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Public Service Labour Relations Act

Before an adjudicator and the Public Service Labour Relations Board

BETWEEN

IAN SHAW

Grievor and Complainant

and

DEPUTY HEAD
(Department of Human Resources and Skills Development)

Other party to the grievance

and

STAN WOJICK, LUCIENNE ROBILLARD AND WAYNE WOUTERS

Respondents

Indexed as
Shaw v. Deputy Head (Department of Human Resources and Skills Development) et al.

In the matter of an individual grievance referred to adjudication

In the matter of a complaint made under section 190 of the *Public Service Labour Relations Act*

REASONS FOR DECISION

Before: Beth Bilson, adjudicator and Board Member

For the Grievor and Complainant: Susan Ballantyne , counsel

For the Other party to the grievance and Respondents: Adrian Bieniasiewicz, counsel

Heard at Toronto, Ontario,
June 26 and 27, 2006.

Individual grievance referred to adjudication and complaint before the Board

[1] Ian Shaw, the grievor and complainant, is employed in the Service Canada branch of the Department of Human Resources and Skills Development. In a letter dated April 1, 2005, the employer indicated to Mr. Shaw that the latter would be suspended for 10 days without pay, as a consequence of statements he made at a meeting on January 28, 2005. Mr. Shaw filed a grievance in relation to this disciplinary penalty, and also a complaint under paragraph 190(1)(*g*) of the *Public Service Labour Relations Act* ("the *Act*"), alleging that the imposition of discipline by the employer under these circumstances constituted an unfair labour practice.

Summary of the evidence

[2] Mr. Shaw has been employed by this employer since 1990, and has since 2002 been a project officer in the Scarborough Employment Services Unit. Prior to that, he testified, he had been in a number of different positions, including those of job information clerk, employment and insurance officer and employment counsellor.

[3] Mr. Shaw testified that his workplace had undergone significant changes since he began working there, and he attributed many of these changes to the decision of the employer to contract out a portion of the work previously being done in the department. The grievor said that when he began his employment, there had been 250 bargaining unit employees in four different locations; there are currently approximately 150 employees at a single site.

[4] The grievor commented, in particular, on his duties as a project officer. He stated that when he began, his work had been a form of community development; he had developed projects "from the ground up" in collaboration with community-based organizations and had a high degree of personal responsibility for the success of these projects. As an example, he referred to his involvement with a coalition of community groups to provide employment services as well as health services and other resources in a storefront venue.

[5] Several years ago, the employer began to implement a new call for proposals (CFP) system. Mr. Wojick, Director, Toronto East Region, Service Canada, testified that this system was an initiative intended to make the process by which contracts were awarded and projects undertaken more transparent and accountable. The CFP system had a number of elements, among the most important of which were the requirement

that all contracts, including renewals, for projects with a dollar value of $500 000 or more go through a formal tendering process; and the implementation of a more centralized review process for all projects.

[6] Mr. Shaw said that, from his point of view as a project officer, the new system was significantly more bureaucratic, and removed much of the decision-making authority from project officers. Rather than working with community-based organizations on developing and instituting projects, project officers spend most of their time "at the computer" reviewing and assisting with the formulation of contract proposals, and reporting to the Regional Review Committee (RRC).

[7] At the time the events giving rise to his suspension occurred, Mr. Shaw was the local president of the Canada Employment and Immigration Union (CEIU), a component of the bargaining agent representing the employees in his workplace. He had been local president for approximately 12 years, and had been on the local executive before that. Subsequently, he became one of four regional vice-presidents of the bargaining agent.

[8] Mr. Shaw's evidence was that the CEIU had responded vigorously to the contracting out by the employer of work previously done by CEIU members. He said that the bargaining agent had raised the issue with management at every possible opportunity. They had also tried to build alliances with community-based organizations that had been their clients and had invited them to protest the changes. Mr. Shaw said that he had been one of the key regional organizers of this campaign and had been involved in lobbying activity, joint occupation with community-based organizations of workplaces, public rallies and communication through the press and directly to the public.

[9] Mr. Shaw said that the perception by the bargaining agent was that the employer was attacking it and the jobs of its members and that their strategy was to draw attention to the implications for the public of cuts in government services.

[10] He said that the bargaining agent saw the CFP system as part of the same process of cutting back on public services. He said that it was concerned generally about the ongoing contracting out of work; there was also a concern about the centralization of control, the loss of attention to the particular needs of various groups because of standardized project criteria and the deskilling of the work of bargaining agent members. As evidence that the bargaining agent had taken a position on these

issues, he pointed to a brief presented to the House of Commons Standing Committee on Human Resources, Skills Development, Social Development and the Status of Persons with Disabilities by Jeannette Meunier-McKay, National President of the CEIU (Exhibit U-4). This brief was presented on April 12, 2005, shortly after the suspension was imposed on Mr. Shaw.

[11] In his testimony, Mr. Wojick acknowledged that he knew in general terms that the CEIU had taken a position adverse to the contracting out of department work. He testified that a certain amount of adjustment was necessary when the CFP system was implemented and that some concerns expressed by employees about an increased workload had been met by hiring into the positions of two retired employees, but he denied that there was any general disaffection or demoralization among employees in the unit.

[12] Both Messrs. Shaw and Wojick were questioned about a report entitled *Employment Service Capacity Review: Scarborough* (Exhibit U-2), which was placed in evidence by counsel for Mr. Shaw. The report, dated March 14, 2005, was based on "group and individual interviews" with a number of managers and employees in the Scarborough unit, as well as on a review of documentation and processes, examined a number of aspects of the working environment following the introduction of the CFP system. Messrs. Shaw and Wojick differed considerably in their assessment of the significance and validity of the report.

[13] From Mr. Shaw's point of view, the report supported his allegations that the process had led to a decline in morale and a sense of crisis in the unit. The report noted, for example, that project officers had expressed the sentiment that they were "more and more removed from the decision and influencing stages of their work", and that "the competencies required to do the tasks did not currently exist with all staff in Scarborough". The report stated that members of staff had spoken of the "demeaning manner" in which feedback was provided to them, and had said that there was a "significant lack of clarity as to what was expected", that communication within the office was "generally poor"; that there was a sense that the unit had "lost the trust of regional headquarters", and that they felt a "loss of control and an increased vulnerability". Mr. Shaw said that the report confirmed that there was some substance to many of the concerns he and the bargaining agent had expressed.

[14] Mr. Wojick, on the other hand, questioned whether the report represented anything more than transitory "venting" on the part of a few disgruntled employees. He said his understanding was that the report was just a preliminary draft by the review committee, and that they had not proceeded any further with the exercise. He said that neither he nor other members of the management team had been approached by employees with the volume or seriousness of complaints that would lead them to perceive it as a crisis, or that would suggest that there was anything fundamentally wrong with the CFP process. He acknowledged that there was a certain amount of stress associated with the changes that were being made, but he did not think the references to "increased vulnerability" or "loss of control" were accurate.

[15] Mr. Shaw also made reference to a document titled *Issues Identified at Ontario Region CFP Training, July 6, 7 and 8, 2004* (Exhibit U-5). This document listed, in summary form, a series of issues such as "shortage of staff", "negative impact on current service delivery network and clients", "lack of a transition plan" and "assessment grid – what info do we need to include?" Beside each of the issues listed was a check mark indicating whether responsibility for examining or addressing the issue would be assigned locally, to regional headquarters or to national headquarters. There was also a line to indicate whether training would be appropriate in connection with the issue. Though neither his testimony nor that of Mr. Wojick made it entirely clear what the status or authority of this document was, Mr. Shaw indicated that he viewed it as another sign that the implementation of the CFP system was accompanied by a variety of problems for employees and managers.

[16] External organizations, both clients and organizations that were providing services, were also, of course, affected by the CFP process. As existing contracts were no longer routinely renewed, and contractors had to submit to a tendering process, it stood to reason that not all service providers could be confident that their contracts would be renewed. An article published in *The Toronto Star* on January 20, 2005 (Exhibit U-3), described representations made to the government by a number of community-based organizations in Toronto that were experiencing this uncertainty.

[17] The Community Social Planning Council of Toronto hosted a meeting on January 28, 2005, to give community organizations an opportunity to discuss these issues. The Council requested that the CEIU send a representative to speak at the meeting and Mr. Shaw was selected to represent the bargaining agent. He made a brief

address to the meeting. The employer was subsequently provided with a transcript of these remarks; it is not clear where this transcript originated but Mr. Shaw does not dispute that the transcript accurately reflects the comments he made.

[18] It is worth reproducing Mr. Shaw's comments in their entirety for two reasons. For one, the transcript provided the employer with the grounds for imposing discipline. For another, it is difficult to capture fully the tone and tenor of the discussion by reference to isolated words or phrases. The following represents what Mr. Shaw said after he was introduced to the meeting as the local president of the CEIU by John Campey, Chair of the Community Social Planning Council:

> *Thanks very much, John, and good morning, everybody. Certainly it's an impressive turnout, and I think that's a reflection of how critical this issue is to everyone in the community.*
>
> *I'd like to bring greetings this morning, solidarity greetings from 23,000 members of the Canada Employment and Immigration Union, and specifically those workers like myself who work as project staff here in the GTA and have known many of the people in this room over the years. We've worked at local offices trying to do the kind of work that develops our communities, and I want to say as well that our union is of the view that this CFP process is flawed and that we support the demand as outlined by John earlier this morning that this has got to be frozen and reviewed with an eye to fixing a process that is going to, at the end of the day, harm the clients that all of you serve so well.*
>
> *As some of you have been speaking to our members, project officers, you've probably gotten the feeling over the last few months that we don't always seem to know a whole lot of what the hell's going on in this department. And I think that that's not just by accident. I think that one of the things that I wanted to share or bring to the dialogue and important debate that you're all going to have here today is that what's happening right now is not simply an aberration or a series of screw-ups by mid- or senior-level people in the department. We believe in the CEIU that in fact what we're seeing now, the removal of local decision-making from our members and from communities that we've worked with, is in fact another step along the road to privatization and turning the client services into little more than a Wal-Mart system of employment service in this country.*
>
> *This is a process that began back in '95, '96, the same as* Martin *budget of 1995 that laid off 50,000 of our members, and the next day he flew down to Wall Street to talk to the*

bond rating agencies rather than talk to the workers whose jobs he just cut. That's the kind of government that we're dealing with. So believe me, the fight that you're entering into here today is not going to be an easy one, but it's a critical one, and it's one that we must all join in.

At that time in '95, '96, what happened in our communities was the massive contracting out of federal employment services. Now, I've had discussions with people in this room before about what that meant, and I don't think that we're apart on that issue. I don't think we disagree with each other. Our view in the CEIU was that the government has thrown the baby out with the bathwater when they started shutting down federal employment centres across this country, and that that set in motion a series of problems and gaps in service and access to services that could have been solved had they at least kept some system of referral out of those centres that our members work in. But I don't think that should mean that we were opposed to the services and the funding that we then entered into, because we'd always worked with the community and we'd always funded the community grassroots-based organizations.

And so what I wanted to say to you today was that when they did that in '95, '96, that was step one: take the [state] out of direct services. And when they did that, the next step was what you're seeing today, and that's removal of local decision-making and a closure of more offices, believe me, and our part is on the way.

One of the things that that's about, of course, is opening the door to private sector coming here to make money on the backs of the unemployed of this country, and I think it's really important that we take a look at how it's funded, because the money, the EI fund which is money contributed by workers in this country, is now going to be taken out of their pockets and used to cut community-based services and hand it over to the private sector. That's the agenda that's on display. Let's make no mistake about it. It's a transfer of money from the pockets of the workers into the profit margin of companies that are going to look at this as poverty industry bonanza, and that's where this is going.

I wanted to keep my remarks brief, but I've just gone through a ratification process, and you get kind of fired up when you talk about this employer. Actually, I was going to introduce myself by saying I'm someone who works with the bastards, but I think we need to take a look at what that really, truly represents, so I need turn no further than a report that was done, even asked for by HRSDC from IBM (International Business Machines). This is the same organization that did this kind of report for the Campbell government in BC. And what IBM came back to HRSDC with

> *was a set of observations and recommendations of what they needed to do to improve and streamline their services, and one of the things they told HRSDC in that report a couple of years ago now was that the problem with this department over the years has been that its focus had been on public services, direct services to clients. What they needed to do was to shift their thinking into how to achieve the lowest unit production costs. That was the language of IBM, and it's coming true in the department.*
>
> *Our membership right now are living in an environment of fear and intimidation. Project officers are being told they'll be held personally responsible if every penny doesn't add up or if they spend money on things like water. We've had people called up on the carpet because they've funded in a community organization a bottle of bloody water.*
>
> *This is an outcome of the kind of approach that IBM recommended. They talked about further contracting out and they talked about using for-profit agencies to do the work. This is the agenda.*
>
> *Well, the impact on our membership has been negative, and yet we do have individuals who want to speak up and join with you in this. And I think today – [there's a saying in the labour movement]: the longer the line, the shorter the strike. And I want all of you in this room to know that this morning the CEIU is going to join your line in this fight. Thank you very much.*
>
> [*Sic* throughout]

[19] Mr. Wojick testified that he received a copy of the transcript of these remarks, and that he was concerned about many of the statements made by Mr. Shaw. In particular, he drew attention to the reference to "a series of screw-ups by mid- or senior-level people in the department" in the third paragraph, the statement that the new system opened the door to "the private sector coming here to make money on the backs of the unemployed" in the sixth paragraph, the allusion to the employer as "the bastards" in the eighth paragraph, and the statement that employees were "living in an environment of fear and intimidation" in the ninth paragraph. He was particularly concerned that the statements had been made at a public meeting attended by both recipients and providers of services in programs for which his department was responsible; he felt that the statements had the capacity to undermine the credibility and effectiveness of the department.

[20] Mr. Wojick said that he assessed Mr. Shaw's conduct in light of the *Values and Ethics Code for the Public Service* (Exhibit E-2), which applies to all employees. He gave the following as examples of some of the principles that public servants are expected to observe:

. . .

- *Public servants must work within the laws of Canada and maintain the tradition of political neutrality of the Public Service. . .*
- *Public servants shall perform their duties and arrange their private affairs so that public confidence and trust in the integrity, objectivity and impartiality of government are conserved and enhanced. . .*
- *If a conflict should arise between the private interests and official duties of a public servant, the conflict shall be resolved in favour of the public interest. . .*
- *Respect for human dignity and the value of every person should always inspire the exercise of authority and responsibility.*

. . .

[21] Mr. Wojick stated that he concluded that, by making the remarks he did at the January 28, 2005, meeting, Mr. Shaw had failed to live up to these obligations in a number of ways. He said that he interpreted the comments as being disrespectful and personally hurtful to managers, as having the potential to undermine public confidence in the department, and as conveying a political viewpoint on issues about which Mr. Shaw was obliged to maintain public neutrality. Though he conceded that he had not received direct complaints from members of the public or client organizations, he understood Mr. Shaw's statements to have occasioned distress and anxiety among people and organizations who relied for service on the unit. In consultation with his superiors in the department, Mr. Wojick decided to have a meeting that would investigate Mr. Shaw's conduct further. Mr. Shaw attended, along with a representative of the CEIU, and the Director General of the region attended the meeting as well. Mr. Wojick said that Mr. Shaw did not offer satisfactoryn explanation for his conduct, so the decision was made to impose the penalty of a 10-day suspension.

Summary of the arguments

[22] The basic argument made by counsel for the employer was that the conduct of Mr. Shaw at the meeting of January 28, 2005, contravened his obligations as an employee to refrain from endangering the credibility of the department and to show respect for his employer. He suggested that the *Values and Ethics Code for the Public Service* clearly sets out the obligations of employees in this regard and indicates that an employee is expected to put aside personal opinions in order to maintain the confidence of the public in the programs and services offered by the government, to treat others with respect, and to behave with circumspection. In this respect, counsel drew to my attention the decision of the Public Service Staff Relations Board ("the Board") in *Stewart v. Canada (Treasury Board)*, PSSRB File No. 168-2-108 (1976) (QL), which upheld the discipline of an employee for writing a newspaper article critical of his employer. The Board quoted the following statement from a decision of the United States Supreme Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S. Ct. 1731 (1968):

. . .

> *At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.*

. . .

[23] The Board went on to observe, at page 8 of *Stewart*:

. . .

> *The Chief Adjudicator reasonably inferred from the evidence that the article contained a series of attacks on the Minister of Supply and Services and that "in all the circumstances [the article] is wholly inconsistent with the role of a public servant…" If we were called upon to make a determination on the merits, we would have no hesitation in arriving at the same conclusion. We are not persuaded, any more than was the Chief Adjudicator, "that the Bill of Rights swept away the tradition that a civil servant should refrain from attacking publicly the policy or integrity of his own government. He*

> *may cast a ballot against it, but he may not campaign against it in the press."*
>
> . . .

[24] Counsel also pointed me to several decisions that have explored the obligations of a public servant in the context of the so-called "whistleblower defence." In *Fraser v. Canada (Public Service Staff Relations Board)*, [1985] 2 S.C.R. 455, Dickson C.J.C. put forward the following proposition, at para. 41, contemplating that there may be circumstances in which it is appropriate for a public servant to be critical of the government:

> . . .
>
> *And indeed, in some circumstances, a public servant may actively and publicly express opposition to the policies of a government. This would be appropriate if, for example, the Government were engaged in illegal acts, or if its policies jeopardized the life, health or safety of the public servant or others, or if the public servant's criticism had no impact on his or her ability to perform effectively the duties of a public servant or on the public perception of that ability. But, having stated these qualifications (and there may be others), it is my view that a public servant must not engage, as the appellant did in the present case, in sustained and highly visible attacks on Government policies.*
>
> . . .

[25] In *Stenhouse v. Canada (Attorney General)*, 2004 FC 375 (FC), Kelen J. read this as follows:

> . . .
>
> *Chief Justice Dickson . . . identified two situations where freedom of expression prevails over the duty of loyalty, namely, where the government is engaged in illegal acts, or if its policies jeopardize the life, health or safety of the public, and where criticism does not have an impact on a public servant's ability to perform effectively the duties of a public servant or on the perception of that ability.*
>
> . . .

In this reading – with a conjunctive "and" rather than a disjunctive "or" between the first and the last part of the comment of Dickson C.J.C. – the ability to perform the job effectively is a condition of being able to speak out on the illegal or unsafe acts of the government, not a ground in itself for being able to speak freely.

[26] Though this point was not discussed explicitly in the more recent decision of the Federal Court of Appeal in *Haydon v. Canada (Treasury Board)*, 2005 FCA 249, Desjardins J.A. did, at paragraph 13, say of the passage above from *Fraser* :

. . .

> *The Supreme Court of Canada identified three situations where freedom of expression prevails over the duty of loyalty, namely whether the Government is engaged in illegal acts, or if its policies jeopardize the life, health or safety of the public, and where criticism does not have an impact on a public servant's ability to perform effectively or on the perception of that ability.*

. . .

[27] Counsel for the employer conceded that, where employees are represented by a bargaining agent, its officers may be granted some latitude with respect to the degree of deference they are required to show to their employer. Even if this is the case, however, he argued that such latitude does not represent carte blanche for a representative to ignore his or her responsibilities as an employee. In his decision in *Stewart v. Treasury Board*, PSSRB File No. 166-2-2000, the adjudicator said:

. . .

> *There is no doubt that employees entitled to bargain collectively are entitled to speak their minds about the subject matter of their negotiations and to criticize the position taken by the employer's negotiators. It does not follow that they are entitled to attack publicly any Minister, deputy head or department in respect of matters remote from collective bargaining and closely associated with political controversy.*
>
> *Some common sense must be brought to bear on the problem. An employer has obligations to employees; in return those employees have certain obligations to the employer, whether or not they appear in a statute, a regulation or a collective agreement. One such obligation is to render a useful service. Another is to refrain from attempting to defeat or frustrate what the employer is trying*

> *to do, whether the employer is wise or unwise in trying to do it.*
>
> . . .

[28] This comment was approved in the adjudication decision in *Chedore v. Treasury Board (Post Office Department)* (1980), 29 L.A.C. (2d) 42, where the adjudicator held that appropriate recourse for union representatives was through bargaining with the employer or through the grievance procedure, rather than through the press.

[29] In the decision of the arbitration board in *School District No. 22 (Vernon) and C.U.P.E., Local 5523 (Hegler)* (2002), 104 L.A.C. (4th) 435 (Taylor), the majority of the board also suggested (at pages 443-444) that there are limits on the latitude enjoyed by a union officer:

> . . .
>
> *The authorities do not stand for the proposition that a union official is immune from discipline for acts of insubordination. They make the point that union officials must be free to properly and fully represent their members in grievance, arbitration and collective bargaining matters without being subject to discipline for acts which fall within the exercise of those and other legitimate union duties. The protection does not extend to conduct which falls outside the proper scope of union responsibility.*
>
> . . .

Counsel for the employer argued that the conduct of Mr. Shaw did fall outside the scope of his responsibilities as a union officer. He pointed out that Mr. Shaw had made the disputed comments at a meeting attended by clients and contractors, in a quite public setting, and not at the bargaining table or in the confines of a grievance meeting. He further drew a distinction – as did Mr. Wojick when he explained the reasons for imposing discipline - between the position of Mr. Shaw as an elected officer of the bargaining agent's local and that of a full-time staff member of the bargaining agent. Someone who is employed full time to speak for the bargaining agent may be subject to relatively few limits. However, a person in Mr. Shaw's position must always reconcile their duties as a representative with their responsibilities as an employee, and it is expected that their obligations to the employer will trump whatever obligation they owe to the bargaining agent or to other employees.

[30] Counsel for the grievor/complainant argued that the standard by which the conduct of representatives is now measured has changed significantly since the observations made in cases like *Chedore*. In this respect, she argued, "whistleblower" cases like *Fraser, Haydon* and *Stenhouse*, which suggest that public servants may only challenge their employers where illegality or a threat to health or safety is involved, are not relevant to this case. The position of representatives is quite different from that of ordinary employees who have a difference of opinion with their employer. In matters that affect the terms and conditions of employment of the employees they represent, officials must be able to candidly and openly challenge the decisions made by the employer, and there must be some protection from retribution when they do so.

[31] The basic rationale for this was outlined in *Re Firestone Steel Products of Canada and U.A.W., Local 27* (1975), 8 L.A.C. (2d) 164 (Brandt) at 167-68:

. . .

> *For the purposes of assessing whether or not conduct is insubordinate the standard of conduct that the company is entitled to expect should be different when applied to the acts of union committeemen engaged in the legitimate discharge of their duties…a committeeman is, while attempting to resolve grievances between employees and company personnel, always functioning on the borderline of insubordination. His role is to challenge company decisions, to argue out company decisions and, if in the discharge of that role he is exposed to the threat of discipline for insubordination, his ability to carry out his role will be substantially compromised.*

. . .

[32] In *Burns Meats Ltd. v. Canadian Food & Allied Workers, Local P139* (1980), 26 L.A.C. (2d) 379 (Picher), which involved statements made by the grievor in a union newsletter, the board commented:

. . .

> *While generally a company may be entitled to expect a degree of faithfulness and respect from employees in statements which they make after working hours, it is clear that an employer cannot hold employees to a standard of unquestioning loyalty, especially where union business is concerned. It would be unrealistic not to expect that a union steward will, whether in a speech or a newsletter, occasionally express strong disagreement with the company*

> *and its officers, and do so in vivid and unflattering terms. Being at the forward edge of encounters with management, the shop steward becomes particularly vulnerable in the area of discipline.*
>
> . . .

[33] In *Canada Post Corp. v. C.U.P.W. (Van Donk)* (1990), 12 L.A.C. (4th) 336 (Burkett), the arbitrator cited a number of labour relations board decisions recognizing that communication with the public and the media is often an aspect of the collective bargaining process, and that protection must be offered to union officials speaking in this context as well as at the bargaining table. The arbitrator stated at page 344:

> . . .
>
> *If union stewards are to have the freedom to discharge their responsibilities in an adversarial collective bargaining system, they must not be muzzled into quiet complacency by the threat of discipline at the hands of their employer. In our view the principles developed by the arbitral awards canvassed above and by the Court in* [Linn v. United Plant Guard Workers (1966), 383 U.S. 53] *disclose the standard to be applied. The statements of union stewards must be protected, but that protection does not extend to statements that are malicious in that they are knowingly or recklessly false. The privilege that must be accorded to the statements of union stewards made in the course of their duties is not an absolute license or an immunity from discipline in all cases.*
>
> . . .

[34] This standard was also adopted by the arbitrator, after a careful review of a number of cases, in *National Steel Car Ltd. v. U.S.W.A., Local 7135 (Ryerson)* (2001), 101 L.A.C. (4th) 316 (Shime) at page 330:

> . . .
>
> *After reviewing the decided cases and after considering the difficult role of Union officials, who are also employees, in representing the interests of Union members, I am of the view that considerable leeway must be given to employee/officials in performing their proper Union responsibilities. Such employee/officials are entitled to be sheltered from discipline and discharge for their acts and conduct and protection may range from immunity in some instances, to requiring an employer to strictly prove either malicious or reckless conduct on the part of the employee/union official in other instances.*

> *Also, some distinction should be made between internal and external speech and conduct. Thus, where an employee/official, acting within the scope of his/her authority as a Union official, engages in abusive speech in a closed door meeting, he/she may be immune from discipline. However, speech or statements made outside to third persons, such as the press, by a Union official, may attract discipline only if the speech or conduct is malicious or reckless.*
>
> . . .

The arbitrator went on to suggest that a union official should also be acting in good faith when carrying out union responsibilities.

[35] Counsel for the grievor/complainant referred me as well to the decisions in *Nicole Fugère v. Québecair/Air Québec* (1987), 77 di 44; 88 CLLC 16,035 (C.L.R.B.); and *Cassellholme, Home for the Aged v. C.U.P.E., Local 146 (Campbell)* (2004), 128 L.A.C. (4th) 425 (Carrier), where this standard based on maliciousness, recklessness and bad faith is further discussed.

[36] Counsel urged me to reject the distinction put forward by counsel for the employer between elected representatives and full-time staff members employed by the bargaining agent. She suggested that, as the cases mentioned above demonstrate, it is representatives who are employees who are at risk of being disciplined by employers for statements made in the course of carrying out their representational responsibilities. The duty of fidelity owed to the employer by an employee who is also a bargaining agent representative must, therefore, be balanced against the responsibility to represent other employees and the standard outlined in these cases is the appropriate way of evaluating that balance.

[37] Counsel also took issue with the assertion made on behalf of the employer that the conduct of Mr. Shaw could not be characterized as falling within the scope of his responsibilities as a representative. The bargaining agent had been arguing systematically for some years against the contracting out of work previously done by its members. Though, clearly, one of the central concerns of the bargaining agent was the loss of jobs, it had also made many statements about the negative implications of contracting out on the quality of services provided. While the members of the bargaining agent had tried to maintain an acceptable level of service to clients within the framework of new relationships with outside contractors, they saw the

introduction of the CFP system as undermining their ability to ensure that quality service could be offered. Representatives like Mr. Shaw viewed a sustained critique of the way the CFP process was working as an important element of a strategy aimed at protecting the interests of the employees they represented.

[38] Counsel further argued that the decision to impose discipline on Mr. Shaw represented not only an injury to the grievor but to the bargaining agent, and asked for a declaration that the decision constituted an unfair labour practice within the meaning of section 190 of the *Act*. The imposition of discipline on a bargaining agent official who is engaged in activities legitimately related to the representation of employees constitutes interference in the representation of those employees, and has the potential to inhibit such representatives from acting as forcefully as they should.

Reasons

[39] The fundamental issue in the disciplinary case is whether the conduct of Mr. Shaw at the meeting of January 28, 2005, constituted a breach of his obligations to his employer, or whether his status as a representative of the bargaining agent qualified these obligations sufficiently that he should be protected from discipline in these circumstances. Both parties recognized that bargaining agent officers enjoy some latitude in this regard, though they differ on the extent of that latitude and its implications for this particular sequence of events.

[40] Counsel for the parties provided a number of decisions in which criteria were considered for assessing the conduct of employees who are openly critical of the decisions and policies of their employers. Counsel for the employer argued that the most compelling of these cases are those that emphasize the duty of loyalty owed by an employee to an employer and that strictly limit the circumstances in which an employee will be permitted to openly criticize the decisions made by the employer. Counsel for the grievor, on the other hand, suggested that I should be most influenced by those cases that outline more generous protection for the statements made by a bargaining agent representative. I have concluded that the appropriate standard to apply is that represented by the line of cases put forward by counsel for the grievor, which suggest that representatives should not be subject to discipline unless they make statements that are malicious or knowingly or recklessly false.

[41] The value of this standard is that it makes it possible to take into account the realities of collective bargaining relationships. It is fundamental to such a relationship that those who speak for the bargaining agent chosen by employees to represent them must be able to raise questions about decisions made by the employer that affect the terms and conditions under which those employees work and must be able to challenge the wisdom or legitimacy of those decisions. The responsibility that an officer has to represent employees forcefully and candidly may sit uneasily with the duty of obedience and fidelity such an officer, like other employees, owes to the employer. This makes it necessary to articulate a standard of conduct that does not unfairly expose the officer to discipline for on occasion placing his duties towards the employees he represents ahead of deference to the employer. On the other hand, this standard makes it clear that no officer is shielded from the disciplinary consequences for making statements that are false or malicious.

[42] In this connection, I must reject two of the distinctions made by counsel for the employer. The first of these is the distinction between elected officers at the local level, like Mr. Shaw and staff members employed full time by the bargaining agent. Mr. Bieniasiewicz argued that, while full-time staff members may be permitted more licence to criticize employers, employees who are also officers of the bargaining agent are always constrained by their duty of fidelity and deference to their employer. It is my view that there is no foundation for this distinction. Those elected at the local level to serve in a voluntary capacity are every bit as much representatives as those employed full-time as staff. Indeed, the tension earlier described between the duty of deference to an employer and the responsibility to represent employees forcefully is experienced almost exclusively by elected officers, and, therefore, the rationale I have outlined for providing protection only makes sense in relation to this kind of representative.

[43] The other distinction drawn by counsel for the employer is between bargaining agent activity in a narrow sense, primarily the negotiation of collective agreements and the handling of grievances and the kind of conduct that is at issue here, that is, statements critical of the employer made by an officer of the bargaining agent to a public audience. Again, this seems to me to be a questionable distinction. Collective bargaining is a process in which the parties attempt to bring persuasive pressure to bear on each other in order to bring about or resist change in the terms and conditions of employment of members of the bargaining unit. Though the most common venues

for this are the bargaining table and union-management meetings of various kinds, it has been recognized that both parties may resort to other strategies in an attempt to influence the course of bargaining. In *Canada Post*, though the arbitrator expressed reservations about the effectiveness of the strategy of appealing to a wider audience, he found that it was a common component of collective bargaining, at pages 345-46:

. . .

> *Labour relations matters most often are best dealt with directly by the parties. The airing of such matters in a public forum often impedes resolution by inflaming the situation and encouraging posturing. However, where the parties hold intransigent positions that may affect the public interest they may seek to advance their respective positions through public pressure. This facet of labour relations, especially as it pertains to service industries, is recognized in the jurisprudence cited in this award. It is recognized that union officials may decide to "go public" with such matters. It is stipulated, however, that having made such a decision public statements must not be malicious or knowingly or recklessly false.*

. . .

[44] The evidence demonstrated that the issues canvassed by Mr. Shaw in his comments at the January 28, 2005, meeting, were part of an ongoing interchange between the CEIU and this employer about contracting out bargaining unit work and the alleged defects in the CFP process. Issues such as the loss of positions, changes in work assignments and reporting relationships, the relationships with clients and the quality of services offered were all clearly relevant to the terms and conditions of employment of bargaining unit employees, and, therefore, within the scope of the collective bargaining relationship.

[45] Though the employer found the general tone and tenor of Mr. Shaw's comments objectionable, the decision to impose discipline was based on several particular remarks: the reference to "screw-ups by mid and/or senior-level people," the characterization of the employer as "bastards," the allusion to the use of contractors "on the backs of the unemployed" and the statement that employees were working "in an environment of fear and intimidation". In the case of the first of these statements, Mr. Shaw pointed out that what he actually said was that it was *not* simply a question of "screw-ups by mid and/or senior-level people." He said that what he meant was that the existing situation was not attributable to the management of the department but to

a more fundamental and more ideological set of choices by the government, which, in the view of the bargaining agent, had led to a decline in the quality of the programs offered.

[46] In relation to the use of the term "bastards", Mr. Shaw said that he was not thinking of his own employer when he used this term, but was using this term to point to the irony of his apparent connection with the government he was describing in such unflattering terms. By saying that contractors were operating on "the backs of the unemployed", he was not attacking any particular contractor, but expressing a view often put forward by the CEIU: that the contracting out of employment-related services opened the door to the provision of services by private contractors motivated by an opportunity for profit, and that this profit would derive from the contributions made by employees towards these services through their employment insurance premiums. Finally, he said that he felt the employees he represented were living in an atmosphere of fear and intimidation; he did not think these words were too strong to describe the anxiety of employees due to the pressure attached to the scrutiny of their work by the regional review committees and the new criteria by which they were required to assess proposals for the provision of services by contractors.

[47] Though the comments made by Mr. Shaw were made available to Mr. Wojick – and to me – in the form of a written transcript, the remarks themselves were made extemporaneously, and Mr. Shaw was not speaking from a written script. Considered as a whole, the comments have many of the characteristics of such informal statements: not all the references are clear, the speaker presumes knowledge by the audience of the things he is talking about, and the focus on particular subject matter is not always coherent. It must be remembered, in any case, that the burden is on the employer to show that the conduct of Mr. Shaw exceeded the latitude accorded vigorous representation, latitude which is based on a recognition that the level or deference normally expected from employees may be inconsistent with the role of the bargaining agent's representative. In *Scruby v. Staub (Employment and Immigration Canada)* (1987), Board File No. 161-2-420, the Board commented:

. . .

> *Undoubtedly, there are limits to the immunity enjoyed by union officials in the performance of their duties. However, I have seen nothing to indicate that speaking in an offensive or disrespectful tone of voice transgresses those limits.*

. . .

See also *Prante v. Staines (Solicitor General Canada – Correctional Services)* (1987), PSSRB File Nos. 161-2-388 to 393. In *Scruby*, as in *Burns Meats* and *Canada Post*, the line is drawn at statements which are malicious or knowingly or recklessly false.

[48] There can be no doubt that the remarks made by Mr. Shaw were likely to be hurtful and distressing to Mr. Wojick and other managers. There is no reason to suppose that Mr. Wojick and his colleagues are any less concerned about the quality of the employment-related services provided to the public by the unit than are Mr. Shaw and other employees, or that they are any less concerned about the difficulties caused by the transition to the new CFP system. The employer has failed to show on a balance of probabilities, however, that the statements made by Mr. Shaw were malicious, or knowingly or recklessly false, and I therefore find that the imposition of a disciplinary penalty was not warranted.

[49] Counsel for Mr. Shaw also requested a declaration that the employer, by imposing discipline on Mr. Shaw, committed an unfair labour practice and a violation of the *Act*. The relevant sections of the statute read as follows:

> ***185.*** *In this Division, "unfair labour practice" means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1).*
>
> ***186.*** *(1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall*
>
> *(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or*
>
> . . .
>
> *(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall*
>
> *(a) refuse to employ or continue to employ, or suspend, or lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person because the person*

. . .

(iv) has exercised any right under this Part or Part 2;

190. *(1) The Board must examine and inquire into any complaint made to it that*

. . .

(g) the employer, an employee organization or any person has committed an unfair labour practice within the meaning of section 185.

191. *(3) If a complaint is made in writing under subsection 191(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[50] As I have indicated earlier, the rationale for protecting bargaining agent representatives from discipline for statements critical of the employer unless those statements are malicious or false is that such representatives must be able to make the judgment that it is necessary to forego the ordinary level of deference to the employer in order to carry out a responsibility to represent employees forcefully and candidly. The legislative purpose expressed in the provisions I have quoted here is similar. Discipline which singles out people for having exercised their rights under the *Act* constitutes interference with union representation. It not only makes it difficult for representatives to perform their representational duties and exacts a personal price that may inhibit them from challenging the employer, it also sends a message to other employees about the dangers of exercising their own rights under the *Act*. Thus, employers are expected to refrain from making disciplinary decisions that violate the above provisions.

[51] The argument of the employer here was directed at showing that the conduct of Mr. Shaw did not fall under the rubric of activity connected to collective bargaining. I have found that this argument must fail and that Mr. Shaw was exercising his rights under the *Act* when he made his speech. Though I accept that Mr. Wojick and his colleagues were sincerely of the view that Mr. Shaw was acting outside the scope of his responsibilities as an officer of the bargaining agent and that they assessed his conduct in this light, this does not in itself meet the onus of showing that no failure to observe the requirements of the statute occurred. By unilaterally defining the actions

of Mr. Shaw as not being union activity, the employer failed to take into account fully the sensitivity of Mr. Shaw's position and the implications of imposing discipline under these circumstances. I therefore find that the employer did commit an unfair labour practice by suspending Mr. Shaw.

[52] It should be noted that counsel for the employer placed heavy emphasis in his argument on the disciplinary infraction of Mr. Shaw, and did not address significant attention to the implications of the disciplinary penalty in relation to the unfair labour practice complaint under section 190 of the *Act*. In particular, counsel did not make any argument that the three individuals named in the complaint – Mr. Wojick, Ms. Robillard and Mr. Wouters – should not be found guilty of an unfair labour practice in the event the complaint was upheld against the department. Though counsel for the grievor did not particularize any conduct on the part of these individuals which might constitute a violation of the *Act* – other than their association with management levels in the department because of their respective positions – it must be remembered that sub-section 191(3) makes the written complaint itself evidence of the alleged violation, and places the burden on the employer, in this case, to rebut the truth of the allegation. I, therefore, feel I have no choice but to uphold the complaint against the three individuals.

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

(The Order appears on the next page)

Order

[54] The grievance of Mr. Shaw, with respect to the 10-day suspension, is allowed.

[55] The employer is ordered to compensate Mr. Shaw to the amount of all wages and benefits he lost due to the suspension.

[56] The complaint that Stan Wojick, Lucienne Robillard and Wayne Wouters committed an unfair labour practice, contrary to s. 190(1)(*g*) of the *Act*, is allowed.

November 10, 2006.

Beth Bilson,
adjudicator and Board Member