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



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

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BETWEEN

**ARLENE WILSON**

Grievor

and

**DEPUTY HEAD  
(Department of Natural Resources)**

Respondent

Indexed as

*Wilson v. Deputy Head (Department of Natural Resources)*

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:** Christopher Schulz, Lisa Dubé, and Anastasia Trofimoff, counsel  
Taya Van Dyke, representative

**For the Respondent:** Marc Séguin and Adam Feldman, counsel

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Heard by videoconference,  
September 21, 2022, April 3 to 6, June 16 and 20,  
and December 18 and 19, 2023, and February 21, 2024,  
and based on written submissions and oral submissions,  
heard on May 15, 2024.

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**REASONS FOR DECISION**

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**I. Introduction**

[1] Arlene Wilson (“the grievor”) is an indeterminate employee with Natural Resources Canada (“the respondent” or “NRCan”). She has been employed with the respondent since April 6, 1998, and occupies the position of Chief, Stakeholder Relations in the Office of Energy Efficiency (“OEE”) at the CO-03 group and level.

[2] On March 28, 2018, the grievor was advised that an independent third party would be conducting an administrative investigation into four allegations: attempting to influence a staffing process, intimidating a subordinate by trying to have her modify a reference for a candidate, insubordination, and inappropriate conduct toward NRCan employees. The report was delivered in December 2018, and the investigators upheld all four allegations.

[3] A grievance was filed on January 30, 2019, challenging the investigation process and the report. This grievance is not before the Federal Public Sector Labour Relations and Employment Board (“the Board”). However, during the grievance process, the respondent determined that the 4th allegation was inconclusive and would not be considered in the disciplinary decision.

[4] On November 4, 2019, the grievor participated in a pre-disciplinary hearing. On January 10, 2020, she received a 3-day suspension without pay for the first three allegations related to the staffing process. She filed an individual grievance on January 24, 2020, challenging the suspension as unjustified and abusive. The grievance also alleges that the discipline resulted from a procedurally unfair and abusive investigation process. The grievance was filed under the relevant collective agreement between Treasury Board and The Professional Institute of the Public Service of Canada (“PIPSC”) for the Audit, Commerce and Purchasing (AV) group that expired on June 21, 2018 (“the collective agreement”).

[5] The respondent denied the grievance at the final level on February 24, 2020. It was referred to the Board for adjudication on March 10, 2020, 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 suspension.

[6] The bargaining agent requested that this grievance be heard jointly with the grievor's complaint (Board file no. 560-02-38817) under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2) filed before the Board on June 21, 2018 ("the reprisal complaint"). The reprisal complaint relates in part to the same investigation process and the decision of the respondent to remove the grievor's managerial duties and relocate her offsite. The parties agreed to hold the reprisal complaint in abeyance until the discipline grievance was determined. While there was some overlap in the bargaining agent's submissions between the discipline grievance and the reprisal complaint, the Board has been careful not to make findings on any issues that are the subject of the reprisal complaint.

[7] The Board heard evidence from eight witnesses, including the grievor, over eight days on the merits of the discipline grievance. The parties filed final written submissions and participated in oral submissions on May 15, 2024.

[8] Based on the evidence presented by the parties at the hearing, I have found that the grievor engaged in misconduct, and the discipline was not excessive. Accordingly, that part of the grievance is dismissed, and the grievor is not entitled to the remedies she requested arising from the disciplinary decision.

[9] I have also found that the respondent's management of the investigation process was carried out in bad faith, causing the grievor harm that could not be fully redressed by a *de novo* hearing before the Board. The grievor has been awarded \$20 000 in damages for mental distress resulting from the investigation process.

## **II. Background to the hearing**

[10] The hearing was preceded by a protracted process of arguments and orders over the production of arguably relevant documents. The grievor has requested costs for lost hearing days it attributes to the respondent's conduct. This issue is addressed separately at the conclusion of this decision.

[11] The staffing process in question began in August 2017. The events giving rise to the investigation occurred over a short period of time at the end of the staffing process in March 2018. Debbie Scharf, Director of Equipment in the Clean Energy Branch, was the sub-delegated manager in charge of several staffing processes at the time, including one to create a pool of qualified Program Officers at the PM-03 level.

Ms. Scharf was not the grievor's direct manager but was accountable for the PM-03 process. The grievor ran the PM-03 process and reported to Ms. Scharf for this limited purpose. The grievor was also a hiring manager with a vacancy at the PM-03 level, which she intended to fill from the pool.

[12] The following six witnesses testified for the respondent:

- Joyce Henry, Director General, OEE, Low Carbon Energy Sector, advised the grievor of the allegations against her in the meeting on March 28, 2018, and made the disciplinary decision following the investigation.
- Kathleen Caron, a senior human resources (HR) staffing advisor, provided advice, guidance and logistics to Ms. Scharf and the grievor for the PM-03 process. At the time, she had been involved in hundreds of staffing processes.
- Jennifer Falconer a contractor who reported to the grievor and was a candidate in the PM-03 process. The grievor is accused of targeting Ms. Falconer in the staffing process.
- Stephanie Ansari, a junior program officer, reported to the grievor and provided a reference for Ms. Falconer in the PM-03 process. A meeting took place between Ms. Ansari and the grievor that led to the allegation that the grievor sought to intimidate a subordinate.
- Sarah Stinson, a Director in the Clean Energy Branch, was the grievor's direct manager.
- Ms. Scharf, Director of Equipment in the Clean Energy Branch.

[13] The grievor and Marie-Claude Chartier testified in support of the grievance. In March 2018, Ms. Chartier had been an Employment Relations Officer at the PIPSC for more than a decade. She was the grievor's bargaining agent representative throughout the investigation and grievance processes.

[14] There was a discussion on the first day when the bargaining agent raised allegations of racial discrimination. No notice was provided to the Canadian Human Rights Commission as required under the *Act*. The parties agreed that the grievor would not advance formal allegations of racial discrimination in this grievance.

### **III. The discipline and grievance process**

[15] On March 28, 2018, the grievor attended a meeting with Ms. Chartier, Ms. Henry and Andrew Crain, Senior Labour Relations Advisor for the respondent. The grievor was advised that an administrative investigation was being conducted in relation to the following allegations made against her:

...

- 1) You attempted to influence the outcome of staffing process #2017-RSN-EA-ES-179267;*
- 2) You sought to intimidate a subordinate by trying to have the subordinate modify a reference provided for a candidate in staffing process #2017-RSN-EA-ES-179267;*
- 3) You were insubordinate by refusing to provide staffing materials to the delegated HR Manager when requested in staffing process #2017-RSN-EA-ES-179267; and*
- 4) You have been inappropriate and demonstrated unacceptable behavior in your interactions with NRCan employees.*

...

[16] Ms. Chartier requested further details for allegations 1 and 4 and was advised that the investigators would provide them in due course. After the meeting, the grievor was given fifteen minutes to clear her desk. She was relocated to a different building to be assigned other duties, and her management responsibilities were removed pending the outcome of the investigation.

[17] The grievor did not return to work after this meeting. She has been on medical leave since April 3, 2018. In April 2018, she was cleared with some medical restrictions to participate in the investigation. She is currently in receipt of long-term disability ("LTD") benefits.

[18] The investigation began in April 2018. In September 2018, after multiple requests for the details of allegations 1 and 4, and just before the grievor's first interview with the investigators, Ms. Chartier learned that the investigators had 2 mandates. The first was investigating allegations 1, 2, and 3 arising from the staffing process. The second was a broad, open-ended, general audit of the grievor's conduct in the workplace. The investigators advised Ms. Chartier that the first three staffing allegations were separate from the audit they were carrying out in relation to the 4th allegation. Ms. Chartier also learned that the investigators' mandate permitted them to interview up to 40 people for both files.

[19] On September 18, 2018, the grievor was interviewed regarding the first 3 allegations. At the end of the interview, she was presented with 44 highly critical, vague allegations from unnamed witnesses organized under seven themes. In November 2018, the grievor received a list of 67 allegations, again from unnamed sources, with only slightly more detail than the first 44. The grievor was devastated.

[20] This raised significant procedural fairness concerns for the grievor and Ms. Chartier, who escalated those concerns to Patrick Giroux, Assistant Director, Centre of Expertise and Labour Relations. Mr. Giroux told Ms. Chartier that the investigators did not have a mandate to investigate at large and had likely misunderstood the scope of the investigation. Ms. Chartier was then advised by the investigators that they would not be conducting any further interviews and would be delivering their report to the respondent. Ms. Chartier reasonably assumed that the investigators were not proceeding with allegation 4.

[21] The grievor received the investigation report on January 7, 2019. The investigators found that the first three allegations were substantiated. They also found that the 4th allegation was substantiated based on the interviews conducted in relation to the first three allegations. The grievor and Ms. Chartier were shocked that the investigators had not disclosed that these details, arising from the staffing process, were part of allegation 4. All along, Ms. Chartier had been advised that it was a separate audit.

[22] On January 30, 2019, the grievor filed a grievance (“the investigation grievance”) against the investigator’s report and alleged that the respondent failed to conduct a fair investigation. The grievor requested that the investigation process be cancelled, the final report destroyed, compensation for any loss of income and benefits, and damages. This grievance is not before the Board for adjudication, but it is part of the timeline relevant to the discipline grievance.

[23] On October 21, 2019, a grievance hearing regarding the investigation grievance was held. The grievor, represented by Ms. Chartier, made submissions about the report and investigation process. In the third-level decision on November 15, 2019, Mollie Johnson, the Assistant Deputy Minister (“ADM”), Low Carbon Energy Sector, concluded that allegations 1 to 3 had been investigated in accordance with the principles of procedural fairness and natural justice. However, she partially upheld the grievance finding that allegation 4 was inconclusive and determined that the respondent would proceed to the disciplinary phase only on allegations 1 to 3.

[24] On November 4, 2019, the grievor and Ms. Chartier attended a pre-disciplinary hearing with Ms. Henry. The purpose of the hearing was to allow the grievor to provide further information or address any mitigating factors before the disciplinary decision

was imposed. During the hearing, Ms. Henry was advised that the grievor's feedback concerning the investigation and its conclusions had been provided to Ms. Johnson during the hearing of the investigation grievance on October 21, 2019. The grievor indicated that this information should be considered by Ms. Henry before a decision was rendered.

[25] Ms. Henry issued the discipline letter to the grievor on January 10, 2020. The letter reiterates the allegations that were founded through the investigation process and then goes on to describe the discipline and the reasons:

...

*During the disciplinary hearing, it was stated that all of your feedback in relation to the investigation and its conclusions had been provided at the grievance hearing held on October 21, 2019 and that this was the information management should consider in rendering its decision for disciplinary action.*

*At your grievance hearing, it was argued that the Employer had failed to conduct a fair investigation done in accordance with the principles of procedural fairness and natural justice in relation to allegations of misconduct made against you on March 28, 2018. You also grieved the investigator's report that you received on January 7, 2019.*

*On November 15, 2019, Ms. Mollie Johnson, the Assistant Deputy Minister, Low Carbon Energy Sector, rendered a decision in relation to your grievance. In her response, she indicated that she was in support of the investigation report with respect to allegations 1 to 3, and concluded that these allegations had been investigated in accordance with the principle of procedural fairness and natural justice. She however partially allowed your grievance by concluding that allegation 4 was inconclusive and would not be given any further consideration.*

*Based on this decision and all evidence before me, I have concluded that misconduct has occurred and a disciplinary measure is warranted to correct your behaviour. In determining appropriate disciplinary measure, I have taken into account mitigating factors such as your free disciplinary record and the fact that these incidents were isolated. I have also considered aggravating factors, including, but not limited to, your lack of remorse, limited sense of responsibility for these actions, managerial position and length of service.*

...

[26] Ms. Henry's decision was partly based on the decision of ADM Johnson, who ruled out allegation 4. The letter indicates that a 3-day suspension will be imposed and

that the grievor will be required to complete courses on values and ethics, and staffing when she returns to the workplace. The grievor was also directed to familiarize herself with her obligations pursuant to the *NRCan Values and Ethics Code* and the *Values and Ethics Code for the Public Sector*.

[27] The discipline grievance challenging the suspension was filed on January 24, 2020. The grievance challenges the suspension as unjustified and abusive and the result of a procedurally unfair and abusive investigation process. The grievor requested that the suspension be rescinded and removed from her personal file, compensation for any loss of salary and benefits, and any type of damages resulting from this situation.

[28] ADM Johnson issued the third-level response to the grievance on February 28, 2020, upholding Ms. Henry's decision to impose the 3-day suspension without pay. The grievance was then transmitted to the Board for adjudication on March 10, 2020.

[29] I now turn to the evidence and analysis of the two issues raised by the grievance: the disciplinary decision and the investigation.

#### **IV. Issue 1: Summary of the evidence relevant to the disciplinary decision**

[30] The grievor acknowledged in her direct examination that she was insubordinate. She testified that, in hindsight, she would not have delayed providing Ms. Scharf with the information she requested. Given the grievor's admission, I have not commented on all the evidence related to that issue except where it is relevant to the remaining allegations of misconduct and the discipline imposed. The events leading to the March 28, 2018, meeting were well-documented, and the key parts of the chronology were not in dispute.

##### **A. Reference for Ms. Falconer**

[31] The events leading to the grievor's suspension began in March 2018 at the final stage of the PM-03 staffing process, where the candidates were rated on their references.

[32] Ms. Falconer testified that she worked for the grievor under a temporary contract renewed several times. She first worked as a consultant through Olav Consulting. Ms. Falconer testified that the grievor helped her to obtain another sole source provider company in October 2017 because she was being paid very little under *Federal Public Sector Labour Relations and Employment Board Act* and *Federal Public Sector Labour Relations Act*

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the Olav Consulting contract. She testified that she also learned about the staffing process from the grievor, who encouraged her to apply and offered to provide a reference. Ms. Falconer testified that she expected a positive reference from the grievor.

[33] At some point, in the months leading up to March 2018, the relationship between the grievor and Ms. Falconer began to deteriorate. The grievor decided that Ms. Falconer was not meeting her expectations and began to informally manage her performance. Ms. Falconer felt the grievor was unduly controlling and critical of her work. She expressed this concern to Ms. Stinson, the grievor's manager, in a letter dated March 7, 2018.

[34] The parties agree that Ms. Falconer was not the subject of a formal performance management plan. I am not adjudicating the grievor's management of Ms. Falconer's performance, the veracity of the alleged performance issues or Ms. Falconer's complaints to management about this issue. It is not disputed that the relationship had been difficult in the months leading up to March 2018.

[35] While Ms. Scharf had overall responsibility for the staffing processes, the grievor was responsible for various aspects of the PM-03 process, including the development of an assessment guide and the questions for interviews and reference checks. She was also responsible for either sitting on or obtaining suitable participants to sit on the interview boards. The grievor received administrative support from Rachel Leduc, a HR consultant with the respondent. She provided administrative support for the PM-03 process through "A la carte", an internal group that managers could access for a fee.

[36] Ms. Leduc emailed the grievor with the reference check questionnaire for Ms. Falconer asking that it be returned by February 9, 2018. On February 16, 2018, Ms. Leduc emailed the grievor that her reference was outstanding. The email indicates that she would like to close the file before her vacation the following week. If not, the process would be on hold until March 7, 2018. The grievor did not respond to Ms. Leduc's email but assumed she had until March 7, 2018, to submit the reference.

[37] The same day, Ms. Falconer emailed the grievor that Ms. Leduc had contacted her about the grievor's outstanding reference. She asked if the grievor could provide it as soon as possible. The grievor emailed back the same day:

*Of course I will provide a reference. No worries Jen, I got you. It is on the list of priority things to do. I scheduled time on Monday to complete all of the reference checks I have to complete. 3 days out of the office last week, still playing catch up. it is my PM 03 process, so no worries.*

...

[38] Ms. Falconer testified that she felt reassured by this response and believed the grievor would provide a good reference for her.

[39] On March 6, 2018, the grievor sent the completed reference for Ms. Falconer. She identified Ms. Falconer as a contractor working for the grievor's program. She raised several concerns about Ms. Falconer's performance in the reference. In the last section, which calls for any other comments the referee would like to make, the grievor added additional comments ending with this statement: "However, I would not fail her in this regard, but in terms of the suitability factors that are being assessed in this reference check, **I would consider her borderline- just passing**" [emphasis in the original]. She also indicated in this section that her experience with Ms. Falconer differed from the references she checked when she first considered Ms. Falconer's placement from an agency.

[40] On March 7, 2018, Ms. Leduc acknowledged receipt of the grievor's reference. The same day she emailed the grievor, copying Ms. Caron and Ms. Scharf, a copy of the rating overview grid ("the grid") with the scores for all the candidates after the reference checks. Part of the grievor's role was to sign the grid to close off the process. Ms. Leduc confirmed in the email that no candidates had been eliminated. She requested that the grievor sign the grid and send it to Ms. Caron for her files. The grievor was unaware that Ms. Leduc had completed the process without her reference.

[41] The same day, Ms. Leduc emailed the grievor to let her know she had completed the references for all the candidates as of the February deadline. She stated that she had enough information with the other two references to rate Ms. Falconer.

[42] The grievor responded to Ms. Leduc the same day, as follows:

*Thanks. However, I would like the reference that I provided for Jennifer to be taken into consideration, so please review the reference I provided and adjust the scores if needed accordingly. From my experience since last May-June there are issues that need to be reflected in the assessment and the current assessment is not*

*reflective of the current context in which I have seen her work.  
Your email below indicated that they [sic] process would be on hold  
until March 6.*

[43] Ms. Leduc incorporated the grievor's reference, adjusted Ms. Falconer's score and sent the overview grid back the same day for the grievor's signature. Ms. Falconer's score went from 10 to 7 for her references, but she was still a successful candidate. This was the final stage in the staffing process before the pool was finalized.

## **B. The LinkedIn issue**

[44] The grievor did not immediately sign the grid. She testified that she was at home on the evening of March 8, 2018, conducting research when she stumbled across Ms. Falconer's LinkedIn profile. The grievor testified that she was doing marketing research to support the launch of an energy efficiency program when she came across Ms. Falconer's profile. The grievor denied that she was searching for information about Ms. Falconer on LinkedIn.

[45] Ms. Falconer identified herself as a Public Relations and Communications Consultant at Public Relations and Communications Consulting, providing strategic communications; public, media, community and stakeholder relations; event management, outreach and engagement; writing and research; and committee and file work. Under contracts, she lists "Natural Resources Canada, Office of Energy Efficiency – Communications & Stakeholder Relations, 2017-present." The profile also includes a link to her resume.

[46] She testified that she was very concerned about the profile and the resume because it gave the impression that Ms. Falconer had contracted directly with NRCan as a consultant. She testified that Ms. Falconer had misrepresented herself and should have identified her employment with NRCan as a temporary employee working under a contract with an employment agency (Altis). The grievor testified that Ms. Falconer was holding herself out as having a consulting relationship with the government of Canada rather than as temporary help from an agency. She also had the same concern about the posted resume and felt that Ms. Falconer had misrepresented her employment with the department on LinkedIn and in the PM-03 process.

[47] The next day, March 9, 2018, the grievor advised Ms. Leduc that she needed to see all the references submitted for Ms. Falconer and asked for them to be sent to her that day. The grievor testified that she wanted to see if the other references were consistent with her own. The grievor had seen the overview grid and thought Ms. Falconer's personal suitability marks were high, considering the grievor's experience with her work. Ms. Leduc sent two references to the grievor that were submitted on Ms. Falconer's behalf, which were both very positive. One was from a client of Ms. Falconer, and the other was from Ms. Ansari, a colleague and one of the grievor's permanent employees.

[48] Ms. Leduc also forwarded the grievor's email to Ms. Scharf with the following message: "For your info. I don't have a good feeling about this situation." This is the first time that Ms. Scharf was aware that the grievor had any concerns about a candidate in the PM-03 process.

### **C. Values and ethics and discussions with Ms. Caron**

[49] On March 9, 2018, the grievor shared her concerns about Ms. Falconer and sought advice from Ms. Caron and NRCan Values and Ethics ("values and ethics") about the LinkedIn issue.

[50] The grievor sent the following email, with the subject line: "LinkedIn Profile - Conflict of Interest? Ethical Concern?" to Jacinthe Leclerc, the Senior Internal Disclosure Officer for values and ethics:

*To whom it may concern;*

*I identified the attached during a search last night on LinkedIn. It pertains to an agency employee that I hired through an agency to support the work of my team.*

*This employee has positioned herself as a consultant with NRCan, with the inference that her services are being paid for directly to her and that she has been retained as a consultant.*

*I can assure you that this is not the case and I feel extremely uncomfortable with the manner in which she has positioned herself, especially considering her role within the team. NRCan has a contract with her employment agency to provide services for the department. There is absolutely no contractual relationship with this individual. The contractual relationship exists solely between NRCan and the employment agency that hired her. Furthermore, in my opinion she is misrepresenting herself in order to obtain a collateral benefit that puts her at an advantage to the unknowing*

*by indicating that she is working with NRCan directly as a consultant from **Public Relations and Communications Consulting**. This is not correct. She does not consult. She is employed for a Temporary Help Assignment. As such, she completes the tasks that I assign, her with much guidance and support from me as her manager.*

*I would like some guidance regarding this. I could speak to her myself, but I would prefer to be arms length from this and for your office as the experts to assess this and determine if warrants action on your part. I am attaching for you her current profile on LinkedIn and also a link to her LinkedIn account.*

[link for Ms. Falconer's LinkedIn page]

*Can you please contact me at your earliest convenience? I am also available today for a call.*

...

[Emphasis in the original]

[51] The grievor then spoke with Ms. Caron by telephone. The grievor recorded their conversations unbeknownst to Ms. Caron. The grievor testified that she made the recordings to supplement her notes. She also had a transcript created and edited the transcript by comparing it to the recording. I have only addressed the key issues arising from these discussions. Ms. Caron's evidence was relevant, for the most part, to the insubordination issue, and she had no role in the disciplinary decision.

[52] The grievor shared her concerns with Ms. Caron about the LinkedIn issue and her view that the references given for Ms. Falconer did not accurately reflect her experience. The grievor thought the reference scores were higher than Ms. Falconer's abilities. Ms. Caron advised the grievor that, as a manager, she had the flexibility to use her own personal knowledge to assess the candidate as long as merit was still established and there was a documented explanation for the manager's intervention. She also had options for addressing the LinkedIn issue, including speaking directly to the candidate. Most importantly, she strongly recommended that the grievor speak to Ms. Scharf about her concerns. Ms. Scharf was entitled to this information because she would ultimately have to defend the process.

[53] The grievor was already aware that she had some flexibility to use her knowledge of the candidate in a staffing process. She testified that earlier in the process, Ms. Leduc did not believe that Ms. Falconer met the essential criteria for the PM-03 process but the grievor suggested she be screened in. Ms. Caron testified that

she had never seen a manager use their knowledge in the opposite way: to reduce the score or eliminate an otherwise qualified candidate.

[54] The grievor testified that she did not sign the grid at this time because she was doing her due diligence as a hiring manager, collecting more information about her concerns, and protecting Ms. Falconer's reputation until she was sure that she had engaged in misconduct. The grievor testified that her personal experiences of working in a toxic work environment made her sensitive to falsely accusing Ms. Falconer.

[55] On March 12, 2018, the grievor spoke with Ms. Leclerc, who confirmed her advice in an email dated the same day:

...

*As suggested on the phone you may contact Brigitte Bernier, the new Values & Ethic manager for NRCan. Brigitte should let you know how best to proceed. It may be seen as an ethical issue. Since she has been hired by Altis Agency, Jennifer should be transparent and let people know that she is under contract with the Altis Company. She doesn't have any contract with NRCan.*

...

[56] On March 12, 2018, Ms. Scharf emailed Ms. Caron about receiving the email from Ms. Leduc that the grievor had requested all of Ms. Falconer's references:

*Kathleen – to me, it is unusual for the lead on a process to request assessment material on one candidate only, when that candidate is her employee.*

*I would like to ensure there is no conflict of interest here. Certainly, if she comes back and requests a change in grade that would be unacceptable. For now, she just requested the info. Even with that I am uncomfortable, but it may be ok if it just stays at that.*

...

[57] There is no dispute that the grievor did not conduct any research or request assessment material concerning any candidate in the PM-03 process other than Ms. Falconer.

[58] Ms. Caron responded to Ms. Scharf with the same information she had given the grievor that managers could use their personal knowledge to assess candidates as long as merit is demonstrated. She gave an example of a candidate failing part of the assessment process and the manager using their knowledge of the employee's abilities

and experience to keep the candidate in the process, so long as there is a written explanation describing how the candidate meets the criteria. Ms. Caron also stated that she recommends these decisions be made with the HR delegated manager who would have to defend the file should there be a complaint or audit. There is no dispute that she strongly recommended that the grievor do so in their telephone conversation days before.

#### **D. Meeting with Ms. Ansari**

[59] On March 11, 2018, Ms. Ansari was asked to meet with the grievor in a boardroom over her lunch hour. She testified that she was caught off guard when the grievor approached her. She was not told what the meeting was about. When she arrived, the grievor had the reference she submitted for Ms. Falconer in the PM-03 process, with her answers to each question highlighted.

[60] Ms. Ansari described her experience of the meeting in a handwritten note that she quietly passed to Ms. Stinson, the grievor's direct manager, the next day:

...

*Yesterday, March 12, 2018, Arlene requested to meet with me regarding a sensitive subject. Arlene had requested information regarding a reference check I completed for Jennifer Falconer in a PM-03 process. I believe my working relationship with Jennifer is positive therefore this was reflected in my answers. Arlene asked me and challenged every answer I gave. She highlighted parts of the reference check and asked me why I answered the way I did and asked to give specific examples of each answer. I was caught off guard and put on the spot. I was challenged the entire time about what I had written and told me how to answer a reference check questionnaire in the future. It was communicated to me that her relationship with Jennifer is challenging which also made me uncomfortable. I feel as though my reference check was a clear indication of my personal observations and experience working with Jennifer and I felt that my opinions/answers did not reflect Arlene's opinion so she was trying to change my opinion by [sic] Jennifer by challenging me. I am not certain how to go about this but I feel that you should be aware of this situation. Arlene also mentioned to me that this conversation does not leave "this boardroom".*

[61] Ms. Ansari testified that the meeting happened as she described in the note. When she saw the yellow highlights, she immediately thought she had done something wrong. The grievor asked her to explain each of her answers. Ms. Ansari testified that

it was overwhelming and that she felt intimidated. She thought she had written a good reference, which was supported by her observations of Ms. Falconer.

[62] The grievor was familiar with Ms. Ansari's writing and believed that she had not written the reference herself. The reference also contained information the grievor believed that Ms. Ansari could not have observed. She testified that Ms. Ansari admitted to cutting and pasting answers to the questions provided by Ms. Falconer and that she was apologetic and remorseful, like someone whose hand was caught in the cookie jar.

[63] Ms. Ansari testified that she wrote the reference for Ms. Falconer based on her own observations. She also had a brief conversation with Ms. Falconer where she needed more detail about a task. She denied the grievor's allegation about cutting and pasting answers from Ms. Falconer. She also denied admitting she had done anything wrong and feeling bad about it, as alleged by the grievor.

[64] Ms. Ansari testified that she told the grievor she felt her reference was accurate but wasn't comfortable saying anything further. She mostly went along with what the grievor said, nodding affirmatively at times so that she could get out of the meeting. Ms. Ansari testified that she was afraid to stop the meeting. She would have had to ask the grievor to physically move to exit the boardroom. She testified that she had tried before to talk to the grievor about feeling uncomfortable, and it did not go well, so she just stayed until the meeting ended.

[65] Ms. Ansari testified that the grievor said that her working relationship with Ms. Falconer was not good and that she was challenging to work with. Ms. Ansari thought this was inappropriate. She did not believe that a manager should speak poorly of one staff member in front of another. She testified that it felt like the grievor was trying to sway her opinion of Ms. Falconer. The tone of the meeting was overly friendly as if the grievor was speaking to her as a friend. That felt awkward to Ms. Ansari because the meeting was negative, even if the tone was not.

[66] The grievor thought the meeting lasted approximately 20 minutes. Ms. Ansari testified it lasted over half an hour. There is no dispute that at the end of the meeting, the grievor told Ms. Ansari the conversation was not to leave the boardroom. Ms. Ansari testified that she felt that she was being told not to tell anyone, not that the grievor would not tell. She testified that she was very uncomfortable with this and did



not understand why she could not tell anyone. She did not think what the grievor had done was appropriate or fair.

[67] The grievor testified that she told Ms. Ansari she would let it go for now and treat it like a teachable moment. Ms. Ansari recalled the teachable comment, but she felt the meeting was about swaying her opinion of Ms. Falconer instead of teaching her how to write a reference.

[68] The grievor did not explicitly ask Ms. Ansari to change the reference she submitted for Ms. Falconer. Ms. Ansari testified that she felt the grievor was trying to pressure her to change her opinion of Ms. Falconer.

[69] Ms. Ansari testified that she was shaken up by the meeting. She went to the washroom and cried because she was overwhelmed. She testified that she felt in her gut that this was wrong.

[70] Ms. Ansari testified that the next day, she still felt very upset by what had happened and decided to alert Ms. Stinson. She testified she was afraid to stand up for herself directly with the grievor. She created a handwritten note because she feared the grievor could access anything she created on her computer or obtain a copy through ATIP. She did not want the grievor to see her in Ms. Stinson's office, so on March 13, 2018, she waited until she saw Ms. Stinson in the hallway, put up her hand, and quietly passed her the note.

[71] Ms. Ansari testified about her relationship with the grievor and why she felt intimidated and unable to push back. She was a student in 2012 and landed her first permanent position with the respondent in 2015. She had worked for the grievor since 2016. In 2017 she started looking for another position to escape what she described as a toxic work environment. Ms. Ansari testified that she had a few encounters with the grievor where she felt intimidated and discredited and had tried, with no success, to raise those concerns directly with the grievor. She recalled that on one of those occasions, the grievor called her a "zeal with no knowledge", which was not disputed by the grievor, and accused her of overstepping her position. Ms. Ansari looked that term up afterward and testified that it had a negative connotation. The grievor testified that she was trying to convey that Ms. Ansari was going too fast and not thinking things through.

[72] The grievor testified that she was heartbroken by Ms. Ansari's testimony because she was very fond of her and thought she was a wonderful employee. Nevertheless, she did not acknowledge that her conduct toward Ms. Ansari was inappropriate. She testified that Ms. Ansari had admitted to writing a reference that was not her own and was remorseful about it. The grievor did not take any further steps, including advising Ms. Scharf. She testified that otherwise, she would have to disclose that Ms. Ansari made statements that were not her own. She also felt that as a manager, her reference would have more weight in the PM-03 process.

[73] Ms. Stinson testified that she was alarmed when she received the note from Ms. Ansari, which was very concerning. She had never experienced anything like this in her career. Ms. Stinson testified that the note suggested possible interference in the staffing process. She scanned the letter and sent it to Mr. Giroux, copying Ms. Henry, with the following message:

...

*One of Arlene's staff members provided me with the attached letter this morning. If the information contained within it is true, Arlene's behaviour is in clear violation of the code on values and ethics (mistreatment of others, bias and abuse of authority). In my view, we are obligated to take action. I would like to address this directly with Arlene, but need your advice and guidance before doing so. I think that we should also have a plan as to what action, disciplinary or otherwise, should be taken if what I am being told is true. We also need to ensure that the employees involved are protected. The employee provided this to me because she trusts me, but she is petrified of retribution by Arlene.*

...

[74] Ms. Henry sent a copy of the email chain to Ms. Stinson and Ms. Scharf, who had briefed her the previous day about the grievor requesting Ms. Falconer's references. Ms. Henry suggested they meet with Mr. Giroux. A meeting appears to have taken place on March 13, 2018, that also included Christine Gillis. Ms. Stinson was in the process of transitioning to a new role at this time. Ms. Henry had asked Ms. Scharf and Ms. Gillis to share the role for a period until she found a replacement for Ms. Stinson. Ms. Gillis became the grievor's direct manager but was only peripherally involved and did not testify at the hearing.

**E. Refusal to provide Ms. Scharf with assessment materials and information**

[75] On March 14, 2018, several emails were exchanged between the grievor and Ms. Scharf about the fact that the overview grid had not been signed. Ms. Caron testified that the grievor's signature had been outstanding for about a week, since March 7, 2018. Ms. Scharf emailed the grievor that she was trying to finish the paperwork for all the staffing processes and the grievor's signature on the grid was outstanding. She asked the grievor to let her know when it would be done. The grievor responded the following: "The grid is with me for review. I am in discussions with HR right now and another unit concerning the process and will sign once that process is completed. I anticipate having it signed by end of next week. If there is a delay I will let you know."

[76] Ms. Scharf responded, asking for details on the discussions with HR. She advised the grievor that she was the HR delegated manager overseeing the process and needed to know if there were any issues. She stated that she was not clear whether the grievor was raising a flag in her previous email. The grievor responded as follows:

*Debbie, I am aware that you are the delegated manager. However, as the hiring manager, I have to do my due diligence and I am currently consulting with various subject matter experts and when I have the details I will provide an email briefing of the situation. I am raising a flag, and I plan to provide additional details, but cannot do so, until I have all of the facts to make a final decision. Due to the sensitivity of the issue, I will also limit the individuals who will be apprised of the situation.*

...

[77] Ms. Caron was copied on the email exchange between the grievor and Ms. Scharf. She responded the following:

...

*The HR delegated manager has final authority over the staffing process as he/she is responsible to defend the file should there be a complaint, or the file is audited. Therefore, any concerns in the staffing process should be brought to the HR delegated managers attention. I recommend you meet to discuss the situation in detail and work on a solution together.*

...

[78] The grievor then responded to Ms. Caron, copying Ms. Scharf, confirming that during her discussion with Ms. Caron on March 9, 2018, the grievor said she would

brief Ms. Scharf of the situation "... only after obtaining all the facts and taking it into consideration to determine if there is a definite issue/concern and my decision regarding it." The grievor stated that she felt uncomfortable discussing the situation "with a wide audience" until she had all the details. She advised Ms. Caron that the candidate had not been available for a discussion, but she had been in touch with values and ethics who also provided advice that she speak with the candidate. The grievor stated: "This is the last piece of the puzzle. Once I can speak to the candidate and gather all of the information, I will be in a position to brief the HR manager as I indicated."

[79] Ms. Scharf responded the following to the grievor on March 15, 2018, clarifying her expectation to be briefed if there was a concern about the staffing process:

...

*I would like to make a distinction here - if you have an issue as a hiring [manager] in appointing a candidate to a position, that is something you can work out with your Director. My concern is whether there is an issue in the competitive process we are running. In that instance you are the project lead working under me.*

*I appreciate that we have not had the opportunity to work together until now. So, I would like to explain how I work. When overseeing files, I expect that my Chiefs to bring to my attention any risks or concerns in their files and discuss with me their proposed approach for dealing with it. In a staffing process, I am especially sensitive to this issue, so my threshold for flagging problems is much lower.*

*Given this, I would like you to clarify whether your concern is with the competitive process itself. If so, and you are undertaking activities in that regard, then I need to [be] briefed on it now before this goes any further.*

...

[80] The grievor responded the following to Ms. Scharf:

...

*Perhaps this will not turn out to be an issue. This implicates one of my resources and it is a sensitive issue. As such as I mentioned yesterday, I am not comfortable disclosing the issue widely unless it is necessary nor until I have confirmed that there is an issue or a misunderstanding. My standard, values and ethics in terms of how I work are as follows: I collect and only accept fact-based details so that I can ensure the integrity of information, especially when it*

*can harm a person. At this stage, I only have 1 perspective. Therefore, this even more critical for me when there is a potential to damage someone's reputation by making unfounded accusations and relaying incorrect information.*

*In order to assess I am obtaining the facts and fulfilling my responsibility to ensure that I understand this issue from all perspectives before briefing regarding any risks, or to decide if there is a risk, issue or misunderstanding at all.*

*My concern is with a candidate who participated in the process, who also happens to be one of my team members. I am following up with the individual, they have been away. I plan to finalize by end of week as stated and will let you know then.*

...

[81] Ms. Scharf copied these emails to Ms. Henry and Ms. Stinson. She expressed her discomfort that the grievor would brief her only when the grievor was ready. She stated: "I have never had anyone work for me who says 'no, only when I am ready' when I ask them to brief me on an issue. This does not work for me, and I would like your guidance on how to proceed."

#### **F. March 16, 2018: The grievor raises the LinkedIn issue with Ms. Falconer**

[82] Ms. Falconer and the grievor testified that they met on March 16, 2018, during which the grievor raised her concerns for the first time about Ms. Falconer's LinkedIn profile. Ms. Falconer did not agree that she had misrepresented herself. She started working for the grievor through Olav Consulting as a consultant. Her first timesheet, signed by the grievor, identified her as a consultant. The grievor testified that Ms. Falconer agreed with her concerns about misrepresenting herself and offered to change her LinkedIn profile. Ms. Falconer denied admitting she had done anything wrong but agreed to look at the profile online. They both testified that the meeting ended cordially.

[83] I note that this meeting took place after the grievor was told the day before that she needed to brief Ms. Scharf before she took her activities any further. Ms. Scharf reiterated that the grievor was not to take further action on the LinkedIn issue in her meeting with the grievor on March 16, 2018.

#### **G. March 16, 2018: first meeting with the grievor**

[84] The email correspondence on March 14 and 15, 2018, resulted in a meeting on March 16, 2018, with Ms. Stinson, the grievor and Ms. Scharf, the purpose of which was

to discuss the grievor's issue with the PM-03 process. Ms. Scharf prepared a summary of the meeting on March 20, 2018, at the request of labour relations and shared it with Ms. Stinson for any corrections.

[85] The following points have been summarized from Ms. Scharf's notes:

- The meeting was requested because the grievor did not respond to requests to brief Ms. Scharf on her issue with a candidate in the staffing competition;
- The grievor was advised that the purpose of the meeting was to understand what activities or investigations she was undertaking with respect to one individual;
- The grievor responded that she was doing research online and came across the LinkedIn profile of one of her contractors who had applied to the competition. The grievor felt this person had misrepresented her relationship with NRCan. Based on that, the grievor looked at the person's resume from the process and felt her employment with NRCan was misrepresented;
- The grievor then spoke with values and ethics but did not share what was discussed or what advice was given;
- The grievor indicated that she spoke with the individual in question, indicating directly to her that her LinkedIn profile and resume were misleading and asked for an explanation. She ended the meeting by saying that these misrepresentations demonstrated poor judgment on the part of the individual, and she was close to making a final decision on the impacts of this on the competitive process;
- Ms. Scharf reiterated that the grievor should have shared this with her prior to proceeding with her interventions. The grievor continued to maintain that she needed to do her due diligence before reporting to Ms. Scharf; and
- Ms. Scharf requested a complete summary of the grievor's activities and the information she collected. They agreed this information would be provided Monday.

[86] Ms. Scharf added a postscript to the memo that she never received the summary. She reviewed Ms. Falconer's resume and found no misleading information in her employment history, and Ms. Henry confirmed the same. Ms. Scharf also added as follows:

...

*Also worth noting that even though I indicated to the manager not to take further action, this issue of misrepresentation and poor judgement was raised again in a conversation with the individual on Monday [March 19, 2018] as part of the reason why her contract was not being renewed.*

...

[87] Ms. Stinson verified the accuracy of the notes from the meeting on March 16, 2018. She also suggested that Ms. Scharf add that the grievor never raised any

concerns that the contractor misrepresented her work or duties in her resume, only the characterization of her employment.

#### **H. No Issue with the LinkedIn profile**

[88] Ms. Scharf and Ms. Stinson exchanged emails about the issue of Ms. Falconer identifying herself as a consultant. On March 18, 2018, Ms. Scharf sent Ms. Stinson a copy of Ms. Falconer's resume. Ms. Stinson responded on March 19, 2018, as follows:

*I guess the question is: is working through a temp agency considered consulting work? I know that Arlene did charge her with developing and implementing a stakeholder engagement plan. But wouldn't Arlene have seen her CV prior to this stage in the process? And if she was concerned with misrepresentation, flagged it much earlier in the process?...*

...

[89] Ms. Scharf responded the same day:

*I am not concerned with the representation. She is clearly stating that she is a consultant, which in my mind means she is a contractor (they are synonyms, but consultant sounds nicer). I do not interpret the text to mean that she runs her own company.*

[90] Ms. Stinson responded that Ms. Falconer's description of her work matched what she understood the grievor had given Ms. Falconer to work on and indicated that she did not have concerns.

[91] Ms. Stinson testified that once she reviewed the LinkedIn profile and resume, she had no issues with Ms. Falconer representing herself as a consultant. She testified that it was over the top for the grievor to consult values and ethics. In her view, the grievor was looking for something that wasn't there and that this was inappropriate and a significant lack of judgment on the grievor's part.

[92] Similarly, Ms. Scharf testified that she had no issues with Ms. Falconer's LinkedIn profile. She did not interpret the profile to mean that Ms. Falconer ran her own company, which contracted with NRCan.

#### **I. Ms. Falconer's contract is not renewed**

[93] The grievor then met again with Ms. Falconer on March 19, 2018, and advised her that her contract would not be renewed at the end of March 2018. The grievor

acknowledged that she raised the issue of misrepresentation and poor judgment on the LinkedIn profile as part of why her contract was not being renewed. She denied discussing the PM-03 process with her at this time.

[94] Ms. Falconer testified that the discussion with the grievor in the boardroom that day was the most challenging meeting she had in her career. She testified that the grievor made personal and accusatory comments and discussed her poor judgment regarding the LinkedIn issue. She described the grievor using an aggressive tone and raising her voice. She acknowledged that she also raised her voice to defend herself. The grievor testified that the conversation was “passionate” but professional, that voices were raised momentarily, and that Ms. Falconer made a sarcastic remark to her. The grievor testified that she tried to explain to Ms. Falconer that she cared about her as an individual, but she wasn’t seeing the changes in her performance that she needed to see.

[95] Ms. Falconer testified that she felt humiliated when she left the boardroom. An employee who had overheard the conversation reached out to ask if she was okay. She testified that she would not return to work with the grievor even if her contract were extended.

[96] A report was made to Ms. Stinson about the loud voices in this meeting. Ms. Stinson, Ms. Scharf and Ms. Gillis met with two employees and Ms. Falconer. The notes prepared by Ms. Gillis indicate that Ms. Falconer reported that the grievor raised the staffing process and said that Ms. Falconer had misrepresented herself in the staffing process.

[97] Ms. Gillis invited the grievor for a meeting the same day, with the subject “PM-03 process”. The grievor emailed Ms. Gillis asking what the meeting was about and indicated that a meeting had already taken place on March 16, 2018, about the process. Ms. Gillis responded that the meeting related to the grievor’s meeting with Ms. Falconer that day. The grievor responded and clarified that she met with Ms. Falconer and told her she would not be extending her contract past March 31, 2018, but did not speak with her about her status in the PM-03 process.

[98] The grievor attended the meeting with Ms. Gillis, Ms. Stinson, and Ms. Scharf. The notes from the meeting indicate that the grievor explained that she and Ms. Falconer were having a passionate but professional disagreement. She added that the



walls in the meeting room were thin, making it easy for others to hear what was happening. The grievor testified that these points were accurate. The grievor also testified that Ms. Scharf snapped at her when the grievor said she was not comfortable signing the grid after speaking with values and ethics and HR.

[99] The grievor was not disciplined for the meeting with Ms. Falconer on March 19, 2018. I have not made any findings, except where the facts overlap with the staffing process and the respondent's argument that the grievor was overly scrutinizing Ms. Falconer. The key facts are that Ms. Falconer was informed by the grievor that her contract would not be renewed, and part of the reason was that she exercised poor judgment regarding her LinkedIn profile.

[100] It is also clear from the summary the grievor sent on March 26, 2018, to values and ethics, that the grievor spoke to Ms. Falconer about the LinkedIn profile in the context of her application to the PM-03 process in one of their meetings, most likely on March 16, 2018. On March 26, 2018, the grievor wrote:

*Good afternoon Jacinth [sic],*

*Thank you for taking the time to speak with me on March 12, 2018, our conversation was very helpful.*

*I spoke with the Delegated HR manager for the staffing process - Debbie Scharf regarding the concerns that I had regarding this file. She indicated on March 19, 2018 that she has no issues with the manner by which the temporary help resource employee positioned herself for the staffing process. As such, the delegated HR Manager assumed the responsibility to sign the final screening board report.*

*I maintain my position with respect to my concerns related to the presentation of the relationship between NRCan and the services actually provided by Jennifer Falconer. In our discussion, I explained to her that her resume did not clearly demonstrate the nature of her work at NRCan as a temporary employee working under contract with an employee agency (Altis). I showed her where her application depicted a consulting relationship with the government of Canada rather than that of a temporary help agency, and that the two roles are quite different. Jennifer stated that a previous employment agency had formatted her cv that way, and that she had an issue with formatting her cv and that the way it was presented was a means to group her similar work together. I explained to Jennifer that it was important to ensure that when submitting an application for staffing processes that she be as clear as possible in order to assist hiring managers and HR to understand the nature of the work that she does. During our conversation, Jennifer stated that she had felt uncomfortable with*

*her resume and that she had changed it after submitting it for consideration in the hiring processes. She also offered of her own volition to change her LinkedIn profile.*

*Note: I have several variations of Jennifer's resume. The original resumes that I received as a result of NRCan's RFP – 5000033907 for a temporary help employee was completely different, and not at all in keeping with the resume in question that was submitted for consideration in the hiring process.*

*I now consider this matter closed. I wanted to follow up with you and close this file for my records.*

...

## **J. Decision to investigation**

[101] Ms. Henry testified that the incidents with the grievor were accumulating quickly and that there were several discussions about the best course of action. At one point, a draft letter of expectation was prepared and attached to the notes from the March 19, 2018, meeting with the grievor about loud voices in the boardroom. The grievor submits that the respondent had all the information it needed by this date and intended to impose a letter of expectation when it suddenly changed course. Ms. Henry denied this and testified that there were several options discussed. She relied on advice from labour relations, and a decision was made to conduct an administrative investigation. Ms. Henry conducted the meeting on March 28, 2018, where the grievor was notified of the administrative investigation and 4 allegations. However, she was not involved in the investigation process.

[102] After the meeting of March 28, 2018, Ms. Caron and Ms. Scharf agreed to remove the grievor's reference from Ms. Falconer's application to maintain the integrity of the staffing process and because they believed Ms. Falconer had been unfairly penalized.

## **V. Analysis of the Issue 1: the disciplinary decision**

[103] The parties agree that the Board is not bound by the investigation report. The hearing before the Board is a hearing *de novo*. The Board is not bound by the investigators' framing of the issues, the evidence they gathered, or their conclusions. The Board's role is to consider the evidence presented at the hearing and determine whether the grievor engaged in misconduct and whether the employer's disciplinary

response was excessive. This includes evidence of the respondent's role in managing the investigation process and making the disciplinary decision.

[104] Ms. Henry testified that she did not rely exclusively on the investigation report in making the disciplinary decision. The report played an important role in the decision, along with her knowledge of the events in March 2018, the advice she received from labour relations and the grievor's representations in the pre-disciplinary hearing.

#### **A. Misconduct**

[105] The respondent has the burden to prove, on a balance of probabilities, that the grievor engaged in misconduct which gave the respondent cause to impose discipline.

[106] The grievor reasonably assumed she had additional time to submit a reference for Ms. Falconer. It was also not unreasonable for her to insist that her reference be considered. The grievor was entitled to submit a reference based on her work with Ms. Falconer. It was not my role to assess the veracity of the performance issues identified by the grievor in the reference. However, the message to Ms. Falconer that she should not worry because "I got you" was not transparent. Ms. Falconer could not have known that the grievor intended to say such damaging things in her reference, including the comment that she was "borderline- just passing".

[107] By March 7, 2018, the grievor's reference had been incorporated, and Ms. Falconer's score had been adjusted. At this point, she was expected to review and sign the grid so Ms. Scharf could finalize that process. The grievor intentionally kept the PM-03 process open while she probed further information about Ms. Falconer. She started by requesting all of Ms. Falconer's references, which Ms. Scharf confirmed, was unusual but likely would not have attracted any discipline if the grievor had stopped there.

[108] However, the grievor did not stop there. It strains credulity that the grievor stumbled on Ms. Falconer's LinkedIn page the evening after she had reviewed her references. Even giving the grievor the benefit of the doubt here, she took this information and made a confidential disclosure to values and ethics. She is entitled to seek guidance from values and ethics. However, she prefaced the disclosure with her conclusion before she had even spoken with Ms. Falconer, that she had "... positioned

herself as a consultant with NRCan, with the inference that her services are being paid for directly to her and that she has been retained as a consultant.” It is unsurprising that values and ethics responded that this might be an issue given the grievor’s framing of Ms. Falconer’s conduct. It still does not explain why the grievor did not immediately bring this issue to Ms. Scharf’s attention. Notably, once Ms. Scharf and Ms. Stinson had their own opportunity to review the LinkedIn page and Ms. Falconer’s resume for the PM-03 process, they did not share the grievor’s concerns.

[109] When the grievor reviewed Ms. Falconer’s references, she decided that they did not accord with her views of Ms. Falconer’s performance, and then challenged and intimidated Ms. Ansari about her reference. She had authority over Ms. Ansari, which she abused by asking to meet with her at lunch without warning or an agenda and then holding the reference in front of her covered with yellow highlights. Any reasonable person would have the same reaction as Ms. Ansari, that she had done something wrong and the grievor was about to admonish her.

[110] I reject the grievor’s submission that she used this as a “teachable moment”. She did not say this at the beginning of the meeting but rather, at the end of the meeting, along with the statement that the conversation was not to leave the boardroom. The grievor is a manager with significant experience, influence and control over Ms. Ansari, a junior officer. There was a clear power imbalance between them. It is unclear whether the grievor had any authority to challenge Ms. Ansari’s confidential reference in the first place, but she chose to do this while the process was still ongoing rather than after it closed. This is not the act of a supervisor taking advantage of an opportunity to teach a subordinate how to complete a reference.

[111] The fact that the grievor did not explicitly ask Ms. Ansari to change her reference is immaterial. Ms. Ansari testified that the grievor told her about the performance issues she was having with Ms. Falconer and was trying to change her opinion. Ms. Ansari could have done any number of things in response to being pressured by her manager, including asking for her reference to be removed. Instead, she slipped a hand-written note to Ms. Stinson as she passed by, which demonstrates the serious impact of the grievor’s conduct on her at the time.

[112] The grievor testified that Ms. Ansari admitted that she had cut and pasted the answers to the questions provided by Ms. Falconer and that she was remorseful and

apologized. Ms. Ansari denied this. If the grievor was truly concerned about the integrity of the staffing process, according to her version, Ms. Ansari had falsified a reference, and the grievor was duty-bound to report this to Ms. Scharf. For that reason, I prefer Ms. Ansari's version, that she did not admit to getting the reference answers from Ms. Falconer other than a few points of clarification and, at most, nodded affirmatively at times to get out of the meeting.

[113] The grievor testified that she disclosed the information she had gathered to Ms. Caron because she was looking for advice. And yet she ignored the most important advice given to her by Ms. Caron, who strongly recommended on March 9, 2018, that the grievor speak with Ms. Scharf if she had a concern about a candidate in the PM-03 process.

[114] The grievor met with Ms. Falconer, which was one of the options suggested by Ms. Caron on March 9, 2018. She also challenged Ms. Falconer about the relationship between her LinkedIn profile and her application to the PM-03 process and accused her of exercising bad judgment. She did this after being told by Ms. Scharf on March 15, 2018, that she was to be briefed before the grievor took further action. She did not disclose the nature of her activities until she was forced to in the meeting on March 16, 2018. Again, she was told to stand down, and again, she ignored this directive, raising the LinkedIn issue once again in the meeting with Ms. Falconer, where she was advised that her contract would not be extended.

[115] I reject the grievor's submission that she did not disclose her activities to Ms. Scharf because she was looking out for Ms. Falconer's best interests and trying to protect her reputation. She submits that she regrets not providing Ms. Scharf with the information she requested and putting Ms. Falconer's best interests ahead of her own. This submission is belied by the fact that she told Ms. Ansari, on March 12, 2018, a co-worker of Ms. Falconer's, that she was having problems with Ms. Falconer's performance and that she was difficult to work with. In addition, it does not explain why she spoke with Ms. Caron about the LinkedIn issue and the grievor's performance issues but not Ms. Scharf, who was responsible for the integrity of the staffing process.

[116] This evidence leads to only one logical conclusion, which is that the grievor was delaying signing the grid and keeping the PM-03 process open while she scrutinized Ms. Falconer's candidacy. These activities arose from the grievor's perceptions of Ms.

Falconer's performance and the deterioration of their working relationship. I reject the grievor's submission that it would have been easier for her to exclude Ms. Falconer from the pool based on her knowledge as a manager, which she did not do. A decision to exclude an otherwise qualified candidate from the pool would have attracted significant scrutiny and could not have been accomplished without Ms. Scharf's consent.

[117] I also reject the grievor's argument that she was conducting due diligence as a hiring manager. Ms. Scharf advised the grievor on March 15, 2018, that if she had an issue as a hiring manager, she would work that out with her director. If the issue related to the staffing process, the grievor was a project leader working under Ms. Scharf. Even if the grievor disagreed with this, Ms. Scharf was in charge, and the grievor had an obligation to bring to her any concerns about a candidate in the process.

[118] The grievor did not approach Ms. Falconer's candidacy in the staffing process in a transparent and fair manner as required by the *Public Service Commission Appointment Policy* and the *NRCan Values and Ethics Code*. She did not act impartially, subjecting Ms. Falconer to additional scrutiny during the PM-03 process without giving her an opportunity to address any concerns. She intimidated Ms. Ansari about the reference she provided for Ms. Falconer, which is a further breach of her obligations under the *NRCan Values and Ethics Code* to treat employees with respect and dignity and foster a healthy work environment. She was insubordinate by not providing the information requested by Ms. Scharf about her activities. The grievor should have involved Ms. Scharf from the outset. These actions, considered together, constitute an attempt to interfere with a staffing process.

[119] Based on the evidence, the respondent has proven that the grievor engaged in serious misconduct which gave the respondent cause to impose discipline.

#### **B. The discipline was not excessive**

[120] The respondent has the burden to prove that the discipline imposed on the grievor was not excessive.

[121] The grievor engaged in a series of acts of misconduct over a short period of time, all related to Ms. Falconer's candidacy in the PM-03 staffing process. The

grievor's submission that the quantum of discipline should be reduced was based on the Board dismissing allegations 1 and 3 and finding that the insubordination was not serious or consequential and created minimal delay in the staffing process. The respondent submits that the discipline in this case was not excessive.

[122] In *Varzeliotis v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-9721 to 9723, 10273, and 10879 (19831011), the former Public Service Staff Relations Board stated the following at paragraph 164:

*In arbitral jurisprudence, insubordination is perceived as a subjective evaluation of the attitude of an employee. Forms of misconduct that may be categorized as insubordination include "failure to follow the instructions of the supervisor", and "defiant and disrespectful behaviour toward a supervisor"....*

...

[123] Insubordination is a serious act of misconduct because it directly challenges the employer's right to manage its organization (see *NAV Canada and I.B.E.W., Loc. 2228 (Coulter) (Re)*, 2004 CanLII 94784 (CA LA)). However, the quantum of discipline in each case must be determined through an assessment of both the aggravating and mitigating factors.

[124] In her disciplinary decision, Ms. Henry confirmed that she considered mitigating factors such as the grievor's free disciplinary record and the fact that these incidents were isolated. She also considered aggravating factors, including the grievor's lack of remorse, limited sense of responsibility for her actions, managerial position and length of service.

[125] I have also considered the grievor's discipline-free record and the fact that these incidents were isolated as mitigating factors. However, I agree with the respondent's submission that those factors are outweighed by the following aggravating factors.

[126] The grievor has 20 years of experience in the federal public service. She has been a manager since 2010 and has been entrusted with greater responsibility, authority, and influence within the respondent's organization and in the management of her team members since that time.

[127] The grievor has also been involved in several staffing processes. She has had ample time and opportunity to acquire the skills necessary to understand her

obligations to adhere to the principles of merit, non-partisanship, fairness, transparency, access, and representativeness in a staffing process.

[128] The grievor acknowledged that she was insubordinate in her direct examination. However, she downplayed the seriousness of that conduct by claiming that she was protecting Ms. Falconer at her own expense and that the staffing process was delayed by only a few working days.

[129] In addition, if the grievor were sincerely concerned about the staffing process, she would have recognized that her behaviour toward Ms. Ansari was intimidating and compromised the integrity of that process. The grievor was holding open the process by not signing the grid when she called a junior employee into a boardroom and accused her of falsifying a reference for a candidate in that same process. Even after Ms. Ansari's compelling testimony about the impact of this meeting, the grievor did not express regret. She described their meeting as professional and defended her conduct because she had not explicitly asked Ms. Ansari to change the reference.

[130] The respondent has proven that the grievor's misconduct warranted discipline. Given the seriousness of her misconduct, interfering in a staff process by subjecting Ms. Falconer to additional scrutiny, intimidating Ms. Ansari and being insubordinate toward Ms. Scharf, a 3-day suspension was not excessive.

## **VI. Issue 2: Summary of the evidence relevant to the investigation process**

[131] The grievor alleged that the discipline arose from an unfair and abusive investigation process amounting to bad faith. The factual allegations relate primarily to allegation 4: "You have been inappropriate and demonstrated unacceptable behaviour in your interactions with NRCan employees".

[132] Ms. Chartier was the only witness, apart from the grievor, who testified about their involvement in the investigation process. Ms. Henry, who made the discipline decision, was not the person who set up the investigation mandate, nor did she provide any instructions to the investigators during the process.

[133] Ms. Chartier's efforts to bring to the respondent's attention the grievor's concerns about the fairness of the investigation process were well-documented. The respondent did not call evidence to explain the investigators' mandate, or the instructions provided to the investigators during the process. From the respondent's



perspective, the investigation into allegation 4 is irrelevant because it was not the subject of discipline. The respondent also relies on the principle that procedural defects in an investigation process are cured by a *de novo* hearing before the Board.

[134] Ms. Chartier attended the meeting on March 28, 2018, and made her first request for particulars of allegations 1 and 4. Ms. Henry told her that the investigators would provide that information in due course. The grievor also testified that she did not understand the basis for these allegations.

[135] On April 6, 2018, Ms. Chartier requested an update on the investigation from Mr. Crain. She also confirmed that although the grievor was not fit to work, she wanted to proceed as quickly as possible with the investigation. Ms. Chartier subsequently provided Mr. Crain with a medical note on April 18, 2018, giving the grievor medical clearance to participate in the investigation.

[136] Mr. Crain responded on April 9, 2018, advising Ms. Chartier that the respondent was in the process of hiring an investigator. On May 3, 2018, he confirmed that an investigation firm had been hired and the investigators would contact the grievor in due course. There were two investigators from one firm involved in the investigation.

[137] On May 17, 2018, Ms. Chartier requested an update on the investigation's status and when the grievor was likely to be interviewed. Mr. Crain responded the next day that the investigators would make that decision. The following day, the investigators emailed Ms. Chartier to advise that they had begun interviewing witnesses and would keep her informed of their progress.

[138] The grievor was invited to an interview with the investigators on September 18, 2018. On September 12, 2018, Ms. Chartier confirmed that the grievor was available to meet with the investigators on September 18, 2018. She set out the grievor's accommodation needs. She also requested a clear and detailed statement of the allegations made against the grievor. She indicated that the first and fourth allegations in the letter of March 28, 2018, were vague and requested details in advance about the specific incidents and the people involved. She also indicated that the grievor would need time to review the allegations to prepare for the interview.

[139] On September 17, 2018, the investigators responded and confirmed they would proceed with the file concerning the staffing process at the grievor's interview the next

day. The investigator also stated that they would provide a general summary of the allegations regarding the other file.

[140] Ms. Chartier responded the same day, confirming that the grievor felt comfortable being interviewed regarding allegations 2 and 3. However, she reiterated her request for details of the first allegation. Specifically, she asked the investigators to provide details on how the grievor attempted to influence the staffing process. Ms. Chartier also confirmed her understanding that the investigators would provide further information about the 4th allegation before proceeding with a second interview.

[141] The investigators responded the same day that the allegation about influencing the staffing process involved three issues: that the grievor provided a late negative reference regarding a candidate, and allegations 2 (intimidation of Ms. Ansari) and 3 (insubordination).

[142] Ms. Chartier spoke with one of the investigators on September 17, 2018. She testified that she was informed that the 4th allegation was separate from the staffing process and based on interviews with the grievor's colleagues. She was advised that general information about these allegations would be shared during the grievor's interview the next day. Ms. Chartier also clarified the investigator's earlier message about the details of allegation 1. She was told that the late reference allegation, along with allegations 2 and 3, could potentially serve to illustrate that the grievor attempted to influence the staffing process.

[143] On September 18, 2018, the grievor attended the interview and was questioned about the three staffing allegations. At the end of the interview, the investigators provided the grievor with a two-page document with general information about the 4th allegation. The document included 44 allegations under seven recurring themes, arising from interviews with 23 witnesses. It was immediately apparent that the allegations were vague and impressionistic, and the names of witnesses were not provided. Ms. Chartier testified that the grievor could not be expected to respond to these allegations. She had never received such vague allegations when representing a member.

[144] On September 27, 2018, Ms. Chartier emailed the investigators confirming the grievor's receipt of the recurring themes document and the discussion that took place

at the end of the interview. She confirmed that the investigators had no specific incidents to investigate regarding the 4th allegation but were tasked to do a general audit of the grievor's interactions with her colleagues, managers, and subordinates over an open period. Ms. Chartier reiterated that the anonymous statements could not serve as a basis for interviewing the grievor and were highly distressing to her. Ms. Chartier emphasized that the grievor had a right to be provided with detailed allegations, including information on the incidents, the people involved and dates. She confirmed her understanding that the investigators were working on those details now. She also confirmed that the investigators agreed to provide a copy of the purpose and scope of their mandate and the names of the 23 witnesses interviewed regarding the 4th allegation.

[145] The grievor testified that she was devastated and could barely keep from breaking down. She testified that seeing this document further traumatized her and that she was concerned that the investigators had already made up their minds. She wrote to Ms. Chartier the day after the interview, describing how she felt after the interview. She stated that it was emotionally draining and that she was severely depressed. She had cried during lunch and all the way home. She said that all the pain she had experienced resurfaced, and she became overwhelmed. The grievor told Ms. Chartier she was upset about the vague allegations and lack of direction in the investigation process. She stated that it felt like a witch hunt and was reminiscent of a previous investigation in which she had been involved.

[146] On October 3, 2018, the investigators shared the grievor's interview summary for her review and signature. There were follow-up communications about the grievor's response. On October 17, 2018, Ms. Chartier asked when they could expect to receive the details of the 4th allegation, a copy of the mandate, and the names of the 23 witnesses.

[147] On November 1, 2018, the investigators confirmed receipt of the grievor's response to the interview summary and informed her that they would be in touch to set up the next meeting and would be sending the information requested by Ms. Chartier. On November 5 and 6, 2018, Ms. Chartier provided the grievor's availability for a meeting and reiterated her request for the outstanding information in advance. Ms. Chartier testified that these were very serious allegations that could lead to

discipline, and was important to have the details so that the grievor could fully respond.

[148] The grievor's interview was scheduled for November 14, 2018. On November 12, 2018, the investigators sent the description of their mandate and a summary of their interviews with NRCan employees listing 67 undated, anonymous allegations from 24 witnesses pertaining to allegation 4. This was the first time that Ms. Chartier had seen a copy of the investigator's mandate, which reads as follows:

...

***Scope of the work for this portion of the mandate in relation to inappropriate behaviour:***

*The allegation is as follows:*

- *The employee was inappropriate and demonstrated unacceptable behaviour in their interactions with other NRCan employees.*

...

[Emphasis in the original]

[149] The mandated continues as follows: "Interview the employee and up to 40 other employees (total for both aspects of the allegations, i.e. incl. the staffing process issue) as deemed necessary and appropriate to complete the investigation ...."

[150] Ms. Chartier testified that this information was consistent with what the investigators had told her about two separate investigation files and that allegation 4 was unrelated to the staffing process. However, she was shocked by the scope of this part of the investigation and the number of witnesses the investigators were mandated to speak with.

[151] Ms. Chartier testified that the allegations document did not provide sufficient details for the grievor to respond. She testified that, like the original 44 allegations, many statements were not fact-based. For example, one witness states: "She implies that she is right and everyone else is wrong", and another witness states: "She turns things around against you. It comes across as manipulative."

[152] Ms. Chartier testified that the grievor could not respond to these allegations. They did not know who made these allegations, what incidents they were talking about, or when they occurred. She was also concerned about the open period and how far back the investigators had gone to interview people. Ms. Chartier advised the

grievor that they should escalate these concerns to senior management. Ms. Chartier explained that she did not request further information from Mr. Crain, because he had referred her back to the investigators in the past, and these concerns were so serious they warranted a discussion with senior management.

[153] On November 13, 2018, the grievor emailed Ms. Chartier agreeing with her recommendation. The grievor stated that she could not participate in another unfair and unsubstantiated process. She was concerned about being re-traumatized.

[154] The grievor testified that in March 2023, during the bargaining agent's preparation for the hearing, she finally received copies of the witness statements from the audit. One of the individuals interviewed had worked for the grievor for approximately one year from March 2002. The grievor was able to correlate the witness statement with the list of allegations she was given by the investigators. She could not believe that the investigators had reached back this far in time to speak with witnesses.

[155] On November 13, 2018, Ms. Chartier emailed Mr. Giroux, with a summary of her concerns about the investigation process, attaching a copy of the allegations. She also advised the investigators that they would not be attending the second interview regarding allegation 4 scheduled for November 22, 2018. She told Mr. Giroux and the investigators that the grievor's procedural fairness rights were not being respected.

[156] On November 15, 2018, Ms. Chartier spoke with Mr. Giroux. She testified that he seemed surprised about the investigators' mandate and appeared to share her concerns about the fairness of the process. He told her there was some confusion on the part of the investigators as to the focus and scope of the investigation. He stated that the investigators never had a mandate to investigate at large. He told her that he had two meetings with the investigators and these allegations related to allegation 4 were never discussed. He stated that he would meet with the investigators to clarify what had happened. Ms. Chartier testified that she was surprised that Mr. Giroux was not aware of what was going on.

[157] Ms. Chartier did not hear back directly from Mr. Giroux. However, on November 15, 2018, the investigators advised the grievor that they had been directed by NRCan labour relations not to proceed with further interviews and would be submitting their

report. Ms. Chartier took this to mean that they would not proceed regarding allegation 4, which was a reasonable assumption given her discussion with Mr. Giroux.

[158] Given the flaws in the process, Ms. Chartier was concerned that the investigators were preparing a report. On November 21, 2018, she wrote to Mr. Giroux, informing him that they believed the whole investigation was flawed and asking what the respondent intended to do regarding the concerns they had raised. She also requested a scanned copy of the signed investigation mandate, which Mr. Giroux had promised in their telephone conversation on November 15, 2018.

[159] Ms. Chartier testified that given what happened with allegation 4, she had less confidence in the capacity of the investigators to conduct a fair investigation. She did not allege that the investigators were biased. Still, they had interviewed 23 witnesses about their general perceptions of the grievor, and she was concerned that those interviews would influence them in determining the staffing allegations. Ms. Chartier was especially concerned that the grievor was not given an opportunity to respond to any of those allegations.

[160] On November 27, 2018, Mr. Giroux provided Ms. Chartier with the statement of work, which sets out the 4 allegations in the same order as the letter of March 28, 2018. This document, which is not the complete mandate, does not show allegation 4 being separated from the other staffing allegations. The respondent did not explain why the investigators had a different copy of the mandate.

[161] On December 21, 2018, Mr. Crain sent Ms. Chartier a copy of the final report. She did not receive it until January 7, 2019, when she returned from the holiday break. The investigators made findings concerning all 4 allegations.

[162] Ms. Chartier testified that when she reviewed the investigation report, she was surprised to see allegation 4 included in the report. Ms. Chartier also noted that the investigator used facts that occurred in the context of the staffing process to substantiate allegation 4. The grievor had not been advised of this, nor had she been given the opportunity to respond to allegation 4. Ms. Chartier testified that she understood allegation 4 was a separate file and the investigators were not proceeding on that issue.

[163] On January 16, 2019, Ms. Chartier emailed Mr. Giroux confirming receipt of the investigation report. She advised him that before responding to the report, they needed an update on what the respondent intended to do to address the concerns about the fairness of the investigation process. On January 18, 2019, Mr. Giroux responded that the four allegations presented to the grievor were investigated in accordance with the principles of natural justice and procedural fairness. He also stated that he clarified to the investigators to limit the scope of the investigation in accordance with the allegations presented to the grievor.

[164] The grievance was filed regarding the investigation process and the report on January 30, 2019. Ms. Chartier prepared written submissions with a comprehensive overview of the procedural fairness issues arising from the investigation. She also prepared a full response to each of the investigators' findings, which were presented at the October 21, 2019, grievance hearing. As previously noted, ADM Johnson found that allegation 4 was inconclusive because the investigators did not have Ms. Falconer's perspective on her meetings with the grievor. The decision does address Ms. Chartier's broader submissions about the investigator's carrying out an audit regarding allegation 4 and the potential impact on the findings regarding allegations 1 to 3. Ms. Chartier felt the respondent was trying to hide what actually happened in the investigation process.

[165] Ms. Chartier testified that the entire investigation was flawed and constituted a witch hunt against the grievor. She felt that the respondent was ignoring the nature of the investigation that had taken place. The grievor received mixed messages about the mandate when it included a broad-ranging audit from the start. In Ms. Chartier's opinion, the entire investigation should have been stopped. Instead, the 4th allegation was changed, and the report was delivered 9 months after the grievor was first notified of the allegations.

## **VII. Issue 2: Analysis**

[166] The grievor's misconduct concerning the staffing process was serious. Given the number of incidents and potential witnesses, which included the grievor's managers, the complexity of the issues and the potential consequences for the grievor, it was reasonable for the respondent to retain an independent third party to investigate the allegations arising from the staffing process. For those reasons, I disagree with the grievor that the respondent made a bad-faith decision to commence an administrative

investigation. The issue is whether the investigation the respondent initiated was procedurally unfair and carried out in bad faith, as alleged by the grievor.

[167] The bargaining agent submits that the investigation was carried out in bad faith in several respects. The focus of this part of the decision is on the bargaining agent's submissions about the evolving nature of allegation 4.

[168] The respondent submits that the investigation process met the requirements of procedural fairness regarding allegations 1, 2 and 3 and that the 4th allegation was not the subject of discipline. The respondent also submits that a fresh adjudication of the grievance by the Board cures any prejudice or unfairness that a procedural defect might have caused (see *Aujla v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLRB 38 ("*Aujla*").

[169] The respondent did not call any evidence to contradict or explain Ms. Chartier's testimony or to defend the investigation process. Accordingly, no evidence exists to rebut Ms. Chartier's clear, cogent, and well-documented evidence about her experience of the investigation process. This includes the telephone conversation between Ms. Chartier and Mr. Giroux on November 15, 2018, in which he advised her that he believed the investigators had misunderstood their mandate. This evidence speaks to a key issue in the design of the mandate and chronology of the investigation process. Therefore, I accept Ms. Chartier's evidence that Mr. Giroux made these statements to her, but I do not accept them for the truth of their contents. The explanation that the investigators were confused by their mandate was inconsistent with the documents Ms. Chartier received directly from the investigators. In addition, the respondent did not rely on this in its limited defence of the investigation process.

[170] Ms. Chartier repeatedly requested details of the 4th allegation so that the grievor could properly respond. The grievor was entitled to those details as a matter of procedural fairness. Throughout the investigation, several versions of allegation 4 were shared with Ms. Chartier beginning in September 2018. First, she was told that allegation 4 was separate from the other three staffing allegations. She was then given a list of 44 vague, harsh allegations that purportedly came from interviews with 23 unnamed people. That list grew to 67 allegations by November 2018 from 24 unnamed individuals. While more information was provided, the allegations were still anonymous and undated, and most remained vague and impressionistic.



[171] The grievor was entitled to know the details of the allegations against her. I note that the document containing the 67 allegations has an introduction which states: “Repetition was avoided as much as possible as employees may have had similar experiences or may have been witness to the same events.” The grievor was also entitled to this information and to know whether multiple individuals made these allegations and whether they were witnessed. She was never provided with sufficient details to respond to allegation 4.

[172] Ms. Chartier was also given different versions of the investigators’ mandate. At the September 18, 2018, meeting, she learned from the investigators that there were two separate mandates: one for the 3 staffing allegations and a second for an open-ended audit. The investigators provided Ms. Chartier with a copy of their mandate, confirming that allegation 4 was separate and that they had the authority to interview up to 40 people regarding both files.

[173] By the time Ms. Chartier learned about the mandate, the investigators had conducted interviews with at least 23 employees, past and present, who were invited to share their unvarnished impressions of the grievor. From these interviews, the investigators catalogued at least 67 allegations of misconduct but did not share with the grievor any positive or neutral comments made about her during the audit. Most importantly, the grievor never received sufficient details to respond and was never interviewed about these allegations before the respondent changed course.

[174] When Ms. Chartier escalated her concerns about the dual investigation mandate, Mr. Giroux responded that the investigators must have misunderstood their mandate. He then sent her the statement of work created for contracting purposes rather than the signed mandate documents.

[175] Ms. Chartier escalated her concerns to Mr. Giroux because she concluded that there were glaring breaches of procedural fairness that gave rise to a reasonable apprehension of bias, undermining the entire investigation process. Instead, the investigators received instructions to conclude the investigation with the information they had already gathered. They used this information to substantiate a different version of allegation 4 involving the March 19, 2018, meeting between the grievor and Ms. Falconer. The respondent then jettisoned allegation 4 as inconclusive because Ms. Falconer’s evidence was unavailable. It is possible that allegation 4 was meant to

address the March 19, 2018, meeting all along; however, no evidence was provided by the respondent to substantiate this, and no one advised the grievor of this.

[176] Ms. Chartier, who was closest to the investigation process of all the witnesses, did not allege that the investigators were biased. Indeed, they came to many of the same conclusions as the Board on the grievor's misconduct. She was concerned, and rightly so, about a reasonable apprehension of bias. I agree with Ms. Chartier's concern that the investigators could have been influenced by the 23 interviews they conducted, specifically those carried out under the audit portion of the mandate, as they assessed the specific allegations related to the staffing process. A fair process is critical to ensuring that the outcome is reliable.

[177] The respondent is responsible for the conduct of the investigation. Given what the investigators told Ms. Chartier in writing, it is doubtful they misunderstood their mandate. They were authorized to speak to more than 40 people, which is well beyond what would have been necessary to determine the three staffing allegations. The nature of the allegations presented to the grievor from the unnamed witnesses, one of whom worked for the grievor for one year in 2002, 16 years before the investigation started, further supports the investigators' representation of the open-ended nature of their audit mandate. Even if the investigators misunderstood their mandate, for which there is no evidence, that would be even more reason to stop the investigation altogether.

[178] Without any explanation by the respondent, I find that the investigation was managed by the respondent in bad faith. The respondent took the opportunity presented by the staffing allegations to conduct a sweeping audit of the grievor's conduct in the workplace. When Ms. Chartier raised concerns about this, the respondent misled her by instructing the investigators to make findings on allegation 4 without disclosing this to the grievor. This was unfair, misleading, unduly insensitive, caused significant delay, tainted the investigation into the three staffing allegations and caused the grievor unnecessary harm.

[179] There is no basis on the evidence before me to conclude that the respondent's conduct was malicious. There is an issue about the grievor's treatment of other people in her workplace. That is evident from the findings in this decision. However, the respondent has other tools to address those issues.

[180] I disagree with the respondent that the procedural fairness breaches in this case are comparable to the procedural defects identified in *Aujla*. That case involved a change in an allegation from providing false testimony to providing false information. The adjudicator found that they meant the same thing. The procedural defects described by Ms. Chartier go to the foundation of the investigation process and cannot be fully addressed by a *de novo* hearing before the Board.

[181] Having found that the investigation was carried out in bad faith concerning allegation 4, it is unnecessary to fully address the additional bad faith arguments raised by the grievor. For example, the grievor alleges that the respondent was preparing to give the grievor a letter of expectation and then suddenly changed direction. This was speculative, and the witnesses involved at that time confirmed that several things had happened over a short period of time, and they were considering options. The grievor also alleges that it was bad faith to investigate the grievor for the delay in signing the grid when Ms. Leduc's vacation delayed the staffing process much longer. There is no comparison between Ms. Leduc's vacation and the grievor's activities after she was sent the grid on March 7, 2018.

## **VIII. Remedies**

[182] The Board has dismissed the grievance regarding the disciplinary decision. Accordingly, the grievor is not entitled to have the discipline rescinded or any monetary compensation arising from the discipline.

### **A. Lost income**

[183] The grievor submits that she intended to work for an additional 15 years after she left the workplace on March 28, 2018, but was deprived of that opportunity because of the respondent's conduct. The grievor was approved for LTD benefits on July 28, 2018. She will continue to receive benefits for total disability until December 21, 2032 (when she turns 65), subject to the provision of periodic medical evidence. At that point, the grievor will draw on her pension if she remains unable to work. The grievor has been offered but has not yet accepted a medical retirement from her employment with the respondent. She has also been unable to look for alternate employment because she cannot obtain medical clearance from her doctors.

[184] The grievor's initial request for lost income was amended after final submissions. The grievor requests that under lost income, the Board order the

respondent to pay the employee and employer pension premiums from July 28, 2018, to December 21, 2032 (or earlier if LTD ends), or to the date of the Board's decision.

[185] I agree with the respondent's submission that no damages for loss of income are available since the grievor is medically incapable of working (see *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43 at para. 15). There was also no evidence about the nature of the grievor's medical condition(s) or her prognosis, nor did the evidence establish that the respondent caused the medical condition(s) that prevented the grievor from returning to work.

[186] The grievor's request for damages for loss of income in the form of pension contribution payments is denied.

#### **B. Damages for mental distress**

[187] The grievor requests an order for damages for mental distress in the amount of \$30 000. The grievor alleges that the respondent's conduct caused her significant mental distress beginning with the March 28, 2018, meeting, when she was notified of the administrative investigation. The grievor submits that it was foreseeable that the respondent's actions would cause the grievor significant harm.

[188] Subsection 228(2) of the *Act* provides that after considering the grievance, the adjudicator must render a decision and make the order that the adjudicator determines to be appropriate in the circumstances. The respondent does not dispute that the Board has broad remedial authority to award damages, including mental distress. The respondent submits that the facts of this case do not support an award.

[189] The grievor submits that her testimony supports an award for damages without supporting medical evidence. She testified that she was "blindsided", "stunned", and "devastated" and was not emotionally prepared for what she experienced at the March 28, 2018, meeting. She was immediately put off work on medical leave when she saw her doctor the next day. She described having headaches, finding it hard to function, losing her motivation and desire to do things. She kept the situation from her children but that impacted her ability to be the mother, wife and daughter that she was accustomed to being. She is still reluctant to go out in public and has stopped socializing as she used to. Her memory and ability to work under pressure have been

negatively affected. The grievor testified that this experience changed her world, and she has never been the same.

[190] The grievor testified that on September 18, 2018, when she was handed the document with 44 allegations from an unnamed witness, she could barely keep herself together. She recalled the investigators saying they were directed to conduct a general audit and that the results were “bad”. She testified that she was devastated by this and felt the investigators had already made up their mind. The grievor also testified that she did not see a list of witnesses from the audit portion of the investigation until March 2023, during the bargaining agent’s preparation for the hearing. She testified that this brought her back what she alleges were the respondent’s tactics in a previous investigation in 2014, and she felt victimized and traumatized, like a scapegoat once again.

[191] The respondent submits that an award of mental distress requires evidence of conduct that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive” (see *Honda Canada Inc. v. Keays*, 2008 SCC 39 (“*Honda*”) at paras. 56 to 60). The respondent’s position is that there is no evidence of conduct rising to that level, nor is there evidence of psychological harm to the grievor. The respondent also submits that there is no evidence that there is a causal link between the grievor’s state of health and the employer’s conduct (see *Dussah v. Deputy Head (Office of the Chief of Human Resources Officer)*, 2020 FPSLREB 18 (“*Dussah*”) at para. 486).

[192] In *Honda*, the court found that compensation is not awarded for the normal distress and hurt feelings resulting from a dismissal. I make a similar finding in this case regarding the respondent’s decision to initiate the investigation. The investigation was triggered by the grievor’s misconduct, and the decision to investigate was not unreasonable. Accordingly, she is not entitled to compensation for the normal distress and hurt feelings resulting from the decision to investigate or the way the March 28, 2018, meeting was carried out. I also note that she was medically cleared to participate in the investigation despite the impact of the March 28, 2018, meeting. Having said that, I reiterate that I have not commented on what mental distress damages may flow if a finding of reprisal is made. That issue will be adjudicated in a separate proceeding in due course.

[193] The grievor is entitled to damages for mental distress for the respondent's management of the investigation process. The audit portion of the investigation added significant delay. The grievor experienced unnecessary mental distress when she was presented with 44 and then 67 bald allegations of misconduct from unnamed sources months after the investigation began. She was also misled by the respondent when she was told that the investigators had misunderstood their mandate. She lost confidence in the entire investigation, which added significant mental distress and suffering to an already difficult process.

[194] Finally, after making the reasonable assumption that the investigators were not proceeding with allegation 4, the grievor experienced further distress when she discovered that she was guilty of inappropriate conduct toward NRCan employees without receiving details of those allegations or having an opportunity to respond. While the respondent eventually discarded this allegation, it was months before that decision was made. The grievor is entitled to compensation for the mental distress she experienced, which is attributable to the effects of an unfair, misleading, and insensitive investigation process undertaken by the respondent in bad faith.

[195] On the issue of quantum, I have no difficulty accepting the grievor's testimony without medical or psychological evidence. I also find that the grievor's claim for damages for mental distress is comparable to the grievor in *Mattalah v. Treasury Board (Department of Foreign Affairs, Trade and Development)*, 2018 FPSLREB 13. In that case, the respondent's lack of forthrightness and clarity negatively affected the grievor. It caused him to experience similar forms of pain and suffering as the grievor in the case before me. The grievor was awarded \$20 000 in damages.

[196] The grievor's request for \$30 000 in damages is not excessive. I have discounted the award to reflect my determination that the grievor is not entitled to damages for the impact of the decision to investigate and the imposition of discipline. Otherwise, her request is reasonable and supported by her testimony about the impact of the investigation process.

[197] The grievor is awarded \$20 000 for mental distress.

**C. Punitive damages**

[198] The grievor has requested an order for punitive damages in the amount of \$30 000.

[199] The respondent submits that punitive damages should only be awarded to punish wrongful behaviours that are "... so malicious and outrageous that they are deserving of punishment on their own" (see *Honda*, para. 62). Moreover, the respondent submits punitive damages need to be rationally required to deter the employer from repeating reprehensible behaviour, considering the other remedies that are awarded (see *Dussah*, at para. 487)

[200] The respondent submits that the employer's conduct does not meet the criteria set out in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36. The evidence must establish that the conduct is "malicious, oppressive and high-handed" and "offends the court's sense of decency".

[201] The grievor relied on the Board's decision in *Robitaille v. Deputy Head (Department of Transport)*, 2011 PSLRB 28 ("*Robitaille*"), where the Board found that a manager with Transport Canada had been improperly disciplined following the investigation of a harassment complaint. The adjudicator found that the deputy head had breached its duties of transparency, diligence, prudence, and impartiality. The grievor was reinstated to his management position and awarded compensatory and punitive damages.

[202] The award of punitive damages was made following the adjudication of four grievances determined in the grievor's favour. The grievances contested: 1) the unfairness of the findings of an investigation into harassment allegations made against him by a subordinate, 2) the 15-day disciplinary suspension that was imposed on the grievor, 3) his assignment to other duties without his consent, and 4) the imposition of a remedial plan.

[203] I have declined to award punitive damages based on the issues and evidence in this case. There are two critical distinctions between the facts in *Robitaille* and the case before me. The first is that the grievor was unsuccessful on the discipline portion of the grievance before me. The second is that the adjudicator in *Robitaille* had the benefit of the facts and conclusions on all the grievances related to the harassment

complaint and discipline. In this case, I have addressed the discipline and the fairness of the investigation process. However, the same investigation process is at issue in the grievor's outstanding reprisal complaint.

[204] Based on the evidence and issues before me, I have not concluded that the respondent's conduct was malicious or that punitive damages are required to deter the employer from repeating its behaviour. However, as I have said throughout this decision, it is open to the Board member hearing the reprisal complaint and grievance to consider whether the same circumstances, in a different context, result in a finding of reprisal and attract punitive damages.

#### **D. Damages for lost hearing days**

[205] The grievor submits that the respondent should be liable for damages due to lost hearing days. The parties agree the Board has no jurisdiction to award costs. The grievor is seeking damages for obstruction of the adjudication process, relying on the decision in *Tipple v. Canada (Attorney General)*, 2012 FCA 158 ("*Tipple*"). In *Tipple*, the Federal Court of Appeal upheld the Board's finding that an adjudicator has the power to compensate for loss incurred by a party which results from the other party's actions.

[206] The grievor submits that ten hearing days were lost: 5 in the fall of 2022 due to shortcomings in the respondent's pre-hearing production and 5 in the fall of 2023 when the respondent changed counsel.

[207] The hearing into the discipline and reprisal grievances (which moved together at that time) was initially scheduled for September 21 to 23, 2022. On August 22, 2022, the bargaining agent sent a detailed production request to the respondent. The parties met but were not able to resolve the request. A case management conference was scheduled for September 12, 2022, following which the Board issued a direction granting part, but not all, of the bargaining agent's request.

[208] The hearing started on September 21, 2022, but September 22 and 23, 2022, and October 31, 2022, were postponed, and December 7 and 8, 2022, were converted to a preliminary hearing on the outstanding production issues. Based on the availability of the parties and the Board, the hearing resumed on April 3, 4, 5, and 6, 2023.



[209] The respondent's ongoing disclosure issues were summarized in a direction from the Board dated January 31, 2023:

...

*This direction follows a preliminary hearing on December 7, 2022, and December 8, 2022, held to address the Employer's outstanding disclosure obligations.*

*The Board issued disclosure directions on September 12, 2022, September 21, 2022, and October 18, 2022. On November 21, 2022, the parties participated in a case management meeting where the Board directed that all outstanding disclosure issues would be addressed on December 7, 2022. The Employer agreed to have witnesses available to explain its search for arguably relevant documents to ensure that disclosure was complete before the hearing on the merits resumed.*

*The parties filed an agreed statement of fact setting out the chronology of events related to the disclosure of documents for the Employer, the Board heard testimony from Mr. Andrew Crain, Mr. Justin Théberge and Mr. Luc Deault.*

*The final merits decision in this matter will address the issue of disclosure more comprehensively, including any issues of prejudice that arise during the hearing. For the purpose of this direction, the Board wishes to highlight two primary concerns.*

*The first concern is the Employer's understanding of the scope of its disclosure obligations. The Board's policy on "Pre-Hearing Exchange of Documents Lists" indicates that sixty days prior to hearing, parties are to deliver a document list disclosing to the full extent of the party's knowledge, information, and belief, all documents arguably relevant to the matters at issue. In accordance with this policy, the Union delivered approximately 3800 pages of disclosure. The Employer disclosed 9 records. The Union was aware that this was inadequate because Ms. Wilson obtained many more arguably relevant documents through her access to information requests. The Employer explained at the preliminary hearing that until recently, it had not contemplated that its obligation to produce arguably relevant documents extended beyond the documents contained in the Labour Relations file. Apart from the documents that would be generated for the Labour Relations file in a potentially disciplinary matter, the Employer does not have a process for ensuring that all other email correspondence and documents that relate to that matter are preserved. This is particularly problematic in a context where email folders are deleted within a short time after an employee transfers or resigns.*

*The second concern is that once the Employer began to undertake the broader search that was required from the outset, it failed to tailor the search appropriately, resulting in the disclosure to the Union of approximately 10,000 pages of documents. The disclosure*

*included documents that were unrelated to the matters at issue, some of which contained confidential, personal information that should never have been disclosed.*

*In these circumstances, the Board cannot conclude that the Employer has met its disclosure obligations under the Board's policy. A number of hearing days have been lost to this issue and countless hours have been wasted as the Union attempts to sort through documents without any assurance that all arguably relevant documents have been disclosed. Not surprisingly, the Union has now determined that it is no longer fruitful to continue requesting disclosure from the Employer.*

*The Union requested several findings from the Board, including breaches of the information technology policy on the deletion of email folders. This was not the purpose of the hearing and the Union acknowledge that these requests were made without proper notice to the Employer. However, the Board's role is to ensure that any prejudice arising during the hearing from the Employer's failure to meet its disclosure obligations is properly addressed. No party before this Board should have to rely on access to information results to make out their case. Any prejudicial impact on the Union and Ms. Wilson will be addressed as appropriate during the hearing on the merits. This may result in the Board refusing to accept documents into evidence that Employer intends to rely on. The Board may also draw an adverse inference from the failure to produce the documents in accordance with the Board's policy and directions. The Board will also consider whether an award of damages is appropriate in the circumstances.*

...

[210] The grievor also submits that five hearing days scheduled for September 11, 21, 25, 28 and 29, 2023, were lost when there was a change in respondent counsel. Following the April 2023 dates, the hearing continued on June 16 and 20, 2023, at which time, the respondent's former counsel notified the Board that he would no longer have carriage of the file. It was not until August 8, 2023, that the respondent advised the Board that new counsel now had carriage of the file. At the same time, the respondent requested an adjournment of the September 2023 hearing dates. The adjournment request was granted by the Board.

[211] The respondent submits that obstruction of justice is reserved for highly unusual circumstances where one party has obstructed or delayed the hearing process, resulting in unnecessary additional legal costs for the other party. The respondent submits that the caselaw establishes a high threshold for such a finding, which is appropriate only in rare cases.

[212] The respondent submits that the facts in *Tipple* are distinguishable. The Board's predecessor specifically found that the employer had engaged in obstructive conduct by "... failing repeatedly to comply with orders for the disclosure of information ..." and that it "... displayed a pattern of late and insufficient compliance, which was remedied only after constant pressure from Mr. Tipple's counsel."

[213] The respondent relies on *C.D. v. Canadian Security Intelligence Service*, 2024 FPSLRB 22. In that decision, The Board did not find the employer's conduct to be deliberate despite the employer's failure to keep records and postpone the hearing. The Board stated the following at paragraph 256:

*[256] With respect to the grievor's request for damages for obstruction of justice, I cannot conclude that the employer deliberately obstructed or delayed the adjudication process. Its conduct cannot be described as abusive or as attempting to obstruct the opposing party (see Tipple, at para. 29). Although it did not explain its failure to retain documents, the evidence is insufficient to allow me to conclude that it deliberately destroyed or altered evidence, in an attempt to obstruct the opposing party. As for the time limits in the adjudication process, it informed the opposing party and the Board of disclosure delays, although belatedly. It is unfortunate that it was necessary for the Board to make a disclosure order to ensure that the disclosure was made in a timely manner, to avoid a second postponement of the hearing. However, when the disclosure order was made, the employer complied and disclosed certain documents. I accept that the hearing had to be postponed once due to the employer's delays in disclosing documents. However, I cannot conclude that the postponement was necessary because of deliberate behaviour on the employer's part. Furthermore, no evidence was presented at the hearing that could have demonstrated that the grievor incurred additional legal costs because of the hearing's postponement.*

[214] The circumstances of the case before me are distinguishable from the highly unusual facts in *Tipple*. In that case, Mr. Tipple personally incurred legal fees to pursue his grievances, all of which were successful. His counsel provided a detailed statement of all reasonable steps taken on his behalf because of the respondent's failure to comply with the disclosure orders. The parties agreed that the value of the unnecessary expenses he incurred was significant. In the case before me, the grievor has not personally incurred an unwarranted financial burden in the form of legal expenses due to the respondent's conduct.

[215] More importantly, I cannot conclude that the respondent deliberately delayed the process or engaged in conduct that can be described as abusive or an attempt to obstruct the opposing party. At the outset of this case, there was a dispute about the proper scope of the discipline and reprisal grievances. The initial production motion was contested. That is to be expected in a case of this complexity. While I agree that over the next three months, the respondent repeatedly failed to meet its disclosure obligations, this was due to the absence of a proper administrative system for providing its counsel with all arguably relevant documents. There is no doubt that the respondent is responsible for these failures, but in the circumstances of this case, I find that the employer's conduct does not meet the high threshold established in *Tipple*.

[216] I also agree with the respondent that the grievor's reliance on what would happen in a private arbitration setting is misplaced. The Board does not have a practice of ordering costs or cancellation fees by reference to the costs of private arbitration.

[217] Regarding the change in counsel, the bargaining agent opposed the September 2023 postponement request for new counsel. Another member of the Board considered the arguments made at that time and granted the postponement. I will not revisit those submissions or the Board's decision. The parties participated in a case management meeting in September 2023 and booked new dates as early as possible. The hearing resumed on December 18 and 19, 2023, and the evidence concluded on February 21, 2024. A change in counsel is not obstruction.

## **IX. Conclusion**

[218] For those reasons, the portion of the grievance challenging the imposition of the 3-day suspension is dismissed. The grievor is awarded \$20 000 for damages for mental distress arising from the respondent's bad faith management of the investigation process. All other issues are dismissed.

[219] Finally, I thank the parties and counsel for their assistance throughout the adjudication of this matter and urge them to negotiate a global resolution of the outstanding issues and the grievor's employment.

*(The Order appears on the next page)*

**X. Order**

[220] I order that the respondent to pay the grievor mental distress damages in the amount of \$20 000. The grievance is otherwise dismissed.

September 27, 2024.

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