Date: 20240125

Files: 566-02-14489 to 14493, 14497 to 14499, 14506, and 14507

Citation: 2024 FPSLREB 12

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

ROSE-MARIE SAHADEO

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

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

In the matter of individual grievances referred to adjudication

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

For the Grievor: Michael Fisher, counsel

For the Respondent: Karen Clifford and Pierre Marc Champagne, counsel

Heard by videoconference,
September 29 to October 2, 2020; February 9-12 and 23-26, June 7-10 and 21-23, 2021; January 10-14, February 1-4, June 20-22, July 6-7 and 13, 2022; written submissions August 31 and September 9, 2022.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Rose-marie Sahadeo was a border services officer (BSO) with the Canada Border Services Agency ("the employer" or CBSA). Her employment was terminated for non-disciplinary reasons (unsatisfactory performance) on May 1, 2016. Before that, she received the following discipline: a 3-day suspension, a 7-day suspension, a 10-day suspension, and a 15-day suspension. She grieved the discipline as well as the termination of her employment. She also referred to adjudication a grievance alleging discrimination based on gender and colour. In addition, she referred to adjudication two grievances alleging a breach of the management-rights clause of the relevant collective agreement and two grievances alleging that she was subjected to disguised discipline.

[2] For the reasons set out in this decision, I have allowed the grievance against the termination of the grievor's employment on the merits. I have reduced the amount of discipline for the 3-day, the 7-day and the 10-day suspensions and have allowed the grievance of the 15-day suspension. I deny the discrimination grievance as well as the other grievances relating to management rights and disguised discipline.

[3] The collective agreement between the parties at the relevant time was the one between the Treasury Board and the Public Service Alliance of Canada for the Border Services group that expired on June 20, 2014.

[4] The grievor filed notice (a Form 24) with the Canadian Human Rights Commission (CHRC) as is required when a grievance raises an issue involving the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). The CHRC advised that it did not intend to make submissions.

II. Proceedings

[5] These grievances were initially scheduled to be heard in person in March 2020. The initial hearing dates were cancelled due to COVID-19 pandemic restrictions. The hearing was then scheduled by video for the fall of 2020. There was a change to counsel for the employer (from Karen Clifford to Pierre Marc Champagne) after the hearing had commenced, which also resulted in some delay in scheduling.

[6] Mr. Champagne was appointed as a full-time member of the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision refers to the current Board and any of its predecessors) effective March 13, 2023. He and this panel of the Board have had no discussion about these grievances beyond case management meetings and his hearing advocacy as counsel, both done in the presence of the grievor's representative, and all of which took place before his appointment to the Board.

[7] Patricia Harewood was the bargaining agent representative who signed the grievances' referral to adjudication. Ms. Harewood was appointed as a full-time member of the Board, effective March 13, 2023. She and this panel of the Board have had no discussion about these grievances.

[8] In its final submissions, the employer relied on a Board decision (*Bah v. Deputy Head (Canada Border Services Agency)*, 2022 FPLSREB 55) that had not been translated as of its submissions. I allowed the grievor to make submissions in writing after the decision was translated and publicly available. The employer was given an opportunity to provide submissions in reply.

III. Confidentiality orders

[9] Videos of the Customs area of the Toronto Pearson International Airport, which the parties refer to as PIA, were entered as exhibits at the hearing. The faces and therefore the identities of passengers (also known as "travellers") are visible. Some documents provided by the parties also contained personal information about travellers and their names. A traveller testified at the hearing. The employer requested a sealing order for the videos and anonymization of the travellers' names. The grievor did not object to the request.

[10] For the following reasons, I ordered the videos sealed, the personal identifiers in any documents related to travellers redacted, and the traveller's testimony done in a closed hearing. In addition, I ordered the anonymizations of the travellers mentioned at the hearing in any documents.

[11] The Supreme Court of Canada set out the test for sealing and confidentiality orders in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38, 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 outweigh its negative effects.

[12] I find that protecting the travellers' identities is an important public interest, as they were all third parties, with no direct interest in the grievances. Sealing the videos is necessary to protect their identities, and there are no reasonably alternative measures available to prevent the risk. Redacting their names in documents is a suitable alternative to sealing those exhibits that refer to them by name. Closing the portion of the hearing when one of the travellers testified was the only option available to ensure that their identity was not revealed. In terms of proportionality, the benefits of protecting the travellers' identities outweighed any negative effects. The identities of the travellers, who are not parties to any of these grievances, is not relevant to the grievances' outcomes.

[13] The employer also requested sealing orders for videos of the arming rooms at PIA. The grievor did not object to the request. The arming rooms are used for the arming and disarming of duty firearms as well as their storage. I find that protecting the layout and other details of the arming rooms from public scrutiny is an important public safety issue. There is no reasonable alternative measures available to prevent the risk to public safety. I find that the benefits of protecting the layout and details of the arming room outweighs any negative effects of the sealing order. I have described in this decision the relevant information about the events in the arming rooms.

[14] There was also evidence related to the grievor's mitigation efforts, including tax documents. Those tax documents were ordered sealed, and the parts of the hearing when those documents were reviewed were closed to the public, for the following reasons.

[15] Protecting Canadian taxpayers' information is an important public interest. Section 241 of the *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) provides among other things that no official or other representative of a government entity shall "… knowingly provide, or knowingly allow to be provided, to any person any taxpayer information …" (s. 241(1)(a)), "… knowingly allow any person to have access to any taxpayer information …" (s. 241(1)(b)), or "… knowingly use any taxpayer information

otherwise than in the course of the administration or enforcement of this Act …" (s. 241(1)(c)). The *Income Tax Act* defines a government entity to include "a board or commission … that performs an administrative or regulatory function of government…": s. 241(10)(e). Therefore, the Board must protect the taxpayer's information pursuant to s. 241.

[16] There is no alternative to a sealing order for the taxpayer's information that would be practicable. Most of the information in the tax documents is personal, so redaction would not be appropriate. In light of my conclusions on the appropriate corrective action, I did not need to summarize this evidence.

[17] The names and birthdates of the grievor's spouse and children were included in documents related to one of the suspensions. I have ordered that the birthdates be redacted from the documents for the following reasons.

[18] The Board routinely allows the redaction of personal identifiers, including date of birth, if the identifier is not relevant and necessary for the determination of the dispute. Through an oversight, the birthdates were not redacted by the employer. This information is clearly not relevant to the grievances before me.

IV. Summary of the evidence

[19] The grievances before me involved both discipline and alleged unsatisfactory performance. Although the alleged misconduct occurred during the grievor's participation in and the assessment of her training, it is necessary that the evidence related to alleged misconduct be separated, to the extent possible, from the assessment of her performance. This is because the Board assesses misconduct to a different standard than termination of employment for unsatisfactory performance.

[20] For context, I will start with a brief introduction that summarizes the grievor's work history before summarizing the evidence related to each disciplinary suspension. I will then summarize the evidence related to the assessment of her performance in the training program that led to the termination of her employment. I then summarize the allegations and evidence related to the discrimination claim, followed by the events immediately following the termination of her employment.

A. Introduction

[21] The grievor commenced her employment in the federal public service in a clerical position at the CBSA (a CR-04 position) in 2009. In 2013, she was selected for the Officer Induction Development Program (OIDP) and took a training program at Rigaud, Quebec, called the Officer Induction Training Program (OITP). She graduated from the program and was provided a letter of offer for a CBSA officer trainee position on December 16, 2013. The position was classified at the FB-02 group and level. I have summarized the evidence related to the OIDP in the section of the decision that deals with the termination of her employment.

[22] The grievor started working at PIA in Toronto on January 13, 2014.

B. The three-day suspension (NEXUS enrolment)

[23] On March 5, 2015, the grievor received a three-day suspension for her actions on July 18 and 19, 2014, related to obtaining NEXUS cards for herself and her family members. The NEXUS program is jointly administered by the Canadian and United States governments and provides preferred entry for travellers at the Canada-U.S. border. After a fact-finding investigation, the employer determined that the grievor had used her job title and official identification as a BSO for personal gain, which it alleged was a breach of its *Code of Conduct* and the *Values and Ethics Code for the Public Sector*.

[24] The grievor, her husband, and three children wanted to enrol in the NEXUS program. The wait for an appointment at PIA as a member of the public was two to three months, so initially, she made an appointment with her family for August 5, 2014, to travel to the NEXUS Enrolment Centre in Fort Erie, Ontario. To avoid the wait for a NEXUS appointment, the option was to travel the distance to Fort Erie. The drive to Fort Erie from PIA is approximately two hours.

[25] It was regular practice at PIA for BSO officers to request permission from the supervising superintendent of the NEXUS office to apply for the NEXUS program at the PIA office. The grievor spoke to the supervising superintendent, Supt. Robert Lambert, in late June 2014 and requested an appointment. He asked her to email him further details and said that he would then provide her with an answer to her request. She did so on June 27, 2014.

[26] On July 13, 2014, the grievor emailed Supt. Lambert again, following up on her request. He did not reply. On July 18, 2014, she went to the NEXUS office in her CBSA uniform. She testified that an acting superintendent had suggested that she go to the office to speak to Supt. Lambert. She asked to speak to him and was told that he was not at work that day. She testified that when a U.S. customs officer learned of what she wanted, he told her that her NEXUS application could be processed then. She also testified that a BSO heard this exchange. She testified that the customs officer looked at her pre-approval online and mentioned that her passport would expire soon. She had her photograph and fingerprints taken. She estimated that the whole process took no more than five minutes. She testified that there were no members of the public in the waiting room at the time.

[27] Supt. Lambert testified that the NEXUS program was popular at the time and the office was regularly very busy. The employer did not retain the video of the waiting room, and no CBSA BSOs who were at the office on that day testified. The superintendent who conducted the fact-finding, Supt. Marcel Muka, testified that based on the sign-in sheets, it appeared that the NEXUS office was "quite full" and that on July 18, 2014, at least seven members of the public were in the office, not counting any walk-ins. He also testified that the NEXUS office was busy the following day. The sign-in sheet was not introduced as an exhibit at the hearing.

[28] After learning that the grievor went to the NEXUS office, in an email on September 8, 2014, Supt. Lambert requested details from the CBSA BSOs who had been present. One BSO replied that the grievor came into the office and spoke to some officers at the "far end". The BSO stated that she did not hear what was discussed.

[29] Supt. Muka testified that the grievor's NEXUS application would not have been approved without a passport. He also testified that her statement that the U.S. customs officer mentioned that her passport was expiring led him to infer that she had the passport with her. In the disciplinary notice, the employer stated that she had her passport with her. She testified that she did not have it with her. The disciplinary letter stated that to enrol for a NEXUS card, a passport is required. Supt. Muka asked Supt. Lambert in an email if it was possible to have the NEXUS interview, photos, and fingerprinting done without a passport. Supt. Lambert answered that it was possible but that the individual would have to bring it in later. He confirmed this statement in his testimony.

[30] In response to an emailed request from Supt. Lambert, another BSO reported that the U.S. customs officer told the grievor that she could come back with her family the following day. The BSO was not certain if that officer volunteered the offer or if he was asked for it.

[31] Supt. Lambert testified that after a management meeting held on or about July 30, 2014, Supt. Danielle D'Alessandro told him about seeing the grievor and her family in the NEXUS office. She emailed Chief Rhonda Raby on July 30, 2014, describing what she saw on the day that the grievor's family was at the NEXUS office. Supt. D'Alessandro did not testify at the hearing. She stated in her email that she observed the grievor enter the NEXUS office and approach her family. Supt. D'Alessandro reported that she left the NEXUS office shortly after the grievor entered. She stated in her email that she advised the grievor's supervisor, Supt. Elie Chamieh, of it when she next saw him on July 28, 2014.

[32] In the disciplinary notice, the employer stated that the grievor attended with her family at the NEXUS office in her CBSA uniform on July 19, 2014, "to assist with the enrolment process." Supt. Muka stated in his report that the grievor "may have assisted with the processing". She stated that she attended but that she stood off to the side and did not participate in the processing. In an email to Supt. Lambert, she stated that her family was already being processed when she arrived. In her testimony, she testified that her daughter had difficulty having her iris scanned and that she assisted by talking to her daughter. She testified that she was in the NEXUS office with her family for about 15 minutes.

[33] Another BSO reported to Supt. Lambert that he processed two of the grievor's family members. The BSO stated in an email that he thought that she had spoken to a superintendent about walking in without an appointment, but he did not ask her.

[34] In an email to Supt. Lambert, the same BSO stated that the waiting room was "quite full" with members of the public when the family was being processed. In the disciplinary letter, the employer stated that the waiting room was "… full of members of the public at the time [her] family was being processed." The grievor testified that she did not see people sitting in the waiting area.

[35] Supt. Lambert testified that each NEXUS applicant is booked for a 15-minute appointment, although in cross-examination, he admitted that it could take less than 15 minutes to process an application.

[36] On July 22, 2014, Supt. Lambert (before learning that the grievor had already attended the NEXUS office) advised her in an email that the NEXUS office would not be able to process her application due to the number of family members. She testified that she did not respond because he did not ask for a response.

[37] After learning that she had attended the NEXUS office, Supt. Lambert emailed the grievor on July 31, 2014, requesting details and an explanation. She stated in her email that she had asked for him, and the officers on duty asked her what she wanted. She told them that she was inquiring about enrolling in the NEXUS program, and she was told that she could be accommodated as no one was waiting at the moment. She wrote that after she finished her enrolment, the officers told her that she could bring her children in for enrolment, "no problem".

[38] In a follow-up email sent later that day, the grievor told Supt. Lambert that it was not her intent to undermine his authority. She stated that it had not been her intent to be processed at that time. She continued with this: "I do apologize for any misunderstanding … I meant no disrespect".

[39] The notes of the fact-finding interview report that the grievor said that she apologized for going to the NEXUS office. She referred in the interview to the professional courtesy that customs officers often extend to each other and acknowledged that a member of the public would not know about it.

[40] Supt. Lambert testified that although BSOs were sometimes processed for NEXUS enrolment at PIA, they never had their photographs taken while in uniform. Supt. Muka also testified that he was not aware of any BSOs doing so.

[41] Supt. Lambert testified that he felt that the grievor had undermined his authority by proceeding with the NEXUS process without his permission. He testified that it was not appropriate to attend the NEXUS office on personal business while on duty and in uniform. He described it as "common sense".

[42] Supt. Muka recommended discipline of three to five days' suspension for the grievor's conduct. He testified that he reached that recommendation after consulting

CBSA labour relations officers and Chief Raby. He testified that there was a long list of aggravating factors and a short list of mitigating factors.

[43] The discipline was imposed by Jennifer Ritchens, the CBSA's acting director general of learning and development. In the notice of discipline, she stated this:

> …
>
> *… I have concluded that your behavior and actions on July 18 and 19, 2014 are considered a breach of the CBSA* Code of Conduct *and the* Values and Ethics Code for the Public Sector*. You used your job title and official identification as a CBSA Officer for personal gain. You did not adhere to the Public Sector values of Integrity as you used your official role inappropriately too obtain an advantage for yourself and your family over members of the public. Employees are to act in a manner that will bear closed public scrutiny and to avoid preferential treatment to family and friends.*
>
> …
>
> [*Sic* throughout]

[44] In the notice, Ms. Ritchens noted these factors, relied upon when determining the appropriate corrective action: a) no previous discipline for the grievor, and b) the grievor's failure to recognize the seriousness of her behaviour. In her testimony, Ms. Richens stated that as a BSO, the grievor was held to a higher standard of professionalism than the general public. She testified that the management team recommended to her discipline of three to five days' suspension. She stated that given that it was a first act of misconduct and that the grievor eventually expressed remorse, she applied the minimum number of days.

[45] In cross-examination, the grievor testified that going to the NEXUS office and agreeing to being processed was "absolutely not professional".

[46] In an email to Supt. Lambert, Supt. Muka used "LOL" when asking for some information about the NEXUS office incident. He testified that he used this phrase to "lighten the email", as he and Supt. Lambert were colleagues, and Supt. Muka was no longer acting as the chief.

C. The seven-day suspension (for firearm handling)

[47] The grievor received a seven-day suspension for failing to handle her firearm in accordance with CBSA operating procedures. The discipline related to conduct that occurred on October 31, 2014. The discipline was imposed on June 19, 2015.

[48] Until arming rooms were built at PIA, firearms were stored in the Corporate Security office at Regional Headquarters (in the Matheson Blvd. office, also known as "Matheson"). Therefore, BSOs and trainees were required to retrieve their firearms from Matheson for either practice or recertification. Overnight storage of a firearm was available at PIA Terminal 1 in the area named the "Customs Secondary Transient Arming Room". In an email to all BSOs, including the grievor, sent on March 17, 2014, Larry Hoffberg, Chief of Corporate Operations for Passenger Operations at PIA, provided the following information about storing a firearm in the arming room:

> …
>
> *… DO NOT leave your firearm in the carry case on the floor. The firearm should be locked in one of the available firearm lockers in the DASCO cabinet. You will maintain control of the locker key while your firearm is in storage. Your empty carry case may be left in the arming room.*
>
> …

[49] Mr. Hoffberg sent a further email on March 27, 2014, clarifying the instructions on retrieving firearms and repeating the warning about storing a firearm in the individual lockers provided.

[50] The grievor testified that was provided no orientation on the arming rooms. She testified that she was not comfortable "at all" with a firearm and that she was anxious and nervous.

[51] On October 31, 2014, the grievor retrieved her duty firearm from Matheson. She testified that she was required to load it there. She started to load it at the cleaning tray, but the security office employee told her that she had to load it in the proving barrel. She testified that she did not know the name of the device at the time and that there were none at the Rigaud training facility. She testified that it did not occur to her that using a proving barrel was a safety measure.

[52] The grievor went to the West Secondary Arming Room at PIA Terminal 1. She asked Kevin Leah, an acting superintendent, to unlock the room. He did so for her and then left.

[53] The video of the grievor's actions in the arming room show the following sequence of events. She approaches the wall that she faces and drops a metal tray that is used when cleaning firearms. To her left is the proving barrel and a ballistic panel that is used when loading and unloading a firearm. She faces the wall without a ballistic panel and draws her firearm out of the holster. She then removes the magazine and the round in the chamber. She then places the firearm on the metal table in front of her. She then tries unsuccessfully to open the gun locker. She then puts the cable lock on the firearm, places it in the proving barrel, and then leaves the room to find Supt. Leah, to obtain his assistance.

[54] The grievor testified that she pointed the firearm in the direction of the cleaning tray due to "muscle memory". She testified that in Rigaud, the cleaning tray was used to load the firearm, and the cleaning tray was facing her when she entered the arming room. In cross-examination, she testified that she did not recall whether she saw the proving barrel in the arming room when she entered.

[55] Supt. Leah reported in an email to Acting Chief Muka on the following day that the grievor returned to his office to tell him that she could not access the gun locker that was assigned to her. When they entered the arming room, she told him that she had left her unloaded and cable-locked duty firearm in the proving barrel until she knew which locker had been assigned to her. Supt. Leah tried the key on the locker number that had been given to her, and it did not work. He told her to lock her firearm and place it in an unassigned locker with a key while they left to sort out the locker that had been assigned to her.

[56] When they returned to the superintendents' office, Acting Chief Muka informed them that there was another arming room in the Immigration section and that her locker was likely there. Supt. Leah and the grievor were not aware that there was a second arming room. They returned to the arming room to retrieve the firearm. He reported that she asked if she could just keep the firearm cable-locked and place it in her cargo pants pocket to bring it to the other arming room. He told her not to do that

and to "load for duty" anytime she transported her firearm within PIA. Supt. Leah testified that no BSO had ever asked to transport a firearm in a pants pocket.

[57] The video then shows the grievor placing the firearm on the metal table, as before. Facing the unprotected wall, she inserts the magazine into the firearm and puts a round into the chamber. She then points her firearm at the same wall. She then goes to the proving barrel and appears to carry out a visual check of the gun chamber. She then holsters the firearm and leaves the arming room.

[58] After leaving the first arming room, the grievor met Supt. Bart Junik at the second arming room. Supt. Junik showed her the logbook to sign, waited until she had unlocked her gun locker, and then left the room. She then walked toward the proving barrel and drew her firearm, pointing it at the ballistic panel. She then cable-locked the gun and placed it in the locker. She testified that she used the proving barrel this time because Supt. Junik had oriented her to the room, and the proving barrel was "very visible". She said that when she saw it, she remembered that she had used it at Matheson. She also testified that her anxiety level was much lower than previously, as Supt. Junik had made her feel comfortable.

[59] Supt. Muka testified that when Supt. Leah returned to the office, he mentioned that the grievor had tried to put the firearm in her cargo pants pocket. He testified that "some time later" in his shift, it occurred to him that there might be health-and-safety considerations related to her actions. He then retrieved the video of the arming room and viewed it.

[60] Supt. Muka asked the grievor to provide a report on her activities in the arming room, and she provided what she labelled a "draft" report on November 2, 2014. In it, she stated her recollection as follows:

…

> *…I unloaded and placed my firearm with the cable lock in it in the unloader. I tried to open the Dasco but the key would not work … I placed the firearm in the unloader, cable locked it and the cable key was secured on me… There were no phones in the room, nor was I issued a radio to contact S/ Leah. I have always been instructed that our port was an unarmed position that I was not to wear my loaded firearm at any time. Superintendent Lea only knew I was unloading and placing my firearm in the Dasco -- he did not know I would be reloading and walking out -- there was no permission received to do this. I knew the room only had one door*

> *and that only an authorized Superintendent personnel had access and that the room was monitored by CCTV. Since there was no other way for me to get a hold of S/Leah and I was confident my firearm was secure and that nobody else had access to it, I quickly went to inform S/Leah that I could not get into the Dasco and advised him that my gun was in there and that I would be waiting near the Dasco door. When S/Leah accessed the entry and, and we walked in, he tried to open the Dasco and he could not. I asked if we were in the right room and he said there was only one room and it seems the key is not working. He said in the meantime, we will store my firearm in an available Dasco … and that he would send an e-mail to all related to advise the Dasco that I was issued, was issued to someone else and that the key was not working, and that in the meanwhile my firearm could stay there. … As Superintendent Leah was about to send* [the email], *Chief Muka and Superintendent Junick walked in and Superintendent Leah was advised that there is another Dasco room.*
>
> [*Sic* throughout]

[61] According to the "CBSA Arming Room Guidelines", ballistic panels are not meant to replace proving barrels. BSOs are trained "… for muscle memory to draw, punch out arms fully extended and point straight ahead to a target each time the duty firearm is removed from the holster" and then to use the proving barrel in preparation for safe storage. The guidelines require a ballistic panel to be installed directly above the proving barrel. The floor is required to be marked with tape or paint at one metre from the panel as a visual aid. The grievor could not recall if she saw any markings on the floor.

[62] The "CBSA Directive on Agency Firearms and Defensive Equipment" sets out the following requirements for BSOs, and recruits:

> …
>
> ***7.5*** *BSOs, employees and recruits shall:*
>
> ***a.*** *Adhere to the principles for safe handling of defensive equipment and firearms (ACTS and PROVE), at all times;*
>
> ***b.*** *Ensure that firearms and other defensive equipment is properly maintained, transported, and securely stored when it is not in use;*
>
> ***8.24*** *Defensive equipment is to be stored at an Agency facility when it is not in use and stored in container, receptacle, vault, safe or room that is kept securely locked and has been approved by Regional Security.*
>
> …

[63] The "CBSA Standard Operating Procedure on Agency Firearms and Defensive Equipment" (SOP) sets out the following principles of firearm safety that are to be followed "at all times":

…

> ***4.0.1*** *…*
>
> ***a.*** *Assume every firearm is loaded;*
>
> ***b.*** *Control the muzzle direction at all times;*
>
> ***c.*** *Trigger finger must be kept off the trigger and out of the trigger guard;*
>
> *and*
>
> ***d.*** *See that the firearm is unloaded.*

…

[64] The SOP provides the following directions for using clearing devices:

…

> ***4.1.1*** *Load, unload and prove safe firearms in an area designated for such purposes and use a clearing device or ballistic panel.*
>
> ***4.1.3*** *Where a clearing device or ballistic panel is not available, firearms must be unloaded and proven safe in accordance with your training on firearms safety.*

…

[65] The SOP also sets out the following guidance on storing firearms:

…

> ***5.0.2*** *In accordance with* Public Agents Firearms Regulations, *ensure that Agency firearms are safe and securely stored:*
>
> ***a.*** *with a locking device; and*
>
> ***b.*** *in a metal storage container issued by the Agency; or*
>
> ***c.*** *in an assigned storage compartment of a firearms storage locker at an Agency office.*

…

[66] Nigel Suarez, the acting manager of the use-of-force policy unit of the CBSA's arming division concluded in an email that the grievor had contravened the following policy and SOP sections:

…

> *• The duty firearm was not loaded or unloaded in an area designated for such purpose as required by **paragraph 4.1.1** of the SOP.*
>
> *• For 5 minutes the duty firearm was not securely stored in an Agency approved firearms storage container, compartment or locker as required by **paragraph 7.5 and 8.24** of the Directive, and **section 5.0.2** of the SOP.*
>
> *• The duty firearm was allegedly **not** pointed on two (2) occasions in a safe direction as required by **paragraph 7.5** of the Directive and **4.0.1** of the SOP.*
>
> …
>
> [Emphasis in the original]

[67] Mr. Suarez made the following comments on the level of seriousness of the incident:

> …
>
> *• Officer Trainee SAHADEO understood the situation and accepted full responsibility for the matter.*
>
> *• Officer Trainee SAHADEO was not familiar with the Pearson International Airport arming rooms.*
>
> *• Officer Trainee SAHADEO has been armed since 2013.*
>
> *• Officer Trainee SAHADEO has received training in firearm safety and handling of the duty firearm.*
>
> *• Officer Trainee SAHADEO admitted she knew the proper procedures for loading/ unloading the duty firearm. She was also aware of the purposes of the ballistic panel and clearing device.*
>
> …

[68] The grievor did not dispute Mr. Suarez's conclusions.

[69] Clayton Rucker, a CBSA firearm and control tactics instructor, testified about the training that trainees receive in the Rigaud training program. He testified that in training, the concept of safe direction and pointing toward a ballistic panel or using a clearing device is emphasized. He testified that the training provided would be sufficient for a BSO to find the safe direction to load and unload a firearm in the arming room. He also testified that the trainees would have seen demonstrations of how to properly use a clearing device. He testified that the trainees would have seen a ballistic panel in their training and would have been told that it was unacceptable to put a firearm in a pants pocket.

[70] In cross-examination, Mr. Rucker stated that the training facility has four ballistic panels and four clearing chambers. Although the clearing chambers are smaller than the ones in the arming room, they have an orange ring around them to signify that they are clearing devices, which is the same as the clearing device in the arming room.

[71] Supt. Reet Sandhu was assigned as the lead superintendent in the fact-finding into the firearm incident. Another superintendent, Supt. Ross Stewart, took notes. Supt. Sandhu testified that the grievor should have known about a safe direction to point the firearm from her training and from safety courses.

[72] Supt. Sandhu testified that in the fact-finding interview of December 4, 2014, the grievor demonstrated that she knew the appropriate safety rules. She also testified that the grievor showed remorse when she watched the video and realized that the gun had not been pointed in a safe direction. The grievor stated at the meeting that she had not followed proper safety procedures and that she would in the future. In cross-examination, Supt. Sandhu did not agree that the grievor's lack of familiarity with the arming room was a mitigating factor.

[73] The grievor's duty firearm was taken from her on November 1, 2014. The reason provided by Supt. Muka for the removal was the investigation of "multiple suspected safety violations" during loading and unloading it for duty. The rest of her defensive equipment was taken on November 6, 2014. The defensive equipment that was removed included handcuffs, a defensive baton, and OC (pepper) spray. She testified that Supt. Muka belittled her and "snickered" during the meeting when her defensive equipment was taken.

[74] Supt. Muka testified that he consulted the CBSA's arming policy unit, which clarified that removing a firearm also includes removing all defensive equipment (handcuffs, defensive baton, and OC spray).

[75] The disciplinary investigation report listed the following aggravating factors:

> …
>
> *1. Officer Trainee Sahadeo was aware of the four rules of firearms safety, and articulated all four rules ….*
>
> *2. Officer Trainee Sahadeo has received training in firearm safety and handling of the duty firearm.*

> *3. Officer Trainee Sahadeo admitted she knew the proper procedures for loading/unloading the duty firearm. She was also aware of the purposes of the ballistic panel and clearing device.*
>
> *4. Officer Trainee Sahadeo had just been advised, less than two hours prior, by an individual at Matheson (Corporate Security) to load her duty firearm using the clearing device/ballistic panel provided in the arming area within Corporate Security. The ballistic panel and clearing device are similar to those located in the West Secondary Arming Room.*
>
> *5. Officer Trainee Sahadeo acknowledged the existence of the clearing device when she placed her duty firearm in there for storage.*
>
> *6. Officer Trainee Sahadeo proceeded to utilize the clearing device to perform the 'peek check' portion of the loading for duty procedure.*
>
> *7. Officer Trainee Sahadeo unloaded her duty firearm using the ballistic panel and clearing device provided when she was in the Immigration Arming Room.*
>
> …

[76] The disciplinary report set out the following mitigating factor: "After being shown irrefutable evidence, Officer Trainee Sahadeo showed remorse for her actions."

[77] The disciplinary report made the following recommendation:

> …
>
> *CBSA Officer Trainee Sahadeo showed poor judgement, negligence and lack of concern for safety of others in the handling of her duty firearm on October 31, 2014. If the firearm had accidentally discharged, the consequences would have been tragic. The procedures for the safe handling and storage of the duty firearm, for which she received significant amounts of training, were not adhered to in this case. She did not follow* CBSA Standard Operating Procedures on Agency Firearms and Defensive Equipment.
>
> *It is recommended that given the seriousness of this matter, discipline should be imposed in an effort to continue to reinforce the expected standards of conduct. Taking into consideration the aggravating and mitigating factors present in this case, it is recommended that a suspension of 10 -15 days be rendered.*
>
> …

[78] After receiving advice from a labour relations advisor, Ms. Ritchens imposed the discipline of seven days of suspension. In the disciplinary notice, she noted the following:

…

> *I have carefully considered the facts of the incident as well as the information you presented at the fact-finding meeting. I have concluded, your actions on October 31, 2014 are considered a breach of the* CBSA Standard Operating Procedures on Agency Firearms and Defensive Equipment *and the CBSA* Code of Conduct*. You did not handle your firearm in accordance with the CBSA safety procedures or in a manner that ensured the safety of others in the workplace. It is extremely concerning that you did not follow procedures in the safe handling and care of your firearm and these actions had the potential for serious ramifications.*
>
> …
>
> *In determining corrective action, I have considered a number of factors including, but not limited to, the following: during the meeting of December 4, 2014, you were able to list the four rules of firearms safety; in the same meeting, you demonstrated that you were aware of the purpose of the ballistic panel; when you attended the Immigration Arming Room a short time later in the same day, you followed the proper safety procedures for the handling of your firearm; and you appeared to exhibit remorse for the manner in which you handled your duty firearm in the West Secondary Arming Room on October 31, 2014.*
>
> …

[79] Ms. Ritchens testified that the incident was “extremely concerning” from a safety perspective. She testified that the management team recommended a suspension of 10 to 15 days. She stated that she took into account the grievor’s remorse when imposing the 7-day suspension.

[80] Ms. Ritchens did not accept the grievor’s contention that she was not properly trained on using the arming rooms. She testified that the grievor had received extensive training on the use and control of a firearm. She said that arming rooms have a “standard footprint” and that each room has standard equipment. She also testified that BSOs have to be aware of their surroundings at all times.

[81] Ms. Richens was asked about the delay imposing discipline (the incident occurred on October 31, 2014, and the discipline was imposed in June 2015). She testified that the unit that carried out the fact-finding was extremely busy and that the time it took was “about the norm”. She also testified that arming BSOs was relatively new at that time and that the CBSA’s arming policy centre had to be consulted.

[82] After the arming room incident, new posters were put on the rooms' walls indicating the proper procedures for loading and unloading firearms.

[83] At the hearing, the grievor apologized for her handling of the firearm.

[84] The grievor's defensive tools (other than her firearm) were returned to her in August 2015. Her firearm was returned to her after November 12, 2015, when a recommendation was made for its return, and she successfully recertified for the use of a duty firearm.

D. The 10-day suspension (the security-line incident)

[85] The grievor received a 10-day suspension for attempting to bypass the line for a security check at PIA on May 31, 2015. The discipline was imposed on October 3, 2015.

[86] The grievor was on duty in PIA Terminal 1 on May 31, 2015. She opened the barrier (a stanchion) to bypass a security line that was the exit from a secure area. She wanted to get a coffee from the food court. The employer alleged that the security guard, an employee of the Greater Toronto Airports Authority (GTAA), asked her if it was an emergency. It is alleged that she said that it was not an emergency but that since she was a CBSA employee, she should be allowed to proceed. The security guard instructed her to go to the end of the line.

[87] The employer alleged that the grievor continued to state that she was with the CBSA and that she should have priority over other employees. The employer stated that she convinced an airline employee that she was right and that that person also questioned the security guard's order. The employer alleged that once the grievor reached the front of the line, she continued to challenge the security guard and that she used a condescending tone.

[88] The GTAA reported the grievor's conduct to the CBSA.

[89] Supt. Liz Szplitgeiber asked the grievor for a report of the incident. On June 1, 2015, she responded by email with this:

…

> *Yesterday afternoon I went to get a coffee and when I got to the security area, I opened the stanchion and proceeded to the scanner to scan my id and my fingerprint. The security guard asked me to*

> *go to the back of the line so I went to the back of the line and when it was my turn I scanned and went through.*
>
> …

[90] Supts. Szplitgeiber and Lucie Cellucci conducted a fact-finding investigation. On June 3, 2015, they met with the grievor and a bargaining unit representative. The grievor told them that she was aware of situations in which CBSA employees had received priority access through secure checkpoints. She told them that she did not have a negative interaction with the security guard. The disciplinary notice states that she was reported as saying this in the fact-finding interview: "it was a mistake, she owns it, and knows she did something wrong and I apologizes [*sic*]".

[91] Supt. Cellucci interviewed the security guard on June 28, 2015. The security guard did not testify at the hearing. Supt. Cellucci reported that the security guard told her that the grievor was rude and that she "had an attitude" during their interaction. The security guard reported that she asked the grievor if it was an emergency and that the grievor told her that it was not but then said that since she was with the CBSA, she could go first. The security guard then asked her to return to the back of the line. The security guard reported that the grievor then spoke to a person at the end of line who worked for an airline and told that person that she was with the CBSA and should not wait. The security guard stated that the airline employee questioned her orders and offered to let the grievor go ahead of her.

[92] The security guard stated that once the grievor reached the front of the line, she once again told the guard that she should be allowed to go to the front of the line, and when the guard told her that she had to wait in line unless it was an emergency, the grievor "stated yes three times with an attitude and would not look at the guard to acknowledge her" (as reported in the disciplinary report). The security guard stated that the grievor walked to the scanner and "slammed" her airport access card on it. The security guard told Supt. Cellucci that the grievor was rude and entitled.

[93] The grievor admitted that she lifted the stanchion to proceed to the front of the line. She testified that at the time, she did not know that she could not do that. She testified that she had done it before, and she thought that BSOs were allowed to do it. She stated that she felt "pretty stupid about it now". She testified that she should not have skipped the line and that she had learned from this experience. She testified that

she told Supt. Cellucci that it was an honest mistake. At the hearing, she stated that she was sorry that it happened.

[94] The grievor testified that when she was in the line, she had a conversation with an airline employee about how long the lines were. When the grievor reached the front of the line, the security guard said something like “now you know what it is like to be in line”, the grievor testified. She stated that she ignored the security guard and scanned her pass.

[95] Supts. Cellucci and Szplitgeiber reviewed the video of the incident, which was entered as an exhibit at the hearing. It confirms the grievor’s basic movements and shows her removing the stanchion and being sent to the back of the line. Her actions when she reaches the front of the line are not visible.

[96] Supt. Cellucci and Supt. Szplitgeiber recommended a 10-day suspension on the basis that the grievor had not corrected the behaviour for which she had received prior discipline.

[97] The 10-day suspension was imposed by Jacqueline Rigg, the director general of the CBSA’s Training and Development Directorate. Ms. Rigg concluded that the grievor had breached the CBSA’s *Code of Conduct* and the *Values and Ethics Code for the Public Sector*. She stated in the disciplinary notice that the grievor had attempted to use her job title and position to gain a personal advantage over other PIA employees while in full CBSA uniform and in view of employees from other organizations. She also concluded that the grievor “did not show respect towards” the GTAA security guard, who was following her post orders. Ms. Rigg also concluded that the grievor “did not wish to follow security procedures” for entry into a secure area, which was a condition of her “Restricted Area Identity Card”. Ms. Rigg testified that she relied on the sections of the CBSA *Code of Conduct* related to avoidance of preferential treatment and “accountability and professional conduct” to support her conclusion on the misconduct.

[98] Ms. Rigg stated in the disciplinary notice that management had considered the grievor’s previous discipline when it determined the amount of discipline for this act of misconduct. Ms. Rigg characterized the previous discipline for the NEXUS office incident as the grievor using her official position and title for personal gain. Another

aggravating factor that Ms. Rigg considered was the grievor's lack of recognition that her behaviour was offensive to the security guard, who was following her post orders.

E. The 15-day suspension (the traveller complaints)

[99] The grievor received a 15-day suspension following complaints from two members of the travelling public about how she treated them in the Customs Secondary screening area. As noted earlier in this decision, the travellers' identities have been anonymized.

[100] The first complaint was made on January 13, 2016, about an incident on January 5 ("the January 5 incident"), and the second one was made on January 22, 2016, about an incident on January 14, 2016 ("the January 14 incident"). On both dates, the grievor was assigned to work on the Customs Secondary function at PIA Terminal 1. Both travellers complained of rude and disrespectful conduct by the grievor. Supt. Szplitgeiber investigated both complaints and determined them founded.

1. The January 5 incident

[101] The first complaint was from two Canadian travellers (a husband and wife) arriving from the U.S. with their daughter. They used their NEXUS cards on their arrival at PIA. On their declaration forms, they had noted that they were bringing in dried fruit.

[102] The complaint stated that the BSO on duty at Customs Secondary (later determined to be the grievor) was "very abrupt and rude towards us" for filling in the forms incorrectly. The complaint also stated that the grievor questioned whether the husband was suitable for the position he told her he held. The complainants alleged that she lectured them for over 45 minutes on how customs forms should be filled out. They understood that they had made an error filling them out. They alleged that the grievor's conduct was "poor, discriminative and offensive". They suggested that they might have been treated that way because of their religion or race. They also stated that the grievor "penalized [them] to show her power". They requested an apology from her.

[103] The complainants did not testify at the hearing. A video of the customs examination was entered as an exhibit.

[104] The grievor provided a written response to the complaint. She stated that she had no recollection of questioning whether the husband was qualified for his position. She also did not recall the examination lasting 45 minutes, as stated by the complainants. She wrote as follows about the issue of lumping deductions for the whole family rather than noting them individually:

> …
>
> *I explained the policy as it relates to exemptions per traveller and educated the travellers on how to properly declare their exemption individually.*
>
> …
>
> *…CBSA policy under the Customs Act, Section 12 and that everyone entering is legally obligated to answer truthfully. They are Nexus card members, have been educated during enrollment on how to fill out the declaration form. Furthermore, there are instructions attached to each Declaration card and in bold* ***"Each traveller is responsible for his or her own declaration".*** *I was acting under the law and the scope of my duties as an Officer.*
>
> *I explained the form thoroughly, pointing to the numbers on the form and how they correspond to the per person exemption from Part A, as I would do in a similar situation. I also informed them that because they are Nexus members that there is an expectation that they fill the card correctly. It was clear that they were well within their exemption, but that they each are required to declare as individuals. I informed them that their card could have been revoked and they were in violation of the Nexus program, specifically on the reporting of goods and I said to them this information is being given to them for future reference so they can continue to be members in good standing. I was trying to help them for future travel as I have done in the past for other Nexus travellers.*
>
> …
>
> *If I was misunderstood during the examination and this caused the travellers to become offended, then I apologize for this as this was not my goal. My goal was simply to ensure that the travellers continue to enjoy the benefits of the Nexus program in the future and that their travelling experience through Pearson International Airport is only a positive one.*
>
> [Emphasis in the original]

[105] The grievor also wrote that the travellers' names had no bearing or relevance in her examinations, in an apparent reference to the discrimination allegations.

[106] Supt. Szplitgeiber spoke to the complainants and reviewed the video footage of the examination before drafting her recommendation on the complaint. She determined that the examination lasted eight minutes. She continued with this: "During this time the Officer is [rigid], waves her hands repeatedly at the passengers, points repeatedly at the same area on the declaration card and [is] displaying negative body language". She also observed that the grievor displayed a "negative ending" to the examination when she sat in her chair, facing forward, as the travellers placed their bags back on the cart.

[107] She noted that the travellers appeared (in the video) to understand the grievor's explanation but that it was "excessively long and should have been brief". She also stated that the travellers were well within their exemption limit and that the grievor provided "incorrect information". Supt. Szplitgeiber concluded as follows:

> …
>
> *The officer's response is written in a defensive manner and quotes sections of the Customs Act. The section that the officer quotes is that "everyone entering is legally obligated to answer truthfully". This clearly demonstrates the officer abusing her authority during this examination. The clients did declare all their goods and offered receipts for all their purchases which the officer declines [sic].*
>
> *Follow up with the Officer is required and will be assigned by the Chief.*

[108] Supt. Szplitgeiber stated in cross-examination that she did not know why the grievor pointed at the complainants. She also testified that it was general practice to wait for passengers to leave before entering information into the computer.

[109] Supt. Szplitgeiber had no further involvement in the complaint after submitting her report.

[110] On January 14, 2016, Supt. Matthew Crowley emailed Supt. Matthew Forrest about the complaint. Supt. Forrest reviewed the video of the interaction and provided a summary to Susan Trenholm, a labour relations advisor, on the following day. He noted that the interaction lasted 11 minutes, not the 45 minutes alleged by the complainant. He noted that during the 11 minutes, it was evident that the grievor was "lecturing" the complainants, as follows:

…

> *What she was lecturing on, I don't seem to grasp. The passengers were entitled to an 800 dollar declaration each. As there was no attempt at pooling the exemptions to account for a high-value item, or an attempt to smuggle – the point of the lecture is moot.; especially amongst low-risk Nexus travellers. In my opinion, this seems to be another case of this trainee using her position to attempt to belittle others or place herself in an air of authority without cause. If – the trainee was attempting to advise the travellers not to declare all goods under one traveller in case of a future traveller where this may not be a good idea, I don't see how that would have taken 11 minutes.*
>
> …
>
> *While parts of the complaint seem to be rather embellished, ie the timeline or the reasons of religion, I still believe that it is most likely factual in nature. …*
>
> …

[111] In the email, he asked Ms. Trenholm whether if "considering the history of the officer" and the conduct at issue, the incident should be "best handled as a further point of discipline".

[112] A fact-finding meeting occurred on February 10, 2016. Chief Tina Karsakis took the lead, and Supt. Forrest took notes. The grievor attended with two bargaining agent representatives. At the meeting, her response was reviewed, and the video was viewed. The notes report that she said that she "talks with her hands and that she didn't think the clients liked being told their privileges could be revoked".

[113] In the fact-finding report, Chief Karsakis stated that it had been permissible for the family to lump their purchases rather than declare them separately. The report concluded as follows:

…

> *…the Officer was in error of current policies and abused her authority while dealing with the clients. There is no policy, regulation, or procedure that mandates that the E311 card is completed with the declared goods divided amongst the boxes on the cards. The Officer was satisfied that all the goods were declared and stated that as her reason for not inspecting the baggage. Also, the Officer was incorrect when stating that point of finality wasn't reached. Point of finality is reached in primary during the kiosk interaction where the OGD declaration was made. This should have been a very quick interaction at Customs Secondary. The travellers were truthful in declaring the goods they*

> *brought with them and the total value of the goods were [sic] well under the $800 limit for each exemption. (There was not one item that was valued over $800.) In addition, they truthfully declared the food product (dates) that they had purchased. Due to the time they were detained in Customs Secondary, the interaction on the video, and the information in the traveller's complaint, it leads us to agree with the Nexus traveller that she and her family were being lectured (on incorrect information). The warning that their Nexus privileges could be revoked when, in fact, there had been no contravention of any policies or legislation by the travellers was inappropriate. The traveller and her family considered the exchange to be offensive.*

2. The January 14 incident

[114] The second complainant was a Canadian student returning from the U.S. She forgot her customs form when leaving the plane. In her complaint, she stated that when she asked an airline agent for another form, she was told that she did not need one as she had a NEXUS card. Because she did not have the form, she was sent to Customs Secondary. She stated in her complaint that the BSO called her a liar and told her to stop making up stories. The BSO was later identified as the grievor. The BSO standing at the next booth, later identified as Todd Robertson, was reported to have said very loudly that the traveller was not trustworthy. The traveller stated that she tried to apologize but that the male BSO continued to shout and would not allow her to provide a further explanation.

[115] The grievor then provided the traveller with a customs form to fill out. She then removed all the belongings from the traveller's backpack. The grievor informed her that gum and candy were considered food and therefore, her form was not correctly filled out because she had a throat lozenge in her backpack.

[116] In the complaint, the traveller states that the "male agent" (BSO Robertson) stood up and yelled over the "female agent" (the grievor), causing other travellers in the room to stare. The traveller also stated that BSO Robertson "repeatedly" shouted this:

> *Cut out your stories young lady! That's not true! It is your fault for listening to 'those people' in the yellow jackets, they don't know anything, you should have known better, you're the only one to blame. You are supposed to be a trusted traveller, you are not trustworthy.*

[117] In her complaint, the traveller described herself as “frightened and tearful”. She also wrote that she was “crying uncontrollably”. She alleged that the BSO Richardson shouted over her apologies and said that she should have known better. She alleged that he would not allow her to provide a further explanation. The traveller alleged that the grievor interrogated her “as if [she] was a documented criminal”.

[118] The complainant testified at the hearing. She testified that being accused of lying “kind of scared” her. She also stated that her reading ability was mocked. She felt that both the grievor and BSO Robertson mocked her. She testified that once she started crying, the grievor “started to be nicer”. She testified that she felt that the grievor’s comments had made her feel intimidated. In cross-examination, she stated that the male BSO (BSO Robertson) was “acting aggressively” and that she felt intimidated as a result. She also stated that the grievor’s body language was not aggressive, but her words were. She stated that BSO Robertson “definitely was more intimidating” but also noted that the grievor called him to join the discussion.

[119] The complainant testified that she made the complaint because she felt that the situation had been blown out of proportion. She also testified that she made it because she had been called a liar and the grievor had said that her passport had been flagged when that was not true. In addition, she made the complaint because the grievor did not know the rules about what had to be declared.

[120] BSO Robertson testified that it was not possible that he yelled at the complainant because he was less than 20 metres away from a superintendents’ office, and a superintendent would have checked had there been yelling. The complainant agreed that he might have just used a loud voice.

[121] BSO Robertson testified that the complainant did not seem to understand her obligations under the *Customs Act* (R.S.C., 1985, c. 1 (2nd Supp.)), and she acted differently than the majority of travellers do under the NEXUS program. He testified that he was coaching the grievor on that day. He testified that he talked to her about the traveller and then addressed the traveller when he heard some of her statements.

[122] Supt. Szplitgeiber investigated the complaint. She interviewed the complainant, the grievor, and BSO Robertson. In the “Complaint Investigation Report”, she concluded that the complaint was founded. She observed the video of the interaction

and determined that the grievor "displays negative body language which does not portray a positive interaction". She concluded that neither BSO yelled at the complainant. She also found that the allegation that the grievor called the complainant a liar was "undetermined".

[123] Supt. Szplitgeiber concluded that the complainant not having the required form completed was a "minor infraction" and that the grievor was incorrect when she told the complainant that her NEXUS status could be revoked. Supt. Szplitgeiber concluded that the grievor handing the form back to the complainant to have her rip off the instruction sheet was "neither professional nor required". She also concluded that when the grievor told the complainant about gum or lozenges, "her body language changes and she speaks assertively while using hand motions". Supt. Szplitgeiber noted from her observation of the video that the complainant became emotional and was "wiping tears from her face repeatedly". She noted that neither BSO acknowledged that the complainant had become emotional.

[124] Supt. Szplitgeiber spoke to the complainant on February 1, 2016. She explained her obligations under the NEXUS program. She recommended that Supt. Jennifer Marsden (the grievor's supervising superintendent at that time) follow up with the grievor on gum and candy being considered food.

[125] In her written response to the complaint, the grievor stated that she has never called any passengers "liars" and that she would not use that language. She also denied telling the complainant to stop making up stories. She set out what she recalled from the encounter as follows:

> …
>
> *…The passenger said that someone dressed like me working at the customs desk had told her not to fill out the form.*
>
> *I confirmed with the traveler if the person was someone dressed like me?*
>
> *I also asked her if it was an officer? The traveler said yes. I told her that no one dressed like me would say that. I confirmed with her that if the person was an officer and she said yes. I tried to have her explain who told her, but she changed who had told her. She said when she got off the plane, someone told her that I asked her if the person was wearing a yellow jacket or if it was someone else. She said the person was wearing a yellow jacket.*

> *I recall explaining if she could identify who the person was so that we could follow up with the employer to make sure incorrect information is not being given to travelers in the future. The traveler could not identify who gave her the information. I did not make any reference that an employee could lose their job.*
>
> …
>
> *I am unsure what the traveler means by a "documented criminal". I examined the contents of her luggage as I normally do. I asked her questions about her trip, as I normally do with travelers. The traveler had two cameras and lots of receipts, I asked her questions about them.*
>
> …
>
> *… It is my normal practice to say to travelers that "anything you put in your mouth is considered food and to check the yes box. When you get to the Officer, they will ask you what it consists of and they will determine if it is okay or not". I had this conversation with the traveller.*
>
> …
>
> *I speak to every traveler in a way that they can understand how to fill out the declaration form so that they don't encounter any unnecessary delays. This was a student, spoke English and answered questions. At no times did I speak to her as the complaint suggested, "illiterate".*
>
> *The traveler was not crying uncontrollably, as stated in the complaint.*
>
> *It is my normal practice to ask a traveler to complete the card in front of me as this allows passengers the comfort of writing while standing and not bending at the counter.*
>
> …
>
> *I did not make threats of taking the nexus card away and have never said 'flagging my profile" to any traveler. What I do recall saying is that she has travelled many times and that her card could have been taken away for not following the program requirements and that I was not going to take it away, rather put a note in the system that she was given a warning.*
>
> *Although the traveller did not maintain the established protocol as a Nexus traveller, her card was not confiscated. I chose to give her a verbal warning.*
>
> *It is my normal practice to be polite, professional and act with integrity. I remember adding a note in ICS under the traveller profile as I said I was going to do.*
>
> [*Sic* throughout]

[126] The fact-finding report noted that it was not an uncommon occurrence for a passenger to unintentionally leave their declaration form on a plane.

[127] At the fact-finding meeting, the video of the examination was shown to the grievor. The fact finders observed that in the video, the complainant is "visibly crying" during the interaction. The grievor told them that she did not know why the complainant was upset and commented that the complainant was not "crying uncontrollably", as stated in the complaint. The grievor told the fact finders that she routinely tells travellers that "anything put in their mouths is considered food and should be declared". The fact finders confirmed with the grievor that any declaration of food items would generate a referral to Customs Secondary, "but she made no attempt at understanding what impact that would have on the program if passengers were referred for a throat lozenge or gum/candy". The fact finders noted that both items are not required to be reported. The grievor replied that this was how she was trained.

[128] The grievor told the fact finders that due to the complainant's failure to fill out the declaration card, her NEXUS privileges could have been revoked. She also told them that she did not see anything inappropriate about her conduct in the examination.

[129] In the fact-finding report, the fact finders reached the following conclusion about the two complaints:

> …
>
> *… There are issues of concern which relate to basic knowledge that officers learn when they are working Customs PIL or Point. Officers at PIL are expected to know what an acceptable method of reporting goods on an E311 is. Furthermore, officers are not to assume that all food products are to be reported or declared (including throat lozenges and gum); however, it is expected that officers will refer to AIRS (Automated Import Reference System) to determine what food products can be imported into Canada and educate the clients appropriately.*
>
> *The similarities of the complaints appear to validate the travellers' concerns with the Officer. Both sets of clients are Canadians who have long travel records dating back multiple years with no other records of complaints on file or any issues with their entry back into Canada. They each are members of the trusted traveller program… Both passengers complained about rude and disrespectful behaviour by the officer. Both instances, due to the lengthy and unnecessary interactions with the clients, caused other clients to wait in line longer to be processed. Both sets of clients were given inaccurate information about CBSA processes and incorrect notes were placed in ICS which could complicate subsequent examinations in Customs Secondary.*

> *During the fact finding, no remorse or understandings of the reasoning for the issues at hand were present. The Officer completely failed to recognize the seriousness of [sic] actions and that those actions would have enduring effects on the travellers with whom she was dealing.*

[130] In the fact-finding report, the fact finders identified the following "aggravating factors":

> *The employee failed to recognize the seriousness of the incidences [sic] which are very alike in scope. The employee lacks remorse and in fact indicated she was offended by the complaints and did not know why the travellers would complain about her.*
>
> *The employee used her position of authority and trust to inappropriately lecture and demean the clients.*
>
> *The employee has previous disciplinary measures that remain part of her personnel file. The employee was previously disciplined when she behaved inappropriately towards a security officer with the Greater Toronto Airports Authority. She was advised that that type of conduct was not acceptable.*
>
> *Her actions are harmful to the employer's reputation.*
>
> *Her actions could have long term effects against the clients via comments in the system and the manner in which she dealt with them, considering that one traveller was in tears.*
>
> *The seriousness of the misconduct in relation to the organizational policies, mandate and obligations.*

[131] They identified no mitigating factors. Chief Karsakis consulted with CBSA labour relations, and a suspension of 15 to 20 days was recommended. Chief Karsakis testified that she thought that that amount of discipline was excessive. She testified that she had thought that the appropriate discipline was about 2 days, not taking the other discipline on the grievor's record into account. She testified that in the end, she was comfortable with 15 days, based on the previous discipline.

3. The discipline notice

[132] In the discipline notice, signed by Chief Karsakis, she wrote, in part, as follows:

> …
>
> *…it was determined that your conduct with the passengers that elicited the complaints was not in keeping with the CBSA Code of Conduct. You failed to follow CBSA policies and procedures and failed to process the passengers in a professional manner.*

> *Both sets of complainants were given inaccurate information about CBSA processes and incorrect notes were placed in ICS which could impact subsequent examinations in Customs Secondary for these passengers. It was also founded that in each case, you prolonged the examinations without due reason, examinations which should have been efficient and routine. Instead of providing a service to the clients, you lectured in how they made their declarations and further told them their Nexus privileges could be revoked.*
>
> *…*

[133] The discipline notice stated that the grievor did not show remorse or accept responsibility for her actions. It also stated that she did not comprehend the impact that her actions could have had on the employer's reputation and the public's service expectations. The notice continued as follows:

> *…*
>
> *…Given the above, I find your actions and conduct to be contrary to the CBSA's Code of Conduct and involved an abuse of authority. You failed to follow proper policy and procedure as prescribed in the CBSA Code of Conduct and your conduct in both examinations resulted in complaints by the travelling public. Your conduct placed CBSA in disrepute with the public.*
>
> *This is not in accordance with CBSA values, mainly Professionalism and Integrity and the Agency's Code of Conduct. The CBSA value of Professionalism requires that we provide efficient, competent and excellent service. The CBSA value of Integrity requires that we serve the public interest by making decisions and behaving in ways that maintain public confidence and preserve CBSA's reputation in light of its high visibility.*
>
> *…*

[134] In the notice, Chief Karsakis stated that the following mitigating and aggravating factors were considered when assessing the appropriate corrective action: the grievor's years of service, her acknowledgement that she understood the *Code of Conduct* but that she failed to adhere to it, her conduct placing the CBSA into disrepute, her lack of remorse, her actions demonstrating abuse of authority as a BSO, and her previous discipline.

[135] In cross-examination, Chief Karsakis agreed that the grievor thought that she was following the correct policies in her interactions with the travellers. She also agreed that the grievor did not deliberately set out to provide incorrect information.

She agreed that it was both a performance issue because of the incorrect information and a conduct issue. However, she testified that her findings were based on the *Code of Conduct* and not the grievor's performance.

[136] Supt. Forrest testified that Chief Karsakis made the decision as to the discipline but that she had asked for his opinion. He agreed that the conduct merited discipline.

[137] BSO Robertson testified that he received no discipline for his involvement in the investigation of the student traveller. He also testified that he did not notice that the traveller was crying. He testified that crying in Customs Secondary is a daily occurrence.

F. Termination of employment for unsatisfactory performance

[138] The grievor's employment was terminated on May 1, 2016, for unsatisfactory performance. The letter of termination, signed by Ms. Rigg, stated, in part, as follows:

> …
>
> *…Over the course of your tenure in the program, your actions and behaviors have caused serious concerns regarding your suitability to become a Border Services Officer. Despite receiving training, performance feedback, counselling and coaching, you have failed to demonstrate that you can be consistently relied upon to adhere to established policies, procedures and practices in the areas of client service, program and service delivery, enforcement-related activities and the appropriate application of legislation.*
>
> *Upon review of your performance to date, in consultation with management at Pearson International Airport (PIA), and despite ongoing support and having been provided with ample opportunity to demonstrate your ability to function independently in the CBSA operational environment, I have determined that you have failed to meet several of the key requirements of the Officer Induction Development Program. Therefore, in accordance with the authority delegated to me by the Deputy Head, and pursuant to paragraph 12(1) (d) of the* Financial Administration Act*, your employment from the public service is hereby terminated for unsatisfactory performance effective May 1, 2016.*
>
> …

[139] The OIDP "Program Guide" was provided to the grievor, along with the letter of offer, which stated that by signing it, she attested that she "clearly understand and undertake to comply" with the terms and conditions of employment. The grievor did

not suggest that other trainees did not receive the same letter of offer and program guide at the commencement of their employment.

[140] The Program Guide set out the evaluation and assessment methods to be used during the OIDP. The duration is a minimum length of 12 months and a maximum length of 18 consecutive months. The superintendent or supervisor was to conduct "regular checks" using a document called the "OID Program Trainee Performance Questionnaire" (TPQ) to determine the quality of the trainee's work. The checks were to be "noted and conducted in a way that provides valid, reliable and fair evaluation". The superintendent or supervisor was also expected to provide "informal and on-going feedback based on their observations".

[141] At the 3-month, 6-month, and 9-month points, the trainee and the superintendent were to engage in "formative reviews based on the cumulative results from the TPQ" completed during the previous 3-month period. At 12, 15, and 18 months, the trainee was to undergo a "summative evaluation" by submitting an evaluation package to the Merit Review Board (MRB). In this process, the trainee was required to present evidence to support their competency development using a report called a "Competency Demonstration Report" (CDR).

[142] To be eligible for promotion to the FB-03 group and level at the end of the development program, the trainee had to have an evaluation package that included a CDR, TPQ "Quarterly Review", and proof of the successful completion of all core training. This package of information was then to be reviewed by the MRB which would then recommend promotion, further development, or removal from the OIDP.

[143] The MRB is composed of human resources representatives and regional operations management representatives, but not superintendents. The MRB oversees and ensures consistency in the promotion process. The MRB meets once per quarter. The trainee and superintendent submit an evaluation package which includes CDRs, TPQs and proof of the successful completion of all core training.

[144] A BSO trainee was promoted if he or she "has consistently demonstrated all required competencies" and met the FB-03 merit criteria.

[145] Those trainees who were not successful in the merit review process at the 12- or 15-month periods would have an enhanced performance development plan (EPDP)

developed by the OIDP and a superintendent. The trainee would then be assessed after an additional 3-month period until he or she reached the 18-month point. If the trainee was not successful at the end of the 18-month period, he or she would be removed from the OIDP.

[146] The Program Guide states that trainees recruited from within the federal public service (such as the grievor) who are unsuccessful in the OIDP are to be subject to a termination of employment for unsatisfactory performance. If the Merit Review Board determines that a trainee has not been successful in meeting the program requirements and recommends a termination of employment, it must prepare a justification with supporting documentation of unsatisfactory performance or insufficient progress. This justification is provided to the director general of the Training and Development Directorate and the regional director general of the host region to determine whether they support the justification or if further development is warranted. Exceptional cases are to be considered on a case-by-case basis, according to the guide.

[147] To be promoted to FB-03 BSOs, the trainees in the OIDP must demonstrate that they can apply the FB-02-level competencies that they attained in the OITP in an operational environment. They must also demonstrate eight of them at level 3 (five behavioural and three technical) as set out in the competency profile for BSOs.

[148] The OIDP guide defines a competency as any measurable or observable knowledge, skill, ability, or behavioural characteristic that contributes to successful job performance. The OIDP has two categories of competencies — behavioural and technical. Behavioural competencies are interpersonal and personal attributes that are necessary for the job, and technical competencies are the technical knowledge, skills, and abilities that are relevant to the job.

[149] These are the behavioural competencies required by the OIDP:

- Adaptability
- Analytical Thinking
- Client Service Orientation
- Conscientiousness and Reliability
- Dealing with Difficult Situations
- Decisiveness
- Effective Interactive Communication
- Judgment

- Personal Integrity
- Values and Ethics

[150] These are the required technical competencies:

- Information Seeking Techniques
- Inspection Techniques
- Safety Orientation
- Legislation, Policy and Procedures
- Writing Skills

[151] Those competencies were assessed quarterly using the TPQ and EPDPs. The TPQ set out the work performance and behavioural expectations of trainees in the following categories: client service; program and service delivery; enforcement-related activities; legislation, policies, procedures, and guidelines; and behavioural expectations and requirements. Under each category was a series of questions to be assessed. The EDPDs set out the areas identified for improvement, the ways in which the trainee would be supported in improving in the identified areas, and the method of assessment of progress.

[152] For the purposes of this decision, I need only set out those work performance and behavioural expectations that in the employer's opinion the grievor did not meet. I have focused the summary of the performance assessments on the aspects of her performance that the employer ultimately based its decision to terminate employment on. In other words, I have not summarized any negative assessments of performance areas where later in the OIDP she was found to have met expectations. The grounds for termination are set out at the beginning of this section, where Ms. Riggs stated that the grievor had "failed to meet several of the key requirements" of the OIDP.

[153] In addition, it is important to note that positive aspects of the grievor's performance were noted in the TPQs. However, I have not summarized them because they are not relevant to the employer's assessment that her performance was unsatisfactory overall.

[154] Supt. Sandhu testified that when they first arrived at PIA, officer trainees' BSOs started with a six-week shadowing exercise with a structured schedule and assigned coaches in each area of operations. The grievor testified that she switched from Terminal 3 to Terminal 1 in her first two weeks at PIA. She stated that this was done because she was required to follow her supervising superintendent, Supt. Chamieh.

[155] The trainees were required to keep a journal to track their experiences and observations about their work, which the supervising superintendent was to regularly review. In addition, superintendents could record observations online in what was termed the "G drive". The observations there were usually made by superintendents who were not the trainee's supervising superintendent. These observations could be used in the trainee's assessment.

[156] Supt. Forrest testified that trainees were regularly assigned to areas of operation where coaches were working. He testified that it was also up to a trainee to seek and obtain guidance from coaches as needed.

[157] BSO Sharon Austin works at PIA and is a coach. She testified that coaches received no training. She testified that coaching was "very casual". A trainee would watch the coach do their job, and the coach would explain why they were doing what they were doing. After a day or two, the trainees would start doing tasks. The coach would be there to coach or guide them in the right direction, discourage certain behaviours, and correct any errors. She testified that coaches were always available for questions, and superintendents were supportive of trainees asking coaches for assistance.

[158] She testified that for the first two weeks at PIA, trainees were assigned a coach. After that two-week period, some of the coaches were identified by a pin on their uniform and were available to answer questions or provide guidance. There is no tracking of the use of coaches in the OIDP, BSO Austin testified.

[159] The grievor testified that she did not have any one-on-one contact with Supt. Chamieh, her supervising superintendent, before April 2014. She testified that she might have seen him once but that they had no meetings until April. She testified that her first meeting with him was on April 6, 2014, in what she described as a "meet and greet". Supt. Sandhu also attended. The grievor testified that she was told that if she "did anything, it will be reported to us". They also told her about being honest and "owning up to [her] mistakes". The grievor testified that she later learned that other trainees received a "welcome" to the CBSA, unlike what she received.

[160] Supt. Chamieh drafted a TPQ for the first quarter of 2014. It was dated April 13, 2014, and was provided to the grievor on May 25, 2014, by a superintendent other than Supt. Chamieh. That superintendent sat down with the grievor and read the TPQ.

The grievor disputed some of the examples in the TPQ. She testified that the superintendent told her that she should not sign it. The grievor then sent her information to counter some of the examples in the TPQ, one of which referred to her missing work without authorization.

[161] The grievor grieved the TPQ, and an amended assessment was provided to her on September 16, 2014. The amended TPQ contained the same ratings but removed the example in the narrative section relating to missing work. The following areas of work performance and behavioural expectations were identified as "Improvement Needed":

- Under "Client Service": "Makes a timely and accurate decision based on findings."
- Under "Program and Service Delivery": "Makes appropriate release/authorize entry or referral decisions."
- Under "Enforcement Related Activities": "Asks appropriate additional and clarifying questions", and "Determines when/if more in-depth examination is required."
- Under "Legislation, Policies, Procedures and Guidelines": "Accurately completes, codes and/or verifies E67 or E311", and "Completes required documentation to meet CBSA standards."
- Under "OIDP Trainee Behavioural Expectations and Requirements": "Willingly demonstrates the ability to apply the OITP acquired competencies and skills", and "Holds themself personally accountable for decisions and actions."

[162] "Improvement Needed" was defined in the TPQ as follows:

> …
>
> *Work performance did not meet expectations. Able to perform the task but requires guidance or is inconsistent in demonstrating the necessary actions and behaviours relative to the task. Work performance does not consistently meet the standards of performance for the task. Significant improvement is needed.*
>
> …

[163] The TPQ outlined the areas in which the grievor had worked in the first three months of her training: the Primary Inspection Line (PIL), Customs Secondary, and Immigration Secondary. The TPQ noted some concerns about journal entries and stated that for the next assessment period, she was to incorporate into her journal entries "how she meets and demonstrates the competencies against which she is being evaluated." Supt. Muka testified that not completing her journal on a timely basis would have had a great impact on the TPQ, as it was not possible to provide a meaningful assessment without it.

[164] The grievor testified that Supt. Chamieh never discussed any of her performance deficiencies with her. She testified that the content of the TPQ was a surprise to her, since he had never discussed the identified deficiencies with her. She testified that other trainees had had discussions with their supervisors about areas of concern. Supt. Chamieh did not testify at the hearing.

[165] The grievor replied to the first TPQ assessment on October 10, 2014. She testified that she provided the reply to have the TPQ corrected and to add context. She testified that there was "a lot of missing and inaccurate information". She testified that she did agree with some of the assessments — she agreed that she was not timely and that she might not have done some things correctly.

[166] On October 19, 2014, the grievor sent an email to the OIDP that was forwarded to Supt. Forrest. The subject line was, "Request for a mature Superintendent". In the email, she asked to be assigned to Supt. Ed Lee, who she said had seen her work and "has been 100% supportive of" her. She continued with this:

> …
>
> *Ed is very professional and when he has something to say to me, he says it with utmost respect towards me. He is a Superintendent who actually cares and who has lent an ear to many of my concerns that I have had since coming on-board.*
>
> *Ed does not embarrass me in front of travellers. Ed has an approach that is quite conducive to my learning style. Ed has coached me and I have been able to learn and accept when he says something to me. He is someone who I can trust.*
>
> *He actually takes time to listen and respond. He can relate to me as he actually participates when I am in Customs. He does not interfere during my examinations, rather gives very constructive criticism.*
>
> *Can I please ask, that I get paired up with him. My learning curve is huge and with him helping me it is most comforting and assuring that a Superintendent actually wants to see me succeed.*
>
> *I have not received this type of concern/help/advice from any other Superintendent.*
>
> …

[167] The grievor testified that she never received a reply to this request.

[168] The TPQ report for months four to six (the second quarter) was also prepared by Supt. Chamieh and is dated July 13, 2014. Supt. Chamieh did not discuss the TPQ

with the grievor. It was noted in the TPQ that the grievor had worked in both Customs Secondary and Immigration Secondary during this period of assessment. Under "Legislation, Policies, Procedures and Guidelines", "Completes required documentation to meet CBSA standards" was changed to "Meets Expectations". Under "OIDP Trainee Behavioural Expectations and Requirements", the following additional behaviours were identified as "Improvement Needed": "Records key learning events, documents how evaluated competencies were demonstrated", and "Reacts positively to changes in the workplace." The rest of the ratings remained the same as those in the first quarterly TPQ.

[169] The following observations were included in the TPQ to support the areas identified as requiring improvement:

> …
>
> *Rose-marie still has issues with her willingness to follow the directions and advice given to her by a coach officer or a Superintendent. For example, while working secondary, a Superintendent had to repeat instructions to her twice on how to conduct a proper examination on a live animal importation, which she was unsure about. After an hour and a half, the superintendent was forced to get another officer to intervene and complete the examination. Coach officers have also provided feedback stating that Rose-marie does not willingly listen to their advice, but will seek assistance from less senior officers. Improvement in this area is required, as the coach officers have been specially selected to give the correct advice and guidance for proper learning and development.*
>
> …
>
> *Rose-marie needs to communicate more with the superintendents when she's having difficulty at work.*
>
> …
>
> *Rose-marie has to ensure that she asks travelers appropriate additional and clarifying questions, dealing with the situation at hand to be able to make timely and accurate decisions.*
>
> *Rose-marie must apply the OITP Skills and Competencies during her working day. She must ensure that she takes responsibility for her decisions that her actions are supported by the CBSA Values and Ethics.*
>
> …
>
> *Rose-marie must also maintain a positive approach to changes in the work environment. On one occasion, she was unwilling to leave her post in Immigration and assist with a long lineup in primary after being asked to do so by a superintendent as, as [sic] she*

> *hadn't completed her file that she was working on. She even challenged the superintendent that she didn't need to assist in primary until her shift in immigration ended under [sic] overtime began. Before Rose-marie went home the superintendent asked her to provide her 509 for signature, which she didn't do. The superintendent then emailed her asking for her timesheet, which she still failed to provide. Rose-marie must accept and follow the directions given by a superintendent, and must be willing to work in a busy and fluid environment.*

[170] Supt. Chamieh identified "Wrong attitudes towards constructive feedback" as a barrier that "… hindered or prevented the trainee from applying their learning …". He also provided a narrative about the grievor's performance. He noted that her notes were "clear, concise and detailed." He also noted that she was polite and courteous when dealing with passengers. He wrote that she took much longer than usual to make determinations on admissibility, "despite having assist officers assigned to help her". He noted that she was "often times indecisive and has difficulty making a definitive call".

[171] Supt. Chamieh noted in the TPQ that the grievor did not complete her work journal in the month of June and that after this was brought to her attention, she submitted a narrative for the entire month. Supt. Chamieh wrote that the journal had to be a day-by-day account of her work. He advised her that for the next assessment period, she was required to complete her journal and illustrate how she was meeting the competencies "with clear and precise detail".

[172] The grievor replied to this TPQ sometime in October 2014 (the reply is not dated). She provided her perspective on many of the examples set out in it. She noted that she received her first-quarter assessment (the revised version) on September 16, 2014, "making it difficult to improve on noted areas". She concluded as follows:

> *I am very concerned that my other FB2 colleagues [trainees] have benefitted from their Superintendent, however since January, I have met with my Superintendent once for a meet and greet, and once from a meeting that I asked him to discuss the comments from the meet and greet, and once for approximately five minutes when he issued me a new Officer's reference booklet. The idea of me following my Superintendent from Terminal to Terminal was for him to oversee me. I worked similar shifts with him but I have not received any help/advice/mentoring from him. My other coworkers have benefitted from their Superintendents as they have actually spent time with them, agreed to meet with them before their assessments are written as final and have given them special*

> *training in the Airport. In addition my coworkers have told me that when they have had a comment appear on the Gdrive about them, their superintendent spends time with them to discuss AND that does not result in a level 2 [Needs Improvement], like I have. Why have I been treated differently?*
>
> *[Sic throughout]*

[173] The TPQ for seven to nine months, the third quarter, (dated October 13, 2014) was presented to the grievor by Supt. Junik prior to December 7, 2014. It was subsequently revised on February 6, 2015, to remove a reference to a disciplinary investigation, although the ratings did not change. She received "Improvement Needed" on the following tasks and experiences:

- Under "Client service": "Makes a timely and accurate decision based on findings."
- Under "Enforcement Related Activities": "Asks appropriate additional and clarifying questions" and "Able to identify concealment methods."
- Under "Legislation, Policies, Procedures and Guidelines": "Understands and appropriately applies legislation, policy and procedures." and "Stays current on legislation, policies and procedures."
- Under "OIDP Trainee Behavioural Expectations and Requirements": "Willingly demonstrates the ability to apply the OITP acquired competencies and skills."; "Actively participates in learning conversations, and competency and performance reviews." and "Holds themself personally accountable for decisions and actions."

[174] Supt. Chamieh noted that the grievor was not always willing to follow a superintendent's directions and advice, and he provided two examples. He also noted that she once needed help processing a traveller in Customs Secondary and that she should have been able to complete the process without assistance at that stage of her training. He also noted that she had not become familiar with all the different responsibilities in Customs Secondary. He noted that her performance in Immigration had improved since her previous assessment.

[175] Supt. Chamieh also wrote that she needed to "… take responsibility and control for her learning and development …" and that she was required to outline the steps she would take to accomplish it in the "Trainee's Comments" section of the TPQ. He also noted that her journal was "now much more comprehensive than previously."

[176] The grievor replied to this TPQ on December 7, 2014. In her reply, the grievor noted that the supervising superintendent did not wish to discuss the TPQ with her.

[177] In November 2014, the grievor's defensive tools were removed after the arming room incident (related to the eventual seven-day suspension). Acting Chief Muka advised all superintendents on November 7, 2014, not to schedule the grievor in Customs Secondary "until further notice". This was due to the removal of her defensive equipment.

[178] An email was sent from the OIDP to all trainees, including the grievor, advising them of the actions to take to submit a complete package for assessment from December 13 to December 27, 2014.

[179] Supt. Forrest, along with Supt. Chamieh and another superintendent, met with David Akerley, the manager of the OIDP, on November 6, 2014, to discuss (in Supt. Forrest's words) "how to proceed with the assessment of our more challenging recruits". In his email summarizing the meeting, Supt. Forrest outlined the suggestions that would be implemented for the upcoming assessment period as follows:

> …
>
> *Implement a pathway to an Enhanced Development Plan. This is via the 7-9* [month] *assessment. The assessors will clearly indicate on their assessment the abilities that they recruit must improve upon before the final 12 month assessment is delivered. The recruit will also be directed to input how they will meet these conditions in the assessment in the employee comment box. If the recruit does not agree with these directions/improvement plan, David has offered to speak via conference call with the recruit personally to outline the situation for them. If the recruits do not abide by this plan or show the required development they will be placed in the "Red" group. The "Red" group is consisted of recruits whom are in the last stages of the process but under strict review with an official "Enhanced Development Plan" signed by both the directors of the port and OIDP program.*
>
> *Coaches (FB-03) comments can only be entered into the assessment if they are submitted in the form of suggestions or statement of fact. Ex: "Coach Smith suggested you not seize these goods but you did not anyways. Can you please explain?"*
>
> *It was confirmed that we cannot offer any additional language training to recruits as they meet the hiring standard, and if we did it would set national precedent. What we can offer recruits who are struggling in certain areas is additional training not involving the*

> *Official Languages. Ex. A recruit whom is not sufficient in writing reports can be given an extra report writing training class.*
>
> …
>
> [*Sic* throughout]

[180] Supt. Forrest testified that he had reviewed all the grievor's TPQs and her rebuttals to them. He noted that only two trainees had provided rebuttals to their assessments. He testified that he had no objections to filing a rebuttal but that the grievor's rebuttal was "very defensive and argumentative". He stated that "feedback is a gift; you need to be grateful to receive it". He also testified that an identified roadblock in her performance was accepting feedback and taking accountability for her actions.

[181] Supt. Forrest noted that the signing of a TPQ was only an indication that the trainee had received it, not that they agreed with it. He testified that by not signing her TPQs, the grievor indicated that she did not want to be part of the development process.

[182] On November 30, 2014, Supt. Muka provided a document listing examples of the grievor's performance to Christine Durocher, the regional director. It was copied to Supt. Chamieh, who added to it on December 5, 2014, and sent it to Ms. Durocher. She forwarded the email chain and the document to Ms. Trenholm and others on February 9, 2015. There was no evidence presented at the hearing on how this document was used. Supt. Muka had no recollection of preparing it.

[183] Mr. Zimmer, Senior Program Advisor in HR, sent a draft EPDP to Supts. Chamieh and Junik on December 1, 2014. On December 5, 2014, Supt. Junik expressed in an email his opinion that the grievor would not be ready for appointment to FB-03 in January due to the gap in her competencies as a result of the removal of her defensive equipment.

[184] An EPDP was signed on December 13, 2014, and was put in place for the grievor. The following skills were identified as needing improvement: "developing/correcting/improving": interviewing and questioning skills, secondary processing and enforcement actions ("to be discussed on return to full duties"), and Immigration documentation completeness and accuracy. The following behaviour was identified as also needing improvement: "Accountability for actions/decisions". The

following proposals or recommendations for improving the skills and behaviour were set out in the EPDP document:

> …
>
> • *Take accountability for actions and provide response to Superintendents.*
>
> • *Develop job aids to assist with completing documentation and submit to Superintendent Junik for review.*
>
> • *Use coaches to assist when required.*
>
> • *Ask Superintendents for assistance*
>
> …

[185] The EPDP document noted that the grievor's progress did not meet the requirements for appointment to the FB-03 level and that significant improvement had to be demonstrated. It stated that there would be continued monitoring by coach BSOs "and/or" a superintendent and that the grievor would be given informal feedback. It also noted that notes would be taken of the informal feedback and any actions taken and that they would be reflected in the next TPQ. The grievor and Supt. Junik signed the EPDP document on December 13, 2014.

[186] On January 9, 2015, a pre-assessment acting eligibility list for the officer trainees was provided to the acting director general and director that included the grievor's name. This list was part of the MRB process. This process was to be held in the week of January 19 to 23, 2015.

[187] On January 15, 2015, in an email from Caroline Jacques, the director of the CBSA's human resources branch, the grievor was advised that she was not recommended for an acting assignment and that she would continue in the ODIP until the next assessment period at the 15-month mark. This recommendation followed a review of her assessment package, specifically the pre-assessment component of the OIDP's MRB process at the 12-month mark, January 13, 2015. The grievor did not demonstrate the CDR and TPQ components. She was advised that someone from the OIDP would be in contact with her to "follow up on [her] specific situation" and that she would continue in the OIDP until the next assessment period at the 15-month mark on April 13, 2015.

[188] Supt. Junik received a follow-up email from human resources on January 22, 2015, asking that he complete the "Superintendent Report on Officer Trainee Readiness for FB-03 Appointment" (the "readiness report") and fourth quarter TPQ based on the grievor's day-to-day performance, without including any reference to matters that might lead to discipline. The human resources officer noted that these documents would be "very helpful" in drafting a 13-to-15-month EPDP for approval by the director in the following week. At this point, the first EPDP had already been signed by the grievor in December 2014. Supt . Junik completed the readiness report on January 23, 2015. The report is not signed.

[189] Supt. Junik provided a TPQ, dated January 27, 2015, for the 10- to 12-month quarter. The ratings indicated that he was unable to assess some of the indicators because the grievor had been unable to work in Customs Secondary. He identified the following areas that "Improvement Needed": "Makes a timely and accurate decision based on findings", "Understands and appropriately applies legislation, policy and procedures", "Actively participates in learning conversations, and competency and performance reviews", "Records key learning events, documents how evaluated competencies were demonstrated", and "Holds themself personally accountable for decisions and actions." He also rated her performance as "Unsatisfactory" in the handling and storage of tools and equipment. This rating was related to the removal of her defensive equipment due to the inappropriate handling of her duty firearm.

[190] Supt. Junik noted the following barriers that prevented the grievor from applying her learning: "Inadequate knowledge of policies, procedures, rules, work processes", "Lack information, reference material, tools, or job aids", and "Wrong attitudes towards constructive feedback".

[191] In the comments section of the TPQ, Supt. Junik noted that the grievor took longer to conduct immigration interviews and enforcement actions when compared to her colleagues. He also wrote this:

> …
>
> *…In some cases Officer Trainee Sahadeo has been found to "shop around" for answers from a number of officers and even superintendents, instead of accepting the answer she was given in the first place. This is especially problematic when she seeks assistance from the superintendent and then poses the same question to her colleagues.*

[192] Supt. Junik concluded that once her defensive tools were returned (and she could work in Customs Secondary), it was his belief that "she may rise to the level required to graduate" from the OIDP. He also noted that "having not worked in customs secondary in over four months [it] will be a very difficult bump for her to overcome". He stated that "necessary coaching and other assistance will be offered at that time".

[193] Supt. Junik testified that he did provide ongoing feedback to the grievor and that she would listen but not apply it. He testified that she did not develop at the same pace as did other trainees. He testified that she "never quite managed to make timely decisions or grasp the job at the necessary level". He testified that she had not been treated any differently than had any other trainee.

[194] Supt. Sandhu testified that she had conversations with the grievor about the processing of files taking too long and that the feedback was "never taken too well". Supt. Sandhu testified that she learned this from receiving feedback from the grievor's co-workers. Supt. Sandhu testified that she stopped providing direct feedback to the grievor and that she provided it to her supervising superintendent, "based on her comments to others that [Supt. Sandhu] was targeting her".

[195] Supt. Muka testified that "answer shopping" can be excused for a new employee but that after a while, "it gets tiresome". He testified that "answer shopping" was brought to his attention by those BSOs and superintendents assigned to assist the grievor.

[196] The original draft of Supt. Junik's TPQ had to be amended because it referred to disciplinary investigations that were still ongoing. In an email to Supt. Junik on February 16, 2015, Supt. Forrest wrote that the assessment "of our special friend there needs to be amended …". Supt. Forrest testified that the reference to the grievor as "our special friend" was a "poor attempt at humour". At the hearing, he apologized for the comment and agreed that it was a poor decision at the time. In cross-examination, he did not agree that the use of "special friend" was a reference to a disability. He stated that it was inappropriate but not meant to be derogatory. Supt. Junik testified that he did not pay attention to Supt. Forrest's comment. He stated that it was "atypical" to refer to a subordinate as a "special friend".

[197] The grievor received another EPDP in February 2015. It was developed on February 4, and signed by Supt. Junik on February 15, 2015. The grievor signed it on February 24, 2015. The following skills were identified as needing "developing/correcting/improving": timeliness of decision making and the completion of documentation, and the understanding and application of appropriate legislation. The following behaviours were identified as also needing improvement: active engagement in own learning, and personal accountability. The recommendations to be implemented for the EPDP were scheduled time at the Immigration counter with a coach BSO for one hour per block of shifts; learning conversations with a superintendent to be held once per block of shifts, with the grievor leading the discussion; and for the grievor to accept feedback and apply the recommendations. The following "Development Indicators" were identified in this EPDP:

> …
>
> • *Continued monitoring by coach officers and/or a Superintendent*
>
> • *Officer Trainee Sahadeo will be provided informal feedback.*
>
> • *Notes will be taken of the actions and feedback provided*
>
> …
>
> • *Faster completion of interviews/documentation in Immigration*
>
> …
>
> • *Learning conversations will be led by Officer Trainee Sahadeo (will seek guidance when needed and use feedback provided)*
>
> …

[198] The EPDP was to be completed by April 6, 2015.

[199] Supt. Junik was asked for feedback on the EPDP on March 25, 2015. He replied that there was not much to talk about since he had not seen the grievor in Customs Secondary and she had been on leave. He provided the following summary of what he told Mr. Akerley of the OIDP earlier in the week:

> …
>
> • *Last week I approached Rose-marie while she was in immigration and asked her if she was aware that there was a coach officer on duty. She explained* [that she] *was not aware so I directed her attention to who the coach was and encouraged her to speak to him if she had any questions at all.*

> *• I explained that on that particular day we would not be able to assign the coach to her alone for one hour as called for by her EDP since we had a large number of new OIDP 4's in the area that needed his attention*
>
> *• Rose-marie followed up to me with an email that I could not make much sense of and I asked for clarification. It seems she disagreed with my tone and felt that I was too abrupt in my approach to her*
>
> *• I reiterated why I had spoken to her, what was said and advised her over email who the coach officer on duty was one more time*
>
> *• I then mentioned her EDP and the requirement for an employee lead [sic] meeting with a superintendent once a week. I offered myself on that day for the meeting to which she replied that she has been having regular meetings with Superintendent Darryl Dalton.*
>
> *• She also asked for assistance with her timesheets, approximately a months' worth, which we completed and submitted today.*
>
> *…*

[200] On March 25, 2015, the grievor was advised that Supt. Darryl Dalton would conduct the written assessment of the 15-month EPDP. Supt. Dalton wrote to Supt. Junik on April 2, 2015, asking for feedback on the grievor. He noted to Supt. Junik that he had had the opportunity to monitor her only for the past week and that he would appreciate Supt. Junik's input. Supt. Junik replied with this: "I really don't have much to say." In Customs, she had been working only on the PIL, and he noted that reports are not written when on the PIL, "… so it is really hard to do an OIDP assessment for PIL alone." He noted that he had heard that the grievor took a long time to carry out examinations on the Immigration side, but he had no concrete examples. He concluded with this: "… I think these past few months have been relatively unremarkable."

[201] In an email on April 11, 2015, Supt. Dalton advised the OIDP office that given the limited feedback from Supt. Junik and the short period in which he had monitored her, "… it would seem there will not be an abundance of information on the report." He concluded that he would try to provide as much relevant information as possible that would reflect her work on the EPDP.

[202] In the email he sent with the TPQ attached, Supt. Dalton noted that it was based "on the short period [of] time that I monitored her in the Immigration Secondary stream". In the TPQ, Supt. Dalton noted that the grievor had made "some positive strides" in completing tasks in a timely manner. He stated that her timeliness in

decision making and in completing documentation was “on par with others with equal experience”. He stated that she had good decision-making abilities but that she lacked some confidence. He stated that this lack of confidence should not be an issue with continued support and experience gained. He stated that any limitations in her knowledge base could be understood given the amount of experience she had to that point. He further stated that “with the right guidance it is clear she could be successful at her role”. Supt. Dalton also noted in the TPQ that she was not “shopping around” for assistance and had been receptive to feedback.

[203] The 15-month point for the last summative evaluation by the MRB was April 13, 2015. The grievor was not included in this process.

[204] Supt. Dalton provided an unsigned TPQ to Mr. Zimmer, on June 2, 2015. It was not provided to the grievor before her termination of employment.

[205] In the TPQ, Supt. Dalton noted these several areas for which he was unable to assess the grievor: “Provides and introduction in both official languages”, “Ensures mandatory questions are asked”, “Ensures declaration is made by all travelers”, “Able to identify concealment methods”, “Uses, handles, stores, transports, and maintains tools and equipment, safely and according to CBSA policies and procedures”, and “Records key learning events, documents how evaluated competencies were demonstrated.” He noted that during the assessment period, the grievor worked in the Immigration Secondary stream and engaged in a variety of tasks, including landings, permits, and enforcement activities. He noted that she was able to complete these tasks “with minimal guidance and/or supervision”.

[206] The grievor testified that Supt. Dalton treated her “like an adult” and with respect. She stated that he provided regular feedback and that he did not embarrass her in front of others. She said that there was “no comparison” with the other superintendents she had worked with.

[207] The 18-month point for the last summative evaluation by the MRB was July 13, 2015. The grievor was not part of this process.

[208] The grievor had most of her defensive tools returned to her in August 2015 and had her firearm returned after November 12, 2015. Therefore, she was able to resume her duties in the Customs Secondary area. She worked there almost exclusively from

mid-October of 2015. Supt. Forrest testified that about 60% of a BSO's work is in Customs Secondary. For this period, the grievor was to be assessed only on her skills and competencies in Customs Secondary, Supt. Forrest testified.

[209] Supt. Forrest testified that initially, Supt. Dan Brennan was to be the grievor's new supervising superintendent. However, when Supt. Brennan's transfer request to another port of entry (POE) came through, the choice of a different superintendent became necessary. Supt. Marsden was chosen. Supt. Forrest testified that many superintendents did not want to work with the grievor and "already had their own opinion of her from what was going on".

[210] The grievor testified that from October until December 2015 she worked primarily on her own and had no one assigned to assist her. She testified that she would reach out to other BSOs if she needed help, and she would then receive support.

[211] Supt. Marsden prepared a quarterly report (6th TPQ) relating solely to the grievor's secondary processing skills in Customs Secondary, dated November 18, 2015. This covered the period from mid-October to mid-November (approximately one month). The form used is marked as the quarterly report for month 10-12 and Supt. Marsden states at the beginning of his comments: "This 12-month quarterly report is meant to reflect Officer Trainee Sahadeo's secondary skill level at this time."

[212] Supt. Marsden reported that the grievor's performance was "Unsatisfactory" in the following areas:

> Client service:
>
> - "Adapts approach when interacting with clients depending on the situation(s) and the person(s) concerned."
> - "Validates that clients' needs have been addressed."
> - "Makes a timely and accurate decision based on findings."
>
> Program and Service Delivery
>
> - "Appropriately uses available databases, tools and equipment …."
>
> Enforcement Related Activities
>
> - "Determines when/if more in-depth examination is required."
> - "Maintains direction and control of interview/examination and uses appropriate intervention options when necessary."

- "Chooses and applies appropriate enforcement actions within legislative guidelines."

[213] Supt. Marsden reported that improvement was needed in the following areas:

Client Service

- "Remains calm when provoked and takes action to calm others."
- "Informs travelers of decision."

Program and Service Delivery

- "Asks travelers for all required documents."
- "Ensures mandatory questions are asked."
- "Ensures declaration is made by all travelers."
- "Ensures all questions are fully answered."
- "Verifies all documents."
- "Makes appropriate release/authorize entry or referral decisions."

Enforcement Related Activities

- "Recognizes and pays attention to indicators" (enforcement-related activities).
- "Asks appropriate additional and clarifying questions."

Legislation, Policies, Procedures and Guidelines

- "Follows established policies and procedures when conducting secondary examinations."
- "Completes required documentation to meet CBSA standards."
- "Understands and appropriately applies legislation, policy and procedures."
- "Uses, handles, stores, transports, and maintains tools and equipment safely and according to CBSA policies and procedures."
- "Applies the appropriate penalty/officer option when a contravention has occurred."
- "Stays current on legislation policies and procedures."

OIDP Trainee Behavioural Expectations and requirements

- "Willingly demonstrates the ability to apply the OITP acquired competencies and skills."
- "Records key learning events, documents how evaluated comments competencies were demonstrated."
- "Ensures the safety and security of self and others in the work environment."
- "Is actively engaged in the workplace, shares information and best practices."
- "Holds themself personally accountable for decisions and actions."
- "Acts in accordance with and upholds the Codes of Conduct of the Public Service and the CBSA."

[214] Supt. Marsden reported that she was unable to assess the grievor's ability to identify concealment methods and the detention and seizure of goods because there was no record of any seizures being made during the assessment period.

[215] In the commentary section of the report, Supt. Marsden wrote as follows:

> *At this time, Officer Trainee Sahadeo is polite and professional with travelers and offers a bilingual greeting. It has, however, become apparent that Officer Trainee Sahadeo lacks confidence in many secondary processing functions.*
>
> *It has been reported in many cases that Officer Trainee Sahadeo seeks direction from coach Officers or Superintendents on a regular basis, even in cases that would normally be considered routine or simple processing. As an example of this, Officer Trainee Sahadeo requested assistance in determining what course of action to take with a traveller who had a minimal overage of tobacco products. She was considering seizure action in a case where a fourth payment would have been the most appropriate course of action. She had significant difficulty in determining the course of action to take. She also had difficulty in creating the associated B15* [form]*, despite having recently been assisted with a similar B15, and needed step by step assistance in completing the associated routine BSF241.*
>
> *Processes such as TEPS entries for B15s or K21s, and paperwork such as completing a BSF241 are very routine secondary processing. After weeks of working exclusively in the secondary inspection area, skills in these processes and forms are something that trainees would be expected to complete independently and correctly. In the example outlined above, Officer Trainee Sahadeo had the associated traveller in secondary for approximately 3 hours, which is an extraordinary amount of time for this type of secondary processing.*
>
> *As a second example, Officer Trainee Sahadeo was approached at her secondary counter with delayed baggage. Officer Trainee Sahadeo had to request direction from the Superintendent on duty on how to proceed. Processing delayed baggage is another secondary inspection function that is considered to be simple and routine processing.*
>
> *These are just a few examples of ways in which Officer Trainee Sahadeo was still lacking knowledge of the policies/procedures/ guidelines that are associated with secondary processing. These examples also demonstrate the lack of confidence that Officer Trainee Sahadeo displays on a regular basis while working in the secondary inspection area.*
>
> *Feedback from coaches and Superintendents on Officer Trainee Sahadeo's secondary skills has been consistent. She thus far has been unable to make decisions on her own, to make decisions in a*

> *timely manner, or to make determinations on the direction to take an examination.*
>
> …

[216] Supt. Marsden prepared an assessment of the grievor's "OID Program – Superintendent Report on Officer Trainee Readiness for FB-03 Appointment", also dated November 18, 2015. She rated the grievor's performance as "Unsatisfactory" in "Client Service" and "Enforcement Related Activities". She rated the grievor as "Improvement Needed" in "Program and Service Delivery", "Legislation, Policies, Procedures and Guidelines", and "OIDP Trainee Behavioural Expectations and Requirements". She based these ratings on the "facts and examples" contained in the quarterly report (set out in the previous paragraphs), that related to skills in Customs Secondary.

[217] Supt. Marsden identified the following concerns in the areas she identified as "Improvement Needed":

- "… lacks the knowledge, confidence, and skills required to deliver the program or service in a timely manner… even with simple/routine processing."
- "… has demonstrated on numerous occasions that she in [*sic*] unsure of the relevant legislation, policies, procedures, and guidelines that she is required to know and utilize in her daily job functions in the secondary inspection area."
- "… demonstrates that she requires assistance with these skills [the OITP required skills in secondary] and is not demonstrating them independently."
- "… not holding herself personally accountable for decisions and actions as she is not demonstrating the ability to make her own decisions or to determine the required actions on her own".

[218] Supt. Marsden identified the following concerns in the areas she identified as "Unsatisfactory":

- "… routinely has passengers in secondary for very lengthy periods of time for routine or simple processing due to her lack of confidence, knowledge of processing and procedures, and an inability to make and implement decisions on her own."
- "… she does remain professional and polite, her client service skills are still unsatisfactory, as in some cases travellers are held in secondary for a multiple hours for which should be routine processing."
- "…although she has been working exclusively in secondary since their return of her defensive tools, she has had no enforcement recorded … which has made assessing her skills in enforcement related activities impossible at this time."

[219] Supt. Marsden concluded that the grievor was not performing at the FB-03 level for the following reasons:

…

> *… Officer Trainee Sahadeo lacks confidence in essentially all secondary inspection functions and is struggling to make decisions in a timely manner. In addition to the struggle to make decisions in a timely manner… Officer Trainee Sahadeo has also demonstrated an inability to make these decisions on her own, as she routinely requires assistance from coach Officers and Superintendents to make even simple, routine decisions in secondary.*

…

[220] Supt. Marsden recommended that the grievor's training be extended and that a "secondary skills enhancement action plan" be implemented.

[221] The grievor testified that she had had only one interaction with Supt. Marsden before receiving the report. She testified that one of the examples in the report was a Customs examination that had not gone well but that Supt. Brennan had told her that he had "dealt with it".

[222] Supt. Brennan wrote in an email on November 26, 2015, that she had met the competencies for her work on the primary inspection line. This was in response to an email she had sent to him where she recounted him telling her that she was ready to be promoted to FB-03 and that he had provided direction to Supt. Marsden on her promotion. Supt. Brennan did not testify at this hearing.

[223] On December 1, 2015, the grievor emailed the following to Supt. Marsden about the sixth TPQ:

…

> *1. Can you kindly provide, with concrete examples, items covered in the assessment how you were aware of the various actions, to include information received from Officers, Management, to include Acting members, and any written or oral form of correspondence communicated by others to you*
>
> *2. Were you aware that I was prohibited from conducting secondary examination on the basis of a currently contested removal/impoundment of my defensive tools?*
>
> *2 (a). Kindly include that matter in this assessment, so context will be available to third parties who refer to the assessment.*

…

[*Sic* throughout]

[224] On December 11, 2015, the grievor emailed Supt. Marsden again, stating that since she had not received a reply to her email, a "formal written complaint letter of harassment" would be sent to the regional director general. Supt. Marsden replied to the email and the grievor's initial questions on December 14, 2015. She copied the regional director, Ms. Durocher, because the grievor had stated that she would file a formal harassment complaint. Supt. Marsden noted that concrete examples of her performance were included in her performance assessment. She also wrote that she was aware that the grievor had received training in secondary examinations at Rigaud and that she had training in secondary before her defensive tools were removed. She also noted that the grievor had been provided with further training and coaching since her defensive tools were returned to her in August 2015.

[225] The grievor testified that she had felt harassed by Supt. Marsden. No harassment complaint was ever made. Supt. Forrest testified that he was not aware of a possible harassment complaint until he prepared for this hearing.

[226] Supt. Forrest advised superintendents that two OIDP trainees would receive a "secondary assistance plan" and that both BSOs (including the grievor) should be kept in Customs Secondary "as best you can".

[227] The grievor met with Supts. Forrest and Marsden on December 15, 2015. Mr. Akerley and Mr. Zimmer attended via telephone. The grievor's bargaining agent representative also attended. In the meeting notes, Supt. Forrest noted that the grievor agreed that the "fine tuning" of her skills in secondary was possible. Mr. Akerley asked her if she would "trust in the program". She reserved comment, and her representative stated that there were "a lot of reservations with trust in management". Supt. Forrest's notes indicate that the grievor said that she was "okay" with the plan. It was agreed that the plan would start in January 2016.

[228] The grievor testified that she was open to the plan, although she was "somewhat hesitant". She testified that in the end, she agreed to the next steps.

[229] On December 22, 2015, Supt. Forrest sent this plan for the four-week third EPDP commencing on December 29, 2015:

> *Week 1:*

> - *Back to basics – breakdown of procedures and skills in blocks*
> - *Secondary observation*
> - *Feedback on observations – learning discussions on improvements needed by non-assessing Superintendent.*
>
> *Week 2:*
>
> - *Reflection and self-identification of developmental needs*
> - *Targeted practice based on the above and needs identified in previous week*
>
> *Week 3:*
>
> - *3 days of autonomous work with formative review*
> - *2 days of closing any gap(s) identified*
>
> *Week 4:*
>
> - *Autonomous work with full assessment leading to promotional review.*

[230] Supt. Forrest testified that since the grievor had "alienated a lot of coaching staff", he decided to make one of the staff members in his section available to provide guidance. He testified that he had made staff members in his section available to provide guidance to other trainees as well.

[231] BSO Austin testified that the grievor did not alienate her. She stated that the grievor asked appropriate questions and sought help when she needed it. She also testified that the grievor never declined assistance and that "she was a sponge".

[232] The non-assessing superintendent in week 1 was Supt. Voss. The grievor provided a detailed report of her work activities on January 11, 2016. She stated in her email to Supt. Forrest that she thought she had a "productive and great start". She concluded with the following:

> *I found the superintendent I was working with to be very supportive and patient and was able to give constructive feedback which aided in broadening my secondary skills. In my enforcement duties, I would like to become much faster but I believe that will come with experience and as my confidence builds up.*

[233] Supt. Forrest replied to the grievor's report on her progress as follows:

…

> *The focus of this dissertation was for you to self-identify any developmental needs so I may be able to tailor the additional four days towards them, but as you've written below – it sounds like you've got everything under control. You've only identified that you wish to become quicker with your enforcement duties, and you will with practice/greater confidence.*
>
> *As there isn't anything identified, we will therefore go ahead with the notion that you are only requesting more practice which is what week 2 will do. For the next four days, please continue as you have in week one – Supt. Suyama and Dan are both available for guidance or assistance if you require it, as am I.*
>
> *Next up is week three, the first three days will be autonomous work with a formative review at the end – which I will work closely with Supt. Marsden with [sic] to provide you with information to close any gaps in the final two days of that week.*
>
> …

[234] Supt. Forrest testified that the grievor's email was not the self-assessment he was expecting; he had asked for a self-assessment of what she needed, and he stated this: "she just told me how well she had done during her first week". On January 21, 2016, Supt. Forrest sent the list of gaps identified by Supt. Marsden as part of the 3rd week EDPD plan concerning the following areas: inspection techniques, judgement, analytical thinking and time management.

[235] On February 8, 2016, Supt. Forrest advised the grievor that the four-week third EDP had ended and that the assessment report was being finalized by Supt. Marsden, in consultation with the Rigaud training centre. He advised her that once the report was finalized and Supt. Marsden returned from annual leave, a meeting would be set up to present the assessment.

[236] Supt. Forrest testified that Supt. Marsden carried out the assessment in mid-February but that it was put on hold until the disciplinary process related to the travellers' complaints was complete. He testified that management did not want to mix the discipline with the performance assessment, as the "two paths are separate".

[237] Supt. Marsden completed a TPQ assessment dated May 1, 2016, which Supt. Forrest signed. He testified that this was because he delivered the report at the meeting on May 1, 2016, at which the grievor was told that her employment had been terminated.

[238] This TPQ was based on an assessment period of January 26 to 30, 2016, and after the conclusion of the third EPDP of January 2016. Supt. Marsden identified the following areas where improvement was needed, including the TPQ section names:

- "Client Service": "Makes a timely and accurate decision based on findings."
- "Enforcement Related Activities": "Asks appropriate additional and clarifying questions", "Maintains direction and control of interview/examination and uses appropriate intervention options when necessary", "Able to identify concealment methods", and "Chooses and applies appropriate enforcement actions within legislative guidelines."
- "Legislation, Policies, Procedures and Guidelines": "Completes required documentation to meet CBSA standards", "Understands and appropriately applies legislation, policy and procedures", and "Applies the appropriate penalty/officer option when a contravention has occurred."

[239] Supt. Marsden, in her report, provided a list of 42 examples of observed actions of the grievor while performing her secondary skills. Some of the observations were positive comments on the grievor's performance. The following deficiencies were also identified:

- Four times, the grievor made an incorrect decision on the appropriate action to take when dealing with tobacco being brought in that was over the duty-free limit. One of those times, the grievor told Supt. Marsden that she made the decision she chose as she did not want the traveller's angry behaviour to escalate.
- The grievor was unable to correctly complete the necessary form, when medication without a proper prescription was seized, for Health Canada to make a determination.
- Incorrect X-ray techniques were used when examining a piece of luggage (the poles were not fully extended).
- An ION scan (used for detecting narcotics) was not used in "systematic/logical areas" (scanning toiletries but not the luggage itself or the poles).
- When conducting high-intensity examinations, she did not open or fully examine all the items.
- The grievor allowed a traveller to sit down during a narcotics exam, "unaware of the importance of physical indicators and how they present themselves".
- In numerous examinations, she encountered bags of medications and did not go through each one to determine if any further action was required (such as forfeiture or holding for a Health Canada assessment).
- A forced payment was issued when, based on the threshold, a seizure would have been the most "logical course of action".
- The necessary paperwork to detain a traveller with a suspected arrest warrant took 4.5 hours to complete, when typically, a BSO would take 1.5 hours to complete it.
- The paperwork for a currency seizure took the grievor almost 3 hours to complete, when 30 to 45 minutes would be more typical.

- Two intelligence reports took her 3 and 3.5 hours, respectively, to complete, when 1 hour per report was more typical.
- A number of examples were noted of the grievor failing to include information in forms or filling them out incorrectly.
- The grievor had to catch up to a traveller to have them sign a form.
- The grievor did not verify with Immigration when she found passports not belonging to a traveller (to determine if they should be seized or if they belonged to undocumented refugees).
- She did not record a lookout in the logbook and did not complete a lookout narrative on the night of an interception, as required.

[240] Supt. Marsden concluded as follows:

> *There continue to be some areas where work performance does not meet expectations and significant improvement is needed. In these areas, Officer Trainee Sahadeo may* [be] *able to perform a task, but requires guidance or is inconsistent in demonstrating the necessary actions and behaviors relative to the task. Her work performance in these areas does not consistently meet the standards of performance.*

[241] BSO Matthew March was a CBSA instructor since 2009. He trained CBSA employees on contraband detection tools, among other areas. Part of the training he has delivered is related to X-rays. He testified that it could take six months to a year for BSOs to become comfortable with X-ray techniques. He stated that BSOs would not be taught formally to pull the poles out of suitcases when X-raying. He testified that he would deliver that in training as a tip. If a BSO did not receive this information as a tip in training, then he or she would have to be told by an experienced BSO. In cross-examination, BSO March testified that he has worked with travellers only "infrequently".

[242] Kirsten Parfitt, the acting director of the CBSA's national recruitment and professional development division, prepared a recommendation document for the termination of the grievor's employment. In addition to setting out the results of the TPQs and EPDPs, she made the following observations:

> …
>
> *…Her first three evaluations at the third, sixth and ninth month marks revealed several ongoing behavioral and performance issues. Notably she was unable to make timely and accurate decisions; she did not understand and appropriately apply legislation, policy and procedures; she was unwilling to follow directions and advice given by coaches and superintendents and she refused to hold herself personally accountable for her actions*

> *and decisions, often deflecting blame for her poor decisions. In spite of being asked on several occasions to communicate more with superintendents when having difficulties at work, she would often seek advice from less experienced officers.*
>
> *In response to all of her assessments Officer Trainee Sahadeo wrote lengthy rebuttals denying responsibility for the actions leading to negative comments and claiming that the assessments were untrue and unfair.*
>
> *The following example demonstrates how Officer Trainee Sahadeo refused to accept responsibility for her actions. On July 18, 2014 Officer Trainee Sahadeo used her position as a CBSA Officer Trainee to gain access to NEXUS enrolment without appointment, in full uniform, bypassing waiting members of the public having appointments. The next day she brought in her husband and children and did the same for them. In the investigation, it was clear that she did not receive permission to do so but she still denied any wrong doing [sic] and saw nothing wrong with her actions. She was given a 3-day suspension for the incident. The event further demonstrated lack of accountability that had been pointed out clearly on her OID program assessments.*
>
> …
>
> *In July of 2015, Officer Trainee Sahadeo had her defensive tools returned, excluding her firearm. This allowed her to return to many of the duties previously unassessed, notably secondary examinations. During this time period, she served a ten-day suspension for trying to use her position to bypass a lineup at a security checkpoint. Officer Trainee Sahadeo had her firearm returned to her on September 29, 2015. She continued in Customs Secondary until November 18, 2015 during which there was a concentrated effort to assign specific duties to Officer Trainee Sahadeo so that she could gain more experience and benefit from coaching to develop her skills. The assessment from that period showed many deficiencies in her secondary skills including the areas needing improvement previously identified on her other assessments.*
>
> …
>
> *During the enhanced development plan period Officer Trainee Sahadeo received two founded complaints, within a two-week period, from travellers she processed in secondary. As a result of the ensuing investigation the assessment for the enhanced development plan has yet to be not [sic] delivered.*
>
> …

[243] The recommendation was that "[d]espite the efforts of management to support the development" of the grievor, "she has failed to demonstrate that she can consistently perform the skills necessary of a Border Services Officer". Ms. Rigg accepted the recommendation.

[244] Ms. Rigg testified that she reviewed this document as well as the grievor's TPQs and the learning plans. She testified that the grievor did not master the skills required of a BSO, especially in Customs. She testified that she concluded that the grievor was not able to accomplish the OIDP's objectives. She testified that the grievor's disciplinary record had no impact on her assessment of the termination for unsatisfactory performance.

[245] In cross-examination, she stated that she did review Supt. Dalton's positive evaluation. She testified that that assessment was done when the grievor was on modified duties due to her lack of defensive equipment and that Supt. Marsden's last assessment was used to determine if the grievor had met the requirements for graduation from the program.

[246] Ms. Rigg testified that the PIA managers determined that an additional assessment period of three months would not be offered to the grievor.

[247] On May 1, 2016, Ms. Rigg delivered the letter of termination in a PIA meeting room. The grievor attended with a bargaining agent representative. A management representative prepared notes. Supt. Forrest read the training assessment prepared by Supt. Marsden and then left the meeting. Ms. Rigg then read the letter of termination.

[248] In the notes of the meeting prepared by an employer representative, the bargaining agent representative is reported to have noted that there had been improvement in the grievor's performance since November 2015. Ms. Rigg is reported to have said that she agreed that the grievor had shown improvement in some areas, "but the key is consistency". She noted that "a large chunk … remains problematic". The grievor did not speak at the meeting.

[249] Supt. Forrest testified that he was not involved in the decision to terminate the grievor's employment. He provided the opinion that she had received "well beyond" the support provided to other trainees to that point in the OIDP.

[250] Apart from her performance assessments, the grievor questioned the OIDP itself. An evaluation of the OITP and OIDP was conducted in October 2018 by the CBSA's internal audit and program evaluation directorate. The grievor relied on parts of it to support her arguments that the OIDP was not structured to allow for a proper

assessment of her performance. In this section, I have summarized the parts of the evaluation that she relied on.

[251] The evaluation found that training provided at the POEs was inconsistent. It also surveyed participants and provided the following summary of the findings on training:

> *Survey results also suggest that the OIDP phase of the OIM requires further refinement to ensure consistency.*
>
> …
>
> *… Respondents specifically referred to poor or altogether absent training structures and inconsistency in mentorship or coaching provided as compared to what is offered at other POEs. Other challenges cited by survey respondents included: lack of regular feedback outside the Trainee Performance Questionnaire (TPQs), lack of reference material, the OIDP timelines, challenges with the assessment tools, and constant turnover of Field Coaches. Interviewees explained that, since there are often no dedicated Field Coaches from whom to seek guidance, Officer Trainees have sometimes received conflicting responses to inquiries. Field Coaches are often voluntary positions and can be somewhat difficult to fill as there is little incentive for experienced officers to take on additional work.*

G. Discrimination allegations under the *CHRA*

[252] The grievance in Board file no. 566-02-14489 alleges a violation of article 19 of the collective agreement — the "No Discrimination" clause. This grievance was filed on February 2, 2015.

[253] The grounds of discrimination that the grievor relied upon are sex and colour. The grievor self-identifies as a Black woman. The grievance sets out the following allegations:

- the employer's failure to provide a respectful workplace;
- its requirement that the grievor resign her substantive position, and it's inappropriate imposing of a probationary period;
- it knowingly allowed erroneous and inappropriate comments about her performance evaluations;
- its refusal to meet and discuss revisions to her performance appraisals, thus perpetuating the harassment;
- its decision to remove her firearm and defensive equipment, which exposed her to physical risk and harm and limited her ability to complete the tasks required of her under the OIDP;
- she was a victim of "yelling, shouting, or intimidating behaviour" and workplace bullying, contrary to the *Canada Labour Code* (R.S.C., 1985, c. L-2);

- local managers targeted her intentionally ; and
- she was singled out for different treatment than others, including excessive scrutiny.

[254] In her grievance, she stated that the allegations, "… coupled with the orchestrated actions of local managers, constitute harassment, and discriminatory practises [*sic*]". She requested the following corrective action:

- fair and respectful treatment;
- an investigation of employer representatives and, if wrongdoing is founded, the censuring of those representatives;
- all representatives who monitor her performance be advised that erroneous comments about her are inappropriate;
- the employer comply with Treasury Board policies and the regulations under the *Canada Labour Code* on workplace violence;
- she cease to report to (unnamed) employer representatives, given the harassment;
- her acting pay be reviewed, should these matters be founded;
- her probationary period as a "public servant" be both observed and respected, within the context of her current position; and
- she be made whole.

[255] In the notice provided to the CHRC, the grievor provides the following description of the alleged discriminatory practice:

> *The complainant received negative performance reviews and disciplinary measures which were eventually used to justify her termination. It is the complainant's view that she was discriminated against because her colleagues would be present or involved in incidents however the complainant would be the only person being targeted. The complainant raised the issue that she was being singled out, targeted and harassed by her superior but her employer did nothing to correct the situation.*

[256] Supt. Sandhu identified as a woman of colour and testified that she has never observed any discrimination in the workplace at PIA. She testified that she would not tolerate it.

H. Post-termination events

[257] After the termination meeting of May 1, 2016, Ms. Durocher emailed this to all CBSA employees at PIA:

> *All,*
>
> *Please be advised that BSO Sahadeo is no longer an employee with the CBSA and should not be granted entry to CBSA areas. By way*

> *of this email, I'd like to remind you that all former CBSA employees no longer have automatic access rights to CBSA areas. Should a former CBSA employee request access to a CBSA area, please advise the former employee that you will contact a member of on duty management for assistance.*
>
> *Thank you in advance,*
>
> …

[258] The bargaining agent local president raised the circulation of this email with Goran Vragovic, a management representative. He replied later that same day that the message was not intended to be sent to all staff and that normally, all the managers are made aware that an employee is no longer to have access to the worksite. He said that he would "deal with it". Ms. Durocher did not testify.

[259] Frances Baroutoglou was on the bargaining agent local executive when the grievor's employment was terminated. She testified that she heard about the email from the bargaining agent's local president. She stated that it was not a normal email for BSOs to receive and that many asked the bargaining agent if they should be concerned for their safety. She testified that this was the only time such a message had been sent after a termination of employment since 2008, when she started her CBSA employment. She did not recall if Ms. Durocher ever provided an explanation to the bargaining agent for the email.

[260] Supt. Forrest testified that after the termination meeting, there was some difficulty in locating the grievor's firearm. He stated that it had been moved without the proper logging of its new location. He testified that this was no fault of the grievor but was solely the responsibility of management.

V. Summary of the arguments

A. For the employer

1. Discipline

[261] The employer relied on the well-known test used by the Board in determining discipline grievances, set out in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1) Was there misconduct by the grievor? 2) If so, was the discipline that the employer imposed an excessive penalty in the circumstances? 3) If it was excessive, what alternate measure should be substituted that is just and equitable in the circumstances?

[262] The employer submitted that in both the NEXUS office and the security-line incidents, the grievor provided a very limited acknowledgement of wrongdoing. These incidents go to the heart of a peace officer's role, in which trust is paramount. The employer stated that her conduct in both situations would not bear public scrutiny.

[263] The employer submitted that an aggravating factor was the grievor's failure to accept responsibility for her misconduct and her blame of others. In addition, it stated that she showed disrespect to others, including the GTAA security guard and the travellers who made complaints.

[264] The employer also submitted that the grievor abused her authority as a BSO in her dealings with the travellers (the 15-day suspension). It submitted that the grievor, through her actions, was stating that the travellers were complaining for no reason and that she was right. The employer submitted that as a BSO she was required to have the utmost respect for travellers.

[265] The employer's position was that she went to the NEXUS office with the intention of enrolling in the NEXUS program as she brought her passport. It alleged that she obtained a benefit outside the usual employer-employee relationship when she and her family were processed for NEXUS cards while she was on duty and without authorization. The benefit was the enrolment in the NEXUS program without having to travel to her already-secured appointment. The employer submitted that this misconduct was exacerbated when she obtained this benefit while wearing her uniform. It submitted that the security-line misconduct was also an effort on her part to obtain something she was not entitled to by relying on her uniform.

[266] The employer also submitted that the grievor knew that what she had done was not appropriate, as demonstrated by her failure to respond to Supt. Lambert's email, in which he told her that she could not be accommodated, and by not being forthright with him.

[267] The employer submitted that a three-day suspension for the NEXUS office incident was reasonable. It argued that a violation of the *Values and Ethics Code for the Public Sector* is serious misconduct (see *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106 at paras. 58 and 61). It also referred me to *Hyslop v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 29.

[268] The employer submitted that the grievor's handling of her firearm demonstrated a lack of concern about its safe operation. The employer noted that she was shown how to use the proving barrel when she picked up her firearm.

[269] The employer submitted that the grievor was not treated differently than was any other BSO after misusing a firearm (see *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37). In that case, the adjudicator determined that a suspension of five days was appropriate for a first offence. In this case, the employer noted, it was not the grievor's first act of misconduct. It also submitted that her failure to acknowledge any issues with her handling of the firearm was a factor in the amount of discipline imposed on her. It also noted that she did not express any remorse for her actions. It submitted that in keeping with progressive discipline, a seven-day suspension was not excessive.

[270] The employer submitted that any procedural errors in the fact-finding process for any of the discipline grievances were cured by the hearing before the Board (see *Hyslop*, at para. 86).

2. Termination for unsatisfactory performance

[271] The employer noted that the Board's role in a grievance against a termination for unsatisfactory performance is limited to determining the reasonableness of the employer's opinion that the grievor's performance was unsatisfactory (see s. 230 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *FPSLRA*"). The employer submitted that the Board's role is not to reassess the grievor but simply to examine how the employer assessed her. It relied on the following decisions: *Raymond v. Treasury Board*, 2010 PSLRB 23; *Plamondon v. Deputy Head (Department of Foreign Affairs and International Trade)*, 2011 PSLRB 90; and *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94).

[272] The employer submitted that the test for the Board to apply was clearly set out as follows in *Raymond*, at para. 131:

- Was the assessment of performance done in bad faith?
- Were there appropriate standards of performance?
- Were the standards of performance that the employee was required to meet clearly communicated?
- Did the employee receive the tools, training, and mentoring required to meet the standards of performance in a reasonable period?

[273] The employer submitted that the OIDP is a very structured program with clearly established standards. The grievor was provided with support, including coaching and mentoring. She also received feedback from the TPQs, which told her what to focus on. In addition, she was provided with an action plan as a support tool. The employer acted in good faith and wanted her to succeed.

[274] The employer submitted that whenever the grievor received guidance or feedback, she took it personally and did not listen to it.

[275] The employer submitted that if the grievor's position is accepted that the Supt. Marsden's one-week assessment in Customs Secondary was not reliable, then Supt. Dalton's positive one-week assessment is also not reliable.

[276] The employer noted that the grievor agreed with the December 2015 action plan.

[277] The employer submitted that the grievor's relationships with her supervisors were challenging. It submitted that it is hard to believe that all her supervisors were wrong and that she was right. It submitted that to accept that all the supervisors were wrong, one would have to believe that there was a huge conspiracy to set her up for failure. It submitted that that was an impossible proposition.

[278] The employer submitted that there was no evidence of bad faith in this case. It submitted that the OIDP is the same for everybody. It submitted that although communications might not have been perfect, there was plenty of communication with many people involved. In addition, it noted that the grievor received TPQs that communicated the appropriate standards of expected performance. It submitted that she had received extensive training before the OIDP (in the OITP) and that she received coaching and mentoring throughout the process.

[279] The employer submitted that the same evaluation criteria were applied to all OIDP candidates. In addition, it noted that different supervisors observed the grievor and identified the same issues with her performance. The TPQs set out their observations, the employer noted. It submitted that there was no evidence that she was assessed differently than were other candidates.

[280] The employer submitted that the grievor did not demonstrate bad faith by the supervisors who assessed her. It noted that the transfer from one supervisor to another was not ideal and that it did not do everything right. However, it stated that it made sufficient and reasonable efforts when it assessed her. It submitted that assistance was available from others and that she either did not ask for assistance or when she received it, and there were negative comments, she objected. It also submitted that it should not be held to the standard of perfection (see *Williams v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 39 at para. 112).

[281] The employer submitted that the performance standards were communicated to the grievor, and it was not necessary to explain those standards in great detail (see *Plamondon*, at para. 57). The employer submitted that the grievor knew that her job was at risk, and she testified that she believed that she would be fired.

[282] The employer submitted that the grievor was given more time in the program and additional support, which should be seen as a demonstration of its good faith. It noted that she was placed in Customs Secondary exclusively from September to January, which was not a normal assignment. It submitted that this was also a sign of good faith.

[283] The employer submitted that Supt. Forrest recognized that his comment of "our special friend" was not a good idea. However, on its own, it was not sufficient to show bad faith, the employer argued. The employer stated that the Board must weigh everything and be convinced that the assessment as a whole was either tainted with bad faith or was not reasonable.

[284] The employer also referred me to *Kalonji v. Deputy Head (Immigration and Refugee Board of Canada)*, 2016 PSLREB 31 (*Kalonji 1*) (upheld in *Kalonji v, Canada (Attorney General)*, 2018 FCA 8 (*Kalonji 2*)); *Lortie v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 10 (upheld in *Lortie v. Canada (Attorney General)* 2019 FCA 294); *Yates v. Deputy Head (Department of Citizenship and Immigration)*, 2020 FPSLREB 21 (upheld in *Canada (Attorney General) v. Yates*, 2021 FCA 74); *McLaren v. Deputy Head (Statistics Canada)*, 2020 FPSLREB 58; *Grant v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 59; *Williams*; *Gagné v. Canadian Food Inspection Agency*, 2016 PSLREB 3; and *Mazerolle v. Deputy Head (Department of Citizenship and Immigration)*, 2012 PSLRB 6.

3. Discrimination

[285] The employer submitted that the grievor had to establish a *prima facie* case of discrimination but that she provided only allegations, without any supporting evidence (see *McLaren*, at para. 272, and *Bah*, at paras. 246 and 249). It also submitted that an action plan and other performance-management tools do not constitute harassment (see *McLaren*, at para. 276).

[286] The employer also referred me to *Agbodoh-Falschau v. Canadian Nuclear Safety Commission*, 2014 PSLRB 4; and to *Tudor Price v. Deputy Head (Department of Agriculture and Agri-Food)*, 2013 PSLRB 57.

4. Post-termination events

[287] The employer submitted that Ms. Durocher's email sent after the termination of the grievor's employment was not intended for all employees. Had it been sent only to the management team members, the employer stated that it would not have been problematic. It submitted that it can do nothing to change this mistake and that it was an unfortunate error. It submitted that this mistake did not make the termination of the grievor's employment discriminatory.

B. For the grievor

[288] The grievor submitted that it is critical when assessing the evidence in this case that a human rights lens is applied not only to the discrimination grievance but also to the termination grievance.

1. Discrimination and termination for unsatisfactory performance

[289] The grievor recognized that she filed her human rights grievance in February 2015. She submitted that there is no requirement to file a fresh grievance every day — a claim of systemic discrimination is an ongoing grievance; see *Ontario (Ministry of Transportation) v. OPSEU*, 2014 CarswellOnt 12578 at paras. 19 to 22; *Waterloo (Region) District School Board v. Custodial and Maintenance Assn.*, [2010] O.L.A.A. No. 225 (QL) at paras. 9 to 12; and *Toronto District School Board v. E.T.F.O.*, 2011 CarswellOnt 9713 at paras. 1, 4, and 23 to 31).

[290] The grievor submitted that racism is a recognized fact in Canada (see *R. v. Parks*, [1993] O.J. No. 2157 (QL) at paras. 42, 47, and 54). She also submitted that many discrimination cases do not involve direct evidence and that a tribunal must draw

reasonable inferences from proven facts (see *Toronto (City) Police Service v. Phipps*, 2010 ONSC 3884 at para. 75). She submitted that intent to discriminate is not necessary to find that discrimination occurred. She submitted that there are no "bright lines" in racial discrimination cases and that these types of cases are often difficult and nuanced (see *Phipps*, at para. 77).

[291] The grievor referred me to *Turner v. Canada Border Services Agency*, 2020 CHRT 1 (*Turner*), which sets out the framework for analysis at paragraphs 43 to 45. She relied on this statement of the test of *prima facie* discrimination at paragraph 45:

> *[45] In order to prove a* prima facie *case of discrimination, the test that [sic] complainant must generally satisfy is that: i) the complainant has one or more characteristics protected from discrimination under the Act such as race, colour, national or ethnic origin, age or disability; ii) the complainant was subjected to adverse treatment or disadvantage; and iii) one or more of the complainant's protected characteristic(s) was a factor, but not necessarily the only factor, in the adverse treatment or disadvantage.*

[292] The grievor submitted that the Board must examine all the circumstances that both support and undermine the discrimination allegation to determine if there exists the "subtle scent of discrimination" (see *Turner*, at para. 48). She submitted that racial stereotyping can affect decision making, in particular the use of negative racial stereotypes directed toward Black people, including Black women. She also referred me to *Perry v. Honu Boat Charters and another (No. 2)*, 2022 BCHRT 68 at paras. 68, 70, 74, and 75; *Balikama v. Khaira Enterprises and others*, 2014 BCHRT 107 at paras. 585 to 587; and *Abbott v. Toronto Police Services Board*, 2009 HRTO 1909 at para. 45.

[293] The grievor submitted that it is through the lens of a Black person that the facts must be considered, and the analysis of whether adverse treatment amounts to discrimination must be considered (see *Balikama*, at para. 587). She submitted that in assessing the evidence, the Board must be entirely sure that the fact that she is Black was not a factor in her treatment, and if the Board is not "absolutely sure", then there is a subtle scent of discrimination.

[294] The grievor also noted that multiple grounds of discrimination cannot be separated and parsed individually (see *Radek v. Henderson Development (Canada)*, 2005 BCHRT 302 at paras. 463 to 465).

[295] The grievor referred me to *Francis v. British Columbia (Ministry of Justice) (No. 3)*, 2019 BCHRT 136 at para. 296, and noted that the reliance on the comments of others to assess performance was also a factor in her treatment. She submitted that the actions against her when viewed in isolation may not be that bad, but the actions take on a different characterization when a racialized person is being singled out.

[296] The grievor submitted that she was not looking for perfection in her assessment; she was just looking to be treated fairly. She submitted that there was no conspiracy; she just wanted to provide input to clear up misconceptions, and her supervisors resisted those efforts.

[297] The grievor submitted that the facts in *Bah* are distinguishable from the facts in this case. She also submitted that the *Bah* decision was ultimately unhelpful to the Board in determining the grievance.

[298] In *Bah*, the Board found that there was no evidence of racial stereotyping against the grievor in that case. By contrast, the grievor in this case submitted that there is evidence of the racial stereotyping of her. This includes direct evidence that she was subject to belittling and derogatory remarks by the person who was responsible for her final EPDP. It included evidence that Supt. Chamieh refused to remove a false allegation in her TPQ that she abused sick leave. It included evidence that the grievor and a white male colleague were accused by a white female passenger as being aggressive during her examination, and only the grievor received discipline for it. It included evidence that on the day of her termination, the director, exceptionally, sent an announcement to all staff that gave the impression that the staff had reason to fear her if she returned to the workplace.

[299] The grievor submitted that there was also evidence that she was treated differently than were other recruits, unlike in *Bah*. She testified that she had learned from other recruits that she was not receiving the same level of support. This view is consistent with the testimonies of Supt. Szplitgeiber and Supt. Dalton concerning their approach to mentoring recruits. Since Supt. Chamieh was not called to testify, it is open to the Board to infer that her concerns had merit.

[300] The grievor stated that Supt. Chamieh first met her only after she completed her first quarter. In addition, she noted that although the first TPQ was prepared on April 13, 2014, it was not delivered to her until May 25, 2014. She also identified

inaccuracies in it. She also submitted that the error about missing work was in line with stereotypes about Black people being lazy and not wanting to work. She submitted that it was outrageous that she had to file a grievance to have this erroneous information removed from the TPQ. She stated that this was a significant error based on misinformation and that it was consistent with racial stereotyping.

[301] The grievor submitted that she identified inaccuracies in her TPQ and that the employer did not look into them. She submitted that she had asked for feedback from her supervisor and did not receive any. She submitted that this is a hallmark of discrimination and that it raises a red flag. She submitted that she was required to write lengthy responses to her TPQ because her supervisor would not talk to her, and then she was criticized for writing such long responses.

[302] The grievor also submitted that Supt. Forrest's comment referring to her as "our special friend" was shocking and very demeaning. She submitted that it is consistent with recognized stereotypes about Black people. She submitted that it was discriminatory. The grievor noted that in his testimony, Supt. Forrest stated that he found it "interesting" that she referred to herself as racialized.

[303] The grievor submitted that Supt. Chamieh had a negative attitude toward her, but it was unclear where this came from, as he never talked to her. The grievor also submitted that emojis in his emails were also disrespectful. Mr. Zimmer was unable to explain the comment about Supt. Chamieh's heart not being in it. The grievor submitted that Supt. Chamieh obviously had some antipathy to her, and he did not assess her reasonably.

[304] The grievor submitted that the action plan developed by Supt. Junik did not include a formal assessment process and that there is no record of what he did to implement the action plan. However, he carried out the readiness assessment and concluded that she was not ready. She submitted that the allegation in this assessment that she was "superintendent shopping" was vague and that it included no concrete examples. It also included information of which he was not sure of the origin. She submitted that the fact that the assessment was just a general impression was also a red flag. She submitted that because there is no record of any observations, there is no credible way to evaluate any rating for this assessment.

[305] The grievor submitted that she received a good assessment by Supt. Dalton that was not shared with her while she was employed with the CBSA. She submitted that although Mr. Zimmer dismissed Supt. Dalton's observations as being not based on a long period of observation, Supt. Marsden spent only one week with her.

[306] The grievor submitted that there were errors in her performance assessments. She submitted that the ratings and assessment were overly critical of her — although she was not perfect, she was far better than Supt. Marsden stated in her assessment. She submitted that there was evidence that pulling up luggage poles was not formally taught to new recruits, for example. She also noted that after she was told to do it, she did it. She gave other examples of criticism in situations in which her actions were a matter of judgment. She submitted that these examples demonstrated that the assessment process was flawed.

[307] The grievor submitted that the final TPQ was prepared before the serving of the 15-day suspension discipline. She submitted that this demonstrated that the employer was still deciding whether to extend her training period. She submitted that her 15-day suspension was part of the rationale for getting rid of her.

[308] The grievor submitted that the OIDP was not implemented uniformly across the country — there were structural issues, which Mr. Zimmer acknowledged. She submitted that the program guide requires providing ongoing support to recruits and envisages mentoring by a superintendent that is both constructive and timely. She submitted that this did not occur in her case and that there are problems with relying on the observations of others, as occurred in her case. She submitted that only two TPQs were based on direct observations, those of Supt. Dalton and Supt. Marsden. She noted that the appendix to the TPQ directs the assessing superintendent to record the dates on which the competencies were observed. Mr. Zimmer testified that people do not want to do that. The grievor submitted that failing to do it makes it difficult to determine how her performance was assessed.

[309] The grievor submitted that there was not enough information in the G drive to substantiate all the negative scores she received each quarter. She submitted that there was a disconnect between the theory and the practice of the use of the G drive. She noted that there was testimony that a superintendent would usually verify what was on the drive but that it was not done in her case. She stated that Supt. Szplitgeiber said

that she would talk to a trainee about what was on the G drive, but it did not happen in the grievor's case.

[310] The grievor also submitted that there was no assessment of the assessors — no one evaluated whether the superintendents were qualified to assess the recruits. She noted that Mr. Zimmer testified that not everyone has the same recruit experience. She also noted that the OIDP evaluation identified structural issues with it that should be considered when assessing the evidence.

[311] The grievor submitted that she felt that she was being treated differently than were the other recruits. There was no need to call other recruits as witnesses because the superintendents who testified agreed that the recruits were not treated the same.

[312] The grievor submitted that a decision to terminate employment made in bad faith, arbitrarily, or on a discriminatory basis or unrelated to the position could not be deemed reasonable.

[313] The grievor submitted that she was not subject to the appropriate standards and that the employer did not clearly communicate them. She also submitted that she did not receive the tools, training, or mentoring required to meet the standards of performance in a reasonable period.

[314] She submitted that her supervisors were not able to provide concrete examples of her not meeting the performance standards and that there was plenty of evidence of animosity from her supervisors. She also referred me to *Dussah v. Deputy Head (Office of the Chief Human Resources Officer)*, 2020 FPSLREB 18 at paras. 444 to 464.

[315] The grievor also referred me to the definition of bad faith in *Yeo v. Deputy Head (Department of Employment and Social Development)*, 2019 FPSLREB 119 at para. 126, and submitted that she met that definition.

[316] The grievor submitted that the Board must consider all relevant evidence in coming to a decision, even if that evidence is subsequent to the termination of employment (see *LaBranche v. Treasury Board (Department of Foreign Affairs and International Trade)*, 2010 PSLRB 65 at paras. 162 to 175).

2. Discipline

[317] The grievor submitted that the discipline imposed was too harsh.

[318] The grievor submitted that she simply checked up on her request to carry out her NEXUS enrolment and that she did not have her passport with her when she went to the NEXUS office. She submitted that the employer provided no evidence that she had her passport with her at that time. She questioned why the BSO on duty did not inform her or Supt. Lambert about the inappropriateness of attending the NEXUS office in her BSO uniform. She also noted that there was no evidence of delays in the waiting room or of overtime paid to any BSOs. In addition, she submitted that there was no evidence that there were any members of the public in the waiting room.

[319] The grievor submitted that she might have committed an error in judgment. She stated that she had been a new BSO and that probably, she should not have obtained a NEXUS card at PIA. However, she submitted that she had not been devious.

[320] The grievor submitted that the employer exaggerated the consequences of this error in judgment. In the fact-finding report, it states that the process takes 25 minutes, when Supt. Lambert testified that it was quick. Supt. Muka admitted that he did not know how long the enrolment process takes or where he obtained the reported information from. The grievor noted that there is evidence that it takes 8 minutes and that interviews are scheduled in 15-minute increments.

[321] The grievor submitted that the language in Supt. Muka's email with the emoji was demeaning or belittling. She submitted that it demonstrated that he looked down on her. His explanation that he was trying to break the tension did not make any sense, she said. Supt. Lambert testified that the use of "LOL" was not normal in business emails.

[322] The grievor submitted that it was curious that Supt. Muka did not advise Supt. Lambert that an investigation was being conducted related to the NEXUS enrolment incident. She also noted that after that incident, Supt. Muka developed an alternative assessment file of her, even though he was not her assigned superintendent. He could not remember anything about the document. She submitted that I could use this to make an inference.

[323] The grievor submitted that the employer provided no explanation for the delay in the fact-finding or for not obtaining the video from the days in question. Although Supt. Muka stated that the video had been erased, it was not determined if anyone had asked for it.

[324] The grievor submitted that the NEXUS office incident was referenced in her third-quarter TPQ, even though no finding of discipline had made as of that point. Mr. Zimmer testified that there was no good reason for including it in the TPQ.

[325] The grievor submitted that although there were grounds for discipline, three days was an excessive penalty. She had no prior discipline, and she was a new BSO. She submitted that there was no evidence that her actions had any impact on scheduling NEXUS program appointments, and no BSO at the office expressed any concern. She submitted that she acknowledged that she should not have done it. She also submitted that there was a delay imposing the discipline — the employer was aware of the incident at the end of July 2014, and discipline was not imposed until February 2015.

[326] The grievor referred me to *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72, in which a two-day suspension was substituted with a written reprimand.

[327] The grievor acknowledged that any issues with respect to the fact-finding investigation were remedied by the fresh hearing of the evidence at adjudication (see *Hyslop*, at para. 86). However, she noted that procedural errors are not meaningless and that there is an added obligation when they occur (see *Legere v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 65 at paras. 237 and 238). She also referred me to *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30 at para. 108, where the Board stated that "[d]iscipline tainted by a breach of natural justice is inappropriate …"; consequently, a termination of employment was overturned.

[328] The grievor submitted that the principle of proportionality must be applied when assessing appropriate discipline and that each case must be examined on its merits. She submitted that in this case, an important mitigating factor is that she has accepted responsibility for her actions. She also submitted that the length of the disciplinary process was a factor to consider (see *Cwikowski v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 7 at para. 106).

[329] The grievor submitted that in the circumstances, a written reprimand was appropriate discipline for this conduct.

[330] The grievor submitted that with respect to the firearm incident, the only issue is the appropriate penalty. She submitted that there was confusion about the number of arming rooms. She acknowledged during the investigation that it would have been safer had she put the gun in her holster rather than cable-locking it in the clearing barrel. She also submitted that the setup at Rigaud differed from that at PIA. Supt. Leah testified that it was safe to keep the gun in the device with a cable lock. He testified that the door was very thick and that very few people had access to it.

[331] The grievor submitted that the posters in the arming rooms were changed after the incident. She also submitted that there were supposed to be markings on the floor, but none are visible in the video.

[332] The grievor noted that Supt. Muka took a particular interest in this investigation. She submitted that Supt. Muka reviewed the video shortly after the incident without obtaining the approval to use it, in writing, as required by CBSA policy. She submitted that there was no concern about health and safety, as no report was made to the health and safety committee. The grievor submitted that Supt. Muka was obligated to comply with policy, which the Board should consider when assessing the appropriateness of the discipline.

[333] The grievor submitted that another mitigating factor was that she had never been shown the arming room and facilities. She also submitted that she had accepted responsibility for her actions. Supt. Sandhu acknowledged that she had not considered this as a mitigating factor.

[334] The grievor submitted that there was a delay rendering the discipline and that no plausible reason for it was provided.

[335] The grievor submitted that this misconduct was different in character from the previous discipline and that therefore, progressive discipline did not apply. She referred me to *Eden*, in which a firearm was left unsecured for two days, and a five-day suspension was imposed.

[336] The grievor submitted that as in *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 33 at para. 108, the seriousness of the misconduct should be reduced slightly due to the lack of a proper briefing.

[337] The grievor submitted that the removal of her firearm was consistent with CBSA policy but that having the rest of her defensive tools removed was a particularly traumatic experience. She noted that it was not clear why they were removed. She testified that she was intimidated by Supt. Muka when he took them. She testified that he belittled her and that he snickered. As a result of the removal, her OIDP was essentially put on hold as she could be only partially assessed without her defensive tools.

[338] The grievor submitted that she testified at the hearing about how stupid she felt about the security-line incident. She admitted that she made a mistake and that it had been "not a smart move".

[339] She submitted that the security guard did not testify and that the Board could not rely on hearsay. She submitted that the video in evidence before the Board was not the video that she was shown during the fact-finding. She also submitted that the video in evidence did not support the security guard's view of the event. She submitted that the conversation that was supposed to have occurred would have taken longer than what is observed in the video. She submitted that she was calm throughout her interactions in the security line.

[340] She submitted that the Board cannot rely on the security guard's statements to establish critical facts (see *Lortie v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 108 at para. 223). She submitted that the Board cannot rely on what the security guard said, in which case there is no reason to disbelieve the grievor's testimony. She submitted that she took responsibility for her actions and was apologetic — what she did not acknowledge was the security guard's version of events.

[341] The grievor submitted that the discipline imposed for this act of misconduct was excessive. She submitted that the discipline was not progressive since it was only arguably similar to the NEXUS office incident.

[342] The grievor submitted that neither of the travellers' complaints relied on for the 15-day suspension had any merit. She submitted that the complaints likely had an impact on the decision to terminate her employment. She submitted that Supt. Forrest developed an early interest in the complaint, even though he was involved in her performance assessment. She noted that performance assessment and discipline should be addressed separately.

[343] The grievor submitted that Supt. Forrest suggested that the family in the first complaint were "seasoned travellers" but he did not speak to any members of that family. The grievor also submitted that she had no intent to mislead the travellers and that Chief Karsakas had agreed.

[344] The grievor submitted that the complaint against the female traveller was completely exaggerated and inaccurate. She stated that the video does not demonstrate the allegations set out in the complaint. She submitted that there was no evidence of negative body language. She also submitted that two BSOs were involved but that only she faced any discipline. She submitted that the discipline was unreasonable given that the other BSO involved did not receive any discipline (see *Kinsey*, at para. 101)

[345] She submitted that she was not rude and disrespectful with the female traveller and that she had no intent to provide inaccurate information. She submitted that there was no basis for the discipline.

3. Post-termination events

[346] The grievor submitted that the email that was sent to all staff on the day of her termination of employment gave the impression to others that she might be dangerous. She submitted that there was no reason for it. She also submitted that although the employer suggested that it was sent to all staff in error, there was no indication that the employer ever dealt with it. She submitted that her situation was similar to the one in *Grant*, as her treatment was also based on negative stereotypes.

C. The employer's reply submissions

[347] The employer agreed that racism exists in Canada and that the grievor was covered by the protected grounds of discrimination. However, it did not agree that she established a link between the protected ground and its decision. It submitted that she did not establish a *prima facie* case of discrimination. It referred me to *Bah*, at paras. 243 and following, in which the panel of the Board agreed that racism exists at the CBSA but that allegations must still be supported by evidence.

[348] The employer submitted that the use of "LOL" and emojis is an everyday occurrence and should not be seen as discriminatory or unprofessional. It did not agree with Supt. Forrest that his comment about "our special friend" was an attempt at being funny but submitted that the comment had nothing to do with the grievor's race.

It also submitted that Ms. Durocher's email sent after the termination of the grievor's employment does not demonstrate a connection to discrimination.

[349] The employer noted that the discrimination grievance was filed on February 2, 2015, which was before the last three months of assessment and the termination of the grievor's employment. It also noted that the Form 24 sent to the CHRC contained wording that was quite different from the wording in the grievance. It noted that there was no reference to discrimination in any of the other grievances referred to adjudication. It referred me to *Bowden v. Treasury Board (Canada Border Services Agency)*, 2021 FPSLREB 93, for its discussion of a continuing grievance. The employer also referred me to *Reddy*, at paras. 80 to 85; and *Gagné*, at paras. 12 to 17.

[350] The employer submitted that the scope of the discrimination grievance is limited and that any remedy is also limited to 25 days before its filing.

[351] The employer submitted that BSO Robertson was investigated and was not disciplined. It noted that he explained that he had done nothing wrong. It was not so sure that an adverse inference could be drawn from how he was treated. It also noted that he did not say that the grievor was correct in her treatment of the traveller.

[352] The employer submitted that Supt. Cellucci spoke to the security guard about the security-line incident and that the evidence of that conversation must be given some weight.

[353] The employer submitted that the grievances that refer to the management-rights clause should be denied. It submitted that that clause does not create a substantive right for employees. It also noted that the grievor made no submissions on those grievances.

[354] The employer submitted that the OIDP was not a uniform program across all POEs — it is impossible to apply one formula everywhere. It submitted that the OIDP was based on operations and that it had to be implemented flexibly. It submitted that the witness who testified about the ODIP worked at a different airport than was the grievor.

D. The grievor's rebuttal

[355] The grievor submitted that she does not seek a different standard for assessing discrimination. She submitted that a protected ground need only be a factor in her adverse treatment, and it does not matter how strong that link is. She submitted that the Board must be absolutely convinced that the fact that she is a Black woman had no impact on her adverse treatment.

[356] The grievor submitted that the "special friend" comment was consistent with the stereotype that Black people are not smart — Supt. Forrest was questioning her intelligence.

[357] The grievor submitted that she is not suggesting that BSO Robertson should have been disciplined — both of them should not have been disciplined. She stated that the differential treatment was the employer's recommendation as to discipline.

[358] The grievor submitted that her criticisms of the OIDP were about flexibility in delivery but that there was no standard training, no assessment of recruits, and no training of supervisors. She submitted that the success of the OIDP depended on who delivered it. She submitted that part of the assessment's reasonableness is its fairness and whether it was arbitrary or if the standards applied to her were different from those for anyone else.

VI. Reasons

A. The disciplinary suspensions

[359] The grievor received a total of 35 days of suspension for misconduct (3-day, 7-day, 10-day, and 15-day suspensions). I will determine each suspension grievance individually. I have determined that the disciplinary suspensions for some of the founded misconducts were excessive and have allowed the grievance against the 15-day suspension. In this section, I will set out the general principles that apply to all four disciplinary suspensions.

[360] In *Basra v. Canada (Attorney General)*, 2010 FCA 24, at para. 24, the Federal Court of Appeal confirmed the required analysis in discipline matters, which is: Has the employee given reasonable cause for some sort of discipline by the employer? If so, was the employer's decisions to discipline an excessive response in all of the

circumstances of the case? And if the discipline imposed was excessive, what alternative measures should be substituted as just and equitable?

[361] If there was misconduct, discipline is assessed by considering a range of mitigating and aggravating factors. I have assessed any such factors in my determination on each founded misconduct.

[362] The grievor submitted that procedural errors in a disciplinary investigation result in an added obligation on the employer and could taint the discipline (see *Legere* and *Kinsey*). It is not disputed that a grievance hearing is a fresh hearing of the evidence and that it corrects any procedural unfairness in the disciplinary process (for example, see *Hyslop*). An employer's failure to adequately investigate misconduct can impact the evidence that must be introduced at the hearing, as was noted as follows in *Legere*, at para. 237: "At this hearing *de novo*, the employer is still required to discharge its burden of proof and establish the facts upon which the disciplinary action was founded. This is even more crucial when the investigation and report are flawed and biased …". But this does not change the burden of proof required of the employer. In *Besirovic*, at para. 145, I noted this: "… an employer that fails to properly investigate runs the risk of having flaws exposed at adjudication, and its conclusions may be overturned …".

[363] The focus in *Kinsey* was on bias, and the level of it was significant. I note that the conclusion that there was a breach of natural justice related solely to the amount of discipline imposed (a termination) rather than the finding of misconduct.

1. The three-day suspension

[364] The grievor received the three-day suspension for using her position as a BSO to enrol her and her family in the NEXUS program. She grieved the discipline imposed.

[365] The grievor admitted that she made an error in judgment that gave reasonable cause for her misconduct to be disciplined but a three-day suspension for it was not justified. I agree that the disciplinary suspension was an excessive response. I find that a written reprimand would have been just and equitable in the circumstances.

[366] The misconduct was that the grievor proceeded with the enrolment process for her and her family while in uniform, without the permission of the superintendent

responsible for the NEXUS office (Supt. Lambert). This was a benefit outside the usual employer-employee relationship.

[367] It is not uncommon for BSOs to be processed at the PIA NEXUS office with the supervising superintendent's permission. The grievor did initially make a request in person, followed by an email on June 27, 2014. Supt. Lambert told her that he would follow up with her but did not reply by July 18, 2014. She went to the NEXUS office, as she had done previously, on that day. She testified that she went there just to secure a response from Supt. Lambert, while the employer concluded that she went with the intention of enroling in the NEXUS program.

[368] The grievor's intent in attending the NEXUS office on July 18, 2014, is critical to determining the seriousness of her misconduct. If she went with the intent of enroling in the NEXUS program, she deliberately undermined Supt. Lambert's authority. However, if she went solely to discuss the status of her request with him, and was offered processing, the error in judgment is less serious.

[369] The grievor testified that she went to the office to find Supt. Lambert, and she asked for him by name when she arrived. She testified that a CBSA BSO overheard the U.S. customs officer's offer to process her. That BSO did not testify at the hearing. The employer did not call any witnesses to the interactions between the grievor and the officers in the NEXUS office. Asking to speak to Supt. Lambert was not consistent with an intent to go behind his back and enrol in the NEXUS program without his permission.

[370] The employer maintained that the grievor attended the office with her passport, which would also support an intent to enrol without Supt. Lambert's permission. However, she testified that she did not have her passport with her, and Supt. Lambert told Supt. Muka that it was possible to start the enrolment process without having one. In the fact-finding interview, the grievor mentioned that the U.S. customs officer commented on her soon-to-expire passport, but it is not clear from the evidence if that was based on a physical review of her passport or of her online application.

[371] I find that on a balance of probabilities, the employer did not establish that the grievor had her passport with her. The employer could have easily obtained that evidence by simply interviewing the U.S. customs officer who enrolled the grievor.

[372] The employer did not establish that the waiting room was full. The grievor testified that it was not full. An email from a BSO who did not testify at the hearing stated that the waiting room was "quite busy". However, this evidence was not subject to cross-examination, and I find the grievor's direct testimony more reliable. The employer recognized that it should have obtained video of the waiting room as early as July 31, 2014, when Chief Raby suggested "pulling the video". However, Supt. Muka did not attempt to obtain any video of the events of July 18 and 19, 2014.

[373] There is also contradictory evidence of how long it took to process the grievor and her family. Supt. Lambert initially told her in his July 22, 2014, email that it would take "over half an hour" to process 5 people (the grievor and her family). He later told Chief Raby that it would take 40 minutes to process 5 people. He also told the grievor that she and her family could not be processed because it would lead to overtime costs for the office. The employer provided no evidence on the amount of time it took to process the grievor and her family. It admitted that no overtime was paid to BSOs in the NEXUS office due to processing the grievor and her family on either July 18 or 19, 2014.

[374] The employer did not call any evidence about the treatment of those officers who, it is alleged, processed the grievor (and later her family) while the waiting room was allegedly full. If, as the employer asserted, the photo for the NEXUS program was of the grievor in her CBSA uniform, one would have expected the officers who observed this to be cautioned. It could be that the officer who took the picture was with U.S. customs, but the employer provided no evidence that it followed up with U.S. customs management on this breach.

[375] Supt. D'Alessandro waited almost two weeks to report the grievor's actions, which also supports a finding that the misconduct was not that serious. Supt. D'Alessandro did not testify at the hearing, but it can be inferred from her statement in the email that she waited to raise it with the grievor's supervisor (Supt. Chamieh) that she did not view it as a serious breach of the CBSA's *Code of Conduct*.

[376] The grievor apologized to Supt. Lambert as soon as he expressed his concerns to her about the enrolment of her and her family. The employer did not consider her timely apology to Supt. Lambert when it determined the appropriate discipline.

[377] The grievor was also relatively new in her position as an officer trainee. The employer did not consider her lack of experience as a uniformed officer in assessing the appropriate discipline.

[378] The employer referred me to *Hyslop*, a decision that involved a BSO "vouching" for his traveling companions by "flashing" his badge. I find that the facts of that case are easily distinguishable from the facts established in this case. In *Hyslop*, the BSO used his badge and position to vouch to the U.S. border officers that no one in his group had smoked marijuana, when they had done so. In the case before me, there was no deliberate lie told by the grievor.

[379] The employer also referred me to *Stewart*, a decision that involved the acceptance of complimentary concert tickets. The facts in that case are clearly more egregious than the established facts in this case. The Board found that the employer was justified in disciplining the grievor "up to the point of termination." In that case, as well, the Board found that the expression of remorse "rang hollow" (at para. 59). In this case, I have found that the grievor was quick to apologize to Supt. Lambert.

[380] In light of my determinations on the seriousness of the misconduct and the grievor's timely apology, I find that a written reprimand is more appropriate for a first act of misconduct. Accordingly, the three-day suspension is substituted with a written reprimand.

[381] The grievance against the three-day suspension is allowed, in part. The discipline imposed was not justified, and the three-day suspension is substituted with a written reprimand.

2. The seven-day suspension

[382] The grievor received the seven-day suspension for her handling of a firearm on October 31, 2014. I agree that there was misconduct, and I also agree that it was serious because the grievor's handling of the firearm demonstrated a lack of concern about its safe operation. Pointing a gun away from a ballistics panel while loading and unloading could have had significant consequences to other BSOs or travellers.

[383] The grievor admitted that that she gave reasonable cause for her misconduct but did not agree with the amount of discipline. In her view, mitigating factors and the principle of progressive discipline warranted a lesser amount of discipline.

[384] The grievor stated that she did not have sufficient training to know how to properly handle her firearm. However, she was able to properly handle it in the second arming room. She was also shown how to use the proving barrel shortly before she mishandled the firearm, while at Matheson. I agree that initially, she did not seem to express much concern about her handling of the firearm, but at the hearing, she did express some remorse for her actions.

[385] In *Eden*, a BSO received a suspension for mishandling a firearm. The disciplinary response was the first one imposed by the employer. The adjudicator determined from the evidence before her that although direct comparisons with other law-enforcement agencies was impossible, the "base penalty" for an officer for failing to store a duty firearm safely was equivalent to about a 2- or 3-day suspension. In *Eden*, the grievor had worked for the employer for 22 years, had a discipline-free record, and immediately expressed remorse and was in a supervisory role. The adjudicator reduced the 10-day suspension in that case to 5 days. She stated at para. 62 that a 5-day suspension was appropriate for failing to properly store a firearm, even for a first offence, because "… it recognizes the seriousness of the offence and takes into account the grievor's supervisory role."

[386] The grievor has argued that progressive discipline principles should apply and that this act of misconduct is different in character from the NEXUS incident. I agree that the mishandling of her duty firearm is different in character than using her position as a BSO to obtain preferential treatment. Accordingly, I find that the previous discipline (now reduced to a written reprimand) should not be a factor in the amount of discipline appropriate for this act of misconduct.

[387] *Eden* provides some guidance on the appropriate amount of discipline for the mishandling of a duty firearm. The adjudicator first established a "base penalty" of two to three days of discipline and then applied both aggravating and mitigating factors in assessing the appropriate amount of discipline. In *Eden*, the grievor was a supervisor, which was an aggravating factor. He had also immediately expressed remorse, which was a mitigating factor. In the case before me, the grievor was not in a supervisory role. However, she did not express any meaningful remorse until this hearing and attempted to shift responsibility for her actions by claiming a lack of training.

[388] I agree that this was a serious offence and not easily explained, as she had very shortly before been shown how to use the proving barrel. I have also considered her lack of remorse or acceptance of responsibility for her actions at the time of the incident and shortly after. Accordingly, I find that reducing the suspension to five days is just and equitable. I find that this misconduct was serious enough to warrant a strong disciplinary sanction.

[389] A hearing of a grievance is a fresh hearing of the evidence that therefore cures any procedural defects in the employer's disciplinary process (see *Tipple v. Canada (Treasury Board)* (F.C.A.), [1985] F.C.J. No. 818 (QL)). Therefore, I dismiss the part of the grievance relating to procedural unfairness.

[390] The grievor also grieved the length of time it took to reach a decision to impose discipline. Although it took some time before discipline was imposed, I do not find it to be an excessive amount of time and the grievor did not identify any prejudice to her as a result of the delay. I therefore deny this aspect of the grievance.

[391] The grievor provided no evidence and made no submissions on the employer's alleged failure to allow bargaining agent representation at a disciplinary hearing. In the absence of evidence and submissions, this part of the grievance is denied.

[392] The grievance also referred to the fact that no health and safety report was made to the joint health and safety committee. However, she made no submissions on this point, and the occupational health and safety requirements under the *Canada Labour Code* are not within the Board's jurisdiction in these grievances.

3. The 10-day suspension

[393] The grievor's 10-day suspension was imposed for going to the head of a security line, thus circumventing the line of people waiting to go through the security door. The employer concluded that the grievor breached the *Code of Conduct* and the *Values and Ethics Code for the Public Sector* by attempting to use her job title and position to gain personal advantage over other PIA employees while in full CBSA uniform and in view of employees from other organizations. The employer also concluded that the grievor did not wish to follow security procedures for entry into a secure area, which was a condition of her "Restricted Area Identity Card". The alleged misconduct also included her behaviour toward the security officer. The grievor admitted that going to the front

of the security line was not appropriate and that her behaviour gave reasonable cause for her misconduct to be disciplined, but she disputed that she was rude to the security guard.

[394] The security guard did not testify at the hearing. Her evidence of her experience is her statement to Supt. Cellucci as well as the video of the incident, which is without audio, and the images are not sufficiently clear to be able to determine whether the grievor was rude to her. Hearsay evidence such as the security guard's statement in the course of the disciplinary investigation is admissible, subject to weight.

[395] The grievor and the security guard did have a conversation when the grievor first removed the stanchion and then again when the grievor reached the front of the line. Although the security guard did not testify, the grievor admits that there were two interactions (although she disagrees with the security guard's recounting of those conversations) and the security guard was interviewed by Supt. Cellucci. Although Supt. Cellucci recorded the security guard's views that the grievor was rude, "had an attitude", and was entitled, these views were not subject to cross-examination.

[396] The security guard recounted the first interaction with the grievor, and there does not seem to be a dispute about the contents of that conversation — the grievor told her that it was not an emergency but that she should go first because she worked for the CBSA.

[397] The security guard recounted a conversation that the grievor had with an airline employee at the end of the line. Her account of what the grievor said to the airline employee simply repeated what the grievor had already told her. The grievor cannot be held responsible for the airline employee's reaction.

[398] The security guard's statement about the grievor's behaviour when she reached the front of the line detailed the interaction that it seems struck the security guard as rude. The video does not show this interaction. The security guard stated that the grievor repeated her earlier statement about being allowed to go to the front of the line, and the security guard repeated what she had earlier told the grievor about the rules. She reported that the grievor said "Yes" — in other words, the grievor agreed with her. She perceived that the grievor said it "with an attitude" and that the grievor "slammed" her access card on the scanner. The grievor denied that she had an attitude or that she slammed her access card down.

[399] Although the security guard may have had the perception that she did, the evidence is not strong enough to conclude that the grievor was rude. Attitudes and negative body language are always difficult to assess. Had the security guard been called as a witness, she might have been better able to express in what way the grievor was rude to her. I am not prepared to rely on hearsay evidence to support a finding that the grievor was rude to her. I also come to the conclusion that the security guard's perceptions are not critical facts to prove for my decision, as was the case with the hearsay evidence that was introduced in *Lortie v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 108.

[400] The grievor admitted that at other times, she had gone to the front of the line. After the fact, she also recognized that this was wrong. She did not provide any evidence to support her earlier view that she should have been allowed to go to the head of the security line, and there is no objective reason that she should have thought that doing so was appropriate. I find that this is an aggravating factor.

[401] In its disciplinary notice, the employer stated that the grievor used her job title and position to gain an advantage. The evidence is that the grievor was in her uniform and told the security guard that because she was employed by CBSA she could go to the head of the line. I find that the combination of wearing a BSO uniform and advising that she was an employee of CBSA was the equivalent of telling the security guard her job title and position.

[402] I agree that an attempt to use one's office to obtain a benefit — in this case, using a CBSA uniform to justify going to the head of the line — is a serious act of misconduct that could bring the CBSA's reputation into disrepute.

[403] The employer also relied on the failure of the grievor to follow security procedures for entry into a secure area, which was a condition of her "Restricted Area Identity Card". The security procedure that was applicable in the circumstances at the time of the misconduct did not permit the grievor to go to the head of the line. To that extent, the grievor's actions were contrary to security procedures.

[404] The grievor also had previous discipline related to obtaining a benefit while wearing a CBSA uniform, which is an aggravating factor. I have reduced that discipline to a written reprimand. The misconduct in this case was a very public act. I therefore find that a significant disciplinary sanction is appropriate. In the

circumstances, I find that a 5-day suspension to be an appropriate response to this act of misconduct. Therefore, the grievance against the 10-day suspension is allowed in part and a 5-day suspension is substituted.

[405] The grievor also alleged in her grievance that the discipline was "punitive in nature". She provided no submissions on how the discipline was punitive. I have already addressed the issue of whether it was excessive.

[406] The grievor alleged in her grievance that the discipline violated management guidelines for discipline (both departmental guidelines and Treasury Board policies and directives). She made no submissions on this allegation. Any defects in the disciplinary process are cured by this hearing (*Tipple*). I have already addressed the amount of the discipline.

4. The 15-day suspension

[407] The grievor received a 15-day suspension for two interactions with travellers in Customs Secondary on January 5 and 14, 2016. Both travellers made complaints that her conduct was rude and disrespectful.

[408] The employer relied on the following findings to support imposing discipline on the grievor allegedly not in keeping with the Code of Conduct and failing to process the passengers in a professional manner and with integrity:

- The lack of basic knowledge.
- The rude and disrespectful behaviour toward the travellers.
- The length of the exams and unnecessary interactions led to delays processing others.
- Inaccurate information was provided to the complainants.
- Incorrect notes were placed in the employer's computer system.

[409] This grievance raises the important distinction between performance-related issues and misconduct. In this case, the issues related to the grievor's understanding of the rules applying to NEXUS travellers are intermingled with misconduct allegations. I find that on the balance of probabilities, most of the substantiated concerns relate to her performance of her duties (and her knowledge of CBSA policies and procedures) rather than misconduct.

[410] The grievor believed that she was correctly applying the rules under the NEXUS program and Chief Karsakis agreed that the grievor did not deliberately set out to

provide incorrect information. Chief Karsakis also stated that the grievor's interaction with the travellers was both a performance issue and a conduct issue. Although she testified that her conclusions on the discipline were based solely on the *Code of Conduct*, the disciplinary notice does not reflect that, as it refers to both conduct and performance as the basis for the discipline imposed.

[411] In *Professional Institute of the Public Service of Canada v. Treasury Board*, 2019 FPSLREB 7, the Board noted the importance of distinguishing between culpable (i.e., deliberate or intentional) and non-culpable behaviour: "It has long been accepted that non-culpable behaviour, is usually behaviour that is outside of an employee's control, and warrants a non-disciplinary approach" (at para. 130).

[412] The one substantiated act that gave reasonable cause for her misconduct relates to the treatment of the traveller who cried. However, I find that the employer's inconsistent approach when another, more experienced BSO who was coaching the grievor, was also a witness to the crying to be a significant mitigating factor. Accordingly, I find that the grievance should be allowed.

[413] Both travellers' complaints referred to rudeness or disrespect. The evidence related to the first complaint from the family is inconclusive. The family members did not testify at the hearing, and the video of the interaction does not include any audio. I find that the employer did not demonstrate that the grievor treated the family members in a rude or disrespectful manner.

[414] The evidence related to the second complaint, made by the student traveller, included both the video of the interaction and the traveller's complainant's testimony. I accept that the traveller did cry during the interaction with both the grievor and the other BSO. I also accept that how both the grievor and the other BSO treated the traveller contributed to her crying. However, I find that it was not appropriate to discipline the grievor for this act of misconduct based on the mitigating factor of the unequal treatment of the other BSO who had contributed to the traveller's crying.

[415] I discussed the proportionality of discipline imposed in *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58 at para. 126, as follows:

> *[126] Equal treatment for equal cases is a fundamental part of fairness and reasonableness in labour relations. In* Re International Association of Machinists, Lodge 890, v. S.K.D.

> Manufacturing Ltd. *(1969), 20 L.A.C. 231, the arbitrator quoted an earlier unreported decision (*Re Brockville Gas Co.*, unreported, (1968)):*
>
> …
>
> …"the logic of this same principle requires that even where offences are somewhat different in character, the difference in the form of penalty imposed must not be radically out of line with the difference in employee fault, especially where they arise out of the same incident".
>
> …

[416] In this case, the other BSO received no discipline or even a discussion about his contribution to the traveller crying. The traveller testified that she found the other BSO intimidating, which she also told to the employer. Although the grievor was the lead BSO in the interaction with the traveller, the other BSO inserted himself into that interaction. He was also coaching her. The fact that the grievor received a 15-day suspension and that the other BSO did not even receive a reprimand shows a significant level of disproportionality.

B. Termination for unsatisfactory performance

[417] The grievor's employment was terminated for unsatisfactory performance under the *Financial Administration Act*, R.S.C., 1985, c. F-11 (the "*FAA*"). Section 230 of the *Act* clearly sets out the Board's role in grievances relating to termination for unsatisfactory performance, which is to determine the termination was for cause if the deputy head's opinion that the grievor's performance was unsatisfactory was reasonable. To determine that, it is necessary to set out the basis for that opinion. However, the Board makes no independent assessment of the grievor's performance (see *Forner v. Canada (Attorney General)*, 2016 FCA 136 at para. 18). If I find that the employer's assessment of the grievor's performance was reasonable, my jurisdiction is exhausted (see *Plamondon*, at para. 48).

[418] The criteria to be assessed when determining if the employer's assessment (or opinion) of an employee was reasonable were set out in *Raymond,* at para. 131, as follows:

- Was there an assessment based on appropriate performance standards?
- Were the performance standards that the employee was required to meet clearly communicated?

- Was the employee provided with the necessary tools, training, and mentoring to meet the performance standards in a reasonable time?
- Were those individuals who assessed the employee's performance involved in a bad-faith exercise?

[419] In *Dussah*, at para. 434, the Board reframed the *Raymond* criteria as follows:

> *[434] …*
>
> - *Did the employer set reasonable work objectives for the grievor and clearly communicate them to her in advance?*
> - *Did the employer set reasonable performance indicators for her and clearly communicate them to her in advance?*
> - *Did the employer give her reasonable time to meet the work objectives and performance indicators that it set for her?*
> - *Did the employer provide her with all the support she needed to meet the work objectives and performance indicators that it set within the time that she was given?*

[420] In *Setlur v. Canada Revenue Agency*, 2022 FPSLREB 59, the Board stated (at para. 147) that the criteria relied on in *Dussah* provided "added clarification" to the criteria set out in *Raymond*. However, the reformulated criteria in *Dussah* omitted the question of whether those who assessed the employee's performance were involved in a bad-faith exercise. I therefore prefer the criteria as set out in *Raymond* and will apply the criteria as set out in that decision.

[421] An element of a bad-faith exercise of assessment includes an assessment based in whole or in part on discriminatory grounds under the *CHRA*. I have addressed the alleged grounds of discrimination, which are wider than an alleged bad-faith exercise of assessment, in the section on the human rights discrimination grievance later in this decision.

1. Was there an assessment based on appropriate performance standards and were those performance standards clearly communicated?

[422] In this section I have addressed two of the criteria set out in *Raymond* – whether the performance standards were appropriate and whether those standards were clearly communicated to the grievor.

[423] In this case, the performance standards that the grievor was required to meet for a promotion to the FB-03 group and level included core competencies, work

performance and behavioural expectations. The expected performance standard was clearly set out in the documents provided to all trainees in their letters of offer, including the OIDP Guide.

[424] The core competencies and performance and behavioural expectations set out in the OIDP guide were all rationally connected to a BSO's duties and responsibilities.

[425] I also find that the core competencies and expectations (both of performance and behaviour) were clearly communicated to the grievor at the beginning of her training at PIA. I will discuss later the TPQs and EDPDs that she received, but those documents also reinforced the communication of the performance and behavioural expectations in that they provided a level of detail and a rating on the indicators of those expectations.

[426] The documents provided to all trainees at the start of their training at a POE clearly indicated the consequences of failing to meet the requisite core competencies and performance and behavioural expectations. Failing to meet the requirements would result in the termination of a trainee's employment (rejection on probation for those appointed from outside the core public sector and termination under the *FAA*, for those appointed from within the core public sector).

[427] The grievor did not suggest that these competencies and expectations as set out in the OIDP guide were inappropriate. The grievor suggested, however, that the appropriate standards were not applied, and the employer did not clearly communicate its performance expectations. I have addressed that argument in the section on whether the necessary tools, training and mentoring was provided in a reasonable time.

[428] Therefore, I find that the expectations of the grievor (and of all trainees) were clearly set out and communicated at the beginning of the training as well as during the training using detailed TPQs and EDPDs that listed all the performance and behavioural indicators.

2. Was the employee provided with the necessary tools, training, and mentoring to meet the performance standards in a reasonable time?

[429] The grievor received feedback on her performance through quarterly reports (the TPQs) that identified where she was deficient and not meeting the expectations.

The TPQs not only rated her performance but also provided examples that the assessing superintendents thought demonstrated the deficiency. She disagreed with many of the examples and with the ratings. However, the role of a panel of the Board in a grievance against a termination for unsatisfactory performance is not to assess the grievor's performance — it is only to assess the reasonableness of the employer's assessment.

[430] The grievor was given an opportunity to provide rebuttals to her TPQs and did so. Those rebuttals were available to the employer when it made its decision to terminate her employment. Although she did not sign some of the TPQs, there is no dispute that she received them, and the fact that she responded to them indicates that she did read them (see *Kalonji 1*, at para. 198, confirmed in *Kalonji 2*, at para. 5).

[431] The grievor also had three performance-management plans (the EPDPs) that clearly identified the areas that she needed to work on to meet the expected standard that would have led to a promotion.

[432] The grievor argued that the EPDP developed by Supt. Junik did not include a formal assessment process and that there is no record of what was done to implement the action plan. She then questioned the credibility of the rating. I find that Supt. Junik's assessment was supported by some evidence and was therefore not done in bad faith.

[433] However, the grievor was not given reasonable time to address the identified deficiencies. Although she was in the OIDP for just over two years and the deficiencies were first brought to her attention in 2014, she was unable to address the deficiencies identified related to the work in Customs Secondary when her defensive equipment was removed, from November 2014 to August 2015. Her deficiencies in Customs Secondary in 2015 were brought to her attention in the TPQ she received in November 2015. She did not receive the final TPQ until the date of her termination.

[434] The grievor had worked in Customs Secondary before her defensive equipment was removed, so it was not a new work environment for her. However, she had not been doing these duties for an extended period. The employer did provide support and mentoring after her EPDP in December 2015. She was provided with one-on-one support and given time to adjust to the work environment without assessment. The employer also sought her input on what she felt she needed to improve her

performance. The grievor agreed that she did receive support from coach BSOs when she requested it.

[435] However, the employer rushed to judgment without giving the grievor sufficient time to address the identified deficiencies. She was given approximately one month, January 2016, to address the multiple deficiencies that were identified in the November 2015 TPQ. The final TPQ was being finalized in February 2016, but was placed on hold until the disciplinary process relating to the travellers' complaints was completed. If she had received this final TPQ in February 2016, she would have had three months to improve, prior to her final assessment under the OIDP.

[436] I understand why the employer put the TPQ on hold pending the outcome of the disciplinary investigation. However, the result of putting it on hold should have been an extension of the assessment period to allow the grievor to be appropriately (and reasonably) assessed.

[437] I therefore find that the necessary tools, training, and mentoring to meet the performance standards in a reasonable time were not provided to the grievor.

3. Were those individuals who assessed the employee's performance involved in a bad-faith exercise?

[438] The standard for assessing performance is not perfection — it is whether the decision to terminate an employee's employment based on unsatisfactory performance was not made in bad faith, arbitrarily, or on a discriminatory basis (see *Raymond*, at paras. 129, 140, and 141).

[439] In *Grant*, at para. 108, the Board recognized that not all conflict with supervisors will constitute bad faith, as a certain amount of conflict is inevitable when managing the performance of employees who are not meeting performance standards. However, the Board continues at para. 109: "Bad faith, if it is proven to have tainted the assessment of performance, can lead to a finding of unreasonableness under s. 230.

[440] The grievor was assessed by several superintendents. Her supervision did not get off to a good start, as Supt. Chamieh did not take an active role in supervision and did not meet with her to discuss her performance between January and November 2014. The employer conceded that the relationship with Supt. Chamieh was difficult

(Supt. Forrest termed it a "personality conflict"). Supt. Chamieh did not testify at this hearing to provide his side of the story. The source of any conflict is not relevant to the termination, however. What is relevant is whether the employer's opinion that the grievor's performance was unsatisfactory was reasonable. In this case, the OIDP contemplated regular interactions between a trainee and a supervising superintendent, as well as discussions at the 3-month, 6-month, and 9-month points. Although it is not the role of the Board to enforce OIDP guidelines, those guidelines do provide some guidance on what should be considered "reasonable". The ability of the grievor to improve her performance was severely limited by the lack of feedback from Supt. Chamieh and his unwillingness to discuss his TPQ assessments with her. In this case, the opinion of the employer that the grievor's performance was unsatisfactory under the supervision of Supt. Chamieh is not reasonable.

[441] I appreciate that it can sometimes be difficult to separate performance from misconduct. However, in labour relations it is critical to do so. I have already noted that a significant portion of the rationale for the 15-day suspension arose out of traveller complaints related to the grievor's performance and not her conduct. Similarly, the recommendation document prepared for Ms. Rigg in support of terminating the grievor for unsatisfactory performance contained references to discipline imposed for misconduct. In her testimony, Ms. Rigg stated that she was able to differentiate between the misconduct and the identified performance deficiencies contained in the recommendation document. However, the highly prejudicial information about the grievor's misconduct was presented to her to support the recommendation of termination. In my view, this taints the decision-making process on termination for unsatisfactory performance and meets the definition of bad faith.

[442] The grievor suggested that a group of superintendents, including Supts. Chamieh, Junik, Sandhu, and Muka, had a mutual interest in seeing her fail. However, she provided no evidence of any concerted action by them to engineer her failure — or, in other words, to act in bad faith in their assessments of her. Supt. Marsden conducted her final assessments, and initially, the grievor had no concerns about her good faith. There is no evidence that Supt. Marsden acted in bad faith in her assessment of the grievor.

[443] The grievor testified about her difficult relationships with a number of supervising superintendents and others, including Supt. Forrest. Although the grievor's

relationships with some superintendents were sometimes difficult, there is no evidence that these difficult relationships influenced the assessments of the grievor (other than the assessment by Supt. Chamieh, discussed earlier). The supervising superintendents did identify deficiencies in the performance of her duties in Customs Secondary that were not tainted by errors in judgment based on their relationship with the grievor.

[444] In conclusion, I find that there is evidence of bad faith in the grievor's assessment both in the assessment by Supt. Chamieh and in the decision to terminate the grievor's employment based, in part, on culpable behaviour for which she was disciplined.

4. Conclusion

[445] Therefore, I allow the grievance against the termination of the grievor's employment based on her performance. The termination of employment is rescinded and the grievor is to be reinstated as an officer-trainee in the OIDP.

[446] The employer did have well-substantiated concerns about the grievor's performance in Customs Secondary during her performance of those duties commencing in November 2015. The role of the Board is not to assess the grievor – it is only to determine whether the employer's assessment was reasonable. In this grievance, I have determined that the employer was not reasonable in its assessment because it did not allow sufficient time for the grievor to address her shortcomings in Customs Secondary. I have also determined that there was bad faith exercised in Supt. Chamieh's assessment and in the decision to terminate her employment, based in part on her acts of misconduct.

[447] Although I recognize that the grievor demonstrated significant shortcomings in the performance of her duties in Customs Secondary, it is not reasonable to deprive her of the time given to other officer trainees to demonstrate that she meets those performance standards. I note that Supt. Junik did say on January 27, 2015 (only a few months prior to her termination of employment) that it was possible for the grievor to meet the performance standards with more support.

[448] If the employer had provided an additional three months of assessment, as was allowed under the OIDP, rather than terminating her employment, the grievor would

have received three-months of pay and benefits prior to a determination by the employer of whether she met the requirements for promotion to FB-03. I therefore order the payment of three-months of pay and benefits at the applicable rate of pay at the time of the termination of employment, to make her whole.

[449] My jurisdiction is limited to reinstating the grievor to the OIDP and to putting her in the position she would have been, but for the employer's unreasonable assessment. I have found that there were two periods of assessment where the grievor did not receive a reasonable assessment due to either bad faith or a failure to provide sufficient time for an appropriate assessment. I find, therefore, that to make the grievor whole, the only option is for her to start the OIDP from the beginning.

[450] Accordingly, the grievor is reinstated to the OIDP, to commence on a mutually agreeable date. Her progress through the OIDP will be subject to the current rules and process for promotion to the FB-03 group and level. The employer and the grievor will need to discuss reorientation, recertification, and retraining as part of the OIDP process.

[451] In the corrective action for the termination grievance, the grievor requested that the employer be responsible for any tax implications related to the reimbursement of lost wages. There were no submissions from the parties on this request.

[452] The grievor also requested in her grievance that any mention of the termination of employment be removed from the employer's records. I order that the letter of termination be removed from the grievor's employment files.

[453] The grievor suggested that she could have been returned to her former position at the CBSA instead of her public service employment being terminated. This issue is related to the appointment process and is outside the Board's jurisdiction. In *Kalonji 1* and *Plamondon*, the grievors suggested that the employer should have considered finding them another position. In *Plamondon*, the Board noted that examining that issue exceeded its mandate, "… which is to examine whether it was reasonable for the employer to decide that Mr. Plamondon's performance was unsatisfactory" (at paragraph 59; endorsed by the Board in *Kalonji 1*, at para. 218). In any event, since I have rescinded the termination of employment, this issue is now moot.

C. The OIDP grievances

[454] The grievor filed four grievances relating to the employer's management of her training program, relying on the management-rights clause in her collective agreement (Board files nos. 566-02-14498 and 14506) as well as disguised discipline (Board file nos. 566-02-14499and 14507). She made no submissions on them. In my view, they duplicate her grievance against the termination of her employment. These grievances are therefore denied.

[455] In Board file no. 566-02-14498, the grievance allegations are as follows:

> I grieve that the employer failed to provide the resources to allow my success in the Officer Induction Development Program
>
> I grieve that the employer failed to follow their own guidelines pertaining to the Officer Induction Development Program
>
> I grieve that the employer failed to provide me adequate mentoring, coaching, training, direction, and the meaningful feedback I should have been provided in the workplace
>
> I grieve that the employer held me to a higher standard than my peers during the Officer Induction Development Program.

[456] In Board File no. 566-02-14499, the allegations are almost identical. These grievances replicate the allegations in the grievance against the termination of employment. Accordingly, these grievances are dismissed as moot.

[457] In Board file nos. 566-02-14506 and 14507, the grievor stated that the employer provided her with a three-month assessment but that it assessed her for a significantly shorter period. One grievance alleged that this was a breach of the collective agreement, and the other alleged that it was disguised discipline. The grievor made no submissions on these grievances. I have already addressed the OIDP assessment process in the termination grievance. Accordingly, these grievances are denied.

D. The discrimination grievance

[458] The grievance in Board file no. 566-02-14489 alleges a violation of article 19 of the collective agreement — the "No Discrimination" clause. The grievor relied on the grounds of discrimination of sex and colour. This grievance was filed on February 2, 2015, over a year before the termination of her employment. The employer argued that

this grievance is limited to the events at the time the grievance was filed and that it cannot be extended to include her subsequent performance evaluations and the termination of her employment. The grievor argued that it is a continuing grievance and therefore is applicable to events and the employer's actions after the grievance was filed. The allegations are as follows:

- the employer's failure to provide a respectful workplace;
- its requirement that the grievor resign her substantive position, and its inappropriate imposing of a probationary period;
- it knowingly allowed erroneous and inappropriate comments about her performance evaluations;
- its refusal to meet and discuss revisions to her performance appraisals, thus perpetuating the harassment;
- its decision to remove her firearm and defensive equipment, which exposed her to physical risk and harm and limited her ability to complete the tasks required of her under the OIDP;
- she was a victim of "yelling, shouting, intimidating behaviour" and workplace bullying, contrary to the *Canada Labour Code*;
- local managers targeted her intentionally; and
- she was singled out for different treatment than others, including excessive scrutiny.

[459] In her grievance, she stated that the allegations, "… coupled with the orchestrated actions of local managers, constitute harassment, and discriminatory practises [*sic*]". She requested the following corrective action:

- fair and respectful treatment;
- an investigation of employer representatives and, if wrongdoing is founded, the censuring of those representatives;
- all representatives who monitor her performance be advised that erroneous comments about her are inappropriate;
- the employer comply with Treasury Board policies and the regulations under the *Canada Labour Code* on workplace violence;
- she cease to report to (unnamed) employer representatives, given the harassment;
- her acting pay be reviewed, should these matters be founded;
- her probationary period as a "public servant" be both observed and respected, within the context of her current position; and
- she be made whole.

[460] In her grievance, the grievor refers to workplace bullying that was contrary to the *Canada Labour Code*. The Board does not have jurisdiction over workplace violence allegations under the *Canada Labour Code*. Accordingly, I have not addressed that allegation.

[461] Although the grievor was not placed on probation when she started the OIDP, I understand this allegation to refer to not being able to return to her former position at the CBSA if her performance were judged unsatisfactory. The Board does not have jurisdiction over this aspect of the appointment process, as I have already determined in this decision.

[462] In the notice provided to the CHRC, the grievor changed the focus of her grievance by describing the alleged discriminatory practice as relating to the termination of her employment. The basis for my jurisdiction over the grievor's human rights allegations rests on the grievance, not the Form 24. A grievor cannot use a Form 24 to expand the scope of the grievance that is before the Board. Before addressing the merits of a discrimination claim, I must first determine the scope of the human rights grievance that was filed.

[463] The issue to be determined is whether the issue in dispute is encompassed by and flows naturally from the grievance or whether it is separate and distinct from the issues raised in the grievance (see *Toronto District School Board*, at para. 22).

[464] In *Bowden*, at para. 37, I stated that grievances "… are rarely well-crafted legal documents, and it is necessary to look at them in the context of the facts, as well as their wording." To determine the nature of a grievance, it is also important to look at both its details section as well as the requested corrective action.

[465] Some of these allegations are very specifically limited to the period before the grievance was filed — the erroneous or inappropriate comments in the TPQ and the refusal of managers to meet and discuss revisions to the TPQs. These refer to specific actions of the managers in question in early 2015, which are not continuing behaviour that would carry over to the date of the termination of the grievor's employment. The grievor also referred to the employer's decision to remove her firearm and defensive equipment on November 1, 2014, prior to her termination.

[466] The remaining discrimination allegations — the targeting by local managers, being singled out for different treatment and the employer's failure to provide a respectful workplace — are more general in nature and can be viewed as allegations of ongoing and continuing discrimination by the employer. Therefore, I conclude that this part of the grievance is a continuous grievance and is applicable to the period after the discrimination grievance was filed.

[467] The grievor has also alleged at this hearing that the discipline imposed for her interaction with a white passenger was discriminatory, in part because the white male BSO who was also involved in the interaction received no discipline for the interaction. In her grievance against the 15-day suspension, the grievor did not allege a breach of the *CHRA*. The grievor had an opportunity to allege discrimination in this grievance but did not do so. I therefore find that her discrimination grievance does not include this disciplinary action of the employer.

[468] Subsection 226(2)(a) of the *FPSLRA* provides that the Board has jurisdiction to interpret and apply the *CHRA*. The *CHRA* states at s. 3(1) that the prohibited grounds of discrimination include race, colour and sex.

[469] Section 7 of the *CHRA* provides that it is a discriminatory practice "directly or indirectly" to do the following based on a prohibited ground of discrimination:

7 *…*	***7*** *[…]*
(a) *to refuse to employ or continue to employ any individual, or*	***a)*** *de refuser d'employer ou de continuer d'employer un individu;*
(b) *in the course of employment, to differentiate adversely in relation to an employee,*	***b)*** *de le défavoriser en cours d'emploi.*

[470] Section 3.1 of the CHRA clarifies that a discriminatory practice includes a practice based on the effect of a combination of prohibited grounds.

[471] The grievor bears the onus of demonstrating a *prima facie* case of discrimination, on a balance of probabilities. To meet it, the grievor must establish a connection to a prohibited ground of discrimination (see *Quebec (Commission des droits de la personne et des droits de la Jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at para. 65).

[472] The test that the grievor must satisfy to prove *prima facie* discrimination was set out as follows in *Moore v. British Columbia (Education),* 2012 SCC 61, at para. 33: "complainants are required to show that they have a characteristic protected from discrimination under the *Code* [British Columbia's *Human Rights Code*]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact".

[473] In this case, the grievor established the first two parts of the test — she is a Black woman, and she was subject to adverse treatment (performance assessments that resulted in the termination of her employment).

[474] In *Turner*, the Canadian Human Rights Tribunal (CHRT) noted at para. 46, that its role was to assess the decision-making process, "… to determine whether the complainant was adversely impacted by the decision and whether the complainant's protected characteristics or a combination thereof played a role" in the decision-making process. The Board has a similar role in the determination of human rights grievances.

[475] A grievor is not required to prove that the employer intended to discriminate to establish a *prima facie* case, as "… discrimination is not a practice that would ordinarily be displayed openly or even practiced intentionally" (see *Turner*, at para. 48). The Board's role is to examine all the circumstances, including circumstantial evidence, to determine if there is what has been termed the "subtle scent of discrimination" (still at paragraph 48).

[476] In *Turner*, the CHRT made the following comment about racial stereotyping (at para. 49):

> *[49] Racial stereotyping bred by social conditioning and encouraged by popular culture and the media, can affect decision-making. This can happen in an employment context, by causing a decision maker who has accepted the stereotype as true, however unconsciously, to opt for an easy solution based upon an irrational stereotype instead of a more difficult solution based upon a rational conclusion reached through the processes of thought, and listening and evaluation. Racism, including anti-black racism, is present in society in Canada not only in overt forms but also subconsciously among many people and institutions who operate on the basis of negative racial stereotypes including those directed towards blacks and in particular black males. (see* R v. Parks*, [1993] OJ No 2157 at paras. 42-3, 47, 54 and 60-61 (*Parks*);* Knoll North America Corp v. Adams*, 2010 ONSC 3005 at paras 20, 32-37 and 48 (*Knoll*);* Sinclair v. London (City)*, 2008 HRTO 48 at paras 17-18 and 53-54;* Shaw v. Phipps*, 2012 ONCA 155 at paras 33-36.)*

[477] *Turner* was a case about a failure to hire, not a termination of employment. However, the test articulated in *Turner* as follows at paragraph 54 is also relevant to a termination of employment:

> *[54] … The Tribunal is tasked with discerning whether discrimination was a factor in failure to hire. To do so the Tribunal must consider all of the circumstantial evidence, make findings of fact and determine whether the inference that may be drawn from the facts support [sic] a finding of discrimination on the balance of probabilities. However, there has to be a nexus between the conduct under scrutiny and a prohibited ground of discrimination. The nexus can be inferred through the circumstantial evidence, but the inference of discrimination must be more probable than other possible inferences. In making the inference, the fact at issue must be proved by other facts. Each piece of evidence need not alone lead to the conclusion. The pieces of evidence, each by themselves insufficient, are combined to provide a basis for the inference that the fact at issue exists.…*

[478] In *Turner*, the complainant had received positive work evaluations before the selection process at issue in that complaint. The CHRT held that the evaluations had to be considered to properly assess the decision to disqualify Mr. Turner. The CHRT noted the positive comments about Mr. Turner's job performance over a lengthy period and stated this, at para. 125: "To me, these evaluations starkly contrast with and, as a result, raise serious doubts about the validity of the reasons given for disqualifying him simply because of his performance at the … interview."

[479] Mere suspicions of discrimination are not sufficient for a finding of discrimination; see *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32 (upheld in *Filgueira v. Garfield Container Transport Inc.*, 2006 FC 785), at para. 41.

[480] I recognize that the grievor perceives how she was treated as being discriminatory. Although Supt. Sandhu testified that she had not observed racism in the workplace, that is her experience and cannot be applied to the experiences of others.

[481] In *Bah*, the Board noted as follows at paragraph 246:

> *[246] However, it is not enough to make a racism allegation, even in an environment in which racist acts are seen; allegations directed at a particular person … must still be supported by evidence. I know that racism can be subtle, but a mere allegation is not enough (see* Filgueira*). As the Supreme Court indicated in* Bombardier*, at para. 88, "Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct."*

[482] I have addressed the erroneous comments in the TPQ in the section of this decision on the termination of the grievor's employment. I note that the comments about the NEXUS office incident were removed from the TPQ. Although Supt. Chamieh did refuse to remove an allegation in a TPQ related to abuse of sick leave, there is no evidence that this refusal was based on race, colour or sex. Supt. Chamieh did not testify at this hearing. The grievor did not establish that the inappropriate comments or Supt. Chamieh's refusal to meet with her were based on any grounds of discrimination.

[483] The removal of the grievor's firearm and defensive equipment was done after she inappropriately handled the firearm. She made no submissions on how the removal was motivated by discrimination, in whole or in part. There was no evidence of discrimination in the employer's actions of removing both the firearm and defensive equipment. I find that there is no evidence of discrimination in the removal of the firearm and defensive equipment.

[484] The allegations of being targeted or singled out for differential treatment and excessive scrutiny are the only allegations that pertain to the termination of the grievor's employment. I have already reviewed the basis for the employer's decision to terminate her employment. She could point to no evidence in her assessments in support of her discrimination allegations. Her view was that Supt. Forrest's reference to "our special friend" was discriminatory. While I agree that it was not an appropriate reference, the grievor did not establish that the word "special" referred to a prohibited ground of discrimination. Supt. Forrest's view expressed at the hearing that it was "interesting" that the grievor viewed herself as racialized does not demonstrate discrimination — it is not clear in what way he found it interesting. In any event, there is no evidence that it was a factor in the decision to terminate her employment.

[485] Although the grievor alleged in her grievance that she was "targeted" by superintendents and subject to "excessive scrutiny", she did not prove that she received any scrutiny that was not associated with the employer's concerns with her performance. There was some evidence that other trainees had different experiences during their training — in both oral testimony and the OIDP evaluation. However, the grievor did not establish a nexus between any differential treatment and a prohibited ground of discrimination. A mere allegation that it was discriminatory is not sufficient to support a finding of discrimination.

[486] The grievor also alleged that the notice that went to all employees at PIA after her termination of employment was based on racial stereotypes. This allegation relates to being "targeted" or "singled out" in the words of her grievance. I heard evidence that this email was sent in error to all employees, when emails about employees whose employment had been terminated would normally be sent only to managers. The grievor did not establish that the email was sent based on racial stereotyping. It is unfortunate that a correction or explanation was not forthcoming from Ms. Durocher, but the grievor has not established that the action was a discriminatory practice.

[487] Accordingly, the grievance alleging a breach of the "No Discrimination" clause of the collective agreement is denied.

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

(The Order appears on the next page)

VII. Order

[489] The grievance against the three-day suspension (Board file no. 566-02-14490) is allowed, in part. The suspension is replaced by a written reprimand.

[490] The grievance against the 7-day suspension (Board file no. 566-02-14491) is allowed in part. The suspension is reduced to 5 days. The parts of the grievance related to a breach of procedural fairness and the lack of a bargaining agent representative are denied.

[491] The grievance against the 10-day suspension (Board file no. 566-02-14492) is allowed in part. The suspension is reduced to 5 days.

[492] The grievance against the 15-day suspension (Board file no. 566-02-14493) is allowed.

[493] The grievor is entitled to interest from the dates of each suspension until the date on which payment is made, calculated at the annual rate based on the Bank of Canada Rate - Monthly Series.

[494] The grievance against the termination of employment (Board file no. 566-02-14497) is allowed on the merits.

[495] The grievor is awarded three months of salary and benefits at the rate in effect at the time of the termination of employment (May 1, 2016). The grievor is awarded interest from May 1, 2016, until the date on which payment is made, calculated at the annual rate based on the Bank of Canada – Monthly Series.

[496] The grievor is to be reinstated to the OIDP, to commence on a mutually agreeable date, subject to the rules and procedures currently in place for the OIDP.

[497] The grievances alleging a breach of managerial responsibilities and disguised discipline (Board file nos. 566-02-14498, 14499, 14506, and 14507) are denied.

[498] The grievance alleging discrimination (Board file no. 566-02-14489) is denied.

[499] Exhibits E-8, E-10 to E-13, E-19, E-21, G-24, and G-30 to G-33 are ordered sealed.

[500] The identities of the travellers mentioned at the hearing are ordered anonymized.

[501] The personal identifiers of any travellers in the exhibits are ordered to be redacted in all Board files related to this decision. The employer shall submit redacted copies of any documents that contain personal identifiers of travellers to the Board, within 30 days of this decision. Any documents containing those personal identifiers will then be returned to the employer by the Board.

[502] The birthdates of the grievor, the grievor's spouse and children are to be redacted. The employer shall submit redacted copies of the documents that exclude the birth dates to the Board, within 30 days of this decision. Any documents containing those personal identifiers will then be returned to the employer by the Board.

[503] I retain jurisdiction to address any issues relating to the redaction of the files.

[504] The documents requiring redaction by the employer are ordered sealed until the redaction is completed.

January 25, 2024.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board