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

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

BETWEEN

MARK JASON MENZIES

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

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

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: Zachary Rodgers, counsel

For the Respondent: Laetitia Auguste, counsel

Heard via videoconference,
June 14 to 16, 2022.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Mark Menzies, is a border services officer at the Canada Border Services Agency ("the Agency") working at the Blue Water Bridge Port of Entry in Sarnia, Ontario. He began his employment in 1996 as a customs inspector, as the position was then known, and had 18 years of service when he filed this grievance to challenge the imposition of a 20-day disciplinary suspension.

[2] On March 2, 2015, the grievor failed to report to work for his "midnight shift". Upon receiving a call from his supervisor, he made immediate arrangements to come to work and was on site, ready to work, an hour after the start of his scheduled shift.

[3] The grievor had a significant disciplinary record that included 6 prior incidents of failing to report to work, as well as multiple incidents of other kinds of misconduct, for which he had received written reprimands and suspensions of 2, 5, 10, and 15 days. None of the prior disciplinary actions had been grieved.

[4] The grievor acknowledged that his failure to report to work violated the Agency's *Code of Conduct* and was unacceptable conduct warranting discipline. However, he took issue with the 20-day suspension he received, which he considered excessive.

[5] Accordingly, the only issues for the Board to determine are whether the disciplinary action imposed was excessive and, if so, what lesser disciplinary action should be substituted.

[6] I have determined that the 20-day suspension is excessive and substitute a 4-day suspension.

II. Summary of the evidence

[7] The Board heard testimony from Sebastian Marschner, currently the regional manager of the Agency's Trusted Trader programs, who was a superintendent in the commercial operations section at the relevant time, and from Robert Long, currently the chief of commercial operations, who was then the acting chief. The grievor testified on his own behalf.

[8] Mr. Marschner was the superintendent on duty who reported the incident. He confirmed at the hearing that the grievor had failed to report for his “midnight shift”, which was scheduled from 23:10 on March 2 to 08:00 on March 3, 2015. When Mr. Marschner called him at 23:30, the grievor said that he thought that he was working an afternoon shift, realized his error, apologized for it, and said that he would be in as soon as he could. Mr. Marschner reported at the time, and testified at the hearing, that the grievor reported for duty ready to work (meaning fully uniformed and armed) at 00:10 hours on March 3, 2015, one hour after the start of his scheduled shift.

[9] When Mr. Marschner reported the incident, Mr. Long asked him to verify if there had perhaps been a shift change that might explain the grievor’s failure to report to work. There had been no shift change. Ultimately, he tasked Mr. Marschner with conducting an investigation.

[10] On March 17, 2015, Mr. Marschner conducted an investigation, the purpose of which was to obtain more information and to give the grievor an opportunity to provide any additional considerations that should be taken into account. When asked if management should consider any mitigating circumstances, the grievor apologized again. He stated that it had been nearly two years since his last failure to report and that he would make every effort not to repeat this conduct. He raised no other explanation or mitigating circumstances.

[11] On April 9, 2015, Mr. Marschner conducted a pre-disciplinary meeting, the purpose of which was to present his preliminary findings and to receive any additional information that should be considered before any disciplinary decision was made. Mr. Marschner reviewed the facts and conveyed his finding that the grievor’s failure to report to work was a violation of the sections of the Agency’s *Code of Conduct* dealing with neglect of duty and hours of work. He gave the grievor an opportunity to respond to those findings and to present any further mitigating circumstances. The grievor responded that he had nothing to add.

[12] Mr. Marschner testified that typically, he would have led the process through to the end; that is, he would have decided upon a disciplinary action and imposed discipline. However, in this case, it was clear that the discipline would be more than five days’ suspension, which is the longest suspension that an Agency superintendent

can impose. Therefore, some time after the investigation, he turned the file over to Mr. Long.

[13] However, Mr. Marschner could not recall when, how, or by whom the decision to do that was made. He testified that when considering discipline, management generally consults with labour relations specialists throughout the process. He would have been involved in the decision-making process, relaying what had taken place and the results of the investigation, but he did not recall making that decision or making any recommendations about a specific disciplinary action.

[14] On May 11, 2015, Mr. Long conducted the disciplinary meeting. The record of the meeting lists the mitigating and aggravating factors considered as follows:

> …
>
> - *The following mitigating factors were considered:*
>
>   ➢ *Length of service — 18 years; your CSD is February of [sic] December of 1996*
>
>   ➢ *Demonstrated remorse - you were genuine and sincere in your apology for the failure to report for duty*
>
>   ➢ *Employee response to management's investigation of alleged misconduct - you have been fully cooperative in all meetings and exchanges with management with respect to this investigation*
>
> - *The following aggravating factors were considered:*
>
>   ➢ *This is your eighth incident of discipline. The most recent was in 2014 which was a suspension without pay for a duration of 15 days or 112.5 hours due to misconduct.*
>
>   ➢ *Your failure to report for duty makes it difficult for the employer to manage its operations efficiently.*
>
> …

[15] Mr. Long explained that twice a year, employees use their seniority to bid on the shifts they want. When all shifts are filled, they are notified by email, and the shifts are posted on a centrally located bulletin board. Changes can then be made to the schedule at the request of either management or an employee, and an updated schedule is posted weekly. Employees know their schedule months in advance.

[16] Mr. Long explained why failing to report for work is a serious matter for the Agency and how it can significantly impact operations. He said that especially on a midnight shift, a failure to report can make things very difficult, as the staff

complement is reduced. A failure to report creates a significant amount of work for the superintendent, who should be making shift schedules, responding to stakeholders, and dealing with any other issues that arise. Instead, the superintendent must spend time calling the employee who has failed to report for duty. If the superintendent cannot reach the employee, they are obliged to carry out a wellness check. This entails going to the employee's residence with another officer, which takes time and further depletes the staff complement on site.

[17] The superintendent may try to call another employee to come in on overtime. This is a complex procedure and can take hours, especially for a "midnight shift" as it is typically difficult to have anyone come in at that time. Or the superintendent may have to shut down a commercial line or try to borrow an officer from the travellers operation. The absence may affect secondary inspections, which must be done by two officers for safety reasons, thus impacting health and safety in the workplace if two officers are not available.

[18] There is no system for logging in — border services officers are treated like law-enforcement officers. They are simply expected to be there. Unexpected absences can put their colleagues in an uncomfortable position as it is up to them to notify a superintendent of any absence. Since they do not want to do that, they will sometimes choose to say nothing and instead close a lane or take some other action. At times, superintendents are not even aware that an officer has failed to report until traffic backs up or other problems occur.

[19] Mr. Long said that while some jobs are not time sensitive as to when the work is done, it is not so for border services officers. Arriving an hour late does not necessarily avoid problems. If the lines cannot be covered and trucks are backing up, then the Agency is not meeting its obligations to its stakeholders. That can result in calls and complaints, some of which would be to the Agency's president or vice president. However, Mr. Long confirmed that he had received no report of any actual impact on operations arising from the incident on March 2, 2015.

[20] Mr. Long testified that he decided on the disciplinary action. He said that Mr. Marschner would have consulted with the Agency's regional labour relations section and that at some point, he would have realized that the disciplinary action would be

more than a 5-day suspension and, therefore, would have to go to Mr. Long. However, like Mr. Marschner, he could not recall when, how, or by whom this was determined.

[21] Mr. Long testified that the purpose of discipline is not to punish but rather to be corrective and that he applied the principle of progressive discipline. He confirmed what he had written on the notice of disciplinary action — that to determine the disciplinary action, he had considered all relevant facts and policies, as well as any aggravating or mitigating circumstances. He elaborated that the policies he considered were the Agency's discipline policy and guidelines for managers, as well as the Treasury Board's guidelines for discipline.

[22] He recalled that the main aggravating factor was the grievor's substantial disciplinary record, especially the severity of the most recent disciplinary action, which had been a 15-day suspension. As he understood progressive discipline, this established the starting point for the next disciplinary action which would have to be at least one step higher in severity. Mr. Long acknowledged that progressive discipline had not been applied that way in the past and indicated that he did not know why but assumed that previous management had simply applied it incorrectly.

[23] Mr. Long did say that there was some flexibility to skip steps; for example, for very serious unacceptable behaviour, one could impose a 10-day suspension in the absence of any prior disciplinary record. Therefore, the only other possibility open to him would have been to skip a step and impose a 25- or 30-day suspension, but he saw no need to do that in the circumstances.

[24] Although he could have chosen a more severe disciplinary action, Mr. Long did not believe that there was any flexibility to go in the other direction — to impose anything less severe than the last disciplinary action imposed. Nor did he feel that he could impose a suspension of the same length as the previous one, that is, another 15-day suspension. Neither were half-steps available; for example, he could not impose a 16-day suspension. Although 1- and 2-day suspensions were available at the lower rungs of the disciplinary ladder, at the higher levels, the increment was 5 days, and the next step could only be 20 days.

[25] Mr. Long said that there were many mitigating factors, such as the grievor's 18 years of service and the fact that he was remorseful. The one that weighed most heavily for Mr. Long was that the grievor had fully co-operated with management

throughout the whole process. When he imposed the 20-day suspension, he was aware of the significant financial impact and tried to mitigate it to some extent by delaying its start until after an upcoming holiday, so that the grievor would not lose statutory holiday pay.

[26] The grievor testified on his own behalf. He candidly advised that he had no independent recollection of the events, given the amount of time that had passed, but that he did not dispute any of the documents that recorded these events. He confirmed that he had failed to report to work as described by the deputy head's witnesses. He did not dispute that that conduct warranted discipline. He took issue only with the severity of the disciplinary action.

[27] He testified that he had been under the impression that he was working afternoons rather than "midnights". Asked how that could have happened, the grievor speculated that he could have looked at the wrong section of the schedule or simply copied it down wrong in his book. The grievor confirmed that when asked for mitigating factors in the investigation meeting, he had responded that it had been almost two years since his last failure to report, that he had apologized and that he had promised to make his best efforts to not repeat the mistake. He confirmed that he was then asked if he had anything to add, and that he had not added anything.

[28] The grievor testified that he knew that he had made a mistake and that it was a violation of Agency policy and warranted discipline. However, he thought that he might receive a 2- or 3-day suspension. Given the amount of time that had passed since his last failure to report, he did not think that his behaviour was serious enough to warrant a 20-day suspension.

[29] In the grievor's experience, management looked back to prior disciplinary action for conduct of the same type to determine disciplinary action. For example, the notice of disciplinary action he received for his 15-day suspension said that any future behaviour "of this nature" could result in more serious discipline. Based on his experience when disciplined in the past, he assumed that management would look to his last disciplinary action that dealt with a failure to report to work, and progress from there.

[30] From the way it had been previously handled, he believed that similar policy violations were grouped together. Failures to report would be treated as a "stream" or

a "business line", while complaints from the public or legislative offences, for example, were considered different streams. Discipline was meted out based on the nature of the unacceptable conduct. When he had been disciplined for five "lates", they were all grouped, and he had received the combined disciplinary action of a 2-day suspension.

[31] The grievor testified that he thought that "the punishment should fit the crime" as that principle is drummed into border services officers. They are directed to facilitate the lawful movement of goods and people across the border and are reminded that a traveller's previous enforcement action is not relevant when looking at a new infraction of a different type. He felt that that was only right and that it should apply to employee discipline as well.

[32] The grievor testified about serious personal issues that he had been experiencing at the time and for which he had sought help after these events. He said that his union representative raised this at the first level of the grievance process, as recorded in the notes of that meeting, as follows: "There are also some ongoing, personal issues at home which **are confidential**. These should also be considered as mitigating factors" [emphasis in original]. The grievor testified that the information was phrased that way because he wanted management to be aware that he was experiencing personal issues, but he was not prepared to divulge their nature at that time.

[33] The grievor was not involved in the third-level grievance meeting. However, the documents show, and it is not disputed, that his union representative raised the issue that the deputy head should have given the grievor's personal issues more consideration when determining the disciplinary action.

[34] The grievor testified that after these events, he received help from friends to deal with some of his personal issues, sought treatment from doctors for medical issues, and several years later, after he was diagnosed with a sleep disorder, he requested an accommodation from the Agency. The accommodation was to work a steady day shift to avoid the difficulty of changing his sleep cycle from days to afternoons to midnights. He noted that this change had helped a great deal and that he has had no subsequent late arrivals or failures to report to work. He sought to introduce medical records from several doctors he had consulted. However, the deputy head objected to their admissibility. I will address that objection later in this decision.

[35] The grievor described the same operational impacts of a failure to report as had the deputy head's witnesses, adding that it could also negatively impact fellow officers waiting to be relieved from their shifts. Nevertheless, he also said that in his view, being one hour late was not that serious and that the seriousness of a failure to report could be assessed in two ways. In certain circumstances, the impact on operations can be significant, but a failure to report to work is not necessarily serious when considered for the purpose of discipline. He had never heard about any resulting impact on operations and therefore, did not feel that this incident of failing to report to work was very serious.

[36] Although the grievor referred to his failure to report for work as being "late", he acknowledged on cross examination that he did not know he was supposed to be at work and that his absence could have been a good deal longer than one hour had he not received the call from Mr. Marschner.

[37] Before this incident the grievor had received disciplinary actions nine times for various types of behaviour, as follows:

- On June 27 and August 17, 2009, he received written reprimands for two separate violations of the firearms handling procedures.
- On October 17, 2010, he received a written reprimand for revealing confidential Agency matters to the public and engaging in public criticism of the Agency.
- On February 3, 2012, he received a 2-day suspension for 2 incidents of smoking while on duty, one of which also involved delaying a traveller, which resulted in a complaint.
- On February 28, 2012, he received a 5-day suspension for two negative interactions with travellers.
- On November 15, 2012, he received a written reprimand for failing to attend court as the Crown's essential witness, resulting in the Crown's case being dismissed.
- On April 15, 2013, he received a 10-day suspension for a negative interaction with a truck driver and one incident of failing to report to work.
- On October 17, 2013, he received a 2-day suspension for 5 incidents of failing to report to work. All the incidents were similar to the one at issue — he failed to report, was phoned by the Agency, and reported for work shortly after that. The 5 incidents occurred on October 9, 2011, November 9, 2011, September 12, 2012, March 23, 2013, and August 27, 2013.
- On September 4, 2014, he received a 15-day suspension for an extremely serious negative interaction with a driver.

[38] The grievor did not dispute any facts relating to those prior incidences of discipline. He said that there might be a few factors with which he disagreed but confirmed that he had chosen not to grieve any of them.

III. The deputy head's submissions

A. Admissibility of post-discipline medical records

[39] The deputy head argued that the post-discipline medical records that the grievor sought to introduce in evidence should not be admitted because he had not disclosed them in advance contrary to the Board's pre-hearing disclosure requirements; their introduction changed the nature of the grievance and therefore offended the principle established in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.); the information in them was untested hearsay; and they were not relevant to the period in question.

[40] The deputy head did not suggest that the late disclosure was intentional but argued that pre-hearing disclosure requirements allow parties to prepare adequately for a hearing and that the late disclosure hindered its ability to make a fulsome argument. This raised an issue of procedural fairness. The deputy head did not dispute that it was provided with the documents as soon as the grievor received them but maintained that nevertheless, there was an element of surprise, as it had no knowledge that the grievor had even sought them.

[41] The deputy head also submitted that a grievor cannot argue a new or different grievance at adjudication (see *Burchill*). The grievor tried to reconfigure the grievance to something that had not gone through the grievance process. The notes of the meeting held at the first level of the grievance process reflect that his union representative mentioned that the grievor was having "personal issues" but that they were confidential. He acknowledged that he had not wanted management to have any further information about his personal issues. The deputy head argued that the grievor could not have it both ways; he could not cite confidentiality and then ask the Board to consider issues of which management had no knowledge. There was no mention of a medical defence during the grievance process and introducing medical records at adjudication would amount to raising new grounds for the grievance.

[42] The deputy head also submitted that the medical information was untested hearsay. It consisted of the clinical notes of four different medical professionals, none

of whom testified. The deputy head asked the Board to draw an adverse inference against the grievor, given his failure to call any of the doctors as witnesses and to simply testify himself about the documents' contents.

[43] The deputy head also argued that the records were not relevant as they only began in June 2015, after both the misconduct and the disciplinary action had taken place. The grievor's testimony confirmed that timing — he said that he first saw doctors only after these events. As cited by the Board in *Peterson v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 29, the Supreme Court of Canada stated in *Cie minière Québec Cartier v. Quebec (Grievance arbitrator)*, [1995] 2 SCR 1095 at para. 13, that a decision maker can rely on subsequent-event evidence only if it is relevant to the issues and sheds light on the reasonableness of a decision at the time at which that decision was made. If the 20-day suspension was justified at the time management imposed it, the Board cannot rely on later occurrences to annul that suspension on the sole ground that subsequent events render such an annulment fair and equitable, in the Board's opinion.

[44] In this case, management was not aware of any medical issues at the time it made the decision to give the grievor a 20-day suspension, and even if it had been aware of any such issues, no medical information or diagnosis was available as the grievor had not yet seen doctors. Nothing in the grievor's medical records indicates that any diagnosis relates to the period of the misconduct, and there is no way of knowing if any such diagnosis existed at that time. The deputy head cited *Tobin v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 76, for the proposition that management must craft a disciplinary action based on the best evidence available to it at the time.

B. Principle of progressive discipline

[45] The deputy head submitted that nothing was unreasonable about progressing from a 15- to a 20-day suspension. The aggravating factors included the grievor's disciplinary record (see *Riche v. Treasury Board (Department of National Defence)*, 2013 PSLRB 35, in which a disciplinary history, none of which was grieved, was considered an aggravating factor).

[46] The grievor had had nine incidents of discipline and more incidents of misconduct (some of the notices of discipline referred to more than one incident). None had been grieved or disputed in any way.

[47] Although the incident at hand was only one hour of lateness, the grievor acknowledged that it could have been considerably more had he not received a call from the superintendent as he did not realize that he was supposed to be at work. The evidence was clear as to the operational impact of an employee not showing up for a shift and why it is considered to be serious unacceptable conduct.

[48] Mitigating factors were considered — the grievor's length of service, his remorse, and especially his co-operation with the whole process. The personal and medical issues raised at the hearing as possible mitigating factors were not raised prior to the Board hearing, so management could not have taken them into account. The grievor did not testify to any link between his personal issues and his failure to report to work. He reiterated at the hearing that he simply got the schedule wrong.

[49] The deputy head submitted that the principle of progressive discipline was properly applied and referred to Brown and Beatty, *Canadian Labour Arbitration*, 5th edition, at para. 7:72 (Rehabilitative Potential), and in particular to the portion which reads, in part, as follows:

> *… The theory, very simply, is that by progressively increasing the severity of disciplinary sanctions for persistent misconduct, an employee will be encouraged to reform. Such a system enhances the fairness and efficacy of discipline as a corrective tool by ensuring that employees are not punished more harshly than necessary and are not caught by surprise.…*

[50] The deputy head argued that the Treasury Board's *Guidelines for Discipline*, the Agency's *Guidance for managers with respect to discipline*, and the Agency's *Discipline Policy* all speak to the idea of progressive discipline; that is, discipline should be imposed in increasing levels of severity. And Mr. Long testified that the purpose of discipline is not to punish but rather to be corrective and that he applied the principle of progressive discipline.

[51] The deputy head cited *Reid-Moncrieffe v. Deputy Head (Department of Citizenship and Immigration)*, 2014 PSLRB 25, for the proposition that the principle of progressive discipline means that discipline at increasing levels of severity can be

imposed in the context of different kinds of misconduct. In that case, Ms. Reid-Moncrieffe had received a 25-day suspension for conflict-of-interest and preferential-treatment issues, then a 30- day suspension for making long-distance calls at very minor cost. Her employment was then terminated for twice failing to report for work. An adjudicator noted that if the modest phone calls had led to the first disciplinary action, things would have been different, but as her most recent disciplinary action had been the 25-day suspension, it was impossible to conclude that a 30-day suspension was unwarranted. Further, the adjudicator upheld 1 of the 2 absences as justification for terminating Ms. Reid-Moncrieffe's employment, and again, he said that although that misconduct alone would not warrant termination, having upheld the 30-day suspension, it was impossible to conclude that termination was unreasonable as the next step.

[52] The deputy head argued that although the grievor's last disciplinary action was about a driver complaint and not a failure to report to work, it did not preclude applying progressive discipline. Going from 15 to 20 days suspension was reasonable as the failure to report to work did not occur in isolation. Even if reporting to work one hour late could be considered not serious (with which the deputy head did not agree), the validity of the suspension depended on the grievor's whole disciplinary record plus any aggravating and mitigating circumstances.

[53] Between 2009 and 2014 the grievor had gone from a written reprimand to a 15-day suspension. As well, there had been multiple failures to report to work, and by March 2, 2015, an increased level of discipline was warranted because the prior disciplinary action had not been successful.

IV. The grievor's submissions

A. Admissibility of post-discipline medical records

[54] The grievor's position was that the parties were not as far apart on the issue of the admissibility of his medical records as the deputy head's submission suggested.

[55] The grievor acknowledged that technically, the Board's pre-hearing disclosure policy had not been followed, but argued that he had substantively complied with it by giving the deputy head the documents as soon as possible. As well, the deputy head had alleged no specific prejudice as a result.

[56] As for *Burchill*, the fact that the grievor experienced personal issues was raised at the first and third levels of the grievance process. His personal circumstances were a live factor throughout the grievance process, and management should have given it more weight.

[57] That said, the grievor did not put his medical records forward as a medical defence. He did not argue that it was unfair of management to discipline him because he had a disability. Rather, he merely asked the Board to consider his challenging personal circumstances at the time, as the Board did in *Desjardins v. Deputy Head (Shared Services Canada) and Treasury Board (Shared Services Canada)*, 2020 FPSLREB 43, when it found that the grievor in that case was understandably not focussed on being in perfect compliance with his employer's letter of instruction, due to challenging personal circumstances.

[58] The grievor offered his medical records in this case only to corroborate his testimony about his personal circumstances and state of mind at the time, to help the Board evaluate the blameworthiness of the conduct and, to a certain extent, his disciplinary record. In *Cie minière Québec Cartier*, an adjudicator found that an employer had been justified in imposing a disciplinary action on the facts it had at the time but nevertheless relied on new evidence to overturn that disciplinary action. That is not what is asked of the Board in this case. The grievor asked the Board to consider the medical evidence as a mitigating factor **only** if it finds that management imposed an excessive disciplinary action and that, therefore a lesser disciplinary action must be preferred.

[59] The grievor also noted that in *Tobin* and *Peterson*, post-discipline medical evidence was admitted. In *Peterson*, the Board specifically found that the evidence was relevant and therefore could be considered.

B. Principle of progressive discipline

[60] Mr. Long's testimony was clear; in his mind discipline always went one way — one could never impose less than the last disciplinary action previously imposed. He saw the grievor's prior 15-day suspension as controlling. The 20-day suspension was the only disciplinary action he considered imposing because in his view, it was the next step. It is impossible to reconcile this with Mr. Long's written statements and testimony that he considered all the aggravating and mitigating factors.

[61] What does it mean to consider the aggravating and mitigating factors in this context? Certainly, Mr. Long considered the grievor's length of service and remorse, and he especially appreciated the grievor's co-operation with the process. However, none of that influenced his decision. Mr. Long effectively fettered his discretion based on his understanding of the Treasury Board's and the Agency's policies and guidelines; however, the notion of progressive discipline upon which he based his decision is not found in those documents. Rather, the starting point when assessing discipline is always the behaviour itself, and then the aggravating and mitigating factors are considered.

[62] The grievor could reasonably expect that lateness in reporting to work would be considered relatively less serious than the prior misconduct involving direct interaction with a driver that had resulted in a 15-day suspension. Management's discretion was fettered, and as a result it discounted the mitigating factors and overweighted one aggravating factor (the previous 15-day suspension).

[63] The notice of disciplinary action for the grievor's previous lateness in reporting to work states that any future behaviour "of this nature" could result in increasing discipline, up to and including termination. Accordingly, even in its communications with the grievor, management acknowledged silos of conduct that while not watertight, indicate that the starting point is the nature of the conduct, with the severity of disciplinary action to be adjusted up or down from there.

[64] As for mitigating factors, the grievor was a long-service employee and was generally recognized as a good border services officer. He has demonstrated significant improvement with respect to attending work as scheduled since being disciplined in October 2013 for five failures to report. This speaks to his rehabilitative potential. He was remorseful and fully co-operative with the process right up to and including the hearing before the Board.

[65] The March 2, 2015, incident was not premeditated, and although being late with no good reason is serious in the abstract, this incident was not serious in the fact — nothing bad happened as a result, and short-staffing was acknowledged as a day-to-day issue. As well, the grievor's personal life was in serious disarray at the time, and while it does not excuse the incident, it can and should be considered.

[66] The grievor's disciplinary record constitutes an aggravating factor to be considered, but it is not a controlling factor. All the serious disciplinary actions related to interactions with drivers. The 10-day suspension had been followed by a 2-day suspension for 5 incidents of failing to report to work. The disciplinary action for the March 2, 2015 incident should have progressed primarily from that 2-day suspension. And the length of that suspension would suggest that the appropriate disciplinary action for the current incident should be a 1- or 2-day suspension or perhaps a written reprimand considering the mitigating factors.

V. Reasons

[67] The decision in *Canadian Food and Allied Workers Union, Local P-162 v. Wm. Scott & Company Ltd.* (1976), [1977] 1 Canadian LRBR 1 (BC LRB) ("*Wm. Scott & Company Ltd.*"), which dealt with a disciplinary termination of employment, and the many decisions that followed and applied it to discipline, have established that the Board should pose three distinct questions when analyzing a disciplinary grievance:

1. Did the employee's conduct warrant a disciplinary action?
2. If so, was the disciplinary action imposed excessive?
3. If it was, what alternative measures should be substituted?

[68] At page 4, *Wm. Scott & Company Ltd.* provides a list (not intended to be comprehensive, but nevertheless useful) of factors to consider when addressing the first two questions. It states that one must consider the seriousness of the behaviour, whether it was premeditated or spontaneous, whether the employee had a long-standing and good record of service, whether progressive discipline was attempted, and whether the disciplinary action was consistent with the employer's established policies or whether the employee was singled out for harsh treatment.

[69] The deputy head bears the burden of proof in this matter; however, the grievor acknowledged that his failure to report to work was misconduct that warranted discipline. Therefore, the deputy head had to establish only that the disciplinary action it imposed for the misconduct was not excessive. The Board's task is to determine whether the disciplinary action was excessive and, if so, what alternative measures should be substituted.

A. Ruling on the admissibility of post-discipline medical evidence

[70] The grievor testified to personal and medical issues for which he sought assistance after he received the 20-day suspension for the March 2, 2015, incident. He sought to introduce his medical records. The deputy head objected to their admissibility on several grounds, as outlined earlier. I heard the medical evidence, subject to it being admitted formally into the evidence before me and reserved my ruling as to its admissibility.

[71] The deputy head argued that the late disclosure of the grievor's medical records breached the Board's pre-hearing disclosure requirements and was detrimental to the deputy head's ability to prepare its case, thus raising an issue of procedural fairness. It asked the Board to use its discretion to refuse to admit the evidence on that basis. I note however that the deputy head alleged no specific prejudice that it suffered as a result, and that any element of surprise could have been addressed by the deputy head requesting a short or long adjournment. In the interest of ensuring that the grievor is afforded the opportunity to put all potentially relevant information before the Board, I would not rule the evidence inadmissible for a mere technical breach of the disclosure requirements.

[72] I do not agree with the deputy head that the grievor breached the *Burchill* principle and tried to change the nature of the grievance after its referral to adjudication. This is a disciplinary grievance, and the onus is on the deputy head to justify the appropriateness of the disciplinary action. As well, the deputy head was made aware of the existence of potentially relevant personal issues at the first and third levels of the grievance process. Although the grievor did not divulge any details at that time, management was alerted, and the deputy head cannot have been taken by surprise when these issues were raised again at adjudication.

[73] The deputy head submitted that the grievor's medical records are hearsay evidence and that they are incomplete, lack context, and are untested without a doctor's testimony to speak to them. The grievor argued that he did not seek to introduce them to establish a medical defence to his misconduct, but only to corroborate his testimony, and help the Board consider his personal circumstances as a mitigating factor, should it determine that a lesser disciplinary action would be appropriate. I agree that the grievor's medical records are hearsay. As hearsay evidence is admissible in an administrative hearing, I do not rule them inadmissible on that

basis, although I do note that they would not be of significant use to the Board without some explanatory and contextual testimony.

[74] However, I agree with the deputy head that the records are not relevant as they do not relate to the time period surrounding the incident of March 2, 2015. Although the grievor's testimony suggested a link between what he experienced at that time and what the medical professionals recorded when he belatedly sought treatment, it is a tenuous link at best. I find that the grievor's medical records are not sufficiently relevant to be admitted as evidence and therefore allow the deputy head's objection on that basis. Accordingly, the grievor's medical records do not form part of the Board's record of these proceedings. I further note that even were they to be admitted, the weight that could be accorded them would be minimal without a doctor's testimony linking the information contained in them to the period in question.

[75] The Executive Director of the Board's Secretariat will ensure that no copies of the grievor's medical records (provisionally identified as Exhibits 3 and 4 during the hearing held on June 14 to 16, 2022) remain in the Board's records of these proceedings.

B. The inappropriateness of the lock-step approach

[76] The grievor had a significant disciplinary record when the March 2, 2015, incident of failing to report to work occurred. He had been progressively disciplined and had received several written reprimands as well as 2-, 5-, 10-, and 15-day suspensions. It was clear on the evidence that the last suspension of 15 days, was the reason he received a 20-day suspension for misconduct that while serious, was certainly not serious enough on its own to warrant such a severe penalty.

[77] Mr. Long was forthright in his testimony that he imposed a 20-day suspension because the grievor had already had a 15-day suspension, although it was not for failing to report to work. Mr. Long acknowledged that discipline had not been meted out that way in the past. However, he testified that his understanding of the principle of progressive discipline as outlined in the applicable policies and guidelines mandated such an approach. He felt that the prior 15-day suspension was the controlling factor as to the severity of the disciplinary action to impose.

[78] Mr. Long did say that there was flexibility to skip steps; for example, for very serious unacceptable behaviour, one could impose a 10-day suspension in the absence of any prior disciplinary record. Therefore, as he saw it, the only other possibility open to him would have been to skip a step and impose a 25- or 30-day suspension, but he saw no need to do that in the circumstances.

[79] Although he could have chosen a more severe disciplinary action, Mr. Long did not believe that there was any flexibility to go in the other direction — to impose anything less severe than the last disciplinary action imposed. Nor did he feel that he could impose the same length of suspension as the previous one – 15 days. Half-steps were also not available. Mr. Long did not believe he could impose a 16-day suspension which would be more severe than the previous 15 days. Although 1- and 2-day suspensions were available at the lower rungs of the disciplinary ladder, at the higher levels, the increment between steps was 5 days. The next step could only be 20 days.

[80] Mr. Long's interpretation of progressive discipline is known as a lock-step approach. A disciplinary action is determined by simply going to the next step of the disciplinary ladder, regardless of the nature or seriousness of the behaviour. This kind of approach to discipline has long been rejected, even when it is mandated by an employer's policy. But no such approach is mandated in this case. Although Mr. Long was clearly under that misapprehension, the applicable policies and guidelines do not mandate, or even imply a lock-step approach.

[81] For example, the Treasury Board's *Guidelines for Discipline* state this:

…

> ***4. Determining appropriate disciplinary action***
>
> *Each incident of alleged misconduct is considered* ***on the basis of individual merit. Based on the circumstances****, in management's opinion, what corrective measures are necessary to correct the undesirable behaviour? The application of disciplinary measures is not to be punitive.…*
>
> *Mitigating circumstances, such as the employee's length of service, past record,* ***the seriousness of the offence****, and* ***the unique circumstances of each situation, may*** *require variations in management's response to seemingly similar offences. Whatever the response,* ***disciplinary actions depend on the nature of the offence, the attendant circumstances, and any mitigating factors****.…*
>
> ***5. Flexibility and application of discipline***

> ***It is recommended to avoid the rigid equation of offences and disciplinary measures****. Disciplinary action of a progressively more serious nature* ***may*** *be warranted when there are repeated incidents of misconduct.*
>
> …
>
> [Emphasis added]

[82] Similarly, the Agency's *Guidance for managers with respect to discipline* states this:

> …
>
> ***Flexibility and Application of Discipline***
>
> ***Rigid equation of offences and disciplinary measures should be avoided****. Disciplinary action of a progressively more serious nature is warranted for repeated incidents of misconduct or for a single act of serious misconduct.*
>
> ***Determining Appropriate Disciplinary Measure***
>
> *Each incident of alleged misconduct must be considered on a* ***case-by-case basis****. Based on the circumstances, in the manager's opinion, what corrective measures would be necessary to correct the unacceptable behaviour? The application of disciplinary measures should not be punitive in nature but rather corrective….*
>
> *Mitigating circumstances, and* ***the unique circumstances of each situation****, may require* ***variations*** *in the manager's response to seemingly similar offences.…*
>
> …
>
> [Emphasis added]

[83] The Agency's *Code of Conduct*, Chapter 4, entitled, "Disciplinary Measures and Resolutions of Issues pertaining to the *Code of Conduct*", states this: "A decision regarding disciplinary measures will be determined on a **case-by-case basis** taking into consideration the **nature of the breach and the seriousness of the misconduct"** [emphasis added].

[84] These policies and guidelines clearly convey that they are not based on, and do not mandate, a lock-step approach. To the contrary, they stress that determining an appropriate disciplinary action must be done on a case-by-case basis and must be based on the nature of the offence and the specific circumstances of each situation. Nor do they suggest that suspensions must occur in pre-determined steps of 1, 2, 5, 10, 15, 20, 25, and 30 days, regardless of the nature of the behaviour.

[85] The deputy head pointed out that the applicable policies and guidelines refer to disciplinary actions “in order of increasing severity”. It is true that the Treasury Board’s *Guidelines for Discipline* document prefaces its definition section as follows: “In order of increasing severity, disciplinary measures are as follows …”. It then lists and defines the different kinds of disciplinary actions that may be imposed, in the following order: oral reprimand, written reprimand, suspension, financial penalty, demotion, and termination. However, this simply explains that the order in which they are listed indicates their relative severity, as understood by the employer. A written reprimand comes after an oral reprimand on the list because it is considered to be a more severe disciplinary action. The Agency’s *Discipline Policy* reproduces the same list of disciplinary actions in its definition section to indicate by their placement on the list how the Agency views their relative severity.

[86] Nothing in these policies and guidelines restricts management’s options for determining the length of a suspension by suggesting that it must always be longer than the last one or that it must increase by specific increments. The policies and guidelines say nothing that suggests a lock-step approach, but even if they did, as the policies of some employers do, it would clearly be an incorrect application of the principle of progressive discipline. The proportionality of a disciplinary action must always be assessed in light of the nature and the specific circumstances surrounding the behaviour that needs to change.

[87] The decision in *United Steel Workers of America, Local 5795 v. Iron Ore Company of Canada* (2015), 262 L.A.C. (4th) 400 (NL) (“*Iron Ore*”), dealt with the impact of an employer’s lock-step discipline policy. Although the policies and guidelines applicable at the Agency do not have any lock-step requirement, Mr. Long, was under the impression that they did. Accordingly, the analysis in *Iron Ore* is relevant to this matter. In *Iron Ore* an arbitrator canvassed several prior decisions and analyzed the case before him as follows:

…

> *122 Arbitrator Oakley in* Iron Ore Co. of Canada and USW, Local 5795 (Winters), Re*, (Lorne Winters) notes that the Progressive Discipline Policy of the Employer does not require the imposition of the penalty at the next step in the progressive discipline system. He also noted that an Arbitrator is not bound by the Progressive Discipline Policy when reviewing the penalty. In that case he*

refused to uphold the discharge of the Grievor, even though the Grievor had proceeded through step 4.

123 Brown and Beatty *note at p.7-167 of their text that typically Arbitrators look at employment histories in which the employee persists in the same kind of misconduct more seriously than those that are marked by a series of different offences. In an extreme case, the earlier misconduct may be so minor and/or different from the final culminating incident that it may not count against the employee at all.*

124 In Calgary (City) v. C.U.P.E., Local 37 *(2010), 196 L.A.C. (4th) 225 (Alta. Arb.)* (Tettensor) *it was stated that notwithstanding the employer's lock-step progressive discipline system (ie. next step on system applied even if unrelated misconduct), arbitrators should consider the specific circumstances to determine whether the discipline is reasonable.*

125 The Arbitrator in that case wrote in referring to the decision of Arbitrator Adams in the Livingston Industries Ltd. case, "he noted such models provide certainty for the parties to allow them to regulate their affairs without the need for excessive arbitral intervention", but he also recognized that Adams also noted "that employers are constrained by the legal requirement of just and proper cause".

126 That is most certainly the case with Arbitrators and in my view one must never lose sight of the fact that the system is a construct of management, not of the parties and that we are not dealing with something enshrined in the Collective Agreement.

127 In Calgary (City) v. C.U.P.E., Local 37 *there is a further reference to Livingston Industries Ltd. and the Arbitrator notes that it states "the system can't be determinative of the outcome. Arbitrators have an obligation to consider the specific circumstances of the misconduct in weighing whether the discipline falls within the reasonable range of employer responses."*

128 The Arbitrator in Calgary (City) v. C.U.P.E., Local 37 *noted in the case before him that the City reserved the right to jump a step when this is justified by the nature of the misconduct. In his view the lock step approach should also be tempered when this is warranted by the circumstances.*

129 I agree.

…

132 Though the Policy states that violations of different rules shall be considered the same as repeated violations of the same rule for purposes of progressive discipline in that it demonstrates a pattern of misconduct, I conclude that blind and inflexible adherence to that is not appropriate when talking about correcting behavior.

133 The problem that needed addressing in this case was absenteeism. Not calling in on time was clearly related to that. A seatbelt infraction was not. While one should not discount the

> *seatbelt infraction entirely, in my view it cannot be and should not be accorded the same degree of weight as if that one day suspension had been for absenteeism or for not providing advance notice that he was going to be absent.*
>
> *134 The level of discipline imposed in March should, in my view, have reflected that he was being disciplined only for not providing one hours [sic] advance notification that he was going to miss a shift and not as well for unjustified absenteeism. It should also, in my view, have reflected that his previous suspension was not for absenteeism or failing to provide timely advance notification but for something entirely different.*
>
> …
>
> *138 In* Etobicoke General Hospital v. O.N.A., *1977 CarswellOnt 702 (Ont. Arb.), the majority of a Board chaired by Arbitration [sic] Brandt distinguished between the significance of a record for an offence entirely unrelated to the offence committed on the occasion of the culminating incident and one which was related and because it was unrelated treated the culminating incident as standing alone.*
>
> *139 The fact that the impact is just as great on the Employer if one does not provide advance notification as if one fails in that respect and is as well unjustifiably absent, and the fact that the seat belt violation should not be entirely discounted, are in my view adequately addressed by a suspension of three (3) days, the pinnacle of step 3 discipline. This was discipline greater than the one day suspension that had previously been imposed.*
>
> …

[88] As cited in *Iron Ore*, an arbitrator in *Canadian Union of Public Employees, Local 37 v. Calgary (City)*, 2010 CanLII 96455 (AB GAA), also addressed this issue in a case in which an employer had a lock-step disciplinary policy in place, as follows:

> …
>
> *110 … While I accept that arbitrators should give weight to an employer's system of progressive discipline for the reasons outlined in the* Livingston *case, I also accept, as Arbitrator Adams states, that the system can't be determinative of the outcome. We have an obligation to consider the specific circumstances of the misconduct in weighing whether discipline falls within the reasonable range of employer responses. The City reserves the right to jump a step when this is justified by the nature of the misconduct. In my view, the lock step approach should also be tempered when this is warranted by the circumstances.*
>
> *111 … taking all of the circumstances here into consideration, I am of the view that imposing a penalty which places a twenty-five (25) year employee one (1) step from termination, which under the lock step approach could be relatively minor misconduct, for calling in*

> *late, is excessive and offends my sense of justice and equity. In my view a reasonable response would have been the imposition of another two (2) day suspension.*
>
> …

[89] Mr. Long seemed to have a good deal of empathy for the grievor and was well aware of his obligation to determine and consider all the mitigating circumstances. His first response upon being notified of the incident was to ask if perhaps there had been a shift change that might explain the grievor's failure to report to work. When he imposed the 20-day suspension, he delayed its start until after an upcoming holiday, so that the grievor would not lose statutory holiday pay. It was clear that Mr. Long approached the matter and the grievor in good faith and with every intention of reaching a just determination. However, in my view, he incorrectly interpreted and misapplied the principle of progressive discipline and the applicable policies and guidelines.

[90] In fact, it appears that the Agency might have misapplied the principle of progressive discipline and the applicable policies and guidelines even before the file reached Mr. Long. The evidence revealed that in the normal course, Mr. Marschner would have retained the file through to completion. As superintendent, he would have determined and imposed the disciplinary action, if it was a 5-day suspension or less. It was determined at some point that it would definitely be more than 5 days, and therefore, the file was taken out of his hands and passed to Mr. Long. However, neither manager knew or could recall exactly how or by whom this decision was made. They both speculated that it likely arose from a discussion that Mr. Marschner would have had with a labour relations representative, with whom he would have consulted in the normal course.

[91] This gap in the evidence suggests that the decision that the discipline would definitely be more severe than a 5-day suspension was made before anyone decided what the discipline would be. Further, it was not made by either Mr. Long or Mr. Marschner but was either made or recommended by someone else. Therefore, it is more likely than not that Mr. Long's misunderstanding of the principle of progressive discipline and the applicable policies and guidelines was not his alone.

[92] Whoever determined the severity of the discipline did so before Mr. Marschner had an opportunity to make his own determination after considering all the

circumstances and the mitigating and aggravating factors. Mr. Marschner testified that he was involved and passed on the information from the investigation but did not recall making any recommendation about discipline. Therefore, it is more probable than not that the decision to refer the matter up the ladder was based on the same assumption that Mr. Long made — that the principle of progressive discipline should be applied in a lock-step fashion based simply on the severity of the last disciplinary action imposed.

C. The proportionality of the discipline imposed

[93] I note again the *Wm. Scott & Company Ltd.* list of factors to be considered. As already mentioned, that list is not comprehensive, but it is nevertheless useful. The first factor listed is the seriousness of the behaviour at issue which must be considered first and foremost.

[94] Had the grievor's behaviour been a negative interaction with a traveller or truck driver, behaviour for which he had already received 5-, 10-, and 15-day suspensions, then a 20-day suspension might not have been excessive, depending, of course, on all the circumstances and the mitigating and aggravating factors. But this was not a negative interaction with a traveller. While there is no doubt that failing to report to work is a serious matter that can negatively impact operational safety and efficiency, it is simply not in the same league as negative interactions with drivers.

[95] The grievor had also had prior incidents of failing to report to work, but the last one (on August 27, 2013) had occurred almost two years prior to the March 2, 2015, incident. And while both witnesses called by the deputy head, and even the grievor to some extent, spoke to the seriousness of a failure to report to work in the border services context, the best evidence of the relative seriousness of this behaviour is the previous discipline that the grievor received for it — a combined 2-day suspension for five distinct incidents.

[96] It is also telling that management waited until five such incidents had accumulated over a period of two years before imposing any discipline for them. The grievor was disciplined in October 2013 for failures to report to work in 2011, 2012, and much earlier in 2013. This suggests that had the fifth incident not occurred, the first four failures to report to work would likely have resulted in no discipline at all.

[97] Further, he had received that 2-day suspension *after* receiving suspensions of 5 and 10 days for more serious matters. Clearly, as Mr. Long acknowledged, management had not previously applied progressive discipline in a lock-step manner.

[98] In these circumstances, the principle of progressive discipline would be correctly applied by primarily considering the prior combined 2-day suspension for the five distinct similar incidents of failing to report and progressing from there, rather than jumping off from the 15-day suspension that had been imposed for very serious behaviour of a completely different nature.

[99] However, this is not to say that progressive discipline would dictate simply going to the next step after the combined 2-day suspension for five distinct failures to report while not considering the prior discipline received for other, more serious, behaviour. The grievor suggested that if five distinct similar prior incidents resulted in a combined 2-day suspension, then proportional discipline for the March 2, 2015 incident would be a 1- or 2-day suspension, or possibly even a written reprimand. I disagree.

[100] While a significant disciplinary record for conduct of a different nature does not automatically constitute the starting point, neither should it necessarily be completely discounted. The jurisprudence is clear that while disciplinary actions should not be imposed in a lock-step fashion, prior discipline for different types of behaviour need not be ignored but rather, where appropriate, can be considered as an aggravating factor.

[101] Neither witness for the deputy head testified that the grievor was not a good employee. To the contrary, Mr. Marschner said that he was a good officer. Nevertheless, the fact remains that he had a substantial disciplinary record that cannot be ignored simply because it largely consisted of behaviour of a different nature than the failure to report to work. The grievor's negative interactions with travellers and drivers, firearms violations, failure to attend court, and public criticism of the Agency do not paint a picture of an employee who cared greatly about his job, took discipline seriously, or learned from his mistakes. The grievor testified that he did not dispute the underlying behaviour that had resulted in these prior disciplinary actions and that while he might have disagreed with some of the details, he confirmed that he had chosen not to grieve them.

[102] Accordingly, I have considered the grievor's substantial disciplinary record as a significant aggravating factor. I have also considered the mitigating factors that management considered: the grievor's length of service, his remorse, and his co-operation with the process.

[103] Although I did not admit the grievor's medical records into evidence, I considered the grievor's testimony about his personal and medical issues. However, the grievor did not draw any link between these issues and his failure to report to work on March 2, 2015. For example, although he was diagnosed with a sleep disorder much later, and although he testified to having trouble sleeping at the time, he did not suggest that he failed to report to work on March 2, 2015, because of it. He said that he simply got the schedule wrong, either by reading the wrong section of the master schedule or by copying it down in his book incorrectly.

[104] Although it is not hard to appreciate that the grievor's personal circumstances meant that his life was in significant disarray and that that may well have contributed to the likelihood of him getting his work schedule wrong, no evidence established any such link, not even his own explanation as to what happened on March 2, 2015.

[105] Accordingly, considering the nature of the grievor's conduct on March 2, 2015, the operational difficulty that such conduct can create, the mitigating factors of remorse and co-operation, as well as the aggravating factor of a significant disciplinary record, I find that the 20-day suspension was excessive. A 4-day suspension will be substituted as an appropriate disciplinary response.

VI. Confidentiality Order

[106] The grievor requested a confidentiality order with respect to his medical records given the sensitive personal and medical information in them. These documents were provisionally identified as Exhibits 3 and 4 during the hearing pending my ruling on their admissibility. They were not formally entered in evidence. As I have allowed the deputy head's objection to their admissibility and declared that they do not form part of the Board's record of these proceedings, the grievor's request for a confidentiality order is moot.

[107] For its part, the deputy head requested a confidentiality order with respect to Exhibit 2 (the grievor's work schedule) due to security concerns should information about the scheduling process of the border services officers be made public.

[108] Requests for confidentiality orders must be considered and analyzed in the context of the open court principle, a fundamental principle that applies to all Board hearings. In *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 38, the Supreme Court of Canada reformulated the applicable legal analysis so as to require the party seeking a confidentiality order to establish that:

> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and*
>
> *(3) as a matter of proportionality, the benefits of the order sought would outweigh its negative effects.*

[109] The Court noted that this new formulation preserves the essence of the *Dagenais/Mentuck* test (*see Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and *R. v. Mentuck*, 2001 SCC 76), as redefined in *Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41.*

[110] The Board has considered security-related requests for confidentiality in various contexts. For example, in *Douglas v. Treasury Board (Correctional Service of Canada*), 2020 FPSLREB 51 the Board was asked to seal exhibits that had been introduced to show the physical setup for grievors with respect to an accommodation. They consisted of pictures and a floor plan of a federal correctional facility and the request to seal them was based on security concerns. Citing the *Dagenais/Mentuck* test as redefined in *Sierra Club* the Board concluded that:

> *[64] The Board adheres to the open-court principle in its hearings and decision making. Its files are publicly accessible. However, some situations warrant a confidentiality order ….*
>
> *[65] Preserving the security of a penitentiary is a valid concern that outweighs the public's interest in the proceedings. …. Making those public could create a risk for* [the Nova Institution for Women]*. The pictures and floorplan constitute Exhibit E-2, and that exhibit shall be sealed.*

[111] Ensuring security at the border is an important public interest and I accept, on a balance of probabilities, that public access to the grievor's work schedule — that is, to the work schedule of a border services officer at the Blue Water Bridge Port of Entry — poses a serious risk to the security of the border. I find that nothing short of shielding the grievor's work schedule from public access would prevent a risk to the security of the border. Therefore, sealing the grievor's work schedule is the only reasonable option available to Board. In my view, the beneficial effect of sealing the grievor's work schedule in these circumstances far outweighs the negative effect on the right of the public to access the Board's record in this matter.

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

(The Order appears on the next page)

VII. Order

[113] The deputy head's objection to the admissibility of the grievor's medical records into evidence is allowed and I declare that they do not form part of the Board's record of these proceedings.

[114] I order the Executive Director of the Board's Secretariat to ensure that no copies of the grievor's medical records (provisionally identified as Exhibits 3 and 4 during the hearing held on June 14 to 16, 2022) remain in the Board's records of these proceedings.

[115] The 20-day suspension is replaced by a 4-day suspension.

[116] I order the deputy head to pay the grievor the 16 days' salary and benefits to which he would have been entitled but for the 20-day suspension, less the usual deductions.

[117] Exhibit 2 (the grievor's work schedule) is sealed.

[118] I will remain seized for 60 days from the date of this decision with respect to all questions related to calculating the amounts due under paragraph 116 of this decision.

November 17, 2022.

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