affect the validity of certain assertions, such as his 25 years of service unblemished by a prior disciplinary history. Nor does it affect the sincerity of his expression of remorse.

[74] However, his lack of testimony does make it difficult to accept certain other submissions at face value. The grievor submitted that his actions on July 23, 2010, were a justifiable exercise of discretion and risk assessment.

[75] Risk assessment, it must be said, is a highly subjective exercise. It is difficult to blindly accept his risk assessment in the absence of the respondent's ability to cross-examine him on his choices at the time.

[76] Some pressing questions come to mind on the issue of risk. For example, how urgent was it to answer the phone rather than stand there and watch, to ensure the farm truck made those two left turns rather than carry on straight into Canada? Apparently, other BSOs were on duty. Could one of them not have answered the phone? Did it need to be answered right away? Is there not a voicemail system in place? If he felt he just had to answer it, could the grievor not have said to the caller, "Hold the line, please, I have a very brief duty to attend to", and gone back to watch the truck for all of 10 seconds or so?

[77] Absent some convincing testimony from the grievor, I find that I reach a completely different assessment of risk. Ask any reasonable person to weigh the unauthorized entry of apparently hazardous insecticide into the country against answering the telephone. Watching a farm truck for a few moments is by far the more risk-averse option. The ringing telephone can wait. If the call was urgent, the caller would most assuredly have called back or at least left a message.

[78] The grievor also submitted that the first time he became aware he was not facing any disciplinary action for the conflict-of-interest issues alleged in the investigation report was at the hearing. Although the grievor characterized this as an important mitigating factor, he only brought it up in final submissions. There was no support by way of direct evidence, only circumstantially, in documents entered by the respondent.

[79] Had he taken the witness stand, the grievor could have answered some key questions about his level of understanding of his degree of jeopardy at the different stages of the process.

[80] As it is, I am forced to go by the documents on file to determine what the level of the grievor's understanding would likely have been. The suspension letter, dated September 6, 2011, refers to only one misconduct allegation. It opens with the following: "This letter is further to our meeting of July 15th, 2011. At this meeting, we discussed the professional standard report investigation PS 10-277 (the Report) triggered by the events of July 23rd, 2010."

[81] The grievance of his one-day suspension without pay was filed on September 17, 2011, and was considered at the first level on October 28, 2011. On November 2, 2011, he acknowledged receipt of the decision to deny his grievance at

that level, which again clearly makes reference to only one misconduct allegation, as follows:

> *The Employer considers that the misconduct you committed on July 23 2010, Acting in violation of the exportation of goods directives, constitutes a severe lack of you obligation and responsibilities as a border Guard. Consequently I maintain my decision to suspend you for 1 day.*
>
> [*Sic* throughout]

[82] His grievance was also denied at the next level, and the grievor acknowledged this decision with his signature on January 24, 2012. The denial of the grievance is articulated in these five paragraphs:

> …
>
> *This refers to your grievance (number 2011-3921-106172) in which you contest the Employer's decision to suspend you without pay on September 15th, 2011.*
>
> *As a corrective measure you request that the Employer reimburse you for that day of suspension without pay, with all benefits, and explain the reason for the suspension. You also request that all documentation should be removed from your permanent file and that no prejudice should be held against you.*
>
> *A grievance hearing took place on October 31st, 2011 with Mr. Florent Roy, President of CIU's Eastern Townships Branch and Mr. Patrick Toupin, Labour Relations Advisor.*
>
> *As a Border Services Officer (BSO), it is one of your main responsibilities and obligations to ensure that products which do not have appropriate permits, be exported diligently.*
>
> *After reviewing all the information contained in the file and the arguments put forward by your union representative at your hearing, I am of the opinion that, on July 23rd, 2011, you failed to apply the* Exportation of Goods Directive *by not controlling the products exportation to the U.S.A. By doing so, you failed to one of your main responsibilities and obligations as a BSO.*
>
> [*Sic* throughout]

[83] So far, it certainly sounds to me as though the grievor was being taken to task only for his failure to properly supervise the export of the goods on July 23, 2010 (the incorrect date in the previous paragraph is obviously a typographical error).

[84] If there are any lingering doubts as to the extent of the grievor's jeopardy, they must certainly be dispelled by the text of the reply to the grievance at the final level, which the grievor acknowledged by way of his signature on October 15, 2012:

> *This is in response to your grievance dated September 17, 2011, in which you grieved management's decision to suspend you without pay on September 15, 2011. As corrective action, you requested that your suspension be rescinded and the 7.5 hours of lost pay be reimbursed with full benefits.*
>
> *I have carefully reviewed the circumstances giving rise to your grievance and considered the submissions made by your Customs and Immigration Union representative.*
>
> *The suspension was imposed as you failed to ensure that products, which did not have the appropriate permits, were returned to the United States under CBSA supervision without delay. Your negligence resulted in the importation of these products to Canada.*
>
> *You failed to meet your obligations and responsibilities as a Border Services Officer. Therefore, I find that your suspension was a reasonable measure to impress upon you the seriousness of your misconduct.*
>
> *As such, your grievance is denied and no further corrective action will be forthcoming.*

[85] It is difficult to imagine how the grievor could possibly think there was any ambiguity as to the scope of his misconduct. No mention was ever made, at any level of consideration of his grievance, of anything at all to do with a conflict-of-interest allegation. The only allegation mentioned (and it was mentioned consistently) was that of failing to properly supervise the export of the goods on July 23, 2010. His argument of vagueness and lack of specificity fails utterly.

[86] It is also difficult to accept, by way of bald assertion in final submissions rather than through sworn testimony, the grievor's position that he cooperated fully with the investigation. Had he taken the witness stand, the grievor could have answered questions about the apparently deliberate omission of an important detail in his December 15, 2010, note to Ms. Dinarzo. His last sentence in that note reads, "Today and in the past I have no reason to believe that the goods were not exported." No reason other than, perhaps, the presence of a commercial invoice he obtained four months earlier, indicating that the permethrin that he certified as having been duly exported on July 23, 2010, was apparently exported four days after that, on July 27, 2010.

[87] Had he taken the witness stand, the grievor would also have had the opportunity to explain why, in August of 2010, he did not follow up with a suggestion to management for enforcement action when he learned that Mr. Kaiser had

deliberately ignored his order to export. One possible explanation is that the grievor was likely quite content to simply let sleeping dogs lie, hoping his neglect of duty would never come to light.

[88] Neglect of duty carries an important *mens rea* component. This Latin expression literally means “guilty mind”, and it means that in order to prove neglect of duty, it means proving the person in question knew he or she had a duty to perform, and deliberately decided not to perform it.

[89] The grievor made an outright admission at his disciplinary hearing on July 15, 2011, that he knowingly neglected his duty. This is more than sufficient proof, on the balance of probabilities, of *mens rea*. However, I also find the grievor’s deliberate withholding of important information (the existence of the commercial invoice, and the decision not to suggest enforcement action against Mr. Kaiser), because it would reveal his own misconduct, to be additional circumstantial evidence of a guilty mind.

[90] I agree with both parties: *Scott* provides the framework for analysis in this case, and the first step is to determine whether misconduct occurred that warranted a sanction. On the balance of probabilities, I find clear, convincing, and cogent evidence that on July 23, 2010, the grievor knowingly neglected his duty to properly supervise the export of the goods he had turned over to Mr. Kaiser. The allegation is founded, and there was a valid basis for imposing discipline because the proper control and supervision of people and goods at Canadian border crossings is at the heart of the CBSA’s mandate.

[91] The next step in the *Scott* analysis is an assessment of whether the sanction imposed was reasonable. This involves assessing the aggravating and mitigating factors.

A. Aggravating factors

[92] Owing to the grievor’s neglect of duty, chemicals that posed a potential environmental or health risk were permitted to enter Canada without the proper authorization. They stayed here for four days before they were taken back to the U.S. The respondent would have me consider this an aggravating factor. It is not one. These

facts are not external to the events in question; they are an integral part of the misconduct itself.

[93] Mention was also made of the uncertainty over whether the chemicals returned to the distributor on July 27, 2010, were in fact the same ones that the grievor released into Mathias Kaiser's custody on July 23, 2010. I find that absent any additional evidence whatsoever, the fact that the materials impounded on July 20, 2010, had a reported value of $119.70 and seemed to have been refunded for this same amount on July 27, 2010, is sufficient proof that the goods simply remained in the Kaisers' farm truck for four days, as per Mr. Dominique's interview notes. Nor, then, do I consider this to be an aggravating factor.

[94] In fact, the only aggravating factor I can find, which is why I dedicated so much effort to discussing it, is the grievor's lack of cooperation. He was not deliberately dishonest about anything, but he was quite content to wait quietly and see if his misconduct would go undetected or unpunished. When he did provide information, he left incriminating details out.

B. Mitigating factors

[95] The grievor would have me accept as a mitigating factor the length of time between the offence date and the date on which the sanction was imposed. He characterized 14 months as unreasonable. I cannot agree. First, as I have already mentioned, he was quite content to let sleeping dogs lie and did not bring any information to light until he was obliged to. This delayed the ultimate resolution of matters by several months.

[96] The investigation into the events of the grievor's misconduct on July 23, 2010, was relatively simple. However, it was accompanied by what was likely a much more complex investigation into the conflict-of-interest allegations, which are very serious in the public service and cannot be dismissed until a thorough investigation is conducted. This takes time. Ultimately, the conflict-of-interest allegations were unfounded, but only after a fulsome investigation was carried out.

[97] All things considered, it is not surprising that 14 months passed from the event to the discipline. Given all the circumstances, I cannot find this length of time unreasonable, and I certainly do not find that it amounts to a mitigating factor.

[98] Mitigating factors are present, however. The grievor's lengthy record of blemish-free service is important. I also appreciated hearing about his admission of responsibility at his disciplinary hearing of July 15, 2011, along with his expressions of regret and remorse. They are significant mitigating factors. I can only add that I would have preferred to hear these words from the grievor himself, but I do not doubt he said them.

[99] I agree with Ms. Dinarzo's position on the appropriate sanction for misconduct of this nature. I feel that a period of two to three days' suspension without pay is appropriate. Canadians must be able to rely on BSOs, who are often the first and last line of defence, to control the movement of goods and persons across our borders. A deliberate failure in that duty strikes at the heart of the CBSA's mandate and can lead to serious consequences. Even though the stakes were fairly low in this case, the gravity of this type of misconduct cannot be reflected in a mere letter of reprimand. Suspension without pay is clearly in order.

[100] The mitigating factors are significant, and I find they outweigh the aggravating factor. On this basis I am inclined to reduce what would normally be a two-or-three day suspension to a single day.

[101] Given all the circumstances of this case, and given the relative weight of the mitigating factors over the sole aggravating factor, a one-day suspension without pay is the appropriate sanction. Since this is the sanction imposed in the first instance, there is no need to proceed to the third phase of the *Scott* analysis.

[102] For all of the above reasons, I make the following order:

(The Order appears on the next page)

V. Order

[103] The grievance is dismissed.

November 25, 2019.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board