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



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

BETWEEN

RANDALL MARTENS

Grievor

and

**DEPUTY HEAD
(Department of National Defence)**

Respondent

Indexed as
Martens v. Deputy Head (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: Christopher Rootham, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Grievor: Himself

For the Respondent: Alyson Sutton, counsel

Heard at Ottawa, Ontario,
February 19 to 21, 2024.

REASONS FOR DECISION

I. Overview

[1] The issue in this grievance is whether I should uphold a one-day suspension for insubordination. Dr. Randall Martens grieves against a one-day suspension issued by the Department of National Defence (DND), which I will refer to as “the employer”. On two occasions in January 2019, Dr. Martens was instructed to read and sign his Professional Development Assessment (PDA). Dr. Martens did not do so.

[2] I have dismissed the grievance and upheld the one-day suspension.

[3] Dr. Martens received an instruction on January 9, 2019, to read and sign his PDA. However, the instruction did not come with any deadline to complete those tasks. Dr. Martens met with more senior managers over the next two weeks to discuss his concerns about the PDA. By doing so, he did not ignore the January 9, 2019, instruction, nor did he disobey that instruction as it did not come with any express or implied deadline.

[4] Dr. Martens received a second instruction on January 23, 2019, to read and sign his PDA by the end of that day. He did not do so. This time, the instruction was clear and given by a manager responsible for Dr. Martens. His decision not to read or sign his PDA was insubordinate.

[5] Dr. Martens provided four justifications for not reading or signing his PDA. I have rejected those four justifications. Briefly, the employer was not required to warn Dr. Martens that he could be disciplined for his disobedience, the manager who gave the order had the authority to do so, the order was capable of being performed as Dr. Martens had ample time to read and sign his PDA, and the PDA was ready for his signature and did not require the signature of the final manager responsible for countersigning it.

[6] I have also decided that a one-day suspension was appropriate in the circumstances. Dr. Martens has not indicated that he would change his behaviour voluntarily going forward. Dr. Martens was also dishonest during the investigation into this disciplinary matter. While his refusal to read and sign the PDA had no concrete impact on the employer, nevertheless, I have decided that a one-day suspension is

appropriate in the circumstances to drive home to Dr. Martens the need to follow the instructions that he is given.

II. Admissibility of documents presented by the employer

[7] At the outset of the hearing, the grievor objected to 23 of the 35 documents filed by the employer because they were disclosed shortly before the hearing. The employer then objected to 19 of the 44 documents filed by the grievor on the grounds of relevance. I allowed both objections in part. I read my reasons for allowing the objections to the parties at the hearing and said that I would provide a written version of those reasons in this decision, after editing them for grammatical purposes. My reasons were as follows:

The grievor objects to the employer introducing documents that were not disclosed to him on the employer's Pre-Hearing Exchange of Document List.

The employer provided a copy of its Pre-Hearing Exchange of Document List to the grievor on January 12, 2024. During a pre-hearing conference held on January 29, 2024, I directed that the grievor disclose his Pre-Hearing Exchange of Document List on February 9, 2024. He did so. The parties also filed copies of the documents they intended to rely upon in this hearing on February 14, 2024, again as I directed.

The employer's book of documents contains 35 documents in total. Of those 35, 23 of them were not previously disclosed to the grievor. The employer explained that it added these documents in response to the documents disclosed by the grievor on February 9, 2024 as well as issues raised during the pre-hearing conference. The employer could not explain why it did not alert the grievor to having added to its book of documents, although the employer's representative did apologize for having done so.

At the outset of the hearing on February 19, 2024, I asked the parties for their submissions about whether I should exclude the impugned documents. The grievor stated that the documents should be struck. The grievor stated that he was prejudiced by their late inclusion as he has not had time to adequately prepare for those documents. The employer stated that the documents are relevant, and then asked me to strike a number of the grievor's documents which I will list later. The parties both agreed that some personal information of the grievor was in the employer's book of documents and should be redacted. The employer submitted that none of the documents it objected to were relevant. I also asked a number of questions about the documents to both parties.

The Board's Policy on Pre-Hearing Exchange of Document Lists requires parties to exchange lists of arguably relevant documents with each other 60 calendar days before the first scheduled

hearing date. Both parties missed that deadline. The policy permits parties to apply to the Board for an order that a non-complying party comply with the policy. Neither party made such an application. The policy also reads as follows:

...

15. If a party fails to comply with this direction by failing to provide the Document List within the set time frames or fails to produce a document, the Board or adjudicator assigned to hear the matter may, among other statutory authorities, exercise its or his or her discretion by making determinations at the hearing. For example, it or he or she may refuse to accept the document into evidence or may draw adverse inferences.

16. If a party fails to comply with this direction by failing to request the production of documents, and during the course of a hearing, a document otherwise disclosed is entered into evidence, an adjournment or a postponement request may be refused.

...

The Board's policy permits, but does not require, me to refuse to admit documents that were disclosed late. However, the Board's policy does create an expectation that parties will provide timely disclosure of relevant documents in their possession. That obligation is ongoing, so that late disclosure is not always problematic and in some situations ought to be encouraged. This is not such a case. These are not new documents that came into the employer's possession; these are documents that the employer has decided are relevant after thinking about the nature of the case.

In deciding whether to admit the documents, I have considered the reasons for the late disclosure, the prejudice to the grievor, the prejudice to the employer if the documents are not admitted, the relevance of the documents, the significant number of documents that were disclosed late (in particular, that two-thirds of the employer's documents were not in its disclosure list), and the conduct of the employer in adding these documents to its book of documents without warning the grievor or the Board that it had not previously identified or disclosed those documents.

Having heard the parties' submissions, I have decided as follows about the employer's book of documents.

- *Tabs 1-2: These documents are duplicates of documents filed by the grievor, except the grievor's versions properly redacted his PRI. These documents will be struck.*
- *Tab 3: this is a blank copy of a PDA. It is irrelevant because I can see what the PDA form looks like by reading its completed version.*
- *Tabs 4-6: these documents are of very low relevance to the employer, and I am not certain they have any relevance. This*

means that the employer will suffer little prejudice if they are excluded. I have excluded them.

- *Tab 11: this is an email that goes on to provide a series of attachments. The attachments to the email are already in the grievor's documents. The email itself simply provides one person's (who is going to be a witness) reasoning for wanting to discipline the grievor. I fail to see the prejudice to the grievor, and I have admitted the document.*
- *Tab 14: This document has low relevance and I am not certain it is relevant at all. However, I understand the employer's submission that it is responsive to the grievor's documents about the IRM process and therefore will allow it.*
- *Tab 16: This document has low relevance, but I admit it for the same reasons as Tab 14.*
- *Tabs 22-29 are about the grievor's previous misconduct. The letter of discipline in this matter states that the grievor was suspended, in part, because "you have been disciplined in the past for similar misconduct" without identifying that misconduct. I am frankly confused about why the employer did not consider these documents relevant from the start. While the grievor obviously had copies of these documents already, the employer's failure to produce documents like this is prejudicial because it could lead a grievor to conclude that the employer is not relying upon that previous disciplinary record. I have excluded those eight documents from the employer's book of documents. For clarity, the employer's witnesses may still explain the discipline letter and explain what "similar misconduct" they are referring to, but they will have to do so without referring to any of these documents. Additionally, I want to be clear to the grievor about the previous discipline. I am not here to rule on whether there were grounds for the earlier discipline. I will not hear any evidence about whether the grievor should or should not have been disciplined previously. I will only hear evidence about the fact of the previous discipline and the subject-matter of the previous discipline, as this is relevant to the penalty in this case.*
- *Tabs 30-31 are the Treasury Board Secretariat Values and Ethics Code and the DND Code of Values and Ethics. These documents are widely available. Those two documents are also referred to by name in the discipline letter. They are clearly relevant and certainly should have been disclosed; however, since they may form an integral basis of the discipline the prejudice to the employer in refusing to admit these documents would outweigh the prejudice to the grievor in their late disclosure.*
- *Tabs 32-34, on the other hand, are not referred to in the discipline letter. I refer in particular to Gordon v. Canada Revenue Agency, 2021 FPSLREB 99 at paragraphs 116 to 122 where the Board concluded that a grievor (in that case represented by a bargaining agent) is entitled to rely on the employer's pre-hearing disclosure of documents and that the*

failure to list a policy in that disclosure is not inconsequential. I am not convinced that the documents are relevant since the letter of discipline does not refer to them. Even if they were relevant, the prejudice to the grievor in having the scope of this hearing expanded at the last minute to include those policies outweighs the prejudice to the employer in not being able to rely on them.

- *Tabs 34-35 are duplicates of documents already in the grievor's book of documents.*

I want to be clear about the consequences of my decision. First, I have ruled that the documents are to be excluded from the employer's book. If the grievor wants to introduce the documents (through cross-examination of an employer's witness, for example), he is still permitted to do so.

Second, I have admitted some of the documents. In cases involving late disclosure, the prejudice to the grievor can sometimes be cured by postponing the hearing to give the grievor the opportunity to review the documents and adjust his case accordingly. I have concluded that for the documents I have excluded, that is not possible to cure the prejudice. However, I will set out the grievor's choices shortly.

Additionally, I wanted to remind the grievor about the rule in Browne v Dunn, 1893 CanLII 65 (FOREP). If he is going to contradict the employer's witness, he needs to put that contradiction to the employer's witness. I am thinking in particular of the information in the employer's Tabs 4-6.

On the employer's motion, the employer has moved to strike Documents 1, 10, 11, 19 to 22 and 31 to 42 from the grievor's list of documents on the grounds of relevance.

- *Document 1: I agree this document is not relevant. The document is the email from the employer's counsel providing particulars to the grievor to allow him to prepare for the hearing. This email is not evidence of the facts stated in it — they are only allegations.*
- *For the rest of the Tabs, it is too early to determine their relevance. The grievor has yet to hear the employer's case in full, and neither have I. I am not prepared to rule on the relevance of these documents at this time. The employer may repeat this objection at the conclusion of the hearing, when the relevance of the documents will be more clear.*

Therefore, I have ordered as follows:

Tabs 1-6, 22 to 29, and 32 to 35 of the employer's book are struck.

Document 1 of grievor's documents is struck.

[8] I also directed the employer to refile a version of its book of documents after the hearing was completed that took out the impugned documents (but left the document numbering intact). Additionally, I went through the list of documents with

the parties on four occasions (at the beginning of the second day, at the conclusion of each of the two witnesses heard on the second day, and again during closing arguments) to identify which documents were now exhibits, because a witness had referred to them or discussed them, and which were not. I did this to assist everyone: out of fairness to Dr. Martens who was self-represented, because the employer requested that I do so, and to satisfy my craving for an orderly hearing.

[9] As it turned out, Tabs 14 and 16 of the employer's book of documents never became exhibits. Additionally, most of Dr. Martens' documents that the employer objected to were not entered as exhibits. The employer ended up not renewing its objection to the documents that did become exhibits.

[10] Finally, after reading my reasons for striking some but not all of the impugned documents, I informed Dr. Martens that the prejudice caused by the late disclosure of documents can often be cured by an adjournment. I gave Dr. Martens three choices: proceed with the hearing immediately, adjourn the hearing until later that week to give him more time to review the employer's documents, or adjourn the hearing indefinitely, to be rescheduled later. Dr. Martens took some time to consider those options and elected to continue with the hearing immediately.

III. Motion for a sealing order

[11] As I just discussed, the employer filed several documents in this grievance. Two of those documents contained a copy of an employee's personal record identifier (PRI), which is a number assigned to associate an employee with his or her personal records in the federal public service. Parties to a proceeding commonly redact an employee's PRI because it is not relevant to the proceedings before the Federal Public Sector Labour Relations and Employment Board ("the Board") yet can be used by malicious actors to access an employee's personal file. Therefore, I invited the employer to re-file its documents and consider whether it should redact the PRI or any other sensitive but irrelevant information in this case.

[12] The employer filed a redacted version of the PDA as well as a redacted copy of a letter containing Dr. Martens' PRI.

[13] In addition to redacting Dr. Martens' PRI, the employer redacted his salary from that letter. However, it did not redact Dr. Martens' classification level in any of the documents filed with the Board.

[14] Dr. Martens requested that the Board seal his classification level. He argues that by showing his classification level (including his step on that classification level), a person may use the publicly available information about the rate of pay for each step in his classification level to calculate his annual salary. The employer stated that it objected to further redactions based on the open court principle. Dr. Martens replied to state that "this is not an occasion to debate public vs private" because redacting the salary but keeping his classification level and step "hides nothing".

[15] In *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 the Supreme Court of Canada set out the test for an order redacting documents filed with a court. The party seeking the order must establish (1) that not sealing the document poses a serious risk to an important public interest, (2) that 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) that as a matter of proportionality the benefits of the order outweigh its negative effects. The Board has stated that the open court principle outlined in *Sherman Estate* applies to it as well; see *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLR 48 at para. 20.

[16] While Dr. Martens did not specify the important public interest at stake that would meet the first part of the *Sherman Estate* test, it is clear from his submissions that his concern is personal informational privacy. However, as the Supreme Court of Canada pointed out in paragraph 75 of *Sherman Estate*, a risk to informational privacy is not automatically a risk to an important public interest. The information must consist of what the Court calls a person's "biographical core" or information the release of which threatens a person's dignity.

[17] Dr. Martens' request raises this issue: does an employee's salary constitute biographical core information? I have concluded that it does not, unless there are special circumstances making it so.

[18] The parties did not provide me with any case finding that an employee's salary forms part of their biographical core, nor am I aware of any.

[19] A person's financial records do form a part of their biographical core; however, they do so because they disclose a person's "financial status and intimate lifestyle choices" (see *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841 at para. 55, in dissent but not on this point). A person's salary does not disclose their financial status or their intimate lifestyle choices. A person may have a high salary yet live like a Spartan; a person may have a high salary yet be swamped in debt because they live like a Sybarite; a person may have a low salary yet live a life of luxury because of some inheritance or spectacular investment — we know very little about someone just because we know their salary.

[20] There may well be a case in the future when disclosure of an employee's salary may impact their biographical core of personal information because their salary, together with other information in the documents filed with the Board, may allow someone to determine the employee's financial status, intimate lifestyle choices, or some other part of their biographical core. In this case there is no such information. Dr. Martens would prefer to keep his salary private. This is precisely the type of "... personal discomfort associated with participating in judicial proceedings ..." that the Supreme Court of Canada found in *Sherman Estate* (at para. 31) would not justify redacting information from the public record.

[21] Finally, I note that the Board's *Policy on Openness and Privacy* recommends that parties redact information that is not necessary to their case before sending it to the Board, including an employee's salary. If a party files a redacted document with the Board, the document remains redacted. Another party may request that the Board order that an unredacted copy be filed, and then the unredacted copy may end up being sealed (see, for example, *Albano v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 79), but until that happens the redacted copy is the extent of the Board's file. The employer voluntarily redacted Dr. Martens' salary. The fact that it did so does not mean it was required to or that the Board must seal the salary if disclosed elsewhere.

[22] For these reasons, I deny Dr. Martens' request to redact his classification and level from the documents filed in this grievance.

IV. Framework for the decision on the merits

[23] In a discipline case, an adjudicator must decide two things: whether the alleged misconduct occurred, and whether the disciplinary measure imposed was appropriate. The employer bears the burden of proving that the misconduct occurred and the facts underlying the appropriateness of the discipline; see *Basra v. Canada (Attorney General)*, 2010 FCA 24 at paras. 24 to 26.

[24] I will follow this same outline in these reasons by first considering the alleged misconduct and then turning to whether the disciplinary measure imposed was appropriate.

V. The misconduct

A. The disciplinary allegation

[25] Dr. Martens is a defence scientist working for Defence Research and Development Canada (DRDC). DRDC is part of DND. Dr. Martens worked in the Centre for Operational Research and Analysis (CORA). Dr. Waller was a Section Head in DRDC and was responsible for managing five teams within CORA. Dr. Waller supervised team leads, who in turn supervised scientists, including Dr. Martens. Dr. Waller reported to Dr. Charles Morrissey, the Director of CORA, who in turn reported to Jocelyn Tremblay, the Director General.

[26] On January 9, 2019, Dr. Waller sent an email to Dr. Martens that read as follows:

...

I have attached your 5-year PDA. Both John Weaver and I have signed it. Please read it, sign that you have read it, and provide comments if desired. I can discuss the details with you via telephone tomorrow afternoon or Friday. Please send me a meeting invite for a time that suits you.

...

[27] The employer states that Dr. Martens did not read or sign his PDA as ordered.

[28] On January 23, 2019, Dr. Waller sent another email to Dr. Martens that read as follows:

...

Before you do anything else today, I need you to read and sign your revised PDA (see attached). It is identical to the version I sent you previously, except the rating in Section 2.1 has changed from "unsatisfactory" to "satisfactory" and the wording in Sec 2.3 has changed. I will talk to you to explain the reason for the change. I am at Cumberland today so we can talk in person.

Please book a silent room from 1330 to 1400 so that we can discuss your PDA.

...

[29] The employer states that Dr. Martens did not read or sign his PDA as ordered.

[30] During its closing argument, the employer also argued that Dr. Martens' failure to respond to two emails from Dr. Waller dated January 17 and 20, 2019 was also insubordinate. However, the employer's letter of discipline stated that Dr. Martens was insubordinate on January 9 and 23, 2019. There is a long-standing principle that an employer may not alter the grounds for discipline at a hearing; see *Brown and Beatty, Canadian Labour Arbitration* (5th ed.), at 7:10. The employer did not provide any indication that this case fell within the exceptions to that principle. I will say more about the January 17 and 20, 2019, emails later; however, I am discussing those emails only to provide context and not as grounds for discipline in and of themselves.

[31] Recently, the Board has stated that to establish insubordination, the employer must establish three things: (1) that a clear order was given, which the employee understood; (2) that a person in authority gave the order; and (3) that the employee did not comply with the order; see *Walker v. Deputy Head (Department of the Environment)*, 2024 FPSLRB 18 at para. 452.

[32] The employer submitted that the test for insubordination is in fact fourfold: (1) the employer gave an order, (2) it clearly communicated the order, (3) the person giving the order had the proper authority to do so, and (4) the grievor did not comply on at least one occasion. The employer relied on *Focker v. Canada Revenue Agency*, 2008 PSLRB 7 at para. 103, for this fourfold test. Both *Focker* and *Walker* cite *Nowoselsky v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-14291 (19840724), in support of their respective tests. *Nowoselsky* sets out the fourfold test rather than the threefold test as in *Walker*.

[33] Having reviewed both tests, I cannot discern a difference between them that is relevant to this case. Regardless of which variant of the test I use in this case, the result would be the same.

[34] To understand this case, I will turn first to describing the professional development of research scientists employed at DND. I will then describe the events that occurred in this case and whether the employer has proven that Dr. Martens was insubordinate. I will conclude by considering the justifications offered by Dr. Martens for his behaviour.

B. Professional development of defence scientists

[35] The professional development of research scientists in the federal public service is different from other public servants. Promotion for most public servants is position-based, meaning that a public servant who wants a promotion must apply for a different position and be appointed according to the merit principle. Positions are classified and paid according to their duties.

[36] Research scientists are promoted based on an incumbent-based process, as provided for in s. 34(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) and s. 2 of the *Public Service Employment Regulations* (SOR/2005-334). An incumbent-based process means that research scientists are promoted when their work achieves certain levels along a continuum of professional development. While each department with researchers has a slightly different process, the broad outlines are the same at DND as in other departments. Research scientists work with their managers to prepare a form outlining their accomplishments over a number of years. Increasingly higher levels of management review the form and provide their recommendations. Ultimately, the form goes to a committee composed of an Assistant Deputy Minister, other senior executives, and sometimes participants from other departments. This committee reviews each form and decides what to do (to promote a scientist, hold them at level, or do something else). Research scientists who disagree with the committee's decision can apply for independent recourse against the committee's decision. The department selects an independent reviewer from a list agreed upon by the bargaining agent for research scientists (typically, an experienced researcher from another department), who then reviews the committee's decision to decide whether it abused its authority in some way. The reviewer makes a recommendation to the deputy head of the department, who makes the final decision.

[37] While the details of and some of the terms used in this process have changed over time, an overview of the process in place at DND in the early 2010s is set out in *Rabbath v. Canada (National Revenue)*, 2014 FC 999 at paras. 3 to 8 and was helpful context for me to understand the facts of this case.

C. What happened in this case

1. The PDA

[38] The PDA is the form used to assess the work of a defence scientist. The rules for this incumbent-based process at DND that I summarized earlier are set out in the “DS Salary Administration System” or “SAS”. Part VI of the SAS is a 29-page document setting out how to complete a PDA. It states that a PDA is to be completed in 9 possible scenarios. The most common reason is that a defence scientist is being proposed for a promotion (either by their manager or on their own initiative). The second most common reason is a 5-year review, as a defence scientist’s rate of professional development must be assessed every 5 years. The PDA in this case was prepared on the basis of a 5-year review, improperly as it turned out.

[39] The process of completing a PDA begins with a call letter from the Assistant Deputy Minister. For the process relevant to this case, the call letter was dated August 31, 2018. The call letter required all PDAs to be completed by December 21, 2018, although Dr. Waller and Dr. Morrissey both testified that in their experience, the annual deadline was almost never met, and that in practice, the PDAs were completed much closer to the meeting date of the committee called the Defence Scientists Career Progression Committee or “DSCPC”.

[40] The PDA is composed of six sections plus an annex. Section 5 of the PDA sets out the evidence of the state of professional development of a defence scientist assessed against seven criteria. The annex provides a list of the defence scientist’s publications, reports, peer-reviewed external literature, and oral presentations. The other sections contain either biographical information about the defence scientist (name, position number, etc.) or recommendations by the different managers responsible for making recommendations on a PDA.

[41] In this case, the work began on Dr. Martens’ PDA in the summer of 2018. Dr. Martens testified that this was “out of cycle” because it would normally be worked on later in the year after the call letter was sent out. That work was put on hold after Dr.

Martens complained to Mr. Tremblay. Nevertheless, Dr. Martens prepared a draft of section 5 of the PDA by July 30, 2018 before it was put on hold. Dr. Waller edited section 5 of that draft closer to January 9, 2019 and prepared section 6, which is the assessment by the “Immediate Line Manager”. He then had it reviewed by the “Professional Development Manager” (John Weaver) who completed section 2 of the PDA.

[42] Dr. Waller stated in the PDA that Dr. Martens’ state of professional development was unsatisfactory and recommended that his pay increment be held (i.e., frozen) at its current level. The Professional Development Manager concurred.

2. The January 9, 2019 order

[43] Dr. Waller sent the PDA attached to the email dated January 9, 2019 that I quoted earlier. Section 3 (which is the section for Dr. Martens to sign and make comments) was left blank. Section 3.2 is where Dr. Martens was to sign the PDA.

[44] Section 4 of the PDA is where the Reviewing Officer (Dr. Morrissey) states whether they concur with the recommendation made by the other managers. At this stage, it remained blank.

[45] Dr. Martens did not respond by email to Dr. Waller’s email of January 9, 2019.

3. Events between January 9 and 23, 2019

[46] Dr. Waller states that he did not receive a response from Dr. Martens and therefore sent a follow-up email on January 17, 2019. Dr. Martens stated that he “would have” spoken to Dr. Waller on either January 9 or 10, 2019, about the PDA. Dr. Martens could not recall the date of that conversation or any details about the conversation.

[47] However, Dr. Martens did introduce into evidence an invitation for a meeting between him and Mr. Tremblay that was to take place on January 15, 2019. The meeting invitation was sent by Dr. Waller. The meeting invitation states, “Randy Martens would like to meet with you to discuss his 5-year PDA.” The meeting was later rescheduled to January 22, 2019.

[48] Dr. Waller testified that he could not remember whether Mr. Tremblay or Dr. Martens requested this meeting. However, the wording of the invitation clearly

indicates that Dr. Martens requested the meeting. This means that Dr. Martens must have spoken to Dr. Waller about the PDA at some point before January 15, 2019 — even if only to ask for a meeting with Mr. Tremblay about the PDA.

[49] Therefore, I cannot conclude that Dr. Waller did not receive any response to his email, as he stated. He must have received some response to know that Dr. Martens wanted to discuss his PDA with Mr. Tremblay.

[50] Additionally, Dr. Martens introduced a similar meeting invitation from Dr. Waller to him and Dr. Morrissey, this time for January 22, 2019. This time, the invitation states this:

...
Charles Morrissey, as CORA's Acting CD, will be taking part in the DSCPC review of PDAs in February. All Centre Directors will be participating at the DSCPC by "providing clarification" on individual cases when asked by the voting members of the DSCPC (largely DRDC DGs with two or more very senior scientists). In order for Charles to be as well prepared a [sic] possible, he would like to meet with you to discuss your case.
...

[51] Dr. Morrissey testified that he requested this meeting with Dr. Martens because he was confused about why Dr. Martens had not signed the PDA. In light of the wording of the meeting invitation, I have no reason to doubt that explanation.

[52] Dr. Martens also introduced into evidence an electronic message indicating the acceptance of the meeting with Mr. Tremblay. Dr. Martens put to Dr. Waller during cross-examination that this meeting acceptance was actually for a meeting between Dr. Waller and Dr. Martens, but Dr. Waller denied that any such meeting was scheduled or held. He explained that he was responsible for setting up meetings between Dr. Martens and other managers to discuss the PDA, and this meeting acceptance was for one of those meetings. I accept Dr. Waller's explanation, particularly as Dr. Martens never testified that he met with Dr. Waller on or about January 15, 2019, about his PDA.

[53] Nevertheless, I have concluded that Dr. Martens must have spoken with Dr. Waller about the PDA at some level before January 15, 2019, to schedule the meeting between Dr. Martens and Mr. Tremblay.

[54] On January 17, 2019, Dr. Waller sent an email to Dr. Martens, asking, “Would you like to discuss your PDA before you sign (and, if you want, comment on) it?”

[55] Dr. Martens did not respond to this email, either verbally or in writing. While Dr. Martens testified that he found it hard to believe that he would not have mentioned it or brought it up, he could not recall any discussion about his PDA with Dr. Waller after January 17, 2019. He said that he must have spoken with Dr. Waller because he requested a meeting with Mr. Tremblay. However, I concluded that as the meeting with Mr. Tremblay was originally scheduled for January 15, 2019, any discussion about it must have occurred before that date.

[56] When asked during cross-examination why he did not respond, Dr. Martens said that this email was a pressure tactic to get him to sign the PDA, against his will. He also later submitted during his closing argument that it was rude and offensive to email him about his PDA after January 9, 2019, because Dr. Waller knew that he was not going to sign the PDA.

[57] Then, for the first time during his closing argument, Dr. Martens stated that he met with Dr. Waller on January 18, 2019, about his PDA.

[58] Dr. Waller had testified that he met with Dr. Martens on January 18, 2019, to discuss his mid-year performance review that had been prepared the previous November. Dr. Waller testified that he did not discuss Dr. Martens’ PDA at that time because the discussion was supposed to be about Dr. Martens’ mid-year review. Dr. Martens did not ask Dr. Waller in cross-examination about the January 18, 2019, meeting, and he never put to Dr. Waller that they spoke about his PDA.

[59] Moments later in his closing argument, Dr. Martens changed his version of events again and stated that it was just unlikely that he did not respond to Dr. Waller after January 17, 2019.

[60] I cannot accept Dr. Martens’ statement that he discussed his PDA with Dr. Waller on January 18, 2019, since he made that statement during his closing argument and not while testifying. Even if I were to consider his closing argument as if it was testimony given under solemn affirmation, I would reject it as he contradicted himself several times (saying that he spoke with Dr. Waller after January 17 to set up a meeting

scheduled for January 15, then that he spoke with Dr. Waller on January 18 specifically, and then that it was just “unlikely” that he did not speak with Dr. Waller).

[61] The meeting invitation for January 18, 2019, said that it was about the mid-year review, and I have concluded that that is what was discussed.

[62] On January 20, 2019, Dr. Waller sent another email to Dr. Martens, as follows:

...

On Jan 9, I sent you your 5-year PDA for your review. You haven't responded to any of my emails about your PDA and you haven't returned the PDA with your signature or comments yet. Your PDA will have to be sent to the board members for their review, with or without your comments, on Monday or very soon thereafter. If I don't get your signature, I'll note on the PDA that you were given the opportunity to sign and comment and declined to do so.

Please let me know ASAP if you will be providing your signature and/or comments.

...

[63] Dr. Martens did not respond to this email either. This time, Dr. Martens does not dispute that he did not respond. He said again that the January 20, 2019, email was rude and inappropriate because Dr. Waller knew that he was not going to sign his PDA.

[64] No reasonable person reading the emails dated January 17 or 20, 2019, could characterize them as either a pressure tactic or as rude or offensive.

[65] Dr. Martens met with Dr. Morrissey on January 22, 2019, to discuss the PDA. Dr. Morrissey said that it was not a long meeting because Dr. Martens acknowledged that he had not read the PDA. Dr. Morrissey said that he encouraged Dr. Martens to read the PDA, add his comments, and sign it. Dr. Morrissey also said that he did not understand why Dr. Martens would not read and sign his PDA. Dr. Martens provided no evidence about this meeting.

[66] Dr. Martens met with Mr. Tremblay on January 22, 2019. Other than the fact of the meeting, Dr. Martens provided no information about what happened during that meeting.

[67] In the meantime, Dr. Martens' PDA had been amended. Originally, the PDA stated that Dr. Martens' job performance was unsatisfactory. However, the SAS as

written at the time prohibited an unsatisfactory rating on a PDA unless the employee had received an unsatisfactory rating on their annual performance assessment. Dr. Martens had not received such a rating. Therefore, the PDA was amended to indicate that Dr. Martens' performance was satisfactory instead of unsatisfactory. However, section 2.3 of the PDA (signed by John Weaver on January 22, 2019) was also amended to include the following passage, in square brackets:

... Note: under 2.1 a "satisfactory" rating was given because the option of an "unsatisfactory" rating was not available in the absence of preceding annual performance agreements with such ratings. However, a "satisfactory" rating does not accurately reflect the evidence that his state and rate of PD is below expectations for his level/step....

4. Events of January 23, 2019

[68] On January 23, 2019, Dr. Waller sent Dr. Martens the email I quoted earlier with the amended PDA. Then, Dr. Waller travelled to Dr. Martens' building to hand him a copy of the PDA and to instruct him to spend the next 1.5 hours reading the PDA and then to discuss the PDA with him. Dr. Waller also instructed Dr. Martens not to work on any other tasks until that was done. Dr. Martens told Dr. Waller that he did not need a hard copy because he already had the electronic copy, but Dr. Waller gave him the hard copy anyway.

[69] Dr. Waller then met with Dr. Martens 1.5 hours later (at 13:30). When they met, Dr. Martens told Dr. Waller that he still had not read the PDA. Dr. Waller testified that Dr. Martens explained that he did not have time to read it because Dr. Waller had assigned him too much other work to do. Dr. Waller then gave Dr. Martens until the end of the day (roughly another 3 hours) to read and sign the PDA.

[70] Dr. Martens never signed the PDA.

[71] I have no evidence that Dr. Martens ever read his PDA either. Dr. Martens testified that he looked at the PDA on January 9, 2019, and that he saw that it recommended that his salary be held in place. He testified that as soon as he read that, he did not need to read anything else and would not do anything else until he met with Mr. Tremblay. As to why he did not read it after he met with Mr. Tremblay on January 22, 2019, he said during his closing argument (but not during his testimony) that there

would have been no point because he knew that he did not have enough time on January 23, 2019, to review the PDA and prepare his comments.

[72] In conclusion, Dr. Waller instructed Dr. Martens to read and sign his PDA on January 9, 2019. While he was not given any firm deadline to do so, he never read or signed his PDA. Dr. Waller also instructed Dr. Martens to read and sign his PDA on January 23, 2019, by the end of that day. He did not read his PDA, and he did not sign it.

5. Events after January 23, 2019

[73] Despite Dr. Martens' refusal to sign his PDA, it was submitted to the DSCPC, which considered it during its meeting on February 12 and 13, 2019. The DSCPC agreed with the recommendation to hold Dr. Martens' salary progression at its current point and ordered that his PDA be sent back to the DSCPC for reassessment in one year.

[74] Dr. Waller advised Dr. Morrissey about Dr. Martens' actions. Dr. Morrissey conducted a disciplinary meeting with Dr. Martens and imposed a three-day suspension on him for insubordination. That disciplinary measure was later reduced to one day because an earlier disciplinary measure was reduced from a one-day suspension to a reprimand, and reducing this suspension from three days to one day reflected the principle of progressive discipline.

[75] Outside the discipline process, Dr. Martens applied for recourse against the DSCPC's decision. On August 29, 2019, the independent reviewer assigned to that request for recourse recommended that the DSCPC's decision be annulled, for 2 reasons. First, the reviewer concluded that the DSCPC should not have directed Dr. Martens' PDA be returned to it the following year because, according to the SAS, it requires more than 1 year to demonstrate a change of rate of professional development for a research scientist. Second and more importantly, the reviewer concluded that the PDA should never have been prepared in the first place because Dr. Martens had worked for only the equivalent of 35 months since his last PDA was prepared in 2013 as a result of some periods of leave. The SAS states that the period of review in a PDA "... should include the equivalent of at least three years of full time work." Since 35 months is 1 month shy of 3 years, the PDA was "finalized

prematurely” in the words of the reviewer and should not have been considered by the DSCPC.

[76] Dr. Martens highlighted another portion of the reviewer’s recommendation that he says was critical of the decision to prepare a PDA on his behalf. Having read that portion of the reviewer’s report carefully, it was as critical or more critical of Dr. Martens for having refused to participate in the preparation of his PDA in January 2019. The reviewer’s report read as follows:

...

*Rationale: Whether or not the material in the PDA is accurate or not is overshadowed by a bigger issue of Dr. Martens being permitted **not** to engage in the preparation of his PDA nor read nor sign the documentation prior to submission to the DSCPC — although he was strongly encouraged to do so by management. The DND system involves a series of checks and balances to help ensure that each PDA presented to the DSCPC is a fair and complete reflection of a Defense Scientist’s performance and state of professional development. In particular, the “DS Salary Administration System (SAS) Part VI — Guide to DS Professional Development Assessment (PDA) Submission Process and PDA Form Completion” (note: The Role of the Employee in Identifying the Evidence” (p. 16) and see also Completion of Section 3 (Employee Comments), p. 26 and 27) are clear on the roles and requirements of the employee, even when there is a “case of disagreement with what evidence is provided or how it is presented...”.*

*In my opinion as Independent Reviewer, meaningful participation of a DS throughout the PDA process by, variously, her/him discussing and providing input to the assessments from her/his Line Manager and providing fulsome comment on the contents of her/his PDA are imperative to the transparency and effectiveness of the system. **Consequently, if there was false and/or missing information in the PDA, then Dr. Martens’ choice to not take part in the preparation of his documentation could be as likely a cause of Claim #4 as Abuse of Authority by management.** In the circumstances, I am unable to make a recommendation as retroactively delving further into the claim would only generate speculation and go beyond my role as an Independent Reviewer.*

...

[First emphasis in the original, and second emphasis added]

[Sic throughout]

[77] The reviewer went on to recommend that DND change its PDA process so that researchers bear the responsibility for preparing their own PDAs and that any refusal to do so be dealt with using other human resources tools.

[78] The deputy head of DND agreed with the reviewer's recommendation to annul the DSCPC's decision. DND has not adopted the broader recommendation by the reviewer to change its PDA process.

6. Conclusion about the essential elements of insubordination

[79] I have concluded that Dr. Martens was not insubordinate in his failure to read and sign his PDA on or shortly after January 9, 2019.

[80] The email of January 9, 2019, did not contain any deadline for Dr. Martens to read and sign his PDA. Dr. Waller explained that he was not in the practice of giving deadlines to defence scientists for these sorts of matters because they usually came back to him within a day or the next day. However, he also said that employees should be given a reasonable amount of time before responding to a PDA so that they can discuss it with their union or someone else.

[81] In this case, Dr. Martens did not completely ignore Dr. Waller's email. While he did not discuss the substance of his PDA with Dr. Waller, he did ask Dr. Waller to arrange a meeting with Mr. Tremblay to discuss his PDA. That meeting did not occur until January 22, 2019.

[82] Additionally, Dr. Waller's email on January 20, 2019, was some indication that the instruction to read and sign the PDA was less firm than might otherwise have been indicated in the January 9, 2019, email. That email asks Dr. Martens to let Dr. Waller know **if** he will be providing his signature or comments. That email, coupled with the fact that Dr. Waller had arranged for Dr. Martens to meet with Mr. Tremblay to discuss his PDA, means that there was no clear order given that Dr. Martens did not comply with. To put this another way, it was reasonable for Dr. Martens to take until after he met with Mr. Tremblay to finish reading and then sign his PDA.

[83] However, the situation changed on January 23, 2019. Dr. Waller gave Dr. Martens a clear order to read and sign his PDA. Dr. Waller ordered Dr. Martens by email to take those steps before he did anything else that day. Dr. Waller later gave Dr. Martens a verbal order to complete those steps by 13:30 that day before they met. When they met and Dr. Martens still had not read or signed his PDA, Dr. Waller gave him until the end of the day to do so.

[84] Dr. Waller gave a clear order on January 23, 2019, which Dr. Martens did not comply with. The employer has proven that those two essential elements of insubordination occurred on January 23, 2019, but not before.

D. Dr. Martens' justifications for not reading or signing his PDA

[85] Dr. Martens offered four justifications for not reading or signing his PDA. I will address them in the order in which he made those arguments. In addition to those four justifications, Dr. Martens made another claim during the hearing that he did not itemize at the end, which I will address after addressing his first four justifications. In short, Dr. Martens has not justified his failure to comply with the instruction given to him on January 23, 2019.

1. A warning was not required

[86] First, Dr. Martens argued that he could not be disciplined for refusing to follow the order to read and sign his PDA because Dr. Waller did not warn him that he could be disciplined for refusing to follow the order.

[87] Dr. Martens cited no authority for this proposition. Nor could he, as the proposition is incorrect.

[88] Warnings about the consequences of misconduct are relevant when determining the appropriate level of discipline. As explained as follows in Brown & Beatty, at 7:71:

*The failure of an employer to advise an employee that it will not tolerate certain activities or practices, including non-culpable behaviour such as inadequate work performance or innocent absenteeism, **is considered a mitigating factor** if it denies the person the chance to defend himself or herself and show capability of acting in the way the employer requires, and/or lulls the employee into a false sense of security.*

[Emphasis added]

[89] Had the employer moved immediately to terminate Dr. Martens' employment for insubordination, its failure to warn him that insubordination could lead to termination of employment would be relevant when assessing whether termination was appropriate. The failure to warn would mitigate a more serious disciplinary consequence.

[90] However, employers are not obligated to ensure that every order or instruction is accompanied with a warning about the consequences of disobedience.

2. Dr. Waller could order Dr. Martens to sign the PDA

[91] Dr. Martens argued that Dr. Waller could not order him to sign his PDA. His argument on this point was threefold.

[92] First, Dr. Martens argued that employees do not have to sign their PDAs. I agree. There is nothing in the SAS that requires an employee to sign their PDA. Dr. Morrissey also agreed that defence scientists are not absolutely required to sign their PDAs.

[93] However, Dr. Martens' submission misses the point. He was not disciplined because he did not sign his PDA; he was disciplined for not following Dr. Waller's order to sign his PDA. Signing the PDA was optional up to the point that Dr. Waller ordered him to sign it. From that point on, it was not optional.

[94] Second, Dr. Martens argued that he could not sign his PDA because the act of signing it would mean that he agreed with the propriety of preparing it and with its contents. His position was that there should not have been a PDA and that his salary should not have been held in place as a result of it. He reasoned that signing the PDA would have meant that he was giving it the "green light", in his words.

[95] This is also not the case.

[96] Article 3.6.3 of the SAS says clearly that:

*The employee's signature in Section 3 confirms the content of Section 3. It also confirms that the employee has read and understood the contents of this PDA, has discussed it with his/her ILM and has been offered the opportunity to comment. **It does not necessarily imply any agreement with the other contents of the PDA by the employee.***

[Emphasis added]

[97] Section 3 of the PDA has only two parts. Section 3.1 is an empty box marked "Employee Comments". The signature line is prefaced with the following: "I have read and understood the contents of this PDA, have discussed the PDA with my Immediate Line Manager, and have been offered the opportunity to comment."

[98] Neither the SAS nor the PDA states that signing the PDA means that the employee has agreed with its contents.

[99] In any event, Dr. Waller gave Dr. Martens two orders: to read and sign the PDA. Dr. Martens' two arguments address only why he did not sign it; they cannot explain his refusal to even read it.

[100] Third, Dr. Martens argued that Dr. Waller should not have been involved with the PDA after completing his portion of it. Dr. Martens reasoned that the PDA should have been sent to him from an administrative employee and that it was not Dr. Waller's role to have him sign it. When it was pointed out to Dr. Martens that the preface to the signature line requires the employee to confirm that they have discussed the PDA with their Immediate Line Manager (Dr. Waller in this case), Dr. Martens said simply that he would never do that. I cannot agree with Dr. Martens that his personal decision that he does not want to speak with Dr. Waller about his PDA means that Dr. Waller is no longer involved with it.

[101] More importantly, again, Dr. Martens misses the point. The point is not to decide Dr. Waller's role in the PDA. The point is that Dr. Waller is his manager and, therefore, is empowered to instruct him about what work to perform.

3. The order was capable of being performed

[102] Dr. Martens argued that he could not comply with the order to read and sign his PDA on January 23, 2019, because he was not given enough time to do so. He stated that in addition to reading and signing his PDA, he needed to go through each of his accomplishments listed in section 5 of the PDA and "fact-check" them (in his words) and review his work history over the past five years, to make sure that nothing was missing. He suggested that it takes weeks to accomplish this.

[103] Dr. Morrissey testified that even the 1.5 hours Dr. Martens was initially given on January 23, 2019, was sufficient for him to read and sign the PDA. Dr. Waller also testified that even if Dr. Martens had to "fact-check" his PDA, he could have done so in a couple of hours on January 23, 2019.

[104] I reject Dr. Martens' argument. His argument presupposes that he had only a matter of hours on January 23, 2019, to read and review his PDA. His argument

ignores the fact that he was sent his PDA on January 9, 2019, and therefore, he had two weeks to perform his fact-checking.

[105] His argument also discounts the fact that he had prepared an initial version of the PDA in the summer of 2018. He pointed out that the January 2019 version was different from the one he prepared in 2018. Dr. Waller explained that he had to rewrite the PDA because the version Dr. Martens worked on in the summer of 2018 was mainly composed of work done more than five years earlier. Dr. Martens invited me to compare the 2018 and 2019 PDAs. I did. I was struck that Annex A (the list of documents, publications, and other communications during the assessment period) in the 2018 version of the PDA was composed almost entirely of publications or other work done before 2012. The 2018 version prepared by Dr. Martens listed only four pieces of work after 2012. The 2019 version of the PDA listed only three of those four. I do not know why; Dr. Waller testified that he took out items that had not been approved in DND's publication process or papers that were not completed, but he did not go through the PDA line-by-line during his testimony.

[106] However, it is not important to understand why some items were not included in the final PDA. What is important is that I agree that logically, it does not take more than a short time for Dr. Martens to add a comment to the PDA to the effect that one or more of his accomplishments is missing and then to list them.

[107] I put it directly to Dr. Martens during his closing arguments that he never asked for more time to read his PDA, and he agreed. I also asked him directly why he did not even try to read his PDA on January 23, 2019. He said that he knew it was an impossible task and so decided not to try. I asked him why the task was impossible given all the work he already did in the summer of 2018. Dr. Martens was unable to answer that question.

[108] Instead, he changed his submission to complain that the DSCPC does not actually consider employees' comments and that it would not actually read his PDA since it was so late in the process. Dr. Martens asked Dr. Morrissey about this point during cross-examination, and Dr. Morrissey stated clearly that DSCPC members read the PDAs before each meeting. Dr. Martens did not lead any evidence to contradict Dr. Morrissey and stated simply that he did not believe it. On this point, I must accept Dr. Morrissey's evidence as he has actually attended a DSCPC meeting, while Dr. Martens

was simply speculating. As to whether the DSCPC considers an employee's comments, it is required to consider all relevant material (including an employee's comments), and it is an abuse of authority for it not to; see *Gupta v. Canada (Attorney General)*, 2016 FC 1089 at paras. 24 to 27.

[109] In any event, the alleged futility of adding comments does not explain why Dr. Martens refused to read and sign his PDA — it explains only why he did not add comments.

[110] I have concluded that Dr. Martens' belief that the task of reading his PDA was impossible does not justify his refusal to follow Dr. Waller's order. I do not accept that it was impossible to read the PDA on January 23, 2019. Additionally, Dr. Martens had had the PDA since January 9, 2019. He decided not to read it because he was upset that it recommended that his salary be held in place. While that decision was not insubordinate until January 23, 2019, he still had the opportunity to read the PDA despite his hope that it would never be sent to the DSCPC.

[111] Finally, Dr. Martens suggested that it was the employer's fault that the PDA was provided to him at the last minute, in January 2019. However, Dr. Martens testified that he asked Mr. Tremblay that he not have to work on his PDA after the summer of 2018, for reasons Dr. Martens did not explain. Regardless of the reasons, he cannot now blame the employer for providing him with the PDA only in January 2019, when he was the one who asked not to work on it after the summer of 2018.

[112] I have concluded that the order to read and sign the PDA on January 23, 2019, was capable of being followed.

4. The PDA was ready for Dr. Martens' signature

[113] Finally, Dr. Martens argues that the PDA was not ready for his signature because it had to be signed by Dr. Morrissey first. He relies upon the following line from Part VI of the SAS about preparing the PDA: "If the RO makes additional comments after the employee has signed the PDA, a copy will be provided to the employee as soon as possible in advance of the DSCPC meeting." Dr. Martens says that this line means that the Reviewing Officer (Dr. Morrissey) must sign it before he does.

[114] The line Dr. Martens relies upon does not bear the meaning he ascribes to it. The line implies that the Reviewing Officer makes comments after the employee has

signed the PDA. Therefore, the Reviewing Officer must sign it after the employee — as the Reviewing Officer does not sign it before making their comments.

[115] Additionally, Dr. Martens ignores the following passage from Part VI of the SAS, provided immediately above the passage he relies on: “The PDA is not final until the RO has signed the document. Until then, the RO has the prerogative to request changes to the PDA as a result of employee comments.”

[116] The SAS is clear: the employee signs the PDA and makes comments, and then the Reviewing Officer conducts the final review and signs it.

[117] Finally, as I pointed out with some of Dr. Martens’ other justifications, this justification cannot explain why Dr. Martens did not read the PDA — only why he did not sign it.

5. Other claim made by Dr. Martens

[118] Dr. Martens claimed that the entire process of requiring him to read and sign his PDA was abusive because Dr. Waller did so with the intention of making sure that his salary was held in place. In support of that purpose, Dr. Martens relied on an email from Dr. Waller dated January 22, 2019, explaining why the rating in the PDA was changed from unsatisfactory to satisfactory. In that email, Dr. Waller refers to the need to change the rating as “negative news”. Dr. Martens asked me to infer from the use of the term “negative news” that Dr. Waller wanted his salary held in place and that that was the purpose behind the PDA.

[119] That single email is a slender thread on which to hang a theory that the PDA was abusive because it was a pretext to try to hold his salary in place. Dr. Waller explained that what made the news “negative” was that the rating on the PDA would not be a true reflection of his and other managers’ opinion of Dr. Martens’ performance. I was given no evidence that caused me to doubt Dr. Waller’s explanation. At several points during the hearing, Dr. Martens suggested that Dr. Waller was inherently untrustworthy or prejudiced against him. I certainly believe that Dr. Martens does not like Dr. Waller, but I have no evidence that this dislike was reciprocated, particularly in early 2019. When Dr. Waller completed Dr. Martens’ PDA, he wrote that “Dr. Martens had extremely challenging personal interactions during the assessment period. His working relationships with his supervisors and managers have

been predominantly fractious. A notable exception to the discord is with me ...”, indicating that Dr. Waller believed at the time that he had a good relationship with Dr. Martens. Finally, none of this explains why Dr. Martens disobeyed the order to read and sign the PDA. I have no evidence that Dr. Waller was “baiting” Dr. Martens into disobeying him.

E. Conclusion about insubordination

[120] I have concluded that Dr. Martens was insubordinate on January 23, 2019, when he did not read or sign his PDA.

[121] The order given on January 9, 2019, did not contain a fixed time frame. In light of Dr. Martens’ meeting with Mr. Tremblay scheduled for January 22, 2019, it would not have been reasonable to expect him to sign the PDA before that meeting.

[122] By January 23, 2019, in contrast, the time for discussion about whether the PDA would be completed was over. Dr. Waller gave Dr. Martens a clear order: read and sign the PDA. Dr. Waller initially instructed Dr. Martens to do so by 13:30 that day and later amended that order to give him to the end of the day. Dr. Waller had the authority to give the order by virtue of being Dr. Martens’ manager — he was in his “chain of command” as his supervisor’s supervisor. Dr. Martens did not obey the order to read and sign his PDA — he neither read it nor signed it. He was not justified in refusing to comply with that order.

VI. Disciplinary measure

[123] The employer initially suspended Dr. Martens for a period of three days but reduced that measure to a one-day suspension during the grievance process to reflect the fact that another suspension was reduced to a reprimand.

A. Framework to assess the level of discipline

[124] The employer initially submitted that my role was to assess whether the discipline imposed was reasonable. After I brought *Walker* to its attention, the employer stated that my role was to determine the “appropriate” level of discipline, as stated at paragraphs 381 and 470 of *Walker*.

[125] In light of the employer’s concession, I will not address the issue of whether I should defer to the employer’s disciplinary measure if I conclude that it falls within a

range of reasonable outcomes. I will instead take up the employer's invitation to consider the appropriate disciplinary measure in this case.

[126] The appropriateness of discipline typically turns on an assessment of the aggravating and mitigating factors. Unusually, Dr. Martens did not argue any mitigating factors at the hearing and did not present any mitigating factors during his discipline meeting with Dr. Morrissey. Nevertheless, I have considered any mitigating factors that are apparent from the evidence adduced in this case.

B. Factors when assessing the appropriate discipline in this case

1. Seriousness of the misconduct

[127] I first considered the seriousness of the misconduct. I appreciate that insubordination is inappropriate in its nature, and I do not wish to underplay its seriousness. Nevertheless, a disciplinary measure should reflect the degree of harm caused by the misconduct; see *Walker*, at para. 473, and *Sidorski v. Treasury Board (Canadian Grain Commission)*, 2007 PSLRB 107 at paras. 104 and 105.

[128] In this case, the employer suffered, at most, trifling harm as a result of Dr. Martens' insubordination. The PDA was still sent to the DSCPC, as it would have even had Dr. Martens signed it. The DSCPC's decision was set aside after an independent review, as it would have been even had Dr. Martens signed it and indicated his disapproval. I note that the DSCPC's decision was not set aside because of anything stated in the PDA but, instead, because it was one month early. I have not been able to discern any difference that Dr. Martens' signature would have made to the employer.

[129] This is not a mitigating factor as suggested by Dr. Martens (despite the Board treating it as such in *Sidorski*) but more accurately a "not-aggravating" factor. I am still giving it considerable weight.

2. Dishonesty during the disciplinary hearing

[130] I next considered Dr. Martens' conduct after being informed of the possibility of disciplinary action. I have concluded that he was dishonest during the discipline process.

[131] When he was invited to a disciplinary meeting, Dr. Morrissey provided Dr. Martens with an email outlining the allegations against him. That email included a

description of the January 23, 2019 email and added that Dr. Waller "... was at Cumberland that day to discuss his PDA from 1330 to 1400." During the disciplinary meeting, Dr. Martens did not give any reasons for not reading or signing his PDA; he gave his reasons for the first time during the hearing.

[132] Most importantly, he stated during the disciplinary meeting that he did not remember meeting with Dr. Waller on January 23, 2019. Dr. Morrissey invited Dr. Waller to provide additional information. Dr. Martens emailed Dr. Morrissey a week later to say this: "... I checked my calendar and there was no meeting scheduled for Jan. 23."

[133] When I put to Dr. Martens that saying that there was no meeting scheduled for January 23 was, at the very least, a lie by omission, Dr. Martens submitted that he still does not recall meeting with Dr. Waller on January 23, 2019. However, Dr. Martens testified under cross-examination that he met with Dr. Waller on January 23, 2019. He testified that he told Dr. Waller that he did not have time to read and sign the PDA.

[134] When I asked him how he could reconcile his submission that he does not recall meeting with Dr. Waller with the text of the email of that date instructing him to meet with Dr. Waller on that day, he had no answer aside from suggesting that he did not read the January 23, 2019, email when preparing for his discipline meeting. Additionally, Dr. Martens never explained how he could suggest that there was no meeting with Dr. Waller on January 23, 2019, given that he admitted that he knew that he had until the end of the day to prepare his PDA, while the email gave him only to 13:30 that day — he must have met with Dr. Waller to receive the extension of time.

[135] I am left with the uncomfortable and unfortunate conclusion that Dr. Martens was truthful when testifying under solemn affirmation but untruthful during the discipline process (and when making his closing arguments). I do not believe that he remembered the January 23, 2019, meeting while testifying in February 2024 but forgot about it in a discipline meeting on March 11, 2019 (and then forgot it again when making closing submissions the day after testifying). By stating that his calendar shows no meeting on January 23, 2019, he tried to suggest to Dr. Morrissey that no such meeting took place, knowing that it did take place. I have concluded that he was dishonest during the disciplinary process, which is an aggravating factor when assessing the appropriate disciplinary measure in this case.

3. Previous discipline

[136] The disciplinary letter mentions that Dr. Martens had previous discipline, and as I said earlier, his suspension was reduced because the measure for that previous discipline was also reduced. However, despite my invitation for the employer to lead oral evidence about that previous discipline, it did not. All I know is that Dr. Martens has previous discipline, resulting in a reprimand (so he cannot rely on a clean disciplinary record as a mitigating factor), but I know nothing about whether that discipline was about similar or dissimilar misconduct. This is a neutral factor in this case as a result.

4. Length of service

[137] Dr. Martens was hired in April 2007, meaning that he had just under 12 years of service at the time of the discipline. This is a meaningful length of service and a modest mitigating factor.

5. No acknowledgement of need to follow managers' orders

[138] Finally, I noted Dr. Martens' statement that he does not feel remorse over these events. In his words, he cannot feel remorse because he did nothing wrong. But he did do something wrong. A refusal to express remorse is not an aggravating factor, but Dr. Martens' refusal to acknowledge his need to follow a manager's instructions is.

6. Conclusion — a one day suspension is appropriate

[139] I have concluded that a one-day suspension is appropriate in these circumstances. Dr. Martens showed contempt for management's authority to instruct him about which tasks to perform, and he refused to acknowledge any need to comply with management's instructions going forward. The purpose of discipline is remedial, to "... 'hammer home' to an employee that what they are doing is improper" (see *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation*, 2022 CanLII 116044 (ON LA)). Despite the trifling impact his insubordination had on the employer, I have concluded that a one-day suspension is necessary and appropriate to drive home to Dr. Martens the importance of following the employer's instructions about which tasks to perform.

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

(The Order appears on the next page)

VII. Order

[141] The grievance is denied.

June 28, 2024.

**Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board**