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

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

BETWEEN

ANDRÉ ROSSIN-ARTHIAT

Grievor

and

DEPUTY HEAD
(Canada Border Services Agency)

Respondent

Indexed as
Rossin-Arthiat v. Deputy Head (Canada Border Services Agency)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Gordon S. Campbell, counsel

For the Respondent: Mathieu Cloutier and Virginie Gagnon-Dubreuil, counsel

Heard at Montréal, Quebec,
January 14 and 16, 2025,
and via videoconference,
January 17 and 21, 2025.

REASONS FOR DECISION

I. Overview

[1] Federal public service employees' terms of employment require them to avoid conflicts of interest. They are also required to declare potential conflicts of interests to their employers, including those that could be created by their outside employment.

[2] This case is about a federal public service employee who occupied multiple types of outside employment — not all of which had been disclosed to his employer — until, on August 3, 2018, the lines between his public-service role and his outside employment became blurred.

[3] André Rossin-Arthiat ("the grievor") was a border services officer (BSO) employed by the Canada Border Services Agency (CBSA or "the respondent") from 2006 to August 2020, when his employment was terminated. He worked at the Montréal-Trudeau International Airport ("the airport") in Montréal, Quebec. Although the Treasury Board of Canada was his legal employer, for the purposes of this decision, the CBSA is described as his employer.

[4] On that August night, the grievor was off duty from his CBSA job. He was in plain clothes. A private entity had hired him to provide tactical-medical services for a well-known American celebrity, who was to arrive by private jet at a private terminal located at the airport. Tactical-medical services can generally be described as the services of a bodyguard who is also trained in and able to provide emergency medical assistance to his clients, if needed.

[5] The celebrity was accompanied by a well-known musician and his entourage. The musician was scheduled to perform at a Montréal-area concert that same evening. By the time the aircraft arrived in Montréal, it was tight for the musician to get to the concert on time. So, time was of the essence.

[6] Even though unauthorized persons are not allowed on an aircraft until the customs process is complete, the grievor boarded it after it landed and while two BSOs were carrying out the immigration and customs-clearance process. He identified himself as a BSO to them.

[7] He showed them his CBSA badge, even though the CBSA's *Code of Conduct* and *Badge Policy* prohibited doing that when off duty. He told them in French that the passengers on the aircraft were his friends and that they were "cleared" for immigration. It is not contested that the passengers were not his friends. He did not know them. It is also not contested that the passengers were not "cleared" for immigration. The grievor knew nothing about their admissibility into Canada. The immigration process had begun only moments earlier, and that decision did not rest with him.

[8] The respondent perceived the grievor's behaviour onboard the aircraft as an attempt to influence or interfere with the immigration and customs-clearance process, which all the passengers were required to undergo upon their arrival to Canada, and to use his BSO position to gain an advantage for his client and those accompanying her.

[9] The respondent suspended the grievor without pay and initiated an investigation into his off-duty conduct. It uncovered that he had not disclosed his part-time work as a bodyguard for hire. It also revealed that he had additional undisclosed outside employment.

[10] At the hearing, he indicated that he had outside employment when he joined the CBSA but that he did not disclose it. He owned a company and worked for it on contract, among other things as a tactical-medical escort for hire. He had done so since 2005 and continued to after joining the CBSA.

[11] The CBSA terminated the grievor on August 14, 2020, for the unauthorized use of his badge while off duty with the intention of influencing a customs process to gain a personal advantage, which breached the *Code of Conduct*, the *Badge Policy*, and the Treasury Board's *Values and Ethics Code for the Public Sector* ("the *Values and Ethics Code*"). The termination letter also set out that he failed to declare his outside employment, which demonstrated a lack of respect, integrity, and professionalism and violated those codes.

[12] At the hearing, the grievor acknowledged that his off-duty conduct on that August day and his failure to disclose all his outside employment constituted misconduct that warranted imposing disciplinary measures on him. However, he argues that the termination of his employment was excessive and that a suspension without pay in the 40-to-60-day range would be an appropriate penalty.

[13] The grievances referred to adjudication challenge the grievor's suspension without pay during the respondent's investigation into his conduct (Board file no. 566-02-42667) and the termination of his employment (Board file no. 566-02-42666).

[14] As misconduct has been acknowledged, and there is no dispute with respect to most of the evidence related to it, this decision will focus primarily on the question of whether terminating the grievor's employment was excessive in the circumstances and, if so, what disciplinary measure should be substituted.

[15] For the reasons that follow, I conclude that the termination of the grievor's employment was not excessive, in light of the nature of his misconduct and the aggravating factors. The grievances are denied.

II. Summary of the evidence

[16] The parties prepared an agreed statement of facts. They filed a joint book of documents, including an audio recording of an interview conducted with the grievor in the context of the respondent's professional-standards investigation.

[17] There is little disagreement between the parties about the core facts. Their disagreement pertains primarily to the grievor's forthrightness during the respondent's investigation process and at the hearing, his intent on that August day in 2018, and his understanding of his duty to disclose his outside employment and his compliance with that duty.

[18] Seven witnesses testified at the hearing.

[19] The respondent called as witnesses the director general of its Quebec Region, Annie Beauséjour, and the investigator who conducted the professional-standards investigation into the events that gave rise to these grievances, Franca Passannante. It also called Samy Ait-Kadi, one of the two BSOs who was onboard the aircraft and interacted with the grievor on that day in August 2018. Mr. Ait-Kadi is the person who communicated his concerns about the grievor's behaviour to CBSA management.

[20] The grievor testified. He also called three former colleagues, Marc-André Charlebois, Natalie Hétu, and Dominic Dubreuil, to testify about their knowledge of his character. He called them to provide evidence to support his request that he be

reinstated. They were not witness to, or involved in, the August 3, 2018, incident. None knew of the nature and extent of his disclosure of his outside employment.

A. The grievor's early years at the CBSA, and his outside employment at that time

[21] The grievor was employed by the CBSA from 2006 to his termination in 2020. He worked at the airport during all his employment with the CBSA. He was very familiar with the customs and immigration processes involving international travellers, including those arriving by private aircraft at private terminals located on the airport grounds.

[22] The grievor's offer letter, dated in 2006, which he signed, indicated that he was required to disclose all outside activities that could place him in a conflict of interest in the exercise of his official functions. He was required to complete a report listing them within 60 days of accepting the offer. The offer letter also referenced the Treasury Board's *Values and Ethics Code* and the CBSA's *Code of Conduct*, but he testified that at no time during his CBSA employment did he read them. He was aware of them, but as of the hearing, he still had not read them.

[23] At the hearing, the grievor indicated that he had outside employment when he joined the CBSA and signed the offer letter but that he did not disclose it.

[24] Before joining the CBSA, the grievor had trained to be a paramedic and had worked as one full-time. After joining the CBSA, he continued to work as one part-time. He testified that the CBSA knew that he was a paramedic when it hired him, but he indicated that he did not tell his employer the full extent of his outside employment.

[25] When he accepted CBSA's employment offer, the grievor owned a company. It hired people with advanced tactical, medical, and firearms knowledge and experience, on contract, to provide training on matters such as advanced first aid; bodyguarding; providing emergency medical aid in high-altitude, wilderness, and natural-disaster settings; and firearms training. In addition to being the company's owner, he worked for it on contract. In that capacity, he worked, among other things, as a defensive tactics instructor and as an apprentice weapons consultant and motion-capture specialist for a company that developed video games that involved firearms and tactical combat. He also worked as a tactical-medical escort for hire. He had done so since 2005.

[26] After joining the CBSA, he continued to operate that company. He also continued to accept training and operational contracts through it. He continued to work as a bodyguard.

[27] At the hearing, he did not attempt to suggest that his employer knew that he also owned and operated a company when he joined the CBSA.

B. Initial disclosure of outside employment, December 2014

[28] In or around late November 2014, the respondent asked the grievor to complete a report disclosing his outside employment. It provided him a form to do it.

[29] It is difficult to say with certainty why he was asked to complete an outside employment report. Two possible scenarios were presented to me by the grievor. Either the respondent was concerned that he was using CBSA equipment in the context of firearms competitions in which he participated in his spare time, or it was concerned about his professional relationship with an international traveller who was subjected to further questioning at the airport. The traveller was an instructor for a tactical-training academy. The grievor knew him because, in his off hours, he worked as a part-time instructor for the same academy.

[30] Regardless of why he was asked to fill out the report, he was asked to. At the hearing, he acknowledged that he did not disclose all his outside employment then and that his description of what he did disclose should have been more complete and more detailed.

[31] Before submitting his outside employment report in early December 2014, the grievor met with a CBSA representative. He provided her with a draft list of that employment. He also gave her his company's business card.

[32] The business card included two lists of activities that the company was engaged in. Each list appeared under a heading. The two headings were, "Medical Training Division" and "Tactical Training Division". Several types of specialized basic and advanced first-aid training were listed under "Medical Training Division", while the activities listed under "Tactical Training Division" included firearms training, personal-protection training, emergency-response training, law-enforcement training, and verbal diffusion tactics.

[33] In reality, his company did more than offer training.

[34] At the hearing, the grievor indicated that when it received his business card the respondent knew or should have known that his business was not limited to training. According to him, it was implicit that his company offered the tactical and operational services associated with the training listed on the business card under the heading "Tactical Training". Training and operations go hand in hand. He indicated that one cannot teach what one does not do. He only taught subjects that he put into practice in an operational setting. For example, if he delivered personal-protection training, it was implicit that he also offered personal-protection services for hire.

[35] In his outside employment report of December 2014, he indicated that he worked as a part-time paramedic and that he had been hired on contract by his company to provide training to first responders and security guards in training and for a tactical-training academy, among others.

[36] At the hearing, the grievor was asked whether he was working as a part-time bodyguard when he submitted his outside employment report. He said, "Yes." He did so occasionally. He also indicated that when he did, he would occasionally go to the airport, to pick up clients arriving by private aircraft.

[37] The form that the grievor was required to use also included a series of questions. Except for one, he answered "no" to them all, including one that asked whether it could be perceived that he had been offered outside employment because of the information or influence that he possessed due to his BSO role, one that asked whether there was any overlap of clientele between his BSO duties and his outside employment, and one that asked whether, as a BSO, he could potentially have dealings with the clients or stakeholders involved in his outside employment.

[38] During his cross-examination, he acknowledged that he should have answered "yes" to several of the questions, including those listed in the last paragraph. When he was asked why he did not, he indicated that because his employer's request that he complete the outside employment report came from an apparent firearms concern, he completed it with firearms-related activities in mind. He testified that it was not his intention to mislead the respondent or hide his involvement in bodyguarding work.

[39] It should be noted that the grievor was involved in those outside activities during his off hours. Other than his CBSA badge, which will be described later, there was no suggestion that he used CBSA assets in the context of his outside employment; nor was there any suggestion that he conducted any outside activities during his CBSA work hours.

[40] In May 2015, after analyzing the grievor's report, the CBSA's then-director general for the Quebec Region wrote to him, to inform him that the outside employment that he had disclosed did not appear to create a conflict of interest, provided that certain conditions were respected. The letter set out a series of measures that he was required to take to avoid any potential or apparent conflict of interest with respect to his outside employment. Specifically, he was required to ensure that he followed several guidelines, including the following:

- act at all times in a manner that upheld public trust and that was consistent with the *Values and Ethics Code* and the *Code of Conduct*;
- not identify himself as a CBSA employee in the context of his outside employment;
- not perform his outside employment while wearing his CBSA uniform or badge;
- withdraw himself from involvement in all traveller files related to the tactical-training academy and not become involved in any way in customs-clearance procedures for merchandise imported by that organization;
- not provide assistance to private individuals or entities in their dealings with the federal government, if it could result in preferential treatment; and
- refrain from using CBSA premises, systems, equipment, or resources in the course of his outside employment.

[41] That letter informed the grievor that he was required to file a new report if his roles and duties in the context of his outside employment changed. He did not. The letter also reminded him that failing to respect the *Values and Ethics Code* and the *Code of Conduct* could lead to disciplinary measures, up to and including termination.

[42] During his cross-examination, the grievor acknowledged that he contravened a number of the conditions listed in the letter and that he did so during the August 3, 2018, incident.

[43] When he was asked why he did not produce a new report at any time after receiving the May 2015 letter, he indicated that it was because he was "not in that mindset". When I asked him to clarify what he meant by that, he referenced, in very general terms, the impact that a July 2015 incident had on him.

[44] I will open a parenthesis to describe that incident.

[45] In July 2015, the grievor was involved in arresting a traveller at the airport. How it unfolded led to a professional-standards investigation into his actions. He was assigned to administrative duties that did not involve contact with the travelling public. He was required to work in another sector of the airport. He had limited access to certain areas of the airport, including the customs-control areas and elsewhere on the grounds.

[46] He took extended sick leave shortly after that. He was absent from work until March 2018. When he returned to work, once again, he was assigned to administrative duties until the investigation completed.

[47] At the hearing, he briefly referenced the fact that the misconduct allegations that were made against him at that time had deeply affected him. He indicated that after the July 2015 incident, he felt like he was under a microscope and believed that the less he told his employer, the better it was for him.

[48] Even though the respondent eventually deemed the July 2015 allegations against the grievor founded, it did not impose a disciplinary measure when the grievor returned to work. It was already engaged in the disciplinary process at issue in this case, and it felt that there was little advantage to be gained by pursuing discipline for the 2015 incident some three years after the fact.

C. The August 3, 2018, incident

[49] The incident that led to the investigation into the grievor's off-duty conduct and to the discovery of the true breadth of his outside employment occurred roughly six months after he returned to work after his extended sick leave.

[50] As previously indicated, a private company had hired him to provide tactical-medical escort for a client, who was a well-known American celebrity arriving by private jet that evening. He knew that his client would be accompanied by a well-

known American musician, who was scheduled to perform at a Montréal-area festival later that night. Some members of the musician's entourage were expected to be onboard the jet.

[51] The grievor's duties as a tactical-medical escort involved ensuring his client's health and safety during the return trip from the private terminal to the festival, where the musician was to perform.

[52] At the hearing, the grievor indicated that it was his first contract for the private company. He also indicated that it retained his services because of his knowledge of the airport and of Montréal generally, the combination of his tactical and medical skills and experience, and his knowledge of Montréal-area first responders and medical personnel. During his cross-examination, he acknowledged that he could see how his employer could have perceived the incident as him being hired by the private company because of information and knowledge that he possessed as a BSO; that is, because of his knowledge of the airport and of the customs and immigration process, generally.

[53] The aircraft arrived at a private terminal shortly before 9:00 p.m. The musician was scheduled to take the stage at 9:45 p.m., and the festival venue was some distance from the airport. Based on the evidence presented to me at the hearing with respect to the average time required to travel from the airport to the venue by car, it is clear to me that time was of the essence.

[54] Passengers arriving by private aircraft at a private terminal are not immune from the immigration and customs process that all inbound international travellers are subjected to when arriving at the main airport terminal. The only significant difference is that BSOs make their way onboard the private aircraft to conduct the required customs and immigration process before the passengers disembark and before their luggage is removed. Unauthorized persons are not allowed on the aircraft until that process is complete.

[55] On that day, unbeknownst to the passengers and the grievor, the CBSA had flagged the flight for additional scrutiny. One of the passengers was known to the CBSA. He had previously attempted to enter Canada at a land border crossing with marijuana in his possession.

[56] The grievor arrived at the private terminal shortly before the aircraft's scheduled arrival time. He was in plain clothes. His CBSA badge was in his pocket, along with his paramedic badge. During the investigation and at the hearing, he indicated that since joining the CBSA in 2006, he always carried his CBSA badge when off duty. During the investigation, he indicated that he did not know that the *Code of Conduct* and the CBSA's *Badge Policy* prohibited him from carrying his badge when off duty.

[57] Once the aircraft arrived, the grievor entered the customs-control zone. It can generally be described as a portion of the tarmac surrounding the aircraft that is off-limits to unauthorized persons until the customs and immigration process is complete.

[58] He saw two BSOs arrive and board the aircraft. He did not know them, but he knew that they were there to conduct the customs and immigration process.

[59] According to the grievor, he waited five minutes after seeing the BSOs board the aircraft. He wanted to let them start the customs and immigration process. He then went onboard.

[60] At the hearing, he indicated that when he provided tactical-medical escorts or protective services for high-risk clients and met their private aircraft at the airport, it was customary for him to board, to inform the client that he was present and that he would be available to assist them as soon as they had been cleared by customs and immigration, which is why he boarded on that day. When he was cross-examined, he acknowledged that there had been no need for him to board.

[61] Once onboard, he saw that the BSOs were in the process of identifying the passengers. Mr. Ait-Kadi, one of the BSOs conducting the customs and immigration process onboard the aircraft, testified at the hearing. He indicated that he only had time to collect the passengers' passports and ask one or two questions of the first passenger when the grievor entered the aircraft cabin.

[62] The grievor identified himself as a CBSA employee who worked at the airport and told the BSOs in French that he was one of them. He showed them his CBSA badge. He did so voluntarily, not in response to a request that he identify himself or provide evidence supporting his statement that he was a BSO.

[63] According to the grievor, he identified himself as a BSO and presented his badge out of what he described as “professional courtesy”. At the hearing, he testified that it is a common occurrence for off-duty law-enforcement personnel interacting in a professional setting to identify what agency they work for and to show their badges as proof. When at the hearing, Ms. Beauséjour and Ms. Passannante were asked whether they had knowledge of such a practice among law-enforcement personnel, they said that they did not.

[64] The grievor also testified that he identified himself as a BSO and that he showed his badge on that day because he did not know the BSOs and he wanted to create a bond of trust with them. He wanted to “avoid having a problem with [the BSOs] later on”. When he was asked what “problem” he meant, he explained that he had boarded the aircraft, in civilian clothing, while the customs and immigration process was underway. He identified himself to avoid looking like a stranger barging onto the aircraft.

[65] According to a written statement that the grievor prepared on the day of the August 2018 incident and an audio recording of an interview conducted in the context of the professional-standards investigation that followed the incident, he always identified himself to fellow CBSA officers when he crossed paths with them in the context of his off-duty employment, whether he attended the airport as a part-time paramedic performing medical-evacuation escorts or as a plainclothes tactical-medical escort. At the hearing, he indicated that normally, he encountered BSOs that he knew, so he did not have to flash his badge. However, as previously indicated, the BSOs onsite on August 3, 2018, were unknown to him.

[66] During the investigation, the investigator asked the grievor follow-up questions, after he indicated that he always identified himself to fellow CBSA officers when he crossed paths with them in the context of his off-duty employment. He was asked for specific examples of when that occurred when he was not on duty with the CBSA or working as a part-time paramedic. In all, the investigator circled back to this issue three times during her interview of the grievor.

[67] At first, he provided the name of his colleague, Ms. Hétu, but then later indicated that he was referencing an incident in which they had both been on duty as BSOs. He then referenced Ms. Hétu again, only to subsequently indicate that he was

describing a situation in which he crossed paths with her while he was attending the airport as a paramedic meeting a domestic medical-evacuation flight. When he was pressed yet again to provide the name of a CBSA officer to whom he would have identified himself as a BSO when off duty and not working as a paramedic, he indicated that in all the times that he boarded an aircraft in such instances, there were no BSOs aboard, so he was not required to identify himself.

[68] I return now to the description of the August 3, 2018, incident.

[69] The grievor was on the aircraft only briefly before the BSOs asked him to leave. During that short time, he told them in French that the passengers were his friends and that they had already been deemed admissible into Canada.

[70] I will now address each of those statements.

[71] Because the respondent argues that the grievor provided misleading, vague, or contradictory explanations for the statements that he made on the day of the August 2018 incident, during the professional-standards investigation, and at the hearing, I will set out the description of events that he provided on those three occasions.

[72] In his written statement prepared on the night of the incident, the grievor described the passengers as “clients”.

[73] During the interview conducted in the context of the professional-standards investigation, he twice indicated that he had referred to the passengers as “clients”. When he was specifically asked if he had referred to them as his “friends”, he said, “Yes.”

[74] At the hearing, he acknowledged that he had never met the passengers on the aircraft. He said that they were not his friends and that only one of them was the client whom he had been hired to protect. When he was asked why he told the BSOs that the passengers were his friends, he testified that it had been a mistake, but that he likely said it because he had never before provided a billionaire with a tactical-medical escort.

[75] I will now turn to the grievor’s statement that the passengers were cleared for immigration.

[76] The written statement that he prepared the night of the incident makes no mention of that statement; nor does it allude to him saying anything about the passengers' immigration statuses or admissibility to Canada.

[77] During the investigation, the grievor was asked why he told the BSOs that the passengers were cleared for immigration. He indicated at that time that he assumed that they would not come for a concert here were they not admissible into Canada. He acknowledged that he had only the passengers' names. He had no other biographical information about them. He had no information about their travel documents or travel histories.

[78] At the hearing, the grievor acknowledged that the passengers had not been cleared for immigration and that the decision as to whether they were admissible into Canada rested exclusively with the BSO conducting the immigration screening process. When, during his cross-examination, he was repeatedly pressed to explain his intention behind saying that they were cleared for immigration, he answered that they were going to a concert and that they would have been on their way once the immigration and customs verification process was over. I then asked him what his intention was in making a statement that he knew to be false. He provided much the same answer.

[79] On that August day, the BSOs asked the grievor to leave the aircraft. He did. They followed him out.

[80] Mr. Ait-Kadi testified that once they were outside the aircraft, the grievor again identified himself as a BSO. He told them that he worked at the airport. He again said that the passengers were cleared for immigration. When Mr. Ait-Kadi challenged him on that issue, indicating that the process was not complete, the grievor stated that he would let the BSOs do their work and that he did not want to be in a conflict of interest.

[81] During the investigation, when the grievor was asked why he would make a statement about not wanting to be in a conflict of interest, on the audio recording of his interview, he indicated that he could "… see that it could appear like I am preventing them from doing their job, or influencing them. Not at all."

[82] Mr. Ait-Kadi testified that he found the grievor's behaviour suspicious, particularly boarding an aircraft that had a passenger flagged for greater scrutiny, his

self-identification as a BSO, and his statement that the passengers were his friends and had been cleared for immigration. He also indicated that at one point in their brief interaction, the grievor addressed him in a condescending tone and made a comment that he interpreted as suggesting that he and his fellow BSO were inexperienced.

[83] According to Mr. Ait-Kadi, he and his colleague decided that the unusual nature of the circumstances warranted a thorough search of the aircraft, the passengers, and their luggage. At the hearing, Mr. Ait-Kadi identified the grievor's interruption of the customs and immigration process as the primary factor that led him to make the decision to trigger an in-depth search of the aircraft, the passengers, and their luggage. The BSOs asked for the assistance of colleagues to conduct the search. Five additional BSOs attended to help.

[84] At one point, Mr. Ait-Kadi called a superintendent, to inform him that an off-duty BSO had boarded the aircraft during the customs and immigration process. After that call, two superintendents attended the scene.

[85] A complete search of the aircraft, luggage, and passengers was conducted. It took roughly 90 minutes. Only while that search was underway did Mr. Ait-Kadi learn that some of the passengers were celebrities. He learned that one was the musician when one of his colleagues showed him social media posts that indicated that the musician was late for his concert.

[86] By the time the search was complete, and the passengers were free to leave, the musician was late for his show. Once he took to the stage, he was more than one hour late.

[87] That evening, and over the following days, media reports and social media posts expressed anger over the musician's late arrival, the concert's shortened duration, and the fact that the customs and immigration process had delayed the musician's arrival.

[88] The grievor, the BSOs, and the two superintendents prepared written reports of the events of the August 3, 2018, incident on that day. They were adduced into evidence.

[89] In his report, the grievor indicated that he had not attempted to "… disturb, facilitate, modify, obtain favors [*sic*] or change …" the customs and immigration processing time.

[90] At the hearing, Ms. Beauséjour indicated that the respondent found the grievor's behaviour on that day concerning. Specifically, it was concerned that an off-duty BSO would board a private aircraft that had been flagged for further scrutiny due to a passenger's prior attempt to enter the country with marijuana in his possession. It found it suspicious that the off-duty BSO would disrupt an ongoing customs and immigration process, identify himself as a BSO who works at the airport, say that the passengers were his friends when they were not, and say that the passengers were cleared for immigration when that was clearly not the case. The respondent was concerned about the nature of the relationship between the grievor and those onboard the aircraft that day.

[91] On August 8, 2019, the grievor was informed that he was suspended without pay pending the results of a professional-standards investigation. His suspension was retroactive to August 5, 2018. He went on sick leave the day after he was informed of the suspension. According to the agreed statement of facts, he did not return until January 12, 2020. That delayed the respondent's investigation.

[92] Most of the information collected during the investigation was not disputed. But I will add that during the investigation and again at the hearing, the grievor maintained his position that when he boarded the aircraft that day and addressed the BSOs conducting the customs and immigration process, he did not intend to influence, disrupt, or change the outcome of the customs and immigration process in any way.

D. Outside employment as of the investigation

[93] As previously indicated, Ms. Passannante interviewed the grievor. An audio recording of that interview was adduced into evidence. Her questions about his outside employment focussed on his activities other than working as a part-time paramedic. The investigation revealed that the grievor's outside employment differed significantly from what he had listed in the report that he filed in late 2014.

[94] During the investigation, the grievor shared the following information about his outside employment:

- He had stopped working as a part-time paramedic.
- He taught handcuffing, baton use, first aid, and different legal concepts relevant to security-guard work. He did so on contract for a Montréal-area school board that offered basic and advanced security-guard training programs.

- He still owned his private company. As of the interview, it employed between 10 and 40 contract workers, including fellow BSOs. Through his company, he taught first aid, bodyguarding, weapons training, and high-altitude climbing. He also worked as a tactical-medical escort for hire, a weapons consultant, and motion-capture specialist for a large video-game developer, and he taught actors how to move and act like law-enforcement officers.

- He owned two other companies.

- Through the first company, he taught interpreting body language, interview and interrogation techniques, lie detection, and use of force. During his cross-examination, he indicated that that company was created at some point in 2015.

- The second company was a vehicle through which he wrote and published examination guides for pilots in training studying to write the Transport Canada exams required to obtain a pilot's licence. He wrote exam guides for planes, helicopters, and ultralights. He told the investigator that he had been writing examination guides of that nature since 1997.

- He had written and published a book on the analysis of non-verbal communication in threat detection and use-of-force situations. That book described him as a CBSA officer.

- As of the investigation, the grievor was writing another book, on lie detection.

E. The respondent's decision to terminate the grievor's employment

[95] On August 14, 2020, the grievor's employment was terminated. Ms. Beauséjour signed the termination letter.

[96] At the hearing, Ms. Beauséjour indicated that she considered two mitigating factors, his clean disciplinary record and the time that had elapsed since the incident. The respondent's termination decision was made a little over two years after the August 2018 incident. However, it seems that the delay was in large part due to his extended sick leave.

[97] She also testified about the many aggravating factors that she considered. They included the fact that the August 2018 incident was not isolated, given that once before, the grievor had shown his CBSA badge at a border crossing in a foreign country and had received a written warning from the respondent. And twice previously, he had been warned not to interfere in customs processes involving someone he knew.

[98] On the issue of the grievor's outside employment, Ms. Beauséjour considered prior circumstances in which he had been informed of the need to disclose it. She also

considered his disregard for the conditions that the respondent set in 2015 when it authorized him to pursue the outside employment that he had disclosed to it then.

[99] She also considered aggravating the reputational harm to the CBSA from that incident. There had been media reports and social media posts linking it and its handling of the customs and immigration process to the significantly delayed start of the musician's concert. Concert ticket holders had filed a class-action lawsuit. Although the CBSA was not a party to that lawsuit, its role in the delay was mentioned in court documents.

[100] Lastly, Ms. Beauséjour considered that the grievor's behaviour during the August 2018 incident led to the mobilization of an important number of BSOs, as well as two superintendents. That mobilization of resources drew staff away from the main terminal and impacted the airport's operations more broadly.

F. The evidence with respect to the grievor's rehabilitative potential, generally

[101] At the hearing, the grievor indicated that he takes full responsibility for his misconduct. He acknowledged that his failure to disclose his outside employment was wrong. Similarly, he indicated that his actions on August 3, 2018, were wrong. He testified that he understood how his behaviour could have been perceived as intending to disturb or disrupt the customs and immigration process. He now knows that he should have stayed clear of the aircraft and the customs-control zone until the BSOs completed the customs and immigration process and left the aircraft.

[102] During his cross-examination, when the grievor was asked if CBSA management had previously reminded him that he had to abide by the *Code of Conduct*, he indicated that it had done so, four or five times. He also acknowledged that he had twice been reminded of the importance of not putting himself in situations that could create a real or perceived conflict of interest. He also acknowledged that once before, he was reprimanded for using his badge when off duty, and that in 2009, he requested the CBSA's permission to use his badge when he was off duty, in the context of an important climbing expedition. He said that he sought permission to use it that time, to avoid getting "dinged" by the respondent.

[103] The grievor's former colleagues all knew that he was a part-time paramedic while he was employed by the CBSA. They respect him. They all testified that the

grievor is the type of colleague with whom they would like to work again, given the chance. They all generally described him as professional, knowledgeable, and efficient. They spoke about his ability to remain calm in stressful situations and about the very useful nature of his medical and firearms knowledge.

III. Summary of the arguments

A. For the respondent

[104] The respondent acknowledges that the grievor's failure to disclose the full scope of his outside employment, taken alone, did not justify terminating his employment. However, his failure to fully disclose it despite having an active duty to, as well as several reminders and occasions to, compounds the importance and gravity of his August 3, 2018, misconduct. According to it, both broad categories of misconduct, taken together and assessed in light of his lack of forthrightness during the investigation and at the hearing, and the numerous other aggravating factors at play, justified terminating his employment.

[105] The respondent argues that the grievor knew what was expected of him but failed to live up to his obligations. He knew that he was required to disclose his outside employment. He did not. He ignored the conditions for outside employment set by the respondent in 2015 and violated several of them on August 3, 2018. Similarly, he knew the rules and procedures applicable to the customs and immigration process conducted onboard private aircraft. He knew that he was not allowed to show his badge when off duty or to use his BSO status for personal gain or to gain an advantage for another person. He knew that he was required to avoid real, possible, or perceived conflicts of interest.

[106] The respondent submits that the only logical explanation for the grievor's behaviour on August 3, 2018, is that he wanted to speed up the process, to ensure that the musician would not be late for his concert. His misconduct was serious and warranted significant discipline.

[107] The respondent argues that it did not proceed with progressive discipline because the grievor does not have rehabilitative potential, which it invites the Federal Public Sector Labour Relations and Employment Board ("the Board", which in this decision also refers to any of its predecessors) to assess in light of his failure to recognize the significance of his misconduct, his lack of remorse, and the inconsistent

or evasive statements that he made during the investigation process and at the hearing.

[108] The respondent submits that in the Board's assessment of the disciplinary measure at issue, the overall impact of the grievor's behaviour on August 3, 2018, must be considered. It cited many decisions to support its position, especially *Jones v. Deputy Head (Canada Border Services Agency)*, 2024 FPSLREB 132; *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88; *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106; *Apenteng v. Deputy Head (Canada Border Services Agency)*, 2017 PSLREB 58; *Viner v. Deputy Head (Department of Health)*, 2022 FPSLREB 74; and *Klouvi v. Deputy Head (Department of Employment and Social Development)*, 2023 FPSLREB 88.

B. For the grievor

[109] The grievor recognizes that his disclosure of outside employment should have been clearer and broader and that he failed to respect some of the conditions that the respondent imposed. However, he submits that the respondent did not demonstrate on a balance of probabilities that he willfully withheld information about his outside employment. He had no intent to mislead his supervisors or hide his involvement in those outside activities.

[110] With respect to the August 3, 2018, incident, the grievor acknowledges that he erred by boarding the aircraft, identifying himself as a BSO, and showing his badge to the BSOs. He acknowledges that he said that the passengers were his friends and that they were cleared for immigration when that was not the case. However, he argues that he did not intend to influence the customs and immigration process in any way. He submits that he has been consistent on that point since the day of the incident, up to and including the hearing.

[111] According to the grievor, his misconduct constituted carelessness on his part, specifically, a failure to consider the ramifications of his actions.

[112] The grievor submits that this case has none of the hallmarks of those in which the Board has upheld a termination after a first instance of misconduct. In that respect, he referenced many of the same cases that the respondent relied on as examples of misconduct that may immediately attract termination (see *Jones*;

Apenteng; and *Viner*; as well as *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24; *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43; *Munroe v. Treasury Board (Department of National Defence)*, 2021 FPSLREB 136; and *Iammarrone v. Canada Revenue Agency*, 2016 PSLREB 20).

[113] He submits that the respondent did not demonstrate that the misconduct at issue constituted a breach of trust or established a lack of integrity. In the absence of such offences, a lengthy suspension normally ensues (see, for example, *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58, and *Stewart*). That should have happened in this case. The respondent should have proceeded by way of progressive discipline, in an effort to correct his behaviour (see *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37; *Sahadeo v. Deputy Head (Canada Border Services Agency)*, 2024 FPSLREB 12; and *Marraty v. Deputy Head (Department of Fisheries and Oceans)*, 2022 FPSLREB 29).

[114] The disciplinary measure imposed on him must be assessed with respect to the two main allegations set out in the termination letter, the scope of the disclosure of his outside employment, and his behaviour during the August 2018 incident. Neither allegation pertains to what he termed an "integrity offence", which involves lying to his employer. He argues that had the respondent truly felt that he had been dishonest or misleading during the investigation process, it would have said so in the termination letter. It did not. According to him, dishonesty was not proved. Similarly, it was not demonstrated that his misconduct led to any preferential treatment for himself, his client, or the musician.

[115] He argues that the respondent failed to adequately consider relevant mitigating factors. He admitted to the misconduct and has learned from his mistakes. He will undertake to respect the *Code of Conduct* if he is reinstated. He had a clean disciplinary record and had over a dozen years of service. He actively participated in the respondent's investigation into his conduct. He declared all his outside employment.

[116] He submits that in light of all those factors, the respondent did not demonstrate that he lacks rehabilitative potential or that the bond of trust was irreparably broken. According to him, an appropriate disciplinary penalty would lie in the range of a 40-to-60-day suspension without pay.

IV. Reasons

[117] To assess the disciplinary measure that the respondent imposed in this case, I must answer the following questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 ("*Wm. Scott*")):

1) Did the grievor's conduct warrant imposing a disciplinary measure?

2) If so, was the disciplinary measure imposed excessive?

3) If it was excessive, what disciplinary measure should be substituted?

[118] The termination letter describes the grievor's misconduct as falling under two broad categories.

[119] The first pertains to the August 3, 2018, incident.

[120] As previously indicated, the grievor has acknowledged that he boarded the aircraft while off duty and while a customs and immigration clearance process was underway. He admitted to making unauthorized use of his CBSA badge and to stating that the passengers were his friends and cleared for immigration when that was not the case. He admits that this amounted to misconduct and that discipline was warranted. I agree.

[121] The second pertains to the grievor's failure to declare his outside employment. He admits that he failed to disclose all his outside employment and that discipline was warranted. Again, I agree.

[122] Given the grievor's admissions, the parties' submissions rightfully focused on the second and third criteria set out in *Wm. Scott*.

[123] They relied on extensive case law to support their arguments. I have read and considered all the cases that they relied on, but for the purposes of these reasons, I will refer only to the decisions that I found most relevant to my analysis of the *Wm. Scott* criteria.

[124] To satisfy the second *Wm. Scott* criterion, the respondent had to establish the underlying facts that were relied on to justify the appropriateness of the termination. It had to demonstrate that the grievor's misconduct was sufficiently serious to justify termination as a disciplinary action, on the balance of probabilities.

[125] It is important to note that under the *Wm. Scott* criteria, the Board intervenes only when the measure imposed was excessive, in light of the circumstances. It does not intervene to reduce a disciplinary measure in circumstances in which a lesser measure could reasonably have been imposed.

[126] Although the grievor admits that his misconduct warranted discipline, he argues that the termination of his employment was excessive, and he significantly emphasizes progressive discipline. He argues that his misconduct was not so egregious as to have irreparably broken the bond of trust between him and the respondent. He argues that the respondent was not justified in moving directly to termination.

[127] Disciplinary measures are generally meant to be corrective and progressive. However, an employer is not required to engage in progressive discipline in every case. There are circumstances in which termination has been found appropriate as a first and only disciplinary measure (see, for example, *Woodcock v. Canada Revenue Agency*, 2020 FPSLREB 73 at para. 63; and *Jones*, at paras. 176 and 177).

[128] Determining whether a disciplinary measure is excessive is a fact-specific exercise that requires considering the seriousness of the misconduct at issue as well as the aggravating and mitigating factors at play. That exercise seeks to assess whether a satisfactory working relationship can be re-established. Some misconduct is so egregious or concerning as to make the prospect of re-establishing a good working relationship impossible. The parties pointed out some related cases (see *Woodcock*, *Jones*, *Apenteng*, *Viner*, *Stokaluk*, *Oliver*, *Munroe*, and *Iammarrone*).

[129] Taken alone, neither of the general categories of misconduct described in the termination letter were, at first glance, so egregious as to fit squarely into the category of cases that have traditionally led the Board to uphold a termination on a first offence. But the grievor's misconduct included both. Together, the two categories, and his lack of understanding of the severity of his misconduct, begin to paint a troubling picture.

[130] As previously indicated, much of the evidence pertaining to the grievor's misconduct was uncontested. The parties' interpretation of it differed when it came to his intent on that August 2018 day, his understanding of his duty to disclose his outside employment and his compliance with that duty, and his forthrightness during the investigation process and at the hearing.

[131] My findings of fact with respect to the first two themes are relevant to the overall seriousness of his misconduct, while the last theme pertains to an aggravating factor that the respondent significantly emphasized at the hearing. They are all relevant to my analysis of whether the disciplinary measure imposed was excessive.

[132] I will begin by addressing the grievor's understanding of his duty to disclose his outside employment and his compliance with that duty, followed by my findings with respect to his intent on August 3, 2018.

A. The grievor's misconduct was serious

1. He understood his duty to disclose his outside employment but chose not to comply with it

[133] Conflicts of interest, even apparent ones, constitute serious misconduct (see *Viner*, at para. 138). Preventing and avoiding them are serious responsibilities for employees.

[134] That responsibility is important in the federal public service, particularly in a law-enforcement role securing Canada's national border, where the utmost integrity and public confidence is required (see *Jones*, at para. 167). The responsibility is of such importance that an obligation to prevent and avoid conflicts of interest is often expressly referenced in employment offer letters.

[135] Integrity and the duty to prevent and avoid conflicts of interest are intertwined. The avoidance of conflict of interest or appearance of conflict of interest goes to the root of the integrity required from federal public service employees (see *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62 at para. 187).

[136] Integrity and the perception of it are essential to maintaining the respondent's credibility in all its activities, and a BSO's failure to respect their obligation to avoid such conflicts puts that employee's integrity at issue.

[137] In his examination-in-chief, the grievor was asked if he received documents or information about conflicts of interest and outside employment on his hiring by the CBSA; he answered, "No". He also answered, "No", when he was asked whether he had been asked to disclose his outside employment before 2014.

[138] However, when he was presented with his CBSA offer letter during his cross-examination, specifically an excerpt from it that included a hyperlink to the *Values and Ethics Code* and mentioned both conflicts of interest and his duty to disclose outside employment, he indicated that he read and understood the letter when he signed it in 2006.

[139] That letter clearly indicated that within 60 days of the start of his employment, the grievor was required to disclose all outside activities that could constitute a conflict of interest. During his cross-examination, he indicated that he knew and understood what was required of him when he signed the letter.

[140] As previously indicated, when he signed the offer letter, he worked as a part-time paramedic. The respondent did not dispute that it had at least some knowledge of his paramedic work when he was hired. However, nothing indicates that it knew or should have known that he was also working as a tactical-medical escort for hire or that he owned a company that provided bodyguarding, defensive tactics, and firearms training, among other things. Except for his part-time paramedic work, there is no basis for finding that the respondent implicitly authorized or condoned his pursuit and maintenance of outside employment.

[141] I need not decide whether the grievor's outside employment following his acceptance of the CBSA's employment offer constituted a real or perceived conflict of interest. The point is that he was required to disclose his outside employment when the CBSA hired him in 2006. He did not, and his failure to do so prevented the respondent from analyzing the situation and making a decision with respect to it.

[142] When, at the hearing, he was asked why he did not disclose the outside employment during the eight years that elapsed between 2006 and 2014, he indicated that it never occurred to him to disclose it or to seek the CBSA's approval.

[143] The Board's jurisprudence is clear. The onus is on the employee to comply with their conflict-of-interest obligations by disclosing all outside activities that could potentially constitute a conflict of interest (see *Viner*, at para. 138). It is not up to the employee to decide unilaterally whether their outside employment or activities place them in a real, potential, or perceived conflict of interest (see *Jones*, at para. 158; and *Apenteng*, at para. 110)

[144] From 2006 to 2014, the grievor did not meet his onus to disclose his outside activities. His explanation that it never occurred to him to disclose them is at odds with his clear statement that as of 2006 and upon reading his offer letter, he knew that he was required to disclose it all. He received clear instructions, which he ignored.

[145] The grievor did not disclose any outside employment until 2014, when the respondent became concerned about his outside activities and asked him to prepare a report listing them. It is not contested that when he completed the report in 2014, he did not disclose all his outside activities.

[146] He did not disclose that he was working as a bodyguard and as a tactical-medical escort at that time.

[147] Although he disclosed that he had a company, he made no mention of the fact that he owned a second one or of the work that he did via that second company; that is, writing and publishing examination guides for pilots in training studying for Transport Canada exams. He also failed to disclose the work he did as a weapons consultant for a video-game developer.

[148] I have discussed some of the outside activities that the grievor failed to disclose altogether. I will now turn to what he disclosed in a misleading manner. He was selective in what he disclosed to the respondent.

[149] Firstly, he disclosed only the training component of his many outside activities, omitting the operational components that were likely to be of greater concern to the respondent. Those operational activities called upon knowledge that the grievor had acquired as a BSO.

[150] He also described some of his training activities in a misleading manner. His disclosure report included an entry that pertained to the contract work he did, via his company, for a tactical-training academy. Two types of activities were listed: acting as a first-aid instructor for security guards in training and acting a firearms instructor. However, at the hearing, when he was asked to describe the activities captured by this entry, he testified that it also included work as an instructor in defensive tactics, bodyguarding, and using a baton.

[151] As previously indicated, the grievor provided his business card to a CBSA representative shortly before providing his report of outside employment to the respondent.

[152] The explanation that he provided at the hearing strains credulity; it was that it was implicit from his business card that his company offered the tactical and operational services associated with the training listed on the card. There was nothing implicit about it.

[153] The grievor may well feel strongly that he cannot teach what he does not put into practice in an operational setting, but he had the duty to fully and accurately disclose his activities. He did not, and I cannot accept that an employer can be expected to infer that training activities *de facto*, involve putting that training into application on a for hire basis.

[154] Similarly, I cannot accept that the respondent could be expected to infer, based a general knowledge of the grievor's participation in firearms competitions and knowledge of those weapons, that he was involved in tactical or operational activities in his off hours.

[155] In early 2015, the respondent authorized the outside employment that the grievor had disclosed and it imposed a series of conditions that the grievor was required to respect. One was that he submit a new report of outside activities if changes occurred in his outside employment. He did not.

[156] Some significant changes to the grievor's outside employment appear to have occurred at some point after the respondent's 2015 conditional authorization.

[157] The grievor founded a third company at some point in 2015. Through it, he taught interpreting body language, interview and interrogation techniques, lie detection, and use of force.

[158] He wrote and published a book on the analysis of non-verbal communication in threat detection and use-of-force situations. That book expressly identified him as a CBSA officer.

[159] He made no effort to disclose those changes to his outside employment or to obtain the respondent's authorization to pursue it.

[160] When he was asked why he did not file an updated disclosure of his outside employment between 2014 and 2018, he responded that he had not been in the right mindset. He referenced, in general terms, the impact that the July 2015 incident had on him. He indicated that at that time, he felt like he was under a microscope and that the less he said to his employer, the better it was for him.

[161] I do not doubt that the grievor was impacted by the July 2015 incident. He went on an extended sick leave shortly after it. However, no evidence was presented to me to suggest that the impact was of a magnitude that would have made him forget his obligation to disclose his outside activities, which he was reminded of in the respondent's May 2015 letter. The evidence that was presented to me at the hearing did not suggest that the July 2015 incident's impact could have clouded his judgment to such an extent as to make him unable to meet his disclosure obligation.

[162] I find that the grievor chose not to provide an updated disclosure. He did so to avoid drawing more attention to himself. Had he provided the respondent with a full and accurate list of his outside activities, it would have become aware of his involvement in activities that involved him attending the airport and interacting with his fellow BSOs. It would have become aware of his books, including one that expressly identified him as a CBSA officer. It would have learned of the full extent to which his outside activities called upon and leveraged his BSO knowledge and experience. Not disclosing it suited his purpose.

[163] It is clear from the grievor's testimony at the hearing that he knew and understood the rules. He knew that he had to disclose all his outside employment. He knew as much in 2006. He was reminded of his obligation in 2014, when he was asked to disclose it. He received another reminder in 2015, when the respondent conditionally authorized the outside activities that he had declared. He had no excuse not to comply.

[164] It is not beyond the realm of the possible that some of his undeclared outside employment could have been found to constitute real or apparent conflicts of interest with his duties as a BSO and as a federal public sector employee. The nature of that work arguably had at least some overlap with the skills and knowledge that he had acquired as a BSO. The respondent should have been provided with the opportunity to

assess the full scope of his outside employment. His failure to disclose it prevented the respondent from doing so.

[165] The grievor testified that as peace officers, BSOs are held to a higher standard. They are expected to follow the rules. However, he could provide no clear and convincing reason for his failure to follow the rules and to fully and accurately disclose his outside employment throughout his CBSA employment.

[166] Although I accept that the grievor was truthful when he discussed his outside employment with the investigator, he provided a full and frank disclosure only once the respondent learned about his work as a tactical-medical escort via the August 2018 incident. Although he was eventually truthful with the investigator, nonetheless, he demonstrated a lack of judgment and integrity before that point.

[167] His misconduct was serious. It was of a type that could have brought the federal public service into disrepute.

[168] Insofar as it relates to a failure to disclose outside employment, this case bears some similarity to *Apenteng*.

[169] In that case, an employee in the CBSA's Computer Systems Group was terminated for violating the CBSA's policy on the use of electronic resources, for failing to report business dealings that could have constituted a conflict of interest, and for misleading the CBSA about the details of his outside business activities.

[170] The Board upheld the termination. It noted that the grievor had been evasive and uncooperative when confronted with the facts pertaining to his misconduct. It found that the extent and nature of his outside activities and his failure to disclose them — despite being reminded of his obligation to and having been asked to disclose them — demonstrated a lack of appreciation for the integrity of the public service and a complete disregard for his responsibilities as a federal public service employee. Lastly, the Board concluded that the grievor demonstrated no understanding or recognition that he had done anything wrong.

[171] I will return to *Apenteng* later.

2. The grievor intended to disrupt and influence the customs and immigration process, to indirectly benefit his client

[172] As previously indicated, the grievor maintains that he did not intend to disrupt, influence, or change the outcome of the customs and immigration process when he boarded the aircraft, identified himself as a BSO, showed his badge, and told the BSOs that the passengers were his friends and that they were already cleared for immigration.

[173] For the following reasons, I do not find the grievor's testimony credible with respect to his intent on August 3, 2018.

[174] For the grievor's testimony to be credible, it must be consistent with the rest of the evidence, and it must be in "… harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (from *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357).

[175] The grievor was an experienced BSO. His entire CBSA career was spent at the airport. He was and is very knowledgeable about the customs and immigration clearance process, including the dedicated process for international travellers arriving by private aircraft at private terminals. He knew what that dedicated process entailed. He had conducted the process himself multiple times.

[176] Even if I were to accept his explanation that he wanted to board the plane to reassure his client that he was present and would be available to escort her and her fellow passengers to the festival venue after the customs and immigration process was over, it does not change the following very important facts.

[177] The grievor knew that when he was off duty, he was not authorized to be within the customs-control zone.

[178] He also knew that as an unauthorized person, he was not permitted onboard the private aircraft until the customs and immigration process was complete.

[179] He knew the importance of not interrupting or disturbing a customs and immigration process that was already underway.

[180] He knew that by waiting five minutes after the BSOs boarded the aircraft before boarding it himself, he would interrupt that process.

[181] Lastly, he knew that only the BSOs conducting the process could draw a conclusion with respect to the passengers' admissibility into Canada.

[182] The grievor had no role in the customs and immigration process on that day. There was no need for him to board the aircraft. Considering his knowledge and experience, he could and should have waited until the process was complete and the BSOs left the aircraft before boarding and introducing himself to his client.

[183] Rather, he boarded the aircraft knowing that he was not authorized to. He interrupted the customs and immigration process. He identified himself as a BSO and told the BSOs onboard that he was one of them. He showed them his badge without having been asked to.

[184] The grievor testified that he wanted to show his badge because it could have appeared strange to the BSOs onboard the aircraft that someone would barge onto the plane while they were conducting their customs and immigration inquiries. His recognition that his behaviour could have appeared strange to them strongly suggests that he knew that boarding the aircraft at that time could have been frowned upon and was out of the ordinary.

[185] I also do not accept the grievor's testimony that he was unaware that he was prohibited from using his badge when he was off duty. The respondent's 2015 letter conditionally authorizing the outside activities that he had declared at the time informed him that he was not to use his badge in the context of his outside employment. The grievor had also been warned in the past not to use his badge when he was off duty. He had received a written warning to that effect after using it at a border crossing in a foreign country.

[186] Another time, he sought permission from the CBSA to bring his badge with him on a climbing expedition to avoid getting "dinged" for bringing his badge without the respondent's approval. If he was concerned about getting "dinged", he knew that he was not allowed to use his badge when he was off duty.

[187] Whether or not the grievor knew of or had read the *Badge Policy* is not determinative in the face of evidence indicating that he knew and understood the

respondent's clear expectation that he was not to use his CBSA badge in the context of outside activities or when off duty.

[188] Even if I were to accept that the grievor showed his badge and identified himself as a BSO for the reasons that he provided at the hearing (i.e., out of professional courtesy, in accordance with what he described as a practice among law-enforcement officers or to establish a bond of trust with them), it would not negate the fact that the respondent had instructed him not to identify himself as a BSO or to use his badge in the context of his outside activities. Its conditional authorization letter in 2015 expressly stated so.

[189] The grievor lied to the BSOs when he told them that the passengers on the plane were his friends and that they were cleared for immigration.

[190] When he was asked at the hearing why he described the passengers as his friends, he indicated that he likely said that because it was his first time acting as a billionaire's tactical-medical escort. Up to that point, he had escorted only millionaires.

[191] The Board rejected a similar argument in *Stewart*.

[192] In *Stewart*, the Board dismissed a grievance pertaining to a 75-hour suspension without pay that was imposed on a BSO for allegedly violating the *Code of Conduct* and the *Values and Ethics Code*.

[193] The BSO was found to have solicited and accepted free concert tickets from a celebrity after having cleared the celebrity and his crew through immigration upon their arrival to Canada via a private plane. He had been told not to accept the tickets, but he did so, nonetheless. The BSO had identified himself as a CBSA officer when he picked up the complimentary tickets at the concert venue. He admitted to breaching the *Code of Conduct* and the *Values and Ethics Code*.

[194] When it discussed the grievor's misconduct in that case, the Board indicated that he knew his obligations on that day. His behaviour could not have been excused because of his excitement at meeting a celebrity. According to the Board, he cast aside his obligations under the *Code of Conduct* and the *Values and Ethics Code* in part, in favour of his excitement at seeing a celebrity perform (see *Stewart*, at para. 57).

[195] I will return to *Stewart* later.

[196] Based on the evidence presented to me at the hearing, it is difficult for me to imagine that the grievor's judgment could have been clouded by the excitement or stress of acting as a billionaire's tactical-medical escort. The grievor is an avid adventurer and likes to take on new challenges. At the hearing, his former colleagues described him as someone who remains calm, unphased, and methodical in stressful situations. Two of his former colleagues provided several examples of situations in which he demonstrated his ability to keep his emotions in check under pressure.

[197] Although I can accept that the grievor might have been stressed or excited at the thought of escorting a billionaire celebrity for the first time, lying to the BSOs by describing people he had never met as his friends was out of step with the evidence about his demonstrated ability to remain unfazed and calm under pressure.

[198] During his cross-examination, the grievor was asked about his intention behind his false statement that the plane's passengers had been cleared for immigration on August 3, 2018. He responded that the passengers were going to a concert and that they would have been on their way once the immigration and customs verification process was over.

[199] I will return to that response later. For now, I will merely state that his answer failed to respond to the question asked of him and was illogical. He provided no explanation or information that could establish a logical link between a question pertaining to his intention to make an admittedly false statement and what the passengers would have been able to do once the customs and immigration process was complete.

[200] One final element of the August 2018 incident jumps out at me — the grievor's statement to the BSOs that he did not want to be in, or create, a conflict of interest and that he should leave them to do their work.

[201] He made that statement after the BSOs asked him to leave the aircraft and followed him out. He made it immediately after Mr. Ait-Kadi challenged him about his statement expressed twice that the passengers were cleared for immigration.

[202] I can see no logical explanation for the grievor's reference to wanting to avoid a conflict of interest, except one. He knew that his statement or behaviour that day could

have led to a perceived conflict of interest, meaning to a perception that he attempted to interfere with or influence the customs and immigration clearance process.

[203] That explanation is further supported by the fact that in his written report prepared the night of the August 3, 2018, incident, the grievor indicated that his actions on that day did not constitute an attempt to disturb, facilitate, modify, obtain favours, or change the customs and immigration processing time. By writing that in his report the night of the incident, he clearly knew that his behaviour and statements that day could be perceived as an attempt on his part to influence the process, to benefit his client and those accompanying her.

[204] On August 3, 2018, the grievor also breached several conditions that the respondent had imposed with respect to the outside employment that he had disclosed in 2014.

[205] He identified himself as a CBSA employee. He used his BSO title and badge. He used CBSA equipment (his badge) in the context of his outside employment. He did not act in a manner consistent with the *Code of Conduct* and the *Values and Ethics Code*. He solicited CBSA employees (Mr. Ait-Kadi and the other BSO onboard the aircraft).

[206] The 2015 letter conditionally authorizing his outside employment prohibited him from becoming involved in customs-clearance processes that included the tactical-training academy for which he was an instructor. Although that condition was specific to the tactical-training academy, nonetheless, it revealed the respondent's more general concern that the grievor could use his BSO knowledge and experience to influence customs-clearance processes involving clients or acquaintances related to his outside activities. That is exactly what he did on August 3, 2018.

[207] When the evidence pertaining to the August 2018 incident is viewed overall, an inevitable conclusion follows. The grievor attempted to speed up the customs and immigration process, to increase the likelihood that his client and the musician who accompanied her would arrive at the concert on time. By doing so, he breached yet another condition set out by the respondent in its 2015 letter: He used information on CBSA practices and procedures pertaining to the dedicated customs and immigration process for private aircraft, to assist his client and those accompanying her in their dealings with the CBSA, in an attempt to obtain preferential treatment for them.

[208] It is more likely than not that the grievor boarded the aircraft and said the things that he did because the musician would be late for his concert. I find that it is also more likely than not that he attempted to use his BSO status, including his badge and title, and his knowledge of the CBSA's customs and immigration process to influence, and speed up, the process that was underway at the time. He attempted it to benefit his client and those accompanying her, to the detriment of the CBSA's interest.

[209] The grievor showed a significant lack of judgment and integrity during the August 3, 2018, incident. His misconduct was serious.

B. Mitigating and aggravating factors

[210] A balancing of the mitigating and aggravating factors forms part the Board's assessment of whether an employer's disciplinary measure was excessive in the circumstances. That assessment requires the Board to determine whether the grievor demonstrated rehabilitative potential sufficient to conclude that the bond of trust between him and the respondent is not irreparably broken.

[211] I will address the mitigating factors before turning to the aggravating factors.

[212] The grievor had 13 years of service with the CBSA, and as of the incident, he had a discipline-free record. Those are both important mitigating factors.

[213] An additional mitigating factor relevant to my analysis is the time that elapsed between the August 3, 2018, incident and the grievor's termination. It was more than two years. That was a significant amount of time.

[214] The grievor did not challenge the respondent's evidence that the investigation was delayed by his extended sick leave. At least half of the period during which he was suspended without pay elapsed while he was unavailable to participate in the respondent's investigation.

[215] The respondent cannot be faulted for the delay attributable to the grievor's unavailability to participate in the investigation for medical reasons.

[216] For that reason, the total duration of the time that elapsed will be given less weight than it would have received had a lack of diligence by the respondent been the only reason for the delay.

[217] The grievor submits that his collaboration during the investigation and his acknowledgement of misconduct in the context of the hearing constitute important mitigating factors.

[218] I accept that the grievor was collaborative and truthful during the investigation, when he shared factual information about his outside employment. However, I find that the same cannot be said of his responses to questions pertaining to the August 2018 incident. I accept the respondent's description of some of his answers during that portion of the investigation as evasive. I will return to this in my analysis of the aggravating factors.

[219] I also accept that, at the hearing, the grievor acknowledged that his behaviour constituted misconduct. His first acknowledgement of misconduct arose approximately six years after the launch of the disciplinary process that led to his termination.

[220] Recognizing misconduct is part and parcel of taking responsibility for one's actions. However, when misconduct is acknowledged at the last possible moment, i.e., at the hearing, it may appear self-serving, and the significance of that acknowledgement as a mitigating factor is diminished.

[221] Although I accept that the grievor's collaboration during the portions of the investigation that pertained to his outside employment and his acknowledgement of misconduct at the hearing constitute mitigating factors, the weight attributable to those factors is diminished.

[222] I will now turn to the aggravating factors.

[223] The respondent relied on numerous aggravating factors that, according to it, when taken together, must lead to the conclusion that terminating the grievor's employment was not excessive in the circumstances.

[224] For the purposes of my analysis, I will focus on those aggravating factors identified by the respondent that I find most relevant and significant.

[225] The first was the grievor's evasiveness and lack of forthrightness on specific issues.

[226] I have given considerable weight to the audio recording of the grievor's interview in the context of the investigation. That recording was entered into evidence on consent, and at the hearing, the grievor expressly indicated that he adopted everything that was said on it.

[227] At the hearing, he provided some explanation for some of his statements made during that interview, but he did not attempt to distance himself from any of the statements he made on that recording.

[228] I found the grievor evasive in the answers that he provided to the investigator on a key aspect of the August 2018 incident.

[229] During the interview, the grievor indicated that he always identified himself as a BSO to fellow CBSA officers when he crossed paths with them in the context of his off-duty employment. He suggested that he had previously boarded aircraft and identified himself as a BSO when working as a tactical-medical escort or bodyguard.

[230] As previously indicated, the investigator asked the grievor follow-up questions. She asked him to provide examples of when he had identified himself as a BSO to a CBSA officer whom he encountered in the context of outside employment, other than his work as a paramedic.

[231] The grievor's answers were off-topic and misleading. The investigator was required to circle back to the issue three times and to repeatedly ask him to provide concrete examples.

[232] The grievor first provided an example of when he had been working as a BSO; then, he provided an example of when he had been working as a paramedic. The third and last time he was asked for an example, he indicated that in all the times he boarded an aircraft in such instances, no BSOs were aboard, so he was not required to identify himself.

[233] His insistence at the hearing that the investigator's questions were confusing is not supported by the recording. The only confusion that I could detect when listening to the recording was my own, specifically my puzzlement as to why and how the grievor could have provided clear and direct answers to dozens of questions, if not more, and then suddenly — when asked questions aimed at following up on his

admission to a past pattern of similar behaviour — provided such muddled, misdirected, and contradictory answers.

[234] The sudden change in how the grievor responded to the investigator's questions on this issue was suggestive of an attempt to avoid answering a question that would have provided the respondent with confirmation that the August 2018 incident was not an isolated incident.

[235] At the hearing, the grievor was evasive on another issue. During his cross-examination, counsel for the respondent twice asked him why he would have twice falsely stated that the passengers were cleared for immigration when that was not the case. He provided vague answers that had nothing to do with the reason he would make a statement that he knew was false.

[236] When I asked the grievor for his intention when he knowingly made a false statement about the passengers' admissibility into Canada, he answered that they were going to a concert and that they would have been on their way once the immigration and customs verification process was over. Again, his answer had nothing to do with his intent when he made a statement that he knew was false.

[237] A lack of cooperation and dishonesty during an investigation or at a hearing can constitute aggravating factors to consider when assessing the disciplinary measure imposed. Both are external considerations from whether misconduct occurred but can influence the determination of the severity of the penalty that should apply to the misconduct at issue (see *Touchette v. Deputy Head (Canada Border Services Agency)*, 2019 FPSLREB 72 at para. 78).

[238] I agree with the respondent that a significant aggravating factor in this case was the grievor's lack of forthrightness during the investigation and, to a lesser extent, at the hearing.

[239] An additional aggravating factor is the fact that the grievor's misconduct occurred after he had already received warnings from the respondent.

[240] A grievor's capacity to follow directions and to conform to the respondent's expectations in the future involves assessing evidence of the grievor's ability and willingness to reform and rehabilitate (see *Viner*, at para. 372).

[241] The misconduct at issue followed repeated reminders from the respondent to the grievor on the importance of complying with its *Code of Conduct* and the *Badge Policy* and of avoiding conflicts of interest that could be created by his intervention in customs processes.

[242] His misconduct also occurred after he was informed, in 2006, of his duty to disclose outside activities that could constitute potential conflicts of interest. He was reminded of that duty in 2014 and again in the respondent's letter in 2015 that conditionally authorized the outside activities that the grievor had disclosed.

[243] Nothing in the evidence presented to me at the hearing suggests that the grievor did not understand the respondent's repeated reminders or that they were in any way unclear. At best, he did not learn from the mistakes of the past. At worst, he intentionally disregarded the respondent' warnings with respect to expected behaviours.

[244] At the hearing, the grievor asked to be reinstated. He wants to return to work for the CBSA. He also wants to continue his outside employment. He indicated that were he reinstated, he would comply with the terms of the *Code of Conduct*.

[245] The problem is that as of the hearing date, the grievor had not read the *Code of Conduct*. Despite having been suspended without pay and terminated, having grieved those decisions in the hope of being reinstated, and having had years to reflect on the facts that gave rise to these grievances, he made no effort to educate himself on the respondent's expectations of him and on his obligations as a BSO, were he reinstated.

[246] The grievor has failed to learn from his past mistakes, disregarded the respondent's repeated warnings, and failed to educate himself on the duties and obligations with which he was expected to comply. Taken together, these make the grievor's promise that he would comply with the *Code of Conduct* if he were reinstated ring hollow.

[247] I am left doubtful with respect to the grievor's ability and willingness to reform and rehabilitate (see *Viner*, at para. 372).

[248] I return now to the grievor's acknowledgement of misconduct at the hearing and his failure to demonstrate remorse.

[249] The Board's jurisprudence has found that there is a relationship between recognizing misconduct, rehabilitative potential, and re-establishing the bond of trust (see, among others, *Viner*, at para. 372; and *Oliver*, at para. 103). Employees who demonstrate a recognition of the impropriety of their impugned behaviour are generally thought to be more likely to meet their employers' expectations in the future, thus making re-establishing the bond of trust more likely (see *Viner*, at para. 372).

[250] For the recognition of misconduct to constitute a mitigating factor that attracts significant weight, it must be more that a simple acknowledgement. It must be accompanied by a demonstrated understanding by the grievor of the nature of his misconduct, how he breached his duties and obligations, and the nature and gravity of the potential consequences for him, his employer, and the broader public that flowed from that misconduct.

[251] In the absence of such a demonstrated understanding, the employee's return to the workplace could be seen to constitute a genuine risk (see *Stokaluk*, at para. 172).

[252] I have already referenced the fact that the grievor's first acknowledgement of misconduct arose at the hearing, which was some six years after the events that gave rise to the grievances at issue in this case.

[253] Regardless of the timing of his acknowledgement of misconduct, the grievor's testimony at the hearing left me with serious doubts as to whether he truly understood the gravity of his misconduct and accepted responsibility for it, even though he said that he did.

[254] Although he indicated that he had erred in judgment and had acted contrary to his BSO duties and obligations, he provided no clear or logical explanation for some of his actions. Given that, it is difficult for me to conclude that he truly understands the gravity of his misconduct, has accepted responsibility for it, has learned from his mistakes, and will comply with his duties and obligations were he reinstated.

[255] At the hearing, the grievor was also flippant and dismissive at times in how he responded to questions posed by the respondent's counsel as to whether, during the events that gave rise to these grievances, he knew that actions and statements described in the agreed statement of facts were wrong or constituted misconduct. His answers certainly did not convey a sentiment of remorse.

[256] His testimony at the hearing, taken as a whole, did not give the impression that he was concerned about the consequences that his actions might have had on the respondent, its reputation, or the broader public's perception of the integrity of BSOs and the CBSA.

[257] The grievor clearly regrets that his actions led to his suspension and termination, but regret with respect to the personal consequences that he has had to endure is not the same as remorse broadly defined as an acknowledgement of the harm that — tangible or not — misconduct or wrongdoing might have caused others.

[258] On the whole, I conclude that the aggravating factors significantly outweigh the mitigating factors.

C. Termination was not excessive

[259] Given the fact-based nature of the exercise that I must conduct under the second *Wm. Scott* criteria, it is not surprising to me that none of the cases that the parties cited are completely on point. Some relied upon pertained to the failure to disclose outside employment (*Apenteng* and *Viner*) or to avoid conflicts of interest (*Stokaluk*), while others pertained to the misuse or abuse of equipment, knowledge, or practical experience by a BSO for personal gain (*Stewart*). This case involves all those misdeeds.

[260] *Apenteng* and *Stewart* involve facts that are the most like the ones in this case. Taken together, those decisions are instructive. Both have been previously discussed, but I will return to them briefly.

[261] In *Apenteng*, the Board upheld the termination of the grievor who was found, among other things, to have failed to report business dealings that could have constituted a conflict of interest, despite having been provided reminders and the opportunity to disclose them, and to have misled the CBSA about the details of his outside business activities. As in this case, the grievor in *Apenteng* was evasive and uncooperative when confronted with the facts pertaining to his misconduct and failed to demonstrate an understanding or a recognition of his wrongdoing. A similar conclusion was reached in *Viner*.

[262] In *Stewart*, the Board upheld a lengthy suspension for a BSO who solicited and accepted free concert tickets from a celebrity whom he had cleared for immigration. As

is the case here, the grievor in *Stewart* identified himself as a BSO when off duty, to gain a personal advantage. Despite noting that the BSO in that case admitted to breaching the *Code of Conduct* and the *Values and Ethics Code*, nonetheless, the Board indicated twice that the employer would have been justified in disciplining him to the point of termination (see paragraphs 58 and 59 of that case).

[263] The grievor's misconduct in this case constitutes an amalgam of sorts of much of the misconduct and of the aggravating factors that were at issue in *Apenteng* and *Stewart*.

[264] On the basis of the evidence presented to me at the hearing, I have concluded that the grievor's misconduct was serious and that the aggravating factors outweigh the mitigating factors.

[265] The grievor's demonstrated lack of judgment and integrity, starting from the moment he accepted the BSO job to the moment at which his employment was terminated, and despite repeated reminders and warnings with respect to what was expected of him, is incompatible with the high level of trust and honesty required of a BSO.

[266] In the circumstances of this case, I find that the termination of the grievor's employment was not excessive. It was a valid option available to the respondent. The seriousness of the misconduct at issue, and the aggravating factors, lead me to conclude that the respondent's decision to proceed directly to termination was not excessive.

[267] The grievance against the termination of the grievor's employment is denied.

D. A word with respect to the grievor's suspension

[268] The grievor was suspended without pay from August 5, 2018, to August 14, 2020, which was his termination date. He grieved that suspension, alleging that it was arbitrary, unjust, and unreasonable.

[269] The termination of the grievor's employment was not retroactive to the date of his suspension without pay, such that his grievance against his suspension remains a live issue, despite my conclusion on his termination grievance.

[270] The grievor was suspended while the respondent investigated his alleged misconduct on August 3, 2018, as well as possible violations of the conflict-of-interest provisions of the *Code of Conduct* related to his outside employment.

[271] The evidence presented at the hearing demonstrated that the respondent had a legitimate concern about the grievor's outside activities, judgment, and integrity.

[272] I accept Ms. Beauséjour's evidence that the respondent's decision to suspend the grievor pending the investigation's results was due to the serious nature of the alleged misconduct and the potential impact of the August 2018 incident on the CBSA's reputation and because, when the incident took place, he had already been assigned to administrative duties of a less-sensitive nature after the July 2015 incident. The August 2018 incident occurred mere weeks after his return to work from the sick leave he went on after the July 2015 incident.

[273] I find that in the circumstances, the grievor's suspension without pay during the investigation into his alleged misconduct was reasonable and appropriate.

[274] The suspension's duration was long —more than two years.

[275] In certain circumstances, such a prolonged suspension without pay could be deemed excessive and inappropriate. However, in this case, at least half of the period during which the grievor was suspended without pay elapsed while he was on sick leave and unavailable to participate in the respondent's investigation. The respondent cannot be faulted for the delay attributable to his unavailability to participate in the investigation for medical reasons.

[276] A little under one year elapsed from the date on which the grievor met with the investigator to the date on which the decision was made to terminate his employment.

[277] After examining the timeline of the events more closely, I have concluded that the respondent acted diligently. It took time to consider the investigation report, to meet with the grievor to provide him the opportunity to present additional relevant information, and to provide him with the time that he needed to provide additional documentation to support his position. Roughly two months elapsed from the date on which he provided that additional information to the respondent's decision to terminate his employment.

[278] In the circumstances of this case, the grievor's suspension without pay was not excessively long.

[279] The grievance against the grievor's suspension is denied.

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

(The Order appears on the next page)

V. Order

[281] The grievances are denied.

May 7, 2025.

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