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File: 566-02-41427

Citation: 2021 FPSLREB 136

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

KYLE MUNROE

Grievor

and

TREASURY BOARD
(Department of National Defence)

Respondent

Indexed as
Munroe v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Rick Dunlop, counsel

For the Respondent: Christopher Hutchison, counsel

Heard via videoconference,
September 20 to 24, 2021

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] On May 24, 2006, Kyle Munroe ("the grievor") began his employment with the Department of National Defence ("DND" or "the employer") as a casual employee at its Fleet Maintenance Facility in Cape Scott, Nova Scotia. In 2010, he was promoted to the marine pipefitter (classified SR-PIP-08) position that he held until his employment was terminated.

[2] By all accounts, the grievor was a very good and capable pipefitter but only, as his supervisors put it, when he showed up for work and was in the right frame of mind. He had serious leave-usage and attendance issues that began at least as early as 2013 and continued for years. As his supervisor described it, the grievor seemed unable to come to work on time, often left early, and had ongoing issues managing his leave usage. The evidence showed that he used all his leave credits as soon as he earned them, often tried to access unearned leave, misrepresented the reasons for his absences, and often failed to provide notice of or medical certification for his absences. This caused serious problems for his supervisors, whose job it was to distribute each day's work to the pipefitters at the start time of 7:45 a.m.

[3] The grievor also developed a pattern of sending his supervisors and managers inappropriate and belligerent texts or voicemails about his absences. In March of 2017, this verbal abuse escalated to two incidents of physically acting out.

[4] The employer tried to manage the situation with letters of counsel and expectations, many meetings and discussions with the grievor, and progressive discipline consisting of a letter of reprimand, a one-day suspension, and a three-day suspension. He was repeatedly given the contact number for the Employee Assistance Program and was warned that continuing the conduct would result in further discipline, up to and including termination. Finally, he failed to attend work at all after March 22, 2017. In June he was put on sick leave without pay until he could provide medical certification that he was fit to return to work.

[5] In July of 2017, while still on leave, the grievor was the victim of a violent home invasion during which he and a friend were bound and assaulted by armed and masked intruders. They managed to free and arm themselves and the intruders fled

toward their truck in the driveway with the victims in pursuit. The grievor fired 20 bullets with his unlicensed semi-automatic rifle and hit one of the intruders in the back. He was charged with multiple offences, including attempted murder, however, that charge was later withdrawn. He pled guilty to one drug charge for which he received a suspended sentence and two firearm charges for which he received a conditional sentence of 1 year imprisonment, to be served in his home.

[6] The grievor's termination letter stated that he had misconducted himself while off duty, had been absent without authorization, had addressed his management team in an inappropriate manner, and had been physically aggressive toward management. Continued aggressive behaviour and the gravity of his actions were identified as aggravating factors.

[7] I find that the employer's decision to terminate the grievor's employment was not an excessive disciplinary response to either his on-duty or off-duty conduct.

II. Summary of the evidence

A. On-duty conduct – attendance, leave-usage and communication with management

[8] The first document entered in evidence that recorded the grievor's leave-usage pattern was a letter of counsel dated March 12, 2014. It noted that the expectations set out in a previous letter of counsel, dated June 10, 2013, had not been met, that his leave records would be monitored for three months, and that other administrative or disciplinary action could follow should he fail to improve.

[9] On July 6, 2014, he received a letter of reprimand for not submitting medical certification for three absences without authorization in May and June 2014. The letter referred to the March 12 letter of counsel as well as to, "… numerous verbal and written reminders from your supervisor that you are required to provide medical certifications for all absences due to illness." It warned that any subsequent offences would not be tolerated and could lead to further sanctions, up to and including termination.

[10] On January 29, 2015, the grievor received a notice of investigation into alleged misconduct referring to five more absences and the use of offensive and insolent language. He confirmed on cross-examination that indeed, on this occasion, he had told his then-supervisor to "go *[f**k]* himself." The investigation report, issued on

March 3, 2015, determined that two of the five absences were founded, but the employer chose not to discipline and instead opted to meet with him to further discuss his leave-usage issues. However, for the offensive language directed at his supervisor, he received a one-day suspension.

[11] On March 13, 2015, he received another letter of counsel on leave usage and attendance from André Monette, who was the acting group manager at the time. The group manager is responsible for 120 employees who report to supervisors on the shop floor. The supervisors report to managers, who in turn report to Mr. Monette. His letter set out expectations with respect to leave usage and warned that any breach or failure to improve could result in administrative or disciplinary action.

[12] Mr. Monette testified that as well as sending the letter, he also met with and counselled the grievor, because his attendance was poor. He was using his leave faster than he earned it. His supervisor was having difficulty getting him to request leave in a timely manner; that is, before taking it. Mr. Monette testified that the purpose of the letter and the counselling was to correct the behaviour and that in fact, the grievor did correct his behaviour at that time.

[13] However, the grievor received a follow-up letter of counsel dated June 23, 2015, from his work centre manager, Denis Fortin. The letter served as a reminder of the contents of Mr. Monette's March 13 letter, which was attached. It reiterated the expectations and explained why it was important to request leave in a timely way, as follows:

> …
>
> *It is imperative that you get your annual leave, personal day, volunteer day and any preplanned family related requirements leave submitted AND approved in advance of taking it. It is not acceptable to come to work at 0600 hrs and submit leave for the day of. This does not give your supervisor enough time to determine if your leave can be approved without impacting operational requirements. The workday is already started before they are aware that you submitted leave and in the event that they cannot approve it, they must try to get a [sic] hold of you and inform you of the requirement to come to work. Moving forward, all types of leave mentioned above that are not approved in advance of the leave start date/time will be denied.*
>
> …

[14] On November 18, 2015, Mr. Monette met with the grievor to discuss his unauthorized absences on October 27 and 29, 2015. He complained that he was sick and tired of being monitored and wanted to be treated like everyone else. He asked that the restrictions in Mr. Monette's March 13, 2015, letter of counsel be removed. Mr. Monette declined, noting that a follow-up letter dated June 30, 2015, was already in place. However, he agreed to meet again, six months from the latest letter, to review the grievor's leave usage and to consider removing the restrictions at that time.

[15] Mr. Monette met with the grievor on January 5, 2016 and agreed to remove the letter of counsel and its restrictions. He testified that he did this to try a different approach as the grievor's relationship with his previous manager "had completely gone south without possibility of repair". Hoping to allow the grievor the opportunity to make a fresh start, Mr. Monette reviewed the rules and expectations and asked him to commit to building up his sick leave credits and to submitting timely leave requests.

[16] However, on August 5, 2016, Mr. Monette had to issue another letter of expectations to the grievor. It warned that failing to adhere to them could result in administrative or disciplinary action. The grievor was late for work multiple times in September 2016. On September 22, his supervisor, Greg Stymest, met with him to discuss expectations. The conduct continued in October 2016.

[17] On November 3, 2016, another notice of investigation of alleged misconduct was issued to the grievor for an absence without authorization on November 1, 2016. He advised that he had had a bad morning and that he had contacted the shop when he could, while en route to work, at 10:45 a.m. On December 1, 2016, he received a three-day suspension and was warned that any further misconduct could result in more severe disciplinary action, up to and including termination of employment. On cross-examination, he confirmed that he became agitated and upset on this occasion.

[18] On January 11, 2017, Mr. Monette issued another letter of expectations that reiterated the contents of the August 5, 2016, letter but added the requirement that the grievor submit medical certification for any absences **immediately** upon his return to the workplace.

[19] On February 22, 2017, at 8:00 a.m., the grievor called Mr. Stymest to advise that he had slept in, likely due to medication he had taken for back pain. He asked about options for paid leave and was advised that there were none; it would have to be leave

without pay. The grievor said that he would get ready and come to work. At mid-morning, Mr. Stymest received a call from a Royal Canadian Mounted Police officer who had found the grievor's phone in a damaged truck at an accident scene. Also at mid-morning, the grievor called another supervisor, Chris Conrod, to advise that he had hit a telephone pole, that he had to figure out what to do about his truck, which was a write-off, and that he would not be in to work.

[20] On February 24, 2017, the employer issued a notice of investigation for alleged misconduct. However, the grievor subsequently obtained a doctor's note with respect to injuries sustained in the accident, and the employer approved the absence. This absence was referred to in the termination letter, but at the hearing, it was clarified that this was an error and that the employer was not relying on this absence.

[21] During an investigation hearing on March 2, 2017, Mr. Monette raised the option of the grievor undergoing a Health Canada fitness-to-work evaluation and suggested that he discuss it with his union representative.

[22] The grievor was absent on sick leave without pay on March 3, 2017. He testified that it was due to back pain, that he advised management before the start of his shift, and that he submitted a doctor's note. He texted the following to Mr. Stymest at 7:46 a.m., one minute after the start time:

> *Hey, I'm actually not not feeling good, are you able to approve a certified day without pay*
>
> *And along with being sick my sleep was horrible cause of my back flareups…but this is why I made decisions to take them…I'm going to go to doctors and try to deal with that stuff. Plus I've been given till next Thursday to get that OFA FORM filled out*
>
> *I was tossing and turning just couldn't get any comfortable position so no sleep is just as bad ..I had to take a pill around 330-4 this morning, I'm lucky I woke up to phone you …set every alarm possible so I could inform you in time ….*
>
> [*Sic* throughout]

[23] The grievor was off sick again on March 6, 2017.

[24] At 7:13 a.m. on Thursday, March 9, 2017, he left a voicemail stating that he would be a half-hour late. Mr. Stymest was on vacation that week, so Mr. Conrod was the responsible supervisor. When the grievor had not arrived by 10:00 a.m., Mr. Conrod called his cell phone and left a message to contact him. At 10:30 a.m. the grievor came

into the office and said that he had been at the dockyards since 9:00 a.m. but that he had been talking with his friend in the steam plant. Mr. Conrod said that he would have to send it up the chain to determine a way forward.

[25] The grievor had a doctor's appointment that afternoon to discuss the possible use of CBD oil for his back flare-ups. He hoped that this option might reduce the side effects he experienced with his current medication. He asked to use the paid leave that was provided for his Health Canada occupational fitness assessment (OFA) for this doctor's appointment. He told Mr. Conrod that he intended to go to the appointment, with or without approved leave. As Mr. Monette had already denied the request, Mr. Conrod advised him that he would have to take sick leave without pay.

[26] He also gave the grievor an OFA consent form to sign. The grievor left with the form, then quickly returned and said that he would not go to the Health Canada assessment because he was not allowed to use the paid time provided for it, for his doctor's appointment. He ripped up the form and threw it down in front of Mr. Conrod.

[27] Mr. Conrod testified that this health assessment is a standard biennial requirement for all employees, but the grievor was not happy and was adamant that he would not do it. He felt that it was intrusive and stated that "they were looking for things". Later that afternoon, the grievor texted Mr. Conrod as follows, "All good buddy and im not being ahittyvto *[s****y to]* you at all if it seems like it…just had enough of them 2 clowns, and you can forward this message to the 2 of rhem if you want." [*Sic* throughout]

[28] In his testimony, the grievor clarified the meaning of the typo in his text (as indicated in the last paragraph) and confirmed that the management employees he referred to as clowns were Mr. Monette, Group Manager, and Mr. Fortin, Work Centre Manager. He testified that his displeasure at not being allowed to use the Health Canada assessment paid leave for his doctor's appointment caused him to refer to the two managers as clowns. On cross-examination, he agreed that he threw the ripped-up form in Mr. Conrod's direction for the same reason. He confirmed that there was no good reason to act in such a disrespectful and inappropriate way, that he was now embarrassed by that conduct, and he apologized for it.

[29] On Friday, March 10, the grievor was off for the day and requested leave under code 699 (leave for other reasons). At 8:10 a.m. on Monday, March 13 he texted this to Mr. Conrod, "Hey its kyle just getting over over [*sic*] sick / flu…throats infected, but I'm still coming in …might be max behind 2 hrs./ can let you know when I'm in so ppl don't cry ..see ya [*sic*] by break at longest".

[30] The grievor testified that there was no good reason to have said something like that ("so ppl don't cry") and acknowledged that it was disrespectful and inappropriate.

[31] He arrived at work at 10:00 a.m. with no doctor's note. At 1:00 p.m., Mr. Conrod told him that he had to attend a meeting with Mr. Monette at 2:00 p.m. and asked him for his leave forms for the previous Thursday and Friday absences. The grievor was entering a leave request at a metal kiosk of four computer stations. Two other employees were seated and working at the other stations.

[32] Mr. Conrod testified that the grievor became agitated with the discussion about his leave issues and slammed the keyboard tray so hard that the whole kiosk rocked from the force. He got up and walked across the shop, shouting and swearing, picked up a metal pipe nipple, and threw it about 30 feet against the wall, causing a loud bang. The pipe nipple was not solid metal and was a bit smaller than a hard ball. Mr. Conrod testified that in his view, anyone walking by could have been struck in the head with it. The grievor stormed out the door while still shouting, then came back through the side door and threw a large roll of duct tape against the lockers near Mr. Conrod and the computer kiosk.

[33] The grievor testified that he did not recall slamming the keyboard tray but that he likely pushed it in harder than he should have. He said that he did not throw the pipe nipple 30 feet against a wall but rather tossed it into the scrap bin, not far from the computer kiosk. Mr. Conrod disputed this and confirmed on cross-examination that the scrap bin is in the hallway and that the grievor had thrown the pipe nipple against the wall. The grievor did not recall throwing the duct tape but acknowledged that he must have and said that if he did throw it, he certainly did not throw it in anyone's direction.

[34] Mr. Conrod testified that the grievor was very aggressive during this episode and that anyone who did not know what was going on would have been significantly taken aback. In his view, some of the grievor's co-workers felt unsafe during this

episode. At least one complained to him that this kind of behaviour had to stop, that he would not work in such a hostile environment. However, none of the witnessing employees were prepared to make a statement as to what they had seen when he approached them to do so. Mr. Conrod did not feel personally threatened, as he did not think that the grievor would attack him or throw the objects at his head.

[35] The grievor said that he was frustrated with Mr. Conrod because he had been waving the OFA form between his face and the computer screen, while he was trying to work on the computer. Mr. Conrod testified that he did not wave the form in that manner. The grievor also acknowledged that although he did not aim at anyone, one should never throw things in a shop. He apologized for the conduct.

[36] The grievor called in sick on March 14 to 17, 2017, and management was unable to give him the amended notice of investigation that had been prepared following the March 9 and 13 incidents. The acting supervisor received this voicemail on March 14 at 7:48 a.m.:

> *hey Matt it's Kyle, I'm not feeling good my voice is f****d, my throat sf****d [sic], you heard me yesterday ya [sic] know I'm sick as f**k, I have to go to the doctor to get something for this throat and stuff. You'll have to put me in for 8 hours sick leave without pay and that's fine with me, I have to take care of this I can't even talk. So I will see you tomorrow and I will get a certified doctors note for you and everything should be good, ok bye.*
>
> [Asterisks in the original]

[37] On March 17, 2017, Mr. Monette was preparing to go on vacation. He emailed Mr. Fortin in preparation for the investigation meeting that was to be held when the grievor returned to work. One of the matters he listed to be discussed at the meeting with the grievor was, "Any other disruption on the shop floor could result in the MPs being called." Mr. Monette testified that when something like the March 13 incident happens and control is lost of an employee, the military police are to be called so that they can control the employee. He acknowledged that it never came to that; the military police were never called.

[38] The grievor was absent on March 20, 2017. A snowstorm hit that day, and he testified that due to his truck accident, he had to borrow his mother's car, which did not have snow tires. He could not get out of the driveway. On March 21, he called in sick, saying that he was "pretty stiff" from slipping while shoveling snow.

[39] On March 22, 2017, he went to work and met with Messrs. Fortin, Stymest, and Conrod, along with his union representative. The employer issued the amended February 24, 2017 notice of investigation which added the unauthorized absences of March 9, 13, 17, 20, and 21, the allegations about tearing up and throwing the health assessment form and referring to his managers as clowns (March 9), as well as the aggressive behaviour in the shop (March 13).

[40] The grievor became agitated and refused to sign to signify his receipt of the amended notice of investigation. He said that it was all lies and that management was out to get him. He asked how many other pipe-shop employees had been treated like this. However, at the hearing, the grievor testified that these statements were excuses and that he realizes now that he was not taking responsibility and owning up to his own mistakes. He acknowledged that he was expected to return to work after that meeting but that in fact, March 22, 2017 was the last day he attended work.

[41] What followed was a series of absences, mostly called in after the daily start time, that continued through the rest of March, April, and May. The grievor's explanations included waking up at 10:00 a.m. due to medication, being unable to get his mother's car out of the driveway as it lacked snow tires, having been up the night before until 5:00 a.m. having a disagreement with his girlfriend, having to take his mother to appointments, residual headaches from a flight during which he had experienced ear and forehead pressure on landing, smoke inhalation from a potting-mix fire in his basement, needing his mother to go with him to co-sign for a new truck (for which he requested family responsibility leave), and having no way to get to work because he had taken his new truck in for undercoating.

[42] It appears that the grievor recognized how these explanations sounded. For example, in his April 20 text about headaches that he thought resulted from pressure buildup on a flight, he said this, "… seems like BS after excuses to you guys probably but its not…I guess slwop [*sic*], I don't want to deal with or have all these things one after another, trust me."

[43] This is also apparent in his April 21 message that stated that he could not come to work because of his basement fire:

…

> *Here's proof that here's the real ridiculous things that happen and I know everything sounds excuse after excuse cause this many stupid things don't happen to anyone this consistent [sic] or at all…but the whole house is full of smoke … I don't know what leave this falls under "disaster"? I have a lot of work for the day and weekend…*
>
> …

[44] As the grievor's explanations for his absences became less and less credible, his messages to management became increasingly belligerent.

[45] When he was denied family responsibility leave because he had none left, the grievor switched his request to sick leave. When reminded that he was not sick, that he had asked for family responsibility leave, he responded, "I'll have a doctor's note to state otherwise ….and how come 2 Fridays ago you didn't ask for reasons.? Anyways I do still have these headaches actually…forgot you guys are doctors too."

[46] When he was denied unearned paid sick leave to see a doctor about possible smoke inhalation on April 26, the grievor responded, "Wow ! That's about as non understanding and not give a *[s**t]* as you can get …". He then said that he would take vacation leave instead. When that was denied too, due to operational requirements, he responded with this:

> *Could of said all that yesterday when I said I'd be off…and it's evident you guys couldn't give a* [s**t] *about anything but yourselfs…I've got bad smoke inhalation and make it so I have to come into the worst environment for air quality and breath in more welding and and* [s**t] *air….I'll be in* [f*****g] *tomorrow.*
>
> [*Sic* throughout]

[47] Mr. Monette had given the grievor until Friday, April 28, to sign the Health Canada fitness-to-work-assessment consent forms. He texted the grievor on Thursday morning, April 27. Receiving no response, he followed up with another text at noon. He asked the grievor if he was well and told him that his union representative was trying to reach him so that he could sign the forms. The grievor responded, "Yeah I'm fine, when I'm not busy I'll call home back ….Stop blowing my phone and I might answer". [*Sic* throughout]

[48] The next day, the grievor texted at 12:16 p.m. to ask if he could sign the papers Monday, as he had dropped his new truck off to be undercoated, and there was no set

time when it would be ready to be picked up. Mr. Monette reiterated that the deadline had been clearly set for close of business that day. The grievor responded with these texts:

> *They were just created deadlines …I'm back Monday , is it gonna throw everything off that much* [12:23 PM]
>
> *I have no way of getting in there so I'm not sure what I'm gonna do, an [sic] do it first thing Monday morning* [12:24 PM]

[49] The grievor did not come to work on Monday, May 1. An investigation hearing was scheduled for May 4, which he did not attend. On May 5, Mr. Monette asked him for a doctor's note stating that he was fit to return to work. Although the grievor had obtained one on May 12, when he saw his doctor about smoke inhalation, he did not tell the employer that he had the note. Instead, he began to send frequent texts, saying that his doctor had given him a requisition for x-rays for smoke inhalation. His texts implied that he had to obtain the x-rays results before he could return to work and described many difficulties obtaining them.

[50] When Mr. Stymest reminded the grievor to advise when he had a note from his doctor, the grievor told the employer that he had such a note, but added, "… didn't you guys say you wanted results as well ??" Mr. Stymest replied that the employer had not asked for x-ray results but simply a fit-to-work doctor's note. The grievor responded with this:

> *And he gave x rays…I told you he recommended them and said needed good most likely and asked you guys since x rays were requested by the doctor and kinda left it up in the air …so I asked good without them or do I need them … and got* [s**t] *for an answer …you guys don't give 2 shots about anyone else but yourself , so made decision to make sure me is good …stop playing games*
>
> [*Sic* throughout]

[51] On May 30, 2017, Mr. Monette advised the grievor that the employer only required a doctor's note, not x-ray results, that he had been offered a Health Canada fitness-to-work assessment five times to get him back to work, and that he had been given the Employee Assistance Plan referral numbers. Mr. Monette further commented that he did not know what was going on with the grievor but that he felt that he had to ask if he still wanted to work for the employer. The grievor responded:

> *Are you* [f*****g] *saying I'm lying* [11:04 a.m.]
>
> …
>
> *And sorry radiologist …. yeah and the doctor that gave the request for x ray does not work at that clinic and has not contacted me…..do not text my phone again!!!* [11:06 a.m.]
>
> …
>
> *And why the* [f**k] *do I need eap…. don't need it and your stupid programs I there are a joke , not sure who you think you are to speak to me like that , I have a been talking to a lawyer so when ya see me next you can answer to him as well* [11:18 a.m.]
>
> [*Sic* throughout]

[52] This was the final straw for Mr. Monette. As he put it in his testimony, "I'm not paid to take abuse." He referred the matter to a labour relations officer.

[53] At this point, the grievor was still not at work, had not signed a consent for a Health Canada assessment, or provided a doctor's note that he was fit to return to work. Management did not know what was preventing him from coming to work and could only speculate as to the underlying issues. It was decided to put him on sick leave without pay so that he could potentially return if he obtained either a doctor's note or a Health Canada assessment that deemed him fit to work.

[54] By letter of June 5, 2017, Mr. Monette put the grievor's disciplinary investigation in abeyance and advised him that he was on approved sick leave without pay subject to medical certification, that he no longer had to contact his supervisor daily, and that medical certification of his fitness to work would be required should he wish to return. He told the grievor to sign and return the consent forms if he wished to participate in the Health Canada assessment.

B. Off-duty conduct – drug and firearms charges

[55] The grievor was still on leave pursuant to Mr. Monette's June 5, 2017 letter when media outlets reported on a violent home invasion involving firearms that had occurred on July 11, 2017. It came to the employer's attention that it had occurred at the grievor's home.

[56] Two masked, armed men had entered the grievor's home, followed later by a third. The intruders had bound and assaulted the grievor and his friend, but they were able to free and arm themselves, the grievor's friend with one of the intruders' guns,

and the grievor with his own unlicensed semi-automatic rifle. The intruders fled, with the grievor and his friend in pursuit. The grievor fired 2 clips (20 bullets) and hit one of the intruders in the back. The grievor testified that he fired the shots to keep the intruders in their truck until police arrived.

[57] The grievor was arrested and appeared in provincial court on July 18, 2017. He was released into his parents' custody and placed under strict house-arrest conditions. The public court documents identified DND as his employer. Mr. Monette attended and observed that court appearance.

[58] Due to 14 marijuana plants found in the intruders' truck that had been taken from the grievor's basement, he was charged with "production of a substance" (s. 7 (1) of the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19; *CDSA*) and with "possession for the purpose of trafficking" (s.5(2) of the *CDSA*). He was also charged under the *Criminal Code of Canada* (R.S.C. 1985, c. C-46) with the following:

- Attempted Murder s. 239(1),
- With Intent Discharge Firearm s. 244(1),
- Intentionally Discharge Firearm While Being Reckless s. 244.2(1),
- Careless Use of a Firearm s. 86(1);
- Contravenes a Regulation to Store, Handle, Transport, Ship, Display Firearm s. 86(2),
- Pointing a Firearm s. 87(1),
- Possession of Weapon for Dangerous Purpose s. 88(1),
- Unauthorized Possession of Firearm s. 91(1), and
- Possession of Firearm Knowing Possession is Unauthorized s. 92(1).

[59] On August 15, 2017, Mr. Monette wrote to the grievor and noted that he had been out of the workplace since March 22, 2017, that he had raised several medical reasons for his previous absences, that he still had pending misconduct allegations, and that he now faced allegations related to off-duty events. Mr. Monette advised him that the employer would no longer accept a note from a clinic doctor but that it would now require a Health Canada fitness-to-work evaluation before he could return to work. The grievor did not sign the consent forms for an evaluation at that time but did so later, on October 4, 2017.

[60] On December 7, 2017, while still under strict house-arrest conditions, the grievor was charged with the following offences under the *Criminal Code*:

- Assault Causing Bodily Harm s. 267(b),

- Assault with a Weapon s. 267(a),
- Unlawful Confinement s. 279(2),
- Mischief s. 430(4),
- Fail to Comply with Recognizance or Undertaking s. 145(3), and
- Fail to Comply with Recognizance or Undertaking s. 145(3).

[61] On March 27, 2018, the grievor pled guilty to production of a substance. The charge of possession for the purpose of trafficking was withdrawn.

[62] On April 11, 2018, the Crown agreed to withdraw the six additional criminal charges on condition that the grievor enter a peace bond. He testified that these charges related to a December 1, 2017 incident with his then girlfriend, who had opted not to testify.

[63] On April 11, 2018, by letter of Vice-Admiral, M.F.R. Lloyd, Commander of the Royal Canadian Navy, the grievor was suspended without pay pending the outcome of the remaining criminal charges and the employer's misconduct investigation. The letter refers to all the charges and specifically notes the attempted-murder charge (s. 239 *Criminal Code*), which arose from the events of the home invasion and the assault with a weapon and assault causing bodily harm charges (ss. 267 (a) and (b) *Criminal Code*), which arose from the later incident with his then girlfriend.

[64] On April 25, 2018, the employer issued its final amended notice of investigation of alleged misconduct. It included all the charges under the *CDSA* and the *Criminal Code*. When he received it, the grievor left the following voicemail for Mr. Monette, referring to the six charges that arose from the incident with his then girlfriend:

> *Hey it's Kyle, just received your letter this morning, I thought you were smarter than this, you were there when the 6 charges were dropped and you put that in a letter and use it against me is stupid, anyways just wanted to tell you that!*
>
> [*Sic* throughout]

[65] On June 7, 2018, the grievor was advised that Lt.-Cmdr. Dominic Dupuis would investigate the misconduct allegations. Lt.-Cmdr. Dupuis began the investigation and interviewed eight witnesses in June.

[66] On June 26, 2018, the preliminary inquiry into the criminal charges that arose out of the home invasion took place. Mr. Fortin and Nancy Newell, labour relations officer, attended the courthouse. When he saw them in the courtroom, the grievor

launched into a profanity-laced outburst. He accused them of trying to take his job, ruining his life, and having been sent there by Mr. Monette because he was too afraid to come himself.

[67] The attempted murder charge was withdrawn. The eight firearms charges remained outstanding.

[68] Lt.-Cmdr. Dupuis interviewed the grievor on July 4, 2018. The investigation was intended to cover allegations relating to both on- and off-duty conduct. However, when the grievor was asked which criminal charges had been dropped, he refused to answer, on the advice of his union representative. No further questions were asked on this topic, and the investigation with respect to the off-duty conduct ended there. On September 6, 2018, the terms of reference were amended to reflect that the investigation related only to the on-duty allegations. The final investigation report was issued on September 13, 2018. Six of the seven allegations of on-duty misconduct were founded.

[69] On September 13, 2018, the grievor accepted a plea arrangement, pursuant to which, on September 20, 2018, he pled guilty to two of the *Criminal Code* charges, careless use of a firearm (s. 86(1)) and unauthorized possession of a firearm (s. 91(1)). The other firearms charges were dismissed, in accordance with the arrangement. On October 4, 2018, he received a conditional sentence of 1 year imprisonment and was fined $400. The sentence was to be served in the community, under strict conditions. The Court noted that it was satisfied that this would not endanger the community's safety.

[70] Media outlets had reported on the events at different times throughout the process. Although his place of employment was referred to in open court and in court documents, no evidence was presented of any such reference in the media.

[71] On October 16, 2018, the grievor was advised of his right to respond to the misconduct allegations, which included absences without authorization, addressing management in an inappropriate manner, being physically aggressive toward management, and engaging in off-duty misconduct resulting in criminal and drug charges. The investigation report was attached with its findings on the on-duty conduct and it was indicated that the court convictions served to substantiate the

allegations of off-duty conduct. The right-to-respond meeting took place on October 29, 2018.

[72] Mr. Monette testified that when the grievor was asked about his criminal charges at the meeting, he became agitated and aggressive. He shouted, swore, refused to answer, and accused the management representatives of setting him up and trying to take away his job. Then he walked out. The grievor did not dispute any of that in his testimony except for walking out. His counsel suggested to Mr. Monette in cross-examination that it was he who had ended the meeting by saying, "I think this meeting is over." Mr. Monette confirmed that he did not end the meeting and that the grievor walked out after the failure of his union representative's attempts to get him to stay.

[73] By letter dated January 28, 2019, Vice-Admiral Lloyd terminated the grievor's employment effective April 11, 2018, the date of his suspension. The letter states that he had breached the *Department of National Defence and Canadian Forces Code of Values and Ethics* ("the *DND and CF Code*") and the *Values and Ethics Code for the Public Sector* and that given the severity of his actions, he had irreparably broken the bond of trust that the employer had placed in him. Vice-Admiral Lloyd testified that, the grievor's actions violated the following sections of the *DND and CF Code* that set out the conduct required of DND employees:

> ***Ethical Principles – Expected Behaviours***
>
> …
>
> *1.1 Treating every person with respect and fairness.*
>
> …
>
> *1.3 Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.*
>
> *1.4 Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.*
>
> …
>
> *2.2 Performing their duty or their responsibilities to the highest ethical standards.*
>
> …
>
> *2.4 Providing decision-makers with all the information, analysis and advice they need, always striving to be open, candid and impartial.*
>
> …

> *3.1 Respecting the rule of law.*
>
> *3.2 Carrying out their duty and their duties in accordance with legislation, policies and directives in a non-partisan and objective manner.*
>
> …
>
> ***Values and expected behaviours*** *…*
>
> …
>
> *1.1 Acting at all times with integrity, and in a manner that will bear the closest public scrutiny; an obligation that may not be fully satisfied by simply acting within the law.*
>
> …
>
> *1.4 Acting in such a way as to maintain DND'S and the CF's trust, as well as that of their peers, supervisors and subordinates.*
>
> …
>
> *2.1 Loyally carrying out the lawful decisions of their leaders and supporting Ministers in their accountability to Parliament and Canadians.*
>
> …
>
> *3.2 Making the right choice amongst difficult alternatives.*
>
> …
>
> *4.2 Considering the present and long-term effects that their actions have on people and the environment.*
>
> …
>
> *5.2 Fostering or contributing to a work environment that promotes teamwork, learning and innovation.*
>
> …

[74] Both Vice-Admiral Lloyd and Capt. David Benoit, Commander of the Fleet Maintenance Facility, testified that in their view, the grievor had exhibited a continuous and escalating pattern of misconduct. They stated that they considered it from all angles, including their *Canada Labour Code* (R.S.C. 1985, c. L-2) obligation to provide a safe and healthy workplace for the 1100 other employees of the maintenance facility. They weighed their obligation to the grievor, including considering the financial burden of job loss and its impact on his parents, who were supporting him.

[75] Capt. Benoit noted that the entire process had been based on using the minimum possible discipline to correct behaviour. However, both were of the view that given the leave-usage and attendance issues, the aggressive language and behaviour toward management, the severity of the criminal charges to which he pled guilty, and

the continued aggression toward management exhibited at the courthouse and the right-to-respond meeting, termination was the only possible outcome.

III. The employer's submissions

[76] The employer argued that the grievor had essentially admitted his misconduct. He did not dispute his unauthorized absences. He acknowledged referring to his managers as clowns, to ripping up and throwing the health assessment form, to sending wildly inappropriate texts to management in 2017, to being arrested and charged with six additional criminal offences while under house arrest, to leaving Mr. Monette an inappropriate voicemail upon receipt of the revised notice of investigation in 2018, to swearing at Mr. Fortin and Ms. Newell at the courthouse, and to losing his temper at his right-to-respond meeting.

[77] The only ground stated in the termination letter that he denied was that he had been physically aggressive with management. Even that was an issue of semantics as to what constitutes physical aggression. He testified that in his view, physical aggression involves hands-on aggression (as opposed to shouting, swearing, and throwing things).

[78] He had been charged with serious breaches of the *Criminal Code* and the *CDSA*, and had pled guilty to 3 charges. Of those, 2 represented misconduct that did not arise from the trauma of the home invasion but was simply discovered because of it — production of a substance relating to 14 marijuana plants and possession of an unlicensed firearm. He described his semi-automatic weapon as having the capacity to hold a clip of 10 bullets that could be fired as fast as he could pull the trigger.

[79] With respect to the third charge of which he was convicted (careless use of a firearm), although the context of the conduct was a traumatic event, the grievor acknowledged that nevertheless, he should not have acted the way he did. His actions were not in self defence; he testified that he was trying to keep the intruders in their truck until the police arrived to arrest them. He acknowledged that after shooting one clip of 10 bullets, he took the time to reload, to shoot another clip of 10.

[80] As there was little factual dispute, the only question before the Board was whether the termination was reasonable. To assess this in respect of the grievor's off-duty conduct, one must consider and apply the factors summarized in *Millhaven Fibres*

Ltd. v. Oil, Chemical & Atomic Workers Int'l Union, Local 9-670, [1967] O.L.A.A. No. 4 (QL)("*Millhaven*").

[81] In this case, the employer's reputation had been brought into disrepute, as the grievor was convicted of serious criminal charges, his conduct resulted in considerable media attention, and the employer was referred to in court documents and in open court. Messrs. Monette, Stymest, and Conrod all expressed concern and unease about the grievor returning to work.

[82] As well, the grievor's on-duty conduct was egregious and repetitive, and its aggressive nature provided a strong nexus to the off-duty conduct. His aggression in the workplace escalated, right up to his arrest in July 2017 and beyond. It would have been impossible for the employer to not connect the on- and off-duty conduct of the same employee it had watched become increasingly volatile over the year and not be concerned for its reputation.

[83] Employer counsel acknowledged that the grievor's testimony appeared to be forthright and contrite but noted that it was the first time he had expressed any remorse. In the employer's view, his expression of remorse at the hearing was made too late. He testified that he is no longer the same person who did these things. However, it was the aggressive and belligerent employee who stormed out of his right-to-respond meeting weeks after being convicted of serious gun charges that the employer had to assess with respect to whether it could risk letting him come back to work. Termination was the only choice.

IV. The grievor's submissions

[84] The grievor's counsel agreed that there was no significant factual dispute in this case. He further noted that as reflected in the grievor's contrite testimony, he had taken responsibility for his actions, especially for the text messages and the outburst in the shop. As well, termination of employment is the "capital punishment" of labour relations and, accordingly, the reasonableness of the grievor's termination must be assessed in that context.

[85] The grievor's termination was really based on the criminal charges and convictions. Two of the employer's witnesses, Capt. Benoit and Vice-Admiral Lloyd, confirmed that they were fundamentally concerned with the gravity of them.

[86] Much reliance was placed on the *Millhaven* factors, several of which, according to the employer, had been satisfied. But the conduct of the *Millhaven* grievor who wilfully damaged the homes of two co-workers who had crossed a picket line, was directly related to his employment. The case law is clear that to justify discipline for off-duty conduct, there must be a clear connection to the employment. The events of this case involved the grievor shooting at intruders at his house. While he should not have had the gun or the 14 marijuana plants, these events must be connected to some kind of interruption to the employer's ability to efficiently operate.

[87] The criminal court found that the grievor was not a danger to the community; therefore, although sentenced to prison, he was allowed to serve the time at his home.

[88] The reason arbitrators, adjudicators, and the principles of labour relations are fundamentally uncomfortable with discipline for off-duty conduct is articulated as follows in *Oshawa General Hospital v. Ontario Nurses' Association*, (1981), 3 OLAC (3d) at 8 and 9:

> *An employer is not the moral custodian of either the community or its employees … A criminal conviction must therefore impact adversely on an important business interest of the employer which interest can only be accommodated by the employee's removal from the workplace.…*

[89] With respect to the employer's reputation, although the DND was referred to in court documents and by the grievor's criminal lawyer in court, it was not referenced in the media reports entered in evidence. As well, the same court documents that the employer relies on to argue reputational damage also state that the grievor is not a safety concern. This is relevant to the test of how a fair-minded and well-informed member of the public might assess the situation, which is the test for harm to the employer's reputation. And while the federal government may have more of a concern for its reputation than would a private employer, it does not mean that every criminal charge is sufficient to meet the *Millhaven* test simply because the grievor works in the public service.

[90] A fundamental consideration when assessing discipline for off-duty conduct is not only the nature of the employer's business but also the grievor's role within it. Cases where a nexus between criminal activity and job duties were found have often involved grievors working in law-enforcement positions. For example, as stated in

Aujla v. Deputy Head (Correctional Service of Canada), 2020 FPSLREB 38, "One must be mindful of a CX's role in the correctional system and the impact on public opinion should someone, who has committed an offence for which others have been incarcerated, be placed in charge of supervising incarcerated persons." The grievor in this case was not in a law-enforcement position of any kind. He was a pipefitter.

[91] The grievor in *Moloney Electric Inc. v. Unifor, Local 55N*, 2015 CarswellNB 230, was a high-voltage winder – a tradesman like the grievor. He was convicted of child pornography charges. The arbitrator noted that the issue was whether there was a real connection between the grievor's criminal activity and his job duties sufficient to justify termination and found that there was not. He said that the employer's burden with respect to reputational harm must be met by more than mere speculation that the crime created uneasiness in the community. And even with tangible evidence of the public's disapproval, there must still be a real nexus between the crime and the job performed by the employee. Some co-workers objected to the grievor returning to work, however, the arbitrator found that without reliable evidence that employees could be harmed, their objections to working with him could not be considered.

[92] There was no evidence in this case that any of the grievor's co-workers had objections to him returning to work; only managers said that they had some uneasiness and concern. The grievor's counsel submitted that that was largely due to his text messages, not the off-duty conduct, and that a well-informed observer who understood all the circumstances would not be uncomfortable with the grievor returning to work.

V. Reasons for decision

[93] As this case involves a termination of employment, the issue to be determined is whether there was reasonable cause for the employer to impose discipline and, if so, whether the discipline imposed was excessive, considering any mitigating or aggravating circumstances. (See *Wm. Scott & Co. v. Canada Food and Allied Workers Union, Local P-162*, [1977] 1 Can. LRBR 1 and *Basra v. Canada (Attorney General)*, 2010 FCA 24.)

[94] The termination letter, dated January 28, 2019, set out the grounds on which the employer relied. It advised the grievor as follows:

…

> *… you misconducted yourself while off-duty on or around 11 July 2017* [the home invasion incident] *and as a result were charged under the Controlled Drugs and Substances Act and the Criminal Code of Canada… were absent without authorization on 22 February 2017 and during various periods from 9 to 21 March 2017* [the February 22 allegation was later withdrawn] *… addressed your management team in an inappropriate manner, and … were physically aggressive towards management….*

…

[95] It further noted that the grievor's continued aggressive behaviour and the gravity of his actions were aggravating factors. The termination letter does not refer to the December 2017 criminal charges arising from the incident with his then girlfriend.

[96] The burden rests on the employer to show that any of these allegations, or any combination of them, justified termination.

A. Attendance and leave-usage issues

[97] In my view, the grievor gave the employer more than enough reasonable cause to terminate his employment due to his chronic attendance and leave-usage issues over a number of years. This includes his frequent late arrivals and his last-minute absences without notice, often without the required medical certification. It includes his practice of using his sick leave entitlement as soon as he earned it and then trying to access more sick leave, or other forms of paid leave, often for reasons that were either not credible or that simply lacked merit as reasons to be absent from work.

[98] The pipe shop has a start time of 7:45 a.m. when the supervisors distribute the day's work to the pipefitters. The grievor's constant unreliability with respect to showing up for work on time, or at all, or providing notice to the employer, undoubtedly caused significant frustration and interfered with the employer's ability to carry out its functions. His constant abuse of the leave procedures and misleading explanations of the reasons for his absences breached the bond of trust that the employment relationship requires.

[99] The employer clearly spent a great deal of time and effort trying to explain its reasonable expectations to the grievor and attempting to obtain his commitment to improve his behaviour. It counselled him, set out expectations in writing, monitored his leave usage, engaged in progressive discipline, and warned him repeatedly about

the possibility of further discipline, up to and including termination. It gave him the contact information for the Employee Assistance Plan multiple times (which he unfortunately ignored and in one case belligerently declined).

[100] The employer's efforts were to no avail. The conduct continued over multiple years, at least five, according to the evidence before me. It increased in early 2017, culminating in many absences in March and two outbursts, followed by the grievor not attending work at all after March 22, through April and May. He was finally placed on sick leave without pay on June 5, 2017.

[101] The grievor's counsel argued that there should have been more progressive discipline; that the reprimand, and the 1- and 3-day suspensions should have been followed by lengthier suspensions before termination was considered.

[102] Progressive discipline is an important principle, however, it is clear to me that none of the employer's efforts to bring home to the grievor the situation he was creating for himself had any positive effect on him. To the contrary, it seemed to have the opposite effect. He became increasingly unwilling to follow the leave-usage procedures and pushed back with increasing belligerence. There is no reason to think that a 5-, 10-, or even 20-day suspension might have caused him to suddenly stop the behaviour that all the counselling, the discipline, and the termination warnings seemed only to worsen.

[103] Given the grievor's repetitive and worsening conduct, the employer had reasonable cause for discipline. Termination for this behaviour alone would not have been excessive. Five years is longer than any employer should have to put up with such conduct.

B. Aggression toward management

[104] Closely tied to the chronic attendance and leave-usage issues was the grievor's pattern of responding to the employer in a disrespectful and belligerent manner, typically when questioned about his absences and the reasons for them. Like the absenteeism itself, this conduct also escalated over time, becoming more frequent and increasingly aggressive.

[105] On March 9, 2017, the verbal belligerence was accompanied by a physical expression of anger when the grievor ripped up and threw down the health assessment consent form.

[106] On March 13, 2017, it completely crossed the line from verbal to physical aggression when he acted out in the shop in what Mr. Monette described, aptly in my view, as a tantrum. The grievor, in his testimony, objected to the characterization of this incident as one of physical aggression, in that it did not include any hands-on aggression. In my view, throwing a tantrum that involved shouting, swearing, and storming around the shop throwing things not at, but near, his supervisor so that they landed with a bang against a wall or lockers was a form of physical aggression. So was slamming a keyboard tray so hard that it rocked the whole four-station computer kiosk at which other employees were seated. Whether or not intended to be intimidating, and although neither were aimed directly at his supervisor, throwing the metal pipe nipple and the large roll of duct tape, were reckless acts. As Mr. Conrod testified, any unsuspecting co-worker walking by could have been hit in the head.

[107] The parties agreed that there is little to no factual dispute in this case. However, the grievor described this incident slightly differently. In my view, he sought to minimize the degree of aggression inherent in it by altering some facts. He said that he did not recall slamming the keyboard tray but admitted that he probably pushed it in harder than he should have. He said that he tossed the pipe nipple into the scrap bin but failed to challenge Mr. Conrod's testimony that the scrap bin is located in the hallway. He said that he did not recall throwing the duct tape but stated that if he did, he did not throw it at anyone. He said that he had been frustrated because Mr. Conrod he had been waving a paper between his face and the computer screen. However, Mr. Conrod said that he did not do this.

[108] While it is understandable that the grievor would want to minimize the incident, doing so damaged his credibility. Where his account differs from that of his supervisor, I prefer the evidence of Mr. Conrod, who was forthright in his testimony and candid about the fact that while he was concerned about the level of aggression displayed and its impact on the grievor's co-workers, he had no personal fear during the incident as he knew that the grievor was not throwing the objects at him.

[109] Mr. Conrod did say that several of the grievor's co-workers were upset by this incident and at least one of them said that things had to be fixed as he could not work in such a hostile environment. Mr. Conrod failed in his effort to obtain statements from the witnessing employees. Regardless, I find that the facts are such that any reasonable co-worker would be concerned about this conduct.

[110] Had the March 9 and 13 incidents been the grievor's only displays of aggression, they would not likely have been grounds for termination. However, in my view, his ongoing pattern of addressing management with profanity-laced, sarcastic, disrespectful, dishonest, and increasingly belligerent text, voicemail, and in-person messages was itself a ground upon which the employer could rely to justify termination, all the more so given that on at least these two occasions, the conduct crossed the line to a physical acting out.

C. Drug and firearms charges

[111] The employer also relied on the grievor's off-duty conduct related to the home invasion and the criminal convictions that arose from it to justify terminating his employment. The grievor's counsel submitted that the termination was really about his conduct on the night of the home invasion and the employer's speculation that he might constitute a danger in the workplace should he return. I agree that the employer was very concerned about that conduct and that the events of the home invasion prompted it to terminate the grievor's employment when it did. However, it did not rely on the off-duty conduct alone, as the termination letter makes clear.

[112] To justify a termination based on off-duty conduct, an employer must establish one or more of the factors summarized in *Millhaven*. It can demonstrate that the conduct harmed its reputation, which can be shown, among other things, by a conviction for a serious criminal offence. It can show that the conduct rendered a grievor unable to satisfactorily perform his or her duties, or that it led to the refusal, reluctance, or inability of other employees to work with the grievor, or that it made it difficult for the employer to efficiently manage its work and direct its working forces.

[113] The jurisprudence is clear that adjudicators are not to be the moral custodians of workplaces and that off-duty conduct should not result in workplace discipline unless there is a nexus between the conduct and the workplace. Determining this

involves considering both the type of employer and the grievor's role and job duties within it.

[114] The jurisprudence cited by the employer showed many examples of terminations for off-duty conduct being upheld when there was a clear connection to the grievor's job. See, for example, *Kullman v. Treasury Board (Citizenship and Immigration Canada)*, [1999] C.P.S.S.R.B No. 64 (QL), regarding an immigration officer who facilitated illegal entries to Canada. See also *Tobin v. Canada (Attorney General)*, 2009 FCA 254 about a prison psychologist heading a program for female inmates who harassed, stalked, and threatened a female employee with whom he had an intimate relationship. Cases involving criminal activity often arise in law enforcement, as the grievor's counsel pointed out. For example, a grievor's criminal activity will, in many circumstances, be found to conflict with a correctional officer's job of maintaining the custody and control of inmates who have been convicted of criminal offences. (See *Aujla*, *Peterson v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 29, and *Stene v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 36.)

[115] However, having said that, not all cases in which terminations have been upheld for off-duty criminal conduct have involved grievors working in a law-enforcement capacity. See, for example, *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46, which dealt with the grievance of an employee who worked as a custodian.

[116] The grievor in this case did not work in a law-enforcement capacity. He was a pipefitter working at the dockyards. I agree with his counsel that there is no obvious nexus between his off-duty conduct and his job duties. However, the grievor did not carry out his pipefitting duties for a private company but rather for the Department of National Defence, the federal government department responsible for the Canadian Armed Forces. He worked on the ships and submarines of the Royal Canadian Navy. Does that make a difference?

[117] In my view, it does. There is no dispute that federal government employees are held to a higher standard of conduct, as explicitly set out in the two codes of ethics and values referred to earlier. That higher standard applies to off-duty conduct as well, and in my view, the grievor's off-duty conduct was incompatible with his DND employment, even if not with his actual duties. The DND has the right and obligation

to protect itself from damage to its reputation attributable to an employee's off-duty conduct.

[118] The jurisprudence is clear that it is not necessary to show actual harm to the employer's reputation stemming from a grievor's misconduct, which in most cases would be difficult, if not impossible, to do. While neither of the two media reports entered in evidence mentioned the DND, the employer was mentioned in open court and in court documents. This information, therefore, was accessible to the media. As well, the Halifax, Nova Scotia, area is a relatively small community, and local news in all small communities is known to travel by means other than the media.

[119] In my view, the grievor's conduct on the night of the home invasion and his resulting conviction on serious criminal charges, in particular, the careless use of a firearm, would harm the employer's reputation in the eyes of reasonably informed members of the public. While the public might understand that the grievor had been traumatized by the armed intruders, it would also be clearly understood that his community was put at serious risk when he used a semi-automatic weapon to fire 20 bullets in his driveway.

[120] The employer also argued that the grievor's off-duty conduct posed a concern with respect to the health and safety of its other employees, to whom it was responsible to provide a safe and healthy workplace. It was not unreasonable for the employer to consider that statutory obligation.

[121] With respect to the *Millhaven* factor involving the reticence of co-workers to work with a grievor, three employees testified that they would be uneasy at the thought of working with him again, both for themselves and for the safety of other employees. They felt that given his acts of aggression while off duty, it was unknown what he might be capable of. These were the same employees who had been subjected to much of his verbal abuse and physical acting out in the shop, all of which had escalated significantly during his last few months of employment.

[122] The grievor's counsel argued that only management employees objected, that none of the grievor's co-workers testified that they would not want to work with him again. While that is true, it is not a reason to discount the unease of shop floor supervisors and a group manager, all of whom worked closely with the grievor.

[123] None of the three said that they would not work with him; however, their concern is understandable. They experienced a multi-year pattern of verbal belligerence escalating to two instances of physically acting out and throwing things in the workplace. When an egregiously violent off-duty episode subsequently took place, followed by off-site verbal outbursts at management employees, it is understandable that the supervisors who had borne the brunt of his abuse for several years saw a worrisome pattern of aggression.

[124] As a general proposition, what employees do on their own time should certainly not be an employer's concern unless there is a clear connection with the workplace. In this case, the gravity of the grievor's off-duty conduct and its resulting harm to the employer's reputation, as well as the escalating on-duty aggression that both preceded and continued after it, created the nexus with his employment that is required to justify termination.

VI. Conclusion

[125] I find that the grievor's on-duty conduct constituted cause for discipline and that the termination of his employment for that conduct was not excessive in the circumstances.

[126] I also find that the grievor's off-duty conduct constituted cause for discipline and that the termination of his employment for that conduct was not excessive in the circumstances.

[127] For these reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[128] The grievance is dismissed.

December 15, 2021.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board