Date: 20210127

Files: 566-02-13057 to 13061, 14405, 40774, and 40775

Citation: 2021 FPSLREB 7

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

ADRIAN CWIKOWSKI

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Respondent

Indexed as
Cwikowski v. Treasury Board (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Doug Hill, representative, Public Service Alliance of Canada

For the Respondent: Caroline Engmann, counsel

Heard at Kelowna, British Columbia,
February 19 to 22, March 8 (via videoconference), and September 16 to 19, 2019.

REASONS FOR DECISION

Table of Contents

I. Summary

[1] This decision considers a series of many incidents, which gave rise to three discipline-related grievances plus another two grievances alleging that Canada Border Services Agency (the employer) violated the collective agreement, of which one alleged that a human-rights violation had occurred.

[2] The collective agreement at issue was between the Treasury Board and the Public Service Alliance of Canada for the Border Services Group. It expired on June 20, 2018 ("the collective agreement").

[3] The evidence established that during some of the times at issue, Adrian Cwikowski ("the grievor") experienced quick and heated emotions, triggering loud and at times profane verbal communication from him in the workplace. He maintained that the evidence did not clearly establish such wrongdoing, that in some of the cases at issue, he felt justified by external factors, and that in at least one of the incidents, he pleaded that a workplace injury and long-standing illness were mitigating factors that should excuse his conduct.

[4] After careful analysis of all the evidence and argument, I conclude that only two of the three incidents that led to a three-day suspension for the grievor warranted discipline. Given this conclusion, I substitute a one-day suspension.

[5] I conclude that the incident that led to the five-day suspension warranted discipline. Considering all the circumstances, I substitute for it a two-day suspension, given my decision to reduce his previous three-day suspension to one-day.

[6] I allow the grievance arising from his 8-day suspension and rescind the discipline as I find that the evidence of his alleged unprofessional behaviour was not clear, cogent, or compelling.

[7] On the first collective-agreement grievance, the grievor challenged a delayed return-to-work decision on the part of the employer on the grounds that it violated the collective agreement article on sick leave without pay.

[8] Despite the grievance being referred to adjudication on the ground of that article, the parties argued the case as if it were an allegation of a human rights - failure

of a duty to accommodate. The only remedy sought was the grievor's salary for the days he was kept off work after his doctor had cleared him to return to active duty.

[9] I conclude that the employer did not participate, as is required, in a meaningful and timely collaboration with the grievor and his union to identify obvious and readily available means to accommodate the grievor. I allow the grievance as the employer unreasonably refused to assign the grievor work shifts when he was ready to work. I order the grievor be compensated as if he returned to work on March 31, 2015, rather than the actual return on April 24, 2015.

[10] On the second collective-agreement grievance, I reject the grievor's claim that he was harassed and discriminated against when his supervisor, Superintendent Michael Cacchioni, travelled to where he was stationed, after they had had a heated exchange to start the shift, and caused an incident.

[11] Both parties provided drastically different testimony of their actions. While it was unwise of Superintendent Cacchioni to follow up on the heated exchange at the start of the shift by driving to the grievor's post and attempting to have another private discussion, I will not allow the grievance due to this alone.

[12] Given these evidentiary findings, I determine that it is equally probable as it is not that the Superintendent did, as alleged, confront the grievor in a hostile, profane, and unprofessional manner.

[13] As such, I conclude that the grievor failed to discharge his burden of proving that violations occurred of the no-discrimination and no-harassment clauses of the collective agreement.

[14] Given this evidentiary finding, I need not consider the employer's submission that I am without jurisdiction to hear the harassment allegation in that grievance.

II. Background

[15] Three out of the five grievances are discipline-related and were referred to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication pursuant to s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). This provision allows grievances to be referred to adjudication when disciplinary action was taken that resulted in a termination,

demotion, suspension, or financial penalty. In such matters, the employer carries the burden to show that the discipline was warranted.

[16] The parties jointly submitted that the case law before the Board governing discipline is well established and traces to the case of *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL)("*Wm. Scott*").

[17] I summarized this authority as follows in my decision in *Braich v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 47:

> …
>
> ***15*** *The Board frequently cites the decision in* 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*"), as authority for determining whether there was just and reasonable cause for a termination.* Scott *finds that for a dismissal for cause to be considered just, firstly, the employer must consider whether the employee has given it just and reasonable cause for some form of discipline. Secondly, it must be determined whether the decision to dismiss the employee was an excessive response in all the circumstances. And thirdly, if the adjudicator considers that the dismissal was excessive, then he or she must determine the measures that should be substituted as just and equitable (see* Scott*, at para. 13).*
>
> ***16*** *For the first two elements,* Scott *considers the seriousness of the offence, whether it was premeditated or spontaneous, whether the employee had a long-standing and good record of service, whether progressive discipline was attempted, and finally, whether the discharge was consistent with the employer's established policies or whether the employee was singled out for harsh treatment (see paragraph 14).*
>
> …

[18] I shall follow this authority in my analysis of the discipline grievances as set out in the next section.

III. Analysis

A. The discipline grievances

1. Files 566-02-40774/40775: 3 day suspension-3 incidents with unhappy travellers

[19] This grievance relates to a three-day suspension imposed on the grievor on February 23, 2014. For administrative reasons, the Board opened two files regarding this grievance (566-02-40774 and 40775).

[20] The grievor argued that an undue delay amounted to a condonation of his actions, which thus vitiated the eventual disciplinary action in the form of his three-day suspension. He also argued that the evidence did not establish that he had been unprofessional in his interactions with travellers. He further argued that the employer ignored the fact that one of the travellers at issue provoked him, thus justifying his more assertive response.

[21] The evidence established that the grievor was involved in interactions at border crossings with travellers to Canada that reportedly left them unsatisfied with his standard of professionalism.

[22] The grievor's disciplinary letter that arose from his three interactions with the unhappy travellers was dated February 8, 2014, noted the following:

On July 28, 2013:

- A male Canadian (who will be referred to as "Traveller Ri") and his wife returned from a same-day trip to the United States (US). He declared that he had some groceries in the trunk of his car. Upon inspection, the grievor discovered an undeclared dozen beer and a prohibited bottle of herbicide, the latter of which was inadmissible to Canada as a small-lot importation.
- The grievor performed a secondary search and allowed the traveller to abandon the herbicide. The letter noted that the grievor failed to complete the proper paperwork to process the abandoned herbicide.
- The traveller later complained that the grievor had been rude and aggressive. The traveller claimed that he was admonished for not having a front licence plate and that he was threatened that things could have been much worse for him for not properly declaring his purchases.
- The traveller claimed that the experience had made him feel violated, embarrassed, and threatened. He also claimed that the grievor had lacked composure and that he had been abusive.

On August 13, 2013:

- A Canadian citizen, Scott Munro, who made regular trips to the US to import auto parts for his small business, presented at the border and declared his items as being of US origin. Upon inspection, the grievor noted some of the

items contained parts that were marked as made in a third country but that had been assembled in the US with other parts of US origin.
- A discussion ensued, in which the grievor advised Mr. Munro that he had to pay an increased duty on the item containing content from a third country rather than the preferred rate for US products. Mr. Munro protested that he had imported the same items for years and that he had never been required to pay that higher fee.
- Mr. Munro then asked to speak to a manager, to plead his case for the preferred import tariff. The grievor then discussed the matter in the office of Acting Superintendent Tina Whitney. The grievor was directed to give Mr. Munro the preferred rate.
- The letter noted that management witnessed the grievor raising his voice in an escalating situation that seemed to invite an argument with Mr. Munro.

On August 30, 2013:
- Another incident arose with the same Mr. Munro. The letter stated that management overheard and intervened in an emotionally charged exchange at the border-crossing counter and that the grievor was witnessed raising his voice in an escalating conversation with Mr. Munro.

[23] In conclusion, for these three incidents, the employer determined that the grievor's conduct lacked professionalism in how he failed to de-escalate the interactions, which violated the Canada Border Services Agency's (CBSA) "Code of Conduct" ("the Code"). It also determined that he was negligent by failing to document the abandonment of the goods on July 28. The letter stated that his "clean" disciplinary record and length of service, as well as the "… length of time it has taken to render this decision" were considered when arriving at the conclusion to suspend him for three days without pay.

[24] In reaching these conclusions, the employer relied upon the following information, which arose from its investigation:

July 28, 2013:
- Traveller Ri emailed the employer on August 3, 2013, to memorialize the unhappy interaction with the grievor arising from their failure to properly declare their purchases. The email noted that the grievor's attitude changed upon discovering the error in their declaration of their purchases. The traveller stated that the grievor became so aggressive that he told them to put a licence plate on the front of their BMW car. Traveller Ri wrote that he and his wife were aggressively interrogated about their purchases to the point that they felt embarrassed and that their integrity had been violated. Traveller Ri closed his email by stating that "he hoped [he] could recover" from his interaction with the grievor.
- Border Services Officer (BSO) Mark Campbell was on duty, working alongside the grievor, when the incident with Traveller Ri arose. Management asked BSO Campbell to put his observations of the events at issue into writing as part of the employer's investigation.

- BSO Campbell stated that he remembered the interactions and wrote that Traveller Ri was "argumentative" and that he tried to downplay his failure to properly declare the items that he sought to import.
- BSO Campbell also wrote, "At no point did CWIKOWSKI treat the travellers in a rude or disrespectful manner."
- The grievor's memo to management reporting the incident confirmed BSO Campbell's account as it also stated that Traveller Ri was "arrogant and argumentative."

[25] I heard the following testimony about this incident from Superintendent Cacchioni:

- He explained that in a phone conversation on August 28, 2013, Traveller Ri told him that it was grievor's manner and tone in their interaction that had most upset him.
- He testified that Traveller Ri stressed how violated he felt and said that he was scared to travel to the US again for fear that he would once more be met by the grievor upon his return to the border crossing.
- He said that although BSO Campbell told him that the grievor did nothing wrong and in fact that Traveller Ri was problematic in terms of his conduct, BSO Campbell did not observe the primary screening.
- He repeated how Traveller Ri was unwavering in his claims of having been upset and of having felt violated.
- He testified that he also considered that other complaints had been made against the grievor when reaching his conclusion that the grievor had treated the traveler poorly.
- He stated that he believed what Traveller Ri had told him and that he concluded that the grievor had acted unprofessionally.

[26] I note the explanation for the incident involving Traveller Ri that the grievor provided to Superintendent Cacchioni when he had the opportunity to explain himself in a "pre-disciplinary" interview on October 3, 2013, which the employer reduced to a memo and submitted as an exhibit.

[27] In argument, the employer noted that the grievor admitted to being blunt, to pointing out that the vehicle had no front licence plate despite one being required by provincial law, and saying that he told the traveller that he was being let off easy.

[28] The grievor's explanation was consistent with his 2019 sworn testimony before me. Upon my review of the totality of the evidence, it was also consistent with my findings of fact with respect to this incident.

[29] As a finding of fact, I view Traveller Ri's references to how often he had made that trip without incident and that he was driving a BMW as a sign of him being

irritated, and no doubt somewhat embarrassed at being searched and found to have falsely declared his goods.

[30] I also find Traveller Ri's declaration that he "hoped he could recover" from this border crossing experience as evidence of his exaggeration.

[31] Even if I accept all Traveller Ri's allegations, I do not find that his drastic claim of a need to recover befits an objective and reliable observer of events for later reliance at an adjudication hearing.

[32] Most importantly, I note the one direct observer and witness to the interactions, BSO Campbell, whom I take as uninterested in them, who reported, "At no point did CWIKOWSKI treat the travellers in a rude or disrespectful manner."

[33] Superintendent Cacchioni chose not to rely to BSO Campbell, claiming that he did not observe the primary screening. But, for the reasons I have stated, I prefer BSO Campbell's observations of the events at issue.

[34] Given these evidentiary findings, I conclude that on a balance of probabilities, the employer failed at the first step of the *Wm. Scott* analysis of establishing that any disciplinary action was warranted arising from the alleged incident with Traveller Ri on July 28, 2013.

[35] Moving on to the grievor's two incidents with the next traveller, Mr. Munro, the following is pertinent:

August 13, 2013:

- Acting Superintendent Whitney was on duty and working in her office when she overheard the verbal exchange between the grievor and Mr. Munro at the front service counter.
- She summarized her observations in a memo to file dated November 29, 2013.
- In that memo, she stated that she overheard an argument between the grievor and Mr. Munro and that each raised his voice.
- She intervened and asked the grievor to step-back into her office, to discuss the matter. Upon doing so, she observed that the grievor was visibly upset. She noted that he explained the situation to her and that he defended his interpretation of the relevant customs and excise rules as they related to Mr. Munro's commercial goods.
- Her memo stated that she replied that there was so little value at stake in the small shipment that it was not worth the aggravation being caused to him and Mr. Munro.
- The grievor replied that he had every right to demand that Mr. Munro pay the duty and that he did not have to listen to her.

- Her memo stated that the grievor did not utter any profanities at her.

[36] I heard the following testimony about this incident:

From Acting Superintendent Whitney:

- She testified that due to her office being in close proximity to the front service counter, and due to the very loud words and the argument that was increasing in intensity between the grievor and Mr. Munro, she rose from her desk to intervene.
- She testified that both men were loud, emotional, and extremely upset.
- She explained that as she entered the conversation, Mr. Munro said that he wanted to go over the grievor's head to speak to a manager and that the grievor replied with, "How about I fine you."
- She asked the grievor to join her in her office so that she could defuse the situation and speak to him privately. She explained how the issue was him being passionate about his knowledge of the tariff system and stating that Mr. Munro lacked the proper documents.
- She sought the facts of the situation and testified that approximately $16 of duty was at issue.
- She testified that upon receiving the facts of the issue from the grievor, she told him that she felt that his interaction with the traveller was headed in a bad direction.
- She said that she told the grievor that she wanted the traveller to be given the benefit of the doubt on this trip and that she would not agree to his suggested levy of an administrative monetary penalty as she felt that it was too severe under the circumstances.
- She testified that Mr. Munro's written allegations were not true that he heard the grievor swear at her and tell her that he did not have to listen to her.
- She did confirm that the grievor had used the expletive "f***" in his discussion with her but that it had not been directed at her. She added that the grievor had been upset and loud in their discussion in her office and that Mr. Munro would have overheard that.
- She testified that the grievor was passionate about and very knowledgeable in his use of the tariff schedules and legislation but that he had become very emotional and that she had to take him off this file as she sought to de-escalate his situation with Mr. Munro as she did not want the grievor to deal with Mr. Munro again.

August 30, 2013:

- The second interaction with the same Mr. Munro in one month resulted in him writing to the employer and claiming that when he presented himself at the office counter to process his import papers, the grievor approached him.
- He asked to see a supervisor. He claimed that the grievor tried to pull the import papers out of his hands and that Superintendent Cacchioni intervened and ushered the grievor away from the counter.

From Superintendent Cacchioni:

- He stated that he was at work in his office and that he overhead the heated exchange and the loud words between the grievor and Mr. Munro. At that point, he approached them, to intervene and de-escalate the situation.

- The grievor had an explosive temper, which was a concern, as the grievor's notes stated that he was close to using his pepper spray to defend himself against Mr. Munro.
- The grievor reported that Mr. Munro had threatened him with violence.
- The grievor was a trained BSO and must de-escalate and not escalate difficult interactions such as with Mr. Munro.
- The Superintendent stated that in his follow-up with Mr. Munro, Mr. Munro admitted to telling the grievor that he "would kick his ass." But Mr. Munro said that it was said in the heat of the moment.
- The Superintendent stated that he concluded that Mr. Munro had no intent to follow through on his threat to the grievor. He stated that he told Mr. Munro that his conduct had been unacceptable and that he could not choose his BSO upon his arrival at a port of entry.

Mr. Munro appeared at the hearing and testified about the two events involving the grievor and said that;

- He had made this border crossing many times over the years with mostly the same machine parts as on the night in question and said that he had never had a problem before then.
- He confirmed the reports that he overheard the grievor swearing in Acting Superintendent Whitney's office and that he heard the grievor tell her that he did not have to listen to her.
- He said that the grievor was rude and that he threatened to fine him but that Acting Superintendent Whitney would not recommend doing so.
- He denied the grievor's security incident report, which stated that he had called the grievor a "chicken shit" and that he had told the grievor that he would "kick his ass."
- He added that his small business depends upon his frequent trips to the US to import machine parts and that he would never threaten a BSO as doing so could risk him being arrested and losing his ability to cross the border to conduct his business.
- He arrived at the border crossing again on August 30 with a similar load of machine parts and was met at primary inspection by the grievor, who he said began the conversation by asking arrogantly, "Did you do it right this time?"
- He replied by asking to be screened by another BSO. The grievor replied, "You don't get to choose."
- The grievor then approached him to take his declaration and importation papers, but Mr. Munro refused to give them to the grievor. At that point, the grievor began to get angry.
- Superintendent Cacchioni then arrived, to intervene.
- Mr. Munro stated that he felt threatened during the interaction with the grievor due to the grievor's bad temper and to the fact that he was armed with a gun.
- In his cross-examination, Mr. Munro admitted to:
    - raising his voice at the service counter when addressing the grievor; and
    - raising his hand towards the grievor in a gesture to indicate that it was none of his business.

[37] I note that another incident involving the grievor was reported by another unhappy traveller (Traveller L) who had been screened by the grievor and was found to be in possession of undeclared shopping merchandise.

[38] Upon his review of that traveller's complaint, Superintendent Cacchioni concluded that the grievor had not acted unprofessionally due to the fact that the traveller had "clearly done something wrong" and "was not as adamant" in his complaint about the grievor's conduct.

[39] I note at this juncture the apparent approach of Superintendent Cacchioni in investigating reports of BSO misbehaviour. A consistent theme through all the incidents in this hearing is that he is more likely to find that the BSO engaged in wrongdoing the more intense the emotion presented by the unhappy traveller who makes the complaint.

[40] On the other hand, the more the level of the traveller's own wrongdoing, the less likely the BSO will have found to be in the wrong.

[41] My conclusion is that neither of these factors that seemed to sway Superintendent Cacchioni necessarily has anything to do with the BSO's actual actions.

[42] The evidence clearly established that both Traveller Ri and Mr. Munro had done something wrong, but apparently, in the mind of Superintendent Cacchioni, their transgressions were minor and they were very expressive in reporting their displeasure with the grievor.

[43] Therefore, I conclude that the Superintendent seemed to be swayed to a material extent in his determination of the grievor's misconduct by the intensity of the travellers' perceptions of their displeasure at being processed by the grievor.

[44] This adjudication is a hearing *de novo* that cures all previous procedural irregularities that might have tainted the handling of the grievor's file.

[45] However, I note that it is a problem that the employer allows supervisors carrying out disciplinary investigations and decision making to be more swayed by the intensity of a complainant's emotions rather than other, more objective evidence.

[46] In reply to a closing question about these incidents in his examination-in-chief, Superintendent Cacchioni stated that there was no problem with the grievor technically doing his job correctly; rather, how he did his job was problematic.

[47] Counsel for the employer submitted in argument that the grievor had clearly violated the Code as the evidence showed his poor behaviour of treating clients poorly and raising his voice in anger during both interactions with Mr. Munro.

[48] Specifically, the employer cited section 10, entitled "Contact With the Public", as the authority for the grievor's behaviour being unacceptable. Section 10 states:

> *Our CBSA values of respect, integrity and professionalism guide our interactions with members of the public. As CBSA employees we demonstrate these values in a number of ways, including:*
>
> …
>
> *By never making abusive, derisive, threatening, insulting, offensive or provocative statements or gestures to or about another person*
>
> ….

[49] Counsel pointed to the actions of the grievor noted earlier, which she said were determined as accurate in his statements about Traveller Ri, and the two heated and loud interactions with Mr. Munro as violations of the Code.

[50] Counsel stressed the testimony of Superintendent Cacchioni, who explained the need for BSOs to de-escalate situations and to treat agitated travellers in a way that avoids provoking an incident.

[51] Counsel stated that the evidence showed that the grievor actually caused or exacerbated the travellers' agitated emotions to the point that the interactions became problematic.

[52] Counsel for the employer noted the arbitral decision in *Purolator Courier Ltd. v. Public Service Alliance of Canada*, [2005] C.L.A.D. No. 368 (QL) at paras. 48 and 49 ("*Purolator*"), as authority for the proposition that an arbitrator should refrain from second-guessing a disciplinary response by an employer to an employee's proven misconduct unless the response was clearly excessive and was outside the range of reasonable disciplinary responses.

[53] Counsel noted that the *Purolator* decision had recently been cited with approval for its admonishment to arbitrators about substituting a penalty by Arbitrator Beattie in *Union of Calgary Co-operative Employees v. Calgary Cooperative Association Limited*, 2017 CanLII 11097 (AB GAA)("*Co-op*").

[54] Both cases dealt with employees being disciplined for being found to have treated clients poorly and below the high standards required by their employers.

[55] Contrast those cases with *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72, which the grievor relied on. *Touchette* is a recent case of this Board that also considered a BSO who was reported as telling a client that he would "haul his ass back to the USA" after a lengthy discussion became frustrating. It occurred because the officer was unable to obtain a clear answer to what should have been a simple question about the traveller's residency.

[56] The BSO in *Touchette* initially denied making any such statement but later recanted and admitted his wrongdoing. The Board found that despite his changing his story, that he had not in fact lied, and that his long years of service without discipline had not been properly taken into account by the employer when it imposed a two-day suspension without pay.

[57] In general, I am of the view that adjudicators should proceed cautiously before concluding that a given penalty is excessive.

[58] I might have been persuaded to follow the *Purolator* and *Co-op* cases if there were no other mitigating factors being argued by the grievor that make my intervention necessary.

[59] However, when an intervening matter makes the quantum of discipline clearly unjust, such as the grievor argued, the adjudicator's role of finding the penalty excessive and substituting a fair quantum of discipline is engaged.

[60] The grievor's representative submitted that:

- the discipline imposed was untimely, resulting in condonation of the grievor's actions;
- given the *Wm. Scott* framework for considering discipline, I should find that no discipline was warranted in any of the impugned interactions; and
- in the alternative, if I find that discipline was warranted in any or all the interactions, the loss of three days' pay was excessive and not warranted, given all the mitigating factors.

[61] I will analyze each of the grievor's submissions.

a. Grievor submission that delay resulted in condonation

[62] The following dates are at issue with respect to the three-day suspension:

- July 28, 2013: Traveller Ri had the unhappy interaction with the grievor.
- August 3, 2013: Traveller Ri's email was received, reporting his unhappiness.
- August 13, 2013: The first incident with Mr. Munro occurred.
- August 25, 2013: Superintendent Cacchioni phoned Traveller Ri.
- August 28, 2013: Superintendent Cacchioni asked the grievor for his version of the events involving Traveller Ri.
- August 30, 2013: The second incident with Mr. Munro occurred.
- October 3, 2013: The grievor's pre-disciplinary meeting was held.
- February 8, 2014: The disciplinary letter was issued to the grievor informing him of the incidents that resulted in his three-day suspension without pay.

[63] The grievor relied upon the adjudicator's decision in *Chopra v. Deputy Head (Department of Health)*, 2016 PSLREB 89 (*Chopra 2016*), as the authority in matters of delayed investigations and discipline amounting to the condonation of alleged misconduct.

[64] However, I conclude that this decision is not applicable to the present case as the facts in it differ significantly from those in the evidence before me.

[65] As explained in an earlier decision by the Federal Court that had remitted the matter back to the adjudicator (see *Chopra v. Attorney General of Canada*, 2014 FC 246; (*Chopra FC*), aff'd *Chopra v. Canada (Attorney-General)*, 2015 FCA 205), the grievor in that case, Dr. Shiv Chopra and a colleague were employed as evaluators in a review process in which their opinions on veterinary drugs ultimately led to Health Canada approving them for use in animals. The reviewers formed the opinion that their concerns that veterinary drugs were possibly harming humans were being ignored. After they tried to rectify it internally through departmental channels, they began to speak out, in public, to the news media and to the Senate. Their actions led to many lengthy disciplinary processes, grievances, and judicial reviews and ultimately to the termination of Dr. Chopra's employment.

[66] The Federal Court in one of those judicial reviews (*Haydon v. Canada*,2000 CanLII 16081 (FC), [2001] 2 F.C. 82) found Dr. Chopra's speaking out about his views of the risks of harm to the public due to Health Canada's decisions was a justified disclosure of policies that jeopardized life or the health or safety of the public, which was an exception to the duty of loyalty to one's employer (see the Federal Court's decision at paragraphs 15 to 19).

[67] I note the following passages of the PSLREB's *Chopra* decision:

> …
>
> ***8*** *The Federal Court [in* Chopra FC*] summarized the relevant legal principles of condonation (at paragraphs 109, 110, and 196 to 198), which I have addressed in the reasons section of this decision. However, the Federal Court made some observations about the facts in this case that the grievors have submitted are relevant to this rehearing.*
>
> ***9*** *The Federal Court stated (at paragraph 205) that "[t]he relevant question was whether they [the grievors] were made aware in a timely manner that their employer believed that their comments warranted discipline." The Federal Court found that* ***the failure to warn the grievors that their statements warranted discipline had to be considered in light of the positive comments the Deputy Minister made with respect to testimony Dr. Chopra and Dr. Haydon gave in Senate hearings****. The Federal Court noted that the grievors' testimony before the Senate Committee on Agriculture and Forestry also included criticisms of their supervisors' qualifications and allegations of pressure and of reprisals.*
>
> ***10*** *The Federal Court found that the grievors were told that the fact-finding processes were not disciplinary in nature and that* ***the employer allowed them "to make numerous public statements over an extended period without ever advising them that it believed that their comments warranted discipline"*** *(at paragraph 208).*
>
> ***11*** *The Federal Court found that the employer was aware of the comments, and concluded that there is no argument that the delay imposing discipline could be justified on the basis that the employer had only recently become aware of them.*
>
> ***12*** *The Federal Court also noted* ***that Ms. Kirkpatrick knew of the grievors' intent to speak out in advance of the comments, on at least two occasions, and that she did not instruct them not to speak out*** *but rather reminded them of their responsibilities as public servants (at paragraph 210).*
>
> ***13*** *The Federal Court noted that although Ms. Kirkpatrick wrote to counsel for the grievors (on July 31, 2003) that inappropriate activities may result in disciplinary action****, "…*** ***at no point prior to the imposition of discipline did she inform Drs. Chopra and Haydon that she considered their comments to have been inappropriate"*** *(at paragraph 211).*
>
> ***14*** *The Federal Court also found that the employer had made no suggestion that there was any kind of "… 'culminating incident', following which employer forbearance was no longer possible" (at paragraph 212).*
>
> ***15*** *The Federal Court noted that even if it was reasonable for the employer to wait for the Public Service Integrity Officer (PSIO)*

> *investigation report (of March 21, 2003), this did not explain why it took a further 8 months to impose discipline on Dr. Chopra and a further 10 months on Dr. Haydon (at paragraph 214).*
>
> …
>
> ***18*** *The Federal Court also stated as follows:*
>
> > [218] I am not prepared to speculate as to what the applicants would or would not have done, had they been disciplined for speaking out in a timely manner. The purpose underlying the arbitral jurisprudence relating to delay and the principle of condonation is to give employees an opportunity to modify behaviour that an employer believes warrants discipline. **While Drs. Chopra and Haydon may [*sic*] have been aware that discipline was a possibility, they never had a chance to make an informed decision whether or not to risk continuing with their public comments as their employer failed to tell them that it viewed their comments as warranting discipline prior to actually imposing that discipline**.
> >
> > [219] Once again, the implications of all of this are not for me to decide, but were matters to be determined by the Adjudicator who was required to balance Health Canada's explanation for the delay against whatever prejudice had been suffered by Drs. Chopra and Haydon as a result. No such balancing exercise was undertaken by the Adjudicator in this case.
>
> …
>
> [Emphasis added]

[68] On the evidence before me, the grievor was disciplined for what I found was clearly established unacceptable behaviour when he dealt with a client. He should have known that his angry responses and his lack of composure were unacceptable and could not be justified by him being right in applying tariff rules and being provoked by a client's poor behaviour and anger.

[69] The evidence before me also clearly establishes that Acting Superintendent Whitney cautioned the grievor during his first Munro incident that his behaviour was going to result in a complaint against him.

[70] Contrast this with what I just noted in emphasis in *Chopra*, in which the grievor in that case felt justified speaking out about his medical opinions related to human health. And in fact, he did speak out repeatedly, without being sanctioned by his management. After years of litigation, he was found to have been justified in law.

[71] Also, in *Chopra*, the events at issue of the grievor in that case speaking out unfolded over a very lengthy period far in excess of the approximately nine weeks in this case from the time of the first incident with Traveller Ri until the October pre-disciplinary meeting.

[72] For the reasons I have just noted, I accept the employer's counsel submission on this point and distinguish *Chopra* on its facts and find that there was no condonation by the employer of the grievor's poor behaviour.

b. Grievor submission that no discipline was warranted

[73] Firstly, the basis for this submission by the grievor was the fact that he felt offended and what I saw as bordering on morally indignant that his interactions with Mr. Munro went askew due to the fact that he appeared to be the only CBSA officer at the Osoyoos Port of Entry who knew the tariff schedule well enough to properly apply it to the imports being presented by Mr. Munro.

[74] I heard a great deal of testimony that established that the grievor was indeed correct in his efforts to apply the tariff to Mr. Munro's imports. Superintendent Farren Schumaker's admitted this.

[75] I note secondly that the next problematic interaction with Mr. Munro arose from the fact that he had wished to avoid the grievor and had requested a different BSO. That was confirmed as improper when Superintendent Cacchioni testified that he told Mr. Munro that he could not choose his BSO at a port of entry.

[76] And when that interaction quickly descended into anger and acrimony, the grievor said that Mr. Munro threatened him (which Mr. Munro confirmed) such that the grievor considered using his pepper spray. That gave the grievor a sense of justification for his more aggressive posture with Mr. Munro.

[77] The corollary of the grievor's statements was the employer's contention that he lacked insight, understanding, and remorse for his actions as he had blamed Mr. Munro for both incidents.

[78] As noted, I find that the employer's evidence was less than the clear, cogent, and compelling proof that was required on a balance of probabilities to discharge its

burden of showing that discipline was warranted due to the grievor's interactions with Traveller Ri.

[79] However, I agree with the employer that the issues of the grievor being correct on his tariff interpretation and the other matters related to Mr. Munro's actions did not justify the grievor clearly becoming agitated or his clearly escalating anger.

[80] The fact that it was established that the grievor was correct in his interpretation of the tariff is of no consequence.

[81] Acting Superintendent Whitney clearly tried to explain to him that the entire tariff matter involved a potential $16 payment, which, in her opinion, was not worth causing the rapidly escalating incident with Mr. Munro.

[82] She went so far as to try to help the grievor by putting everything into perspective when she then said to him, in the privacy of her office, "This is all going in a bad direction and will result in a complaint."

[83] This should have put the grievor on notice that his behaviour was unacceptable.

[84] However, her testimony established that even in her office, removed from the face-to-face confrontation with Mr. Munro, the grievor was still so loud and agitated with her that Mr. Munro testified that he could hear the grievor's loud voice inside the office from his location at the service counter.

[85] As I have noted, Acting Superintendent Whitney testified that the grievor was extremely upset, yelling, and heated and that he uttered "f***" for emphasis in their discussion.

[86] None of her testimony was challenged in argument. I find that she was a reliable witness and was not involved in any way in the investigation of and meting out of discipline to the grievor.

[87] The grievor argued that he was correct in his interpretation and application of the tariff schedule and that his managers, who held an incorrect view of this matter, caused a provocation in his dispute with Mr. Munro.

[88] I disagree. No difference of opinion over rules and procedures can justify anger and profanity directed in the workplace, which is a failure of professionalism.

[89] The grievor also argued that he was justified in his vigorous reaction to Mr. Munro after being threatened by him. I disagree.

[90] The evidence established that during their heated verbal altercation, Mr. Munro said that he would "kick" the grievor's "ass". The grievor reported that at that moment, he felt that he might have to use his pepper spray on Mr. Munro, to defend himself.

[91] At the hearing, the parties presented evidence and arguments on the proper use of force. I found them lacking relevance to the issues underlying the outcome of this case.

[92] It was an examination of the grievor having become agitated and having failed to de-escalate what should have been a routine transaction with a traveller.

[93] The grievor engaging in such a heated discussion at the office counter, to the point that he considered pepper spraying the traveller, is a problem.

[94] If a BSO encounters a threat and needs to use defensive weapons, it should be done as per their training so as to not risk the response being swayed by heated agitation to the point that the BSO is using a loud and profane voice even after being removed from the face to face confrontation and moving into the superintendent's private office.

[95] For these reasons, I accept the employer's submissions that discipline was warranted due to the grievor's unacceptable behaviour of becoming very agitated and thus unprofessional in his dealing with Mr. Munro, which was contrary to the Code, as noted earlier.

[96] The first step of the *Wm. Scott* analysis is determined in favour of the employer.

c. Grievor submission that a 3-day suspension was unjust

[97] The grievor also argued that the employer took an unreasonable and unjustified amount of time to respond to the different matters. In excess of five months passed before it finally issued a letter of discipline to him in February 2014 advising him that he was being placed on the three-day suspension without pay.

[98] The grievor noted that the essence of workplace discipline is to be corrective when pointing out the unacceptability of behaviour. This is a well-established principle

of arbitral jurisprudence (see, for example, *Hyslop v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 29 at para. 115).

[99] The grievor also relied upon paragraph 29 of the *Chopra 2016* decision, where that grievor was arguing delay amounted to condonation, for the proposition that discipline must be expeditious:

> ***29*** *Counsel also relied on the four factors of condonation set out as follows in* Canadian Union of Public Employees, Local 1718 v. Stapleford Medical Management Inc.*, [2007] S.L.A.A. No. 3 (QL) at para. 81:*
>
> …
>
> 1. unreasonable delay may indicate employer condonation;
> 2. the employee's right to procedural fairness must be preserved;
> 3. delay effectively denies the grievor the opportunity to defend himself or herself;
> 3. the requirement for expeditious discipline is a general arbitral principle applicable even in the absence of evidence of prejudice or unfairness to the employee.

[100] While I find the duration of this discipline process to be lengthy and lacking an explanation for the tardiness by the employer, especially given the relatively straightforward nature of the allegations, I do not find any evidence of prejudice having been caused to the grievor. In fact, no prejudice was claimed in his being able to defend himself in closing submissions on this point.

[101] Neither am I able to conclude that the passage of time could have mistakenly caused the grievor to have the unwitting belief that his conduct in dealing with Mr. Munro was acceptable.

[102] The evidence points to the grievor being told during the first Munro incident by Acting Superintendent Whitney that his conduct was going to lead to a complaint being filed against him. This is contrary to the facts supporting the claim of condonation through delay in *Chopra 2016*.

[103] The employer admitted to the fact that the disciplinary process was not conducted in an expeditious manner as it stated in its February letter of discipline that all aggravating and mitigating factors had been considered, "… as well as the length of time it has taken to render this decision."

[104] In conclusion then on the grievance against the three-day suspension without pay, I find that the first event of the unhappy report by Traveller Ri did not warrant any discipline due to lack of clear and compelling evidence of misconduct.

[105] I find that both Munro incidents merited discipline. The grievor's conduct in both events was proven inconsistent with the Code.

[106] I accept the submission of the employer that it took into account the delay in the conduct of the disciplinary process resulting in the three-day suspension.

[107] Given my finding that the first of the three incidents relied upon in determining the three-day quantum was not supported by the evidence before me, I conclude that the quantum was unjust under all the circumstances and substitute it instead with a one-day suspension without pay.

2. Files 566-02-13057/13058: 5-day suspension – injury and profane shouting

[108] This grievance relates to a five-day suspension without pay. As with the previous grievance, the Board opened two files regarding this matter for administrative reasons (566-02-13057 and 13058).

[109] The grievor admitted that he uttered several loud and profane words after a semi-trailer-truck driver released his air brakes, which injured the grievor while he was on duty at the Osoyoos border crossing. His injury and the terrible pain it caused him were not contested.

[110] The grievor explained that the day before this incident, another vehicle had approached his primary inspection lane ("PIL") booth, and one of its tires had exploded just as it arrived in front of him. He testified that the vehicles are only 24 inches from him as he opens the window on his booth to lean forward and take documents from drivers.

[111] The grievor said the exploding tire made such a loud booming noise that his first thought was that there had been a gunshot. He said that he sat stunned for a brief moment and then checked his body for a bleeding wound. He said that he also looked around him to see if a gunshot had shattered the glass of his booth.

[112] The grievor testified that his supervisor, Superintendent Cacchioni, immediately ran outside to check on the situation. Superintendent Cacchioni said that he heard a

loud bang and asked if there had been a gunshot. The grievor said that he felt shaken and that he developed a headache immediately.

[113] The grievor testified that Superintendent Cacchioni helped him into the office and asked him if he was OK or if he needed to go home. The grievor said that he thought that he would be OK and that he stayed in the office for one hour. At the end of his shift, he went home.

[114] He said that upon arriving home, he decided not to seek medical attention and instead went to bed with a headache. He still felt shaky.

[115] The next day, he returned to duty, again at a PIL booth meeting vehicle traffic. He testified that despite warning signs posted near the CBSA offices, a large semi-trailer approached his booth. As it stopped directly in front of him, literally within inches of him, the driver wrongly released his air brakes, which caused a very loud, sharp, and sudden noise.

[116] The grievor testified that the concussive impact of this hit him so hard that it knocked him off his chair and onto the floor of his guard booth. He said that the noise was so loud and that it hurt him so much it felt like a sharp knife had been stabbed into his ears.

[117] The uncontested evidence established that other staff at the border crossing heard the sound and saw the impact upon the grievor. It caused such concern that another BSO immediately came to the grievor's post to check on him and to offer assistance, and the BSO took over clearing the semi-trailer.

[118] Superintendent Chris Babakaiff testified that he was on duty inside his office in the building nearby to where the grievor was greeting traffic on the evening of the air-brake incident. Superintendent Babakaiff testified that he heard the loud noise of the air brakes releasing and then the four or five expletive-laden comments uttered to the commercial driver.

[119] Superintendent Babakaiff testified that he went outside and found the grievor upset, angry, and in obvious pain. He told the grievor that he would be helped and that he would receive medical attention. He added that he told the grievor that the profanity he directed at the driver was unacceptable and that management "would have to deal with that."

[120] BSO David Lonstrup testified that he was on duty the night of the air-brake incident and that his supervisor asked him to write a report of his observations of it.

[121] He testified that while he had no independent recollections of the event, he reviewed his report and confirmed that it stated that he had observed the loud noise caused by the truck releasing its air brakes and then had heard a loud utterance, "f***", from the booth where the grievor was stationed.

[122] He added that his note stated that he then heard the grievor say, "the f****** air brakes." When he was asked in cross-examination if the profanity had been directed at anyone, he replied that he did not know.

[123] The grievor admitted in his examination-in-chief that the severe pain he experienced caused him to swear aloud. He also testified that his profane outburst was not directed at anyone; rather, he was just his expressing pain and his frustration at the situation.

[124] In his testimony-in-chief, the grievor stated that while he "let loose" with a profane outburst at the driver, he said that he did not talk to or swear at the driver. Rather, he explained that he swore at the situation. He also acknowledged that the driver would have heard his profane outburst.

[125] Counsel for the employer noted in her argument that in his June 25, 2014, email to Superintendent Cacchioni, the grievor admitted that he used colourful "trucker" language with the truck driver who had caused the grievor's injury by releasing the air brakes.

[126] She also noted the incident report, which stated that the grievor was very upset because he believed that the driver might have intentionally released the brakes, intending to injure the grievor, and that the grievor wanted it investigated.

[127] In argument on this matter, counsel for the employer also pointed to what she suggested were admissions of guilt from the grievor purportedly extracted from him during questioning by the employer at what the CBSA termed a "pre-disciplinary" hearing that was held on August 2.

[128] The alleged statement made by the grievor was committed to an email note on August 4, 2014 by Superintendent Cacchioni. It states that the grievor yelled at the

driver, “What the f*** are you doing? For f*** sakes, what the f*** are you thinking?” He then yelled “F***!” at the driver four or five times. It stated that the grievor confirmed those statements and added that he had been in extreme pain and had been extremely angry at the driver.

[129] The memo then stated that the grievor was questioned about why he did not rely upon his training in “people skills” that he had been sent to take after some earlier reported altercations with travellers.

[130] The memo suggested that the grievor replied that it had all happened very fast and that he had not been thinking. He said that he was in extreme pain and that he was dealing with a truck driver, not a traveller, and that he used language that a truck driver would understand.

[131] Counsel for the employer pointed to this email as if it were a confession of guilt on the part of the grievor.

[132] I place no probative value upon this email.

[133] The memo itself is prejudicial hearsay as it purports to attribute admissions of guilt to the grievor. I find this email comprised entirely of hearsay to be insufficiently reliable and assign it no probative value in these circumstances.

[134] If the CBSA wished to bring forward evidence of such purported admissions against interest, it would have been well-served to provide a more reliable declaration, such as one signed by the grievor or an audio recording of his interview.

[135] The grievor argued that I should make an adverse finding of credibility with respect to the author of this memo, Superintendent Cacchioni. I will address this argument later in this decision.

[136] For the purpose of ruling on the grievances arising from this incident, I will carefully note the evidence provided, which I have found reliable.

[137] In his testimony about this incident, Superintendent Cacchioni said that he was not present and that he had no direct knowledge of it but that he had interviewed and asked for written statements from staff on duty with the grievor who might have witnessed it.

[138] He testified that when he interviewed the grievor at the pre-disciplinary meeting, the grievor showed no genuine remorse for his profane utterances. Rather, he blamed the truck driver and even suggested that the incident might have been intentional.

[139] He added that the grievor had already been sent on a three-day course to deal with his anger problem and the need to deal properly with difficult situations.

[140] Superintendent Cacchioni then said that the training was necessitated after several incidents with the grievor and that obviously, the course had not been of any help on the evening in question.

[141] In cross-examination, Superintendent Cacchioni stated that he did not bother to take a statement from the truck driver because he had apologized and admitted to his mistake and then added that it had been clear misconduct on the part of the grievor, so he did not need to investigate further.

[142] When he was asked if he was aware of the grievor's injury caused by the air-brake incident or if the employer disputed the injury, Superintendent Cacchioni embarked upon a quite lengthy, circuitous, and rather obtuse discussion. He said that he was not trained as a medical doctor and that he would not speculate as to the grievor's medical condition.

[143] Superintendent Cacchioni was asked in cross-examination, if it was true that he was presented with the letter of the grievor's treating physician of March 10, 2015.

[144] In this letter, the doctor explained that the grievor has previously been diagnosed and treated for PTSD. She added that after the second incident (release of the air brakes) he started to experience disassociation, which is a common psychiatric symptom, especially in hose diagnosed with PTSD.

[145] The doctor also opined that explosive component of both incidents (the exploding tire and the release of the air brakes) would have been reminiscent of prior events during the grievor's military service that had contributed to his PTSD. She then wrote that "It is not certain that without this exposure he would have suffered as he has." And, "Every exacerbation of PTSD further solidifies the neuropathways that lead to the abnormal stress response to non-life threatening events."

[146] The doctor's letter continued by writing that the level to which the grievor suffered was worsened by the way his superiors reacted to the situation Her letter also continued by discussing the harmful effects of sleep deprivation and then how the grievor has been able to lead a very useful life and that he contributes to society.

[147] The doctor also stated that, "she doesn't see why this is not going to be the same in the future if he is able to be employed in an environment where he feels supported and further concussive insults could be minimized."

[148] When he was asked if he had seen this letter, Superintendent Cacchioni began a long reply. He stated that he had seen it but only a copy and not an original signed document. He added that although he had seen it, it was not addressed to him, and a copy was given to him at the third-level grievance hearing.

[149] When he was again asked about the letter and the doctor's diagnosis, he replied that he was aware of the "alleged PTSD" suffered by the grievor.

[150] This reply drew another series of questions about what he meant by the "alleged PTSD". Superintendent Cacchioni gave another long answer about how it was the first he had heard of the PTSD diagnosis. He repeated how he learned of it through a copy of a letter. Thus, his view was that it was an alleged diagnosis.

[151] When he was again challenged as to whether he doubted the grievor's PTSD diagnosis, he again explained that he had learned of the doctor's opinion only through a copied second-hand letter, which was behind his reluctance to agree that indeed, the grievor has PTSD.

[152] Superintendent Cacchioni was then asked to turn his attention to the details of the grievor's PTSD, how it was caused, and how the grievor's doctor thought that the events at work triggered the "abnormal stress response" in him after the air brakes were released.

[153] Superintendent Cacchioni was then presented with the employer's third-level response to the grievance, dated May 14, 2015. Since he had read the doctor's letter and her PTSD diagnosis, which was presented at the third-level hearing, he was asked to explain the employer's conclusion that stated: "There was nothing presented that provides a satisfactory explanation for the behaviour you demonstrated towards a member of the public."

[154] When he was asked to reconcile that conclusion with the doctor's letter, Superintendent Cacchioni explained that the incident with the trucker and the air brakes occurred in 2014 and that the PTSD diagnosis was not known until the grievance was presented at the third level, which was a year later. He further added that nothing in the Code creates an exemption from the required good behaviour for this type of incident.

[155] When he was again challenged that the PTSD diagnosis was on the table for discussion at the third-level hearing of the grievance, Superintendent Cacchioni stated that perhaps the diagnosis would be a mitigating factor. But he then tried to walk back that comment by continuing to say that he did not think that the diagnosis was a real mitigating factor.

[156] The grievor's representative asked Superintendent Cacchioni what the grievor should have done upon suffering a very sudden and painful workplace injury. He replied that a BSO should have left the area and possibly gone to the bathroom and yelled there in private, if needed.

[157] The grievor testified that shortly after being assisted into the office, Superintendent Cacchioni drove him for medical attention. From the incident, he had received a fractured molar tooth and an injury to his jaw and ears.

[158] As a finding of fact, I decline the invitation of the grievor's representative to conclude that the grievor's profane utterances were spontaneous and involuntary.

[159] I might have found one or even possibly a second word uttered contemporaneously with the loud noise causing injury as spontaneous.

[160] However, the evidence leads me to conclude that more words were uttered and that they were not contemporaneous with the injury being suffered. Both the grievor's and Superintendent Babakaiff's testimonies suggested that more than one or two words were uttered at the same time as the injury was suffered.

[161] Given this finding of fact, I conclude that the first step of the *Wm Scott* analysis determines that the grievor's conduct gave just and reasonable cause for some disciplinary action.

[162] Given this evidentiary finding, I will continue to analyze the parties' submissions on the grievor's culpability and the matter of his medical diagnosis of PTSD being a mitigating factor that should reduce or eliminate his exposure to discipline for his transgression against proper workplace decorum.

a. Grievor submission that PTSD is a mitigating factor in determining discipline

[163] The grievor testified that he had served in the Canadian military and that he had been deployed as a peacekeeper in an area of live combat. He said that he had experienced close and hostile gunfire, which had endangered his life.

[164] He explained that he had kept it bottled up inside him for years but that prior to the events at issue in this decision, he sought medical treatment. He was diagnosed with PTSD. The employer did not contest his testimony about his medical condition.

[165] The grievor said that his doctor told him that the release of the air brakes so close to his ears would have been sufficiently similar to the combat explosions he witnessed in his military duty to trigger his PTSD.

[166] The grievor argued that his profane utterances were an involuntary response to a painful physical injury that triggered an "abnormal stress response" rooted in his PTSD. He pointed to the previously noted letter from his family doctor and said that it was presented at the third-level review of his grievance.

[167] The grievor pointed to the decision of the Board's predecessor, the Public Service Labour Relations Board (PSLRB), in *English-Baker v. Treasury Board (Department of Citizenship and Immigration)*, 2008 PSLRB 24.

[168] *English-Baker* considered the case of an employee who was terminated for medical incapacity. Following an incident where the complaint had alleged that she had been harassed, management had developed concerns with her behaviour at the office and she was asked to remain away from the workplace until a Health Canada fitness to work evaluation could be conducted.

[169] After a time had passed and many professional opinions had been rendered, the employee returned to work in a different branch and a different location, workplace problems began to arise, and within several weeks, the employee was again asked to leave the workplace.

[170] When considering the disciplinary matters that arose from these incidents (not including the termination of the grievor's employment), the PSLRB found as follows:

> …
>
> *96 The grievor has also grieved that the employer breached the No Discrimination clause of her collective agreement. The applicable portion of article 19 of her collective agreement provides that there shall be no "disciplinary action exercised" by reason of mental disability. The grievor was both issued a written reprimand and asked to leave the workplace pending a Fitness to Work Evaluation on the same day. I have already concluded that the termination of her employment was not disciplinary. Although the letter of reprimand referred to different events in the workplace than the letter requiring a fitness to work evaluation, the letter to Health Canada referred to all of the events, so it is clear that the employer viewed all of her behaviour in the workplace as related. Given what the employer knew about her behaviour, and the nature of that behaviour, it is difficult to understand how the employer could regard it as culpable (behaviour subject to discipline).*
>
> …
>
> [Emphasis added]

[171] I note the fact that in that case, the Board relied upon the employer's years of experience dealing with the employee's well-documented problems to find that it knew of her illness and that it should have known that her problems mitigated her actions to the extent of rendering them non-culpable.

[172] The grievor also pointed to the Board's decision in *Rahmani v. Deputy Head (Department of Transport),* 2016 PSLREB 10, as an authority for the submission that an employer should be held accountable for failing to consider a grievor's medical condition when it may be an intervening factor that contributed to unacceptable behaviour.

[173] I note the following from that decision:

> …
>
> *75 When assessing the penalty in a case of a work altercation, aggravating or mitigating factors must be accounted for, as applicable (see* Shaver v. Deputy Head (Department of Human Resources and Skills Development*), 2011 PSLRB 43;* Ward v. Treasury Board (Revenue Canada - Taxation*), PSSRB File Nos. 166-02-16121 and 16122 (19861229); and* Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203 *(1975), 11 L.A.C. (2d) 84), as well as the following factors in particular:*

> · *the expression of remorse and the offering of apologies;*
>
> · *the seriousness of the action and the wrong caused;*
>
> · *whether the action resulted from a momentary lapse or was premeditated;*
>
> · *the provocation;*
>
> · *the years of service;*
>
> · *the disciplinary file's status; and*
>
> · *a later improvement in mental health, if it was an issue in the incident that gave rise to the termination.*
>
> …
>
> *104 In this case, I find that* prima facie *discrimination occurred. The evidence showed the grievor's medical condition (his disability), the adverse differentiation of the termination (refusal to continue to employ), and the link between those two facts. As I already determined, his mental condition and possibly his medication influenced his behaviour during the incident. The behaviour that was penalized via the termination was at least partly attributable to his state of health. The prohibited ground of discrimination does not have to be the only factor in the termination; it is enough that it is one.*
>
> …

[174] In its judicial review of this Board decision to reinstate the grievor in *Rahmani*, the Federal Court of Appeal dismissed the application (*Canada (Attorney General) v. Rahmani*, 2016 FCA 249 ("*Rahmani FCA*") and found as follows:

> …
>
> *[4] With regard to discrimination, the member did not err in concluding that "[t]he prohibited ground of discrimination does not have to be the only factor in the termination; it is enough that it is one" (paragraph 104).That conclusion is consistent with the recent pronouncement of the Supreme Court in the* Bombardier *decision,* Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), *2015 SCC 39. The evidence shows that the employer was well aware of the respondent's state of health and refused to take it into account, as the member noted in paragraph 112 of her reasons. Contrary to the applicant's argument, the member's decision does not indicate that an employer cannot terminate an employee who allegedly committed a violent act; at most, we can infer that such a decision cannot be made without consideration of the state of health of the employee at fault (paragraph 108).*
>
> …
>
> [Emphasis added]

[175] In *Rahmani*, the evidence showed that the grievor suffered from an illness. His employer was found not to have considered important medical information about his illness and how it had contributed to his violent act in the workplace, in determining what disciplinary measure to impose.

b. The employer's submission on the grievor's culpability

[176] The employer's counsel argued that I should not consider the matter of the grievor's PTSD as it arose only at the third-level review of his grievance. She also argued that the facts did not support my finding that the profanity directed toward the truck driver was an involuntary outburst as the grievor argued. Counsel relied upon two PSSRB cases to support the submission.

[177] In *Funnell v. Treasury Board (Department of Justice)*, PSSRB File No. 166-02-25762 (19950818), [1995] C.P.S.S.R.B. No. 83 (QL), the PSSRB stated that an adjudicator must look primarily at the facts in existence when the decision to terminate was made. Mr. Funnell had lost his job due to poor behaviour at work. It came to light afterwards that his problems might have been at least in part due to mental illness.

[178] More importantly, the employer's counsel pointed to another case from that decade, *Thomas v. Treasury Board (Revenue Canada - Customs, Excise and Taxation)*, PSSRB File Nos. 166-02-27608, 28503, and 28504 and 149-02-172 (19991105), [1999] C.P.S.S.R.B. No. 124 (QL), which found that upon facts similar to those presented before me, a grievor who was found to be suffering from a mental illness that could have at least in part triggered some if not all his objectionable behaviour towards clients was nevertheless due discipline. For his rude, impatient, and loud behaviour, Mr. Thomas received suspensions without pay of 1, 3, and finally 6 days. The PSSRB wrote this, at pages 12 and 13:

> *Notwithstanding these latter factors, I conclude that the employer did have cause for discipline, in each of the three incidents. The evidence is that Mr. Thomas becomes quickly excited and agitated when dealing with stressful situations. Yet, his behaviour, on each of these occasions, has negatively impacted on the employer and the employer's reputation to serve the public.*
>
> *In addition, all of these incidents could have been avoided, had the grievor been prepared to deal in a respectful and patient manner with the public. Unfortunately, in each incident he consistently demonstrated a lack of personal restraint. I reject any*

suggestion that he was unable to control himself, or that his actions were non-voluntary. His psychiatrist did not suggest that that was so. He had recommended that Mr. Thomas attend the skills' [sic] courses.

When his supervisor questioned him, he did not express any remorse or accept any responsibility for his actions. Even in the adjudication hearing, he was at pains to ascribe wrongdoing to others, while at the same time not accepting any blame for himself.

Given the nature of his employment, it is my opinion that discipline was appropriate for all three incidents. Mr. Thomas has to understand that he has to change his attitude and his actions. He refuses to believe that others in the Department can tell him that he has misconducted himself. If what it takes is my characterization of his actions, he has it in no uncertain terms. He was wrong in all three incidents. The employer tried other means to correct him. When that failed, they had the right to discipline him for all three incidents with a view to correcting his future behaviour.

2. Were the disciplinary measures imposed on the grievor, just and reasonable in the circumstances?

In considering this issue, I am mindful that Mr. Thomas was required to provide his customers with courteous and effective service. "Service" is a core and basic objective for this organization. To display rude or aggressive behaviour in public is simply unacceptable.

I also note that the grievor has shown little remorse for his behaviour. He exonerates himself from any blame or liability. He does not acknowledge that his behaviour might have been inappropriate. Despite the consistency of the evidence and the complaints that have been made, the grievor finds fault with his supervisor, with Ms. Gaudet, Ms. Pike, and Ms. Maisonneuve. He adds that the stress in his environment and his low emotional tolerance contributed to why the incidents occurred.

Without question, patience and care are required when working with the public. Clients are often stressed when they meet a Customs officers [sic], who may have high demands on their capabilities, and their work environment may be a demanding one. In my opinion, Mr. Thomas has improperly reacted to stress and to opinions or attitudes that differ from his own. However, his behaviour on all three occasions was unacceptable for a person in the Public Service.

Unfortunately, the grievor has emotional problems for which he sought professional assistance. He did not, however, advise his employer of his problems, nor did he seek a modification of his job duties. The employer based the disciplinary action on the evidence that was available at the time. I accept and adopt the rationale of the decision in Funnell (supra)*, that says that post-disciplinary*

> *evidence to explain behaviour cannot be used to alter the employer's decision that was just and reasonable.*
>
> *While I respect and encourage the grievor to continue seeking professional help, his emotional problems do not excuse his behaviour. In fact, I agree with the employer's argument that while his doctor's report may explain his behaviour somewhat, it does not absolve him for his blameworthy conduct.*

[179] The similarity in the matter before me to what was before the PSSRB in *Thomas* is striking.

[180] As in Thomas where that grievor had some pre-existing medical or emotional condition, the grievor before me testified that he had been aware of his PTSD and that he had been receiving treatment for it for some time.

[181] His physician wrote as much in her note of March 10, 2015. To his credit, he said that he was making good progress and doing well, which his physician confirmed.

[182] However, when workplace stressors started to trigger inappropriate responses (the two incidents involving Mr. Munro) in the grievor, it was incumbent upon him to take personal responsibility for his wellness and his actions at work, and to seek treatment and a possible workplace accommodation, consistent with the Board findings in *Thomas*.

[183] I note the twice repeated phrase in *Rahmani* where the Board finds that, "…the employer did not understand its responsibility to seriously foresee accommodation." (at para. 124. See also para. 116)

[184] With respect to this excerpt (para. 124), one might be alarmed by the text suggesting that employers are responsible to "foresee" that someone should be accommodated for misconduct.

[185] However, the source of the concern may in fact be due to an unfortunate translation from the original French text of the decision. The original decision stated that the employer did not understand its responsibility to seriously *envisage* accommodation for the grievor.

[186] As the Larousse on-line French/English dictionary points out the verb *envisager* translates in English as to "consider" or "contemplate."

[187] The Federal Court of Appeal in judicial review of this decision made this distinction in the translation as it noted, "The evidence shows that the employer was well aware of the respondent's state of health and refused to take it into account, as the member noted at paragraph 112 of her reasons." (*Rahmani FCA* at para. 3)

[188] The Board was not saying that the employer has a duty to foresee or predict employee illness or accommodation but that it should have *considered* the detailed medical reports provided as to the issue of the grievor's moral culpability for hitting supervisor.

[189] At the final-level hearing the grievor in the matter before me presented a note from his family physician. In this note, as quoted earlier, the doctor writes of the grievor having PTSD. She also writes of several other matters related to his condition and his feelings about a lack of support from his superiors. In his cross examination of Superintendent Cacchioni, the grievor's representative asked him why he did not accept the letter's opinion that the greivor's PTSD caused the "abnormal stress response."

[190] While one can perhaps infer this conclusion from the physician's letter, I note that the doctor does not state this conclusion herself.

[191] The employer's response to the presentation of the physician's letter at the third level hearing of this grievance stated that, "There was nothing presented that provides a satisfactory explanation for the behaviour you demonstrated towards a member of the public."

[192] I find this conclusion to be reasonable given what I find to be the many issues addressed and lack of a clear finding in the physician's letter with respect to this incident and the loud profane utterances at issue.

[193] I contrast this with highly detailed medical reports by specialists and the respective family physicians given to the employers in both *English-Baker* and *Rahmani*.

[194] I also note that the adjudicators in both of these cases relied upon by the griever found it important that the employer was well aware and in fact had dealt with illness related absences prior to the disciplinary actions taken that were the subject of those grievances.

[195] In *Rahmani*, the Board found that the employer must have known of the grievor not being well. The Board states, "The grievor requested sick leave several times, all supported by medical certificates. He also requested two years of leave without pay, which the employer refused." (at para. 114)

[196] In considering what was just discipline in all the circumstances in *Rahmani*, the Board stated that, "violence in the workplace is serious and can justify termination, especially if the person who committed the violent act shows little or no remorse. (at para. 74)

[197] While the profane outburst at issue in this matter was sudden and not in any way premeditated, I cannot conclude the grievor showed any remorse for his actions. In fact, he blamed the truck driver and wanted the employer to investigate him for purposefully causing the air brake incident that injured the grievor.

[198] The conduct of shouting profanity to a member of the public is a serious transgression of the required behaviour of a BSO. The grievor showed no remorse and a lack of understanding of this as he argued he was not responsible for his actions.

[199] In summary on this grievance, I determine that discipline was warranted. but I find it to have been excessive due to the principle of progressive discipline.

[200] Given my earlier decision to reduce the grievor's three-day suspension to one-day, I would instead substitute this five-day suspension with a two-day suspension without pay.

3. Files 566-02-13060/13061: 8 day suspension-Texas dentist with gun permit on vacation

[201] This grievance relates to an eight-day suspension without pay. For administrative reasons, the Board opened two files regarding this grievance (566-02-13060 and 13061).

[202] A dentist from Texas ("Traveller Ro") presented at the border crossing late in the afternoon of September 12, 2014, with a rented car from Seattle, WA., with his young adult son. The two were embarking upon a late summer vacation in Canada.

[203] Upon primary inspection the travellers were found coded in the CBSA database for a gun and were directed to park their car and undergo a secondary inspection whereupon they were met by the grievor.

[204] After some discussion, it was determined that the travellers had a gun permit. However, they declared that they had no weapons, which was later confirmed after their persons and car were searched. They were taken into the CBSA's offices while their car was searched.

[205] The travellers were allowed to enter Canada. Nothing untoward was discovered during their questioning or search.

[206] However, Traveller Ro was so upset and unhappy with his treatment at the border crossing that he wrote a lengthy complaint directed at the grievor. Traveller Ro then took time from his holiday to drive back to the border crossing the next day to personally address his complaints to Superintendent Cacchioni.

[207] Superintendent Cacchioni was so moved by the extreme emotion displayed by Traveller Ro and that he gave up time from his vacation to return to the port of entry offices to vent in person, that he accepted all Traveller Ro's allegations and found the grievor guilty of misconduct.

[208] In making this finding, the Superintendent testified that he chose not to ask the BSO who performed the initial inspection of Traveller Ro for his report of the interaction as Traveller Ro had said that he had had no problems at the initial screening.

[209] And Superintendent Cacchioni received but chose to disregard another BSO's report, who had witnessed the secondary inspection and had reported that in fact, Traveller Ro had been very difficult throughout the entire inspection and that the grievor had done nothing wrong.

[210] In its final-level reply denying the grievance, the employer stated that the grievor was found to have violated section 10 of the Code. And in particular, it found that he had failed to communicate with the two US travellers in a respectful manner and that he had failed to de-escalate the situation.

[211] In his written complaint dated September 19, 2014, filed against the grievor, Traveller Ro provided a highly detailed narrative of the things that the grievor allegedly said and did. I note that it also stated the following:

> *- [*Traveller Ro was*] sending this letter to as many people as possible with authority to do something about this disturbed individual* [the grievor];
>
> *- we had been violated and wronged at this border crossing;*
>
> *- after admitting to having a gun permit, it was an inquisition. He would repeat the same questions over and over… He* ***berated*** *both me and my son with his condescending tone and attitude.*
>
> *- If an inspection was warranted, I probably wouldn't mind.*
>
> *- My son and I were so stunned we didn't speak all the way to Penticton.*
>
> *- Our vacation was never the same.*
>
> *- We decided to forego our visit to the vineyards of the Okanagan Valley.*
>
> *- The* ***belligerent*** *individual* [the grievor] *was* ***cruel*** *and confrontational…*
>
> *- … to deliberately dress me down in front of my son is all wrong.*
>
> [Emphasis added]

[212] As the grievor pointed out in argument, in the disciplinary letter sent to him in response to Traveller Ro's complaint, the employer noted this:

> *Although I found* ***no evidence*** *that you* ***berated*** *them or were* ***belligerent*** *or* ***cruel,*** *you failed to de-escalate the situation in accordance with your training as a BSO and your overall manner in the incident was inconsistent with the expected standards outlined in the CBSA Code of Conduct.*
>
> [Emphasis added]

[213] When he was asked in his examination-in-chief about this incident, Superintendent Schumaker testified that he had reviewed the file and commented on the discussions that led to the decision to impose discipline on the grievor. When he looked at that disciplinary letter, Superintendent Schumaker stated that it was clear to him that animosity had been building and that Traveller Ro had not been happy in his secondary inspection.

[214] Superintendent Schumaker testified that the grievor should not have reopened questioning about whether Traveller Ro was carrying a gun as it was against protocol. He also said that it was within Traveller Ro's rights to be able to sit where he could observe his car being searched.

[215] Otherwise, Superintendent Schumaker could point only to the disputed statement that the grievor allegedly made a sarcastic and rude comment to Traveller Ro upon leaving the search. He also voiced the ubiquitous concern alleged through all these traveller incidents that the grievor's tone had been unprofessional and that he had failed to de-escalate each incident, contrary to his training and professional duties.

[216] When he was asked to look at some of the more pointed allegations of the grievor berating the traveller, Superintendent Schumaker testified that he placed little weight on that aspect of Traveller Ro's letter given that he saw it as inflammatory and given that Traveller Ro was upset at that point.

[217] As a finding of fact, I note the employer did not fully accept the exaggerated aspects of the allegations made against the grievor.

[218] Working alongside the grievor on the day in question and in the vicinity of the incident involving Traveller Ro was BSO Steve Robinson, who was on dog patrol duty.

[219] In his written statement sent to Superintendent Cacchioni on September 20, 2014, BSO Robinson stated the basic details of the incident and noted that after the primary screening, the examination of Traveller Ro was focused upon firearms.

[220] BSO Robinson added that from his observations made during the secondary screening, Traveller Ro was not forthcoming with answers about his trip and the contents of the vehicle.

[221] He wrote that the grievor had to rephrase several questions and add clarifying questions to obtain satisfactory information. He also wrote that Traveller Ro made odd comments and became flushed when he talked about his iPad being searched.

[222] BSO Robinson also wrote that it appeared that Traveller Ro was not happy at being referred to the secondary search or at being questioned. BSO Robinson concluded his note with, "[The grievor's] questions and directions were direct and concise, I did not witness any belligerence or cruelty on [the grievor's] part."

[223] The grievor's representative drew my attention to a statement attributed to BSO Robinson in the investigation report about the incident involving Traveller Ro, which Superintendent Cacchioni prepared but did not sign.

[224] Superintendent Cacchioni wrote the following in the "synopsis of officers and witness reports" section:

> *DDH Robinson* ["DDH" refers to a BSO who is assigned to work a detection dog patrol] *stated that the exam started off with the traveller being wound up and the BSO Cwikowski met him at that level and did nothing to de-escalate the situation. But otherwise, DDH Robinson felt that the exam was not out of the ordinary.*

[225] The grievor's representative questioned Superintendent Cacchioni about writing this statement into the report as it stands out and is apart from what was shown at the hearing in a report that BSO Robinson wrote.

[226] Upon being challenged on the Robinson statement, Cachhionni replied that he accepted the written statement of Robinson and admitted that he was a trained BSO and trained observer who was present for the search.

[227] He then added that he was not sure that Robinson would have been present to hear every comment allegedly made by the grievor to Ro.

[228] Previously, when he was presented with the written statement provided by BSO Robinson in his examination-in-chief, Superintendent Cacchioni acknowledged that BSO Robinson had reported that nothing out of the ordinary had occurred in the interaction with Traveller Ro.

[229] Superintendent Cacchioni then testified that BSO Robinson was a dog handler who had been there as a resource and not to supervise inspections. He added that BSO Robinson might have missed some of the interactions between the grievor and Traveller Ro.

[230] The grievor's representative also questioned Superintendent Cacchioni about the note he wrote purporting to capture details of his in-person meeting with Traveller Ro. He was challenged on the fact that in his lengthy letter, Traveller Ro wrote, "If an inspection was warranted, I probably wouldn't mind." However, in his notes from his meeting with Traveller Ro, Superintendent Cacchioni wrote in an opening summary

statement, “Basically he was not upset that he had been searched, but rather the way in which he felt he had been searched.”

[231] Questions then ensued to elicit testimony about why Traveller Ro was referred for a secondary screening, which included the search. Superintendent Cacchioni replied that it did not matter why the primary BSO had referred Traveller Ro for secondary screening. It had been established in other testimony that the primary-screening BSO referred Traveller Ro for secondary screening due to a gun code in the database.

[232] The grievor’s representative noted this matter in argument and submitted that it was more evidence of Superintendent Cacchioni’s bias as his written report subtly misstated Traveller Ro’s concerns.

[233] He further argued that Superintendent Cacchioni’s failure to interview the primary-screening BSO showed a bias as he wished to focus on inculpatory reports made against the grievor and failed to look for potentially exculpatory statements from an obviously relevant witness.

[234] In his testimony about this incident, the grievor testified that many of the aspects of Traveller Ro’s written statement were inaccurate. The grievor denied reopening questioning about Traveller Ro having a gun.

[235] The grievor denied using an angry or a sarcastic tone when speaking with Traveller Ro and specifically denied making the alleged sarcastic remark when the search was over, namely, “Now you know what it’s like to be inspected.”

[236] Rather, he testified that when it was over, he asked Traveller Ro if he had ever been inspected at the border, to which Traveller Ro replied that he had not. The grievor said that he then told Traveller Ro, “It wasn’t so bad, was it.” He said that Traveller Ro replied, “No, I guess not.” The grievor added that this final comment did not elicit any emotion from or seem to anger Traveller Ro.

[237] In cross-examination, the grievor’s representative took both Superintendents Cacchioni and Schumaker line-by-line through Traveller Ro’s detailed report of what was said and done during his interaction with the grievor. Each witness was asked to comment upon the appropriateness of every alleged action and comment.

[238] After an exhaustive examination of the allegations, Superintendent Cacchioni stated, “It’s not necessarily the line of questioning that the grievor was being disciplined for,” “The grievor could’ve offered [Traveller Ro] a seat at the window of the office so he could observe his car being searched,” and “It was inappropriate to ask [him] if he had ever been searched before and then say, ‘Well, now you know what it’s like.’”

[239] When he was told that the grievor would testify that he never said those words to Traveller Ro but rather told him, “Was not so bad, was it,” Superintendent Cacchioni replied that that was not necessarily bad but that it would depend on the tone of the grievor’s voice.

[240] In other testimony, Superintendent Cacchioni also testified that Traveller Ro could have been offered a seat at the window to view his car being searched. And when the grievor told Traveller Ro how to properly pronounce the name of the B.C. city “Penticton”, he could have first said, “Sir”.

[241] In his cross-examination, the grievor’s representative took Superintendent Babakaiff through the same line-by-line analysis of Traveller Ro’s written statement alleging what had been said and done in his interactions with the grievor.

[242] It was noted that the grievor should not have reopened questioning a second or third time about whether Traveller Ro was in possession of a gun. Superintendent Babakaiff provided a long explanation that once finality is reached in posing that question and a clear answer has been obtained, there will be grounds later, if a gun is found, to clearly establish that a false declaration was made.

[243] However, he was not as sure about it when he was repeatedly questioned about the BSO possibly having safety concerns. Superintendent Babakaiff also testified that it was not necessarily the “line of questioning” that the grievor was disciplined for.

[244] The grievor also adduced evidence that similar to the incident involving Traveller Ro, he had recently gone through the same manner of gun questioning with a traveller in the same tone, and eventually, he made a seizure of illegal guns, for which he was commended.

[245] After the line-by-line analysis, Superintendent Babakaiff was challenged with this statement: “So, am I correct that you cannot point to anything in this [Traveller

Ro's] complaint that on the surface the grievor did wrong, other than possible problems with the tone of the grievor's voice?"

[246] The Superintendent replied, "Correct."

[247] In his examination-in-chief, Superintendent Cacchioni testified that in his opinion, Traveller Ro would not have fabricated this story. And he confirmed how impressed he was by the vigorous emotion shown by Traveller Ro when he presented himself at the border office the day after the incident.

[248] Reviewing the reported conversations and activities, he testified that Traveller Ro reported that the grievor's tone in some of his comments had been sarcastic (such as, "You don't remember when you were last in Canada," and asking Traveller Ro if he had been inspected before and then telling him, "Well, now you have") and unprofessional.

[249] In the closing of his cross-examination, Superintendent Cacchioni was asked how he decided to levy an eight-day suspension without pay, given that the grievor and Traveller Ro had provided contradictory accounts of the interaction and that the only other observer, BSO Robinson, had written in his report that he had seen nothing wrong take place.

[250] Superintendent Cacchioni replied that he was moved by the visceral intensity and emotion shown by Traveller Ro and his giving up most of a day of his vacation to drive back to the office to make an oral statement. He added that he looked at the grievor's past misconduct and the fact that the grievor was on a performance management plan to assess his credibility as a witness to the incident.

[251] Having carefully reviewed all the evidence presented about this matter, and having carefully considering the arguments of both parties, I conclude that the employer failed to adduce clear, cogent, and compelling evidence of any misconduct that would justify any discipline.

[252] I prefer the evidence of BSO Robinson and Superintendent Babakaiff, who both essentially reported that no real wrongdoing was observed. BSO Robinson gave a report of his first-hand observations that said that Traveller Ro was not forthcoming when answering questions.

[253] Superintendent Babakaiff carefully reviewed Traveller Ro's entire statement and could not point to any one alleged act that he would term misconduct. Superintendent Babakaiff was left to say that the problem could have been the grievor's tone.

[254] I make special note of the line in the investigative report written by Superintendent Cacchioni that the grievor pointed out, as I noted earlier in this decision.

[255] I find it more probable than not that Superintendent Cacchioni either exaggerated or completely fabricated the line in his report that BSO Robinson stated, "… the exam started off with the traveller being wound up and the BSO Cwikowski met him at that level and did nothing to de-escalate the situation."

[256] Firstly, I note that in his own report, BSO Robinson was completely exculpatory. He stated that the grievor had done nothing wrong and that in fact, Traveller Ro had been difficult. The statement attributed to BSO Robinson gives the opposite impression.

[257] Secondly, I note the striking coincidence that the comment attributed to BSO Robinson that the grievor failed to de-escalate the situation was the primary allegation of wrongdoing levelled against him in nearly every of the many incidents for which he was disciplined.

[258] And finally, on this point, I find it suspicious and make an adverse finding of inference here due to the fact that the employer did not table as an exhibit and might not have even produced a written confirmation of the discussion Superintendent Cacchioni said he had with BSO Robinson that was said to have resulted in him attributing this highly prejudicial statement to BSO Robinson.

[259] I find it suspicious that Superintendent Cacchioni did not take a statement from BSO Robinson and did not provide a copy of one as an exhibit. He should at least have had BSO Robinson sign a statement, to vouch for its accuracy and authenticity.

[260] I also note that it appears that Traveller Ro was at least somewhat offended for even being sent to a secondary search as he might have felt that it was beneath him. His comments that he was a dentist and a fine and outstanding member of his community and that he had TSA pre-clearance privileges (trusted traveller) for passing

through airport security in the US all suggest that he felt that he was better than someone who had to be searched.

[261] I have also pointed out how even in its letter of discipline to the grievor, the employer rejected some of Traveller Ro's more dramatic hyperbole, which had been directed as allegations against the grievor. I note this to point out that such overly dramatic reports give me caution as to the reliability of Traveller Ro's observations.

[262] Counsel for the employer noted in argument that even if Traveller Ro had been difficult or had acted badly, as reported by BSO Robinson, the grievor had been trained, and his duty was not to provoke the traveller and instead de-escalate the situation.

[263] She spoke of BSO Robinson's exculpatory report of the grievor stating that he did nothing wrong and reminded me that Superintendent Cacchioni testified that "BSO Robinson was just a dog handler", had not been there to supervise, and anyway, might not have observed all the interactions.

[264] She said that the evidence clearly established that misconduct occurred and that the eight-day suspension was reasonable in the circumstances as it was progressive discipline, following the three- and five-day suspensions that the grievor had already received.

[265] The grievor argued that the evidence did not establish that any misconduct occurred and that the items I analyzed with respect to Superintendent Cacchioni's interventions show that he was biased in his conduct of the matter.

[266] I agree that the evidence does not support a finding of misconduct.

[267] I find that the evidence establishes at worst that the grievor did not allow Traveller Ro an opportunity to sit near the window, so he could see his car being searched.

[268] That did not justify disciplining the grievor.

[269] The evidence did not clearly establish that the grievor's questions about Traveller Ro carrying a gun were problematic. The testimony indicated that such repeated questioning can be acceptable if there is a safety concern.

[270] The allegations were contradicted that the grievor made sarcastic and rude comments at the conclusion of the search. The employer clearly noted the fact the Traveller Ro was agitated and that he had exaggerated some aspects of his allegations.

[271] Therefore, I conclude that the employer failed to establish clear, cogent, and compelling evidence upon which I could conclude that in fact and on a balance of probabilities, the grievor uttered the alleged unprofessional comments.

[272] In conclusion, I find that the employer failed to discharge its burden of proving on a balance of probabilities that any misconduct occurred. I allow the grievance and thus rescind the 8-day suspension without pay.

B. The alleged collective-agreement-violation grievances

1. File 566-02-13059: delay to accommodate the grievor's return to work

[273] This grievance stated the following: "I grieve that my physician cleared me to return to work effective March 20, 2015 but management did not allow me to return to work until April 24, 2015 during which time I was on sick leave without pay."

[274] It was referred to the Board for adjudication using the Board's Form 20, which applies to cases involving the interpretation or application of a provision of a collective agreement or arbitral award (i.e., cases referred pursuant to s. 209(1)(a) of the *Act*). The form in this case made reference to "Article 35 – Sick leave with pay" of the collective agreement.

[275] In relation to this grievance, the grievor did not plead that a failure to accommodate occurred; nor did he request a remedy under one of the available remedial provisions of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA)*.. However, the entirety of both parties' cases regarding this grievance was focused upon the need to accommodate him and the alleged failure or delay doing it.

[276] I note that at no time did the employer raise a *Burchill* objection under *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), stating that the grievor had transformed his grievance. And further, I note in my review of the file that the second-level response to the grievance noted that "management made all reasonable efforts to meet your [the grievor's] accommodation needs."

[277] The grievor was ill and went on certified sick leave from work commencing on November 5, 2014. He was advanced 187.5 hours of sick leave; however, he was on leave without pay for a lengthy period, apparently because he had exhausted all his sick leave credits.

[278] The grievor's physician signed a "Functional Abilities Form" (FAF), noted his functional limitations, and cleared him to return to work (RTW) on March 20, 2015.

[279] The grievor alleged that the employer unreasonably delayed his RTW for 34 days, thus causing him a loss of income along with stress and anxiety.

[280] There is no contesting the matter of his illness or his need for accommodation. The only question is whether the eventual RTW on April 24, 2015, was timely, given the circumstances, or whether it was unreasonably delayed.

[281] In his grievance, the grievor requested as corrective action that he be paid sick leave for March 20 to April 24, 2015, and that he be made whole.

[282] The grievor's FAF was presented as an exhibit. The physician who completed and signed it on February 17, 2015, stated that the grievor was fit to RTW but that he had these two permanent limitations or restrictions: "Must avoid loud noises, and not able to work O/N shifts."

[283] It was not contested that "O/N" meant "overnight".

[284] On January 23, 2015, the grievor's physician wrote that the grievor was undergoing treatment and that he was improving. She estimated his RTW, with restrictions, would be February 17. She recommended that he not work the night shift and that his return be on a graduated basis.

[285] On February 19, 2015, Superintendent Cacchioni emailed several management colleagues and stated that he had received the grievor's FAF, which was signed by the grievor's physician. He stated that not much information was provided.

[286] He then wrote that the doctor stated that the grievor could not work overnight and that he had to stay clear of loud noises. Superintendent Cacchioni noted that the doctor set the grievor's RTW as March 20.

[287] After almost a month passed, Superintendent Cacchioni emailed the following to the grievor on March 12:

> *In preparation for your anticipated RTW, I have some questions for your doctor to clarify the content of the latest doctor's note submitted in support of your RTW. We need to be fully able to understand your restrictions before we can look at possible options for accommodating those restrictions and authorize the RTW.*
>
> *Your doctor states that you are fit to RTW but with two restrictions: those being not able to work overnight shifts and not to be exposed to loud noises with these two restrictions being permanent.*
>
> *First, can you please have your doctor clarify what is meant by "overnight". Does this mean that you would not be able to work any part of our graveyard shift (2130-0800 hrs) or are there certain hours you cannot work? Or is it simply than you cannot work any shifts that span the contiguous time from one day to the next (ie starting on one day and work beyond midnight to the next)?*
>
> *Second, can you please have your doctor clarify what is meant by "exposure to loud noises." What is considered to be a loud noises [sic]? Is this based on a decibel level or another objective standard of measurement?*
>
> *Please have your doctor clarify these points for me. If there are any questions, I can be contacted directly.*
>
> *Also, please advise when these questions have been presented to your doctor so we know when to expect a response.*

[288] On March 18, Superintendent Cacchioni wrote to the grievor and stated that he had some additional questions for the grievor's physician, which were included in a copy of a previous email and were written in red ink. The red colour is not legible in the photocopy provided to the Board as an exhibit, but the questions posed to the Superintendent in examination established that his questions were about the two limitations specified by the grievor's physician.

[289] On March 27, Superintendent Cacchioni wrote the following to the grievor: "One last question for your doctor regarding the restrictions on overnight shifts. 'Without providing the diagnosis, can you confirm that the patient is being treated for a medical condition that renders him unable to work overnight shifts."

[290] The grievor replied on the next day, stated that his doctor was away, and stated that the earliest he could see her would be March 30.

[291] On March 30, the grievor's physician wrote the following in response to Superintendent Cacchioni's email:

> *I confirm that Adrian is being treated for a medical condition that renders him unable to work the overnight shift.*
>
> *I would define an overnight shift as any one that starts in the evening and continues to the morning.*
>
> *With regard to the noise level, I am unable to give a precise decibel level however would specifically recommend avoiding the noise created by the setting of truck airbrakes [sic].*

[292] Superintendent Cacchioni testified that he found that note unacceptable as it did not provide the specific hours during which the grievor could not work. He also said that he had asked the doctor for specifics about the noise problem and that he felt that she did not address that issue.

[293] When he was challenged in cross-examination as to whether he thought that the grievor could have worked the shift commencing at 08:00, Superintendent Cacchioni testified that he was not sure if it would have been OK for the grievor to start a shift then and that he wanted clarification from the grievor's physician.

[294] When he was again asked as to what part of "overnight" needed clarification, Superintendent Cacchioni tried to explain that it could be that had the grievor been asked to work from 23:00 to 00:01 (a 61-minute shift), it could have been contrary to the physician's stated limitations as it could have been seen as an overnight period.

[295] This then gave rise to the obvious question as to how often BSOs are required to work odd-hour shifts outside the normal four-shift plan. Superintendent Cacchioni replied that a BSO working on an accommodation might have an irregular shift.

[296] On April 2, 2015, BSO Rob Hepburn, representing the grievor's union, emailed Superintendent Cacchioni and other management members as follows:

> *Adrian has been on sick leave without pay for a few weeks now and he is ready to RTW. Its [sic] been two days since I delivered the doctor's note clarifying the details of his accommodation needs (no graveyards, and essentially no PIL where he can be blasted by airbrakes [sic]).*
>
> *Adrian needs a paycheque to feed his family, and we need more bodies to staff the port.*

What date and time can I tell him to report for duty?

[297] Later that same day, an employer representative replied and stated that the grievor's functional limitations were still being evaluated and that once it was complete, management would have a better idea of what form an accommodation might take.

[298] Upon seeing that response, BSO Hepburn emailed the grievor the next morning, April 3, and told him that given his doctor's approval for his RTW, he should just report to work if he wished and suggested that management could not stop him from working and force him back onto unpaid leave.

[299] On April 7, the employer wrote to BSO Hepburn, who was providing union assistance to the grievor, and asked him if he could obtain a copy of the grievor's accommodation request.

[300] BSO Hepburn replied the next morning with the employer's "Accommodation Request" form, stating as the restrictions and limitations that the grievor must not work the overnight shift and that he must avoid the blasts from truck air brakes.

[301] The accommodation sought was listed as a deployment to a vacant position at the Port of Chopaka.

[302] The testimony had stated that the Port of Chopaka had limited or no commercial traffic and that it operated during only limited daytime hours.

[303] In his oral testimony on this matter, BSO Hepburn stated that in his many discussions with management about trying to secure an RTW date for the grievor, it could not provide him with a credible answer for the delay, other than that it was examining the functional limitations.

[304] The grievor's physician then provided another note, again trying to clarify the functional limitations, stating, "Officer must avoid sustained blast from truck airbrakes [*sic*]. No requirement for hearing protection when performing normal duties indoors or outdoors, when not working around commercial trucks."

[305] Superintendent Babakaiff testified that the BSOs at the Port of Osoyoos worked these four shifts:

- 08:00 to 18:30;
- 11:00 to 21:30;
- 13:00 to 23:30; and
- 21:30 to 08:00.

[306] He explained that the PIL guard booths located on the traffic lanes have two levels, to provide access to both passenger cars and large transport semi-trailer trucks. When he was asked about safety measures, he said that there are signs upon approach to the booths informing drivers not to set their air brakes.

[307] He also testified that all BSOs are offered earplugs or larger over-the-ear hearing protection, such as is used at their gun ranges.

[308] When he was asked about the Port of Chopaka, he testified that it was under the supervision of the Osoyoos office and that it was a popular assignment for the BSOs as it had a slower pace and only one 09:00 to 17:00 shift, 7 days per week.

[309] Superintendent Schumaker also stated that he needed clarification from the grievor's doctor as to whether the 13:00 shift was OK or if the fact that ended only at 23:30 meant that it was an overnight shift.

[310] Superintendent Shumaker testified that he met with the grievor and Superintendent Cacchioni on April 27 and that they discussed the accommodation request. His written note summarizing the meeting stated that the grievor provided a doctor's note with additional information clarifying where he should use hearing protection.

[311] After the discussion, the grievor was told that he would be required to wear hearing protection at all times and in all locations outside the Port office, to protect him from air-brake noise anywhere in and around the Port.

[312] Superintendent Schumaker testified that he was aware of the grievor's two limitations and the need for no overnight shift. He said that it required clarification. He also testified that he was aware that the grievor had resumed work on April 24 despite additional information about his limitations not being received until April 27.

[313] When Superintendent Schumaker was asked in his examination-in-chief about how the grievor returned to work on April 24 but the accommodation agreement was

not finalized until April 26, he replied that the grievor was simply assigned to the 08:00 shift to avoid working overnight and that he was kept away from loud noises.

[314] When Superintendent Cacchioni was asked in cross-examination what finally answered the questions he had been posing to clarify the functional limitations, he replied that HR and the grievor were both consulted and that it was decided not to assign him to the overnight shift.

[315] The "Accommodation Request Review and Agreement" document that the parties signed on April 30, 2015, was tabled as an exhibit. It stated that the grievor could be accommodated in his present position. It described the accommodation as follows:

> *The Agency will avoid scheduling the employee* [the grievor] *for overnight (graveyard) shifts whether on regular time or overtime. The employee can be scheduled for all other shifts within the VSSA at the Port of Osoyoos including relief shifts at other ports as required. The employee must wear approved hearing protection at all times while working outside of the office or in the Primary Inspection Line at the Port of Osoyoos or any other port or location as assigned.*

[316] In his argument on this matter, the grievor pointed to the fact that virtually nothing changed over the many weeks of the employer's purported review of his functional limitations. He submitted that the avoidance of overnight shifts and the use of hearing protection were plainly obvious responses to accommodate the limitations noted in the physician's first letter.

[317] As such, he argued that the 34 days for his RTW were unreasonable and that he should be reimbursed for the 34 days in paid sick leave. I note that the grievance made no claim of a breach of the no-discrimination clause in the collective agreement. Nor did he engage the *CHRA* in this grievance.

[318] It is well established that the responsibility for accommodating an employee's functional limitations falls equally upon the employee, the union, and the employer.

[319] The Board considered this recently in *Herbert v. Deputy Head (Parole Board of Canada)*, 2018 FPSLREB 76, as follows:

…

352 In Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 (*"Central Okanagan*"), the Supreme Court of Canada set out the now well-recognized principles to follow in duty-to-accommodate cases as follows:*

…

> The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated:
>
> > Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.
>
> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.
>
> This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

…

353 As set out in Central Okanagan*, the accommodation process does not mean that an employer is required to put into place what a doctor states is required or what an employee wants. Many factors and variables must be taken into account when an*

> *employee's illness or disability intersects with his or her work environment, which then can lead to other potential issues.*
>
> …

[320] While the passage cited in that decision from *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970 ("*Central Okanagan*") discusses the need for employees to do their part and take reasonable steps, the same responsibility is true of the employer.

[321] The evidence before me clearly established a lack of meaningful engagement by the employer to deal with the limitations identified by the grievor's physician.

[322] Superintendent Cacchioni repeatedly asserted in his sworn testimony that he waited weeks to seek clarification from a medical doctor as to what "overnight" meant and whether it would rule out the grievor working an 08:00-16:00 shift.

[323] This was not reasonable and did not discharge the duty upon the employer to take an active role in seeking to implement necessary accommodations for an employee to facilitate a return to work.

[324] I reject the employer's assertion that it required clarification as to whether an 08:00-16:00 shift would have been contrary to the doctor's assessment since she wrote that the grievor should not work overnight shifts. This is completely absurd.

[325] While the employer's desire to seek clarification about the limitations related to loud noises was not absurd, nevertheless, it was waiting to be solved by a simple proposal that the grievor be required to wear the hearing protection readily available to all BSOs in the workplace.

[326] On the facts of this matter, immediately upon receipt of the physician's functional limitations letter, it was open for the employer to reply to her and ask if the 08:00 shift and hearing protection would be sufficient accommodations for the grievor. Both he and his union showed themselves ready and prompt to try to act upon every one of the employer's requests for more information.

[327] Such a meaningful response by the employer would have been consistent with its duty to participate in the accommodation effort as identified by the Supreme Court

in *Central Okanagan*. The failure to was a violation of the duty to accommodate. Keeping the grievor needlessly off work without pay was wrong.

[328] The employer had noted in its final level response that the grievor had been advanced his full entitlement of sick leave credits. The employer refused to grant him any additional credits, as contemplated in clause 35.04 of the collective agreement, which states as follows:

> *35.04 When an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 35.02, sick leave with pay may, at the discretion of the Employer, be granted to the employee for a period of up to one hundred and eighty-seven decimal five (187.5) hours, subject to the deduction of such advanced leave from any sick leave credits subsequently earned.*

[329] Clause 35.04 is clearly discretionary, and I will not read anything else into the clear language. As such, the employer did not violate the clause by failing to exercise its discretion to grant paid sick-leave.

[330] The issue is not whether the grievor should have had his sick leave extended but rather whether the employer was justified in denying him work for this period.

[331] As of March 20, 2015, the grievor's physician made it clear that he was ready to RTW. The employer required some additional information to clarify what accommodation may have been needed for the RTW.

[332] The evidence establishes that this information was provided by the grievor's physician in her letter of March 30 to the employer. The grievor should have been brought back to work the next day.

[333] Counsel for the employer submitted that if I were to uphold this grievance, the remedial order should be a maximum of 24 days of owed salary, not the 34 days the grievor submitted he was owed.

[334] Having considered the submissions of each party on the remedy for this grievance, I conclude that the grievor should have been assigned work on March 31 rather than his waiting until April 24.

[335] The grievor is owed salary and related benefits as he would've earned had he been assigned normal shifts of work from March 31 to April 23 inclusive.

2. File 566-02-14405: alleged harassment and discrimination

[336] This grievance alleges the following:

- The employer failed to provide a harassment-free workplace.
- The employer failed to accommodate the grievor's disability.
- The employer violated the no-discrimination article of the collective agreement on the grounds of the grievor's disability.
- The employer violated clause 1.02 by failing to share the desire to promote the grievor's well-being.
- The grievor was the victim of workplace violence and verbal abuse from Superintendent Cacchioni.
- The employer violated clause 17.02 by denying him his request for union representation.
- More generally, the second officer was asked to leave the office, thus denying the grievor a witness to the employer's wrongdoing.

[337] The requisite Form 20 to refer this grievance to adjudication cited that the matter relied upon article 19 of the collective agreement, which prohibits discrimination.

[338] The grievor also filed the Form 24 with the Canadian Human Rights Commission as is required when a party raises an issue involving the interpretation or application of the *CHRA*.

[339] While the grievor did not pursue this allegation in argument or point to the language of article 17, I note the following as being related to his allegation of being denied union representation:

> *** **Article 17: discipline** ***
>
> *17.01 When an employee is suspended from duty or terminated in accordance with paragraph 12(1)(c) of the Financial Administration Act, the Employer shall notify the employee in writing of the reason for such suspension or termination. The Employer shall endeavour to give such notification at the time of suspension or termination.*
>
> ****
>
> *17.02 When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary, administrative or investigative hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the*

> *Alliance attend the meeting. Where practicable, the employee shall receive a minimum of two (2) days' notice of such a meeting.*
>
> …

[340] Despite this matter not being pursued in the closing arguments, I will simply observe that clause 17.02 clearly refers to a disciplinary, administrative, or investigative hearing.

[341] The evidence before, me as stated later in this decision, does not allow me to conclude that the ill-conceived discussion at the Port of Chopaka between Superintendent Cacchioni and the grievor was any of those things. As such, I will consider no further this allegation of a failure to allow union representation.

[342] Superintendent Cacchioni testified that on February 12, 2016, when the grievor arrived to begin duty that morning at the Port of Osoyoos, he was returning from sick leave and expected to work that day at the Port of Chopaka.

[343] The grievor had requested to be assigned to Chopaka as it was a slower-paced crossing, with only daytime hours of operation and little commercial traffic. His request to be stationed there was communicated to the employer as an accommodation request.

[344] In testimony about the meeting at Chopaka, Superintendent Cacchioni testified as follows:

- He was upset and very disappointed by the grievor's poor behaviour that morning as the grievor loudly uttered profanity inside the office at the Port of Osoyoos.
- Everyone knew the unwritten rule, which was that if a BSO was off sick, the BSO would be removed from a next-day assignment to Chopaka because it was a remote location, and staffing reliability precluded assigning a BSO who might continue to be away due to illness.
- Out of a sense of compassion for the grievor's well-being, he drove to Chopaka to ask the grievor if we was OK and to remind him that he could access the employee assistance program if he needed to.
- He wanted to approach the grievor as a friend and tell him that his outburst at Osoyoos had been unacceptable.
- He wanted to ask the grievor whether something was amiss and to ask him to seek help, if he needed it.
- Upon his arrival, he asked the other staff to exit the building so that matters of potential personal privacy with the grievor would not risk being disclosed to the other BSOs.
- However, once that happened, the grievor demanded a union representative or, alternatively, a BSO witness.

- He denied that request and told the grievor that it was not a disciplinary hearing.
- He told the grievor that his actions of earlier that morning at Osoyoos would be investigated for potential discipline and that another suspension could potentially result from it.
- He stated that he did not yell at the grievor but that he did raise his voice, slightly.
- He stated that the grievor cut him off and began yelling at him before he could share his feeling of compassion for the grievor.

[345] The grievor testified as follows:

- On February 11, the previous day, he had met with his managers and had been told to "gun-down", which meant that he was to remove his sidearm as he was being called in to discuss another issue along with a disciplinary matter.
- He called in sick due to the stress of that but said that he would return to work the next day.
- He saw his doctor and reported for work early on February 12.
- He saw the shift assignments and was disappointed that he had not been assigned to Chopaka, despite his expectation to be assigned there.
- He discussed this with Superintendent Cacchioni and was told that because he had called in sick, he had been taken off his Chopaka assignment.
- He then became quite upset, loud, and heated and told Superintendent Cacchioni that he was at work and wanted his Chopaka assignment.
- He said that Superintendent Cacchioni replied that management had the right to assign work, to which the grievor testified that it was just another way that management could "f***" him.
- Another BSO observed this and then approached to offer to trade his Chopaka assignment so that the grievor could work there, which Superintendent Cacchioni begrudgingly approved.
- The grievor said that shortly after he arrived for duty at Chopaka, Superintendent Cacchioni arrived, stormed into the office very angrily, and ordered the other staff to leave the office.
- Superintendent Cacchioni then moved out of the view of the office security cameras and started to berate the grievor and to yell profanity at him due to the incident earlier that morning.
- Superintendent Cacchioni threatened to discipline him.
- When the grievor asked to have a union representative present, Superintendent Cacchioni replied, "You don't need a f***ing steward."
- Superintendent Cacchioni was so agitated and angry that the grievor worried that Superintendent Cacchioni might attack or shoot him.

[346] The employer tabled a report conducted by a private contractor into alleged workplace violence arising from the incident at Chopaka. I accepted the report as an exhibit, but I place no evidentiary weight upon it.

[347] The witness statements in it are hearsay. If a party wished to bring up something that a witness was reported to have said to the investigator, it should have called that person as a witness at the hearing.

[348] While the facts of this event are contested, clear to me is the fact that Superintendent Cacchioni seeking to immediately follow up on the heated and stressful exchange at the Port of Osoyoos by driving 30 minutes and then confronting the grievor in private, after asking or at least allowing the other officers there to exit the building, was likely not the wisest thing to do.

[349] I cannot help but note the ironic fact that Superintendent Cacchioni clearly escalated the already bad situation. In his testimony, he admitted to raising his voice in the heated exchange at Chopaka. These are precisely the same two things that he disciplined the grievor for doing with travellers, as noted earlier in this decision.

[350] But these findings alone are not sufficiently clear, cogent, and compelling evidence upon which I can conclude that the grievor suffered harassment, in violation of the collective agreement. Nor do they address the matter argued by the employer that the alleged harassment had to be founded upon a prohibited ground under the *CHRA*.

[351] In conclusion on the allegation of the Chopaka incident, I conclude that it is most probable that both the grievor and Superintendent Cacchioni became at least somewhat agitated and that they both raised their voices.

[352] The grievor asked me to make an adverse finding of credibility about Superintendent Cacchioni's testimony.

[353] While I have made pointed criticisms of his contributions, or lack thereof, to the hearing in his testimony, I decline the grievor's invitation. I expect that each of the two participants in the event at Chopaka gave some reliable testimony as to his version of what occurred.

[354] Although I noted deficiencies in other parts of Superintendent Cacchioni's testimony, I am not willing to accept every aspect of the grievor's version of events from the Chopaka event. I have no doubt that he became agitated upon the arrival of Superintendent Cacchioni. The grievor admitted to being agitated earlier that morning.

[355] I take notice of the fact the ability of a person to observe and accurately recall events and exact words spoken can be diminished by the physiological effects of high stress and agitation.

[356] Given this evidentiary finding, I cannot conclude that anything untoward, including harassment, took place during the event at Chopaka.

[357] As for the grievor's allegation in his original grievance that the employer failed to accommodate him, it was not pursued in detail in the closing argument. But I will simply note that given the previously examined 2015 RTW and the incident of the failure to accommodate, the grievor signed an accommodation agreement dated April 30, 2015.

[358] The agreement clearly stated that he was to wear approved hearing protection at all times and that he would not be assigned to overnight shifts. It specifically added that those accommodations would be in place at the Port of Osoyoos or at any other port or location he was assigned to.

[359] The grievor signed the agreement, indicating that he agreed with it.

[360] Later in October 2015, the grievor requested a deployment to Chopaka. However, it was not an accommodation request. While he might have seen it as one, the evidence before me at the hearing does not allow me to conclude that it was one.

[361] For the reasons I have explained, I find that the grievor failed to discharge his burden of proof of establishing with clear, cogent, and compelling evidence and on a balance of probabilities that the employer violated the collective agreement on the many grounds and allegations in this grievance.

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

(The Order appears on the next page)

IV. Order

[363] For the grievance in files 566-02-40774 and 40775: I order the three-day suspension replaced with a one-day suspension without pay.

[364] For the grievance in file 566-02-13057 and 13058: I order the five-day suspension replaced with a two-day suspension without pay.

[365] For the grievance in files 566-02-13060 and 13061: I allow it and order the eight-day suspension without pay rescinded.

[366] For the grievance in file 566-02-13059: I allow it and order that the grievor be reimbursed for the salary and benefits he would have earned had he returned to work on March 31, 2015.

[367] For the grievance in file 566-02-14405: it is denied.

[368] I will remain seized of this matter for 90 days in case the parties require assistance calculating the proper payment of the amounts arising from this order to the grievor.

January 27, 2021.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board