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Citation: 2005 PSLRB 172

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

BASIL MOHAN

Grievor

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Indexed as
Mohan v. Canada Customs and Revenue Agency

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Ian R. Mackenzie, adjudicator

For the Grievor: Sonia Pylyshyn, Professional Institute of the Public Service of Canada

For the Employer: Caroline Engmann, counsel, and Victoria Yankou, co-counsel

Heard at Toronto, Ontario,
April 5 and 6 and May 31, 2005.

Grievances referred to adjudication

[1] Basil Mohan is an auditor with the Canada Revenue Agency (CRA) (formerly known as the Canada Customs and Revenue Agency (CCRA)). He is represented by the Professional Institute of the Public Service of Canada (PIPSC) and is subject to the collective agreement between the CCRA and the PIPSC (Exhibit G-1). He is grieving two one-day suspensions administered in 2002, both for alleged insubordination. The first grievance relates to the grievor's alleged insubordination in, among other things, sending out a letter to a taxpayer against the express instructions of his supervisor, Peter Iannuzzi. The grievor's position was that the letter had been approved. In the first level grievance hearing before Ann Mayo, Section Head (and Mr. Iannuzzi's supervisor), the grievor produced a copy of the letter at issue with a post-it note that he alleged proved that the letter had been approved by his supervisor. The employer alleges that, although it was in the supervisor's handwriting, this post-it note belonged with another document. The employer subsequently disciplined the grievor for his alleged insubordination on the basis of the representation made by the grievor during the grievance hearing. The grievances were referred to adjudication on February 10, 2004. The initially scheduled hearing of these grievances in December 2004 became a mediation session, which was ultimately unsuccessful.

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

[3] An order excluding witnesses was requested by the employer, without objection from the grievor's representative. Accordingly, an order excluding witnesses was granted. Caroline Engmann, counsel for the employer, requested an order protecting taxpayer information contained on all exhibits filed at the hearing. The grievor's representative, Sonia Pylyshyn, did not object. Accordingly, the exhibits that contain taxpayer names or identifiers have been sealed.

[4] Ms. Pylyshyn submitted at the commencement of the hearing that the bargaining agent would be alleging a breach of the collective agreement by the employer in that it had failed to utilize the interest-based dispute resolution process provided for in clause 34.02 of the collective agreement.

[5] During the hearing, Mr. Iannuzzi referred to notes he had made at the time of the incidents. Ms. Pylyshyn asked for an order disclosing these notes. I granted the order and the notes were produced.

[6] The employer called two witnesses in direct examination and one witness in reply evidence. The grievor's representative objected to the reply evidence on the basis that the employer was splitting its case. I have addressed this objection in my reasons below. The grievor testified, and one witness testified on his behalf.

Preliminary ruling on admissibility of evidence

[7] During the testimony of Mr. Iannuzzi, Ms. Pylyshyn objected to evidence relating to the second grievance on the basis that representations made in a grievance hearing were privileged. I heard argument from both parties on this issue and issued an oral ruling, with brief reasons. I have expanded on those reasons below.

Submissions of the grievor

[8] Ms. Pylyshyn submitted that the evidence concerning representations made during the grievance hearing was privileged. She submitted that the grievance hearing is supposed to be a forum for the open discussion of possible settlement. If the employer could rely on statements made in the grievance process by a grievor in defence of his or her actions, the grievance process would become useless. It would lead to the absurdity of an employer disciplining an employee and then disciplining the employee again for denying that he/she had committed the alleged action.

[9] Ms. Pylyshyn submitted that the grievance procedure should not become the source or springboard for further disciplinary measures or else it would no longer be used by the parties: *Re International Association of Fire Fighters, Local 626, v. Borough of Scarborough* (1972), 24 L.A.C. 78. The overriding purpose of the grievance procedure is to reach a settlement and free discussion and an adjudicator should not breach the confidence of any of the discussions or communications between the parties: *Re Regional Municipality of Ottawa-Carleton v. Canadian Union of Public*

Employees, Local 503 (1984), 14 L.A.C. (3d) 445. This principle applies to written communications as well as oral communications: *Re City of Calgary v. Canadian Union of Public Employees* (1979), 22 L.A.C. (2d) 434 and *Re Canadian Pacific Forest Products Ltd. v. International Woodworkers, Local 2693* (1993), 31 L.A.C. (4th) 173. Ms. Pylyshyn also referred me to *Slavutych v. Baker*, [1976] 1 S.C.R. 254.

Submissions of the employer

[10] Ms. Engmann submitted that the objection lost sight of an important distinction. The document brought forward at the first level grievance hearing was actually written by Mr. Iannuzzi and not the grievor. She also submitted that the privilege for grievance communications was not absolute. The statement made by the grievor in the grievance hearing was made in bad faith and therefore it should be admissible.

[11] Ms. Engmann submitted that I had the statutory discretion to receive the evidence. She submitted that in exercising that discretion I should take a purposive approach. If I failed to admit the evidence, I would be in breach of my statutory mandate to examine the matters in dispute. Also, if I upheld the objection I would, in effect, be denying the grievances, as I would have no information on which to base a decision.

[12] Ms. Engmann referred me to *Canadian Labour Arbitration*, Third Edition, by Messrs. Brown and Beatty, at paragraph 3:4340. She also distinguished *Slavutych* (*supra*) on the basis that the representations at issue in this case were not made in good faith. Furthermore, the post-it note itself was not written with the expectation that it would be held in confidence. In *Re Regional Municipality of Ottawa-Carleton* (*supra*), the board referred to the assumption of privilege "except in unusual circumstances". This was one of those "unusual circumstances". In *Godfrey v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-18382 (1989) (QL), the adjudicator stated: "…it is obvious…that an employee who knowingly and maliciously makes false accusations against some person through the grievance process cannot escape the consequences of his action by claiming privilege." Ms. Engmann submitted that this was the situation here. To hold otherwise would allow management to be attacked with impunity. This does not make for good labour relations. Ms. Engmann also referred me to *Noël v. Treasury Board (Transport Canada)*, PSSRB File No.

166-2-18733 (1989) (QL), and *Re Calgary Board of Education (School District No. 19) v. Canadian Union of Public Employees, Local 40* (1999), 84 L.A.C. (4th) 410.

[13] Ms. Engmann also submitted that to the extent that there was any privilege that privilege has been waived by the grievor. First, the matter was never raised during the grievance process. Second, it was waived at this hearing by the attempt of the bargaining agent to raise a separate breach of the collective agreement at the commencement of the hearing.

Reply submissions of the grievor

[14] Ms. Pylyshyn stated that this was not an issue involving a technicality, but was rather a matter of natural justice and procedural fairness. What would be an absurdity would be to allow the employer to discipline the grievor for his attempt to defend himself against the allegations. She submitted that the facts in *Godfrey* (*supra*) showed a campaign of harassment against the employer, which was not the case here. In *Noël* (*supra*), the employee had forged letters supporting his sick leave. In this case, there is no such allegation.

[15] She also submitted that the privilege should be interpreted broadly, as was stated in *Re International Association of Fire Fighters, Local 626* (*supra*) and in *Godfrey* (*supra*).

[16] With regard to the employer's argument on waiver, the position of the bargaining agent on the breach of the collective agreement related to evidence about the request for alternative dispute resolution, which was made on March 7, 2002 (prior to the grievance) and was outside the grievance process.

Reasons for decision on admissibility

[17] At the hearing, I ruled that I would hear the evidence but that I would reserve my decision on its overall admissibility, as well as on its weight and relevance. I noted that the privilege attached to grievance hearings was not absolute and that bad faith in representations at a grievance hearing would, in my view, remove the privilege attached to the communications. The purpose of the privilege for grievance hearings is to foster good labour relations. Good labour relations are based on good faith and, therefore, evidence of bad faith would remove the foundation for the privilege. Allegations of bad faith in the grievance process are serious allegations and I stated

that I needed to hear the evidence before I could come to a conclusion on such a serious allegation.

[18] I have now heard the evidence and have concluded that no privilege attaches to the grievor's communications, since those communications were misleading.

[19] I have also concluded that, in any event, the grievor has waived any privilege by his subsequent reliance on the document and his representations at this hearing that the letter at issue had been approved by his supervisor. It is not open to the grievor to claim that his representation in the grievance hearing was privileged for the purposes of avoiding discipline and yet use that same representation at this hearing as a defence to his first disciplinary action.

Summary of the evidence

[20] The grievor has been an auditor with the CCRA for approximately 15 years. He is also a teleworker and comes into the office once or twice a week for meetings and to obtain new work assignments. Mr. Iannuzzi, a Team Leader, is the grievor's supervisor. Mr. Iannuzzi is an AU-5 and is a member of the same bargaining unit as the grievor.

[21] The grievor was on Mr. Iannuzzi's work team from the end of 2000; he left Mr. Iannuzzi's team in June 2003. Mr. Iannuzzi testified that, at first, the relationship went well. However, within five or six months the grievor became uncooperative. He would not reply to e-mails for three or four days and Mr. Iannuzzi would have to telephone him three or four times before he got a response. His time sheets and his travel claims were late. He also stopped attending team meetings. With regard to e-mail and voice-mail messages, the grievor testified that there had been problems with his laptop. Also, he only has one phone line in his home; therefore, when he was online, the telephone was busy.

[22] Mr. Iannuzzi testified that there was one incident that caused some difficulties with the relationship. The grievor was allocated an audit that Mr. Iannuzzi felt was quite simple and that should not have taken more than 25 to 30 hours to complete. At the end of the audit, when Mr. Iannuzzi reviewed the file, he discovered that the grievor had spent 90 hours on the file, which Mr. Iannuzzi found to be excessive. Mr. Iannuzzi prepared an evaluation report on the audit but the grievor did not sign it, as he did not agree with it.

[23] The grievor testified about the same audit. He stated that in August or September 2001, Mr. Iannuzzi called him into his office to discuss a taxpayer audit. On this file, the taxpayer had written to the Director complaining that the grievor had not responded to him. The grievor testified that he had never been given the letter from the taxpayer. He also testified that his former team leader had kept the letter from him. The grievor told Mr. Iannuzzi that he was going to speak to the Director about this. He met with the Director and told him that he had not received the letter. The Director advised him that he would look into it. He passed it down to Ms. Mayo, who called the grievor to advise him that she wanted to see him and that he could bring someone with him. He came with his union representative, Al McKie. Ms. Mayo asked him why he had also gone to the Director. He explained that he had advised Mr. Iannuzzi that he was going to speak to the Director, that the Director already knew about the file and he did not want to be blamed for the failure of his previous team leader to give him the correspondence from the taxpayer.

[24] The grievor prepared an Auditor's Report (Exhibit E-3) that contained comments about the taxpayer's representations, including references to the grievor's consulting with his union representative. Mr. Iannuzzi requested changes to the report, including the removal of several sections.

[25] The grievor sent an e-mail to Mr. Iannuzzi after meeting with him to discuss the Auditor's Report, which reads as follows (Exhibit G-6):

> *Confirming our discussion on this matter you are advised of the following:*
>
> > *I am rejecting this report for the causes I discussed with you regarding the three items.*
> >
> > *I suggested that you either change your report to include the "truth" or remove the comments.*
> >
> > *I suggest you take until the end of the second week of 2002 to rectify the report.*
> >
> > *As you flatly responded you were not going to change this report, the matter could be taken up to the highest office.*
>
> *If you are planning on an old years party tonight you may dance until you break both legs – happy new year.*

[26] Mr. Iannuzzi replied: "I wish you the same happiness."

[27] The grievor testified that he was asking Mr. Iannuzzi to reconsider and that he wanted to have the matter closed. He stated that the comment about breaking both legs was not meant in a literal way; he compared it to the expression "Shop till you drop."

[28] Mr. Iannuzzi testified in cross-examination that he did not tell the grievor that his comments were inappropriate. Ms. Mayo did discuss the comments with the grievor after Mr. Iannuzzi brought them to her attention. She testified that the grievor had told her that he did not wish Mr. Iannuzzi any physical harm. She also testified that Mr. Iannuzzi appeared to accept this and that she considered the matter closed.

[29] The grievor put a draft of a proposal letter to a taxpayer in Mr. Iannuzzi's in-basket on February 22, 2002. This was the normal procedure for correspondence from all auditors. The Team Leader work description (Exhibit E-1, tab 9) sets out the role of the Team Leader in approving correspondence by auditors. Mr. Iannuzzi reviewed the letter and made comments on the draft, including editorial changes (Exhibit E-1, tab 1). He testified that he put it on the grievor's desk that same day. One paragraph in the letter stated that the CCRA noted that a copy of the accountant's closing journal entries and documentation for consulting fees had been requested. Mr. Iannuzzi circled this paragraph and wrote "talk to me about this" in the margin. Mr. Iannuzzi testified that a proposal letter is prepared once the audit is complete; therefore, it made no sense to have a paragraph that stated that the CCRA was still waiting for further information.

[30] The grievor came into Mr. Iannuzzi's office on February 26, 2002, to discuss the proposal letter. Mr. Iannuzzi asked him why the paragraph was in the letter, and the grievor replied that he wanted the taxpayer to be aware that the information had been requested and the taxpayer had not complied. Mr. Iannuzzi told him that, if this information was still important for the audit, he should not be sending a proposal letter at this time but should be sending a "requirement" letter. If, however, he did not need the information for the audit, he should drop the paragraph. Mr. Iannuzzi testified that the grievor just walked out of his office and went back to his desk. Mr. Iannuzzi testified that he did not know what to expect from the grievor, but he did not expect that the letter would be sent out as it was. The grievor then came back to his office and advised Mr. Iannuzzi that the letter was going out the way it was

"whether you like it or not". Mr. Iannuzzi testified that he then told the grievor not to send the letter. The grievor walked out of his office.

[31] The grievor testified that the paragraph that Mr. Iannuzzi wanted to discuss was included because he had spoken to the taxpayer several times requesting the chartered accountant's closing entries. The taxpayer wanted this paragraph in the letter so it could be shown to the chartered accountant to enable the taxpayer to get the information. The taxpayer was having difficulties in getting the requested information from the chartered accountant.

[32] The grievor stated that he discussed the letter with Mr. Iannuzzi on February 26, 2002. Mr. Iannuzzi asked him to change the wording but did not indicate the specific wording he wanted; he left it up to the grievor. The grievor testified that Mr. Iannuzzi did not tell him what he did not like about the paragraph. He testified as well that the meeting lasted about half an hour. He denied that he said that the letter would go out "whether you like it or not". He also denied that Mr. Iannuzzi told him that a requirement letter should be issued instead if he still required the information.

[33] The grievor testified that he made changes to the letter and placed the letter in Mr. Iannuzzi's in-box late in the afternoon of February 26, 2002 (Exhibit E-1, tab 3). He testified that he reviewed the letter and the first paragraph had not been changed, as requested by Mr. Iannuzzi, due to an oversight. He stated that he inserted a paragraph on consulting fees; he had discussed this with Mr. Iannuzzi previously and Mr. Iannuzzi was aware of the issue. The second paragraph on page 2 of the letter was the paragraph that Mr. Iannuzzi had discussed with him. The grievor testified that he left the paragraph in because the taxpayer needed the information to pass on to his chartered accountant. The grievor testified that he had reviewed the entries but did not have the document containing those entries to put in the file; Mr. Iannuzzi had put this in the audit plan and it needed the proper documentary support.

[34] The grievor testified that he received the letter back the next day (February 27, 2002) with the post-it note on it and an attachment paper-clipped to the letter. The attached document was referring to GST discrepancies (Exhibit G-4). He testified that there was nothing written on the letter. He stated that he interpreted the attachment and the post-it note as meaning that there was to be no further work on the GST issue. Since the letter was "clean", he determined that Mr. Iannuzzi had approved it and that he should send it out.

[35] On March 5, 2002, Mr. Iannuzzi asked the grievor if he had sent the letter to the taxpayer. Mr. Iannuzzi testified that the grievor replied that he had sent it out the same day. Mr. Iannuzzi testified that when he asked him why, the grievor said that Mr. Iannuzzi was "bone-headed" or a "bone-head". Mr. Iannuzzi stated that sometimes the grievor was soft-spoken; therefore, he could not be sure if he used the phrase "bone-head" or "bone-headed". In cross-examination, Mr. Iannuzzi testified that he did not express his concern about the comment right away but waited until a subsequent meeting to raise it. The grievor testified that he had never called Mr. Iannuzzi a "bone-head" or "bone-headed" and that this was not an expression that he used. Mr. Iannuzzi asked the grievor to provide him with a copy of the letter that he had sent out but testified that he believed that he never did receive a copy. Mr. Iannuzzi discussed other issues with the grievor at this meeting, such as time sheets. They were arguing over each issue. Mr. Iannuzzi testified that the grievor then walked out of the meeting before they had finished talking about all the issues.

[36] The grievor testified that Mr. Iannuzzi came by his cubicle on March 5, 2002, and asked him if he had sent out the letter. The grievor replied that he had. He testified that Mr. Iannuzzi did not say anything else and walked back to his office. He also testified that he went to Mr. Iannuzzi's office later that morning to discuss other files; that meeting lasted about 30 minutes. The grievor testified that Mr. Iannuzzi did not say anything about the letter. He also testified that the meeting ended when he was finished discussing all the issues on his files. He stated that they did not have a discussion about the letter at that meeting.

[37] The letter that was sent out by the grievor (Exhibit E-1, tab 3) had some of the changes made by Mr. Iannuzzi but included the paragraph that the grievor had been asked to remove, with only a slight change in wording that did not change the substance of the paragraph. The grievor testified in cross-examination that he made as many changes to the letter as he thought were reasonable. In cross-examination, Mr. Iannuzzi agreed that it was possible that the letter had gotten mixed up with other correspondence. On redirect examination, he testified that he processes letters in his in-basket quickly and there are never more than two or three letters in his in-box at one time.

[38] The grievor stated that he reviewed the Audit Report for this taxpayer (Exhibit G-5) and noted that GST issues had been raised. Exhibit G-4 is the detailed accounting of the GST discrepancy. He detected a discrepancy in GST payments and noted this in the first draft. He testified that the first draft of the letter to the taxpayer was not shown to his Team Leader (Exhibit G-7). The information that he obtained from the GST computer system was summarized in Exhibit G-3, which he did give to Mr. Iannuzzi. The discrepancy in GST returns was noted as approximately $13,000. In the letter he prepared on February 21, 2002, the GST issue was dropped. However, on another draft (Exhibit E-1, tab 2) there was a handwritten notation "GST" to remind him to reinsert the GST issue in the draft if there was a change. This version of the letter was also not sent to Mr. Iannuzzi. The grievor testified that he did give Exhibit G-3 to Mr. Iannuzzi and that Mr. Iannuzzi said he would think about it.

[39] During the afternoon of March 5, 2002, Mr. Iannuzzi met with the grievor. Also present at this meeting were the grievor's bargaining agent representative, Albino (Al) Lali, and a CCRA human resources officer, Patricia Gauvreau. Mr. Iannuzzi testified that the intended purpose of the meeting was to be a "fact finding" meeting. He testified that his purpose was to ask the grievor why he had sent the letter out and why he kept walking out of meetings. He testified that the grievor replied that he was not acknowledging anything that Mr. Iannuzzi was saying. Mr. Iannuzzi testified that, as the grievor was argumentative and rude, the meeting was terminated. The grievor testified that Mr. Iannuzzi started the meeting by asking him "what was going on?" He responded that Mr. Iannuzzi had called the meeting and that he was there to listen; Mr. Iannuzzi, however, did not say anything, according to the grievor. Mr. Lali then said that, if Mr. Iannuzzi was not going to say anything, there was no point in being there. At that point, the grievor and Mr. Lali left Mr. Iannuzzi's office. The grievor testified that Mr. Iannuzzi did not say anything about the letter. He also testified that as he left the meeting he observed that Ms. Gauvreau's writing pad had nothing written on it.

[40] Mr. Lali made notes at the meeting (Exhibit G-8). He testified that Mr. Iannuzzi commented that he was unhappy with the grievor's conduct; however, there was no "meaningful dialogue" and it was agreed by all the parties that the meeting be terminated. The whole meeting lasted only a couple of minutes. Mr. Lali also testified that the grievor was not asked to explain the February 27, 2002 letter and no reference in the meeting was made to the grievor's alleged "bone-head" comment. Mr. Lali's

notes (Exhibit G-8) state that Mr. Iannuzzi asked what was going on and that the grievor's response was "You tell me; you called the meeting." His notes then state that Mr. Iannuzzi said: "You know why" and "Explain this behaviour." The grievor then said: "I have nothing to explain. I didn't call the meeting, you did. I have nothing to say."

[41] In reply evidence, Ms. Gauvreau testified that the meeting lasted about six or seven minutes. She testified that she took notes at the meeting and subsequently (the same day) prepared a typed note to file (Exhibit E-7). After preparing the summary, she destroyed her original notes. She testified that Mr. Iannuzzi explained that the purpose of the meeting was to discuss the grievor abruptly leaving a meeting with Mr. Iannuzzi and calling him inappropriate names. He told the grievor that he was considering disciplinary action and this was an opportunity for the grievor to provide an explanation. She testified that, at first, the grievor did not respond but then he said that he had nothing to say. Her notes state that the grievor then said that he was not accepting anything that Mr. Iannuzzi said at the meeting. The notes also state that the grievor said that there were "other issues" and that on two occasions he had asked to meet with Ms. Mayo on those issues but had not yet met with her.

[42] On March 7, 2002, the grievor was given a notice of disciplinary action, signed by Mr. Iannuzzi, for his refusal to comply with Mr. Iannuzzi's directions regarding the taxpayer letter, as well as for his behaviour at the meeting of March 5, 2002 (Exhibit E-1, tab 5). Both of these incidents were described as insubordination and he was given a one-day suspension. At the meeting where the notice was presented to him (on March 7, 2002), Mr. Iannuzzi read the notice and asked the grievor to sign it; the grievor, however, refused to sign the acknowledgement of receipt. The grievor testified that he was not asked to comment or given a chance to respond. In cross-examination, Mr. Iannuzzi agreed that the disciplinary letter had already been drafted, that he did not ask the grievor any questions and that the grievor was not given an opportunity to respond.

[43] On March 11, 2002, Mr. Iannuzzi met with the grievor to discuss his performance. The grievor's union representative, Ted Dunston, also attended this meeting. The instructions that Mr. Iannuzzi gave at the meeting were, among others, that all letters or correspondence to clients had to be approved by the Team Leader

and that the grievor had to follow any instructions given by the Team Leader (minutes of meeting; Exhibit E-1, tab 12).

[44] The grievor attended the grievance hearing with Ms. Mayo on May 22, accompanied by his union representative. At the grievance hearing, he produced a copy of the letter that was sent to the taxpayer along with a yellow post-it note signed by Mr. Iannuzzi and dated February 27, 2002, that stated (Exhibit E-1, tab 3):

> *If other issues are uncovered during your audit, we will refer this and others, to GST.*
>
> *If no other issues are uncovered effecting GST, we should accept attached explanation and no further more to be done.*

[45] Mr. Iannuzzi testified that the writing on the post-it note was his writing but that it must have applied to a different file. The letter sent to the taxpayer did not refer to GST issues. He testified that the grievor had two or three letters to be approved that day and it is possible that the post-it note related to one of the other letters. He never discovered which letter it might have been attached to. He also testified that, in his view, the post-it note did not indicate his approval of the letter.

[46] In cross-examination, Mr. Iannuzzi testified that it was possible that the grievor had raised GST issues on this file, but he had no recollection of this. He testified that the taxpayer had provided an explanation for the GST discrepancy and it was not a significant discrepancy. In cross-examination, Ms. Mayo testified that it was possible that the post-it note had been attached to Exhibit G-4.

[47] The Notice of Disciplinary Action (Exhibit E-1, tab 5) was signed by Ms. Mayo on May 31, 2002, and indicated a one-day suspension. In the notice, Ms. Mayo stated that management believed that the grievor had misrepresented that the letter had been approved in order to undermine Mr. Iannuzzi's authority and that this was a violation of the CCRA values of professionalism and integrity and therefore constituted insubordination.

[48] According to the CCRA delegation instrument, Mr. Iannuzzi is delegated the authority to issue oral and written reprimands. Only excluded team leaders have the delegated authority to issue suspensions (Exhibit E-1, tab 7). Mr. Iannuzzi testified that he had the delegated authority to impose that disciplinary action. When he was shown the delegation instrument in examination in chief, he said that this had not

been brought to his attention and was not raised by the grievor or his union representative. In cross-examination, he testified that he had been assured by Ms. Gauvreau that he had the authority to impose discipline.

[49] The collective agreement (Exhibit G-1) provides for an informal dispute resolution process:

> ***ARTICLE 34***
>
> ***GRIEVANCE PROCEDURE***
>
> ***34.01*** *The parties recognize the value of informal discussion between employees and their supervisors to the end that problems might be resolved without recourse to a formal grievance. When an employee, within the time limits prescribed in clause 34.08, gives notice that the employee wishes to take advantage of this clause, it is agreed that the period between the initial discussion and the final response shall not count as elapsed time for the purpose of grievance limits.*
>
> . . .

[50] In his grievance against the first suspension, the grievor included the statement that he grieved "the fact that the interest based approach to the solving conflict (DRS) including mediation was not utilized." In his second grievance, he requested that "ADR and mediation be reinforced as the first and proper choice for settling disputes as per CCRA policy." In the final level response to the first grievance, the Assistant Commissioner, D.G.J. Tucker, stated that it was his understanding that management had given full consideration to the grievor's request to undertake an interest-based form of dispute resolution; however, it concluded that such an approach was not appropriate in the circumstances.

[51] The grievor testified that he felt that the dispute resolution system could have been useful in dealing with the first disciplinary action, as he felt that a face-to-face discussion would have resolved other issues. In cross-examination, Mr. Iannuzzi testified that it was his decision not to go to use the dispute resolution system, as he felt that in this case it was not appropriate. He also testified that he was advised by Ms. Gauvreau.

[52] In cross-examination, the grievor was asked if he had referred to Mr. Iannuzzi as "a fool" during a break in the hearing. The grievor denied this. Mr. Lali testified, in cross-examination, that the grievor had made a comment about "foolishness" or "fool" during a recess in the course of the hearing on the previous day.

Summary of the arguments

For the employer

[53] The submissions for the employer were made by both counsel.

[54] Counsel for the employer made no further submissions on the issue of privilege with regard to the second suspension, and relied on its earlier submissions on this issue. Counsel referred me to the definition of "bad faith" in *Black's Law Dictionary*, 6th Edition, 1990.

[55] Counsel for the employer noted that the grievor is grieving two discrete one-day suspensions for two discrete instances of insubordination. She submitted that the evidence clearly establishes that there was misconduct on two occasions. In the first instance, he disobeyed a clear order. In the second instance, he attempted to undermine his supervisor's authority by providing, in bad faith, misleading information. The authority of Mr. Iannuzzi to supervise the grievor, including his responsibility to review correspondence to taxpayers, was clearly set out in his job description (Exhibit E-1, tab 9). This role in reviewing taxpayer correspondence was confirmed by Ms. Mayo as standard practice. His instruction to the grievor with regard to the particular letter was well within his authority as Team Leader.

[56] Counsel submitted that the working relationship between the grievor and Mr. Iannuzzi was initially good but that the grievor became uncooperative within four or five months on the team. She stated that the tension appeared to have begun when Mr. Iannuzzi assigned a straightforward file that should have taken 25 to 30 hours but took the grievor 90 hours to complete. She also submitted that communication plays an important role for teleworkers and that responding to e-mails and telephone messages, as well as attending staff meetings, was crucial. The grievor attended very few staff meetings and persistently refused to return e-mail and voice-mail messages.

[57] Counsel noted that the letter at issue (Exhibit E-1, tab 1) contains the notations made by Mr. Iannuzzi, including the notation "Talk to me about this." When they had the discussion about the letter, Mr. Iannuzzi's direct instruction was to drop the paragraph. He advised the grievor that if he did not need the information then he should drop the paragraph. If he did need the information, then it was more appropriate to issue a requirement letter and ask for the information. The grievor did not drop the paragraph but rather changed it, which was not what his supervisor had instructed him to do. If there was any doubt about the clarity of the instruction, the grievor should have consulted with Mr. Iannuzzi; he should have taken the letter back to Mr. Iannuzzi and there is no evidence that he did so. Mr. Iannuzzi instructed him not to send the letter but the grievor disobeyed this order and sent out the letter with the offending paragraph.

[58] Counsel submitted that, at the fact-finding meeting on March 5, 2002, there was an opportunity for the grievor to engage in discussions about what was wrong. No meaningful dialogue was possible. His supervisor provided a forum for informal discussion but the grievor did not take advantage of that opportunity. The grievor was well aware of what was going on and that was his opportunity for an informal discussion.

[59] Counsel noted that with regard to the second disciplinary action, Mr. Iannuzzi agreed that the letter could relate to GST issues and that the grievor had been working on GST issues with this taxpayer file. However, the letter does not relate to GST, either in the draft or the final form. According to the final Audit Report (Exhibit G-5), the GST issues were being addressed separately. Ms. Mayo testified about her reasons for finding that the post-it note was not plausible and for her finding of misconduct. Counsel for the employer submitted that, in using the post-it note, the grievor had made a serious misrepresentation for no other purpose than to undermine Mr. Iannuzzi's authority. Ms. Mayo testified that the post-it note could have been attached to Exhibit G-4.

[60] Counsel submitted that I should draw an adverse inference from the failure of the grievor to introduce as evidence the notes taken by Mr. Iannuzzi at the time of his meetings with the grievor. The failure to introduce the notes confirmed that Mr. Iannuzzi's memory was reliable.

[61] Counsel argued that, at the meeting, the grievor had used inappropriate language, calling Mr. Iannuzzi "bone-headed" or a "bone-head". The grievor's testimony is simply not believable. The e-mail (Exhibit G-6) conveys the tone of the grievor's communication. Ms. Mayo also testified that he had a tendency not to go through proper channels when dealing with issues. It is very likely that he made the comment and Mr. Iannuzzi's version is to be preferred. Why would Mr. Iannuzzi make such a thing up? During a recess at the hearing, the word "foolishness" was overheard by Mr. Iannuzzi, showing a lack of respect. Mr. Lali confirmed that such a word was used.

[62] Based on all the evidence, counsel for the employer submitted that I ought to find that the two instances of insubordination did occur and that the conduct was inappropriate and warranted some form of managerial reprimand.

[63] Counsel noted that the bargaining agent alleged a breach of clause 34.01 of the collective agreement. The employer's position is that, given the nature of the dispute, the informal dispute mechanism was not the appropriate way to proceed. At the March 5, 2002 meeting, the grievor was not willing to discuss issues with his supervisor. The informal mechanism presupposes the willingness of the two parties to engage in dialogue. Consequently, the employer's decision not to use the informal process was a reasonable one. Counsel also submitted that no formal request was made by the bargaining agent with respect to this clause. The first request for the informal process was made at the grievance hearing. Therefore, the condition precedent for this clause was not met.

[64] Counsel submitted that even if this part of the grievance was validly before me, there was no breach of this clause. It is a general purpose clause that is about the recognition of values and does not impose an obligation on the employer to initiate such discussions. Counsel referred me to *Canadian Labour Arbitration* (*supra*), at paragraph 4:2130. She also referred me to *Re Integrated Services Northwest v. Ontario Public Service Employees* Union (2004), 134 L.A.C. (4th) 441.

[65] Counsel referred me to the following decisions of the PSSRB on insubordination: *Noel v. Treasury Board (Human Resources Development Canada),* 2002 PSSRB 26; *Larabie v. Treasury Board (Solicitor General for Canada – Royal Canadian Mounted Police)*, PSSRB File No. 166-2-18655 (1989) (QL); and *Sotirakos v. Canada Customs and*

Revenue Agency, 2002 PSSRB 38. I was also referred to *Canadian Labour Arbitration* (*supra*), at paragraph 7:3610.

[66] Counsel for the employer also addressed the position advanced by the grievor's representative in her opening statement that the first suspension was void *ab initio* because Mr. Iannuzzi did not have the appropriate delegated authority to impose the disciplinary action. Counsel admitted that Mr. Iannuzzi did not have the authority under the delegated authority to administer suspensions although he did have the authority to administer oral and written reprimands. Counsel submitted that I had jurisdiction to determine whether the discipline was justified, but that I did not have the jurisdiction to determine whether it was a valid exercise of the employer's discipline authority. She brought the following decisions to my attention: *Bodner v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-21332 (1991) (QL); *Dorion v. Treasury Board (Solicitor General)*, PSSRB File Nos. 166-2-14806 to 14808 (1985) (QL); *Attorney General of Canada v. Gauthier*, [1980] 2 F.C. 393; and *Veilleux v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File Nos. 166-2-15247 and 15248 (1988) (QL). In the alternative, she argued that any flaws in the discipline process had been cured by the hearing *de novo* before an adjudicator: *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (QL); and *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43. In the further alternative, she argued that the grievor had waived his right to rely on this argument because it had not been raised in the grievance process. She also submitted that even if I should find the first disciplinary action void *ab initio*, this did not affect the second disciplinary action: *Re VS Services Ltd., Vending Services v. Teamsters Union, Local 647*, 17 LAC (4th) 339.

[67] Counsel for the employer submitted that credibility was a critical issue in this case given the inconsistent evidence. She referred me to the test set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.):

. . .

> *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…*
>
> . . .

[68] Counsel also referred me to *Canadian Labour Arbitration* (*supra*), at paragraph 3:5110. She submitted that with regard to the discussions about the February 24, 2002 letter, the March 5, 2002 meeting, and the post-it note, the testimony of the employer's witnesses should be preferred to that of the grievor and his witness.

[69] With regard to the quantum of discipline imposed, counsel for the employer submitted that the discipline was reasonable, appropriate and should not be reduced. She referred me to *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-2-15583 (1987) (QL); *Madden v. Canada Customs and Revenue Agency*, 2000 PSSRB 93; and *Imperatore v. Treasury Board (Revenue Canada – Customs, Excise and Taxation),* PSSRB File Nos. 149-2-169, 166-2-27963 (1998) (QL). Counsel also submitted that the discipline was in line with the employer's disciplinary policy, which provides for one to 30 days of suspension for insubordination, with an absolute minimum of one to two days. In both instances, the employer used the minimum period. She submitted that I should not reduce the suspension unless it was clearly unreasonable in the circumstances: *Hogarth* (*supra*), *Madden* (*supra*) and *Bousquet v. Treasury Board (Public Works Canada)*, PSSRB File No. 166-2-16316 (1987) (QL). She submitted that the suspension should not be reduced if it falls within the range of reasonable discipline.

<u>For the grievor</u>

[70] The grievor's representative submitted that the first disciplinary suspension was void *ab initio* because Mr. Iannuzzi did not have the delegated authority to issue the discipline. She referred me to the *Canada Customs and Revenue Agency Act*, at subsection 51(2), and the Delegation of Human Resources Authorities (Exhibit G-2). The CCRA is required to establish standards of discipline and is required to supply those standards to the bargaining agent (Article 37). The principle governing standards of discipline is that bargaining agent members cannot suspend each other. Mr. Iannuzzi acknowledged that he did not have the authority to suspend the grievor and testified that he had relied on the advice of an HR specialist, Patricia Gauvreau. Ms. Mayo testified that the discipline was imposed by Mr. Iannuzzi and he was not carrying out her orders. He did not seek her approval for the suspension; he only discussed it with her. The only possible remedy for the breach of the delegation of

authority is that the disciplinary action is null and void. Ms. Pylyshyn referred me to *Re Fort Saskatchewan General Hospital District 98 v. United Nurses of Alberta, Local 9* (1990), 12 L.A.C. (4th) 166; *Peet v. Canada (Attorney General)*, [1996] F.C.J. No. 59 (QL); and *Re Lakeland College v. Lakeland College Faculty Association* (2003), 124 L.A.C. (4th) 28. In saying that I have no jurisdiction to examine the delegation, the employer is asking me to fetter my discretion. The former *Act* does not restrict the scope of matters on which a grievor can challenge a management decision. This is not a case where another Act of Parliament applies (as there was in *Peet* (*supra*)). To refuse jurisdiction would be to leave the grievor without a remedy. What is illegal, and contrary to the *CCRA Act*, must be unjustified. How can the discipline be reasonable if it flies in the face of the law and the employer's own disciplinary policy? The grievor's representative distinguished *Bodner* (*supra*) on the basis that the resignation in that case fell under the *Public Service Employment Act (PSEA)*. In *Dorion* (*supra*), the matter was not adjudicable. The *Gauthier* case (*supra*) was decided under the *Canada Labour Code* (*CLC*), and the standard for review of the disciplinary action was different from that under the *PSSRA*. She also submitted that the *Veilleux* case (*supra*) was simply wrong. Furthermore, the subject-matter in *Veilleux* fell under the *PSEA*. In the alternative, she submitted that the facts were different. In this case, the disciplinary policy clearly sets out who does what.

[71] The disciplinary action cannot be cured by this adjudication hearing because the fact that it is being void *ab initio* means that it is a nullity. She referred me to *Re Glendale Spinning Mills (1981) Ltd. v. Amalgamated Clothing & Textile Workers Union, Local 1070-T* (1988), 1 L.A.C. (4th) 353; *Re Valdi Foods v. United Foods & Commercial Workers, Local 175* (1991), 19 L.A.C. (4th) 114; and *Peet* (*supra*).

[72] She also submitted that the employer's counsel was wrong when she stated that the grievor had waived his right to raise the delegation issue. The grievance language was broad enough to challenge on these grounds. She referred me to *Schneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133; and *Re Board of Governors of the Riverdale Hospital v. Canadian Union of Public Employees, Local* 79 (2000), 93 L.A.C. (4th) 195.

[73] In the alternative, it was the grievor's submission that the employer did not have cause to impose discipline. The evidence does not support a finding of insubordination. The grievor's version of events makes more sense than

Mr. Iannuzzi's. The grievor did not send the letter out in its original form; he did make changes to it. He gave the amended letter back to Mr. Iannuzzi and Mr. Iannuzzi returned the letter without requesting further changes. There were GST issues in this taxpayer file, and the grievor and Mr. Iannuzzi had had conversations about the GST issue. The post-it note, therefore, made sense. It made complete sense for the grievor to assume that the letter had been approved. Mr. Iannuzzi returned the letter with comments on the GST issue, but without further revisions to the letter. There are a number of possible explanations for how the letter was returned to the grievor. Mr. Iannuzzi may have scooped up the letter, including it with other documents. The post-it note was dated February 27, 2002; therefore, it is not hard to imagine that the GST document would be returned on the same day, as it related to the same file. It is also possible that Mr. Iannuzzi failed to notice that the letter was different and simply returned it. The grievor saw the revised letter with no changes and assumed that Mr. Iannuzzi must have thought it was okay. It was also possible that Mr. Iannuzzi failed to notice the paragraph in the letter; the revised letter looked quite different from the original draft. Any of these scenarios is acceptable, and the grievor was justified in believing that it had been approved.

[74] Ms. Pylyshyn submitted that the grievor had no reason to mislead through the use of a post-it note. The letter came back from Mr. Iannuzzi with no changes indicated. The grievor was accused of lying about the note. However, we know that he and his supervisor had been discussing the GST issue and the grievor was waiting for his supervisor to get back to him. Exhibit G-4 and the post-it note all relate to the same audit file. Mr. Iannuzzi admitted that he wrote the post-it note and that the grievor had given him the GST document (Exhibit G-4). Mr. Iannuzzi admitted that there was a GST discrepancy (Exhibits G-3 and G-4) and the post-it note related to the same file. The attachment to the post-it note was probably Exhibit G-4. Mr. Iannuzzi remembered the letter but absolutely nothing about the post-it note. Ms. Pylyshyn submitted that his inability to remember did not hold water and it demonstrates that he was simply eager to find a reason to discipline the grievor. Mr. Iannuzzi testified that the grievor said that he would send out the letter "whether he liked it or not", yet, the letter was not sent out as it was written; it was changed. Mr. Iannuzzi did not take immediate action but waited for nine days to raise the letter with the grievor. She submitted that the delay was difficult to believe.

[75] Ms. Pylyshyn also noted that the grievor denied calling Mr. Iannuzzi "bone-headed" or a "bone-head". The grievor came to the office to discuss files and Mr. Iannuzzi did not ask about the letter and gave no indication of his displeasure. Mr. Iannuzzi also testified that the grievor spoke so softly that he was not sure what he said. At the second meeting on March 5, 2002, Mr. Iannuzzi did not specifically ask about the letter and provided no details about the allegation. The evidence of Ms. Gauvreau was not properly reply evidence and amounted to an effort by the employer to split its case. The employer should have presented this evidence in chief, as it should have contemplated that there would be disagreement about what happened at the meeting. In the alternative, as between the testimony of Mr. Lali and Ms. Gauvreau, Mr. Lali is the more reliable. He made notes during the meeting, while Ms. Gauvreau testified that her notes had been destroyed and the summary she made was made after the meeting. Mr. Lali had no preconceived notions about the dispute between the grievor and Mr. Iannuzzi while Ms. Gauvreau had discussed the issue with Mr. Iannuzzi and knew what was on his mind. In terms of credibility, Mr. Lali had the less personal interest in the outcome. Ms. Gauvreau was the one who told Mr. Iannuzzi he had the authority to discipline the grievor and she had an incentive to minimize the impact of her error. Ms. Pylyshyn submitted that the evidence of Mr. Lali should be accepted as accurate. Mr. Iannuzzi did not give any details or talk about the letter at the meeting; he also did not raise the alleged "bone-head" comment. It is therefore plausible that Mr. Iannuzzi did not tell the grievor what he had done wrong. If Mr. Iannuzzi had raised these issues, the grievor could have said that he did change the letter as asked.

[76] Ms. Pylyshyn submitted that the history of the conflict between the two showed that Mr. Iannuzzi had not handled that conflict well. This history provided reasons for Mr. Iannuzzi to label the grievor as a troublemaker, and he was looking for ways to discipline him. All the evidence of their previous conflicts concerned events for which the grievor had not been disciplined. With regard to the e-mail and the reference to "break your legs", Mr. Iannuzzi did mention that he returned the wishes.

[77] Ms. Pylyshyn also submitted that the absolute refusal of the employer to consider alternative dispute resolution was evidence of bad faith. Because of ongoing communication problems, this would have been the perfect case for alternative dispute resolution, she submitted.

[78] She also submitted that the grievance hearing should not be used as a springboard for further discipline. Ms. Pylyshyn referred me to *Godfrey* (*supra*) (at page 30) and stated that the communication must legitimately relate to the grievance. In *Godfrey*, the grievor was using the grievance process to harass the manager. This case is entirely different; the grievor filed a legitimate grievance and was simply attempting to explain what he thought had happened. In *Godfrey*, it states (at page 30) that "work-related matters submitted in good faith" are not admissible. She submitted that this should be interpreted broadly. If employees could be disciplined for things they say in a grievance hearing that are untrue, it could lead to an absurd situation where employees could be disciplined again for saying that they did not do what they were alleged to have done. There is no basis for the argument that the information should not be protected by privilege. It was clear that, intended or not, there was nothing about his representation that would take it out of privilege.

[79] Even if I allowed the evidence, Ms. Pylyshyn submitted that the evidence supports the grievor in that it was reasonable for him to interpret the post-it note in the manner that he did. The second disciplinary action was not supported by the evidence.

[80] Ms. Pylyshyn also submitted that clause 34.01 of the collective agreement (Exhibit G-1) was breached and that I should issue a declaration to that effect. She acknowledged that the informal dispute resolution process was voluntary and that the employer has the discretion to decide whether to participate in that process. However, this discretion must be exercised in a way that is reasonable. There was no evidence that the employer put its mind to considering the process. The employer acted in bad faith and unreasonably in refusing to consider informal dispute resolution. The employer alleged that there was no formal request for informal discussions. However, Mr. Dunston, the union representative, asked for informal dispute resolution at the disciplinary meeting prior to the grievance being filed.

[81] With regard to the overheard comment of the grievor at one of the breaks in the hearing (the reference to "foolishness"), Ms. Pylyshyn submitted that it was not relevant and we did not have the context to assess it. She also submitted that I should not draw an adverse inference from the grievor's failure to introduce Mr. Iannuzzi's notes as evidence after he had requested disclosure. The employer chose not to

introduce the documents, and I could draw an equivalent inference from its failure to introduce those notes.

Reply submissions for the employer

[82] Ms. Engmann submitted that, with regard to the first disciplinary action, Ms. Mayo did have discussions with Mr. Iannuzzi prior to the imposition of discipline. Mr. Iannuzzi was not acting as a "renegade" supervisor; he took his time to consider and he had discussions with his manager and with human resources. Ms. Mayo agreed with the suspension in the first level grievance response.

[83] With regard to the reply evidence of Ms. Gauvreau, she submitted that the employer was not splitting its case. The employer had no notice that the bargaining agent had concerns that fact-finding had not taken place. It was not until the testimony of Mr. Lali that the employer had any inkling that the purpose or nature of the meeting was in dispute. The bargaining agent has no basis for its distasteful statement that Ms. Gauvreau's testimony was tainted.

[84] Counsel submitted that none of the grievor's scenarios relating to the approval of the letter was plausible. Mr. Iannuzzi was concerned about the letter and specifically instructed that it be changed. The better view is that, since Mr. Iannuzzi was looking out for the letter because it was crucial, he had never seen the letter again.

[85] There was no evidence that the employer did not consider using the informal process.

[86] With regard to credibility, Mr. Iannuzzi could not recall the post-it note. The post-it note was not shown to the employer along with Exhibit G-4 to which it relates. It was shown with the February 27, 2002, letter. It was not until this adjudication hearing that the employer was ever shown Exhibit G-4. This was not the representation made when he met with Ms. Mayo.

Decision

[87] These grievances relate to two separate disciplinary penalties, both of which are one-day suspensions. Although the two disciplinary actions are related, I must determine the merits of each separately.

[88] Ms. Pylyshyn argued that the reply evidence of Ms. Gauvreau should not be admissible. Although it is true that the employer knew that there was a dispute about the March 5, 2002 fact-finding meeting, it was only after the grievor testified that the employer heard specific allegations about Ms. Gauvreau's presence at the meeting, including the allegation that she had not taken any notes. I am satisfied that, in the circumstances, reply evidence was appropriate.

[89] The bargaining agent raised the issue of the failure to use the informal resolution mechanism contained in the collective agreement as a ground for the grievances. The purpose of informal conflict resolution systems is to encourage voluntary discussions of labour relations matters. It is not appropriate for adjudicators to impose a requirement to engage in a voluntary process. Consequently, I reject the bargaining agent's claim that the informal system should have been instigated by the employer. Ms. Pylyshyn also argued that the failure to use the informal process demonstrated bad faith on the part of the employer. There was no evidence of bad faith in the employer's failure to engage in the informal process.

[90] I was asked by counsel for the employer to draw a negative inference from the grievor's failure to tender the notes of an employer witness. Although an adjudicator can draw an inference from the failure of a critical witness to testify, such an inference cannot extend in this case to documents prepared by that witness. There are many reasons why a decision is made not to tender a document as an exhibit and it is generally not appropriate for an adjudicator to draw any inferences from that decision.

[91] There was testimony about the events that led up to the e-mail that was sent by the grievor on December 31, 2001 (Exhibit G-6). He was not disciplined for this e-mail. Consequently, this evidence has no relevance to the discipline imposed on him, which is at issue here. The evidence does demonstrate that the relationship between the grievor and Mr. Iannuzzi was not an easy one. However, in the absence of previous discipline, that evidence is not relevant in my view.

[92] The grievor's position is that the first suspension is void *ab initio* because Mr. Iannuzzi did not have the requisite delegated authority to impose that kind of disciplinary measure. The employer does not dispute that Mr. Iannuzzi does not have the delegated authority under the CCRA's delegation instrument (Exhibit E-1, tab 7).

[93] I agree that the grievor can raise the issue of delegated authority at the hearing, as the grievance wording is sufficiently broad to encompass such an allegation. However, the argument is ultimately not successful, as it has long-been held in the Board's jurisprudence that the adjudication hearing is a *de novo* hearing to determine whether the employer had just cause to impose discipline, and the hearing is not designed to determine whether the proper process was followed (see *Tipple* (*supra*)). Also, the employer's directives do not limit the jurisdiction of an adjudicator and an adjudicator is not required to rule on the validity of the discipline, only on whether the discipline was unjustified under the circumstances (*Champagne v. Canada* (*Public Service Staff Relations Board*), [1987] F.C.J. No. 906 (F.C.A.). In addition, Mr. Iannuzzi's supervisor, Ms. Mayo (who did have the requisite delegated authority), was aware of the decision to impose a one-day suspension and testified that she had met with Mr. Iannuzzi and discussed the discipline prior to its being administered. She also subsequently affirmed the suspension at the second-level hearing. The suspension, therefore, had the support of those who were delegated to administer the penalty.

[94] In looking at the merits of the disciplinary action imposed on the grievor, the test for insubordination has been set out in the jurisprudence as follows (see *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 66):

- there was a clear order, which the grievor understood;
- the order was given by a person in authority; and
- the grievor disobeyed the order.

[95] In an examination of the evidence concerning the existence of an order, credibility becomes an issue. The grievor claims that Mr. Iannuzzi approved the letter and relies on the post-it note. The test for credibility set out in *Faryna v. Chorny* (*supra*) has stood the test of time: the testimony's "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".

[96] The initial order not to send out the letter was clearly communicated to the grievor. He alleged that the letter was subsequently approved by Mr. Iannuzzi and relies on the post-it note to support his allegation as well as the fact that the letter ended back in his mail slot. I will deal separately below with the discipline imposed as

a result of the expression of this position by the grievor. At this point, I must examine the merits of the explanation offered by the grievor since it goes to the central question of whether an order was given. Mr. Iannuzzi testified that he had never approved the letter. I believe Mr. Iannuzzi's testimony on this point for a number of reasons. First of all, the very section of the letter that he had flagged for discussion and that he did discuss with the grievor was not changed significantly in the final version of the letter. It is hard to conceive that Mr. Iannuzzi would have approved a version of the letter that contained the paragraph that he was so obviously concerned about. Secondly, the comments on the post-it note do not appear to directly relate to the contents of the letter. I accept that there may well have been GST issues in the taxpayer's file, but the letter itself does not refer to those issues. Thirdly, the delay by the grievor in raising the post-it note as his authority to send the letter is suspicious. He had opportunities prior to the imposition of the disciplinary action or at the disciplinary meeting itself to explain that he thought he had the necessary approval. Although I accept that he was not explicitly given an opportunity to explain himself at the meeting where the discipline was imposed, the grievor did have some opportunity to speak, as he did discuss with Mr. Iannuzzi the fact that he would not sign the notice of disciplinary action. I find Mr. Iannuzzi's testimony is more in harmony with the preponderance of probabilities.

[97] The grievor is also alleged to have called his Team Leader a "bone-head" or "bone-headed". There were no witnesses to this alleged comment other than Mr. Iannuzzi and the grievor. In my view, this is not something that Mr. Iannuzzi was likely to make up. The comment is in keeping with the general tenor of the conversation between the two and the view expressed by the grievor that he was prepared to make changes to the letter that he felt were "reasonable". On balance, I find that the comment was likely made. Name-calling in the workplace is never appropriate. When the name-calling is against a supervisor, it can constitute insubordination. In my view, this comment amounted to insubordination on the grievor's part.

[98] It is also alleged that the grievor walked out of a meeting with Mr. Iannuzzi on March 5, 2002. The evidence was that the discussion between the two of them was heated. However, it was not clear from the evidence whether the grievor walked out of the meeting or if the meeting had been terminated by Mr. Iannuzzi. This element of the insubordinate behaviour was not proven on a balance of probabilities.

[99] The meeting during the afternoon of March 5, 2002, was also the subject of conflicting testimony. The views of two witnesses – Mr. Lali and Ms. Gauvreau – were almost totally opposed. It is hard to reconcile the two views of the meeting. On balance, the testimony of Mr. Lali is to be preferred. His notes (Exhibit G-8) were contemporaneous and his involvement in the dispute between the grievor and Mr. Iannuzzi was limited. Ms. Gauvreau may have confused elements of this meeting with other meetings with Mr. Iannuzzi and the disciplinary meeting with the grievor. The only relevance this meeting has to these grievances is the opportunity that the grievor had to explain to Mr. Iannuzzi why he felt that he had received approval to send the letter. From the discussion earlier in the same day about the letter, the grievor must have had some idea of what the meeting was about. Even if that were not the case, there were other opportunities to raise this with Mr. Iannuzzi.

[100] In conclusion, I find that the sending of the letter against the express orders of Mr. Iannuzzi was insubordination. The "bone-head" comment was made and was also insubordination. There was not sufficient evidence to prove that the grievor walked out of a meeting with Mr. Iannuzzi. Given the findings, I conclude that on balance there were sufficient grounds for a finding of insubordination on the grievor's part.

[101] I must now determine if the discipline imposed – a one-day suspension – was reasonable in the circumstances. There was evidence at the hearing of a difficult relationship between the grievor and his Team Leader. The frustration of Mr. Iannuzzi was clearly evident from the documentary evidence as well as from his testimony. The evidence of that relationship prior to the incident of insubordination is not relevant for the determination of the appropriateness of the discipline imposed. If the grievor had received oral or written reprimands with regard to his previous behaviour, then there would be an element of progressive discipline. However, such was not the case. This was the first time that the grievor had been disciplined for his behaviour. The appropriate disciplinary response to this insubordination would have been a written reprimand.

[102] Accordingly, I order that a written reprimand be substituted for the first one-day suspension.

[103] The second disciplinary action imposed was a one-day suspension for undermining his Team Leader's authority at the grievance hearing into his first disciplinary action. The grievor relied on a post-it note on a version of the letter to

argue that, in fact, he had been authorized to send the letter (Exhibit E-1, tab 3). I have already concluded above that the post-it note did not directly relate to the letter and that the grievor's reliance on it lacked credibility, as the grievor did not immediately raise this as a defence. The issue here is whether by relying on this post-it note the grievor committed a further act of insubordination.

[104] The grievor's reliance on the post-it note was misleading. He misrepresented what his Team Leader had said. There was no evidence of how the post-it note came to be attached to this letter, and the document it referred to was not discovered by the employer (there was a suggestion at the hearing that it may have been attached to Exhibit G-4). There was no evidence that the grievor deliberately put the post-it note on the letter. The evidence was not clear on how the post-it note ended up on the document. However, the post-it note clearly did not directly relate to the letter. The grievor should have realized that the post-it note was not sufficient to support his allegation that Mr. Iannuzzi had approved the letter. Given Mr. Iannuzzi's views about the letter and his testimony that the revised letter was not shown to him prior to going out, I also conclude that the revised letter was never shown to Mr. Iannuzzi. By insisting, falsely, that Mr. Iannuzzi had approved the letter, the grievor further undermined Mr. Iannuzzi's authority. I find that this constituted insubordination.

[105] I must now determine if a one-day suspension was reasonable for this further act of insubordination. I find that, given the previous act of insubordination, it was reasonable for the employer to impose a one-day suspension. This conforms to the principle of progressive discipline.

[106] In summary, the first one-day suspension is substituted by a written reprimand. The second grievance is dismissed.

[107] For all of the above reasons, I make the following order:

(The Order appears on the next page.)

Order

[108] The grievance in PSSRB File No. 166-34-33256 is allowed in part. The one-day suspension is substituted by a written reprimand and the grievor is to be compensated for the loss of one day's pay and any related benefits.

[109] The grievance in PSSRB File No. 166-34-33257 is denied.

December 7, 2005.

Ian R. Mackenzie,
adjudicator