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Files: 566-02-10259 to 10261
and 568-02-00329 to 00331

Citation: 2023 FPSLREB 34

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

JEAN-CLAUDE BASTIEN

Grievor and Applicant

and

TREASURY BOARD
(Canada Border Services Agency)

Employer and Respondent

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Bastien v. Treasury Board (Canada Border Services Agency) and Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication and applications for extensions of time referred to in section 61(b) of the *Federal Public Sector Labour Relations Regulations*

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor and Applicant: Marie-Pier Dupont, counsel

For the Employer and Respondent: Noémie Fillion, counsel

Heard by videoconference,
June 21 to 23, 2022.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

[1] In November 2014, Jean-Claude Bastien ("the grievor") referred grievances to adjudication under ss. 209(1)(a) and (b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), now titled the *Federal Public Sector Labour Relations Act*. They were about a decision by the Canada Border Services Agency ("the Agency") to suspend him without pay for 150 hours and to convert sick leave that he had taken into unauthorized and unpaid leave.

[2] The grievor also made extension-of-time applications because his grievances were presented at the final level of the grievance process after the prescribed time limit had expired.

[3] The facts of this case date to 2011. It is not disputed that the grievor requested 9 days of sick leave for dental treatments that he was scheduled to receive during a stay in Santiago de Cuba, Cuba. The sick leave was scheduled months in advance. In response to repeated requests from his manager, he submitted a medical note indicating that he would be unfit for work from July 18 to 28, 2011. It is also not disputed that in the end, he did not receive his intended dental treatments. He had only one 2-hour dental appointment and was not unfit for work. On his return to work, he did not amend his sick-leave request; nor did he inform his manager that he had not been unfit for work. A disciplinary measure was imposed on him, namely, a 150-hour suspension without pay. The Agency also imposed an administrative measure on him by converting the 9 days of sick leave into unauthorized leave without pay.

[4] The grievor challenged the disciplinary measure imposed on him, which, along with the Agency's decision to convert his sick leave into unpaid leave, he alleged constituted discrimination based on disability.

[5] At the hearing, the grievor withdrew all his allegations that the suspension and the sick-leave conversion constituted discrimination based on disability (file nos. 566-02-10260 and 10261). For that reason, these reasons will deal only with the challenge to the Agency's decision to suspend him without pay (file no. 566-02-10259) and the related application for an extension of time; namely, whether misconduct occurred, and if so, whether the disciplinary measure imposed was excessive in the circumstances.

[6] For the following reasons, I granted the extension-of-time application at the hearing, and I allow in part the suspension-without-pay grievance. I find that the length of the suspension that the Agency imposed was excessive in light of all the circumstances.

I. The application for an extension of time

[7] The legal employer, the Treasury Board of Canada ("the employer"), raised a preliminary objection because the grievor did not present his grievances at the final level of the grievance process within the prescribed time limit. He made an application for an extension of time for each grievance (file nos. 568-02-329 to 331) under s. 61 of the *Public Service Labour Relations Regulations* (SOR/2005-79), which was the title of the *Federal Public Sector Labour Relations Regulations* ("the *Regulations*") at that time.

[8] On the first day of the hearing, I heard evidence and the parties' arguments about the extension-of-time application. The grievor adduced evidence by affidavit, and the employer cross-examined him. After hearing their arguments, I granted the application, with the reasons to follow, which they now do.

[9] The grievor had to present his grievance at the final level of the grievance process within 10 days of the date on which the employer's third-level decision was communicated to him (clause 18.06 of the collective agreement between the employer and the Public Service Alliance of Canada for the Border Services group that expired on June 20, 2014). He presented them at the final level 32 working days after the 10-day deadline set out in the collective agreement. The employer dismissed them at that level on the grounds that they were untimely.

[10] The Federal Public Sector Labour Relations and Employment Board ("the Board") may, in the interest of fairness and at a party's request, extend a time limit under the grievance process set out in a collective agreement (s. 61(b) of the *Regulations*). The following five criteria must guide the Board's analysis of extension-of-time applications (see *Schenkman v. Treasury Board (Public Works and Government Services Canada)*, 2004 PSLRB 1):

1) Are there clear, cogent, and compelling reasons for the delay?
2) How long was the delay?
3) Did the employee who filed the grievance exercise due diligence?
4) Who would suffer the worst injustice, the employer by granting the extension, or the employee if it were not granted?

5) What are the grievance's chances of success?

[11] Those criteria are not exhaustive and must be applied flexibly (see *Fortier v. Department of National Defence*, 2021 FPSLREB 41 at para. 30). The importance to give each criterion may vary depending on the circumstances, in the interests of fairness (see *International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board*, 2013 PSLRB 144).

[12] Both parties stressed the importance of the first *Schenkman* criterion, which is the existence of a clear, cogent, and compelling reason for the delay. I agree that it should be given the most importance in the circumstances of this case.

[13] The grievor has legal training and was a hearing officer. He was aware of the importance of meeting deadlines in legal and administrative proceedings. He was also a union representative. He knew that a grievance had to be sent to the final level within 10 days of an employer's response at the third level. However, a knowledge of the law and the importance of meeting prescribed deadlines does not make it impossible for someone to demonstrate a clear, cogent, and compelling reason for a delay.

[14] The grievor was the sole caregiver for his 95-year-old grandmother. He had lived with her alone for several years. Starting in 2009, his grandmother's autonomy began to decline significantly, and her required care gradually increased. In 2011, the time of the events behind the grievances, she was suffering from dementia and required constant support. The home care that she received was short and infrequent. When he was not at work, the grievor was at home, taking care of her. He had to help her with all her daily activities. He alone coordinated her medical care, prepared her meals, administered her medication, ensured that her personal hygiene needs were met, dressed her, helped her with transportation, and ran her errands. He described the care provided to his grandmother as a 24-hour, 7-days-per-week responsibility. Even when he was at work, her care was on his mind and frequently required that he intervene by telephone.

[15] In 2011 and 2012, the grievor had great difficulty obtaining professional home care for his grandmother's growing needs. He argued that he was physically and psychologically exhausted when he received the employer's third-level response.

[16] In 2012, and shortly before receiving the third-level response, the grievor's efforts to obtain professional home care were successful. Although the additional care eventually lightened his caregiver load, at that moment, the access to new care and services led to an increase in his mental and physical burdens. Many additional tasks and steps were added, either to coordinate the new home care or to arrange his home to meet the regulatory requirements that had to be met to use the service. He described his mental and physical burdens during the period in question as unbearable and that they added to his Agency hearing-officer workload. He had great difficulty reconciling his caregiver obligations with his professional obligations. His related testimony was corroborated by an accommodation request that he apparently submitted to the Agency at that time. It apparently did not grant the request but informally would have authorized taking certain steps.

[17] The grievor testified that the generalized exhaustion meant that apparently, the time limit to present his grievances at the final level did not cross his mind.

[18] The employer did not attempt to contradict the grievor's testimony. Instead, it argued that being a caregiver for a family member was not a clear, cogent, or compelling reason for the delay. Many public-service employees must fulfil their professional duties while managing significant personal obligations. According to the employer, he had been caring for his grandmother for several years, and no sudden or unusual event occurred during the period in question.

[19] This case is not the first in which a party has relied on work-family balance or mental and physical burdens as clear, cogent, and compelling reasons for a delay. Extension-of-time applications were rejected in *Grouchy v. Deputy Head (Department of Fisheries and Oceans)*, 2009 PSLRB 92, *Popov v. Canadian Space Agency*, 2018 FPSLREB 49, and *Rouleau v. Staff of the Non-Public Funds, Canadian Forces*, 2002 PSLRB 51, which the employer cited. However, *Grouchy*, *Popov*, and *Rouleau* can be distinguished from the facts of this case. In them, the Board expressed concerns with other *Schenkman* criteria, including due diligence and delay length or with respect to the evidence submitted in support of the grievors' claims. As will be discussed later in the reasons, this case has no such concern.

[20] I find that *Coleman-Kamphuis v. Treasury Board (Department of National Defence)*, 2012 PSLRB 56, is more relevant to this case than the employer's cited

jurisprudence. In that case, the former Board found that the applicant's severe illness during a time in which she had no support and had to care for her two children alone was a clear, cogent, and compelling reason for the several-month delay. At paragraph 45, it stated as follows:

> *[45] … Those were difficult circumstances, not of her own making and over which she did not have control. In my view, those events explain why she was not in a position to respect the time limit for filing a grievance. Although I note that her situation did not prevent her from filing a complaint before the CHRC, I still believe that her situation is exceptional and that, in her case, she was going through such a difficult time in her life that she was not in a position to sift through the recourses available to her and to respect their requirements.*

[21] Although the facts of this case differ from those of *Coleman-Kamphuis*, in both cases, the grievors experienced hard times that were beyond their control. Neither of them was in a position to give serious thought to the steps to take to protect their rights. In this case, the grievor clearly and convincingly described the mental and physical burdens weighing on him. The deadline that he had to meet did not occur to him. It was not a mere oversight made out of carelessness or inattention. He was going through a particularly gruelling period. I am satisfied that he was not in a position to give serious thought to the steps he had to take to ensure that his rights were respected in the grievance process, although he was aware of the deadlines. In that respect, I find that his professional knowledge and experience supports, rather than undermines, his argument that there was a clear, cogent, and compelling reason for the delay. In my view, the fact that he was aware of the time frames and the importance of complying with them shows how overwhelmed he was by the events in his personal life. My view is that his significant mental and physical burdens during the period in question that were related to his caregiver role constitute a clear, cogent, and compelling reason for the delay.

[22] My observations with respect to the other four *Schenkman* criteria follow.

[23] The delay was 43 days, including 32 business days. It is significant but not so much that by that fact, it could prejudice the employer. The grievor transmitted his grievances to the final level as soon as he realized that he had missed the deadline. He exercised due diligence. When I heard the evidence on this matter, it was impossible for me to predict the outcome of the grievance, having not heard any evidence on the

merits of the case. At first glance, to me, the grievance does not seem frivolous or vexatious.

[24] The employer submitted that the grievor would not suffer any prejudice were the extension-of-time application dismissed. The disciplinary measure in question was deleted from his file because of the time that had elapsed. It is true that the suspension is no longer in his file. However, it is wrong to claim that he would not suffer any prejudice were the application denied. A 150-hour suspension without pay was imposed on him, equivalent to 20 days without pay. Were the application denied, he would be denied the opportunity to challenge it. It is also important to recall that the suspension was imposed in connection with allegations related to the fraudulent use of sick leave, which leads to an issue related to his reputation, which he seeks to defend. In addition, the delay occurred between the third and the final levels. Since the late referral to the final level, the employer has known that the grievor still seeks to challenge the disciplinary measure imposed on him. There is no element of surprise that could cause the employer any prejudice. A review of the balance between the injustice to the grievor against the prejudice to the employer from granting an extension led me to find that an injustice could be caused to the grievor were the extension-of-time application denied.

[25] An analysis of the *Schenkman* criteria, which considered the parties' adduced evidence and all the circumstances, led me to conclude that the extension of time should be granted.

II. Objections to the evidence

[26] Interlocutory decisions were also made at the start of the hearing on preliminary objections to the evidence.

[27] The grievor raised an objection to the admissibility of evidence that arose from telephone communications and email exchanges between a Cuban dentist and the grievor's manager. The employer did not place any greater emphasis on the admissibility of a transcript of telephone communications between the dentist and the manager by a third party who could speak Spanish. The employer acknowledged that any transcript of such calls was double hearsay. Therefore, it was not necessary for me to deal with the objection to the transcript. However, I dismissed the grievor's objection to the admissibility of evidence that the Agency obtained through an email

exchange between his manager and the Cuban dentist whose name was on the medical note that the grievor sent to her.

[28] According to the grievor, this evidence did not meet the reliability and necessity criteria because it was hearsay and was obtained without his consent or knowledge. The employer could have subpoenaed the Cuban dentist to appear but chose not to.

[29] Section 20(e) of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) allows the Board to accept evidence, regardless of whether it is admissible in a court of law. At first glance, the email exchanges between the grievor's manager and the Cuban dentist were relevant to the issues in the case and were part of an effort to assess the duration of the grievor's unfitness for work. That evidence was considered admissible as evidence of the context that led the employer to take the disciplinary action. It is up to me — as the adjudicator — to decide, given all the evidence, whether it is appropriate for me to rely on that evidence to decide the issues in dispute and to decide the weight to give it.

III. Summary of the evidence

[30] In 2011, the grievor held a hearing officer position (FB-05) in Montréal. He represented the minister responsible for the Agency before the Immigration and Refugee Board's Appeal Division. His immediate supervisor was Anne-Marie Signori ("the manager"), who was then chief of operations-hearings, in the law-enforcement sector, in the Quebec region. The manager and the grievor were former co-workers. Generally, their relationship was positive. However, according to him, his only disciplinary issues occurred while she was his manager for approximately six months in 2011-2012, the time relevant to the grievances.

[31] The grievor participated in a program that offered caregivers one-week respites. Through it, he travelled to Cuba for his rest periods. On one such trip, he saw how much less expensive dental treatments were in Cuba compared to Canada, and he required some significant ones. He had recently visited a dental clinic in Montréal, which recommended that he receive several such treatments. In Canada, they could have cost more than $10 000. In Cuba, the total would have been much lower. To save money, he decided to receive them on his next trip to Santiago de Cuba.

[32] As part of planning for hearings, hearing officers were required to submit their leave requests several months in advance. In late 2010, the grievor informed his acting manager of his intention to receive dental treatments in Cuba in late July 2011. He expected to be absent for two weeks. According to him, the acting manager did not express any concerns. It appears that the acting manager did not share this information with Ms. Signori when he returned to his position in early 2011.

[33] In late February 2011, the manager asked her employees, including the grievor, to submit their leave requests for June to September 2011. On March 31, 2011, he wrote to her and reminded her that he would be absent the last two weeks of July due to illness. She responded by stating that she did not recall being informed of the sick leave. She asked for clarification.

[34] Initially, she received these details. The grievor anticipated being absent from July 18 to 29, 2011. He was to receive dental treatments in Cuba. His sick-leave request was for nine days of his absence. The remaining days were weekends and a day on which he was not to work because he worked a compressed schedule.

[35] The manager testified that she was surprised that an employee could know, months in advance, the exact time in which he would be unfit to work. She was also surprised that the dental treatments could result in being unfit for nine days. She stated that she rarely saw a sick-leave request for more than one or two days when it related to dental treatments. In her testimony, she also acknowledged that the fact that the dental treatments were to take place in Cuba during the summer season also led her to question the sick-leave request. As the manager responsible for scheduling hearings and coordinating her employees' annual leaves, she wanted to ensure that the request was legitimate before approving it.

[36] At the hearing, the manager acknowledged that in 2010, other managers had twice granted the grievor similar leave. Both times, they approved sick-leave requests for treatment abroad and agreed that he should submit a medical note specifying the duration of his unfitness for work on his return to work.

[37] The manager provisionally approved the leave for summer season planning purposes but asked for a medical note in advance indicating the reason for the absence and the duration of the unfitness for work. She was not in the habit of asking for medical notes in advance. However, in the circumstances, she wanted to take steps to

validate the request in advance, to avoid employee gossip, because the grievor could have been granted sick leave in the summer during which he would be in Cuba.

[38] The manager first requested a medical note on April 5, 2011. Many emails and conversations followed. The parties' exchanges took place from April to July 2011, until the last working day before the grievor's departure for Cuba. I will not list the exchanges, but the manager's notes contain a list of seven apparent requests for a medical note.

[39] The subjects that emerge from those communications are as follows. The manager insisted on receiving — in advance — a medical note "[translation] clearly" stating that the grievor would be unfit for work from July 18 to 28, 2011. In emails dated June 16, 2011, and July 11, 2011, the manager reiterated her requirement for a medical note, noting that if were in Spanish, she wanted to receive the original version along with an official translation to English or French at his expense. She informed him that if she did not receive it by July 15, 2011, before his trip to Cuba, his absence would be considered unauthorized and therefore unpaid, which could result in discipline.

[40] In the context of their conversations and email exchanges, the grievor insisted that it was "[translation] impossible" for him to obtain the desired medical note before he went to Cuba and consulted the Cuban dentist. He had not been to Santiago de Cuba for several months and had not been able to discuss a treatment plan with the dentist. He had an appointment at the dental clinic for treatments that could take several days between July 18 and 28, but only once he was there would he know the exact nature of the treatments he would receive and the duration of his unfitness for work. Several times, he tried to provide a medical note on his return from Cuba. He insisted that that was the only way he could provide one that would describe the reason for his unfitness for work and its duration. In similar circumstances, former managers had allowed him to provide his medical note after the period of unfitness for work. He asked the manager to allow him to do it again.

[41] At the hearing, the grievor argued that he informed the manager that he was very unlikely to really need nine days of sick leave. He reportedly informed her that his sick-leave request could be shortened on his return and that another leave type could be substituted for any sick-leave days that proved unnecessary. She testified that she

did not recall that discussion. However, her notes, written at the time, indicate that in mid-June 2011, he informed her that he would not require two weeks of recovery.

[42] On July 14, 2011, the manager agreed to receive the medical note on July 18, 2011, the first day of the grievor's absence. Again, she reiterated that it should indicate the reason for the absence and that he would be unfit for work from July 18 to 28, 2011. Her notes indicate that apparently on the next day, she also asked for a full medical note on his return. Her recollection of it was hazy, and he denied that such a request was made.

[43] The grievor said that he felt obliged to provide a medical note in advance, despite his reluctance due to the uncertainty about the dental treatments. The manager stated that disciplinary action could follow if he did not comply. He asked a friend in Cuba to take steps with the Cuban dentist to obtain a medical note that contained the manager's requested information. On July 18, 2011, when he arrived in Cuba, he faxed the medical note to her.

[44] The medical note bore the name of a dental clinic in Santiago de Cuba and the dentist's signature. It had a list, in French, of three dental treatments (a root-canal treatment, the treatment of a gum abscess, and an X-ray) and specified again in French that the grievor would be unfit for work from July 18 to 28, 2011.

[45] The grievor went to the Cuban dental clinic three times. He was unable to see the dentist on the first two visits. On his first visit, the clinic was closed. The dentist was absent on his second visit. He testified that he understood from it that the services that the clinic offered were unreliable. Only on his third visit was he able to speak with the dentist. According to him, language barriers contributed to a misunderstanding of the dental treatments that the dentist could carry out. She was not a surgeon, and many of the dental treatments that he sought could be performed only by a surgeon or a dental surgeon. Thus, he received only one two-hour dental treatment, which was on the last day of his stay in Cuba.

[46] On his return to work, the grievor provided the manager with the original medical note that he had faxed to her. He did not amend his sick-leave request. He submitted a signed timesheet that attested that he had been on sick leave with a nine-day certificate between July 18 and 28. He did not contact the manager to provide her with an update on the treatments he received or the duration of his unfitness for work.

According to him, he provided the medical note that she had requested. Since she did not follow up with him on his return, he assumed that she was satisfied with the medical note and that the situation was resolved.

[47] The manager said that she had doubts as soon as she received the faxed medical note. It was written partly in French, which she found surprising, although at the hearing, she acknowledged that she had insisted on receiving a note in French or English or an official translation into either language. The information in the note did nothing to change her initial reaction that nine days was a very long sick leave for dental treatments.

[48] At the hearing, the manager did not recall having a conversation with the grievor about his medical note or his leave request on his return from Cuba. His detailed notes on the history of this matter do not mention a discussion between them on his return. Everything seems to indicate that they did not discuss the medical note or the sick leave until November 2011 at the disciplinary hearing to which he was summoned.

[49] Between September and November 2011, the manager took steps to confirm the accuracy of the medical note and the duration of the grievor's unfitness for work. She first consulted Labour Relations to determine the steps that could be taken to validate the medical note, then consulted it again because she knew that twice in 2010, the Agency had approved his sick-leave requests for medical treatments abroad. She then contacted the Cuban dentist. It is not necessary that I state more about the information obtained through that communication since at a disciplinary hearing and again at the hearing, the grievor acknowledged that he was not unfit for work for the nine days covered by his leave request, that he received only one two-hour dental treatment, and that there had been no real period of unfitness for work during the period in question.

[50] On November 15, 2011, which was more than three months after his return from Cuba, the grievor was called to a disciplinary hearing. He was accused of, among other things, a fraudulent use of sick leave.

[51] According to the manager, the grievor's responses at the disciplinary hearing were unclear and did not answer the employer's questions. According to her, initially, he refused to answer questions about his unfitness for work, the dental treatments he apparently received, and the dates of his appointments with the Cuban dentist. Then,

exasperated, he admitted that not all the dental treatments he had planned took place and that he received only one two-hour dental appointment, on his last day in Cuba. He was unable to provide documentary evidence confirming the treatment received in the only dental appointment that took place. He received neither an invoice nor a treatment plan.

[52] On January 20, 2012, the grievor was informed of his 150-hour suspension without pay. The employer's related letter states that he fraudulently used his paid sick leave by claiming that he was unfit for work for treatments that he did not receive. It also states that therefore, he violated the core values of the *CBSA Code of Conduct* and the ethical values of the *Values and Ethics Code for the Public Service* in effect at the time. On the same day, he was informed that the nine days of sick leave had been converted into unauthorized and unpaid leave.

[53] The grievor filed a grievance challenging the disciplinary measure imposed on him and alleging that it was discrimination based on disability. He also filed a grievance alleging that the imposition of the administrative measure on him, namely, the conversion of the leave days, constituted discrimination based on disability.

[54] As noted earlier, at the hearing, the grievor withdrew his grievance against the administrative measure as well as the discrimination allegation with respect to the disciplinary measure imposed on him.

IV. Summary of the arguments

A. For the employer

[55] The employer submitted that the test in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 at para. 13 ("*Wm. Scott*"; reproduced in *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 24), is met in this case. The grievor's conduct, notably submitting a sick-leave request for medical treatments that he did not receive while knowing that the claim was false, justified it taking disciplinary action.

[56] The grievor submitted a sick-leave request of nine days for dental treatments, not all of which took place. He was not unfit for work. He did not inform the manager of it and did not amend his leave request when he returned to work. He could have amended his leave request on his return but did not. He maintained a leave request

that he knew was inaccurate. An employee who claims to be unfit due to treatments that he or she did not receive is guilty of the fraudulent use of paid sick leave. Adjudicators show very little leniency for fraudulent activities (see *Thomson v. Treasury Board (Revenue Canada - Customs & Excise)*, Board File No. 166-02-27846 (19980402) at 63).

[57] The grievor's testimony that he made an offer to the manager to amend his leave request on his return should not be accepted. He mentioned it for the first time at the hearing. No documentary evidence supports that claim. Instead, the Board should favour the manager's testimony (see *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BC CA) at 357) that no such offer was made, which the notes she took during the events at issue corroborated. Although her recollections on this matter were unclear due to the passage of time, it should not affect the credibility of her testimony (see *Livingston v. Canada (Minister of Foreign Affairs and International Trade)*, 2005 FC 1490 at para. 18).

[58] At the disciplinary hearing, the grievor was not immediately honest and transparent. Only after several questions were posed to him did the employer obtain the desired clarification. In addition to being dishonest, he lacked judgment and integrity, two values important to his hearing officer role. Hearing officers must have integrity and be trustworthy. At the time, they were peace officers. They represent the minister in proceedings that may involve issues of honesty and integrity, notably issues related to making false statements in an immigration context. His conduct also violated the *CBSA Code of Conduct* and the *Values and Ethics Code for the Public Service*.

[59] The grievor fraudulently used paid sick leave, which is time theft (see *Chatfield v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 2 at para. 62). Theft is one of the most serious forms of misconduct that an employee can commit. His actions were incompatible with his hearing officer position. As a peace officer, he was held to a higher standard of integrity due to his position of trust (see *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24, and *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88).

[60] In this case, the employer sought to correct the grievor's conduct. It felt that the bond of trust could be restored. It wanted to send a message to him and all employees

that such conduct is unacceptable and that violating the *CBSA Code of Conduct* and the *Values and Ethics Code for the Public Service* is a serious offence deserving of a serious sanction (see *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106 at para. 61).

[61] Similar situations have led to discipline, up to and including termination (see *Chatfield* and *Thomson*). In the circumstances of this case, a 150-hour suspension without pay was a reasonable disciplinary measure. The grievor had the burden of demonstrating that the discipline imposed was excessive, which he did not meet.

B. For the grievor

[62] The grievor's conduct did not warrant discipline. There was no factual basis to justify imposing such a measure.

[63] The grievor submitted that he was honest with the employer. He explained the situation. Several times, he informed the manager that he could not attest to the duration of his unfitness for work before he went to Cuba and consulted the dentist. Thus, he tried to explain to her why her request was unreasonable in the circumstances. She dismissed his explanations and insisted on receiving a very specific medical note, in advance.

[64] He believes that he was subject to a disciplinary measure for doing what the employer had asked him to do, which was submit a medical note in advance. It was not possible for him to anticipate the duration of the required sick leave until he was in Cuba and obtained confirmation of the treatments that would be administered. He asked the manager to do what the employer had allowed him to do in the past, which was submit a medical note and a specific sick-leave request after his unfitness for work. She refused. She threatened him with disciplinary measures if he were absent without submitting the desired medical note before he left on leave. Despite the reluctance he clearly expressed several times, he complied and submitted the requested medical note. He received no news from the manager for several months. He believed that everything had been resolved to the employer's satisfaction until he was called to the disciplinary hearing.

[65] This is not a matter of time theft, and the employer did not demonstrate an intention to defraud. The grievor never claimed that he would be unfit for nine days.

He informed the manager that he would not likely need nine days of sick leave and that he could amend his leave request on his return, to reflect the number of days of sick leave truly required. His related testimony was clear, accurate, and consistent, while the manager's testimony was unclear, and her memories were vague. Her notes contradicted her testimony and confirmed that more than one month before his leave, he informed her that he would not be unfit for the nine days.

[66] The situation that gave rise to the suspension was the result of the parties' lack of communication. The grievor submitted a medical note that included the manager's requested information and thought that he had responded to the employer's requests.

[67] If the Board considers that a disciplinary measure was warranted, the grievor submitted that the 150-hour suspension for lack of communication was too severe a disciplinary measure and was inconsistent with the concept of corrective and progressive discipline (see *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72 at para. 57, citing *United Brotherhood of Carpenters and Joiners of America, Local 1072 v. Ontario Store Fixtures Inc.*, 1993 CarswellOnt 1256).

[68] According to the grievor, there are two case law streams with respect to disciplinary action related to sick-leave use. The first deals with the misuse of such leave as fraud that justified imposing very severe disciplinary measures (see *Chatfield*, *Thomson*, and *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26). The other stream deals with this issue as evidence of a lack of diligence or communication (see *Fontaine v. Canadian Food Inspection Agency*, 2002 PSLRB 33). The case law shows that measures ranging from a written reprimand (see *Pronovost v. Canada Revenue Agency*, 2017 PSLREB 43) to 2- to 10-day suspensions (see *Schwartzenberger v. Deputy Head (Department of National Defence)*, 2011 PSLRB 4, and *Twiddy v. Treasury Board (Department of Human Resources and Skills Development Canada)*, 2005 PSLRB 37) have been imposed for situations more complex and worrisome than this one.

[69] When it imposed the discipline, the employer did not identify the aggravating and mitigating factors that were considered when the disciplinary measure was chosen. Aggravating factors that the manager identified at the hearing included premeditation and the nature of the grievor's role. However, according to him, the Board should not consider his role an aggravating factor. According to him, an

aggravating factor must be external to the misconduct alleged against him (see *Touchette*, at para. 77). An employee's role is not an external factor and therefore should not result in a more-severe sanction being imposed.

[70] The grievor reiterated that the discipline was also accompanied by an administrative measure in which the 9 days of sick leave in question were converted into unauthorized and unpaid leave. The fact that his absence was converted into unauthorized leave was itself a disciplinary measure that the Board should consider when it decides whether the 150-hour suspension was excessive in the circumstances. He stated that a written reprimand should be substituted for the suspension.

V. Reasons

[71] A disciplinary measure referred to adjudication must be reconsidered based on these three questions: Was there a factual basis for imposing the disciplinary measure? If so, was the disciplinary measure that was imposed, in this case, the 150-hour unpaid suspension, excessive in all the circumstances of the case? If the measure was excessive in the circumstances, what measure should have been imposed? (See *Wm. Scott*, at para. 13, and *Basra*.)

[72] A review of the first question places a burden the employer to demonstrate that on a balance of probabilities, the grievor's conduct warranted taking disciplinary action.

[73] The grievor acknowledged that he requested nine days of sick leave. He also acknowledged not receiving the prescribed dental treatments and receiving one approximately two-hour dental treatment. He was not unfit for work during the period in question. He also acknowledged that he did not amend his leave request once he returned to Canada. He did not inform the manager that he was unable to receive the planned dental treatments, and he did not update her as to the true duration of his unfitness for work. In addition to providing her with the original medical note on his return to Canada, he took no steps to contact her on his return from leave.

[74] The grievor's argument that he was entitled to assume that the manager's silence indicated that everything was in order and that the situation was resolved is not convincing. He knew and understood the requirements that an employee had to meet when submitting a leave request, especially one for sick leave. He knew that it

was necessary that he ensure that a submitted sick-leave request reflected reality. He understood that to be entitled to sick leave, a period of unfitness must have resulted from a medical condition or treatment.

[75] The grievor's misconduct constituted a lack of integrity and contravened the *CBSA Code of Conduct* and the ethical values of the *Values and Ethics Code for the Public Service* in effect at that time.

[76] The grievor stated that he was familiar with the *CBSA Code of Conduct* and the values it set out, especially integrity. It contains working-hours provisions. It provides that working hours and rest periods must comply with the collective agreement's provisions. That agreement set out the circumstances under which an employee was entitled to sick leave (clause 35.02). Unfitness for work was a prerequisite. An employee making such a request also had to be able to convince the employer of his or her physical or emotional condition to be granted sick leave, if the employer requested it.

[77] The grievor also acknowledged his obligation to comply with the *Values and Ethics Code for the Public Service*. He knew its main principles. He also agreed with statements that Agency employees, particularly hearing officers, should serve as models of integrity and professionalism. Hearing officers deal with cases that sometimes involve allegations of misrepresentation and immigration fraud. They must be worthy of trust and respect.

[78] The grievor cited his concern to ensure the accuracy of his leave request's wording when he described his deep disagreement with the manager's request for a medical note before he left for Cuba. However, on his return to Canada, and after the dental treatments he intended to receive did not take place and he had been through a true period of unfitness, he did not demonstrate such a concern for accuracy and integrity. He maintained his request for nine days of sick leave that he knew by then was false. The manager's silence on the grievor's return is irrelevant in this respect.

[79] The grievor demonstrated misconduct when he failed to amend his leave request after he returned from Cuba to ensure that it would accurately reflect reality. His misconduct was not due to a lack of diligence, as in *Pronovost*. He knowingly maintained a sick-leave request that by then he knew was false, which was a fraudulent use of sick leave. Disciplinary action was warranted.

[80] The second part of the *Wm. Scott* test requires analyzing and assessing the disciplinary measure that was imposed to determine whether it was excessive.

[81] The suspension letter indicates that the grievor's actions constituted very serious misconduct that significantly compromised the bond of trust between him and the employer. Other than those statements, the letter does not indicate whether the employer considered any aggravating factors and, if so, which ones in particular. However, the letter states that the manager "[translation] … considered all the factors that could have been in [the grievor's favour] …", without specifying the ones that were involved.

[82] At the hearing, the manager stated that she considered the following mitigating factors: the grievor's years of service, his clean disciplinary record, and the fact that the employer had authorized that type of sick leave twice in the previous year. She also stated that she considered his peace-officer role as an aggravating factor. He had to respect and enforce immigration laws. To do that, he had to be, and be seen as, having integrity and being law abiding. Premeditation was also identified as an aggravating factor. The manager explained that premeditation, in the context of this case, referred to the fact that the grievor had planned for his absence for a long time and that he had significant time to comply with the employer's requirement, which was to provide a medical note.

[83] Although I accept that the grievor maintained a sick-leave request that he knew was false and that would result in nine days of paid leave to which he was not entitled, I am satisfied that he did not intend to submit a fraudulent request in spring 2011 and during his exchanges with the manager before his trip to Cuba. For the following reasons, I disagree with the manager that there was premeditation.

[84] I am satisfied that in his dealings with the manager, the grievor never claimed that he would be unfit for the entire nine-day period. The manager's notes corroborate his testimony in that respect. He repeatedly insisted that it was [translation] "impossible" for him to provide the note that the manager wanted to receive, because he was unable to confirm the duration of his unfitness and of the sick leave that would be required before consulting the Cuban dentist. I also accept that he suggested to the manager that he could amend his leave request on his return and substitute other types of leave if necessary to ensure that the request would reflect reality. The

manager's memories were unclear in that respect. Her notes are silent on that point, but they indicate that in June 2011, he informed her that he would not require two weeks of leave.

[85] Since twice in the past, the employer had authorized the grievor to further clarify a sick-leave request for care received abroad after the fact, I find it more likely than not that he would have made such a suggestion when confronted with a manager who, unlike the other managers he had dealt with in the past, insisted on obtaining a detailed and accurate medical note before he went on leave.

[86] Although it might be unusual to submit a leave request for dental treatments abroad, and although it might be uncommon to submit a sick-leave request without being able to specify, in advance, the nature and extent of the treatments that will be received and the duration of the unfitness for work that should result from it, I am satisfied that the grievor found himself in that situation.

[87] The evidence demonstrated that the grievor and the manager communicated poorly with each other. Each had a strong opinion on how to proceed in the circumstances and did not seem to consider the other's perspective. Each repeated the same messages, and they had no real dialogue. The manager insisted on receiving a medical note in advance that included specific information, notably confirmation that the grievor would be unfit for work from July 18 to 28, 2011. She did not want to approve the leave request until she was assured that he would be unfit due to illness while in Cuba and that he was entitled to sick leave with pay. For his part, he insisted that it was not possible for him to provide such a medical note. He could not be certain or precise as to the duration of his unfitness for work. He could provide the information with a degree of accuracy only after his stay in Cuba. He did not know the exact nature or number of treatments he would receive or the state he would be in afterward. He did not want to provide a medical note that might very well not have reflected reality after consulting the Cuban dentist.

[88] The grievor felt obligated to provide a medical note despite the fact that he had repeatedly expressed his opinion that he had to consult the Cuban dentist in person to understand the treatments he would receive and the duration of unfitness that would result from them. He felt obligated to provide a note that met the requirements that the manager had specified multiple times. He feared disciplinary action if he did not

provide the requested medical certificate. After hearing his and the manager's testimonies, my opinion is that the grievor's fear was reasonable in the circumstances.

[89] This situation could have been avoided had the grievor and the manager been able to communicate with active listening and open minds. Instead, each wanted the last word. They were both stubborn. They did not really listen to each other and were content to repeat the same request and the same disagreement over and over. Ultimately, out of frustration, he resigned himself to providing a medical note that included the information that she had requested. His opinion was that he gave her what she wanted and that the situation was resolved. Unfortunately, he did not look past his frustration and contact the manager when he returned from Cuba to amend his leave request.

[90] The grievor's frustration with the manager's request was still evident more than 10 years after the fact. In my view, the frustration with the manager led him not to inform her of the unforeseen events in Cuba and to maintain his sick-leave request despite the fact that he was not unfit for work.

[91] In his testimony, the grievor stated that at the earliest opportunity, he informed the manager that he had not been unfit for work. That is false. The first opportunity to inform her presented itself on his return from Cuba. An email or short conversation would have sufficed to inform her of the need to amend his leave request. He did not avail himself of that opportunity. Had he done so, the situation in which he found himself might not have happened. Unfortunately, he admitted that he was not unfit for work only when questioned about it at a disciplinary hearing in November 2011. For several months, he took no steps to inform the manager. He chose to remain silent. In his testimony, he also stated that had she requested an update from him on his return from Cuba, he would have amended his leave request. It would have been desirable for the manager to ask questions or inform him of her concerns with his leave request. However, her failure to request an update or to ask questions did not relieve the grievor of his obligation to ensure that the leave request that he submitted was true and accurate.

[92] I am satisfied that a suspension was a reasonable disciplinary measure in the circumstances. However, in my view, a 150-hour suspension was excessive in the circumstances.

[93] When analyzing the proportionality of the sanction imposed on the grievor, I must consider a number of factors, including the principle of progressive discipline and the mitigating and aggravating factors.

[94] Progressive discipline is based on the principle that employees deserve an opportunity to demonstrate that they can correct their conduct if the employment relationship is not irreparably damaged.

[95] The employer stated that its objectives in imposing the disciplinary measure were to correct the grievor's conduct, restore the bond of trust, and send a message to him and all employees that such conduct was unacceptable and that it deserved a serious sanction. The manager said that she did not want to terminate him. She was sure that his misconduct would not recur and that a suspension could restore the bond of trust between the employer and its employee.

[96] The evidence shows that despite the employer's confidence that the parties' bond of trust could be restored, there is no indication that the employer considered — with respect to the principle of progressive discipline — a disciplinary measure less severe than a 150-hour suspension without pay.

[97] The Agency had employed the grievor for several years. He had a clean disciplinary record. It was his first discipline. To those mitigating factors I would add that for several months, and despite its concerns about his leave request, the employer took no steps to inform him of any issue with respect to his leave request or to inquire of him about it.

[98] It is important to remember that in addition to the 150-hour suspension, the employer converted the 9 days of sick leave into unauthorized and unpaid leave. The grievor argued that that conversion was a disciplinary measure in itself and that it must be considered when assessing the sanction that the employer imposed. I do not agree that it was a disciplinary measure. He was not unfit for work and therefore was not entitled to paid leave. The employer was entitled to take the necessary steps to remove the paid leave to which he was not entitled. The administrative measure is not a mitigating factor, and I have not considered it in my assessment of the proportionality of the disciplinary measure that was imposed.

[99] In his testimony, the grievor emphasized that twice, the employer allowed him to submit a sick-leave request for which the details as to the duration of the disability were presented to the employer after the leave. While that past practice might have led him to expect that he could be authorized to specify the duration and nature of his unfitness for work after returning from the leave, such an expectation is irrelevant in the circumstances of this case. That expectation, although it might somewhat explain his frustrations with the manager, did not relieve him of his obligation to ensure that on his return, his submitted leave request was accurate, which he did not do.

[100] I now turn to the aggravating factors. I have already explained why I dismiss the concept of premeditation that the employer raised as an aggravating factor, but I would add to the aggravating factors that the grievor did not immediately admit that he had not been unfit when the employer asked him questions about it at the disciplinary hearing. When questioned, his first reflex was to avoid answering the employer's questions clearly. He certainly did not immediately admit his misconduct.

[101] Another relevant aggravating factor in the circumstances was the grievor's peace-officer role. I disagree with his statement that the particular expectations imposed on incumbents of a position such as his cannot be aggravating factors. The alleged misconduct in this case was his failure to amend or withdraw the sick-leave request that he knew was false. As part of his duties, he represented the minister in proceedings involving issues of honesty and integrity, including those related to making false statements. His failure to act was incompatible with the peace-officer position that he held, the incumbent of which must demonstrate integrity, good judgment, and honesty. Expectations of the incumbents of such positions may imply that the sanction imposed for the misconduct should have been more severe.

[102] I would add that I am satisfied that consciously or not, the employer was also influenced by another factor in its choice of discipline to impose, namely, the manager's doubts about the authenticity of the medical note that the grievor gave her.

[103] As soon as the manager received a medical note written partly in French from a Cuban dentist, she suspected that it had been falsified. However, I heard no evidence on this issue, and no disciplinary action was taken against the grievor in this respect. She was required to ensure that her suspicions did not influence her choice of

disciplinary action. However, my view is that her suspicions coloured her assessment of the facts and her evaluation of the appropriate disciplinary action.

[104] The suspension letter refers to the manager's doubts about the medical note. In her testimony, she also mentioned those doubts when she discussed the alleged misconduct with respect to the use of sick leave.

[105] I am satisfied that the manager's doubts led her to perceive the grievor's misconduct as a premeditated act of dishonesty. Based on the evidence adduced at the hearing, and ignoring her suspicions about the medical note, it is difficult for me to understand how the employer could have reached the decision to impose a 150-hour unpaid suspension in the circumstances of this case. I am persuaded that its suspicions and doubts led it, consciously or not, to impose more severe disciplinary action.

[106] The evidence demonstrated that the grievor's misconduct did not arise from a premeditated intention to defraud his employer. Rather, it constituted a significant lack of judgement, honesty, and integrity that arose from deep frustration caused by the parties' lack of adequate communication. The misconduct should necessarily have resulted in a shorter suspension than would a premeditated act with the intention of defrauding the employer.

[107] According to the grievor, an earlier incident related to another trip to Cuba also coloured his relationship with the manager and would have led to the imposition of a more significant disciplinary measure. The evidence presented at the hearing on this matter was insufficient to allow me to conclude that the incident would have led the employer to impose, consciously or not, a more-severe disciplinary measure in the circumstances of this case.

[108] I find that the manager's doubts about the medical note led her to mischaracterize the grievor's misconduct as a premeditated act by which he sought to defraud the employer. Therefore, I find that one of the two aggravating factors that the employer relied on, premeditation, is unfounded. In addition, as discussed earlier, I believe that the principle of progressive discipline was given insufficient weight. These findings lead me to conclude that given the circumstances of this case, a 150-hour suspension was an excessive disciplinary measure.

[109] The third and final part of the *Wm. Scott* test requires considering the appropriate disciplinary action that should be substituted for the 150-hour suspension. I will not repeat the aggravating and mitigating factors discussed earlier or my conclusion as to the nature of the misconduct for which the disciplinary measure was imposed.

[110] Considering the circumstances, including the nature of the grievor's misconduct, the principle of progressive discipline, and the aggravating and mitigating factors, I believe that a 37.5-hour suspension should be substituted for the 150-hour suspension.

[111] A 37.5-hour unpaid suspension is a significant disciplinary measure with major consequences for the affected employee. The grievor demonstrated a significant lack of judgement, honesty, and integrity. He maintained a leave request that he knew was false. Although he did it out of frustration with the manager and it was not premeditated, I believe that a significant disciplinary measure was deserved because of the honesty and integrity required of a peace officer who deals daily with immigration files in which the honesty and veracity of written and verbal statements are of great importance.

[112] I believe that a 37.5-hour suspension also achieves the employer's objective of communicating the clear and unequivocal message that such misconduct will have significant consequences. A suspension of this duration also restores the bond of trust between the employer and the grievor.

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

(The Order appears on the next page)

VI. Order

[114] The extension-of-time applications (file nos. 568-02-329 to 331) are allowed.

[115] File nos. 566-02-10260 and 10261 are closed.

[116] The grievance against the suspension without pay (file no. 566-02-10259) is allowed in part.

[117] A 37.5-hour suspension will be substituted for the 150-hour suspension. The grievor is entitled to the reimbursement of salary and benefits that would otherwise have been earned.

[118] The grievor is also entitled to the interest on the net salary to which he is entitled under ss. 36 and 37 of the *Federal Courts Act* (R.S.C., 1985, c. F-7). The rate is to be calculated and compounded annually from January 23, 2012, to the day on which the payment is made, inclusively.

[119] The Board will remain seized of the suspension-without-pay grievance for 90 days from the date of this order to resolve any dispute that may arise from its implementation.

April 6, 2023.

FPSLREB Translation

Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board