

Date: 20240925

File: 566-02-38201

Citation: 2024 FPSLRB 132

*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

CHRISTOPHER JONES

Grievor

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Respondent

Indexed as

Jones v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

Before: Leslie Reaume, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Grievor: Himself

For the Respondent: Marc Séguin, counsel

Heard by videoconference,
January 18 and 19, May 24 and 25, and June 6, 2023.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Christopher Jones (“the grievor”) was employed as an indeterminate, full-time border services officer (“BSO”) for the Canada Border Services Agency (“the respondent” or “CBSA”) from October 1, 2007, until his employment was terminated on November 30, 2017. As of the termination, he was assigned to the CBSA’s Halifax Marine Operations in Halifax, Nova Scotia.

[2] The grievor filed an individual grievance challenging the termination under the relevant collective agreement between the Treasury Board and the Public Service Alliance of Canada for the Border Services Group (expired on June 10, 2018; “the collective agreement”). The grievance also alleged that the termination was discriminatory and that it contravened the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*) and article 19, the no-discrimination provision, of the collective agreement. The grievor’s discrimination allegations were based on religion, as set out in s. 3 of the *CHRA*.

[3] The respondent denied the grievance. It was referred to the Federal Public Sector Labour Relations and Employment Board (“the Board”) for adjudication on April 6, 2018, under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *Act*”) based on a disciplinary action resulting in the grievor’s termination. The grievance was referred before the final-level decision was released on June 12, 2018. The Canadian Human Rights Commission was notified of the referral to the Board and the grievor’s discrimination allegations, but it declined to participate in the hearing.

[4] The events that led to the termination of the grievor’s employment in November 2017 began in May 2015, when he advised the respondent that he intended to volunteer as a “Covert Intelligence Officer” (“CIO”) for The Exodus Road, which is an organization based in the United States that fights human trafficking. His work with The Exodus Road required him to travel to Thailand at his own expense to gather intelligence and help identify victims of human trafficking, which was then to be shared with law enforcement. The role required him to work undercover and to meet with women and girls in bars, brothels, and other establishments where human trafficking was likely occurring.

[5] The respondent determined that the grievor's volunteer work placed him in a "... real, potential or apparent conflict of interest of a particularly significant nature ..." that was incompatible with his BSO role. On September 1, 2015, his regional director general ("RDG") directed him not to participate in the proposed activities with The Exodus Road. The respondent was concerned about him directly or indirectly disclosing confidential information that could assist The Exodus Road in its operations. The RDG's decision also referred to diplomatic and international security concerns about having a peace officer of the Government of Canada acting in that capacity and potential exposure to criminal organizations and individuals in the sex trade in Thailand.

[6] The grievor disagreed with the RDG's reasons and grieved the decision. During the third-level grievance hearing, the grievor was asked what he would say about the purpose of his trip to Thailand border officials. The grievor acknowledged that he would not be candid about the purpose of his trips because of the covert nature of his work. This gave rise to further concerns on the respondent's part. The grievance was denied, and the grievor did not pursue it further.

[7] There is no dispute that the grievor disobeyed his RDG's order. He travelled to Thailand three times, in January 2016, September 2016, and April 2017, to work as a CIO for The Exodus Road, without informing the respondent. When the chief of operations discovered that the grievor had travelled to Thailand in April 2017, the respondent took steps to confirm that the grievor's activities contravened the RDG's decision. His employment was terminated on November 30, 2017, for insubordination and failing to remove himself from the conflict of interest. The grievor's position is that there was no conflict of interest, he was not insubordinate, and the respondent misled him and withheld that he was being investigated for misconduct, contrary to its disciplinary policies.

[8] The grievor also submits that the respondent should have considered his religious beliefs and practices as a mitigating factor before the disciplinary decision was imposed. The grievor described the CIO role with The Exodus Road as a form of Christian missionary work. The grievor explained his conduct by saying that the RDG's decision forced him to choose between obeying the respondent's direction or abandoning the work that God had called him to do as a devout Christian. He believes

that the termination of his employment violated the *CHRA*, which prohibits discrimination in employment based on religion.

[9] Notably, the grievor acknowledged that he did not inform the respondent that his work for The Exodus Road was part of his faith practice until October 2017. He testified that he decided to take a wait-and-see approach after his first trip in January 2016 and, in his own words, not “play the religion card” until it became apparent that he was likely to be disciplined.

[10] The respondent’s position is that there is no connection between the grievor’s religious beliefs and his termination for insubordination. It viewed the late disclosure of this information as a rationalization for acts of insubordination that had already taken place. The grievor did not disclose that he was motivated to volunteer for The Exodus Road because of his religious beliefs when the conflict-of-interest decision was made or during the grievance process. The respondent submitted that he simply could not accept the RDG’s decision and disobeyed it and that when he was caught, he asserted that he was entitled to go because he was motivated by his faith.

[11] The respondent’s position is that the grievor was not prevented from practicing his faith or performing missionary work. The conflict of interest with his law-enforcement role as a BSO in Canada arose from the specific activities associated with covert intelligence gathering in the sex trade in Thailand. The grievor had travelled to Haiti for missionary work in the past without the respondent raising any concerns.

[12] A hearing was initially scheduled for June 17 to 19, 2020, and then rescheduled for February 15 to 17, 2022. The Public Service Alliance of Canada (“the bargaining agent”) withdrew its support for the grievance on February 9, 2022. The grievor requested an adjournment, which the Board granted. The grievor was advised that he could continue to argue that the termination was without cause because it was discriminatory under the *CHRA*. However, it was no longer possible for him to argue that any discrimination he allegedly experienced, whether or not it was related to the termination, violated the collective agreement, which would require the support of the bargaining agent. The hearing took place on January 18 and 19 and May 24 and 25, 2023. Final submissions were heard on June 6, 2023.

[13] For the reasons that follow, I find that the grievor did not prove that his termination was discriminatory. I also find that he was insubordinate and that the

termination of his employment was not an excessive response to his misconduct. The respondent did not follow its discipline policy, but the procedural flaws in the disciplinary process were cured by the full hearing before the Board. The grievor also raised an issue of administrative delay, which is addressed at the conclusion of this decision.

II. Summary of the events that led to the grievor's dismissal

A. The witnesses

[14] The Board heard evidence from the grievor supporting his arguments that the termination was discriminatory and unjustified by the respondent. His BSO position required him, among other things, to conduct inspections, make decisions on entry into Canada and analyze data and information to be included in databases for use in client service, risk management, and targeting people or goods. While on duty, he had powers under different Acts of Parliament to arrest or detain individuals suspected of committing offences.

[15] The Board also heard from these three witnesses for the respondent:

- Calvin Christiansen, the RDG during the relevant period. He issued the conflict-of-interest decision prohibiting the grievor from engaging in outside employment as a CIO with The Exodus Road. He also made the decision to terminate the grievor's employment.
- Kevin Watson, Chief of Operations, Newfoundland and Labrador and Nova Scotia District, CBSA, during the relevant period. He was advised that the grievor had travelled to Thailand in April 2017. He was aware of the conflict-of-interest decision and referred the information to his superintendent, who requested assistance from CBSA's Professional Standards branch. He conducted the fact-finding and pre-disciplinary meetings that led to the grievor's termination.
- Jonathan McGrath, Superintendent of Marine Operations and the grievor's supervisor during the relevant period. He had limited involvement in this matter. After discussing the grievor's proposed volunteer activities with The Exodus Road with him, Mr. McGrath suggested that he file the confidential report that led to the RDG's conflict-of-interest decision. He also advised Mr. Watson that the grievor had travelled to Thailand in April 2017.

B. The grievor's religious self-identification and missionary work

[16] The grievor self-identifies as a devout Christian and an active member of the Deep Water Church, a congregation within the Wesleyan Church of Canada. His church

and congregation support many global humanitarian activities, including ending human trafficking.

[17] The grievor testified that he came to faith in 2003. He has engaged in missionary work as part of his faith practice since 2010. He testified that missionary work is done in response to a calling from God. It typically involves the blessing of his church to travel or go forth, serving disadvantaged people. The grievor testified that God calls missionaries to serve in specific capacities.

[18] The grievor participated in missionary work in Haiti between 2010 and 2012, during which he travelled four times for periods of two weeks and once for a two-month period to work on community initiatives. He helped in a hospital, acted as an assistant to the vocational missionaries and generally helped anywhere he could. According to the grievor, his previous supervisor approved his leave and did not suggest that he submit a confidential report for a conflict-of-interest assessment. He also talked about his work in Haiti with colleagues and managers. He testified that working as a CIO with The Exodus Road in Thailand was like his work in Haiti — an expression of his religious faith that he was called by God to undertake.

[19] The grievor testified that when he finished his work in Haiti he had no specific calling until he learned about The Exodus Road. The grievor learned about the opportunity to work as a CIO from someone he was familiar with in the United States and felt a strong calling. He testified that he spent time in prayer and seeking the council of wise people until he was confident that he understood his calling accurately.

[20] The grievor applied for the role of CIO and was accepted in early 2015. The posting for the role indicated that backgrounds in military, police, or security were preferred but not required. The grievor testified that he disclosed his employment as a BSO with the CBSA during the vetting process but that otherwise, he did not speak about his employment while volunteering.

C. May 2015: The grievor's confidential conflict-of-interest report

[21] In May 2015, the grievor informed his supervisor, Mr. McGrath, about his plans to travel to Thailand and volunteer with The Exodus Road. The grievor testified that he wanted Mr. McGrath to be aware of what he was doing in case CBSA officials at the border questioned him about his travel patterns to Thailand. Mr. McGrath testified that

he understood from that conversation that the grievor would be working as an undercover intelligence officer trying to get young women and girls out of the sex trade.

[22] Mr. McGrath testified that he thought that a conflict-of-interest assessment was required because the volunteer activities might conflict with the grievor's BSO role. He advised the grievor to speak with Superintendent Colin Murchison, who was acting for Mr. Watson as the chief of operations then. Mr. Murchison advised the grievor to submit a confidential report so that the respondent could assess the grievor's proposed volunteer activities for conflict of interest.

[23] The grievor testified that based on his previous interactions with his supervisor about his missionary work in Haiti, he expected this to be an informal "FYI". He raised the issue because of his travel patterns. He did not view the volunteer work as a conflict of interest. He felt some pressure but filled out the form anyway.

[24] There is no dispute that the grievor did not explicitly advise Mr. McGrath or Mr. Murchison that the work with The Exodus Road was part of his faith practice. Mr. McGrath was aware that the grievor had travelled to Haiti in the past to do missionary work. The grievor testified that he mentioned to Mr. McGrath that The Exodus Road's work was like the work that he had done in Haiti. Mr. McGrath did not recall this; nor did he make any connection at the time between the grievor's religious beliefs and the work with The Exodus Road.

[25] The confidential report is populated with questions and tick boxes. The grievor acknowledged on the form that in his BSO role, he had access to or knowledge of confidential or sensitive information that was not in the public domain. He also provided his reasons for filing the report, as follows:

I am applying to work for the US based not-for-profit agency The Exodus Road [website] as a Covert Intelligence Officer. Although the work will be overseas and does not involve Canadian interests, because the CBSA is committed to fighting Human Trafficking [website] I want to confirm that there is no real or perceived conflict of interest with my potential volunteer work with The Exodus Road.

[26] The grievor signed the report on May 29, 2015, and enclosed materials from The Exodus Road describing its work, along with a job description for the CIO role. The

position's objective was "[t]o identify victims of human trafficking and their traffickers in partnership with local law enforcement for the purpose of rescue and prosecution." The materials indicate that The Exodus Road has "... no legal authority in the countries we operate to make arrests, breach targets, or remove victims without the expressed partnership of local law enforcement." Candidates also pay the total cost of their deployment for a minimum two-week period.

[27] The duties of a CIO include gathering evidence of trafficking at different locations, such as karaoke bars, beer gardens, villages, remote border crossing areas, factories, plantations, and brothels. They wear hidden recording devices, remain undercover, and maintain an alias. They write reports and provide the evidence that they gather to law enforcement, to conduct raids and free victims.

[28] The grievor testified that he had never been to Thailand and that he had no experience with Asian cultures when he applied for the role with The Exodus Road. He confirmed that on the trips he took after the RDG's directive, he worked in Thailand in partnership with other missionaries and went into go-go bars, where they suspected that human trafficking and prostitution were taking place. His focus was on sex-trafficking cases and identifying minors who might be trafficked. Most of the victims were girls or young women, but occasionally there were boys as well. He used his BSO training to look for indicators that victims might be underage. He bought them drinks and engaged in conversations with them, to try to determine their ages and whether they were being coerced. He took notes and wrote reports, which he provided to The Exodus Road for the Thai government and law enforcement.

[29] The grievor did not disclose to the respondent that his volunteer work as a CIO with The Exodus Road was based on a religious calling. The materials that he provided also explicitly state that The Exodus Road is not a faith-based organization. It is self-described as a nonprofit registered with the U.S. government, without religious affiliation. The grievor testified that The Exodus Road is a Christian organization; however, no evidence was produced to support this. The materials indicate that there are multiple volunteer opportunities with the organization.

[30] Mr. Murchison asked the grievor (by email) to provide further information about how he found the organization and how he would fund the trips. On June 9, 2015, the grievor responded that a friend with a shared interest in international development

and alleviating poverty referred him to The Exodus Road. He would fund his volunteer term through private donations from friends and family and did not anticipate receiving donations from organizations.

[31] Mr. Murchison also asked the grievor how The Exodus Road interfaces with the “25 government and non-government agencies” referenced on its website. The grievor responded by stating that The Exodus Road has relationships with several Thai government agencies, including the Royal Thai Police, their anti-human-trafficking division, and their version of the FBI. The Exodus Road provides evidence to support these agencies in their law-enforcement work. The Exodus Road also has relationships with the U.S. embassy, the U.S. Department of Homeland Security, and the U.S. State Department’s Bureau of International Narcotics and Law Enforcement. If The Exodus Road acquires evidence specifically about U.S. citizens, it is passed on to the appropriate agency. It does not act as an official partner, employee, or contractor of any government or non-governmental organization.

D. The RDG’s decision on the conflict of interest

[32] The grievor heard nothing further until he received a letter dated September 3, 2015, and signed by Jennifer MacPhee, Senior Human Resources Consultant, Labour Relations, CBSA, enclosing the decision of Mr. Christiansen, the RDG, dated September 1, 2015, which stated:

...

I have reviewed your Confidential Report concerning a proposed activity outside of your employment, volunteering for the group The Exodus Road as a Covert Intelligence Officer. I have taken into consideration the issues brought forth by the CBSA Office of Values and Ethics and the recommendations of Regional Labour Relations.

I have determined that this situation presents a real, potential or apparent conflict of interest of a particularly significant nature given the international interests involved and the exposure to criminal organizations and individuals. Consequently, you are not permitted to participate in this outside activity.

As per The Values and Ethics Code for the Public Service and CBSA Code of Conduct if a conflict arises between your private interests and your official CBSA duties, the conflict, whether real potential or apparent, shall be resolved in favour of the public interest. You must never act in a manner that is damaging or potentially damaging to the CBSA or the Public Service of Canada. My primary areas of concern regarding the information disclosed via your Confidential Report are:

- *You may directly or indirectly utilize or disclose confidential internal information, that you possess solely as a result of your employment with the CBSA, which could compromise our operations.*
- *There are diplomatic and international security concerns with having a peace officer of the Government of Canada acting in this capacity.*

Employees who are found to have breached The Values and Ethics Code for the Public Service, the CBSA Code of Conduct or other CBSA policies may be subject to disciplinary measures based on the seriousness of the misconduct in accordance with the CBSA's Discipline Policy.

I sincerely commend you on being vigilant in the conduct of your CBSA responsibilities and bringing this to my attention....

...

[33] The grievor was also invited to contact Ms. MacPhee for further questions.

[34] Mr. Christiansen testified that he received the grievor's confidential report and noted that the grievor identified the role with The Exodus Road as covert intelligence work. He also reviewed the attachments that the grievor provided, which describe the work carried out by The Exodus Road and the CIO's role. He referred the confidential report to the CBSA's Human Resources branch for an initial analysis that Ms. MacPhee conducted.

[35] Mr. Christiansen testified that he was concerned about the grievor's work as a CIO with The Exodus Road, for several reasons. BSOs are peace officers under the *Criminal Code* (R.S.C., 1985, c. C-46) while on duty and enforcing legislation relevant to their duties. In that role, the grievor had access to sensitive information and powers of arrest and detention. He also had access to systems that contained classified information that could have potentially been relevant to the work of The Exodus Road and could have been directly or indirectly shared with it. Mr. Christiansen also had diplomatic and security concerns about a Canadian peace officer performing covert intelligence work in another country. He testified that the CBSA has a director located in Thailand at the Thai government's permission and a relationship with border officials in that country. He was concerned that it could jeopardize relations between Canada and Thailand if something happened to the grievor, and Canada was aware that one of its CBSA BSOs was engaged in covert intelligence work.

E. The request for the reconsideration of the RDG's decision

[36] The grievor did not agree with the RDG's decision. He testified that the reasons were inadequate and that he was not a peace officer when he was off duty; nor was he acting on the CBSA's behalf, and there was no risk that he would use or disclose confidential information obtained in the course of his BSO work. He was also personally and professionally offended by the reasons for the decision and the reference to potential discipline.

[37] The grievor testified that he reviewed the Treasury Board's *Policy on Conflict of Interest and Post-Employment* ("the TB policy") and that he expected to engage in collaborative discussions with the RDG over the conflict-of-interest decision. The TB policy provides for resolution discussions between an employee and the deputy head (or delegate). If no agreement is reached, the disagreement will be resolved through the resolution procedures established by the deputy head.

[38] The RDG testified that he delegated the meeting to Ms. MacPhee, who conducted the initial research and could recommend a change in the decision. The meeting was arranged for September 11, 2015. Ms. MacPhee's notes from that meeting were produced. Although she did not testify, the grievor confirmed that the notes were accurate. During the meeting, he requested further information about the reasons for the decision. He indicated that he had already spent \$5000.00 on airline tickets and that he felt forced to choose between the right thing to do and the risk of being disciplined. He told Ms. MacPhee that when he submitted the confidential report, he was not seeking permission but advising the respondent of his intentions. He requested that the RDG's decision be revised to indicate that the CBSA strongly discourages but does not forbid him from volunteering as a CIO with The Exodus Road. Ms. MacPhee indicated that she would speak with the RDG.

[39] The grievor did not raise with Ms. MacPhee any connection between his religious beliefs and practices and his proposed volunteer work with The Exodus Road.

[40] On September 15, 2025, Ms. MacPhee emailed the grievor, advising that she had spoken with the RDG about their meeting and that she would be in touch shortly. The grievor replied that he understood the RDG's concerns but he was hopeful that a solution could be found. He testified that he wanted to clear up any misconceptions

that the RDG might have had about the activities that he would be engaging in and to find a compromise that would permit him to volunteer without facing discipline.

[41] Mr. Christiansen testified that he made further inquiries in response to the grievor's concerns. On September 23, 2015, he contacted Claude St-Denis, Regional Director for Southeast Asia and Sri Lanka, International Region, CBSA. Mr. Christiansen submitted his notes from the call, as follows:

Conversation with Claude St. Denis September 23, 2015

- 1. Contacted Claude St. Denis, Regional Director, Southeast Asia and Sri Lanka, International Region, CBSA. Never specifically mentioned BSO Jones name so it was in effect anonymous.*
- 2. St. Denis stated that many brothels are run by organized crime **and** the police. They are not safe places to go.*
- 3. Discussed with RCMP liaison in Bangkok and recommended not to go and*
 - a. RCMP would not allow officers to do this under any circumstance,*
 - b. Many NGO's that claim to be legitimate organizations are in fact intricate to human trafficking.*
- 4. We have a legal obligation as his employer with this knowledge to advise he is putting himself at risk.*
- 5. He is jeopardizing CBSA and Government of Canada relations with Thailand if we know he is there to perform this activity.*
- 6. He can contact Claude St. Denis at his e-mail address ...*
[email address provided]

Signed Calvin Christiansen

[Emphasis in the original]

[42] Mr. Christiansen testified that Mr. St-Denis contacted the Royal Canadian Mounted Police (RCMP) liaison officer in Bangkok, Thailand, who recommended against the CBSA authorizing a BSO to conduct covert intelligence gathering in the sex-trafficking industry. Mr. Christiansen testified that he was told that the RCMP would not allow their officers to do this work, and Mr. St-Denis' advice was the same. Mr. St-Denis agreed to speak with the grievor if he had further questions.

[43] By telephone conversation on October 2, 2015, Ms. MacPhee provided the grievor with the information from Mr. Christiansen's call with Mr. St-Denis. She advised

him that the RDG had not revised his opinion. The grievor was provided with Mr. St-Denis' email address and was invited to contact him, but he did not make contact.

[44] The grievor testified that he was very disappointed that Mr. Christiansen chose not to meet him. He testified that the RDG's failure to engage in a collaborative resolution was one of the reasons he felt compelled to disobey the decision. Mr. Christiansen testified that he was responsible for 700 CBSA employees working in the 4 Atlantic provinces. He delegated the meeting to Ms. MacPhee, who conducted the initial research and could have changed her recommendation based on the meeting with the grievor. Mr. Christiansen also made further inquiries to ensure he had made the correct decision. Mr. Christiansen testified that he felt the process was fair and that not every case would be resolved by mutual agreement.

F. The grievance against the RDG's decision

[45] On October 2, 2015, the grievor filed a grievance challenging the RDG's decision. The grievance states that the volunteer activity does not present a conflict of interest and that the RDG's reasons did not accord with the CBSA's *Code of Conduct* ("the Code"). The grievance indicates that to remedy the situation, the grievor requests a letter from the RDG confirming that there is no conflict of interest so that he can volunteer with The Exodus Road and not face disciplinary measures.

[46] The grievance does not refer to a connection between the grievor's religious beliefs or practices and his proposed volunteer work with The Exodus Road.

[47] The grievance was accelerated to a third-level hearing, which was held on October 22, 2015. The grievor attended with a bargaining agent representative. The respondent produced the notes taken during the hearing, and the grievor testified that they were accurate. Grievance hearing communications are considered privileged, but in this case, both parties relied on them and have waived privilege.

[48] The grievor raised concerns about the RDG's reasons, including the grievor's understanding that he was not a peace officer when he was off duty. Mr. Christiansen testified that as an off-duty officer, the grievor's conduct was always required to be on the "up and up".

[49] Mr. Christiansen asked the grievor what he would say to border officials in Thailand. The grievor acknowledged that he would not disclose the true purpose of his

trip, which prompted a discussion about the risks posed by that conduct.

Mr. Christiansen testified that this was a clear conflict of interest that would undermine CBSA's diplomatic relations with Thailand and its border officials. He also testified that it was a significant factor in his decision to uphold the direction.

[50] Also discussed was Mr. St-Denis's information that brothels are owned by the police and the relationships among the RCMP, Thailand, and the CBSA. The grievor testified that the term "brothel" is accurate but misleading. He went only to publicly available bars. He also testified that the respondent did not provide evidence to him that they were owned by the police.

[51] The notes confirm that the grievor mentioned that he had been to Haiti numerous times. He testified that he thought that he used the words missionary work in the meeting, but he could not specifically recall, and the notes do not include the words missionary work. There is a notation that the RDG did not know what the grievor did in Haiti, but the activities with The Exodus Road fall into another category. The grievor testified that when he referred "obliquely" to the work in Haiti, he assumed that the RDG knew what he meant.

[52] Mr. Christiansen testified that there was no discussion of religion or missionary work at the meeting. He acknowledged that the grievor mentioned Haiti, but he was unaware of the grievor's previous trips. The grievor had never previously discussed his missionary work in Haiti with Mr. Christiansen. Still, at the time, the grievor felt that Mr. Christiansen ought to have known about it based on his discussions with colleagues and other managers.

[53] The grievor testified that near the end, the discussion became heated. The grievor told Mr. Christiansen that he could not control where the grievor spent his off-duty time. The grievor testified that he was angry and said that the conflict-of-interest decision violated his rights under the *Canadian Charter of Rights and Freedoms* (enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.); "the *Charter*"). The grievor did not specifically reference his right to religious freedom under the *Charter*. He believes that Mr. Christiansen should have been aware that the grievor was talking about his right to religious freedom. Mr. Christiansen recalled the grievor mentioning the *Charter*, but there was no discussion about religion.

[54] The grievor testified that in hindsight, the RDG might not have known that he was a missionary. However, at the time, he felt his back was against the wall; he had to follow the directive or give up on his religious calling. He was asked why he did not take the opportunity during the grievance hearing to be transparent about his religious beliefs. He answered that he did not recall thinking of that option then.

[55] The grievor also testified that he told the RDG that he intended to go to Thailand to work for The Exodus Road. Mr. Christiansen denied hearing the grievor make this statement, and it is not reflected in the notes. The grievor also testified that if he intended to disobey an order from a superior, he would be transparent about it. There is simply no evidence of transparency on his part — quite the opposite. It is not credible that he would declare that he intended to disobey the RDG's decision without the RDG confirming or addressing this in some way. There is also no evidence that he told the respondent before his three trips to Thailand that he would be volunteering as a CIO for The Exodus Road and disobeying the RDG's decision.

[56] RDG Christiansen denied the grievance and gave the following rationale in his decision dated October 22, 2015:

...

... As per the CBSA Code of Conduct, Conflict of Interest, Outside Employment of Activities section, "We may engage in employment outside the public service and take part in outside activities unless the employment or activities are likely to give rise to a real, apparent or potential conflict of interest or would undermine the impartiality of the public service or our objectivity." A conflict of interest does not relate exclusively to matters concerning financial transactions and the transfer of economic benefit. Conflicts of interest in any activity can have a negative impact on the perceived objectivity of the public service. Public servants must avoid activities that might appear to compromise their effectiveness as public servants, even to the slightest degree.

...

G. The grievor's subsequent trips to Thailand with The Exodus Road

[57] The grievor travelled to Thailand three times after the RDG's direction and decision on the grievance. He travelled for two weeks in January 2016, September

2016, and April 2017. He did not advise the respondent of his intention to work with The Exodus Road as a CIO on those trips.

[58] The grievor testified that he did not want to give up on his calling to volunteer with The Exodus Road, so he had no choice but to disobey the directive. He testified that before his first trip, he contacted The Exodus Road for more information about the activities he would be involved in. He testified that he satisfied himself that he would not be doing anything that the RDG had raised as a concern. When asked what information he received from The Exodus Road, the grievor testified that he could not recall. When asked why he did not bring this information to the RDG's attention before his first trip, the grievor responded that he did not understand that to be an option.

[59] This was a recurring theme in the grievor's testimony. He believed that the RDG's decision was wrong. He testified several times that he was satisfied that the concerns that the RDG raised were not valid and that he had not engaged in any activities that the RDG was concerned about. At the same time, the grievor confirmed that the activities that he engaged in on his trips to Thailand were as described to the RDG before and after the conflict-of-interest decision was made.

[60] The grievor testified that he submitted his vacation request for the January 2016 trip to his supervisor, Mr. McGrath and that he told Mr. McGrath that he was going to Thailand. Mr. McGrath denied that the grievor told him directly that he was travelling to Thailand. He testified that he overheard the grievor speaking about it with his colleagues in the workplace. Mr. McGrath could not specifically recall if this was overheard before the grievor's first or second trip, but he believed he was aware of the last trip in April 2017. The grievor confirmed that he spoke about his trips to people in his workplace, asking about their experiences in Thailand and that he emailed an intelligence officer for suggestions about what to do and see there.

[61] The grievor testified that Mr. McGrath did not ask about his first trip, which weighed into his decision to take the two subsequent trips in September 2016 and April 2017. The grievor testified that he suspected the respondent had been trying to protect itself from liability if something happened to him in Thailand. He speculated that perhaps the respondent had no intention of acting on the RDG's direction and that he was "holding his breath" after the first trip. When Mr. McGrath said nothing and the grievor did not get in trouble, the grievor felt this supported his suspicions. He

also thought that mentioning the *Charter* in his meeting with the RDG may have had an impact, and perhaps he would not be disciplined.

[62] Mr. McGrath testified that the grievor did not tell him the purpose of his trip to Thailand. He was aware that the grievor was unhappy about the RDG's decision and that the grievor had talked about it openly in the group. However, Mr. McGrath testified that he did not condone the grievor going to Thailand and working for The Exodus Road in violation of the RDG's direction.

[63] In his testimony, the grievor acknowledged that he chose to go to Thailand and did not tell anyone that he would be working as a CIO with The Exodus Road. Nevertheless, his position is that the respondent should have deduced that this was the purpose of his trips. Since he heard nothing from the respondent after his trips, the grievor assumed that it tacitly approved or at least was not enforcing the RDG's direction.

[64] The grievor acknowledged that these were assumptions and speculations on his part. He also testified and confirmed in his submissions that he expected to be disciplined when the respondent discovered his activities.

H. Referral to CBSA Professional Standards

[65] Mr. McGrath testified that in April 2017, Mr. Watson, who had returned as the chief of operations, asked him where the grievor was. Mr. McGrath responded that he thought that the grievor was in Thailand. Mr. Watson asked what the grievor was doing there, and Mr. McGrath responded that he did not know the purpose of the grievor's trip. Mr. McGrath was not involved in discussions with the grievor, but he was aware that Mr. Watson met with the grievor when he returned from Thailand and that the grievor acknowledged that he was volunteering for The Exodus Road.

[66] Mr. Watson testified that he was not involved in the conflict-of-interest issue in 2015 but was aware of the RDG's decision. He reported the information that he learned from Mr. McGrath to Superintendent Ernie Antle, who referred the matter to CBSA's Professional Standards group for further inquiry. Mr. Antle did not testify in this proceeding; however, his communications with Professional Standards staff were produced.

[67] An employee in the role of analyst with Professional Standards received Mr. Antle's request to look for any indication that the grievor had worked in Thailand after September 1, 2015, contrary to the RDG's direction. The grievor's travel history was verified, and several emails of interest were found, in which he talked about his visits to Thailand in January 2016 and April 2017.

[68] In one email from November 16, 2015, less than one month after the grievance was denied, the grievor communicated with a CBSA intelligence officer about recommendations on places to see and things to do in Thailand. In an email dated January 31, 2016, the grievor wrote that he had returned from two weeks in Thailand where he was doing some volunteer work. In a personal email dated April 2, 2017, the grievor wrote about being bored at work: "I tried to be productive, but my attention span was negligible. I did some research on organized crime in Thailand, developing potentially useful intel for my upcoming trip in a way that I could connect, however tenuously, to the job I am being paid to do." On April 9, 2017, the grievor wrote that he spent time on "Exodus Road stuff," and discovered that his activities would not be exactly as he thought.

[69] On June 8, 2017, the analyst from Professional Standards sent the information to Mr. Antle. She wrote that Professional Standards had done every possible verification and that the file was being returned to the region for fact-finding with the grievor. Mr. Antle sent the information to Mr. Watson on June 12, 2017, to discuss an approach.

I. August 2, 2017: fact-finding meeting between the grievor and Mr. Watson

[70] Mr. Watson and the grievor testified about a brief interaction that appears to have occurred before any of the fact-finding meetings. The grievor confirmed for Mr. Watson that he had travelled to Thailand and volunteered with The Exodus Road.

[71] The grievor was then asked to meet with Mr. Watson on August 2, 2017, for a fact-finding meeting. Mr. Watson testified that this was not a disciplinary meeting. The purpose of the meeting was to gather further information about the grievor's trips to Thailand to determine whether to commence a disciplinary process.

[72] Mr. Watson testified that he received 10 questions from CBSA's Labour Relations branch to ask the grievor. The grievor acknowledged that he had filed a conflict of

interest form and that the RDG had denied his request. He also acknowledged volunteering for The Exodus Road as a CIO.

[73] When asked if he was still volunteering with The Exodus Road, the grievor responded that he was “actively advocating” for it. Mr. Watson asked him if anyone from CBSA knew that he was volunteering with The Exodus Road. The grievor responded that he was unsure but assumed that the people he was closer to may know, but he could not confirm it. He agreed to provide Mr. Watson with the dates of his Thailand trips. Mr. Watson immediately sent his meeting notes with his questions and the grievor’s answers to Labour Relations, copying Mr. Antle. Mr. Watson testified that the tone of the meeting was very cordial, and the grievor appeared to be open and honest about his activities.

[74] The grievor emailed Mr. Watson on August 2, 2017, acknowledging the three trips to Thailand as follows:

I travelled to Thailand in Jan 2016, Sep 2016, and April 2017. Each trip was 2 weeks long. On each of those trips I spent some time volunteering with the Exodus Road. At no time did I engage in any activities that were deemed to be a real or apparent conflict of interest as per my instructions from RDG Calvin Christiansen.

[75] Mr. Watson questioned the grievor at a later stage in the process about what he meant by his instructions from the RDG. Mr. Watson testified that this response suggested that the RDG had described which activities the grievor was and was not permitted to participate in. As far as Mr. Watson knew, the grievor was instructed not to work as a CIO with The Exodus Road. Mr. Christiansen confirmed this later in the discipline process and testified that this statement to Mr. Watson was misleading.

[76] Mr. Watson sent the grievor’s email to Mr. Antle, Mr. Murchison, Labour Relations, and Professional Standards. On August 3, 2017, Professional Standards advised Mr. Watson that the next steps would consist of formal interviews by Professional Standards with the grievor and the applicable witnesses. It is unclear why these interviews never took place or, ultimately, when or how the Professional Standards’ investigation was concluded. The limited available correspondence refers to timing and logistical problems with organizing the next steps. The grievor was also advised that Professional Standards conducted a preliminary investigation only.

J. August 28, 2017: the grievor is suspended for an unrelated matter

[77] On August 28, 2017, the grievor met with Mr. Watson about an issue unrelated to the conflict of interest. A pre-disciplinary meeting had taken place on July 25, 2017. At the disciplinary meeting, the grievor was suspended for 12 days for misconduct, to be served between August 28 and September 13, 2017, at 9:00 a.m. The letter also indicated that he was prohibited from accessing the CBSA's premises, his email and voicemail, and the electronic network. He was advised that further instances of inappropriate behaviour would result in more severe disciplinary measures, up to termination from the public service.

[78] After the meeting, Mr. Watson told the grievor that Professional Standards was investigating him regarding his Thailand trips. Mr. Watson testified that he was relying on what Professional Standards told him on August 3, 2017.

[79] The next day, August 29, 2017, the grievor emailed Mr. Watson about the statement that he was being investigated. He requested copies of documents relevant to the investigation. Mr. Watson inquired about the status of the investigation with Professional Standards. He was told it had completed a preliminary investigation and that a full investigation would not be conducted. On September 8, 2017, Mr. Watson advised the grievor of this information, following which the grievor made his own inquiries directly to Professional Standards to confirm this.

K. September 11, 2017: communications with Mr. McGrath about the grievor's travel to Thailand

[80] The grievor knew that Mr. Watson learned he was in Thailand from his supervisor, Mr. McGrath. On September 11, 2017, the grievor sent the following email to Mr. McGrath:

...

At the end of my disciplinary hearing Kevin informed me that I was officially being investigated by Professional Standards for a possible conflict of interest regarding my volunteer work in Thailand, which Kevin told me that he heard about from you. Later, when I asked you about the context of that conversation, you told me that several months ago Kevin mentioned to you that he hadn't seen me around in a while and he asked you where I was. You mentioned to him that I like to travel to Thailand and that, as far as you knew, I was in Thailand at that time. You said that you couldn't remember the date that conversation took place but I was

on vacation in April of this year (and was in fact vacationing in Thailand) so that is probably when that conversation took place. Does that sound accurate to you?

...

[81] Mr. McGrath responded the same day with this: "I don't remember saying you like to travel to thailand [sic]. I knew you were in thailand [sic] at the time he asked about where you were. It very well could have been in April, but I can't say for sure."

L. September 13, 2017: the grievor returns to work from the suspension

[82] The grievor returned to work on September 13, 2017, as planned. Mr. Watson testified that the grievor was given access to his email but limited access to CBSA systems because he had indicated that he was still working with The Exodus Road. Mr. Watson testified that the grievor could use CBSA systems to check people's travel, criminal, and immigration histories and that he would have had full access to information that could have assisted The Exodus Road.

[83] The grievor maintained that there was no risk he would share information with The Exodus Road. When he questioned Mr. Watson at the hearing, he asked whether there was any evidence that he had misused CBSA systems in the past. Mr. Watson testified that the grievor had emailed a friend that there were stowaways on board a vessel and that he would be working late to deal with them. Mr. Watson testified that this was unrelated to The Exodus Road, but it was a breach of CBSA policy to give this kind of information to the public.

[84] In the meantime, on September 18, 2017, the grievor requested information from Professional Standards about its involvement in the conflict-of-interest issue. He received an email the next day confirming the timeline, which ended with the referral to the region for further fact-finding. In the grievor's final submissions, he stated that he was "cleared" by Professional Standards. This is not supported by the facts or the information that Professional Standards provided him about its involvement in the conflict-of-interest issue.

M. Notice of the second fact-finding meeting, and the grievor's second conflict of interest report

[85] Mr. Watson notified the grievor in September 2017 that a second fact-finding meeting, following the one on August 2, 2017, would take place, to gather more

information about his involvement with The Exodus Road. The grievor was advised that he could be accompanied by a bargaining agent representative and that Mr. Watson would be accompanied by a management representative. There were delays in arranging the meeting because of the grievor's health, but it was eventually scheduled for October 5, 2017.

[86] Before the second fact-finding meeting took place, the grievor filled out a second conflict-of-interest confidential report. It is dated October 2, 2017, but is stamped as received by the RDG on October 4, 2017. The report is the same as the one he filed in May 2015, except that he replaced the original explanation with one that connected his religious faith, his church, and his work as a CIO with The Exodus Road, as follows:

I am a Christian missionary, sanctioned by the Wesleyan Church of Canada. As a part of my faith practice I am volunteering with US based NGO The Exodus Road as a Volunteer Covert Intelligence Officer. The work is primarily overseas and does not involve Canadian interests in any way. I do not identify myself as an employee of the CBSA. I do not utilize or disclose any confidential information that I possess as a CBSA employee. I want to confirm that there is no real, apparent, or potential conflict of interest with this volunteer missionary work.

[87] There is no dispute that this was the first time that the grievor explicitly advised the respondent that his volunteer activities as a CIO with The Exodus Road were part of his faith practice.

N. October 5, 2017: the second meeting between the grievor and Mr. Watson

[88] The grievor and his bargaining agent representative attended the meeting on October 5, 2017, with Mr. Watson and a management representative. Like the previous meeting in August 2017, he received questions from Labour Relations to ask the grievor. He testified that the purpose of the meeting was to gather more information about the grievor's activities with The Exodus Road. Mr. Watson testified that a very detailed discussion took place lasting almost 90 minutes.

[89] The notes from the meeting were produced at the hearing. The grievor was provided with a copy of the notes on October 12, 2017. He submitted corrections to the notes during the next meeting with Mr. Watson, on October 19, 2017. Mr. Watson

and the grievor testified that the notes from October 5, 2017, with the grievor's corrections added, were accurate.

[90] Mr. Watson began the meeting by reading line by line from his notes from the August 2, 2017, meeting. He asked the grievor if the notes represented an accurate description of their meeting. The grievor responded affirmatively, except that Mr. Watson had used the title investigator instead of volunteer CIO.

[91] Mr. Watson asked whether the grievor used the CBSA's electronic databases for his work with The Exodus Road or if he shared information with them. The answer was no, but the grievor intervened, requesting an explanation of the process before answering further questions. He asked whether he was being investigated for breach of trust and whether that was a criminal offence that would entitle him to his *Charter* rights.

[92] Mr. Watson responded that the grievor was being investigated for conflict of interest and insubordination because he volunteered for The Exodus Road after his request was denied by the RDG. He also advised the grievor that he was being investigated separately for a breach of trust allegedly arising from the email he sent to a friend about stowaways coming in on a vessel. This issue was not included in the reasons for termination and is not before the Board for adjudication.

[93] The grievor was asked a series of questions about his travels to and from Thailand and the activities that he engaged in with The Exodus Road. He acknowledged that The Exodus Road required him to maintain an alias. He also acknowledged that he did not advise customs officials in Thailand of the nature of his volunteer work. He could not remember the exact term he used, whether pleasure, holiday, or personal. When he returned to Canada, he did not speak with a CBSA officer because he used the Nexus line.

[94] The grievor was asked about his previous statement that he was still "actively advocating" with The Exodus Road. He responded that he had given approximately three talks to church groups about his work but not on behalf of The Exodus Road. Other than the vetting process when he applied, he had not talked about his permanent employment with the CBSA.

[95] The grievor was asked to describe his duties. He responded that he spent time with sex-trafficking victims, talking to them and reporting on them to The Exodus Road. He described going into public go-go bars and buying drinks for girls who were potential sex-trafficking victims, to have conversations with them. He reported the information to The Exodus Road's management. He did not have direct contact with law enforcement. He conducted his activities with a partner. He confirmed that he did not have a future trip confirmed but was anticipating the possibility of returning to Thailand.

[96] The grievor denied that he was ever required to solicit or negotiate for the services of a sex worker as part of his work with The Exodus Road. He explained that to have a conversation with a potential victim, he had to buy drinks.

[97] The grievor was also asked about his email to Mr. Watson on August 2, 2017, and what he meant by this statement: "At no time did I engage in any activities that were deemed to be a real or apparent conflict of interest as per my instructions from RDG Calvin Christiansen". He responded that he had a conversation with the RDG at the third-level grievance hearing, and the RDG expressed concern about activities that the grievor could be involved in.

[98] The grievor stated that after the meeting with the RDG he asked The Exodus Road's management for a list of his activities. When he saw the list, he was satisfied the RDG would not be concerned. Mr. Watson asked for details about those activities. The grievor responded that he could not remember, other than the issue of organized crime, and that he would have to check his notes. Mr. Watson questioned the grievor again about what the RDG told him. He said that he did not have his notes and that he could not recall specifics. The grievor did not follow-up with Mr. Watson and provide the requested information.

[99] Mr. Watson asked the grievor whether it was clear that he was not to engage in activities as a volunteer CIO. The grievor responded that it was clear the RDG did not want him to engage in certain activities. The grievor also stated that he told the RDG it was still his intention to volunteer but he would not do the activities the RDG expressed concern about. Mr. Watson asked again what the RDG had expressed concern about, and the grievor answered that he could not recall.

[100] The grievor told Mr. Watson that the conversation with the RDG, which took place after the decision, defined what he was allowed to do. The RDG said he could not participate in certain activities, and the grievor was satisfied that he would not be placed in any of the situations he had discussed with the RDG. When he was in Thailand, he knew what the RDG did not want him to do, and he did not do those things. Mr. Watson asked if the grievor attempted to speak to the RDG or to Ms. MacPhee about his activities, and he responded that he was not aware of a mechanism to do that.

[101] The grievor did not provide information to Mr. Watson, or in his testimony at the hearing, about what activities Mr. Christiansen told him not to do and how he avoided doing those things in his CIO role for The Exodus Road in Thailand.

[102] Mr. Christiansen testified that this was an inaccurate description of the discussion at the third-level grievance hearing. He testified that the grievor was dishonest with Mr. Watson, making it appear that he approved of the grievor working with The Exodus Road as a CIO as long as he did not engage in certain activities. Mr. Christiansen testified that at no time did the grievor say that he intended to travel to Thailand and work with The Exodus Road. Mr. Christiansen testified that it was clear that the grievor was not permitted to volunteer as a CIO for The Exodus Road in Thailand.

[103] Mr. Watson asked the grievor why he had not submitted another conflict-of-interest request, and the grievor responded that he did not know then that he could submit a request for the same thing. He then advised Mr. Watson that he had just submitted a new request and thought that Mr. Watson would have been told about it. Mr. Watson testified that he was unaware that the grievor had filed a new confidential report identifying himself as a Christian missionary and that his work with The Exodus Road was part of his faith practice.

[104] In response to more questions about his interactions with women and girls in bars, the grievor told Mr. Watson that he was a Christian missionary and that going to Thailand was an extension of his church. The grievor stated that the work that he was doing in Thailand was missionary work, like the work he had done previously in Haiti. There is no dispute that this is the first time the grievor disclosed to Mr. Watson that

he considered The Exodus Road work to be missionary work. Neither Mr. Watson nor the grievor followed up on these statements.

[105] The grievor also raised concerns that the respondent had not been forthcoming about the investigation being disciplinary in nature, that he had not been given notice or permitted to have union representation from the start, and that he felt like the “bad guy” when he had been open and honest and that what he was doing was “open knowledge.”

[106] The grievor expressed that he did not believe there was a conflict of interest, that he never tried to hide anything, and that the investigation was an attempt to bully and intimidate him by not telling him the truth. Mr. Watson told him that he had still done something he was told not to do, even if he was being honest about it at that point.

[107] The grievor noted that Mr. Watson did not advise him that he could have bargaining agent representation at the prior fact-finding meeting. The management representative explained to the grievor that he was not entitled to representation at fact-finding meetings, including the one that day. Nevertheless, Mr. Watson allowed him to have one present and made arrangements to ensure the representative could attend.

[108] Mr. Watson’s meeting notes indicate that earlier in the conversation, the grievor and his union representative expressed that since he was not acting as a peace officer while working with The Exodus Road, there was no conflict of interest. They argued that the RDG’s concerns expressed in the September 1, 2015, letter were not applicable. Toward the end of the meeting, the grievor reiterated his belief that the activities with The Exodus Road should not be considered a conflict of interest because he was conducting this activity on his own time and that it had no affiliation with the CBSA. The management representative indicated that off-duty conduct concerns the CBSA and that the Code applies to activities outside work.

[109] There was some confusion about whether this meeting was carried out under CBSA’s *Discipline Policy and Guidelines* (“discipline policy”). Mr. Watson testified that it was a fact-finding meeting, not a disciplinary meeting. He testified that the grievor was not entitled to representation, but he offered the grievor that opportunity in any event.

[110] The grievor testified that he was entitled to the protections of the discipline policy during his meetings with Mr. Watson. At the hearing, he questioned Mr. Watson about his authority to conduct fact-finding meetings that could lead to discipline. Mr. Watson could not point to any policy outside the discipline policy, giving him the authority to question the grievor about his alleged misconduct.

O. October 8, 2017, to October 19, 2017: communications leading to the pre-disciplinary hearing

[111] On October 8, 2017, the grievor sent the following email to Mr. Watson, seeking further information about issues that were raised during the October 5, 2017 meeting:

...

On September 15th you informed me that you were placing me on limited duties and that you were suspending my access to certain systems due to the fact that you were investigating me for Conflict of Interest. In our follow-up meeting on October 5th you confirmed that I was on limited duties but this time you said that it was because you were investigating me for Breach of Trust relating to an email that I had sent back in April. Later you said that our meeting was an information gathering session and that I was not currently under investigation on any matters. I found your explanations very confusing and to date I have not received anything in writing informing me of my status. Could you please answer the following questions:

- 1. What, if anything, am I currently being investigated for?*
- 2. What is my employment status? You stated that you had placed me on limited duties – what does that mean?*
- 3. What systems did you restrict my access to?*
- 4. How long will this restriction be in effect?*
- 5. What was your reason for placing me on limited duties and/or restricting my access to certain systems?*

...

[112] Mr. Watson did not respond to these questions until October 16, 2017. On October 12, 2017, he emailed the grievor a “Notice of a Pre-Disciplinary Hearing” set for October 15, 2017, about the grievor’s involvement with The Exodus Road. Mr. Watson also included a copy of the notes from the October 5, 2017, meeting for the grievor’s review. The hearing was rescheduled to October 19, 2017.

[113] The notice indicates that the grievor is invited to present any clarifications or extenuating circumstances that he feels have not been addressed. It also indicates that

after considering all the relevant information and the aggravating and mitigating factors, Mr. Watson will determine if disciplinary action is warranted.

[114] The grievor responded to Mr. Watson as follows on the morning of October 15, 2017, referring to the meeting notes from October 5, 2017:

...

At our meeting there was significant discussion of the nature of the volunteer work that I was engaging in. I explained that I am a Christian Missionary, sanctioned by the Wesleyan Church of Canada. I explained that I wasn't doing this volunteer work in any way as a CBSA officer, or even as a member of the law enforcement community. I explained that I was doing this work as a function of my role as a [sic] missionary, according to my religious beliefs and practices. It is not law enforcement work, it is religious work. These discussions were not fully reported in the meeting minutes.

...

[115] The grievor sent a separate email to Mr. Watson on October 15, 2017, which begins with: "There seems to [sic] a lack of clarity about what I am and am not being investigated for. On October 8th I sent you an email asking you for clarification that you have not replied to." The grievor then reiterated the text in the email from October 8, 2017, and requested answers to his questions.

[116] The grievor also sent Mr. Watson a separate email on October 15, 2017 with a series of questions about his belief that he was being accused of a criminal breach of trust. He requested information about whether this allegation was being investigated.

[117] The next day, October 16, 2017, Mr. Watson responded that the grievor was not being investigated as far as he was aware and that the other questions would be discussed at the pre-disciplinary meeting on October 19, 2017. It was unclear from Mr. Watson's testimony whether this statement was made in response to the grievor's questions about an investigation for breach of trust or the insubordination and conflict of interest issues. Mr. Watson testified that he did not intend to mislead the grievor in any way.

[118] The grievor responded the same day, requesting information about the nature of the fact-finding meetings conducted by Mr. Watson. He stated that he felt like he was under investigation while he was being interviewed. The grievor advised

Mr. Watson that he could not locate any information under the discipline policy that refers to fact-finding meetings. Mr. Watson responded on October 19, 2017, that a fact-finding meeting is only to gather facts; it is not a meeting to discuss discipline. He also indicated that CBSA follows the Treasury Board policy for discipline and provided links to the TBS discipline guidelines and the CBSA policy on discipline.

[119] The grievor sent a separate email on October 17, 2017, indicating that he was not interested in further discussion of his questions at the October 19, 2017, meeting and that he wanted “clear answers.” He stated that he had asked these questions multiple times and that Mr. Watson had weeks to answer them but continued to be evasive. He asked for the answers in writing in a timely manner so that he could have a clearer understanding of the disciplinary process that he was involved in.

[120] Mr. Watson responded on October 19, 2017, at 12:27 p.m., before the pre-disciplinary meeting was to take place. He responded that, as he indicated in the email of October 16, 2017, the grievor was not being investigated that he was aware of. The grievor was on limited duties, meaning he did not have complete access to all CBSA systems. Mr. Watson stated that on September 15, 2017, he verbally informed the grievor and again in writing on Oct 10, 2017, that he would not have access to certain CBSA systems, which would be in effect until he was told otherwise. Mr. Watson also responded to the grievor’s question about why he was placed on limited duties as follows:

...

a. The reason you’re placed on limited duties is the fact that you’re actively working and advocating for The Exodus Road and you may directly or indirectly utilize or disclose confidential internal information that you possess solely as a result of your employment with the CBSA, which could compromise our operations.

...

P. October 19, 2017: the pre-disciplinary meeting

[121] The pre-disciplinary meeting took place on October 19, 2017. The grievor and two bargaining agent representatives, Mr. Watson and a management representative, attended. The management representative took notes of the meeting, which were produced during the hearing.

[122] One of the issues raised at the meeting was that the notes from the fact-finding meeting on October 5, 2017, were incomplete. Mr. Watson made copies of them and reviewed them with the participants. The final version of the October 19, 2017, meeting notes includes a copy of the notes from October 5, 2017, with the changes requested by the grievor.

[123] There was a discussion about the grievor's access to CBSA systems. In his testimony, Mr. Watson elaborated on his concerns about the grievor's access to CBSA systems. He testified that he would not approve access to them while the grievor was actively working for The Exodus Road. He testified that the systems could be used to check the names and criminal histories of pedophiles whom the grievor might have encountered in his volunteer work. Mr. Watson testified that he was concerned because the grievor was told that he could not do this work, did it three times, and was still actively working with The Exodus Road. Mr. Watson testified that it could compromise the CBSA if the grievor used those systems to the advantage of his work with The Exodus Road.

[124] The grievor's representative also stated that the grievor paid for the trip and that his church endorsed his work. He submitted a letter from the grievor's pastor, which the grievor obtained for the disciplinary meeting, supporting the volunteer work that the grievor does to end human trafficking. The letter, which is undated, is signed by Rev. A.J. Thomas, Lead Pastor of Deep Water Church, and reads as follows:

...

Let it be known that Christopher Jones is an active member in good standing at Deep Water Church and has been approved and appointed by Deep Water as a volunteer missionary to serve with organizations that work to end human trafficking.

Deep Water is a congregation within The Wesleyan Church which has been active in the fight against slavery and human trafficking dating back to the British and American abolition movements of the 19th century. Working for justice in the face of the evils of slavery, both domestic and international, is a cherished part of our belief and practice as Wesleyans that is still carried out today in various ways by local congregations. At Deep Water, a key way we continue to engage in this important work is through our endorsement and support of the volunteer work Christopher Jones does to end human trafficking.

...

[125] The grievor stated that the RDG was concerned about law-enforcement-related activities, but he characterized the work with The Exodus Road as religious activities. The grievor's position with Mr. Watson was that the RDG did not, and could not, preclude him from participating in religious activities. Mr. Watson testified that there was no discussion about what the grievor did for the church versus what the RDG told him he could not do.

[126] The grievor then advised Mr. Watson that he had a trip to Thailand planned for November 2017. He testified that he told Mr. Watson that he did not need the CBSA's permission to do missionary work. However, he would agree to suspend his trip until the issue was resolved. The grievor testified that he told Mr. Watson if CBSA agreed that it was missionary work and that he was free to pursue it, he would continue to volunteer. If CBSA did not agree, he would have to decide what to do next.

[127] The grievor indicated that he suspended his activities with The Exodus Road voluntarily as a sign of good faith. He believed he had a protected right to practice his faith. He stated in the meeting and reiterated in his testimony that the respondent would require a good reason to take those rights away. Mr. Watson asked if the two reasons that the RDG outlined in the September 1, 2015, letter were not good enough for him. The grievor responded that they were not relevant.

[128] Mr. Watson followed up with Mr. Christiansen about the grievor's claim that he received instructions from the RDG during the third-level grievance hearing. He emailed the grievor on November 9, 2017, confirming that the RDG did not indicate that the grievor could participate in activities with The Exodus Road.

[129] Mr. Watson was not involved in the termination decision. He sent his notes of the October 5 and 19, 2017, meetings to Labour Relations and his director. The RDG made the decision to terminate the grievor's employment.

Q. The termination of the grievor's employment

[130] On November 30, 2017, the grievor was advised that his employment was terminated, further to the pre-disciplinary meeting held on October 19, 2017. The termination letter reads as follows:

...

This letter is further to the pre-disciplinary meeting held on October 19, 2017 with respect to your failure to follow a direct order to not volunteer with the organization "The Exodus Road", thereby placing yourself in a conflict of interest with your role as a Border Services Officer at the Canada Border Services Agency.

I am satisfied that you were given the opportunity to review the evidence gathered and provide comments and/or additional information.

I have determined that your actions were contrary to the Canada Border Services Agency Code of Conduct, specifically Chapter 1, Section B. Accountability and Professional Conduct and Chapter 2, Section D-2, Conflict of Interest During Employment – Outside Employment or Activities. I have also determined that your actions were contrary to the Treasury Board of Canada Secretariat Policy on Conflict of Interest and Post-Employment, and the Values and Ethics Code for the Public Sector.

As a Border Services Officer and Peace Officer, you are expected to conduct yourself in a manner that withstands the closest public scrutiny. I find your blatant insubordination and failure to remove yourself from a conflict of interest is [sic] incompatible with the high level of trust, honesty and integrity required of your position. You have irreparably damaged the bond of trust that is fundamental to the employment relationship.

Therefore, in light of the seriousness of your misconduct, your employment is terminated for disciplinary reasons pursuant to the authorities delegated to me under section 12(1)(c) of the Financial Administration Act. The termination of your employment with Canada Border Services Agency is effective today, November 30, 2017.

In determining the appropriate disciplinary measure, I have taken into account your actions and all aggravating and mitigating factors.

...

[131] The letter goes on to describe other administrative issues related to the termination.

[132] Mr. Christiansen testified about the reasons for termination. He concluded that the grievor had simply refused to follow his direction. Mr. Christiansen also testified that the grievor had not been honest with Mr. Watson in the October 5, 2017, meeting about Mr. Christiansen's instructions. He testified that his direction to the grievor was clear; he was not to work with The Exodus Road as a CIO.

[133] Mr. Christiansen described the grievor's misconduct in the dismissal letter as "blatant insubordination". He used that term because the grievor was told not to

volunteer with The Exodus Road as a CIO, refused to accept the direction, and then hid from the respondent that he had disobeyed the direction. Mr. Christiansen testified that the grievor's failure to remove himself from the conflict of interest and the way he went about it, including how he justified his conduct after the fact in meetings with Mr. Watson, was incompatible with the level of integrity and trust required to maintain the employer-employee relationship. He testified that a significant factor was that the grievor did not act with integrity and that the grievor's conduct had irreparably harmed the respondent's trust in him as an employee.

[134] The termination letter cites the Code. Mr. Christiansen testified that the Code requires employees to protect the CBSA's reputation and its internal and external stakeholder and law-enforcement partner relationships in their decisions and actions. Mr. Christiansen testified that the grievor's actions disrespected the CBSA's reputation and the people working in Thailand in a liaison capacity. He was also concerned about the impact of the grievor's conduct on the relationship with the RCMP in Thailand, which had recommended against the CBSA allowing one of its BSOs to conduct covert intelligence gathering for The Exodus Road.

[135] Mr. Christiansen also cited the Code's provision requiring employees to refrain from the direct or indirect use of government property for anything other than officially approved activities. He testified that the grievor acknowledged conducting research on Thailand during work hours relevant to his work with The Exodus Road, which was not part of his official duties.

[136] Mr. Christiansen acknowledged that the grievor submitted a new confidential report that raised, for the first time, that his work with The Exodus Road was part of his faith practice. Mr. Christiansen testified that in his view, the grievor attempted to justify what he had done by linking his actions to his religious activities, which he had never done before. He believed the report was submitted as an after-the-fact explanation for the grievor's insubordination. Mr. Christiansen testified that if the grievor had submitted the explanation before his first trip to Thailand, it would have been considered. Still, he would likely have come to the same conclusion on the conflict of interest, given the nature of the activities that the grievor was to be involved in.

[137] Mr. Christiansen testified that he had no reason to question the content of the letter from the grievor's pastor. When the grievor asked him in cross-examination whether he thought that the letter was illegitimate, Mr. Christiansen responded that it was not the letter that lacked legitimacy, the issue was the grievor's conduct. Mr. Christiansen responded to the grievor that he was told not to go, went anyway and when it was discovered he tried to explain it away with the letter about him being a member of the church.

[138] Mr. Christiansen also testified that the letter was inconsistent with the information he received when the conflict-of-interest decision was made. At that time, the grievor indicated that he was sponsored by friends and family and not by an organization. Mr. Christiansen testified that nothing in the initial presentation indicated that the activities with The Exodus Road were associated with the grievor's religion.

[139] In the hearing, the grievor suggested to Mr. Christiansen that the appropriate time for him to present the letter from his church was once he had been notified of the disciplinary process. Mr. Christiansen disagreed and testified that the disciplinary process was one of many opportunities for the grievor to explain his conduct. He testified that it would have been more appropriate to raise it early, particularly during the grievance hearing or at least before the grievor took his first trip. The grievor asked Mr. Christiansen: "Isn't this the first pre-disciplinary meeting and the first time that I was made aware that I was in any jeopardy of being disciplined?" Mr. Christiansen responded: "You should have been aware that you were in jeopardy of being disciplined when you made your first trip."

[140] Mr. Christiansen acknowledged that he did not follow up or do any research after the grievor asserted that his church supported the work in Thailand. He testified that he was not interested in delving into why the grievor was using a religious justification for his insubordination. He testified that if the grievor had a religious purpose, he should have informed him of it before his first trip.

[141] The grievor testified that he did not know what he was being disciplined for until the termination letter. He knew it related to his work in Thailand, but he was not told specifically that it was insubordination. This testimony was not credible. The notes of the meeting on October 5, 2017, indicate that the grievor was told he was

being investigated for insubordination and conflict of interest. The notes were reviewed by the grievor, and he had an opportunity to correct any inaccuracies.

III. Reasons

[142] The grievor was self-represented, so the Board explained the burdens of proof and confirmed with the grievor that he had a full opportunity to question the witnesses on all relevant issues. The interplay between the discrimination allegations and the reasons for the termination was discussed with the parties. This is a case of “mixed burdens”, with each party carrying the burden to prove certain aspects of the case. The respondent has the burden to prove, on a balance of probabilities, that it had cause to terminate the grievor’s employment. The grievor has the burden to prove, on a balance of probabilities, that the termination was discriminatory.

[143] The grievor filed many documents, including 250 pages, obtained through an access to information and privacy request. Many of the documents in that package were also included in the respondent’s book of documents. Only the documents referred to by the grievor in testimony were marked as exhibits. After the evidence was completed, counsel for the respondent agreed to provide the grievor with an outline of his final submissions and book of authorities in advance so that the grievor could prepare. The grievor also filed many documents, website pages, policies and cases before final submissions, which were reviewed but not commented on unless they were relevant to the issues before the Board.

[144] The grievor described his termination as a breach of s. 2(a) of the *Charter*. The Board explained that the grievance alleges a breach of the *CHRA*, which is the appropriate statute for addressing employment-related discrimination. No notice was provided to the federal or provincial attorney generals that the grievor intended to raise a *Charter* issue in the context of his grievance. Accordingly, the issue before the Board is whether the termination was discriminatory under the *CHRA*.

A. The termination of the grievor’s employment

[145] As the adjudicator noted in paragraph 258 of *Viner v. Deputy Head (Department of Health)*, 2022 FPSLRB 74, the following framework for analyzing a termination of employment is well established (see *Wm Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can L.R.B.R. 1 (“*William Scott*”)):

- Was there cause for discipline?
- If so, was termination an excessive response in all the circumstances?
- If it was excessive, what alternative disciplinary action should be substituted?

[146] The respondent submits that the grievor was insubordinate and failed to remove himself from a conflict of interest, which are serious forms of misconduct, and that termination was not an excessive response in all circumstances.

[147] The grievor submits that there was no conflict of interest, and even if there were, he was not insubordinate. He submits that the RDG's decision was wrong and interfered with his religious beliefs and practice, which the respondent failed to consider as a mitigating factor. The grievor submits that there may have been cause for discipline, but his employment should not have been terminated. He also submits that the respondent misled him into thinking he was not being investigated for misconduct until the pre-disciplinary meeting on October 19, 2020. He submits that the investigation was an abuse of process and that the discipline should be set aside.

[148] The respondent submits, and I agree, that the correctness of the RDG's decision is not before the Board. The grievor had the opportunity to challenge whether the RDG applied the proper factors in determining that his off-duty conduct constituted a real, potential or apparent conflict of interest. He did not pursue the grievance beyond the denial at the third level. Even if the RDG's decision was incorrect, it was in force when the grievor disobeyed it. He exhausted his recourse and was obliged to follow the RDG's direction. However, the Board has addressed the grievor's argument that the termination decision was discriminatory because the respondent did not consider its duty to accommodate or the impact of the RDG's decision on his religious beliefs and practices.

B. The nature of the misconduct

[149] The termination letter indicates that the grievor engaged in "blatant insubordination" by failing to follow a direct order not to volunteer with The Exodus Road, placing himself in a conflict of interest with his role as a BSO. The termination letter also indicates that the grievor's actions were contrary to several respondent policies, including the Code, specifically Chapter 1, Section B, "Accountability and Professional Conduct", and Chapter 2, Section D-2, "Conflict of Interest During Employment — Outside Employment or Activities". The respondent also determined

that his actions were contrary to the TB Policy and the *Values and Ethics Code for the Public Sector*.

[150] The respondent submits that the grievor was insubordinate three times when he travelled to Thailand and worked as a CIO for The Exodus Road, contrary to the RDG's direction. Insubordination requires proof of these four key factors (see *Focker v. Canada Revenue Agency*, 2008 PSLRB 7 at para. 103):

- 1) The employer gave an order.
- 2) It clearly communicated the order to the grievor.
- 3) The person giving the order had the proper authority.
- 4) The grievor did not comply at least once.

[151] There is no dispute that the RDG gave the grievor a clear order in writing that he was not permitted to participate with The Exodus Road as a CIO. There is no evidence that the RDG modified that order, including during the discussions at the third-level grievance hearing. The RDG determined that these activities presented "... a real, potential or apparent conflict of interest of a particularly significant nature given the international interests involved and the exposure to criminal organizations and individuals." The order was not ambiguous, and the RDG was authorized to make those determinations.

[152] The grievor was invited to contact Ms. MacPhee with any further questions, and he asked for a meeting. The RDG delegated the meeting with the grievor to Ms. MacPhee, who reported the grievor's feedback. The RDG made further inquiries before confirming the order. The grievor was also offered an opportunity to correspond with Mr. St-Denis for further information. He asked various colleagues about their experiences in Thailand but not Mr. St-Denis, despite never having travelled to Thailand or knowing anything about the culture in which he proposed to carry out his covert activities. The grievor resisted the RDG's decision from the outset. In my view, he did not contact Mr. St-Denis because he was unwilling to hear anything that might validate the respondent's concern about a conflict of interest.

[153] The grievor argued that the TB policy required the RDG to resolve his concerns about the conflict of interest decision through discussions and compromise. A discussion about the grievor's concerns took place with the RDG's delegate. The RDG responded to the grievor's feedback and took additional steps to ensure his decision was correct. The grievor's proposed compromise was for the RDG to change his

direction. The grievor made no effort to contact The Exodus Road to determine whether he could be of service by carrying out activities that would not conflict with his employment, which would have given the RDG new information and a basis for reconsidering the decision. As the RDG testified, not every situation will result in a compromise that satisfies both parties, and the policy does not require this. The grievor has not proven that the TB policy required the RDG to meet with him personally and compromise with him by changing the conflict of interest decision.

[154] I also note that the grievor appeared to believe that the respondent was obliged to prove or convince him that there was a real, potential or apparent conflict of interest. He also told the respondent that he would stop working with the organization if the respondent proved that it was disreputable. There is no such obligation on the respondent. The employer is the final arbiter of what does and does not constitute a conflict of interest, subject to the grievor's right to grieve the decision.

[155] The grievor filed a grievance alleging that the conflict-of-interest decision was wrong and that it was not in accordance with the CBSA's policy. He participated in a third-level hearing with union representation, and the grievance was denied. He then disobeyed the RDG's order three times by travelling to Thailand to work as a CIO with The Exodus Road, and he was not transparent with the respondent about the purpose of his trips. He acknowledged that he expected to be disciplined, demonstrating that he fully understood the consequences of disobeying the order.

[156] The grievor argued that he disobeyed the order for several reasons, including that he had satisfied himself that there was no conflict of interest between his work for The Exodus Road and his BSO role. He argued that the respondent was partly at fault because he was not disciplined after the first trip, causing him to think the respondent might be condoning his actions. These explanations may be relevant to whether the penalty imposed was excessive but not to whether he was insubordinate.

[157] The grievor also characterized his activities as religious work, not law-enforcement work, arguing that it was beyond the respondent's authority to tell him that he could not volunteer with The Exodus Road as a CIO. That is not correct. The respondent is entitled to scrutinize the grievor's off-duty conduct even if the grievor characterizes it as religious work. In this case, the respondent's concern is not with the

volunteer work in the abstract, but in the relationship between those activities and the grievor's work as a BSO.

[158] I find that the grievor was given a clear order not to volunteer with The Exodus Road as a CIO. The order was given in writing by a person with proper authority. The grievor refused to acknowledge the order and disobeyed it three times before the respondent discovered his activities. He argued that he was not in a conflict of interest and, therefore, could not have been insubordinate. I disagree. It was not for him to decide unilaterally that his activities with The Exodus Road did not place him in a conflict of interest (see *Apenteng v. Deputy Head (Canada Border Services Agency)*, 2017 PSLREB 58 at para. 110).

[159] Based on the evidence, the respondent has proven that the grievor was insubordinate three times, which resulted in him failing to remove himself from the conflict of interest identified by the RDG. This was a serious form of misconduct that gave the respondent cause to impose discipline.

C. Was the termination of employment excessive?

[160] The respondent has the burden to prove that the discipline imposed on the grievor was not excessive. It submits that the termination of his employment was appropriate and proportional to his misconduct. The grievor submits that he would not have been terminated had the respondent considered all the circumstances, including his religious motivation for disobeying the RDG's order.

[161] The grievor accepts that some discipline might have been warranted. Still, he submits that the respondent was obliged to resolve his concerns about the conflict-of-interest decision or at least to engage in progressive discipline. The grievor submits that this would make it clear to him that the respondent intended to enforce the RDG's direction, and he would then be able to make an informed decision about whether to abide by the direction in the future.

[162] The adjudicator in *Viner* described the role of the Board in determining whether the respondent has met its burden:

...

... the Board's role in deciding a disciplinary-action grievance is to determine whether the deputy head has shown cause for imposing a disciplinary action and then to determine if the disciplinary

action imposed was excessive, having regard to the seriousness of the conduct and to mitigating and aggravating factors (see Wm. Scott and Basra).

...

[163] As *William Scott* suggests, the factors used to assess the disciplinary sanction include the seriousness of the offence, whether it was premeditated or spontaneous in nature, whether the employee had a good record and long service, and whether progressive disciplinary action was taken.

D. The seriousness of the misconduct

[164] There is no question that the grievor's misconduct was serious. He had clear instructions about his proposed volunteer work with The Exodus Road, which he ignored. He hid from the respondent the purpose of his trips to Thailand. He testified that he satisfied himself that he did not engage in any activities the RDG prohibited. However, he failed to provide evidence to the respondent or the Board of any difference between the activities under consideration when the RDG's decision was made and the activities he engaged in when he travelled to Thailand. Importantly, he admitted that he worked undercover as a CIO, maintained an alias, gathered intelligence from potential sex-trafficking victims in brothels and bars and failed to disclose the purpose of his trips to Thai border officials. Mr. Christiansen testified that these were the same activities he considered in the fall of 2015.

[165] In *Viner*, the adjudicator noted that "[c]onflict of interest, even apparent conflict, is considered serious misconduct" and that "[t]he onus of compliance is squarely on the employee ..." (see *Viner*, at para. 138). In *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43, the adjudicator commented in paragraph 99: "The prevention and avoidance of conflict of interest is a serious responsibility for all employed in the Public Service. Traditionally, the breach of conflict of interest codes has been treated as a serious offence by adjudicators appointed under the [former *Public Service Staff Relations Act*]."

[166] In *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, the adjudicator commented as follows on the relationship between avoidance of conflict of interest and integrity:

...

[187] In my opinion, avoidance of conflict of interest or appearance of conflict of interest goes to the root of the integrity required from public service employees who carry out contracting activities on behalf of the government. Integrity and the perception of integrity are essential to maintaining the government's credibility when engaging in contracting activities with private contractors. Furthermore, compliance with the principles of fairness enunciated in the contracting policies is essential to ensuring the legality and credibility of competitive procurement processes.

...

[167] It was not up to the grievor to decide whether to obey the RDG's conflict-of-interest decision. The onus was on him to comply with his conflict-of-interest obligations. These obligations are important in the federal public service, particularly in a law-enforcement role securing Canada's national border, which requires the utmost integrity and public confidence. The grievor disobeyed the RDG's conflict-of-interest direction three times and did not disclose his activities until the respondent questioned him. This is the kind of serious misconduct that could bring the federal public service into disrepute.

[168] I find that the grievor's misconduct was serious.

E. The mitigating factors

[169] Mr. Christiansen testified that there were few mitigating factors to consider apart from the grievor's years of service. The grievor referred to several mitigating factors, including condonation, his long service and discipline record, the lack of progressive discipline, the flawed investigation process, and his religious motivations for disobeying the RDG's order.

1. Condonation

[170] There is no basis for finding that the respondent condoned the grievor's misconduct. The principle of condonation is based on an employer's decision not to discipline an employee when it becomes aware of misconduct (see *Viner*, at para. 340). The respondent was unaware that the grievor had travelled to Thailand to volunteer as a CIO for The Exodus Road until he confirmed this after his third trip in April 2017.

[171] The grievor's argument that the respondent condoned his conduct is based on speculation and assumptions. Even though Mr. McGrath knew the grievor had travelled

to Thailand, there was no evidence that he knew about the grievor's activities there. I accept Mr. McGrath's testimony that he did not condone the grievor's actions in disobeying the RDG's order. The grievor also submits that he told the RDG he would not abide by the order at the third-level grievance hearing. I have already addressed this submission and found that it is not credible.

[172] There is no evidence that the respondent knew that the grievor had disobeyed the RDG's direction because he was not forthcoming about the reasons for his trip. He mentioned to people in his workplace that he was travelling to Thailand, but this did not constitute notice to the respondent of his intention to disobey the RDG's order. I reject the grievor's submission that the respondent condoned his activities because he was not disciplined after his first trip. This submission also contradicts the grievor's testimony that he expected to be disciplined once the respondent became aware of his activities in Thailand.

[173] The grievor had the burden of proving on a balance of probabilities that the respondent condoned his behaviour. He did not meet this burden.

2. The grievor's long service and discipline record

[174] The grievor submits that he was a long-serving employee with no record of discipline until the fall of 2017. The respondent submits that he had a recent discipline record, which included a 12-day suspension that he served from August 28 to September 13, 2017. A grievance was filed challenging the suspension, but it was not transmitted to the final level.

[175] The parties did not call evidence on the 12-day suspension, which was mentioned only briefly in Mr. Christiansen's evidence. It does not appear as a reason for termination in the termination letter. Accordingly, I have not placed any weight on the parties' brief submissions about the grievor's discipline record.

3. The lack of progressive discipline

[176] In *Viner*, the adjudicator addressed the issue of progressive discipline in circumstances of repeated misconduct and relied on the decision in *Woodcock v. Canada Revenue Agency*, 2020 FPSLR 73 at para. 63, which states as follows:

[63] ... Progressive discipline should certainly be applied when misconduct which is concerning occurs but is not so serious as to

break the bond of trust between an employer and an employee. However, when misconduct is serious enough, termination can be justified, even when it is the first recorded incident of misconduct.

[177] The respondent is not required to engage in progressive discipline in every case. The grievor repeatedly disobeyed the RDG's order before the respondent became aware of his conduct. The grievor's insubordination and failure to remove himself from the conflict of interest identified by the RDG is serious enough to justify termination. The respondent may have been inclined to impose progressive discipline if it had been aware of his first trip to Thailand in January 2016. However, the grievor was not honest and transparent about his intentions. He cannot rely on the lack of progressive discipline as a mitigating factor when he withheld the information necessary for the respondent to discover his misconduct.

4. The investigation process

[178] The grievor submits that the respondent failed to follow its discipline policy. He alleges that the respondent misled him about whether he was being investigated for misconduct and the nature of the misconduct alleged against him. The grievor submits that had he been told earlier that he was under investigation for misconduct, he would have disclosed, at that point, that the work with The Exodus Road was part of his faith practice. The onus is on the grievor to prove these allegations and to demonstrate that he experienced prejudice due to the respondent's conduct.

[179] The respondent relied on the Code, and CBSA's *Policy on Internal Investigations into Alleged or Suspected Employee Misconduct*. These policies were in force, but do not provide detailed guidance on how to investigate misconduct. The grievor relied on a version of the CBSA discipline policy archived on July 21, 2017. He also relied on a CBSA document dated August 13, 2010 ("guidance document"), which provides guidance for managers with respect to discipline related to off-duty conduct. This document is similar to the guidelines from Treasury Board dated April 1, 2005, which the grievor also submitted at the hearing. It was not clear that these policies were in force at the relevant time. However, they speak to the requirements of procedural fairness, which are not disputed.

[180] The guidance document advises the respondent to commence the investigation as soon as possible after an incident of alleged misconduct. The respondent is to meet with the employee and advise them of the allegations and that an investigation will be

conducted that could lead to discipline. The employee has a right to be told about the details of the alleged misconduct and have an opportunity to respond. The interview with the employee must be documented, and this documentation, including any investigation report, must be retained and made available to the employee upon request. The guidance document indicates that an employee may be accompanied by a bargaining agent representative, as required by the applicable collective agreement provisions, to meetings convened by management concerning a situation related to discipline.

[181] The grievor was not advised that he was being investigated in advance of the meeting on August 2, 2017, with Mr. Watson. On August 28, 2017, Mr. Watson advised the grievor that he was being investigated by Professional Standards regarding his activities with The Exodus Road. At the hearing, the grievor alleged that this was not true, based on his own inquiries with Professional Standards. However, the evidence supports Mr. Watson's testimony that he believed this was true when he made the statement to the grievor. He subsequently confirmed with Professional Standards that it had completed a preliminary investigation and that a full investigation was never conducted, nor would one be conducted in this case. This information was provided to the grievor, raising further questions for the grievor about the nature of the respondent's process.

[182] Mr. Watson then told the grievor on September 15, 2017, that he was suspending the grievor's access to certain CBSA systems because he was being investigated for conflict of interest. After that, Mr. Watson held a second fact-finding meeting on October 5, 2017, where he told the grievor he was being investigated for insubordination and conflict of interest in relation to his activities with The Exodus Road. He did not provide this notice to the grievor at the commencement of the meeting but rather in response to the grievor's questions about the process.

[183] Despite being advised that he was being investigated for conflict of interest and insubordination, he wrote to Mr. Watson on October 12, 2017, expressing confusion about what he was being investigated for. Mr. Watson responded on October 16, 2017, that the grievor was not being investigated, that he was aware of. As I previously indicated, it was unclear from Mr. Watson's testimony whether this statement was made in response to the grievor's questions about an investigation for breach of trust or the insubordination and conflict of interest issues.

[184] Mr. Watson testified that he was distinguishing between fact-finding, which he did not consider part of the discipline process, and pre-disciplinary meetings or disciplinary hearings under the discipline policy. He testified that he had conducted fact-finding but had never conducted an investigation and was taking his instructions from Professional Standards and Labour Relations. Under questioning by the grievor at the hearing, Mr. Watson acknowledged that the grievor was being investigated for misconduct and that it started with Professional Standards. However, he testified that he did not intend to mislead or deceive the grievor in any way. I accept that there was some confusion created by Mr. Watson's communications with the grievor, but there was no evidence that he was acting in bad faith.

[185] I agree with the grievor that he should have been notified before the first fact-finding meeting with Mr. Watson, about the nature of the alleged misconduct and the fact that an investigation had been started that could lead to discipline. The initial request to Professional Standards was to look for any indication that the grievor had worked in Thailand after September 1, 2015, contrary to the RDG's direction. Professional Standards uncovered sufficient information about the grievor's travel history and his volunteer work with The Exodus Road, to allege that he had engaged in misconduct. At that point, the grievor was entitled, as a matter of procedural fairness, to notice under the discipline policy before any further evidence was gathered.

[186] However, the grievor must also demonstrate that a procedural flaw in the respondent's process caused him prejudice, which he has not done in this case. The grievor was aware from the outset that he had engaged in misconduct, that he was being questioned about his activities in Thailand with The Exodus Road and was likely to be disciplined. The grievor held almost all the information relevant to the discipline decision. He misled Mr. Watson with his email of August 2, 2017, claiming that he had not engaged in activities deemed a conflict of interest by the RDG. This resulted in more questions from the respondent about his activities in Thailand. No investigation report was prepared, but the grievor was provided with copies of the notes of his meetings with Mr. Watson. He also had the opportunity before each of his trips and in August 2017, when he was first questioned by Mr. Watson, to be fully transparent with the respondent about his intentions and activities. Mr. Watson created confusion in his communications with the grievor, but it is disingenuous for the grievor to claim that he was unaware of the case against him.

[187] The grievor was represented by a bargaining agent representative in all but the meeting on August 2, 2017. There is no grievance on this issue, and it is not the Board's role to determine if there was a violation of the collective agreement regarding this issue. There is no evidence that the grievor was prejudiced because he was not represented in the first meeting with Mr. Watson.

[188] The grievor submits that had he known earlier that he was being investigated for misconduct, he would have disclosed information about his religious beliefs and practices sooner. Instead, he withheld this information until it was clear he was in jeopardy of being disciplined. As a result, the respondent dismissed his disclosure as a last-minute effort to avoid being disciplined. The grievor appeared to be under the impression that he was entitled to withhold this information until he was advised that he was being investigated for misconduct. That is not the case; he chose to do so. He knew there would be disciplinary consequences as soon as the respondent became aware of his insubordination.

[189] The grievor has demonstrated that the respondent's investigation was flawed, but did not prove that he experienced prejudice.

[190] Even if that finding is incorrect, the Federal Court in *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (CA)(QL) concluded that any procedural defect causing prejudice or unfairness in an employer's investigation process is cured by a *de novo* or fresh hearing before the Board. The grievor had full notice of the allegations against him and a full opportunity to respond. He cross-examined the respondent's witnesses, made submissions, and covered the facts and arguments relevant to the termination and discrimination issues. I also note that the grievance before me does not allege that the grievor experienced prejudice or unfairness in the investigation process.

F. The grievor's discrimination allegations

[191] The grievor alleges that his termination was discriminatory. He submits that when the discipline decision was made, the respondent knew that his work with The Exodus Road was part of his faith practice but failed to consider this a mitigating factor in the discipline imposed.

[192] The respondent submits that the grievor was terminated for insubordination, not his religious beliefs and practices. It also submits that the grievor's disclosure in

October 2017 did not justify his insubordination and would not have changed the conflict of interest decision so long as the proposed activities remained the same.

[193] The respondent learned for the first time that the grievor was volunteering with The Exodus Road as part of his faith practice on October 4, 2017, when the grievor filed the second confidential conflict-of-interest report. He also disclosed this information in his meetings with Mr. Watson on October 5 and 19, 2017. Before this, the respondent did not know that the grievor believed the conflict of interest decision interfered with his religious beliefs and practices. Even in the grievance and the third-level grievance hearing, the grievor raised secular objections to the RDG's decision, not religious ones. I would not conclude that the respondent should have known that the grievor was objecting to the RDG's decision based on religious freedom from the comment to the RDG that the decision violated his *Charter* rights.

[194] The accommodation process is a multi-party inquiry involving the respondent, the bargaining agent, and the grievor. If the grievor required an accommodation based on his religious beliefs and practices, he had a duty to help the respondent understand his needs (see *Andres v. Canada Revenue Agency*, 2014 PSLRB 86 at para. 89). That duty is not fulfilled by oblique references to previous missionary work or the *Charter* or by assuming that people knew about his past missionary work in Haiti and would make the connection with his proposed work for The Exodus Road.

[195] The respondent had no obligation to consider whether the grievor required accommodation until the grievor disclosed his needs or gave the respondent reason to inquire further. However, once the grievor disclosed the connection between his work with The Exodus Road and his faith practice on October 4, 2017, the respondent was obliged to consider its duty to accommodate the grievor and whether this information was relevant to the discipline decision. The respondent did not ignore the disclosure. However, it did not consider whether it had a duty to accommodate the grievor and dismissed his disclosure as an after-the-fact attempt to justify his acts of insubordination.

[196] Section 226(1)(a) of the *Act* authorizes the Board to interpret and apply the *CHRA* in matters referred to adjudication. The hearing before the Board gave the grievor a full opportunity to explain the basis for his belief that the respondent's conduct infringed on his religious beliefs and practices. The Board can make findings

and order remedies if the grievor proves he experienced discrimination. The issue is whether the respondent's decision to terminate the grievor's employment was discriminatory because it failed to consider his religious beliefs as a mitigating factor.

[197] Section 7 of the *CHRA* states that refusing to employ or continue to employ an individual based on a prohibited ground of discrimination constitutes a discriminatory practice. Section 3 of the *CHRA* provides that religion is one of the prohibited grounds of discrimination.

[198] The burden is on the grievor to prove that discrimination occurred. The first step is for him to prove a *prima facie* case of discrimination, which the parties agree is set out in the three-part test in the Supreme Court of Canada's decision in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33:

- 1) the grievor has a characteristic that is protected from discrimination (in this case, religion);
- 2) he experienced an adverse impact (in this case, the discipline that the employer imposed); and
- 3) the protected characteristic was a factor in the adverse impact.

[199] A *prima facie* case covers the allegations made and is complete and sufficient to justify a verdict in the grievor's favour in the absence of an answer from the respondent (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536 at para. 28). If the grievor establishes a *prima facie* case, the burden shifts to the respondent to justify its conduct.

[200] Section 15(1) of the *CHRA* states that a practice is not discriminatory if the following is established:

15 (1) ...

(a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement

...

15 (1) ...

a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;

[...]

[201] Section 15(2) defines a *bona fide* occupational requirement as follows:

Accommodation of needs

15 (2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement ... it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Besoins des individus

15 (2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

[202] If the respondent meets its burden under s. 15(2), and the grievor cannot prove that the respondent's explanation is pretextual, the Board will find that the respondent's actions were not discriminatory. It is settled law that the grievor does not have to prove that the respondent intended to discriminate against him. It is also unnecessary to prove that the prohibited ground was the only factor contributing to the adverse treatment (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. 52).

[203] The grievor is a Christian, which is a characteristic protected by the *CHRA*, which meets the first part of the test. The respondent terminated his employment, which meets the second part of the test. The third part of the test requires the grievor to establish a connection between his termination and his Christian beliefs or practices.

[204] The Supreme Court of Canada addressed the definition of "religious freedom" in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 39, as follows:

39 In order to define religious freedom, we must first ask ourselves what we mean by "religion". While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally

linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

[205] At paragraph 56, the Court described the requirement for a connection between the adverse treatment that a claimant experienced and their religious beliefs and practices:

56 Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

[206] In *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 ("*Des Chênes*"), the Supreme Court of Canada applied *Amselem* in finding that the claimants had a sincere belief that they had an obligation to pass on the precepts of their Catholic religion to their children. However, they failed to show that from an objective standpoint, an Ethics and Religious Culture Program, which became mandatory in Quebec schools in 2008, interfered with their ability to pass their faith on to their children. The Court stated as follows:

...

[23] At the stage of establishing an infringement, however, it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities. This may of course involve any legal form of proof, but it must nonetheless be based on facts that can be established objectively. For example, in Edwards Books, the legislation required retailers who were Saturday observers to close a day more than Sunday observers. In Amselem, the infringement resulted from a prohibition against erecting any structure on the balconies of a building held in co-ownership, while the appellants believed that their religion required them to dwell in their own succahs.

[24] It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but

whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the Canadian Charter and the Quebec Charter, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.

...

[27] To discharge their burden at the stage of proving an infringement, the appellants had to show that, from an objective standpoint, the ERC Program interfered with their ability to pass their faith on to their children. This is not the approach they took. Instead, they argued that it was enough for them to say that the program infringed their right (A.F., at para. 126). As I have already explained, it is not enough for the appellants to say that they had religious reasons for objecting to their children's participation in the ERC course. Dubois J. of the Superior Court was therefore correct in rejecting that interpretation. He stated the following: [TRANSLATION] "To claim that the general presentation of various religions may have an adverse effect on the religion one practises, it is not enough to state with sincerity that one is a practising Catholic" (para. 51).

...

[207] I have found that the grievor has not established a *prima facie* case of discrimination. While there is no dispute that the grievor is a Christian and that he experienced adverse treatment, he has not established a connection between his religious beliefs and the specific activities for which he was disciplined. Like the claimants in *Des Chênes*, this is not about whether the grievor has a sincere commitment, based on his religious beliefs, to missionary work generally, or specifically in the area of human trafficking. It is about the grievor's insubordination and the conflict of interest created by the specific activities associated with the role of a CIO with The Exodus Road.

[208] It is not enough for the grievor to say with sincerity that he was called by God or that working with The Exodus Road allows him to foster a connection with God. The decision in *Amselem* requires the grievor to prove that his beliefs call for "a particular line of conduct" that was prohibited by the respondent, namely, the covert intelligence-gathering activities of a CIO with The Exodus Road in Thailand. He must prove that the respondent prohibited him from engaging in a protected religious activity.

[209] Of the many cases the respondent and the grievor put to me, the grievor's circumstances are most like those in *Seneca College v. OPSEU, Local 560*, 2014 CarswellOnt 10087 ("*Seneca*"). In that case, the arbitration board addressed a claim of religious discrimination on behalf of a grievor, who was Jewish and a full-time teacher at Seneca College. The grievor also taught computer classes in the morning at a Jewish high school called "CHAT". The respondent initially accommodated the grievor by scheduling his Seneca classes in the afternoon. It then found that it could no longer accommodate his employment schedule at CHAT. He alleged that his faith compelled him to give back to his community and that the respondent's refusal to continue his accommodation was discriminatory.

[210] The arbitration board accepted that the grievor sincerely believed that his faith required him to give back to his community but found that teaching at CHAT was not a protected religious activity. The arbitration board found that it was a choice that the grievor made as a means of fulfilling his religious requirement to give back to his community. The board noted that it would be "... remarkable to suggest that the grievor is required by his religious belief to teach at CHAT" (see *Seneca*, at para. 11).

[211] Similarly, the grievor in this case chose to work with The Exodus Road as a CIO as a means of fulfilling his religious commitment to missionary work and ending human trafficking. He had previously chosen to do a different kind of missionary work in Haiti as part of his faith practice. The grievor is not required to prove that his church supports his activities. However, he submitted the letter from his to the respondent, to demonstrate that the work he does to end human trafficking is endorsed by his church. The letter does not indicate that the specific activities of a CIO are a requirement of the grievor's faith practice. More importantly, Mr. Christiansen testified that the letter did not explain the grievor's insubordination.

[212] The specific activities prohibited by the respondent, which include covertly gathering intelligence on the ages and identities of potential victims of human trafficking in bars and brothels in Thailand, are not protected religious activities. The respondent found that the activities overlapped and conflicted with the grievor's BSO role, not that he was prohibited from doing missionary work. The grievor also acknowledged that he took one trip with The Exodus Road after the termination in 2018, and then, for different reasons, he chose not to continue. This emphasizes that his religious beliefs did not require him to work specifically as a CIO with The Exodus

Road. He made that choice to fulfill his commitment as a Christian to missionary work and ending human trafficking.

[213] The grievor has not proven a *prima facie* case of discrimination. The grievor was not engaged in protected religious activities. The respondent is not required to justify its actions. The fact that the respondent treated the grievor's disclosure as an excuse for his insubordination is not itself discriminatory. The respondent's conclusion was based on the grievor's conduct and was not tainted by any animus toward him as a person of religious faith.

[214] It is not disputed in this case that the respondent did not investigate the grievor's claim that his work for The Exodus Road was part of his faith practice. However, no separate remedy is available under the *CHRA* for an employer's failure to take specific procedural steps as part of the accommodation process if the Board finds that the outcome was not discriminatory (see *Petrovic v. TST Overland Express*, 2021 CHRT 26, at para. 140; see also *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2014 FCA 131). If the grievor had established a *prima facie* case of discrimination, it would have been more difficult for the respondent to establish undue hardship without having attempted to accommodate the grievor when the disciplinary decision was made.

G. Aggravating factors, and the bond of trust

[215] The respondent relied on several aggravating factors, including the repetitive nature of the grievor's conduct, his inability to accept the reasons for the conflict-of-interest decision, his insistence that he had not done anything wrong, and his misleading comments to Mr. Watson about the RDG's instructions. The respondent also submitted that the bond of trust was broken and that the public's confidence in the CBSA and its border officials would have been eroded had the grievor's insubordination not resulted in termination.

[216] The termination letter states that as a BSO and a peace officer, the grievor was expected to conduct himself in a manner that withstood the closest public scrutiny. The respondent asserts in the termination letter that his insubordination and failure to remove himself from a conflict of interest were incompatible with the high level of trust, honesty, and integrity required of his position and that his conduct had irreparably damaged the bond of trust that is fundamental to the employment

relationship. The respondent also argues that the grievor's failure to accept the RDG's decision or take responsibility for his conduct demonstrates that he lacks the potential for rehabilitation.

[217] The grievor submits that the respondent has not proven that the bond of trust was broken. When questioned about his activities in Thailand, he submits that he was open and honest with the respondent. He submits that when it became apparent that he was likely to be disciplined, he was forthcoming about his religious motivation for disobeying the RDG's order. He also agreed to put his November 2017 trip on hold until the matter was resolved. He submits that because there was no progressive discipline, he did not receive the opportunity for rehabilitation. Had he been suspended rather than terminated, he would have had to evaluate whether to continue his work with The Exodus Road or his BSO employment.

[218] In *Viner*, the adjudicator commented that the grievor's capacity to conform to the respondent's legitimate expectations in the future "... involves assessing the grievor's ability and willingness to reform and rehabilitate, to re-establish in a viable fashion the trust that the respondent is entitled to have in him" (at paragraph 372). The adjudicator commented that "... great weight must be placed on the grievor's recognition of the reprehensible aspects of his behaviour" (at paragraph 372).

[219] In *Oliver*, at para. 103, the adjudicator made the following observation about the relationship between the recognition of misconduct and rehabilitative potential:

[103] The recognition of culpability or some responsibility for his or her actions is a critical factor in assessing the appropriateness of the discipline. This is because the rehabilitative potential of the grievor is built on a foundation of trust, and trust starts with the truth. If a grievor has misled his employer, failed to cooperate with the legitimate investigation of allegations of conflict of interest, and refuses to admit any responsibility in the face of evidence showing wrongdoing, then re-establishing the trust necessary for an employment relationship is impossible.

...

[220] The grievor has not recognized the serious nature of his misconduct. He repeatedly disobeyed an order from his RDG and did not take steps to remove himself from the conflict of interest. On the contrary, he decided that his work as a CIO for

The Exodus Road was not a conflict of interest, quietly disobeyed the order until the respondent found out, and then continued to justify his conduct.

[221] During the fact-finding and disciplinary processes, the grievor defended his insubordination by saying that he had satisfied himself that there was no conflict of interest. He continues to believe that he could not be insubordinate if there was no conflict. He misled Mr. Watson by saying that he had not engaged in any of the activities that were of concern to the RDG, although he could not describe those activities. He failed to acknowledge that the RDG prohibited him from volunteering as a CIO with The Exodus Road, not from certain activities. He portrayed himself as open and honest with the respondent, but only when it found out about his activities, and even then, he withheld a critical piece of information about his motivations for disobeying the order, which he also failed to disclose when he grieved the RDG's decision in 2015.

[222] Throughout the fact-finding and disciplinary processes, the grievor asserted that the RDG's decision was incorrect for a host of secular, not religious, reasons: he was not a peace officer when he was off duty, he did not share confidential information obtained in the course of his BSO work with The Exodus Road, he did not identify himself as a CBSA employee, his volunteer work was consistent with the CBSA's commitment to eradicate human trafficking, and the respondent failed to prove that The Exodus Road was involved in illegal activities. By his own admission, the grievor waited to "play the religion card" when he concluded that the time was right. Because the grievor did not disclose this information until after he was questioned, the respondent concluded that he was using his religious beliefs in an attempt to justify his acts of insubordination after they occurred. By then, the bond of trust had been irreparably damaged.

[223] The grievor mistakenly believed that he was entitled to disobey the order and to test whether the respondent was serious about discipline. He submits that a suspension would have given him a forum for raising the matter of his religious beliefs and to have the issue finally determined. At that point, he would have known that the respondent was serious, and he would have had to make a difficult decision had the respondent not agreed to permit him to continue his work with The Exodus Road. It is inexplicable why the grievor took that gamble and then blamed the respondent for not catching him soon enough to engage in progressive discipline. The clear and obvious

path to resolving the conflict-of-interest issue was for him to be honest and forthright about all the relevant facts from the outset.

[224] It was particularly concerning that someone employed as a BSO in Canada would defend his actions in failing to disclose the purpose of his trips to Thai border officials. The grievor testified that his actions were consistent with directions from the government of Thailand. No evidence was produced to support this. Mr. Christiansen also testified that this was a significant factor in his decision to uphold the conflict-of-interest decision in 2015.

[225] The grievor maintained throughout the hearing that he had done nothing wrong, which further reduced his rehabilitation potential. In the absence of any recognition by the grievor that his actions were improper, I find that the bond of trust between him and the respondent is irretrievably broken. The trust that the respondent is entitled to have in him cannot be re-established in the face of his failure to recognize the seriousness of his misconduct.

H. Conclusion on the proportionality of the disciplinary action

[226] I have determined that the grievor was insubordinate and failed to remove himself from the conflict of interest that the RDG identified, which is incompatible with the level of trust and honesty required to maintain the employment relationship. These are serious forms of misconduct for which the termination of employment is a valid option. The grievor failed to prove that he was engaged in protected religious activity and that the decision to terminate his employment was discriminatory for that reason. The other mitigating factors are insufficient to make termination an excessive response in this case. The aggravating factors and lack of rehabilitative potential reinforce that the termination was not excessive.

[227] Accordingly, the grievance against the termination of employment is denied.

I. Administrative delay

[228] In his final submissions, the grievor argued that he was prejudiced by the delay in the adjudication of his grievance from the date of the termination to the conclusion of the hearing. I advised the grievor that the Board had no jurisdiction over his termination grievance before it was referred for adjudication on April 6, 2018. The time between the referral to adjudication and the conclusion of the hearing was just

over five years. The grievor submits that two years would have been a more reasonable timeline.

[229] The respondent made no submissions on delay and did not argue that it impaired its ability to defend the termination decision.

[230] The grievor did not provide a chronology of his communications with the Board. The information that follows was provided by the Board from its file in this matter.

[231] The grievor submits that it took four years for the Board to schedule the grievance for a hearing. This is not correct. When the grievance was referred to adjudication, the grievor was represented by the bargaining agent. The grievance was initially scheduled for hearing June 17 to 19, 2020. On March 3, 2020, the Board informed the parties that, due to unforeseen circumstances, the assigned Board member was no longer available. However, the Board offered multiple alternate dates beginning the week of July 6, 2020 and including the entire month of August, 2020.

[232] Neither party responded to the Board regarding the new dates. The Board did not hear from the bargaining agent until November 24, 2021, when a new representative was assigned. On January 12, 2022, the Board advised the parties that the hearing was scheduled for February 15 to 17, 2022.

[233] On February 9, 2022, six days before the start of the hearing, the bargaining agent notified the Board that it was withdrawing representation. The grievor had the option to continue on his own. Understandably, the grievor requested an adjournment to consider his options and the request was granted. The Board also reiterated that its mediation services remained available if the parties wished to mediate.

[234] The Board requested a status update from the grievor in March, 2022. On March 4, 2022, the grievor responded with a request for a further postponement. The request was granted, and the grievor was advised to contact the Board no later than March 25, 2022, with the name of his new representative. The grievor did not respond until May 15, 2022, when he advised the Board that he would be self-represented and was ready to set new hearing dates.

[235] In July, 2022 the grievor requested a “speedy trial”. The Board responded on July 18, 2022 that the schedule for the final quarter of 2022 was established and notice had been given to the parties. The grievor was advised that cases are only added

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

to an established hearing schedule under highly unusual circumstances and generally in the context of both parties' requesting an expedited hearing. The grievor was advised that this matter would be added to the first available 2023 hearing schedule.

[236] On October 18, 2022, the parties were notified that the hearing was scheduled for January 17 to 19, 2023. Opening statements and the evidence began on January 18, 2023. Continuation dates were offered in April and May, and two additional hearing dates were scheduled on May 24 and 25, 2023. Final submissions were heard in June 2023.

[237] The grievor relied primarily on the decision of the Supreme Court of Canada in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, a case involving allegations of delay in disciplinary proceedings brought by a law society against one of its members. The Supreme Court commented on its earlier decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, which the grievor also relied on in his submissions. The Supreme Court affirmed the finding in *Blencoe*, that excessive delay in an administrative law proceeding can give rise to an abuse of process in two ways: where the fairness of a hearing is undermined because the delay has impaired the right of a party to respond to a complaint against them, or where there has been inordinate delay causing significant prejudice. The grievor submits that both of these factors lead to an abuse of process in his case.

[238] The Supreme Court created a framework for assessing inordinate delay. First, the delay must be considered in light of all the circumstances of the case, which includes the nature of the proceeding, the length and causes of the delay and the complexity of the facts and issues. Second, there must be proof that the delay directly caused significant prejudice. To be considered abuse of process, the delay must directly cause detriment to an individual in the form of significant psychological harm, damage to a person's reputation, disruption of family life, loss of work or intrusive media attention.

[239] The grievor has not proven that his ability to fully address the issues relevant to the termination was impaired by the delay. The events leading to the grievor's termination were well-documented, and the grievor provided the respondent with most of the information relevant to the disciplinary decision. The grievor submits that he made notes about meetings with the respondent but could not obtain them after his

termination. This issue arose when he was terminated, not due to the passage of time. The grievor also made general submissions on the impact of delay on the witness' memories but did not point to any specific gap in the evidence that caused him prejudice.

[240] The grievor mentioned two potential witnesses who had passed away. The first was his previous supervisor, who knew about his missionary work in Haiti. This was not disputed by the respondent, but the grievor could not confirm that his former supervisor knew about his work with The Exodus Road. The second potential witness was a previous bargaining agent president. The grievor acknowledged that he was unsure whether this witness could provide the Board with relevant evidence.

[241] With respect to the second ground, whether the delay was inordinate, the grievor's submissions did not address the full timeline, including the delay attributable to himself or his bargaining agent. The Board scheduled the grievance for hearing in a reasonable amount of time after the referral to adjudication. The events that followed were unfortunate but not the result of the Board's delay. The gap in time, from March 2020 to November 2021, was due to the delay in both the respondent and the bargaining agent responding to the Board's offer of new hearing dates. The scheduled dates in February 2022 were cancelled when the bargaining agent withdrew from the process. The Board granted the grievor's request for an adjournment and followed up with him, requesting status updates to reschedule the hearing. When the grievor responded in May 2022 that he was ready to proceed, the Board listed the matter for hearing at the earliest possible date in 2023. The hearing was completed within five months of the first hearing dates.

[242] It is widely recognized that inordinate administrative delay can negatively affect almost every aspect of a party's well-being. I acknowledge the grievor's submissions about his inability to find employment, his financial and psychological pressures, and how his reputation and relationships with family and friends suffered. These are some of the most unfortunate consequences of being terminated from one's employment. However, the grievor did not demonstrate that the delay, as opposed to the termination, directly caused significant prejudice.

[243] The grievor was also permitted to file a Nova Scotia Small Claims Court judgment on the delay issue in the case of *Black and Air Canada* (January 10, 2024,

Claim 519145, unreported) (“*Air Canada*”). The case involved a claim against Air Canada for losses associated with a delay in air travel. The claimants sought compensation under federal regulations enforced by the Canadian Transportation Agency.

[244] The grievor compared the regulations at issue in the *Air Canada* case with the Board’s procedural guide, published in January 2021. The grievor referred to the section on Hearing Schedules (B.11). This section indicates when hearing schedules are released, how to seek a postponement, and the cases given priority which include terminations. Parties are also advised that given the Board’s active caseload, it may take months before a case is placed on the hearing schedule. The grievor alleged that the Board did not prioritize his case but did not point to any evidence to support this other than the passage of time.

[245] I reviewed the *Air Canada* case and found that it did not apply to the grievance before me. The question in that case was whether the regulations mandated that the claimants receive compensation due to a delay in their trip. No regulation mandates that the Board is to complete hearings within a certain period of time.

[246] I conclude that the grievor has not proven that the delay resulted in an abuse of process. The delay did not affect the fairness of the process and did not impair the grievor’s ability to challenge the respondent’s disciplinary decision. The grievor has also not proven that the delay was inordinate. He did not account for delay attributable to decisions made by the bargaining agent, his representative. This is not a criticism of the bargaining agent. The Board does not know the reasons for these decisions. The grievor also did not demonstrate how the prejudice he experienced resulted from the delay as opposed to the termination of his employment.

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

(The Order appears on the next page)

IV. Order

[248] The grievance is denied.

September 25, 2024.

**Leslie Reaume,
a panel of the Federal Public Sector
Labour Relations and Employment Board**