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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

NASIR NAQVI

Grievor

and

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

Respondent

Indexed as

Naqvi v. Deputy Head (Canada Border Services Agency)

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Paul Champ, counsel, and Him Ranjit, Public Service Alliance of Canada

For the Respondent: Simon Ferrand, counsel

Heard at Toronto, Ontario,
June 18 to 21 and August 28 and 29, 2024.

REASONS FOR DECISION

I. Overview

[1] Nasir Naqvi's ("the grievor") was employed as a border services officer (BSO) with the Canada Border Services Agency (CBSA; "the respondent") from 2002 to December 2021, when his employment was terminated after the respondent concluded that while on duty, he engaged in inappropriate, unwanted, and harassing behaviour of a sexual nature involving a young student border services officer (SBSO; "the complainant"). He grieved his termination.

[2] The events that gave rise to this grievance occurred in December 2020. Before then, the grievor and the complainant did not know each other. They met and spoke only twice. Their second interaction is at the heart of this grievance and the respondent's decision to terminate his employment.

[3] Although one person witnessed parts of their interaction from afar, no one overheard their conversation, and no one witnessed the actions that the grievor is alleged to have taken. This is a "he said, she said" scenario in which the parties presented the Board with two very different versions of events. The outcome turns on credibility.

[4] The grievor referred his grievance to adjudication under s. 209(1)b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act"), which pertains to a disciplinary action that resulted in, among other things, a termination. In such matters, the Board must first decide whether the respondent proved that on the balance of probabilities, the grievor's behaviour constituted misconduct that warranted discipline, and if so, whether the disciplinary measure that the respondent imposed was excessive in the circumstances.

[5] At the hearing, the grievor disputed many of the allegations made against him. However, he acknowledged that he should not have engaged in a prolonged conversation with a young SBSO. He recognized that he misinterpreted the complainant's cues and demeanour. He acknowledged that some of his actions and comments were inappropriate, but he denied that they constituted harassment or sexual harassment. He argued that the termination of his employment was an excessive disciplinary measure.

[6] For the reasons that follow, I conclude that the grievor's misconduct was significant and that the termination of his employment was not excessive in the circumstances. His grievance is denied.

II. Interlocutory decisions

[7] At the beginning of the hearing, the respondent requested that the remedy be decided after the Board had issued a decision on the merits of the grievance (bifurcating, in legal phrasing). It also requested a confidentiality order aimed at shielding the complainant's identity from public view. I granted both requests. The following are my reasons for doing so.

A. Bifurcating the proceedings

[8] Customarily, the Board requires parties to file a final witness list in advance of the hearing. The grievor's list was short. It included two witnesses, him and the first investigator involved in this matter. The investigator's testimony was generally expected to be relevant to an important aspect of the grievor's requested remedy, namely, the allegedly excessive duration of the disciplinary process.

[9] The day before the hearing began, the grievor wrote to the Board and the respondent, informing them that he would no longer call the former investigator to testify.

[10] On the first day of the hearing, the respondent argued that it had been taken off guard by the grievor's last-minute decision to not call the witness and that it would be prejudiced in its presentation of evidence on the remedy issue. It had planned to rely on cross-examining that witness, to counter the grievor's requested remedy. It requested more time to adjust its strategy and decide how it could present its remedy evidence to the Board.

[11] I agreed that the grievor's last-minute decision could prejudice the respondent. But adjourning the hearing to allow it the opportunity to review and modify its witness list would not have been an efficient use of the Board's time and resources.

[12] I ordered the matter bifurcated, leaving the remedy to a later phase of the hearing process were the grievance allowed on its merits. The practical consequence of that order is that in this decision, I will address only the evidence and issues relevant to determining the grievance's merits.

B. The confidentiality order

[13] The respondent asked the Board not to identify the complainant by name in its decision. It also asked that her name be redacted from the Board's file and record. It relied on what has become known as the "Dagenais/Mentuck" test, which arose from the Supreme Court of Canada's decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835; and *R. v. Mentuck*, 2001 SCC 76.

[14] The grievor consented to the request.

[15] I granted the request. I informed the parties that the complainant would not be identified by name in this decision. I also ordered the Board's file sealed until her name had been redacted from it and until the parties had filed redacted copies of all the exhibits that contained her name. The Board's file has been redacted. The parties filed the requested redacted copies, and the unredacted exhibits have been destroyed. The Board's file is no longer sealed.

[16] The following are my reasons for making that confidentiality order.

[17] The open court principle is a fundamental principle of law. In *Sherman Estate v. Donovan*, 2021 SCC 25, the Supreme Court of Canada discussed the interplay between that principle and the underlying value of privacy in protecting individual dignity from the exposure of private information. It also emphasized that court proceedings are presumptively open to the public. Where an applicant seeks to limit the application of the open court principle through, for example, a confidentiality or sealing order, they must establish three things:

- 1) court openness poses a serious risk to an important public interest;
- 2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk;
- and,
- 3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[18] Revealing the identity of a sexual harassment victim due to the open court principle puts an important public interest at serious risk, which Canadian courts have long recognized. They have demonstrated a willingness to recognize that information is sensitive when someone is subjected to sexual harassment. They have done so in both criminal and civil matters (see, for example, *Sherman Estate* at para. 78; *R. v. T.W.W.*, 2024 SCC 19 at para. 74; and *Fedeli v. Brown*, 2020 ONSC 994 at para. 9).

[19] That is not surprising. Protecting a complainant's privacy and personal dignity, as far as practicable, promotes the objectives of preventing further harm to the complainant and maintaining the public's confidence in the adjudicative process (see, in the criminal law context, *T.W.W.*). If their privacy interests are not protected, persons who have been sexually harassed may also be unwilling to come forward, to file a report, and to participate in the investigation process (see *Fedeli*, at para. 9). There is a serious public interest in encouraging individuals to report, and testify about, workplace sexual harassment incidents.

[20] The Board recognized those serious public interests in an anonymization order issued in *Doe v. Treasury Board (Canada Border Services Agency)*, 2018 FPSLRB 89. Considerations central to the Board's conclusion in that case were the need to protect the public interest in not discouraging the reporting of incidents of sexual assault and sexual harassment and the need to prevent a serious risk to the privacy, psychological integrity and dignity of the complainant in matters involving allegations of sexual harassment and sexual assault (see *Doe*, at para. 17).

[21] In the present case, I am satisfied that the order sought is necessary to prevent disclosure of the complainant's identity, preventing further harm to her and maintaining the public's confidence in the Board's processes. No reasonable alternative measure would meet those objectives.

[22] I have already described the confidentiality order that was issued in this case. I will not repeat it. I will add only that its impact on the intelligibility of this decision is minimal. Shielding the complainant's identity from public view while allowing the decision to be published and public access to the Board's record and file respects the open court principle while protecting the collective interest of facilitating vulnerable harassment and sexual harassment complainants to come forward. I believe that the proportionality criterion set out in *Sherman Estate* has been met.

III. Summary of the evidence

[23] I will begin this summary of the evidence by providing some relevant, though general, information about the grievor and the complainant, followed by a brief description of the workplace setting in which the events that gave rise to this grievance occurred. I will then describe the evidence pertaining to the interactions between the grievor and the complainant that are at the core of the grievance.

[24] As previously indicated, the grievor was employed by the CBSA from 2002 to December 2021. Over the years, he worked in different roles and work environments. He worked at Pearson International Airport in Toronto for several years. He also worked for two years as a learning services officer, training new CBSA recruits. His training and work experience included detecting verbal and non-verbal cues and indicators of evasiveness and noncompliance in travellers.

[25] In 2015, he began working at a large parcel inspection facility in Toronto, Ontario. I will refer to that facility as “Postal Operations”. He began working there as an accommodation measure after he sustained an injury.

[26] In the Greater Toronto Area, parcels entering Canada are brought to Postal Operations for inspection before Canada Post releases them for delivery. All parcels are subject to a BSO’s primary inspection. Parcels that require imposing duties and taxes, as well as those that require closer inspection, are sent on a conveyor belt to a secondary inspection area, where another BSO inspects them, to determine whether their contents must be seized or subjected to duties and taxes.

[27] For several years, the grievor worked Wednesdays, Thursdays, and Fridays, from 7:30 a.m. to 8:30 p.m. He never interacted with BSOs and SBSOs who worked the Sunday, Monday, and Tuesday shift.

[28] In early December 2020, he changed shifts. His wife’s work schedule had changed, and he had to change his, due to parental obligations. He began working the Sunday, Monday, and Tuesday shift. He continued to work from 7:30 a.m. to 8:30 p.m.

[29] December 6 and 13, 2020, were the first and second Sundays in his new work schedule. Those are the dates of the only two interactions between him and the complainant. Both interactions took place in the secondary customs inspection area of Postal Operations.

[30] At the hearing, the grievor described himself as social and as having the “gift of the gab”. He indicated that he likes to ask questions, including when he first meets someone. He also likes to use jokes to make people feel at ease and relaxed, including when he first meets them. Social interactions in the workplace make his work seem less mundane and repetitive.

[31] He indicated that when the events occurred that gave rise to this grievance, he was being “extra social” because he was on a new shift schedule, and he knew no one who worked that shift. He had to start over, to make friends and meet new people.

[32] The complainant had been on the job for less than 6 months at the time of the events that gave rise to this grievance. She had first been hired to work full-time during the summer, between her third and fourth university years, and was then offered a contract to work during the school year. As was the case for all SBSOs, she was not an indeterminate employee and did not have bargaining agent representation.

[33] She joined the CBSA because she wanted to pursue a career in law enforcement. Her long-term objective was to work as a BSO after completing her studies. In the meantime, she was working on contract.

[34] The complainant felt pressure to do well in the job and to maintain a good reputation because she viewed successive SBSO contracts as the surest and most direct route to becoming a permanent, full-time BSO. She required a recommendation from a superintendent to be considered for a full-time BSO position. She wanted to keep her head down, focus on doing good work, and not rock the boat. Her reputation as an employee and satisfactory work performance were of paramount importance to her.

[35] Most of her social interactions in the workplace were with fellow SBSOs. She only occasionally had conversations with BSOs. Most of those conversations were short (i.e., approximately 5 to 10 minutes) and on work-related topics. Mostly, she spoke to BSOs when she needed advice or guidance on how to deal with a specific type of parcel. A few times, she had had brief career-related discussions with BSOs. She asked general questions about the career path of the BSOs with whom she spoke and responded to questions about her studies or career aspirations.

[36] Superintendents conducted her performance assessments. Although BSOs did not have an official role in the SBSOs’ performance assessment process, Richard Kim (one of three chiefs of operations at Postal Operations at the time) testified that superintendents could choose to consult BSOs with respect to specific SBSOs’ performance.

[37] At the hearing, the complainant described herself, as of the relevant events, as shy and introverted. She lacked confidence. Elizabeth Passmore, a fellow SBSO who

witnessed some of the incident at issue, described the complainant — as she was at the relevant time — in much the same way.

A. General description of the secondary inspection area

[38] As previously indicated, both interactions between the grievor and the complainant took place in the secondary inspection area of Postal Operations.

[39] The secondary inspection area is a large, open space. It contains six rows of workstations that are flanked by conveyor belts on both sides and abut the conveyor belt to the right. On the other side, there is some room to manoeuvre. However, according to the complainant, there is not enough room between a workstation and the conveyor belt on the left for two people to pass each other.

[40] At the relevant time, COVID-19 protocols were in place. Every second workstation was blocked off and could not be used, and the employees were required to maintain a six-metre distance from their colleagues at all times. They were required to always wear a mask, except when drinking or eating.

[41] The BSOs and SBSOs working in the secondary inspection area did not have assigned workstations, but they often had preferred workstations. The grievor liked to sit in the last row, on the left side of the room, while the complainant normally sat in the second row.

[42] Although I described the secondary inspection area as a large open space, nonetheless, it has several large cement pillars. Some workstations have pillars located directly behind them. The employees sitting in them have a conveyor belt abutting their workstation on their right, a pillar directly behind their chair, and another conveyor belt a short distance to their left. The person seated there has little room to manoeuvre.

[43] It is a noisy work environment. Conveyor belts and other machinery are always in operation. Those working there must speak loudly to be heard over the noise.

[44] On some days of the week, it was a very busy place. However, Sundays were generally not busy. There were fewer parcels to inspect, and fewer employees onsite. On average, between 7 and 10 CBSA employees (BSOs and SBSOs combined) worked in the secondary inspection area on Sundays.

B. The two interactions between the grievor and the complainant

[45] Because the parties presented the Board with two very different versions of events, I will describe each version. I will do so in greater detail than I normally would, given the extent to which their recollections of events differed and the overall relevance of their versions to my assessment of their credibility and consequently to my overall assessment of the grievance's merits. That said, the description that follows will not recount every statement made that day but only those most relevant to the allegations at issue.

[46] I will first describe the complainant's evidence with respect to the December 6 interaction, followed by the grievor's evidence. I will then do the same for their descriptions of the December 13 interaction. When other witnesses provided testimony that was relevant to either or both interactions or that was generally more compatible with one version of events, I will refer to that testimony in the relevant portion of the evidence summary.

[47] Generally, the other party disputed comments and actions described in only one version of events.

[48] The summary of the December 6, 2020, interaction is provided for context for the other interaction. The grievor's termination was not directly related to the December 6 interaction.

1. December 6, 2020: the first interaction

[49] The complainant and the grievor testified about this interaction. Ms. Passmore also testified; she was part of the same student cohort as was the complainant. She was working in the secondary inspection area on that day. Her testimony about the interaction was limited to information that the complainant conveyed to her immediately after the interaction, which Ms. Passmore did not witness.

a. The complainant's description

[50] According to the complainant, the grievor initiated a conversation with her as she walked past his workstation on her way to her preferred workstation.

[51] He introduced himself and asked her name. He asked her about her cultural background. They are both of South Asian descent. He asked her if she could speak a

specific language from that region. She said that she could. When he asked her to say something in that language, she said that she did not feel comfortable speaking it.

[52] At one point, the grievor asked her age. She answered, to which he responded that he was exactly twice her age. He then raised his face mask to show her the grey hair in his beard and asked her if he should colour it. To that, she responded, “You do you”, meaning that he should do what whatever he wanted with his beard.

[53] As she turned to leave for her workstation, the grievor said something along the lines of this: “You’re leaving me?” The complainant testified that she found the comment odd in the context of a first — and brief — conversation between colleagues. Her interaction with the grievor on that day did not resemble her past discussions with other BSOs. It was more personal.

[54] In all, they spoke for 5 to 10 minutes. Throughout, she mostly answered the questions that the grievor asked her. She did not volunteer much information. The interaction left her feeling uneasy.

[55] On her way to her workstation, the complainant stopped at Ms. Passmore’s workstation. She told Ms. Passmore that her conversation with the grievor had left her feeling uncomfortable and that she did not have a good feeling about him. In her testimony, Ms. Passmore indicated that the complainant told her that he had a “creepy vibe” and that he had asked her about the colour of his hair or beard. She did not recall what else the complainant told her at the time.

[56] The complainant had never seen the grievor at work before, so she was unsure whether she would see him again. She planned to avoid him if she did.

b. The grievor’s description

[57] According to the grievor, the December 6 interaction was fast-flowing and positive in tone. It was akin to the regular small talk that occurs when he first meets someone.

[58] He testified that the complainant came to him and introduced herself. He asked her about the origin of her name, and she provided an explanation. He asked her if she was a new SBSO and whether she was in university. She told him that she was in her last year of university and that she had started with the CBSA a few months before.

[59] According to the grievor, the complainant asked him where he was from. He told her what city he was born in, what country his parents had immigrated from and what country they were born in. She then told him of her cultural origin. He spoke to her in a specific South Asian language, and she responded in that language. When he asked her to say more in that language, she said, “No.”

[60] The complainant then told him where she was born and raised and mentioned that she had two older sisters and a younger brother. The grievor testified that he then made a joke to the effect that she must be troublesome. At the hearing, he explained that in his opinion, middle children often receive the brunt of their parents’ and siblings’ attention, suggesting that that attention may lead them to be more troublesome.

[61] The complainant then asked him how old he was. He told her his age. She told him hers, to which he responded that he was literally twice her age. She then told him that he did not look his age. He testified that in reply, he raised his mask and showed her the grey hair in his beard. He told her that he normally coloured his beard and asked her if he should continue to. She said to him, “Do you.”, meaning that he should do what whatever he wanted with his beard.

[62] He then told her that he had sustained a back injury. According to him, the complainant told him that he looked like he kept in shape. He told her that he worked out, to lessen the strain on his back.

[63] According to the grievor, it was common for him to have conversations of this nature with the BSOs on his previous shift schedule. He indicated that during his first 3 days on his new shift schedule, he met approximately 20 new people. He would have had conversations with them much like the one described in this decision.

2. December 13, 2020: the second interaction

[64] The next time the grievor and the complainant saw each other was the following Sunday, December 13, 2020.

[65] The complainant and the grievor testified about the interaction.

[66] Ms. Passmore witnessed part of the interaction from afar, overheard part, and intervened to end it. She testified about her firsthand knowledge and observations as

well as about what the complainant told her about the interaction immediately after it occurred. As her testimony about her firsthand knowledge and observations generally aligned with the complainant's description of this interaction, I will weave Ms. Passmore's evidence into the complainant's description when relevant.

[67] Based on the complainant's and the grievor's testimonies at the hearing and on each of their written statements prepared after this interaction, the order in which the grievor allegedly made certain statements was occasionally unclear to me. However, the order is largely irrelevant to the issue of whether the statements were made, whether they were inappropriate, and whether — collectively or individually — they justified disciplinary action, specifically termination. Accordingly, I will describe the events in the complainant's and the grievor's versions in the order that they described them at the hearing.

[68] I will begin with the complainant's description.

a. The complainant's description

[69] The complainant's shift began at 3:30 p.m. As she and Ms. Passmore retrieved items from a supply room, she saw the grievor in the secondary inspection area. She whispered to Ms. Passmore that he was there.

[70] Ms. Passmore suggested that they sit at workstations in clear view of the superintendents' office, rather than at their preferred workstations, which the complainant did. She selected the workstation closest to the superintendents' office.

[71] The workstation that she selected had a large pillar directly behind it. With a conveyor belt abutting to the right and the pillar directly behind her chair, she did not have much room to manoeuvre when standing or sitting at her workstation.

[72] Ms. Passmore sat two workstations ahead of her, as the workstation between them was blocked off due to the social-distancing protocols. Approximately 10 feet separated them.

[73] The grievor was at his preferred workstation, in the last row. It was two workstations to the left of the complainant's. In order, a conveyor belt, a workstation, and a second conveyor belt separated them.

[74] Shortly after she settled in to begin her shift, and as she looked in her bag for a pen, the complainant heard the grievor ask her if she had a snack for him in her bag. He spoke from his workstation.

[75] The complainant testified that she felt uneasy about having to interact with the grievor again. She did not want to talk to him, but she did not tell him that.

[76] A conversation about an array of topics followed. The complainant described the conversation as small talk, at first. They spoke about COVID-19, vaccine protocols, and the American president at that time. Ms. Passmore testified that she overheard parts of their conversation, likely because the grievor and the complainant had to speak loudly, to be heard over the sound of the machinery. Ms. Passmore's testimony differed from the complainant's insofar as Ms. Passmore described the grievor as having been close to the complainant's workstation when the topics just listed were discussed.

[77] Around that time, the grievor moved from his workstation to the one between his and the complainant's. They were then separated only by a conveyor belt. She started feeling increasingly uneasy.

[78] When the grievor moved closer to her workstation, the conversation became more personal. Because he was closer, they did not speak as loudly as before.

[79] He asked her about her family. She told him that she had a brother and two older sisters. At the hearing, specifically during her cross-examination, she recalled telling the grievor that having two older sisters is like having three mothers, but she denied that she provided him with any other information about her family or her upbringing. She vaguely recalled them discussing the origin of her first name.

[80] At one point in the conversation, the grievor began speaking about his family life. He told her that he had a 17-year-old son. According to the complainant, he did not mention having other children. There was no further discussion about his son.

[81] According to the complainant, she asked the grievor one single question during their December 13 interaction. She asked him if he was married. She assumed that he was. Most of the BSOs she interacted with were married, with children.

[82] At the hearing, she indicated that she asked the question to send the grievor a signal, to remind him that he had a wife and a family. She did not know how to end the conversation and get out of the situation. She hoped that by asking him a question that reminded him of his marital status, he would put an end to what she felt was an increasingly personal conversation between a much older BSO and an SBSO.

[83] According to the complainant, the grievor then asked her if she had ever had a boyfriend. She found the question odd in a work setting, particularly from someone she barely knew. She responded that she had not.

[84] At the hearing, she testified that the grievor then said something along the lines of “That means that you are a ...” and mouthed the word “virgin”. She testified that she pretended not to have understood. She asked the grievor to repeat what he had said, and he answered something along the lines of this: “You know what I mean.”

[85] In her testimony, the complainant recounted that after that exchange, the grievor disclosed — unprompted — details about his first sexual encounter, which had occurred at a very young age. She did not respond or comment. She testified that she felt increasingly uneasy. She did not understand why he would think that she would want to know that information or discuss his sexual history. She did not know how to react.

[86] The grievor then said that he had many “R-rated” stories that he could tell her but that they were not appropriate in a work setting. He suggested that they meet at a bar outside working hours, so that he could tell her about them. She said, “No.” She used the COVID-19 restrictions in effect at the time as a way of rejecting his suggestion that they meet outside work.

[87] At the hearing, she indicated that during the interaction, she assumed that her response and her body language would be sufficient for him to get the message that she was not interested and that she wanted the conversation to end. Throughout the conversation, she oriented her body forward, toward her computer and workstation. She continued to inspect parcels, although she could not do it at her usual rate because occasionally, she turned her head toward him when she spoke.

[88] Ms. Passmore’s description of the complainant’s physical positioning was the same. At the hearing, she indicated that because the complainant had told her that the

December 6 interaction had left her feeling uncomfortable, she occasionally turned around, to look at the complainant. She had never met him. She indicated that she wanted to observe and not prejudge the interaction. She could see that the complainant attempted to work while the grievor spoke with her and angled her body toward her computer and workstation, not toward him.

[89] At the hearing, when she described the grievor's statements to that point, the complainant indicated that she felt that they were far beyond a normal, casual conversation between work colleagues, let alone a conversation between colleagues who did not know each other and who had a significant age gap. She feared where it would lead. She felt unsafe, and her senses were heightened. She indicated that after he asked her if she was a virgin and suggested that they meet outside work, she began to "freeze", meaning that she did not know how to react.

[90] The grievor then asked her if she had ever kissed anyone. She felt uneasy due to the question's personal nature. She answered, "No." The complainant testified that he then said that he was not a good kisser, that he needed to practise, and that they should practise kissing together.

[91] Although that comment made her increasingly uneasy, she did not tell the grievor that she was uncomfortable or that she felt that his comments and questions were inappropriate and unwelcome. She wanted the conversation to stop but did not know what to do. She had never experienced a situation like it, in the workplace or elsewhere. She was overwhelmed.

[92] She testified that she did not have the confidence to be direct and blunt. She was concerned about being forceful and direct with a much older BSO in a male-dominated workplace. She was concerned about potential career-related repercussions if she attracted attention to herself by openly expressing her opinion that his behaviour was inappropriate.

[93] I will now turn to the complainant's description of the final phase of the December 13 interaction.

[94] At one point, the grievor sat on one side of the conveyor belt that separated them and swung his legs over it, making his way to her side. He then stood at the left of her workstation, between it and the belt. As indicated, the conveyor belt abutted her

workstation to the right, and a pillar was behind her chair. He stood in the only opening by which she could leave. She felt that she had no way out.

[95] Ms. Passmore looked back, to check on the complainant. She saw that the grievor was standing next to the complainant's workstation in what she described as "close proximity" to the complainant. Both she and the complainant testified that he was not wearing a mask as he stood near the complainant and her workstation. He was not eating or drinking at the time, so he should have been wearing one. The complainant was wearing hers.

[96] The complainant testified that the grievor repeatedly asked her to take her mask off so that he could see her face. She wore one during both interactions, and he wanted to see what she looked like without it. He said that he wanted to see her face. She said, "No."

[97] He then suggested that he would follow her at her lunch break so that he could see her face when she removed her mask to eat or drink. He also suggested that he would follow her into the washroom to see her face, if she removed her mask.

[98] At the hearing, the complainant testified that at that point in the interaction, she felt clammy and cold. She felt panicked. She wanted the conversation to end without drawing anyone else's attention. It was important for her to keep her job, and she did not know whether a superintendent would believe her if she made a scene. She felt that her only way out was to keep it short, respond only with yes or no answers, and not ask questions, hoping that the grievor would get the hint.

[99] She continued to angle her body toward her desk and to turn her head to look at him only from time to time. She testified that she did that to signal that she did not want to pursue the conversation and that she wanted to get back to work. She also tried to increase the distance between them by leaning her body away from him, toward the conveyor belt to her right.

[100] The complainant testified that shortly after he asked her to remove her mask, the grievor, who was less than an arm's length from her, made pinching motions toward her mask, as though he would attempt to pull it off her face. At the hearing, she indicated that he did that two or three times. She leaned back each time.

[101] The grievor again indicated that he wanted to see her face. He showed her the photo on his driver's licence, then he asked to see a picture of her. She refused.

[102] He then grabbed her CBSA ID card with her picture on it. It was hung on a lanyard around her neck. At the hearing, the complainant indicated that he used "some" force when he grabbed it, which caused her body to jerk forward.

[103] The complainant attempted to grab the ID card by pulling on the lanyard, to release the card from the grievor's hands. She testified that over the span of 10 to 20 seconds, he pulled on the card, and she pulled on the lanyard. In that moment, she felt afraid, given his proximity, larger stature, and greater strength.

[104] Once the grievor released her ID card, he looked down to her chest and made a comment suggesting that the complainant was lucky that he had not "grabbed something else". She interpreted his comment as a threat.

[105] The complainant testified that at that point, her heartbeat was elevated. She felt flushed, and her hands were clammy. She indicated that she had never before felt so "frozen" (i.e., unable to act or react).

[106] From her workstation, Ms. Passmore had been observing the complainant and the grievor converse. She became suspicious. The conversation had been going on for a long time, and it was very unusual for a BSO to speak with an SBSO for any significant amount of time. BSOs and SBSOs did not normally interact much.

[107] At a moment that is difficult for me to pinpoint, Ms. Passmore texted the complainant, asking whether she should come over or whether the conversation was harmless. The complainant knew that she had received a text because she wore a watch that alerted her to it. However, she did not want to take her phone out to read the text or respond to it. She believed that if she did so, the grievor would try to grab the phone.

[108] At roughly the same time, the grievor gestured between them asked the complainant if she was "feeling anything here". She said that she was not and that they were colleagues, and nothing more. According to her, he then said that he gets everything that he lays his hands on. As was the case with his previous comment, she interpreted the comment as a threat.

[109] At that moment, Ms. Passmore came to the complainant's workstation. She had continued to observe the interaction from afar and had decided to intervene, to end it. She had seen a change in the complainant's body language and demeanour as the conversation progressed. By that point, the complainant was no longer inspecting parcels. She was leaning away from the grievor, who had moved even closer to her. She looked increasingly uncomfortable.

[110] At the hearing, Ms. Passmore indicated that by the time she intervened, the grievor was about one foot away from the complainant. He still was not wearing a mask.

[111] When she arrived at the complainant's workstation, Ms. Passmore addressed the complainant and said that it was time for their break. It was not. By suggesting that they go on their break, Ms. Passmore tried to give the complainant a way out of the conversation without drawing attention to the situation and potentially jeopardizing both of their jobs.

[112] The grievor introduced himself to Ms. Passmore, asked her if she was an SBSO, and asked where the other SBSOs were. When she answered that the other SBSOs were probably working in "enforcement" (the area of Postal Operations where BSOs and SBSOs complete the paperwork required when seizing parcels or imposing duties), the grievor made a comment alluding to the fact that the SBSOs were probably busy seizing "d*ck pills". Ms. Passmore and the complainant understood that he meant Viagra, a medication commonly prescribed for erectile dysfunction that is frequently seized in large quantities at Postal Operations.

[113] Neither the complainant nor Ms. Passmore laughed. When the grievor asked what they called the pills, Ms. Passmore provided the brand name. He responded with something to the effect that calling them by their brand name was not as funny.

[114] The complainant, Ms. Passmore, and Carina Voss, who was then the acting chief of the CBSA's Outports and Postal Operations District, testified that they had never heard BSOs refer to Viagra in that way; nor had they ever heard BSOs make jokes about those pills.

[115] The grievor returned to his workstation, and the complainant and Ms. Passmore walked away. They left the secondary inspection area.

[116] Ms. Passmore testified that the complainant was visibly upset in the minutes after the interaction. Her eyes watered, and her hands shook. She asked the complainant to recount what had occurred, and using a note-taking application on her phone, she took notes of the complainant's description of the interaction. Those notes were adduced into evidence.

[117] Ms. Passmore and the complainant sat together until the complainant was calmer. They then returned to the secondary inspection area. Their shift was not over, and they had work to do. The complainant asked Ms. Passmore not to leave her alone. She was concerned that she would have to speak with the grievor again. She worked with Ms. Passmore at Ms. Passmore's workstation. They processed parcels together.

[118] At the hearing, the complainant indicated that the entire December 13, 2020, interaction with the grievor lasted approximately 30 to 40 minutes, perhaps more. Ms. Passmore's testimony put the approximate duration of the conversation at a minimum of 30 minutes.

b. The grievor's description

[119] On December 13, the grievor's workday started later than normal. For a reason that is unclear to me, he arrived at work at 1:30 p.m. instead of 7:30 a.m., which was his normal start time. He sat at his preferred workstation.

[120] During the first two hours of his shift, he watched a 40- to 45-minute online memorial service for a recently deceased uncle using his personal cell phone, made some personal financial transactions and called an uncle. At the hearing, the grievor indicated that he maintained an earlier written statement that he had processed parcels while doing some of those things.

[121] He also went to a coffee shop located elsewhere in the building and purchased a coffee. He was away from his workstation for approximately 15 minutes. By the time he returned, the complainant's shift had started. She was seated at a workstation to his right. As described, an empty workstation and two conveyor belts separated them.

[122] When the complainant and the grievor saw each other, they waved at each other. He asked her how she was. She responded.

[123] They once again spoke about the origin of the complainant's first name. They then engaged in small talk about her studies and current events. At the hearing, he could not clearly remember them discussing any other topics during that portion of their interaction.

[124] He had to shout to be heard over the noise of the machinery.

[125] At some point, he got up from his desk, made his way around the conveyor belt to his right, and went to stand at the workstation that separated them. He had a cookie and his coffee in his hands. Because he was eating and drinking, he was not wearing a mask then or at any time during the interaction.

[126] The grievor testified that the complainant asked him how he was doing. He responded, explaining that he was tired and needed caffeine, gesturing to his cup of coffee. When she had difficulty understanding him, he moved closer to her.

[127] He walked around the conveyor belt that separated them and made his way to her workstation.

[128] I will now open a parenthesis. During the investigation and the disciplinary process, the grievor argued that the complainant's suggestion that he hopped or jumped over the conveyor belt was false. Because of a back injury, he was unable to hop or jump. At the hearing, he was asked several questions about how he made his way to the other side of the conveyor belt. He acknowledged that it was not impossible that he would have made his way over the conveyor belt by sitting on its side and swinging his legs over it, rather than walking around it. He had done that before, and Mr. Kim (previously identified as one of three chiefs of operations at Postal Operations at the time) verbally reprimanded him for it.

[129] Once he made his way to the other side of the conveyor belt, he stood in front of the complainant's workstation, with the desk between them. He denied that he stood to the left, in the open area between her workstation and the conveyor belt.

[130] The complainant asked him if he coloured his beard red. He responded in the affirmative but indicated that he did not like its present colour. She said that she liked it. They then talked about her upcoming semester.

[131] At one point, she asked him if he was married. He said, “Yes.” He talked about his children, their ages, and the universities that some of them attended. He testified that he specifically mentioned the fact that he had two sons in university who were close to her age.

[132] The complainant volunteered information about her family and upbringing. She told him that she had two older sisters and a younger brother. She also made comments that led him to believe that she had led a sheltered upbringing. She told him that her parents had not allowed her much freedom before she started working at the CBSA and that her younger brother was given more freedom than she was.

[133] At the hearing, the grievor indicated that because of their similar cultural backgrounds, he empathized with the complainant and understood her experience as the child of South Asian parents born in that region of the world. They discussed the different levels of freedom given to children of parents of South Asian descent who were born in Canada, as opposed to the freedom given to the children of South Asian parents born in that region, more specifically the differences in the freedom that she enjoyed compared to that which the grievor’s children enjoyed.

[134] The grievor testified that speaking with the complainant reminded him of his children. Speaking with her was like to talking to them or to a niece.

[135] He indicated that because the complainant had asked him if he was married, he felt comfortable asking her if she was in a relationship. He denied asking her if she had a boyfriend. He wanted to be inclusive. He framed his question more generally.

[136] The complainant told him that she had never had a boyfriend. At the hearing, he indicated that in the moment, he recalled thinking that if she had a boyfriend, she would have more self-confidence. He also recalled thinking that she would make a good match for one of his sons. According to him, parental matchmaking is common in his culture.

[137] The grievor denied asking the complainant if she was a virgin.

[138] He denied telling her about his first sexual encounter and asking her to meet him at a bar after work. At the hearing, he indicated that he would never talk of such things. He has been in an arranged marriage since an early age and has been with only one person. He is also a strict Muslim and does not drink. He does not go to bars.

[139] He denied asking the complainant to take off her mask or attempting to remove it. He also denied commenting that she was lucky that he had not tried to grab “something else”.

[140] He acknowledged that he took the complainant’s CBSA ID card because he was curious to know what she looked like without a mask. He wanted to see her picture. However, according to him, the situation did not unfold the way she described it.

[141] The complainant had an ergonomic workstation, and the work surface was elevated during the interaction. Her ID card was on the work surface. He picked it up. According to him, she yanked it back. She told him not to look at the photo. She said that the photo was ugly. Only when she yanked it back did he realize that it was attached to a lanyard around her neck. He apologized to her by saying, “My bad.”

[142] The grievor acknowledged that he should not have picked up her ID card without asking for her permission. According to him, his experience working in airport settings routinely involved looking at ID cards. He indicated that he acted on muscle memory when he took her card; that is, by reflex.

[143] After apologizing for picking up her ID card, he commented on the importance of having confidence in one’s appearance. He assumed that she did not want him to see her photo because she was insecure about her looks.

[144] He then told the complainant that he had no idea what she looked like. Because they were required to wear masks in the workplace, he had not seen her entire face. She responded that she had not seen a photo of him either.

[145] He moved closer to her and came around to the side of her workstation. He took out his wallet and showed her a photo of him and his son, as well as his CBSA ID card. After doing that, he once again asked the complainant if he could see a photo of her.

[146] The complainant did not show him a photo of herself. Instead, she responded with something along the lines that he would not get to see her photo because she was “trying to keep the mystery alive”. At the hearing, the grievor testified that at the time, he found her statement peculiar and more than friendly. During his cross-examination, he indicated that he took it as flirtatious.

[147] He indicated that her flirtatious comment made a proverbial light go on in his head. He wanted to change the topic of conversation and lighten the mood. He attempted to by making a joke.

[148] Because of their earlier exchange about his children and the fact that the complainant had never had a boyfriend, he had matchmaking on his mind at that moment, specifically a match of her and his son closest to her age. He indicated that what he had interpreted as her insecurity about her appearance made him believe that she and his son had much in common.

[149] With that in mind, the grievor told the complainant that his son was ill at ease in social situations and that he could benefit from more self-confidence. He told her that his son had never had a girlfriend and had probably never kissed anyone and would need to practise. He made a general comment about the fact that his son was concerned that he would get “Me Too”ed by women, a reference to a social movement aimed at raising awareness of sexual abuse, sexual harassment, and rape.

[150] At the hearing, he described that comment as a silly joke about his son’s nervousness in social situations and lack of experience with women. He did not mean to suggest that his son should practise kissing with the complainant, although he has since recognized that his comment could have been interpreted that way.

[151] When he was asked at the hearing whether there was any indication that the complainant was upset at any point during the December 13 interaction, the grievor indicated that the only change in demeanour that he noticed was when she described the photo on her ID card as ugly and when she talked about her relationship status. At the time, he assumed that those changes were due to a lack of confidence, specifically a lack of confidence in her appearance. He has since realized that she was uncomfortable. She was giving him cues. He missed or misinterpreted them.

[152] Immediately after the verbal exchange that occurred after he took her ID card and joked about his son, the grievor finished his coffee and put the cup in a garbage bin. Only then did he realize that he was not wearing a mask. He decided to return to his workstation.

[153] Before he could make his way back to his workstation, he saw Ms. Passmore walking toward them. He had never met her.

[154] Ms. Passmore introduced herself. At the hearing, all he could recall of his interaction with her was asking whether she and the complainant were in the same SBSO cohort.

[155] When he was asked at the hearing whether he had referred to Viagra as “d*ck pills” during his brief conversation with Ms. Passmore, the grievor indicated that he did not recall doing so. However, he stated that it was not out of the realm of possibility that he would have done so and that it is possible that he made a silly joke about that drug. According to him, the term was commonly used among BSOs at Postal Operations. Furthermore, those BSOs commonly used inappropriate language; it is also used in law enforcement more generally.

[156] At another point in his testimony, he indicated that he has realized that he should not have made such a joke about the pills, particularly in the context of a conversation with young female officers or new SBSOs.

[157] According to the grievor, the December 13 interaction lasted about 40 minutes. When he described it generally, he indicated that he tried to be social. He acknowledged that he likely became too friendly, too fast. He thought that the interest in the conversation was mutual. He indicated that he must have missed cues. In hindsight, he believes that he should not have had such a long conversation with a much younger woman because his attempts at being social could have been misinterpreted.

C. The incident is reported

[158] Immediately after the December 13 interaction, Ms. Passmore encouraged the complainant to report it. At first, the complainant was unable to contemplate reporting it. She needed time to process what had occurred.

[159] Her immediate instinct was to not report it. She did not want to get anyone in trouble. She also did not want to rock the boat and draw attention to herself. She was concerned that if she reported the incident and was not believed, her SBSO contract renewal could be jeopardized.

[160] However, she could not get it out of her mind. Over the next day or two, she kept replaying it in her mind. She increasingly felt that it was unfair that someone could speak to her the way the grievor did and leave her so shaken. She decided to

report it to the respondent. On December 15, 2020, she used the point-form notes that Ms. Passmore took after the interaction as the starting point for a written statement that she prepared, with Ms. Passmore's help.

[161] The complainant testified that she did not intend the statement to be an exhaustive, chronological description of all that was said and done on December 13. She included only the grievor's statements and actions that made her feel the most uncomfortable and unsafe. At the hearing, she testified that when she prepared her statement, she did her best to provide as accurate a timeline as she could in the circumstances.

[162] On the afternoon of December 15, 2020, the complainant's next workday, she reported the incident.

[163] Ms. Passmore accompanied her to the superintendent's office. Because the complainant was too emotional to speak at first, Ms. Passmore initiated the conversation and informed the superintendents that the complainant had a sensitive matter to discuss with them. The complainant then explained what occurred on December 13. She provided the superintendents with her written statement.

[164] The grievor was onsite that day. For that reason, the superintendents provided the complainant and Ms. Passmore the option of working at another CBSA facility, located a short drive from Postal Operations. They were informed that they could do so until they felt safe coming back to Postal Operations. They accepted.

[165] Also on December 15, 2020, the superintendents informed Ms. Voss of the complainant's allegations. Later that day, she reported the complainant's allegations to her superiors.

[166] The two superintendents with whom the complainant and Ms. Passmore met prepared written summaries of their December 15 meeting on that day and December 16, 2020, respectively. Those summaries were adduced into evidence. Both described the complainant as visibly upset when she came to them to report the incident.

[167] On December 18, 2020, Ms. Passmore also prepared a written statement, detailing her observations and her interaction with the grievor on December 13. It was adduced into evidence.

[168] On an unspecified date shortly after that, Ms. Voss spoke with the complainant, to inquire into her well-being and to inform her of her right to make a workplace-violence complaint. She also asked the complainant if she wanted or intended to report the incident to the police. The complainant was initially unsure as to whether she wanted to make a complaint or a police report.

[169] At some point in January 2021, she reported the incident to the police. The grievor was not charged. The complainant testified that she was aware that without audio or video evidence or a witness, reporting the incident to the police was unlikely to result in criminal charges against him. However, she indicated that she wanted to report it to the police, to ensure that there would be a record of the incident, so that he would not be able to treat someone else in the same way again without consequences.

D. The grievor's suspension and the investigation and termination

[170] On December 18, 2020, the grievor received a telephone call, informing him that he had been suspended with pay and that he should not report to work for his next scheduled shift. He was not informed why he had been suspended, only that he would be provided further information shortly.

[171] He was perplexed. He did not suspect that his suspension was tied to his December 13, 2020, interaction with the complainant because, according to him, nothing out of the ordinary occurred during it. At the hearing, he indicated that she smiled and laughed throughout most of their discussion on December 13, so it did not occur to him that his suspension was related to that interaction.

[172] Unbeknownst to the grievor, the previous day, the respondent had decided to launch an investigation into the allegations against him.

[173] Five allegations were to be investigated. All pertained to discreditable conduct, contrary to the CBSA's *Code of Conduct* and the *Values and Ethics Code for the Public Sector*. The allegations, as they were later described in the final investigation report, were the following:

- he attempted to engage an SBSO in a sexualized conversation by inquiring about her sexual history;
- he made inappropriate sexual requests to the SBSO by stating that they should kiss and practise kissing;

- he grabbed the SBSO's CBSA identification card, worn on a lanyard around her neck, which caused her neck to jerk forward;
- he repeatedly attempted to grab and remove the SBSO's mask without her consent; and
- he made a sexualized threat to the SBSO after he attempted to grab and remove her mask, specifically by stating this: "You are lucky I didn't grab anything else."

[174] On December 22, 2020, Ms. Voss informed the grievor that he was being suspended without pay, pending the results of the professional standards investigation. He was not told why.

[175] The following day, he received a letter from Lisa Janes, Regional Director General of the CBSA's operations in the Greater Toronto Area, confirming his suspension without pay. In it, the misconduct allegations were described as related to interactions with SBSOs that had recently been brought to CBSA management's attention, which were alleged to have amounted to a breach of the CBSA's *Code of Conduct* and to have been contrary to the CBSA's values. The letter also indicated that the allegations "could reasonably attract criminal charges."

[176] The complainant was not named in the letter. No details were provided about the nature of the allegations or the date or dates on which the interactions for which the grievor was being suspended allegedly occurred.

[177] The grievor was informed of the allegations against him and the complainant's identity only when an investigator contacted him on or around January 6, 2021. Shortly after that, he prepared a written statement based on his recollection of his interactions with her.

[178] When he prepared his statement, and when he was interviewed in the context of the respondent's investigation, he had not received a copy of the written statements of the complainant, Ms. Passmore, and the two superintendents. Although portions of the complainant's written statement were included in the investigation report that he was provided during the disciplinary process, the grievor testified that he first saw her entire written statement during the adjudication process before the Board.

[179] The respondent's investigation process unfolded over the first half of 2021.

[180] On June 1, 2021, the grievor was informed that the investigation was complete and that all the allegations against him had been deemed founded.

[181] Mr. Kim was the management representative at the grievor's August 2021 pre-disciplinary meeting. He described the information that the grievor and his bargaining agent representative provided at the meeting and the grievor's written response to the investigation report.

[182] According to Mr. Kim, rather than responding to the core of the allegations against him, the grievor focused on perceived inaccuracies in the investigation report and on semantics. Mr. Kim provided several specific examples, including the grievor's focus on the investigator's failure to reference evidence that the grievor had purchased a coffee on the day of the incident, on discrepancies about the alleged duration of conversations and the timing of events, on the investigator's failure to use the grievor's words to describe how he took the complainant's ID card in his hands, and on what the grievor described as inaccuracies in the description of how he made his way to the other side of the conveyor belt that separated him from the complainant.

[183] In her testimony at the hearing, Ms. Janes provided a similar assessment of the information that the grievor provided in writing in response to the investigation report and verbally at the pre-disciplinary meeting (as it was described in a written summary prepared contemporaneously and subsequently provided to her).

[184] On December 17, 2021, the grievor was informed that the CBSA had decided to terminate his employment, retroactive to December 23, 2020, the date on which he had been suspended. Ms. Janes signed the termination letter.

[185] Among other things, the termination letter referenced the grievor's disciplinary record. In the 18 months preceding the events that gave rise to this grievance, he had been disciplined twice.

[186] In August 2019, he received a written reprimand for being on his phone while assigned to work at an X-ray machine to conduct a primary inspection of parcels, which required his undivided attention. Just over a year later, in September 2020, he received a one-day suspension without pay for twice sleeping on duty while assigned to conduct that same task, thus neglecting his BSO duties and jeopardizing the health and safety of CBSA employees and third parties.

[187] Ms. Janes testified that although the grievor's two prior instances of discipline were different from the allegations at issue in this case, they demonstrated a lack of judgment and a failure to meet the expected standards set out in the CBSA's *Code of Conduct*. According to her, there was no indication that the grievor learned from those past mistakes.

[188] She indicated that she also considered the grievor's general lack of credibility when deciding to terminate his employment. At the hearing, she provided a specific example of it.

[189] The grievor told the investigator that he had inspected parcels off and on during his December 13, 2020, shift. He also stated something similar in his written statement in the context of the investigation. However, the data that the investigator obtained from the CBSA's parcel tracking system indicated that he had processed no parcels that day. That data was adduced into evidence.

[190] At the hearing, the grievor indicated that the system used to track the number of parcels that a BSO processes per day is often inaccurate.

[191] The data for the three shifts that the grievor worked immediately before the December 13, 2020, incident indicate that he processed an average of well over 100 parcels per day but none on December 13, 2020. The same data indicate that the complainant processed about 40% fewer parcels on December 13 than she had during her previous shift. The data with respect to Ms. Passmore showed a similar drop in parcels processed on December 13, 2020.

[192] The grievor filed grievances with respect to his suspension without pay and his termination. His suspension grievance has not been referred to adjudication. I am not seized of it.

[193] The grievor testified that he had difficulty finding new employment after his termination because of the disability for which the CBSA had accommodated him and because he disclosed the reasons for his termination with prospective employers.

[194] The grievor sought therapy after the events that gave rise to this grievance. According to him, he now knows that he missed signals that the complainant gave him and that he misinterpreted other cues. He erroneously attributed her reactions to an overall lack of confidence.

[195] At the hearing, he was insistent that were he reinstated, he would not be as social in the workplace as he was. He testified that he would make sure to disengage from conversations that became personal.

E. The impact on the complainant and Ms. Passmore

[196] The complainant described the immediate and long-term impact that the December 13, 2020, incident had on her. I will describe it because it is relevant to the assessment that I must make of the severity of the misconduct at issue.

[197] The complainant testified that immediately after the incident, she was emotional and distraught. She cried easily. Her sleep was disturbed. She felt unsafe returning to work. She feared having to see the grievor again. She was concerned about losing her job or not having her contract renewed if she reported his behaviour.

[198] After she reported the incident to the superintendents and the investigation process was underway, she felt increasingly isolated in the workplace. Her work environment felt hostile. BSOs who had been friendly with her before no longer wanted to be seen speaking with her.

[199] Before the December 13, 2020, incident, both the complainant and Ms. Passmore wanted to become full-time BSOs after they completed their studies.

[200] Ms. Passmore, who had long been interested in a law enforcement career and came from a family of law enforcement officers, testified that she became disillusioned with the CBSA and law enforcement generally as a result of the incident. She no longer felt that working for the CBSA was honourable. She left the CBSA. She has not pursued a career in law enforcement.

[201] The complainant is now a full-time BSO. She described herself as a more guarded person since the incident. She has difficulty letting her guard down at work, particularly around male BSOs.

[202] Ms. Passmore described the complainant as generally happy and positive before the December 13 incident. After it, and for the rest of the time that they worked together, the complainant was constantly on edge and hypervigilant. Her guard was always up when she interacted with others in the workplace.

IV. Summary of the arguments

A. For the respondent

[203] The respondent argued that grievor's unwanted, inappropriate, and harassing behaviour of a sexual nature directed at a vulnerable individual constituted serious misconduct that warranted termination.

[204] As an employer, the CBSA has an obligation to react quickly and efficiently when it is informed of sexual misconduct allegations (see *Doro v. Canada Revenue Agency*, 2019 FPSLREB 6 at paras. 85 and 86; and *Doe v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 55). It argued that it did not rush to judgment. It conducted a thorough investigation and considered all the mitigating and aggravating factors before deciding to terminate the grievor.

[205] According to the respondent, this case turns on credibility (see *Faryna v. Chorny*, 1951 CanLII 252 (BC CA) at 357, and *Bédirian v. Treasury Board (Justice Canada)*, 2002 PSSRB 89 at para. 360), and the grievor's version of events is not credible. The explanations that he provided for a lengthy and invasive workplace conversation with a student were inconsistent. It is not reasonable to believe that he could have believed that his behaviour was appropriate and welcome.

[206] The complainant provided clear, consistent, and compelling evidence that demonstrated that she was the target of sexual harassment. Contrary to the grievor, she had no incentive to lie; rather, she had everything to lose by coming forward with allegations against him. Moreover, Ms. Passmore corroborated significant aspects of her testimony. To the extent that the complainant's testimony varied with respect to her past statements on some minor peripheral issues, those variances are not determinative of her reliability or credibility (see *Gale v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 85 at para. 158; appeal allowed in *Gale v. Canada (Solicitor General)*, 2004 FCA 13, and matter remitted to the Board for redetermination, but not on this point).

[207] The respondent argued that the Board must examine all the facts, to determine whether the grievor's misconduct was sexual in nature and harassing. It must do so based on a reasonable person standard. It relied on *Bédirian*, specifically paragraph 359, and argued that in the circumstances of this case, the "reasonable person" must be a reasonable, young, and sheltered woman, much like the complainant. According to

it, the Board must examine the evidence before it from the perspective of the victim of the alleged misconduct, who was the target of harassing behaviour of a sexual nature by a much older man in a position of some authority over her, albeit indirect authority.

[208] The evidence demonstrated that the grievor breached the standards of conduct expected from CBSA employees, which are set out in the CBSA's *Code of Conduct*. He engaged in harassing behaviour of a sexual nature toward a vulnerable person half his age and demonstrated a lack of integrity by failing to take responsibility for his actions.

[209] As an experienced BSO, he was expected to create and maintain open and positive communications aimed at supporting CBSA recruits. He was expected to demonstrate his consideration of the impact of his actions on others. He did the opposite. He knew or should have known that his behaviour was highly inappropriate. The complainant was not required to object to his comments or openly voice her unease with his behaviour for it to constitute misconduct (see *Carroll v. Cobequid Housing Authority*, 2022 NSLB 85 at paras. 162 to 164).

[210] The respondent submitted that the Board should treat the grievor's comments and actions on December 13 not as a single, isolated incident of misconduct but as a series of different incidents that escalated. According to it, when viewed as such, his comments and actions that day were a pattern of conduct. They demonstrated persistence. His misconduct was significant.

[211] The aggravating factors far outweigh the mitigating factors. The aggravating factors include the fact that the grievor was a long-serving employee who knew his duties and obligations, including the leadership obligations set out in the CBSA's *Code of Conduct* and applicable to senior BSOs in their interactions with SBSOs. They also include the power imbalance between him and the complainant and the indirect power that he could have exercised over her. Additional aggravating factors are the significant impact that the misconduct had on her, as well as the organizational impact, including harm to the CBSA's efforts at recruiting and retaining young female SBSOs.

[212] The grievor has not taken responsibility for his actions; nor has he demonstrated true remorse. At the hearing, he continued to minimize his actions, describing much of the December 13 interaction as ordinary small talk between

colleagues. He denied all wrongdoing until the first day of the hearing, and he failed to show remorse during both the investigation and the disciplinary process. His remorse expressed at the hearing was self-serving and too little, too late.

[213] The grievor also had two prior incidents of discipline as of the events that gave rise to this grievance.

[214] Lastly, the respondent significantly emphasized the grievor's testimony that he had misinterpreted the complainant's behaviour and comments because he believed that she was an engaged participant in the conversation and that he interpreted her cues as indicative of a lack of confidence. The respondent argued that his inability to pick up on cues and his perception that he had her consent and that his comments were welcome indicate that he is likely to reoffend and that it cannot trust him to maintain the high standards of behaviour expected of BSOs. His lack of judgment demonstrates that he does not have rehabilitative potential.

B. For the grievor

[215] The grievor acknowledged that he was wrong to take the complainant's ID card without her consent and that he should not have asked her whether she was in a relationship. He also recognized that making a joke about his son's lack of experience kissing, in the context of a prolonged conversation between people who did not know each other, could have made a reasonable person uncomfortable and could have been perceived as an unwanted sexual innuendo. He accepted that some discipline was warranted.

[216] He agreed that sexual harassment cannot be tolerated and that employers must be commended for acting swiftly when such allegations are brought to their attention. However, he denied that his behaviour constituted sexual harassment or harassment.

[217] The complainant was young, shy, and sheltered. He wanted to help her through guidance and reassurance. He also wanted to play matchmaker for his son. Just once, he made comments that a reasonable person could have deemed inappropriate in the circumstances, but they were at the low end of the spectrum and did not constitute sexual harassment.

[218] The grievor argued that his testimony is the only one that was credible, consistent, and reliable. He submitted that the complainant's testimony contained

inconsistencies and was a mistaken recollection of events. He argued that her recollection of events changed with time, as she looked back on the interaction through the prism of her overall unease afterward. That led her to amplify her description of her unease and to minimize her participation and the extent to which she was actively engaged in a reciprocal conversation that included sharing personal information.

[219] The grievor argued that his misconduct was an isolated incident that arose from a misunderstanding on his part. He missed or misinterpreted the complainant's cues. He thought that she was a willing and engaged participant in the conversation, but in hindsight, he has realized that she was not.

[220] The grievor argued that even were I to accept the complainant's version of events and conclude that the most serious allegations against him are founded, nevertheless, the misconduct at issue would be mild when viewed in the light of the spectrum of behaviour encompassed by the term "sexual harassment". His comments were more akin to one-time verbal innuendos or offensive comments that normally dictate a remedial corrective action (see *Brampton (City) v. Brampton Professional Firefighter's Association*, 2016 CanLII 87624 (ON LA) at paras. 172 and 173).

[221] He argued that he was the victim of the respondent's hypervigilance with respect to sexual harassment allegations and its zero-tolerance approach. Zero-tolerance policies are not rehabilitative. They are not compatible with the progressive nature of discipline.

[222] He submitted that his 18 years of service, his candour, his remorse, and the hardship that the respondent's disciplinary measure caused him constitute important mitigating factors. He relied on *Albert v. Canada Customs and Revenue Agency*, 2005 PSSRB 7, *Alberta Health Services v. Alberta Union of Provincial Employees*, 2022 CanLII 100939, *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLRB 33, *Woodstock (City) v. C.U.P.E., Local 1146*, 2010 CarswellOnt 8106, and *Brampton (City)* as examples of cases in which those mitigating factors were considered in the context of sexual harassment allegations in the workplace.

[223] He submitted that a five-day suspension would constitute an appropriate disciplinary penalty.

V. Reasons

[224] The starting point of the Board's analysis in such cases is the legal test set out in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. L.R.B.R. 1. That test requires the Board to answer these three questions:

- Did the grievor's conduct warrant imposing a disciplinary measure?
- If so, was the disciplinary measure imposed excessive?
- If the discipline imposed was excessive, what measure should be substituted?

[225] With respect to the first two questions, the respondent had the burden of proof. If I find that the termination was excessive in the circumstances, the burden would then shift to the grievor.

[226] Under the first step of the *Wm. Scott* analysis, I must make findings of fact with respect to the grievor's behaviour on December 13, 2020, and conclude whether it constituted misconduct. If I conclude that it did, I must make findings with respect to its nature and severity. Those findings, taken together, will allow me to decide whether his conduct warranted imposing discipline.

[227] The grievor has acknowledged that some of his behaviour constituted minor misconduct and that his misconduct warranted discipline. These acknowledgements are relevant to the task at hand, but they are not determinative.

[228] Although the grievor acknowledged some misconduct, he argued that most of the allegations on which his termination rested were unfounded. He disagreed with much of the complainant's description of their December 13, 2020, interaction. He denied making many of the statements described in the summary of her evidence that is included in this decision. When he acknowledged misconduct, his description of events differed significantly in tone and nature from hers. Although he did not deny that their second interaction made her uneasy, he denied that his comments and actions on that day constituted harassment or sexual harassment.

[229] Accordingly, my analysis under the first step of the *Wm. Scott* test cannot stop at the grievor's admissions. To decide whether the respondent met its burden of proving that misconduct occurred on the balance of probabilities, I must determine whether it made out each allegation for which the grievor was disciplined, which were set out in the termination letter. When I assess each allegation, it is possible that I may

reach a conclusion that I fully accept one version of events over the other. However, it is equally possible that I conclude that the truth lies somewhere in between.

[230] It is useful to repeat the termination grounds. They are the following:

- the grievor engaged the complainant, an SBSO, in a sexualized conversation by inquiring about her sexual history and by making an inappropriate request of a sexual nature by requesting that they kiss or practise kissing;
- he grabbed her CBSA ID card, which she wore on a lanyard around her neck, without her consent;
- he repeatedly attempted to grab or remove her mask without her consent; and
- he made a vague sexualized threat directed to her after he tried to remove her mask.

A. The grievor's behaviour constituted misconduct that warranted discipline

[231] I must make findings of fact with respect to what transpired on that day in December 2020. I will begin by setting out the misconduct that the grievor acknowledged, followed by my findings with respect to his and the complainant's credibility and my findings of fact as to the nature and extent of his misconduct.

[232] As indicated, the grievor acknowledged that he took the complainant's ID card without her consent. He did so out of curiosity. He wanted to see what she looked like without a mask. He admitted that taking the ID card without her consent constituted misconduct. Stated otherwise, he accepted that the second allegation is founded. However, he testified that he did not know that the card was on a lanyard around her neck, and he denied pulling on the ID card with any force.

[233] He also acknowledged that he asked the complainant if she was in a relationship. At the hearing, he indicated that she had asked him if he was married, so he thought that he could ask her if she was in a relationship. He testified that he asked her because he had matchmaking on his mind.

[234] He also testified that he made a joke about his son's lack of experience kissing, suggesting that his son would need to practise. He described it as a silly joke, meant to lighten the mood and change the topic of conversation after the complainant made a comment that he found flirtatious. He testified that he did not mean to suggest that

his son should practise kissing with her, although he has since recognized that his comment could have been interpreted that way.

1. Credibility findings

[235] I have described this case as a “he said, she said” scenario in which credibility plays a crucial role. Cases involving sexual harassment allegations are complex, as many times, they depend on the credibility of the testimony.

[236] An oft-cited decision with respect to assessing witness credibility is *Faryna*, which was a sexual harassment case in which witnesses provided different versions of the events at issue. The British Columbia Court of Appeal set out the following test (at page 357):

...

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its 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.

...

[237] The rule in *Faryna* is generally invoked when two oral testimonies are contradictory or when, as in this case, it is necessary to choose between two versions of the same events. The rule requires a decision maker to look at all the circumstances of the case, to determine which version of events would appear more plausible to a reasonable and informed person.

[238] Assessing the credibility of testimony requires considering criteria such as the likelihood of a version, a witness’s interest in testifying, the lack of contradiction on essential elements, and the corroboration of facts (see *Canadian Pacific Railway Company v. Sauvé*, 2024 FCA 171 at para. 30). It may be that part of a witness’s version of events is credible and another is not. It may also be determined that one witness’s version of events, in its entirety, is more credible than another’s version (see paragraph 138 of *NTN Bearing Manufacturing of Canada v. U.S.W.A., Local 9042*

(2009), 187 L.A.C. (4th) 162, cited at paragraph 140 of *Levi Strauss & Co. v. Workers United Canada Council*, 2020 CanLII 44271 (ON LA)).

[239] With certain exceptions that will be discussed later, the testimonies of the grievor and the complainant were generally consistent with the written statements that they prepared after the December 13, 2020, interaction and those that they provided to the investigator looking into the grievor's alleged misconduct. The grievor's testimony was also generally consistent with the statement that he provided to the respondent during the disciplinary process.

[240] As indicated, the grievor argued that his testimony was the only one that was credible, consistent, and reliable. He submitted that although the complainant's testimony may appear credible, it is not reliable. It contains inconsistencies and is a mistaken recollection of events that developed in retrospect, as she looked back on the interaction through the prism of her overall unease afterward. According to him, over time, she added details.

[241] I disagree with the grievor on that point.

[242] The mere fact that a witness's testimony may contain some inconsistencies does not automatically mean that the witness is being untruthful or is not credible (see *Telus Communications Inc. v. Telecommunications Workers Union, USW Local 1944*, 2024 CanLII 29328 (CA LA) at para. 118). Perfection is not the required standard for testimony to be credible. In fact, perfection, meaning the total absence of inconsistencies between statements, could — in certain circumstances — be indicative of a concocted story (see *Sather v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 45, at para. 161).

[243] The complainant's testimony during her examination-in-chief and cross-examination was not perfectly consistent; nor was it perfectly consistent with her past statements on all points.

[244] Her testimony varied somewhat when she was asked about the approximate duration of the December 13 interaction, the overall time during which she attempted to retrieve her ID card from the grievor's hands, and the number of times he attempted to remove her mask. Her testimony with respect to the order in which certain statements were made and where he stood when they were made was not always

consistent. She added some details in her testimony that did not appear in her written statement, which she prepared immediately after the December 13 interaction.

[245] I will provide two examples. During her examination-in-chief, she insisted that she did not provide the grievor with any information about her family, but during her cross-examination, when she was asked how she could explain that he knew that she had two sisters and a younger brother, she acknowledged that she likely did provide him with some basic information about her family. Another example pertains to a difference between her written statement and her testimony at the hearing. In her testimony, she indicated that the grievor suggested that they meet at a bar outside working hours. In her written statement, she indicated that he implied that they should go out on a date. The statement lists two activities that he reportedly proposed. Neither one involved going to a bar.

[246] When it comes to inconsistencies, what is most important is the nature of the inconsistencies and whether important details in different statements conflict, possibly exposing deliberate untruths (see *Sather*, at para. 161)

[247] The inconsistencies described were on peripheral matters; that is, matters that do not go to the heart of the issue of whether the four allegations against the grievor were founded. And in my opinion, inconsistencies on peripheral matters are not significant or surprising, given the time that elapsed between the incident and the hearing (roughly four years).

[248] It is also important to note that the complainant never suggested or indicated that Ms. Passmore's December 13 notes and the complainant's written statement prepared shortly after that were meant to be exhaustive and chronological descriptions of every aspect of her interaction with the grievor that day. I accept her testimony that the information in the notes and the statement contained only those aspects of the December 13 interaction that most disturbed her at the time. She was focused on putting in writing the statements and actions that she found most concerning and most inappropriate.

[249] On every material point relevant to the misconduct allegations for which the grievor was terminated, I find that her testimony was consistent.

[250] It was consistent with the notes that Ms. Passmore made on her phone using the information that the complainant relayed verbally in the minutes after the incident. It was also consistent with the written statement that she prepared two days after the interaction and with the information that she later provided to the investigator. And it was consistent with the information that she conveyed to the superintendents when she reported the incident, as they described it in their written reports.

[251] All the notes and documents are consistent with her testimony that the grievor asked her if she was in a relationship and whether she was a virgin, suggested that they practise kissing, took her CBSA ID card, attempted to remove her mask, and made a comment to the effect that she was lucky that he had not grabbed anything else.

[252] During her testimony, the complainant clearly differentiated the information that she was providing to the best of her recollection or based on estimates of time and distance from the information that she recalled with great clarity and detail, despite the passage of time. Generally, the latter information was about the portions of the December 13 interaction that left her feeling the most distraught, uneasy, or fearful.

[253] Her testimony almost four years later about the grievor's statements and actions that she found the most concerning at the time was consistent with her recollection of events described in writing immediately after the interaction. Although the passage of time and the frailties of human memory can make clear and comprehensive recall more difficult or less reliable with time, I accept that a witness is generally more likely to clearly, consistently, and confidently recall events and comments that made them uneasy or fearful at the time than they are to recall portions of a conversation that were more akin to small talk.

[254] Whether or not she provided at the hearing estimates of the entire interaction's duration or of the period during which she tried to retrieve her ID card from the grievor's hands that differed from previous statements is not determinative of the issue of whether those events occurred and whether they constituted misconduct. The same can be said with respect to minor inconsistencies in her testimony on the number of times that he attempted to remove her mask.

[255] Given that the complainant was consistent on all the material elements of the allegations against the grievor and that she never claimed that her statements at the

time were an exhaustive accounting of the events, I do not find that minor inconsistencies on peripheral issues or the later inclusion of additional information and details — during the investigation and repeated at the hearing — are indicative that she lacked reliability or credibility (see *Gale*, at para. 158).

[256] In addition, I also considered the following factors when I assessed the complainant's credibility.

[257] The complainant had no reason to lie. Speaking up came with significant risks. At the time, she was a SBSO who worked on contract. She had little job security. She required a superintendent's recommendation to be considered for a full-time BSO position, which she aspired to. She was also concerned about how other BSOs would treat her if she filed a report against one of their own.

[258] I accept the complainant's testimony that she was concerned about whether the respondent would believe her if she reported the incident. If it did not, her job could have been in jeopardy, and as an SBSO, she did not have a bargaining agent that she could turn to for assistance. If she had been found to have made a complaint that was frivolous or in bad faith, she could have opened herself up to discipline (see the CBSA's *Code of Conduct* at pages 23 and 24).

[259] On the whole, she had nothing to gain from making a false or an exaggerated claim against a much older and experienced BSO. In fact, she had everything to lose.

[260] Another witness corroborated several peripheral but highly relevant aspects of the complainant's evidence. Ms. Passmore's testimony did so with respect to the grievor's proximity to her during part of the interaction, as well as the complainant's body language during the interaction, specifically the fact that she leaned away from the grievor, glanced at Ms. Passmore, and angled her body toward her workstation.

[261] Most importantly, the complainant immediately described the incident to Ms. Passmore. At the hearing, Ms. Passmore described the complainant as visibly shaken and emotional after the interaction and in the days that followed. According to her, the complainant's emotional state after the incident was out of character.

[262] At first, the complainant was hesitant to report the incident. She testified that she wanted to speak with her parents before deciding whether to report it to the respondent. She did report it, on her next scheduled workday; that is, two days after

the incident. According to Ms. Passmore, the complainant was so emotional that she had difficulty speaking about the incident when she first began to describe it to the superintendents who met with her. The written statements that those superintendents prepared indicate that the complainant was visibly upset when she recounted her story. She readily accepted the superintendents' offer that she go to work at another CBSA facility until she felt safe coming back to Postal Operations. She was still visibly upset when Ms. Voss spoke with her several days later.

[263] In the absence of evidence about another intervening event, it is reasonable to assume that a young woman whom Ms. Passmore considered generally happy and positive would be visibly shaken and emotional for days after a conversation with a work colleague only if she had been subjected to some kind of significant incident (see *Gale*, at para. 154, where the Public Service Staff Relations Board drew a similar conclusion based on a significant and sudden change in a complainant's behaviour).

[264] It is also difficult for me to understand why the complainant would readily accept an offer to temporarily work at another, much smaller CBSA facility unless she had been involved in a significant event. Her reputation and making a name for herself at Postal Operations was important for her. She wanted and required a superintendent's recommendation to be considered for a BSO position. In such circumstances, one would expect an SBSO to hesitate to go to work — even temporarily — at a much smaller CBSA facility some distance from Postal Operations, with less visibility and exposure to those in a position to make such a recommendation. Yet, both the complainant and Ms. Passmore did not hesitate to accept the offer.

[265] The change in the complainant's behaviour in the workplace was not short-lived. It appears to continue to this day. Ms. Passmore testified that after the incident and for the rest of the time that she worked with the complainant, the complainant was constantly on edge and hypervigilant in the workplace. As of the hearing, the complainant indicated that she continued to have her "guard up" when she interacted with others in the workplace, particularly men. The grievor did not challenge that testimony. Such a long-standing behavioural change lends credence to her description of her interaction with him as having been significantly disturbing.

[266] The complainant also reported the incident to the police. In his closing submissions, the grievor implied that reporting an incident of this nature was

excessive. I need not pronounce on that. I will say that a young person whom both parties described as shy and sheltered reporting an incident to the police is not a small matter. She testified that she reported it to ensure that there would be a record of it so that the grievor could not treat someone else the same way in the future.

[267] Based on the evidence before me, I can detect no other advantage or motivation for her to report it. In the circumstances, I conclude that she would not have reported it had the interaction with the grievor been as friendly, reciprocal, and ordinary as he described it.

[268] I will now turn to my assessment of the grievor's credibility. Applying the test in *Faryna*, I find that his evidence is not credible. I considered the following factors in reaching that conclusion.

[269] The grievor is an interested party. His livelihood is on the line, and he has had years to think about these events in preparation for the hearing. Although he had an incentive to paint himself in a positive light, this alone is not a determining factor with respect to his credibility. The jurisprudence is clear that it does not always follow that self-interest means that a grievor is not credible. It is merely a factor to consider when determining witnesses' relative credibility (see *Alberta Health Services*, at para. 154). In this case, there is much more.

[270] The grievor's position with respect to the allegations against him changed substantially over time. He categorically denied all misconduct during the investigation and again during the disciplinary process. The first admission of misconduct was expressed during his representative's opening statements at the start of the hearing.

[271] As was the case with the complainant, the grievor's written statement generally reflects his description of the December 6 and 13 interactions provided at the hearing. There are some differences with respect to the approximate timing of events, the order of the comments or statements he made, and where he stood when he made them. In my opinion, those differences are not significant or surprising, given the time that elapsed between the incident and the hearing.

[272] However, his version of the December 13, 2020, events changed in one respect. At the hearing, he acknowledged that during the investigation and the disciplinary process, he always maintained that he respected social distancing on that day. He then

acknowledged that — for the first time — he was close to the complainant and did not wear a mask. He expressly indicated that he recanted his statements made in the context of the investigation and the disciplinary processes. Although the change to his story was on a peripheral issue, nonetheless, it was a significant inconsistency, and he provided no logical explanation for it.

[273] If I examine the grievor's version of events, several important aspects of his evidence leave me skeptical about his credibility and his version.

[274] Firstly, his description of both interactions depicted the complainant as someone who easily engages in conversations with people whom she does not know, readily shares personal information with them, and comments on their appearance in the context of a first interaction (i.e., unprompted, on December 6, 2020, when she told him that he looked like he stayed in shape). That description is at odds with his description of her as a shy young woman who had a sheltered upbringing and who — he thought at the time — lacked self-confidence.

[275] Based on his version of events, he knew that her parents did not allow her the same level of freedom as he gave his children and that she had not had much freedom before joining the CBSA some six months prior. He testified that because of that and their shared cultural heritage, he felt that speaking with her was like speaking with one of his children. He wanted to help her as an uncle would a niece.

[276] If the grievor had truly interacted with the complainant as would an uncle with a niece, or a father with his child, I cannot comprehend why he was so curious to see her without a mask. In his description of the December 13, 2020, interaction, his desire to see her face and his curiosity about what she looked like were recurring, and unsettling, themes.

[277] Based on his version of events, he took her ID card because he was curious to know what she looked like. Even after she took it back and told him not to look at the photo, he made a comment about the fact that he had no idea what she looked like. He made that comment after he detected a change in her body language. He then showed her a photo of himself. She did not reciprocate, so he asked to see a photo of her.

[278] That curiosity about her appearance was a strange and unsettling fixation for a person speaking with a colleague for the second time. It is no less unsettling for an uncle speaking with a niece or a father speaking with his child.

[279] If the grievor truly interacted with the complainant as he would with a niece or his child, it is illogical to me that he would have reacted the way he did if she made a comment that he found flirtatious (wanting or trying “to keep the mystery alive”). Based on his version of events, it was the moment he made a joke about his son’s lack of experience kissing, which suggested that his son needed to practise. He testified that in that moment, he was thinking of matchmaking, of setting his son up with the complainant.

[280] I will pause to add that the grievor argued that in his culture, matchmaking by parents is common. That may be so, but I was provided with no evidence that such a practice is common in the workplace.

[281] Even if such a practice existed in the workplace, it does not seem plausible to me that a flirtatious comment, in the mouth of a niece, would lead to thoughts of matchmaking or kissing, generally. If the grievor truly wanted to change the topic of conversation in response to a flirtatious comment, a joke about kissing — regardless of whom it pertained to — would not have had the desired effect. Rather, such a joke would potentially have added sexual undertones to the conversation.

[282] I also do not find credible the grievor’s explanation of why he took the complainant’s ID card. He wanted to see her photo, and he saw the card on her workstation. He testified that he took it out of muscle memory or based on some kind of reflex that he had developed when he worked in airport settings years before. No evidence was presented to me to support the notion that such a reflex exists; nor was I presented with evidence of even one other instance in which the so-called “reflex” kicked in and led to him take a coworker’s ID card.

[283] A final aspect that I have considered in my assessment of the grievor’s credibility is a discrepancy with respect to the amount of work that he did on December 13, 2020.

[284] In his written statement, the grievor indicated that he had worked off and on, including while he was watching his uncle’s memorial service and immediately before

and after his conversation with the complainant. At the hearing, he indicated that he maintained that statement. His testimony focused on the position that he took during the investigation and the disciplinary process that the parcel tracking system was archaic and unreliable.

[285] For a BSO working in the secondary inspection area, “working” means processing parcels. Had he processed parcels on and off that day, one would expect the tracking system data to indicate that he processed some. Yet, the evidence presented at the hearing indicated that he did not process a single one.

[286] Although he claimed that the parcel tracking system is unreliable, he did not provide evidence capable of supporting a conclusion that it could have been so inaccurate and unreliable as to show zero parcels that day while also capturing his parcel processing data on his previous shifts.

[287] A discrepancy with respect to the amount of work that the grievor did admittedly is not directly relevant to whether the alleged misconduct at issue actually occurred. However, his failure to provide a logical and convincing explanation for the inconsistency suggests that he intentionally misled the respondent during the investigation and the disciplinary process by providing false information that would present him in a better light.

[288] On the whole, I find the complainant’s version of events, not the grievor’s, in harmony with the preponderance of the probabilities in the circumstances of this case.

2. Findings of fact, and conclusions with respect to the allegations

[289] I accept the complainant’s version of events in its entirety. I prefer her evidence on every material point, specifically with respect to each of the four misconduct allegations on which the respondent relied to terminate the grievor’s employment.

[290] I find that the grievor inquired about her sexual history by asking her whether she had ever had a boyfriend and by commenting on the fact that her response suggested that she was a virgin. I accept that he shared details about his first sexual encounter and suggested that they practise kissing. As indicated, I do not accept as credible his testimony that he made a silly joke about his son’s inexperience with kissing to lighten the mood and to change their conversation topic. I conclude that the first misconduct allegation is founded.

[291] The grievor acknowledged that he took the complainant's ID card without her consent. He did so because he wanted to see what she looked like without a mask. I do not accept his testimony that the ID card was lying loosely on the surface of her workstation such that he could not see that it was on a lanyard around her neck. The lanyard was of standard length. An ID card attached to it would have hung at chest level. Given that her work surface was elevated at the time, it is implausible that the ID card would have laid loosely on the surface.

[292] The grievor's explanation was made even more implausible by the complainant's evidence — corroborated by Ms. Passmore — in which she stated that she leaned away from the grievor and toward the conveyor belt at the time. She leaned away from her workstation surface, making it even more likely that the ID card hung loosely from her neck when the grievor took it in his hands and pulled it toward him. By doing so, he invaded her personal space. I conclude that the second misconduct allegation is founded.

[293] I find that the third misconduct allegation is founded. I accept the complainant's evidence that the grievor asked her to remove her mask, so that he could see her face. She refused, after which he made pinching motions toward her mask, attempting to pull it from her face without her consent. On the whole of the evidence, and in light of his testimony about his curiosity as to what she looked like without a mask, I have no difficulty accepting that he attempted to remove her mask without her consent and that he did so more than once.

[294] The last allegation in the termination letter is that the grievor made a vague sexualized threat directed at the complainant after he attempted to remove her mask. It refers to her claim that he looked at her chest and made a comment suggesting that she was lucky that he had not "grabbed something else". In her testimony at the hearing, she indicated that he made that statement after he took her ID card.

[295] For the purposes of the adjudication of this grievance, it is largely irrelevant whether that last statement was made after the grievor attempted to remove her mask or after he took her ID card. The respondent's decision to terminate the grievor's employment did not hinge, in whole or in part, on the timing of the comment but on the fact that he made the comment at all. I am satisfied beyond the balance of probabilities that he made the comment and that in the circumstances, it was

reasonable for the complainant to interpret it as a threat that he could or would touch her in a sexualized manner if he wished.

[296] The misconduct at issue was a flagrant breach of the CBSA's *Code of Conduct* and the *Values and Ethics Code for the Public Sector*, both of which have entire sections dedicated to the values of respect, integrity, and professionalism and to the general prohibition of harassment. He knew the respondent's expectation that CBSA employees should never engage in harassing behaviour or take action that could harm the general workplace well-being of another employee. His conduct was contrary to the respondent's duty to provide a safe, healthy, and respectful workplace.

[297] The grievor's comments were inappropriate and objectionable. He engaged a much younger student in a lengthy conversation that he has since acknowledged was unwanted and unwelcome. He made the complainant feel uneasy and fearful. He is much older and taller than her, and he engaged her, a young, shy, and sheltered student whom he did not know, in a personal and invasive sexualized conversation.

[298] Over the course of that conversation, he moved closer and closer to her, until he was very close. She was seated at a workstation that had only one exit. When the grievor came to stand next to it and close to her, she felt trapped. He — perhaps unwittingly — blocked her only means of physically escaping the conversation.

[299] On the whole, his behaviour constituted very serious misconduct that warranted discipline.

3. The grievor's behaviour constituted sexual harassment

[300] The termination letter indicates that the grievor engaged in inappropriate, unwanted and harassing behaviours of a sexual nature with a vulnerable individual. Much of the parties' closing submissions focused on whether the grievor's misconduct constituted sexual harassment or harassment more generally. They relied on, among other cases, *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; *Bédirian*; and *Clarke v. Syncrude Canada Ltd.*, 2013 ABQB 252, affirmed in 2014 ABCA 362.

[301] Sexual harassment in the workplace has three elements: (a) conduct of a sexual nature that (b) is unwelcome and that (c) detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment (see *Janzen*, at page 1284; and *Canadian Pacific Railway Company*, at para. 27). To

constitute harassment of a sexual nature, the behaviour at issue must have an element of persistence or repetition or be a single incident sufficiently severe to detrimentally affect the workplace or adversely impact the victim (see *Canada (Human Rights Commission) v. Canada (Armed Forces)*, [1999] 3 F.C. 653, at paras. 43 and 44; that decision is commonly referred to as *Franke*).

[302] When drawing a conclusion as to whether impugned behaviour constituted sexual harassment, a decision maker must examine all the circumstances, to determine whether it was sexual in nature and harassing according to a reasonable-person standard (see *Bédirian*, at para. 359; and *Franke* at paras. 41 and 46).

[303] Sexual harassment can take many forms. It can manifest itself both physically and psychologically, and it can range from sexual innuendo to sexual touching to sexual violence (see *Franke*, at paras. 37 to 39). Occasionally, it has been described as a continuum of behaviour or a spectrum in which less-serious misconduct is met with less-serious disciplinary measures (see for example, *Clarke*, at paras. 31, 36, and 37; and *van Woerkens v. Marriott Hotels of Canada Ltd.*, 2009 BCSC 73 at para. 181).

[304] In other cases, it has been divided into two broad categories, sexual coercion and sexual annoyance (see *Ottawa City v. Ottawa-Carleton Public Employees' Union, Local 503*, 2016 CanLII 59377 (ON LA) at pages 13 and 14), with sexual coercion warranting in most cases termination for even a single offence, while sexual annoyance would not normally result in termination if the misconduct was not particularly persistent and offensive.

[305] Recent case law indicates a shift away from the categorization of sexual harassment for the purposes of determining the seriousness of the misconduct (see *Calgary (City) v. Canadian Union of Public Employees, Local 37*, 2019 ABCA 388; see also *Corporation of the City of Calgary v Local 583 of the Amalgamated Transit Union*, 2019 CanLII 120130 (AB GAA) at para. 99).

[306] In *Calgary (City)*, the Court of Appeal of Alberta held that categories such as those previously described were proposed to simplify definitions of sexual harassment in the human rights context, not to reflect a hierarchy of sexual harassment (see para. 38). The Court warned that categorization can lead the assessment of the seriousness of the misconduct astray by causing the decision-maker to focus on factors that are not current with present-day analysis of misconduct of a sexual nature and are

inconsistent with the evolving attitudes of what is acceptable in the workplace (see para. 49).

[307] The grievor argued that if I conclude that all the allegations against him are founded and that his behaviour constituted sexual harassment, his misconduct was on the low end of the spectrum and should have resulted in a remedial corrective action, such as a short suspension. He argued that, at worst, his behaviour would amount to sexual annoyance.

[308] I do not find it necessary or helpful to categorize the grievor's misconduct as, for example, as "sexual annoyance" as opposed to "sexual coercion". As the Supreme Court of Canada indicated more than 30 years ago, categorizing behaviour that constitutes harassment may have been needed at a time before sexual harassment was widely viewed as unacceptable, but things have changed and there is no longer a need for that categorization (see *Janzen*, at page 1283). I agree with the Court of Appeal of Alberta in *Calgary (City)* that it is most helpful to focus on the factual findings and assess the seriousness of the misconduct in light of those findings.

[309] Since I have accepted the complainant's version of events in its entirety, I have no hesitation concluding that the grievor's behaviour was conduct of a sexual nature and that it was unwelcome. Her testimony with respect to the unwelcome nature of the entire December 13 interaction was clear, and although he disputes that his conduct was sexual in nature, the grievor has acknowledged that he now knows that the conversation that he engaged her in was unwelcome.

[310] The grievor's behaviour also detrimentally affected the work environment and led to adverse consequences for the complainant. She was fearful of returning to work on her next scheduled workday. She opted to work at another CBSA facility until she felt safe again. She was anxious and emotional for some time.

[311] And the evidence presented at the hearing demonstrated that the grievor's behaviour had a lasting impact on the complainant, specifically on her trust and confidence in her male colleagues. Although the behaviour at issue occurred on a single day and during the span of roughly 40 minutes, he was persistent in his questions, comments, and actions.

[312] His behaviour escalated over the course of the brief interaction. It moved from verbal exchanges (questions and comments about the complainant's sexual history, to comments about his sexual history, to a suggestion that they kiss) to physical actions. Although he did not lay his hands on her body, he moved progressively closer to her, attempted to remove her mask, and grabbed the ID card hanging on a lanyard around her neck, roughly at the height of her chest. The incident culminated with a veiled threat that he would or could grab her chest, if he were so inclined. His behaviour had clear and persistent sexual undertones. He knew that there is a decreasing tolerance for sexual harassment. He referenced the Me Too movement during the incident.

[313] I find that a reasonable person with knowledge of the circumstances of this case would conclude that the grievor's behaviour was sexual in nature and unwanted. A reasonable person with knowledge of his actions and comments would know that they were of a nature that was both inappropriate and offensive and that they constituted sexual harassment.

[314] I will pause here to add that the respondent invited the Board to modify the reasonable person standard — an objective standard — to one tailored to the complainant. It invited the Board to assess the grievor's behaviour using a standard of a reasonable young, shy, and sheltered student. However, it was unable to point to evidence or jurisprudence indicative of a need to revisit a standard that has been in place and consistently applied for years. I have declined to modify it.

[315] The grievor submits that the complainant did not tell him that his behaviour was unwelcome.

[316] There are many reasons why the victim of sexual harassment may not deliver a clear and consistent message that sexually charged conduct is not welcome, particularly where she is in a vulnerable position (see, for example, *Foerderer v. Nova Chemicals Corp.*, 2007 ABQB 349, at para. 99).

[317] In the circumstances of this case, it is not unreasonable to believe that a young woman, particularly a shy and sheltered student with little job security, would hesitate to speak up when confronted by a much older and bolder man making inappropriate comments in the workplace. I accept that in such circumstances, some women may not know how to address the situation or may not want to draw attention to themselves, to avoid unintended consequences for themselves or their job security. In a context such

as this, I accept that a woman may opt to telegraph their unease with cues and body language, which the complainant did.

[318] In this case, the complainant did not expressly tell the grievor to stop. In today's society, she should not have had to expressly tell him that his behaviour and comments were unwanted and inappropriate. No employee should have to be subjected to an invasive sexualized conversation of that nature or be made to fear for their personal security.

[319] However, she did signal her discomfort, through her body language, by asking him if he was married, by refusing to show him a photo of her and by refusing to remove her mask, and by responding to his questions with the bare minimum in terms of answers. By his admission, he twice detected a change in her demeanour and missed or misinterpreted her signals as signs of insecurity or a lack of confidence in her appearance.

[320] In short, the grievor gave no consideration to the complainant, who was a reluctant participant in the interaction (as was the case in *Woodstock (City)* at page 11). He failed to appreciate that she might have lacked the maturity or confidence to take appropriate action to put an end to his inappropriate comments. Even after twice detecting a change in her demeanour, he did not consider whether those changes in demeanour could be indicative of unease with respect to his behaviour.

[321] Lastly, I will address the respondent's argument that the Board should treat the grievor's statements and actions on that December day not as a single incident of sexual harassment but as a series of incidents that happened to occur on the same day. It was unable to point to jurisprudence to support its argument, and the cases that both parties provided support a conclusion that statements and actions made on a single day, during a single interaction between the same people, are normally treated as a single incident (see, for example, *Brampton (City)*). I see no reason to depart from the jurisprudence in the circumstances of this case. The evidence presented to me supports a conclusion according to which the December 13 interaction was a single incident during which the grievor's behaviour escalated over time.

B. Termination was not excessive in the circumstances

[322] Discipline is generally meant to be progressive and rehabilitative. For that reason, the second step of the *Wm. Scott* test requires me to assess whether the respondent's imposed disciplinary measure was excessive, in light of all the circumstances.

[323] Although employers have increasingly adopted a zero-tolerance approach to sexual harassment and to sexually inappropriate behaviour in the workplace generally, labour law jurisprudence does not support a conclusion that any sexual harassment allegation warrants termination. The same can be said of allegations of very serious misconduct. The determination of the discipline warranted depends on the facts of each case (see *Brampton (City)*, at paras. 170 to 174).

[324] The grievor has argued that he was the victim of the respondent's zero-tolerance policy. He characterizes the respondent's zero-tolerance policy as a policy according to which termination is the automatic result of behaviour found to constitute sexual harassment. I disagree. The evidence presented at the hearing demonstrates that the respondent's policy is one according to which sexual harassment allegations are taken seriously to ensure a safe working environment for all employees, and are investigated thoroughly.

[325] Ms. Voss and Ms. Janes' testimonies support that conclusion. They described the CBSA policy with respect to allegations of sexual harassment as being the result of an employer's duty to ensure a safe and respectful work environment, and to act on allegations according to which one or more of its employees are unsafe at work.

[326] I find that the respondent did not rush to termination. It followed the process described in its Disciplinary Policy and its Disciplinary Guidelines. It investigated, considered the grievor's position and arguments, and weighed the nature of his misconduct and the aggravating and mitigating factors. Although its zero-tolerance policy led it to take immediate action in light of the complainant's allegations, I disagree with the grievor's argument that his termination flowed automatically from the mere allegation that he engaged in sexual harassment.

[327] The grievor argues that termination was excessive, and that a 5-day suspension would have constituted an appropriate disciplinary measure.

[328] According to him, *Brampton (City)* is most analogous to this case. In it, a firefighting captain was terminated after he was found to have sexually harassed a female firefighter, who was his subordinate. Specifically, he was found to have made several inappropriate comments of a sexual nature at a holiday party while he was clearly intoxicated. The arbitrator described his misconduct as constituting a single “extremely offensive event of sexual annoyance”. His termination was found excessive. A three-month unpaid suspension and a demotion were substituted for it.

[329] *Brampton (City)* is informative in that it provides a useful review of the case-by-case analysis of disciplinary measures imposed in sexual harassment cases.

[330] As indicated, sexual harassment can take many forms, and the appropriate penalty can vary depending on the circumstances. While its most serious forms (for example, involving sexual touching and sexual violence) have often been found to justify termination, offensive or sexist comments have generally been found to attract a remedial corrective response, such as a suspension.

[331] However, as *Brampton (City)* reminds, the discipline must address both specific and general deterrence. It must send a message that such misconduct is completely unacceptable in the workplace while also allowing for progressive discipline to be applied when warranted. For that reason, remedial responses normally require the prospect of rehabilitative potential (see *Brampton (City)*, at paras. 173 and 174).

[332] Although the general principles outlined in *Brampton (City)* are informative, I disagree that it is a useful comparator to this case.

[333] The work environment described in *Brampton (City)* is unlike the grievor's. In *Brampton (City)*, there was a culture that included juvenile and sexist behaviour. Although the grievor in this case testified that BSOs used inappropriate language in the workplace, there is nothing to indicate that juvenile and sexist behaviour was common at Postal Operations. There is also nothing to indicate that sexualized conversations were commonplace.

[334] Unlike the present case, in *Brampton (City)*, the misconduct at issue was off-duty conduct and the grievor admitted to much of the misconduct allegations. He showed genuine remorse and apologized for his comments once it became apparent to him that his conduct had been unwelcome. Most importantly, the arbitrator found that

the grievor had learned from his one-time lack of judgment and that he could learn from his mistake.

[335] I will return to the grievor's honesty, remorse and rehabilitative potential in the portion of these reasons that deal with the mitigating and aggravating factors. For now, I will only add that those factors are not present here, and the grievor's misconduct arose while he was on duty and in the workplace.

[336] To the extent that the grievor's misconduct did not involve sexual violence or touching of a sexual nature and that his statements were not extremely vulgar or threatening, I agree that his misconduct can be characterized on the lower end of the spectrum of severity. However, I disagree that it can be characterized as merely verbal innuendo and that it should be considered of the least severe effect and the least egregious possible. There was a physical component to his misconduct as well as a vague threat that sexual touching could follow.

[337] Although I treated the grievor's conduct as constituting a single incident, his comments and actions had a cumulative impact on the complainant. That also pushes the misconduct somewhat higher on the spectrum while remaining at the lower end.

[338] Even when sexual harassment can be characterized as being on the lower end of the spectrum, a lower disciplinary penalty can seriously be contemplated only if the grievor demonstrates an understanding that what they did was wrong and expresses genuine regret. For a penalty short of termination to be considered in circumstances such as these, there must be strong assurance that there is a potential for rehabilitation and that the likelihood that the behaviour will be repeated is extremely low (see *Grand & Toy v. United Steelworkers of America - Local 9197*, 2002 CarswellOnt 9326 at para. 12).

[339] I will address his understanding of his wrongdoing, his remorse and his rehabilitative potential more generally in the following assessment of the mitigating and aggravating factors. I will start with the mitigating factors.

[340] The grievor had roughly 18 years of service with the CBSA. That is a significant amount and is an important mitigating factor.

[341] The respondent considered the overall duration of the disciplinary process as an additional mitigating factor. At the hearing, I was not presented much in the way of Federal Public Sector Labour Relations and Employment Board Act and Federal Public Sector Labour Relations Act

evidence or argument that could allow me to agree or disagree with the respondent on that point. In the circumstances, I will accept that the overall duration of the process should be considered a mitigating factor.

[342] The grievor argued that his candour and remorse and the hardship that the respondent's disciplinary measure caused him constitute important mitigating factors. I do not agree that they all constitute mitigating factors.

[343] For the reasons outlined in my assessment of the grievor's credibility, I disagree that he was honest and forthright. I also disagree that he demonstrated remorse. I will address both of those factors in my analysis of the mitigating and aggravating factors.

[344] The grievor testified that he had difficulty finding new employment, in part because of the disability for which the CBSA had accommodated him and because he disclosed the reasons for his termination to prospective employers. He relied on cases such as *Besirovic*, at para. 137, and *Albert*, at para. 14, to support his argument that the Board should consider as a mitigating factor the economic hardship that he has endured because of the termination.

[345] Although the evidence presented to me on this topic was cursory at best, the respondent did not challenge it. I accept that it took the grievor some time to find new employment after his termination, that his disability was a contributing factor to that delay and that the delay in finding new employment had a financial impact on him and his family. I also accept that special economic hardship in light of the grievor's particular circumstances can constitute a relevant mitigating factor (see *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, at para. 179; see also Brown and Beatty, *Canadian Labour Arbitration*, 5th Edition, at paragraph 7:74).

[346] However, the nature and the scope of the evidence presented to me at the hearing does not allow me to conclude that the difficulty in securing new employment created special economic hardship for the grievor. While a disciplinary penalty that results in the loss of employment would create some economic hardship, more is required to demonstrate that, in light of the grievor's particular circumstances, the termination of his employment created special economic hardship. For economic hardship to be qualified as "special", there must be evidence of a hardship beyond what would normally result from the loss of employment. The evidence presented to

me does not allow me to reach a conclusion according to which the economic hardship suffered by the grievor was such that it must constitute a mitigating factor.

[347] Even if special economic hardship had been made out, that mitigating factor – taken alone or in conjunction with the grievor’s years of service and the overall duration of the disciplinary process – would be insufficient to outweigh the following aggravating factors.

[348] I will now turn to the applicable aggravating factors.

[349] The grievor occupied a position for which incumbents are expected to demonstrate and maintain a higher standard of behaviour. He occupied a position of trust and was expected to always act with integrity and honesty (see, among others, *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88, at para. 842, and *Stewart v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 106 at para. 62). The behaviour described in this decision falls well short of that expected standard.

[350] It is also relevant to note that the grievor’s misconduct occurred in the workplace and in the context of a relative power imbalance. Although he was not the complainant’s supervisor, he was a senior BSO. SBSOs would turn to him for work-related guidance and advice when and as needed. As a senior BSO, he was also expected to consistently model expected standards of behaviour for new employees and recruits, including SBSOs, and to maintain positive working relationships that would allow him to provide those new employees with work-related guidance and advice (see the CBSA’s *Code of Conduct* in effect at the time, at pages 12 and 13).

[351] It is generally thought that employees who acknowledge their misconduct and recognize the impropriety of their behaviour are more likely to meet their employer’s legitimate expectations in the future (see *Viner v. Deputy Head (Department of Health)*, 2022 FPSLRB 74, at para. 372).

[352] As I indicated in my assessment of the grievor’s credibility, I have concluded that the grievor was not honest and forthright. I will not repeat my findings. They apply here as well. Although the grievor acknowledged some misconduct at the hearing, his failure to do so during the investigation and the disciplinary process constitutes dishonesty, an important aggravating factor.

[353] At the hearing, the grievor apologized for the limited misconduct that he had only recently acknowledged for the first time. An apology provided, for the first time, at the last possible opportunity appears self-serving at best and disingenuous at worst.

[354] For remorse to be genuine and convincing, it must be accompanied by some indicators of concern for those affected by the misconduct and some understanding of its impact on others. Although I am confident that the grievor regrets his actions because of the consequences that he has suffered, it is not the same as regretting acting in a way that had a significant and lasting impact on a young woman.

[355] The grievor indicated that he gained insight into his behaviour after having participated in therapy. At the hearing, he made general statements indicating that he now knows that the complainant must have been upset and uncomfortable at the time if she later reported the incident to management. That falls well short of a concern for her well-being and does not reflect an understanding of the depth and breadth of the immediate and long-term impact that his misconduct has had on her. He also did not demonstrate an understanding of his behaviour's impact on Ms. Passmore and on the respondent's efforts to recruit and retain female BSOs and to maintain a safe and healthy work environment for all CBSA employees.

[356] Although I accept that he has come to understand that at least some of his conduct was wrong, I am unable to say with any degree of confidence that the grievor demonstrated true concern for the complainant's well-being or true understanding of the impact of his comments and actions on her, the respondent, and Ms. Passmore. His lack of genuine remorse and true concern for the impact of his actions on all of those involved are important aggravating factors.

[357] The grievor had two prior instances of discipline. They did not involve allegations like those in this case. Rather, they pertained to three incidents of inattention or sleeping on the job that constituted a neglect of his BSO duties and jeopardized the health and safety of CBSA employees and third parties. Both instances of discipline pertained to a failure to respect the CBSA's *Code of Conduct*. In that respect, his prior discipline is a relevant aggravating factor, as it is indicative of a sustained lack of judgment.

[358] Another important aggravating factor is the immediate and lasting impact that the grievor's behaviour had on the complainant (see, for example, *Calgary (City)*, at

para. 43). As previously indicated, the grievor's misconduct left her feeling unsafe and fearful of returning to work. She was anxious and emotional for some time. She continues to have difficulty trusting her male colleagues.

[359] An additional aggravating factor of relevance is the dissuasive effect that sexual harassment in the workplace can have on the CBSA's efforts to recruit and retain female BSOs and SBSOs and to maintain a harassment-free workplace. Ms. Janes described the respondent's ongoing efforts to improve its retention rate of female SBOs and BSOs by ensuring that the workplace is safe and welcoming for them, notably by addressing allegations of sexual harassment promptly. The evidence presented at the hearing demonstrates that the grievor's misconduct indirectly led Ms. Passmore to leave the CBSA. She testified that following the December 13th incident, she no longer felt that working for the CBSA was an honourable thing.

[360] In addition to the aggravating factors already described, two additional aggravating factors stand out to me as highly significant and highly relevant to the grievor's overall rehabilitative potential; they are his lack of judgment and his lack of awareness of and consideration of others. The two factors are interrelated, and both leave me with serious doubts about his rehabilitative potential.

[361] Generally speaking, the grievor's testimony demonstrated a lack of awareness of, and consideration for, others. On December 13, 2020, he imposed his interpretation on the complainant's answers, body language, and overall demeanour. I can best describe my interpretation of his behaviour that day as going into a conversation with blinders on, oblivious to the impact of his words and actions on the complainant and uninterested in her feelings and perceptions. I was presented with no evidence that enables me to have any confidence that he has since developed an awareness of, and consideration for, others.

[362] My overall assessment of the grievor is that he lacks judgment in social situations, either misses or misinterprets social cues despite having been trained to pick up on them, and views his social interactions through his own lens; that is, the lens of a very social and seemingly confident man who appears to have little hesitation sharing personal information with those he has just met.

[363] The respondent's description of the grievor as an individual who likes to talk and ask questions but who lacks the ability to have consideration for those that he is

speaking with, and the judgment to know what is appropriate and what is not, is made more plausible by the evidence of the complainant and Ms. Passmore. According to that evidence, the grievor used inappropriate language to refer to erectile dysfunction pills within seconds of his first meeting with Ms. Passmore. Addressing such a topic and using inappropriate language within seconds of starting a first conversation with a young female SBSO demonstrates a lack of judgment and a failure to understand what constitutes an appropriate topic of workplace conversation.

[364] The grievor likes to talk. It is normal for him to ask questions when he first meets a person, including about the person's appearance, age, and family. In the workplace, he uses social interactions to distract himself from the repetitive nature of his work. When he was asked what he would do to avoid a similar situation in the future were he reinstated, his proposed solution was to avoid engaging in workplace conversations. Not only is that proposed solution unrealistic for someone who described his "gift of the gab" with something that came across to me at the hearing as pride, but also, it is improbable that a person who uses social interactions to cope with the repetitive nature of their work could avoid them altogether.

[365] His proposed solution also leaves me doubtful as to whether he truly understands how and why various facets of his conduct that day were highly inappropriate and reprehensible. If he had a true understanding of his misconduct and its impact, one would have expected him to answer that he would refrain from asking personal or invasive questions when interacting with new colleagues, that he would avoid all discussions of a sexual nature, that he would avoid using sexual innuendos and jokes, and more importantly that he would make a concerted effort to look for — and respect — any cues or signals of unease and discomfort that the person with whom he is speaking is giving.

[366] During his testimony, the grievor indicated that when he received his suspension letter referencing interactions with SBSOs, he had no idea what interaction was being referred to or which SBSOs were involved. December 13 was his last shift before he was informed of his suspension. Either he had invasive and personal conversations like the one described in these reasons with SBSOs on his previous shift schedule and could not distinguish between them, or his judgment was so lacking as to believe that having so lengthy a conversation with a student half his age, taking her

ID pass, asking about her relationship status, and repeatedly asking to see her face was uneventful. Both scenarios leave me with serious doubts as to his judgment.

[367] The critical question that I must answer is whether the grievor has the capacity to conform to acceptable standards of behaviour in the future.

[368] On the whole of the evidence, I conclude that the aggravating factors outweigh the mitigating factors. Because of his lack of awareness of, and consideration for, others, his apparent failure to understand the magnitude of the impact of his actions, and his demonstrated lack of judgment, I have little confidence that the grievor is unlikely to reoffend if he is returned to the workplace. Although his misconduct can be characterized as being on the lower half of the spectrum, in light of everything discussed in this decision, I cannot conclude that termination was excessive in the circumstances.

[369] The grievance is denied.

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

(The Order appears on the next page)

VI. Order

[371] The grievance is denied.

July 18, 2025.

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