Date: 20061102

File: 166-34-36584

Citation: 2006 PSLRB 119

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

STEPHEN BYFIELD

Grievor

and

CANADA REVENUE AGENCY

Employer

Indexed as
Byfield v. Canada Revenue Agency

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

REASONS FOR DECISION

Before: Barry D. Done, adjudicator

For the Grievor: Steven Eadie, Professional Institute of the Public Service of Canada

For the Employer: James Gorham, Department of Justice

Heard at Toronto, Ontario,
June 14 and 15, 2006.

Grievance referred to adjudication

[1] Mr. Byfield (the grievor) grieved the imposition of a one-day suspension on April 12, 2004. He believes the suspension was "unwarranted, punitive, unreasonable, harassing and in bad faith". The employer believes the grievor's behaviour was both insubordinate and disrespectful towards his recent supervisor, Jack Meggetto, who was Team Leader in the Enforcement Division at the Canada Revenue Agency, and deserving of a one-day suspension.

[2] The grievor is an auditor/investigator at the AU-03 group and level. As such, his relevant collective agreement (Exhibit G-1) is the one for the Audit, Financial and Scientific group, and expires December 21, 2003.

[3] 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*, this reference 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*").

Summary of the evidence

[4] At the hearing, two witnesses were called and 37 exhibits were submitted. The facts are straightforward and, for the most part, are not disputed.

[5] The grievor was unhappy with both of his former team leaders, Angelo Villella and Cecil Lindo; the grievor believed Mr. Villella had written both an unfair and inaccurate performance assessment (EPMR) and a threatening letter (Exhibit G-5). As a result, the grievor grieved (Exhibits G-3 and G-5), wrote a letter of complaint to his director, Don Renaud (Exhibit G-7), and filed a formal harassment complaint (Exhibit G-4).

[6] The department's reaction to the performance appraisal was to implement an action plan designed to develop the grievor's performance so as to meet management's performance expectations (Exhibit E-2). This action plan was created by Mr. Lindo, Manager, C.I.P. Investigations, on December 11, 2003, and was to apply to the grievor until August 31, 2004.

[7] The grievor refused to sign the action plan, and grieved it on March 11, 2004 (Exhibit G-3). The action plan required weekly meetings with the grievor's supervisor,

and it was Mr. Byfield's refusal to attend these weekly meetings that gave rise to the disciplinary action in this matter.

[8] As a result of the grievor's harassment complaint against Mr. Villella, the grievor began to report to a new supervisor, Jack Meggetto, on March 9, 2004 (Exhibit E-1). This change did little to resolve either the performance issue or the supervisory issue, as within only 24 days a one-day suspension was issued. The grievor's dissatisfaction with his two former supervisors continued with his next supervisor and very quickly escalated from suspicion to mistrust and even fear.

[9] Initially, the grievor was concerned about the level of complexity of files he was being assigned, and with respect to one in particular (Exhibit E-3), he believed it was too junior a file for his AU-03 level. Next (Exhibit E-6), the grievor, contrary to his supervisor's request, arranged a meeting with an auditor, to be held in Barrie, Ontario, as opposed to Toronto. The grievor disagreed with Mr. Meggetto that it was necessary for the latter to attend that meeting. As well, later that day, despite his supervisor's request (Exhibit E-7) to be provided with a copy of the questions the grievor proposed to ask the auditor in Barrie, Ontario, the grievor refused to provide such copy, explaining (Exhibit E-8) that he'd already provided it and had no time to do so again. The grievor continued along these same confrontational lines when he chose to revisit his earlier concern about the complexity of a file assigned to him, although that issue had already been dealt with one week earlier (Exhibit E-4). Although he had been advised to work on the file assigned to him, the grievor again challenged that decision (Exhibit E-12) and, receiving the same reply, chose to refer the matter to Mr. Renaud, Mr. Meggetto's supervisor (Exhibit E-15). All of these events happened within two weeks of the grievor's new reporting relationship.

[10] Although the grievor attended three meetings with Mr. Meggetto - on Tuesday, March 9, 2004 (his first day reporting to his new supervisor), on Friday, March 12, 2004, and Friday, March 19, 2004 - he refused to attend the next four scheduled meetings:

> 1) Thursday, March 25, 2004:
>
> Mr. Byfield e-mailed Mr. Meggetto (Exhibit E-16) that he would only agree to meet on Thursdays at 2:30 p.m. Seven minutes after that e-mail he again e-mailed Mr. Meggetto (Exhibit E-17) saying he was unavailable to

> meet on March 25, 2004, as he was in Barrie, Ontario, in transit or otherwise "pre-occupied" for most of the day.
>
> 2) Monday, March 25, 2004, 2:29 p.m.:
>
> Mr. Meggetto e-mailed Mr. Byfield (Exhibit E-20) in reply that same afternoon, stating that the meeting for March 25, 2004 at 2:30 p.m. would proceed as scheduled if Mr. Byfield returned from Barrie, Ontario, before 2:30 p.m. Mr. Byfield opened this e-mail on March 25, 2004, at 4:45 p.m. (Exhibit E-21). In the e-mail, Mr. Meggetto had advised him that if they did not meet upon Mr. Byfield's return to the office, the meeting would be held on the following Monday, being March 29, 2004, at 9:30 a.m.. Again, Mr. Byfield refused to attend, saying he was not available, but not explaining why he was not available (Exhibit E-22). He reiterated that he would only meet on Thursdays at 2:30 p.m.
>
> 3) Monday, March 29, 2004, 1:30 p.m.:
>
> Mr. Meggetto responded (Exhibit E-23) on Monday, March 29, 2004, at 11:22 a.m., inviting Mr. Byfield to a meeting at 1:30 p.m. that day. Mr. Meggetto cautioned Mr. Byfield that if he chose not to attend disciplinary action would be taken. Mr. Byfield opened this e-mail at 5:20 p.m., March 29, 2004, and did not attend the meeting.
>
> 4) Tuesday, March 30, 2004, 10:35 a.m.:
>
> By an e-mail (Exhibit E-25) on the date and time above, a copy of which Mr. Meggetto hand-delivered to Mr. Byfield, Mr. Meggetto directed Mr. Byfield to meet with him immediately, failing which he would be disciplined. Seven minutes later, Mr. Byfield again refused, (Exhibit E-26) referring to his earlier statement that he would only agree to meet on Thursdays, at 2:30 p.m. (Exhibits E-26 and E-22). After consulting with his supervisor and with staff relations, and after reading relevant portions of the collective agreement (Exhibit G-1) as well as the employer's *Discipline Policy* (Exhibit E-27), Mr. Meggetto recommended that Mr. Byfield be disciplined. A one-day suspension was imposed.

[11] In cross-examination, Mr. Meggetto acknowledged that Exhibit E-2, the action plan, in the right-hand column, provided for potential termination as one of seven options that could result from the plan. Mr. Meggetto said that the grievor was cooperative at the outset, but that he felt strongly about his position and was often defensive. It was not until March 25, 2004, that Mr. Meggetto realized there was a real

problem. Mr. Meggetto's delegated authority to discipline was limited to issuing a written reprimand, but the employer's discipline policy (Exhibit E-27) provided for no less than one and up to thirty days of suspension for insubordination.

[12] The grievor began with the precusor to the Canada Revenue Agency in 1992. In his testimony, he briefly reviewed his career and explained his functions as an AU-03. He said that in December 2003 he'd received a "bad appraisal", which he disagreed with, as he was given a "did-not-meet" rating for overall time taken in general and, specifically, for having spent too much time on civil assessments. He said his earlier appraisals were good and that he'd had no previous indications there was any concern with his performance. A "did-not-meet" rating meant there needed to be an action plan to correct identified deficiencies (Exhibit E-2). He didn't agree with the weekly meetings, as he found them unhelpful and was unclear as to how his performance was to be measured. Moreover, he was alarmed that termination could result from the action plan. He gave several examples of what he believed was bad supervision by Mr. Villella bordering on abuse and harassment. In comparison, he acknowledged that Mr. Meggetto was never abusive at meetings. Dealings with his two former supervisors led the grievor to be suspicious of management, hence his insistence on the attendance of a union representative or observer at the meetings.

[13] The grievor felt anxious about the weekly meetings and felt he needed the calming effect of regularly scheduled meetings. He refused to attend the two meetings proposed for March 29, 2004, because they were not on Thursdays, as previously agreed, and he wanted to hold Mr. Meggetto to that agreement (Exhibit G-2). As well, he said that he was not available to attend other subsequent meetings because his anxiety level was such that he required medication and his Employee Assistance counsellor had recommended that he not attend, or only attend with an observer, those meetings that were "randomly" scheduled. He had never been disciplined before this one-day suspension.

[14] In cross-examination, the grievor said he did attend the weekly meetings with Mr. Villella. The grievor had little experience with civil assessments, as they were done for him by auditors, but he had not requested any training in how to do them. Nor was he taking his own notes at the weekly meetings with Mr. Meggetto. The grievor said that he did not want to meet with his supervisor on what he considered a junior file, although he acknowledged that the complexity of a file can change and, in any case,

the assignment of files is a management decision. The grievor agreed with counsel for the employer that he had not mentioned any medical diagnosis of anxiety in his January 26, 2004, letter to Mr. Renaud (Exhibit G-7), and that he hadn't provided the employer with a doctor's note explaining his medical need for regularly scheduled meetings. Shown Exhibit E-26, the e-mail of March 30, 2004, by which he refused to attend a meeting that morning, the grievor agreed he hadn't mentioned any medical condition as explanation. He added that he had to do what he had to do, that he'd suffered enough, and, if that meant not attending a meeting, he would not go.

[15] As there was insufficient time remaining to prepare for and present oral submissions, the parties agreed to make written submissions.

Submission by the employer

. . .

PART 1 – OVERVIEW AND FACTS

A. OVERVIEW

1. This case asks the question: "Who gets to decide when a work-related meeting will take place, the manager or the worker?" Put another way: "Can the Employer require an employee to attend a work-related meeting with his supervisor at the employee's normal place of work and during normal hours of work?"

2. The Grievor, Stephen Byfield, was required to meet with his Team Leader each week to discuss his caseload (the "Action Plan meetings"). The Employer deemed the Action Plan meetings necessary to ensure that Mr. Byfield was managing his time effectively and efficiently. The EPMR, the Action Plan, and the weekly meetings were all means by which the Employer was attempting to manage Mr. Byfield's performance.

3. In an obvious attempt to avoid the meetings, and thereby thwart the Employer's ability to manage his performance, Mr. Byfield advised the Employer that the weekly meetings must take place at 2:30 pm on Thursday afternoons. He further advised that, if he was not available on any given Thursday at 2:30 pm, the weekly meeting would not take place at all.

4. Mr. Byfield was informed by his supervisor that his position with respect to the cancellation of the weekly meetings was unacceptable. However, rather than asserting

his position through the grievance process, Mr. Byfield simply refused to attend any further Action Plan meetings, despite the fact that he was given notice of the meetings, and the meetings were scheduled at his normal place of work, during his normal hours of work.

5. After the first such refusal, Mr. Byfield was warned, verbally and in e-mails, that failure to attend the meetings would constitute insubordination, with the result that disciplinary action would be taken. Despite these warnings, Mr. Byfield continued to refuse to attend the meetings. He gave the Employer no valid reason for why he was not available to attend the meeting.

6. At a subsequent disciplinary meeting, a one-day suspension was imposed on Mr. Byfield on the grounds that his refusal to obey the direct order to attend the meeting constituted insubordination.

B. BACKGROUND – THE ACTION PLAN

7. At all relevant times, Stephen Byfield was an Investigator at the Toronto North Tax Services Office. Mr. Byfield's work required him to conduct investigations which lasted over several months, frequently over more than one year. This required Mr. Byfield to complete many tasks over the course of his investigation, some of which were time sensitive.

8. Mr. Byfield was given a "does not meet" rating on his Employee Performance Management Report (EPMR) for the period September 1, 2002 to August 31, 2003. On December 12, 2003, Mr. Byfield's supervisor, Team Leader Cecil Lindo, established an Action Plan to improve Mr. Byfield's performance.

9. The problem with Mr. Byfield's performance was identified as poor time management. The Employer determined that Mr. Byfield was not effectively managing his time and, as corrective action, required Mr. Byfield to attend weekly meetings with his Team Leader to discuss his caseload.

10. Mr. Byfield decided, soon after the Action Plan was finalized, that weekly meetings were neither helpful nor appropriate. In his opinion, meetings on a monthly basis would be more appropriate. He refused to sign the Action Plan. Furthermore, on the day after the Action Plan was finalized, Mr. Byfield filed a grievance with respect to his EPMR and the subsequent Action Plan.

11. After filing the grievance, Mr. Byfield was assigned to a new Team Leader, Angelo Villella.

12. On January 26, 2004, Mr. Byfield wrote to Mr. Villella's immediate superior, Mr. Don Renauld, Assistant Director of Investigations, complaining about Mr. Villella's conduct at the weekly Action Plan meetings. In his brief e-mail, Mr. Byfield gave no details of the allegedly inappropriate conduct at the meetings, but accused Mr. Villella of harassment. Mr. Byfield asked that the Action Plan meetings be suspended until a meeting could be held between Mr. Renauld, Mr. Byfield and a union representative to discuss the situation.

13. Mr. Renauld subsequently met with Mr. Byfield concerning his e-mail. Also present at the meeting were Mr. Steve Eadie (union representative) and Mr. Al McCaie, a staff relations officer. Mr. Renauld advised Mr. Byfield that the weekly Action Plan meetings must continue, a decision that Mr. Byfield questioned in a follow-up letter to Mr. Renauld on February 2, 2004.

14. Mr. Byfield was absent from work for several days during the period February 1, 2004 to February 22, 2004. He was also absent due to illness from February 23, 2004 to at least March 2, 2004.

15. On March 2, 2004, after seven days absence from the workplace during which Mr. Byfield did not return voice messages left on his home telephone, Mr. Villella wrote to Mr. Byfield advising that, on his return to work, the Employer would require a medical note from Mr. Byfield's doctor indicating he was fit to return to work. Despite this request, Mr. Byfield did not provide a note confirming his fitness to return to work.

16. On March 8, 2004, Mr. Byfield filed a harassment complaint against Mr. Villella, Mr. Cecil Lindo, (the Team Leader who had developed the Action Plan), Mr. Jack Tse (another Team Leader) and Mr. Renauld.

17. On March 10, 2004, Mr. Byfield filed two grievances. One grievance was with respect to the manner in which Mr. Villella was implementing the Action Plan. The other grievance was with respect to Mr. Villella's letter of March 2, 2004.

C. THE INCIDENT OF INSUBORDINATION

18. On March 9, 2004, Mr. Byfield was assigned to work with a new team leader, Jack Meggetto. Mr. Meggetto was Mr. Byfield's third Team Leader in three months.

19. Mr. Meggetto met with Mr. Byfield on March 9th to discuss Mr. Byfield's caseload. During that meeting, Mr.

Byfield and Mr. Meggetto agreed to conduct weekly meetings as per the Action Plan every Thursday at 2:00 pm.

20. According to their discussion on March 9th, the first Action Plan meeting between Mr. Meggetto and Mr. Byfield would have been Thursday, March 18, 2004. However, Mr. Meggetto was not available on March 18th, so their first Action Plan meeting was held on Friday, March 19, 2004.

21. The schedule established on March 9th called for Mr. Byfield and Mr. Meggetto to meet on Thursday March 25, 2004.

22. At 9:12 am on March 25, 2004, Mr. Byfield sent Mr. Meggetto an email confirming their agreement to meet every Thursday at 2:30 pm to discuss his work as per the Action plan. He further stated that:

> "This is the only day and time of each week that I will available for such a meeting. If either one of us is not available for the meeting on Thursday at 2:30 then the meeting must be postponed unto the following Thursday at 2:30.

23. Seven minutes later, at 9:19 am on Thursday March 25th, Mr. Byfield advised Mr. Meggetto that he would be unable to meet on that day due to a meeting with an Auditor in the Barrie Tax Services Office.

24. In an email sent at 2:29 pm on March 25th, Meggetto stated that the Action Plan calls for "weekly" meetings and "…if our schedule does not permit us to meet on the agreed date of Thursday at 2:30pm, we will meet at the first available time." This email was opened by Mr. Byfield at 4:42pm pm Thursday March 25, 2004.

25. In a separate email, also sent on March 25th at 2:29pm, Mr. Meggetto advised Mr. Byfield that "… if you are in the office before 2:30pm we will meet as scheduled. If you do not return to the office we will meet at 9:30 am Monday March 29, 2004.

26. Mr. Byfield testified that he returned to the office shortly after 2:30 pm on the afternoon of March 25th, and read Mr. Meggetto's message at 4:45pm.

27. Although he read the message on Thursday afternoon, Mr. Byfield did not attend the meeting with Mr. Meggetto at 9:30 am on Monday March 29th. In fact, he did not even respond to Mr. Meggetto until 9:53 am on March 29th, 23 minutes after the meeting should have commenced. When asked why he did not respond in a more

timely fashion, but chose to let the matter sit for over 72 hours (Thursday afternoon to Monday morning) Mr. Byfield stated that he was upset by Mr. Meggetto's message, and delayed his response in order to calm down.

28. Clearly Mr. Byfield's strategy did not work. After 72 hours to calmly consider his response to Mr. Meggetto's request, Mr. Byfield wrote:

> "I am not available to meet with you today. I take great exception to having the times and dates of meetings unilaterally imposed apon (sic) me. I find this insulting degrading and dehumanizing. I am not a piece of human chattel and I will not be treated as such."
>
> …
>
> Finally, I do not agree with some of the things which you have said occurred at these meetings. Therefore, I will no longer be attending these meetings alone. I will always be accompanied by a colleague of my choosing.

29. Mr. Meggetto responded at 11:22 am that morning. In his response, Mr. Meggetto reminded Mr. Byfield that the Action Plan requires they must meet on a weekly basis. He advised Mr. Byfield:

> "I will give you the opportunity to meet with (sic) this afternoon at 1:30pm, failure to do so will result in disciplinary action.
>
> Furthermore, since this meeting relates to work related matters, you are not authorized to bring a representative."

30. Mr. Byfield did not attend the meeting at 1:30 pm that afternoon. Nor did he respond to the message, although a receipt filed by Mr. Meggetto showed that Mr. Byfield opened the message at 5:20 pm on March 29, 2004.

31. At 10:35 am the following morning, Tuesday March 30, 2004, Mr. Meggetto instructed Mr. Byfield to meet with him immediately regarding the Action Plan:

> "You are required to meet me immediately in the south west trial room to discuss your action plan. Failure to do so will result in disciplinary action."

32. Mr. Meggetto sent his e-mail marked 'High Importance'. He also printed a copy of the email and hand-delivered it to Mr. Byfield, who was at his desk at the time. According to Mr. Byfield's own testimony, when Mr. Meggetto delivered the request for a meeting, he gave a verbal warning that failure to attend the meeting would be considered insubordination. Despite the email and the verbal warning, Mr. Byfield did not attend the meeting.

33. At 10:42, Mr. Byfield responded to Mr. Meggetto's email stating:

> "I have already advised you of my availability. (sic) have been advised that I can bring union representation to these meetings. I am not available to meet right now."

34. Mr. Meggetto then met with Don Renauld and Al McCaie. As Assistant Director, Mr. Renauld was authorized to take disciplinary action against Mr. Byfield. Mr. Meggetto advised Mr. Renauld of the events of March 25th, 29th and 30th, including the e-mail exchanges from Mr. Byfield in which he refused to attend meetings as requested. This, in Mr. Meggetto's opinion, constituted insubordination for which disciplinary action is warranted.

35. Mr. Meggetto did not attend the entire meeting, but testified that Mr. Renauld considered the following mitigating factors listed in the CRA Discipline Policy: "a good employment record" and "long service".

36. A disciplinary meeting was conducted on April 1st at 10:30am. Mr. Byfield attended the meeting. Mr. Byfield's union representative, Mr. Eadie, participated via speakerphone. At the meeting, Mr. Byfield was advised that his refusal to attend the meeting as requested by Mr. Meggetto constituted insubordination, and warranted a one-day suspension. The suspension was served on April 2, 2004.

PART II – ISSUES

37. The issues to be resolved in this proceeding are as follows:

(a) Did Mr. Byfield's refusal to attend the meeting of March 30, 2004 constitute insubordination?

(b) If so, was a one-day suspension an appropriate disciplinary action?

PART III – SUBMISSIONS

A. CONCERNS ABOUT THE CREDIBILITY OF MR. BYFIELD'S EVIDENCE

38. During their Action Plan meetings, Mr. Meggetto took notes of the matters discussed at the meetings, including the tasks Mr. Byfield was to complete over the next week. At the end of each meeting, Mr. Meggetto would give the notes to Mr. Byfield, keeping a photocopy for his own files (marked "file copy").

39. Also during the meeting, Mr. Meggetto would take personal notes. These personal notes were shown to Mr. Byfield at the conclusion of each meeting, but Mr. Byfield did not receive a copy of these notes until May 20, 2004. Mr. Byfield did not take any notes during the meeting.

40. Copies of Mr. Meggetto's notes from selected meetings were put into evidence by the Grievor as Exhibit G-2. These notes included the file copy notes for meetings on March 9th and March 19th, and Mr. Meggetto's personal notes from meetings on March 12th and March 19th.

41. In his testimony, Mr. Byfield suggested there were discrepancies between the "file copy" notes provided at the conclusion of each meeting, and Mr. Meggetto's personal notes. He claimed these discrepancies in the notes would be used against him, and therefore sought copies of the notes to verify their accuracy.

42. However, the only inconsistency in the notes identified by Mr. Byfield in his evidence was with respect to the notes to the meeting of Friday March 19th. In the "file copy" notes provided to him at the conclusion of the meeting, Mr. Meggetto concludes by stating "Next meeting March 26, 2004 at 2:30pm." March 26, 2004 was a Friday. In his personal notes, Mr. Meggetto states: "Agreed to meet next Thursday at 2:30pm".

43. Mr. Meggetto testified that the "file copy" note was a simple error and that he and Mr. Byfield had agreed to meet on Thursday March 25th at 2:30. This is consistent with the notes of the March 9th meeting which states:

- "agreed to meet every Thursday at 2:00pm" (sic)

- "for next week we will meet on Friday March 19th at 2:00pm"

44. Mr. Byfield testified that as a result of the apparent discrepancy in the notes, he did not realize he was to meet on March 25th.

45. Unfortunately for Mr. Byfield, the evidence clearly indicates that he was not confused about the date of the March 25, 2004 meeting.

46. Mr. Meggetto's testimony is also consistent with the lengthy email exchange between himself and Mr. Byfield on March 24th and 25th. For example:

(a) Exhibit E-7 – an email from Mr. Meggetto to Mr. Byfield sent Wednesday March 24, 2004 at 1:33pm. Mr. Meggetto states:

> "… be prepared to discuss your meeting with the auditor at our meeting tomorrow afternoon and have your notes available for discussion"

(b) Exhibit E-8 – In Mr. Byfield's reply he takes no issue with Mr. Meggetto's reference to the date of their next meeting.

(c) Exhibit E-10 – Mr. Meggetto's response to Exhibit E-8 sent on March 24th at 2:43pm. Mr. Meggetto reiterates his reference to their planned meeting on March 25th:

> "We will discuss your results at our meeting tomorrow afternoon"

(d) Exhibit E-11 – Mr. Byfield responds to Exhibit E-10, but again fails to assert his alleged confusion over the date of their next meeting.

47. If Mr. Byfield had truly believed that their next meeting would be March 26th rather than March 25th, he would have taken issue with Mr. Meggetto's clear references to a March 25th meeting.

48. However, the most damaging evidence with respect to Mr. Byfield's credibility on this issue is his own email to Mr. Meggetto on the morning of Thursday March 25th when he advises Mr. Meggetto that:

> "I will either be in the Barrie Office or in transit or otherwise pre-occupied for most of the day and therefore I will not be available to meet with you today."

49. This e-mail clearly lays to rest any doubt as to whether Mr. Byfield believed the Action Plan meeting was scheduled to take place on the 25th. Nevertheless, throughout his testimony Mr. Byfield clung to his allegation that Mr. Meggetto's notes created confusion, leading him to believe that the meeting would be on March 26th.

50. When, in cross-examination, he was confronted with his own reference to the planned March 25th meeting, Mr. Byfield could provide no reasonable explanation for the obvious inconsistency of his prior evidence.

51. The Employer submits that Mr. Byfield's evidence of alleged confusion concerning the March 25th meeting was wholly fabricated.

52. The Employer further submits that Mr. Byfield's fabrication on this point raises serious doubts concerning Mr. Byfield's credibility, not only with respect to his alleged apprehension about the manner in which the Action Plan meetings were conducted, but also with respect to his entire testimony in this proceeding.

B. THE REFUSAL TO ATTEND THE MEETING WAS INSUBORDINATION

53. The evidence clearly supports a finding that Mr. Byfield's conduct in refusing to attend meetings as requested constituted insubordination.

54. In particular, the refusals to attend the 9:30 am meeting on March 29, 2004, and the 10:35 am meeting on March 30, 2004 were clear acts of insubordination. In both cases, Mr. Meggetto's direction was clear and simple. The meetings were to discuss work-related issues. They were scheduled to take place during Mr. Byfield's normal hours of work, at Mr. Byfield's normal place of work.

55. Mr. Byfield was present at the workplace on March 29th and 30th. He could have attended those meetings. He simply refused.

56. When pressed in cross-examination for the reason why he did not attend the meetings, Mr. Byfield stated that he "did what he had to do". In other words, he simply decided not to attend the meetings. In the Employer's submission, the decision whether Mr. Byfield should attend the weekly meetings was a management decision to be made by the Employer, not Mr. Byfield.

57. It is clear from Mr. Byfield's evidence that he did not appreciate the Employer's attempts to manage his performance through the implementation of the Action Plan. It is equally clear that Mr. Byfield engaged in conduct specifically intended to thwart the Employer's ability to manage his performance, culminating in his refusal to attend the meetings required by the Action Plan. Such conduct, specifically intended to interfere with a manager's ability to manage the employee, is simply unacceptable and warrants disciplinary action.

58. This Board's jurisprudence on the issue of insubordination is well-settled. The refusal to follow a direct order, clearly communicated to the employee, constitutes insubordination. While exceptions may arise where the health and safety of the employee is endangered by the order, and the employee raises this concern with the employer, these circumstances simply do not exist in this case. Even if the Board accepts Mr. Byfield's evidence that he refused to attend the meeting for medical reasons, these concerns were not put forward to Mr. Meggetto as a reason for his refusal to attend.

59. The Employer submits that the conduct of Mr. Byfield in refusing to attend the meetings as requested constitutes insubordination.

C. A ONE-DAY SUSPENSION WAS AN APPROPRIATE DISCIPLINARY ACTION

60. According to the Employer's Discipline Policy, insubordination is described as follows; "Insubordination, including failure to carry out an instruction or to perform assigned work." According to the Employer's Discipline Policy, the recommended disciplinary action to be taken when an employee is insubordinate is a suspension for a period ranging from one to thirty days.

61. Mr. Meggetto testified that Mr. Renauld, the person with authority to impose disciplinary action upon Mr. Byfield, considered at least two mitigating factors in his decision on the appropriate disciplinary action; Mr. Byfield's employment record and the length of his service with the Employer. In consideration of these factors, Mr. Renauld imposed a one-day suspension for Mr. Byfield's act of insubordination. This represented the most lenient disciplinary action among those recommended in the Employer's Discipline Policy for an act of insubordination.

62. In the Employer's submission, there are no other mitigating factors present in this case to warrant the Employer varying from the recommended range of possible disciplinary action. Furthermore, as stated above, a one-day suspension represents the absolute minimum action within the recommended range.

63. Finally, an adjudicator should only disturb a disciplinary penalty imposed by the Employer where the penalty was unreasonable or wrong. As the Board stated in Hogarth and Treasury Board (Supply and Services):

> …an adjudicator should only reduce a disciplinary penalty imposed by management if it is clearly unreasonable or wrong. In my

> view, an adjudicator should not intervene in this way just because he feels that a slightly less severe penalty might have been sufficient. It is obvious that the determination of an appropriate disciplinary measure is an art, not a science. There are no objective criteria of which I am aware that would permit an adjudicator in a case like the present one to say that a one-day suspension is excessive but that a written reprimand would be appropriate. I cannot conclude that a one-day suspension is clearly wrong or unreasonable or an abuse of management's discretion. In my view, there is, therefore, no proper basis on which I could invalidate the employer's decision to impose a one-day suspension on the grievor.

64. The Board's reasoning in Hogarth was subsequently followed in Noel and Treasury Board (HRDC).

65. The Employer submits that the disciplinary action imposed upon Mr. Byfield was reasonable under the circumstances of this case, and should not be disturbed by the Board.

D. ALLEGED MITIGATING FACTORS

66. In his testimony, Mr. Byfield cited several issues which were, in his opinion, circumstances to be considered in support of his argument that a one-day suspension was overly harsh in this case. These issues included:

(a) A misunderstanding about the schedule for the meetings;

(b) Medical problems which necessitated strict regularity in the meetings; and

(c) His repeated requests to have a representative present at the meetings.

67. It is the Employer's position that none of these allegations amount to a valid mitigating factor.

1) <u>Mr. Meggetto clearly explained his position about the schedule for the meetings</u>

68. Mr. Byfield suggested that his refusal to attend the March 30th meeting was due partly to the fact that he had agreed to meet only on Thursdays at 2:30 p.m. However, Mr. Meggetto clearly instructed Mr. Byfield on March 25th that "If our schedule does not permit us to meet on the agreed date

of Thursday at 2:30 PM, we will meet at the first available time. I will not agree to postpone our weekly Action Plan meetings."

69. Therefore, at 4:42 pm on the afternoon of March 25th (when Mr. Byfield opened Mr. Meggetto's message containing the explanation set out above), Mr. Byfield knew the Employers position with respect to the schedule of the meetings. At that time Mr. Byfield was at liberty to file a grievance with respect to the Employer's clear position with respect to the schedule for the meetings. Despite the fact that Mr. Byfield has shown a propensity for filing grievances in response to alleged wrongs by the Employer, in this instance he chose not to grieve. Instead, he simply refused to attend the meetings.

70. Mr. Byfield's conduct with respect to the disagreement over the schedule of the meetings should not be considered as a mitigating factor in the determination of an appropriate disciplinary action. On the contrary, his conduct with respect to this issue shows that Mr. Byfield knowingly disregarded the established rule "work first and grieve later", and supports the Employer's decision that a suspension was warranted in this case.

2) <u>Mr. Byfield's alleged need for strict regularity in the meetings</u>

71. In his evidence, Mr. Byfield suggested that he did not attend the meetings because he had been advised by his doctor, as well as by his Employee Assistance Plan counsellor, that he should not attend the meetings because they were a cause of anxiety.

72. However, there is no evidence that Mr. Byfield ever raised his alleged medical condition with Mr. Meggetto, despite having several opportunities to do so. Each time he refused to attend a meeting, he had an opportunity to rely on his alleged medical condition, yet in each case he failed to do so. If he had, in fact, been advised not to attend the meetings for medical reasons, he would have made that clear in his refusals.

73. Simply put, Mr. Byfield's evidence on this point is simply not compelling. His claim that there were medical reasons why he needed to meet only on Thursdays at 2:30 pm lacks the ring of truth. Mr. Byfield's evidence on this point, like his evidence concerning the alleged confusion over the date of the March 25th meeting, raises serious issues of credibility. The Employer submits the Board should give little or no weight to Mr. Byfield's allegation that there were medical reasons for his refusal to attend the meetings.

3) <u>The Action Plan meetings were work-related, not disciplinary</u>

74. When he refused to attend the meeting on the morning of March 29th, Mr. Byfield advised Mr. Meggetto that he would no longer attend the Action Plan meetings alone, but would be accompanied by a colleague of his choosing.

75. If the disciplinary action had been taken solely as a result of that initial refusal to meet Mr. Meggetto, the issue of Mr. Byfield's desire to have a representative at the meeting may have been a factor to be considered in determining an appropriate response by the Employer. That is not the case. Instead, Mr. Meggetto gave Mr. Byfield a further "opportunity to meet", and advised that "since the meeting relates to work related matters, you are not authorized to bring a representative."

76. The Employer's position was clear. Mr. Byfield was required to attend the meeting, and he was not authorized to bring a representative. Faced with this clear direction from the Employer, Mr. Byfield simply refused to comply.

77. Mr. Byfield's conduct on this point is not a mitigating factor. On the contrary, this evidence shows a willing defiance in the face of a clear direction from the Employer. Such conduct is worthy of a disciplinary suspension.

E. CONCLUSION

78. The Employer respectfully submits that Mr. Byfield's refusal to attend the weekly Action Plan meetings constituted insubordination.

79. The Employer respectfully submits that there are no grounds to disturb the one-day suspension imposed by the Employer on Mr. Byfield as a result of the insubordination.

80. The Employer respectfully requests that the grievance be dismissed.

. . .

[*Sic* throughout]

Submission by the bargaining agent

. . .

Part I

INTRODUCTION

Mr. Byfield has worked over twelve years as an employee with Canada Revenue Agency. Up until December of 2003 through April 2004, he always had a good work record and an unblemished personnel file. In December he received, without warning, a "does not meet" performance appraisal. As a result, he was issued an action plan which he was not consulted on and did not sign. Part of the action plan was to have weekly meetings with his team leader.

The period of events described at the hearing was very short (December 2003 to April 2004 - 4 months). It was an isolated and uncommon period for Mr. Byfield, a period he didn't really know how to manage.

He testified to being in a state of fear about losing his job, suffering from ill health, and not knowing what his expected targets were in order to meet expectations or to "fail". He says these problems were a direct result of him being placed on an action plan which required weekly meetings in order to monitor his "time management."

In the end, after going to a number of the required meetings, having called for and denied an observer or a representative in the meetings, and failing to establish that he'd seen all of the notes taken by his supervisors in these meetings, he failed to attend a meeting as directed. He was threatened with discipline, but failed to attend another meeting. The thrust of his reasoning for not attending was his health and he "he did what he had to do" to protect himself.

He was suspended without pay for one day for insubordination.

Part II

THE ISSUES

The issues are summarized well by ***Brown and Beatty Disciplinary Penalties 7:4000, pages 7 to 178:-***

"In any grievance in which an employee challenges the propriety of a disciplinary sanction, arbitrators and the courts are agreed that there are two distinct though necessarily related, issues that must be addressed. First, it must be determined whether the employer had cause to

discipline the employee and then a separate assessment must be made about whether the penalty it selected was appropriate. On the issue of cause, the arbitrator must be satisfied that the grievor did what the employer claims justified in invoking its disciplinary powers and that the conduct was of a character that warranted punishment. In cases where both such conditions have been met, arbitrators have consistently perceived their mandate.....is then to assess the fairness of the particular penalty imposed. If an arbitrator finds that the penalty chosen by the employer was not just and reasonable in all the circumstances, he or she will substitute one that is."

Part III

ISSUE NUMBER 1

Q. *Did the Employer have cause to discipline the employee?*

A. ***Did Mr. Byfield do what the employer says caused discipline?***

Mr. Byfield did not contest that he failed to attend a meeting scheduled by his supervisor on Monday, March 29th at 9:30 a.m. He failed to attend a meeting scheduled by his supervisor for later that day and again on March 30th. On the face of it, there is insubordination. So the question becomes - Given all of the circumstances, did Mr. Byfield's conduct warrant discipline?

B. ***Did Mr. Byfield's conduct warrant discipline?***

Looking at the entire scenario, it is the grievor's position that in other situations with other employees this conduct might be worthy of discipline, but given all the facts in this case there was no need to discipline. Discipline in this case is merely a display of authority and without purpose other than to punish.

As noted in the introduction, Mr. Byfield had over twelve years of service and an unblemished record at the time of the disciplinary notice. He had never suffered any administrative or disciplinary actions previously nor had he launched any challenges.

He did his job year after year and people seemed to be quite happy with that until December 2003. He testified there had been no warning in that period that he hadn't been performing adequately. In fact, by

every indication he was well respected in his work. It was a severe blow to him when he received a "does not meet" performance appraisal. Items (which had never been a problem before) such as civil assessments, suddenly became an issue. If the employer were judging differently, if they were dedicated to more stringent measurement, or if they were just trying to get Stephen Byfield to work harder. They never shared that with Mr. Byfield.

Mr Byfield gave evidence that the weekly meetings he objected to were the result of an action plan, developed from a poor performance appraisal, which came as a surprise. The fact that it was a surprise to Mr. Byfield was uncontradicted.

Part III

ISSUE NUMBER 1 (cont'd)

In his evidence Mr. Byfield credibly described why the action plan scared him. On the face of the action plan was the listed ability of the employer to terminate his employment, but nowhere was there a measuring stick to tell him how he was doing? And in those weekly meetings in which he did attend, nobody told him how he was doing or how he was being measured.

Was Mr. Byfield naive in thinking that they wanted to terminate him? Mr. Meggetto said it always appeared to him as a difficult thing to do to terminate somebody in the public service. It didn't appear that way to Mr. Byfield, though and it was Mr. Byfield who was on the action plan, not Mr. Meggetto.

According to Mr. Byfield's evidence, the first meetings he had with Mr Villella only served to confirm that something was amiss. He testified he was mistreated by Mr. Villella. He wrote to Mr. Renaud and told him he was being mistreated.(G-7). In the same e-mail he said that he had to seek medical attention as a result of the meetings. Finally he filed a harassment complaint.

Counsel for the employer attempts to use the several e-mail exchanges to show that Mr. Byfield's evidence should not be seen as credible. But he forgets how Mr. Byfield was forthright in stating that Jack Meggetto treated him differently than Angelo Villella did. There were important differences between the two mens' style.

However, Mr. Byfield continued to be concerned about the meetings and where they were headed. He was concerned with Jack Meggetto's note keeping (which he only received after the fact on May 20th), and individual feedback about how he was doing. He was concerned that they weren't signing off on the notes together, which would have put his mind to rest regarding the question of discrepancies he raised. The mistake made by Meggetto regarding the date of the meeting (March 25 or 26), serves to illustrate the point Mr. Byfield was making.

Mr. Meggetto was acting team leader when the events we are discussing took place. He was new to the job and while he had been a team leader before, this was his first experience as an MG05. He stated that he was not experienced with Employee Performance Management Review.

Part III

ISSUE NUMBER 1 (cont'd)

In cross examination Mr. Meggetto didn't seem to know how he would measure Mr. Byfield in the action plan. He could provide no plan as to how he would judge whether Mr. Byfield was going to adequately meet the needs of the action plan or not. He said that at the end of August 2004 there would have to be a progress report on Stephen Byfield's performance. He seemed to know one thing for sure - meet every week as the action plan had set out. And yet when asked what would have happened if they didn't meet, he said he didn't know, except that the action plan would not have been followed.

The need for the "action plan" and the weekly planned meetings were seen as essential to improving the performance of Mr. Byfield by Mr.Meggetto. Yet the action plan and the weekly meetings were dropped when Mr. Byfield transferred from Mr. Meggetto's team to the Scarborough East Tax Service Office. Once in this office, without benefit of action plan or weekly meetings, Mr. Byfield was able to be completely successful in his work.(Exhibit G-9).

As expressed by Mr. Meggetto, these meetings were "to help" Mr. Byfield with his performance. If they were to really help, the question then becomes; Why was he not consulted on the action plan and on the weekly meetings? When questions were raised by Mr. Byfield as to the productiveness of the meetings, why did management not move to address those questions or

answer them. Mr. Byfield never questioned the right of the employer to put people on action plans. Rather he contested how the weekly action plan meetings were being conducted and their purpose.

Brown and Beatty Exceptions & 7:3620, pages 7 to 154":-

"....*As well, some arbitrators use a balancing approach and invoke what has been characterized as the "disproportionate harm"exception, taking the view that when a refusal to comply does not seriously prejudice the employer's ability to maintain production or challenge its symbolic authority, the conduct of the grievor should not be viewed as insubordinate".*

The employer brought forth no evidence that their production was interrupted, nor did they show evidence of how the CRA's integrity had been undermined by Mr. Byfield's actions. Mr. Meggetto wasn't even concerned enough to stay at the meeting where discipline was decided upon and offered no input into the disciplinary process.

Part III

ISSUE NUMBER 1 (cont'd)

Mr. Byfield's no attendance at the meeting was not some display of bad temper meant to denigrate the managers at CRA, but rather as he testified "it was about self preservation". He did not shout his rebellion from the rooftops, nor did he seek to enlist support against Mr. Meggetto's authority. His actions were kept well within the proper channels (Union, EAP, Physician, Team Leader, Manager and Human Resources. He never attempted to make Mr. Meggetto look or feel foolish in front of others or seek to undermine Mr. Meggetto's authority. Mr. Byfield was not sarcastic, abusive or profane. He did not curse or swear, push or shove. Its true that he tried to avoid meeting Mr. Meggetto except at specified times.

Further, Mr. Byfield's failure to attend as asked caused no disruption. He made no attempt to denigrate either the business or the supervisor. Mr. Byfield refused no service, job or duty to the public.Taxpayers were not endangered or caused to suffer in any way.

Also to be considered, is the fact that the employee was attempting to communicate with management to make them aware that he objected to the meetings

and why. They weren't being conducted constructively and he wanted specific ground rules, a regular meeting time and an observer. He expressed this through several routes (discussions with Human Resources, the union and Mr. Renaud, e-mails and discussions with his team leaders).

He grieved his Performance appraisal and the attached action plan and filed a harassment complaint. He grieved the employer's failure to allow an observer at the meetings. He grieved what he believed to be discriminatory treatment regarding his use of sick leave. He had meetings with management, Human Resources and the Union. People knew there was an issue, but all the doors were shut. His grievances were denied internally right through to final level. His harassment complaint was not ruled upon until it was too late and then it was seen to be unfounded. He couldn't have observers because the meetings weren't disciplinary.

In a series of weekly meetings which he attended, he offered concrete suggestions on how he saw they could be more productive. It was only after a series of meetings that he failed to attend another meeting. This was an isolated incident after a prolonged series. It was an act done out of frustration and after believing he'd exhausted all other avenues.

Part III

ISSUE NUMBER 1 (cont'd)

While it is true that Mr. Byfield's case does not fit into one of the "work now, grieve later" exceptions, it is also true that Mr. Byfield made every effort to no avail to have his concerns heard, including special meetings, grievance procedure and harassment policy. And while Mr. Byfield was certainly very vocal during this period, I cannot agree with the employer's characterization that Mr. Byfield had a "propensity" (paragraph 69), to file grievances. This is just a further attempt to portray Mr. Byfield as the kind of person who is always fighting, in trouble or complaining. Looking at the record we find exactly the opposite is true.

Brown and Beatty Reasonable Personal Excuses 7:3626, pages 7 to 169:-

"Whether an employee's refusal to work will be found to be justified may also be affected by the employer's behaviour. Therefore, for example where an

employer provoked an employee into refusing to comply with its instructions, it has been held that though technically insubordinate, the employee did not merit a substantial disciplinary sanction."

It's the grievor's position that the employer's behaviour in this case is at least partially responsible for the employee's conduct. Its also the grievor's position that by not attempting to address his concerns when he raised them, effectively stonewalling him and giving the weekly meetings the prominence they did (say as opposed to setting out a measurement standard), they frustrated him to the point of provoking him into an unreasonable act.

Part V

ISSUE NUMBER 2

If guilty of misconduct, was the penalty appropriate?

Brown and Beatty "Employees's State of Mind 7:4424, pages 7 to 242.1:-

"A mitigating factor closely related to the potential of an employee to reform his or her behaviour is the employee's intention and state of mind at the time of the alleged offence. Pre-meditated and/or persistent wrong doing is always regarded as more culpable than momentary lapses and those that lack a malicious intent. This is particularly true where it is alleged that an employee has acted fraudulently, or has abused or challenged the employer's authority. Conversely, where the grievor's misconduct was triggered or affected in some way by a reasonable and bona fide mistake, domestic and emotional problems, a medical condition, the wrongful orders of a superior, alcohol or drugs, a gambling habit, or provocation by customers or other employees, arbitrators have, for those and analogous reasons, modified the discipline imposed."

Mr. Chair, if there is a finding of insubordination, then the logical and appropriate penalty in this case would not be suspension but rather a written reprimand. This we suggest for a number of reasons.

1. ***The reason for the quantum of discipline chosen:-***

A one day suspension as opposed to the perfectly serviceable written reprimand has not been explained

by the decision maker nor is there evidence to support that decision. Why was Mr. Renaud left to make the decision without input from the manager?

2. ***The employer failed to introduce the disciplinary notice itself into evidence:-***

Mr. Renaud,,who had the delegated responsibility, signed off on the discipline. He failed to explain to the tribunal how he reached his decision. Mr. Meggetto testified he did not recommend one over the other. Strangely, Mr. Meggetto, the manager offended by Mr. Byfield's behaviour attended only part of the meeting where discipline was discussed. He testified that he knew Mr. Renaud looked at two mitigating factors; 1) Mr. Byfield's employment record and; 2) the length of his service with the employer. But he couldn't say how Mr. Renaud's examination of Mr. Byfield's long service and clean record were viewed in the overall assessment of penalty.

Part V

ISSUE NUMBER 2 (cont'd)

3. ***Exhibit E-27*** *is the CRA discipline policy, which the employer says was used to aid in the decision making regarding the severity of Mr. Byfield's penalty. In this argument, Counsel for the employer referred us to one piece of that document on page 16 "C":-*

"A one day suspension was an appropriate Disciplinary Action", paragraph 60. According to the Employer's Discipline Policy, insubordination is described as follows:- Insubordination, including failure to carry out an instruction or to perform assigned work." *According to the Employer's Discipline Policy, the recommended disciplinary action to be taken when an employee is insubordinate, is a suspension for a period ranging from one to thirty days." It's the employer position that the one day suspension "represented the most lenient disciplinary action among those recommended in the Employer's Discipline Policy." But what's missed in the employer's approach is some of the other features of their document, which are also standard features in the broader Public Service and other labour jurisdictions. At the top of page 9 (the pages are not numbered) it begins:*

"The determination of an appropriate disciplinary measure must be based on the particulars of each

case and must be constructive in that it is intended to correct behaviour rather than punish it."

Its our submission that in these circumstances this penalty is punishment and not corrective. A written warning would have been sufficient and corrective. There would have been no doubt in anybody's mind about what was next. Perhaps this would have focussed Mr. Byfield.

I get the idea in Counsel's argument that what he believes Mr. Byfield was doing was attempting to "thwart" the employer in its attempts to manage Mr.Byfield's performance. However, My. Byfield says he was in self preservation mode. Whichever of those may be true, a simple good old fashioned written warning setting out explicitly what the employer's expectations are would have been a practical solution with potential to help both parties. Its our position that the employer was angry with Mr. Byfield and was going to teach him a lesson and jumped to more sever discipline than necessary.

Part V

ISSUE NUMBER 2 (cont'd)

And the next paragraph:-

*The **progressive approach to discipline** is based on the premise that an employer has a duty to warn an employee of the seriousness of his or her conduct and its potential impact on his employment record. Since discipline is corrective and not punitive, it also gives the employee an opportunity to take action and correct unacceptable behaviour. The corrective measures which can be imposed ascend in order of severity and are defined as progressive discipline. The ultimate penalty is termination of employment."*

This of course does not mean and we don't take it to mean that there will never be a situation in which doesn't warrant moving right to suspension. But for a twelve year employee who has never been involved in any activity and may be a bit naive about how discipline works, the percentages surely are on the side of a written warning first.

It isn't as if there wasn't some insight into why all of a sudden an employee who had never had a problem was experiencing problems. There were plenty of indicators such as his health, being off sick more than the norm, his fear, his non-concurrence with the

action plan, his requests for meeting notes and accompaniment to meetings, and a known measurement criteria. Management had knowledge that after twelve years of one kind of behaviour, Mr. Byfield was exhibiting another kind of behaviour.

Written reprimand is defined on page ten of the same document under c) Types of Disciplinary Measures in Increasing Order of Severity:-

"...Written Reprimand
"A Confidential written notice to the employee explaining the nature of the misconduct. Its purpose is to establish a clear understanding of what is expected of the employee and of the consequences of further misconduct. A copy of the reprimand is put in the employee's Human Resources file. If more severe disciplinary measures should later become necessary, the record of the reprimand is evidence the employee was made aware of the expectations and of the consequences of further misconduct."

Part V

ISSUE NUMBER 2 (cont'd)

4. Employer and Mitigating Factors

Mr. Meggetto's position is that at least two of the 13 bulleted factors listed in a column of mitigating factors were considered (page 17, Exhibit E-27), good employment record and long service. No evidence was presented at the hearing that Mr. Byfield had anything but a good employment record. This wasn't over the course of a year but rather a period of long service (twelve years), the second mitigating factor.

How did consideration of these two factors alone result in a suspension as opposed to a warning letter or letter of reprimand? Nobody knows? Is the employer suggesting that this incident, without a warning letter on file was actually worth a three day unpaid suspension but because of the two mitigating factors considered it was reduced to a one day suspension? Nobody knows.

At a minimum the employer is required to justify their quantum of discipline. And while employer's Counsel in argument has speculated on how this decision was arrived at, we heard no evidence to support his speculation. While he argues: "That this represented the most lenient disciplinary action among those

recommended in the employer's Discipline Policy for an act of insubordination." *That may be true on the face of it, but it makes no sense. By his logic, everybody who the employer felt guilty of insubordination, no matter what the mitigating circumstances, would then have to receive at least a one day suspension.*

6. ***Other Mitigating Factors***

Bullet number 3 considers **"the isolated nature of the incident in an otherwise blameless employment history."** *In view of the long service and clean record, was this considered? It is the grievor's position that this mitigating factor in and of itself would indicate the need for a letter of reprimand rather than a suspension. If a good long term employee finds himself in a situation where there is potential for serious misconduct, then the employer should warn him. The thinking would be: "The employee has never been over this ground before and he may not get it. We should tell him in writing clearly what our expectations are and what the consequences of further similar actions will be."*

Part V

ISSUE NUMBER 2 (cont'd)

Provocation (bullet #4)

By not listening to him and building what all parties could agree were constructive and helpful meetings, insisting that the meetings be conducted in a way that allowed Mr. Byfield no true input, failing to respond to the Mr. Byfield's suggestion that the meetings were making him ill, they frustrated him. They are, at least, partially to blame for his misconduct. This is an important mitigating factor. Mr. Byfield if he misconducted himself did not misconduct himself with a "blameworthy state of mind", nor was any misconduct seeking to undermine authority. Any misconduct was out of sheer frustration and I think that is most clearly seen in the exhibit E-22 and the language he chooses to use to defend his actions.

Lack of Premeditation (bullet number #6)

This is a factor that ought to have been considered. Failure to attend the meetings was not premeditated. It took Mr. Byfield some time to respond to the meeting Mr. Meggetto had wanted to arrange for March 29th. Mr. Byfield said he was upset at the

scheduling of the meeting and wanted to calm down. It would appear that both Counsel for the employer and I agree on the point that his response was not calm when it came. Mr.Byfield did not plot to not attend meetings, he did try and arrange them at a time suitable for himself and in a fashion which would help him.

Relative Seriousness (bullet #7)

*An important feature in mitigation is: "*the relative seriousness of the offence in relation to the organization's policies, mandate and obligations*". While not disputing the management's right to manage, this bullet examines how serious the cause for concern is and what impact it had. I deal with disruption to production elsewhere, but examining Mr. Byfield's actions in terms of management's policies, "Mandate and Obligations", we find its relatively innocuous, with low impact. As mentioned earlier, Mr. Byfield was clear that he didn't object to action plans or management carrying them out, just that the action plans should be productive and helpful.*

Part VI

EVIDENCE AND CREDIBILITY

1. *In paragraph 57 the employer provides no specific evidence from the hearing to support his claim that: "*It is equally clear that Mr. Byfield engaged in conduct specifically intended to thwart the Employer's ability to manage his performance, culminating in his refusal to attend the meetings required by the action plan.*"*

   The grievor's position is that in fact, as agreed to by Mr. Meggetto in cross examination, there was a certain level of co-operation from Mr. Byfield even given the difficulties surrounding the weekly meetings.

2. *The employer submits that Mr. Byfield's confusion concerning the March 25th meeting was wholly fabricated (paragraph 51). And further submits in paragraph 52 that his "entire testimony" is suspect as a result of that "fabrication".*

   What fabrication is he referring to? With respect, the employer leads us through a string of e-mails and imposes his own psychology on Mr. Byfield and how he would have responded if he believed this and this (paragraph 47). The grievor does not dispute Mr. Meggetto's evidence when he says he made a mistake

when he wrote down and gave Mr. Byfield the wrong date for the meeting. Mr. Byfield says this caused confusion.

In paragraph 48 the employer's position is that somehow Mr. Byfield's e-mail damages his credibility. But this is a matter of timing. It is true that by the time he wrote that e-mail he was aware that Mr. Meggetto believed the meeting was that day.

3. *Credibility is obviously important. But trying to answer questions about a series of e-mails over two years old, written before the actual incident leading to the disciplinary charge and where the timing may or may not be certain. Mr. Megetto testified that sometimes he would prepare e-mails and then send them later. May not be the best test of credibility for a witness. Mr. Byfield was absolutely candid about why he refused to go to the meeting. He tried to express why he was having problems with the meetings, and how he thought they could be improved.*

Part VII

CASE LAW

1. ***Employer's Cases***

Noel and treasury Board 2002

The adjudicator here accepts the line of reasoning found in the Hogarth decision. This case, as did Hogarth, revolves around a production issue. Refusal to close a file and an attempt by an employee to order his manager to keep a file open. Nothing like that occurred in the Byfield case.

Imperatore and Treasury Board 1998

Here the adjudicator in denying the grievance considers some "objective criteria"; the record and length of service. He says that because they had taken these into account and because the grievor was issued a written warning on July 13, about a month previous it would not be appropriate to substitute a lesser penalty. This implies that if there hadn't been a warning and if they hadn't looked at the mitigating factors he might have come to the opposite conclusion. This is exactly what we are saying in the Byfield case; look at the mitigating factors and the record.

Nowoselsky and Treasury Board 1984

In this case the three day suspension was upheld partly because of "the fact that the grievor had already received a one day suspension which I upheld....."*(last paragraph of the decision).*

Hogarth and Treasury Board 1987

In this case the adjudicator decided that "There are no ***objective criteria*** *of which I am aware that would permit an adjudicator* ***in a case like the present one;*** *to say that a one day suspension is excessive but that a written reprimand would be appropriate"(emphasis mine). Mr. Bendel is careful to say in a case like the present one.*

This case is distinguishable from the Byfield case in a number of ways.

The supervisor's authority in Hogarth was challenged with other employees around where they could hear, which had potential to undermine the supervisor's authority with others. In order to maintain his authority with the group listening, the supervisor had to act.

Part VII

CASE LAW (cont'd)

More importantly (there was in this case as opposed to the Byfield case), an actual work order given that involved production for a deadline. The supervisor had knowledge of a situation which needed action in order to meet a commitment, which he explained to the grievor. These two were involved in a power struggle over production priorities in front of other employees. This was not the situation with Byfield, where the question doesn't concern a production issue, doesn't have any immediate impact, and is not being played out in front of others.

As the penalty had already been reduced from 3 days to one day in this case the Adjudicator might have been even more reluctant to further reduce it.

Another important consideration is that while Mr. Bendel wasn't aware of any "objective criteria", its our position in this case that there are objective criteria and they are set out in exhibit E-27 and have been discussed above. Our argument above (mitigating

factors), is "proper basis" in this case to alter the penalty.

2. ***Grievor's Cases***

All of these cases deal with the question of penalty. None of these cases are identical to the instant case as far as facts, but they do illustrate a pattern. Even in cases with minor suspensions of one day, some Adjudicators have decided to intervene and reduce the penalty through the use of what they believe to be objective criteria. And in some cases, where they have decided not to reduce the penalty, they express concrete reasons such as an earlier suspension being one of the deciding factors.

Lambert and Treasury Board (Agriculture Canada) - PSSRB file No.166-2-24197®. Labelle) 1994

Grievance dismissed - *Grievor had already received written reprimand for same type of misconduct, so one day suspension remained. The Adjudicator checked the record for a reference point. This decision is subsequent to the Hogarth decision and shows that while Mr. Potter in the Noel decision was inclined to refer to Hogarth, other Adjudicators have used other criteria.*

Part VII

CASE LAW (cont'd)

Odusanya and Treasury Board(National Defence) - PSSRB File No.166-2-25179 (Tenace) 1994

Grievance denied - *But the adjudicator writes in the second to last paragraph of the decision:*

"As for the penalty imposed ,were this the only incident of misconduct involving the grievor, I would be inclined to reduce the suspension to a written reprimand. The evidence showed that it was not. The grievor had been given a written reprimand for misconduct about a year earlier. That being the case, I do not consider the imposition of a one day suspension without pay as being unreasonable in this case."

This case is decided after the Hogarth case.

Chafe and Treasury Board(Department of National Revenue) - PSSRB File No.166-2-12639 (S.J. Frankel) 1982

Grievance successful in part - *In this case, even though the Adjudicator finds insubordination because of mocking behaviour he says in paragraph 27:*

"If this were an isolated incident, a first offense of this kind by Mr. Chafe, it would hardly deserve more than a written reprimand. Chafe's disciplinary record shows two previous written reprimands for abusive language and behaviour towards supervisors."

A further suspension has been grieved and yet to be decided. He then decides:

"Having regards to these factors, and considering the rather petty nature of the incident that is at the origin of the present proceeding, I consider a suspension of two days to be excessive. I would therefore reduce the disciplinary penalty to a one day suspension."

Roy and Treasury Board(Employment and Immigration Canada) - PSSRB File No. 166-2-14522 (L.Mitchell) 1985

In my view, out of the cases I have cited this one has the most similar tone to the Byfield case.

Part VII

CASE LAW (cont'd)

*There is a long term employee with a good record, who feels the purpose of a training assignment he was given was "*setting me up for discharge*". His testimony (paragraph 9) was:*

*"*He was not informed of the object of the training nor given time during working hours to do so*". While the situations are different, the impact on the employees is the same; fear for their jobs.*

The Adjudicator finds in paragraph 22:

*"*I am of the opinion that the order to give training instruction without providing for preparation time was not reasonable in the circumstances of this case.*"*

However, the adjudicator finds fault with the grievor for not requesting preparation time specifically in paragraph 23. Finding finally that paragraph 27:

*"*His conduct reflected an element of defiance of his superiors*", the Adjudicator turns his mind to penalty (paragraph 29):*

> *"...* This is the first disciplinary action taken against the grievor during approximately eight years of service. In my opinion, a written reprimand in all the circumstances of this case would be reasonable.*"*
>
> *As you will note in our conclusion, it is our position that if found culpable of misconduct that Mr. Byfield's penalty be altered from suspension to written reprimand.*
>
> ***Part VII***
>
> ***CONCLUSION***
>
> *We respectfully submit that technically, Mr. Byfield was insubordinate when he failed to attend a meeting called by his supervisor. But given the circumstances, this misconduct was a scheduling issue, had little impact, and did nothing to undermine the business of the employer. Consequently, there should be no penalty. We respectfully submit that the employer who bears the burden of proof has not fully discharged that burden and we request that the suspension be rescinded and , all monies and benefits lost as a result of the suspension be reimbursed.*
>
> *Alternatively, should you find Mr. Chair that there was cause for discipline, we respectfully ask that the disciplinary action be changed to a written reprimand and all monies and benefits lost as a result of the suspension be reimbursed.*
>
> . . .
>
> [Footnotes omitted]
>
> [*Sic* throughout]

Reply by the employer to the bargaining agent's submission

> . . .
>
> *Employer's Written Submissions in reply*
>
> *The following are the Employer's submissions in reply to the written submissions served and filed on behalf of the Grievor on July 6, 2006. The Employer will reply to the following points raised in the Greivor's submissions: 1) The case to be met by the Employer; 2) The credibility of the Grievor; and 3) The relevant factors to be considered in the determination of the appropriate penalty for the Grievor's misconduct.*

1) <u>The Case to be met by the Employer</u>

1. On page 10 of his submissions, on the issue of whether the disciplinary action imposed on the Grievor was appropriate, the Grievor's representative takes issue with the fact that the Employer did not call Mr. Don Renaud, the person who exercised delegated authority on behalf of the Employer to discipline the Grievor, as a witness in these proceedings.

2. The Board does not require evidence from Mr. Renaud in order to determine whether the disciplinary action imposed on the Grievor was appropriate. The Board's determination on this issue requires evidence of the circumstances surrounding the Grievor's misconduct. Evidence concerning the decision-making process is not required.

3. The Employer submits that the evidence in this proceeding overwhelmingly supports a finding that the penalty imposed on the Grievor was appropriate under the circumstances of this case.

2) <u>The Credibility of the Grievor</u>

4. On page 15 of his submissions, the Grievor's representative makes reference to the Employer's concerns about the Grievor's fabrication of evidence. He poses the question "What fabrication is he referring to?" Although this issue is fully canvassed in the Employer's previous submission, we will attempt to provide further clarification of the exact evidence which, in the Employer's submission, gives rise to the issue of the credibility of the Grievor as a witness in these proceedings.

5. In giving his evidence before this Board, the Grievor testified that Mr. Meggetto's notes from their action plan meeting of March 19, 2004 caused him to be confused about the date of their next action plan meeting. The Grievor's testimony on this point clearly conflicts with an e-mail he sent to Mr. Meggetto on the morning of the scheduled meeting. That e-mail confirms that the Grievor knew he was scheduled to meet with Mr. Meggetto on that day. That brief e-mail concludes with the statement "…I will not be available to meet with you today." The e-mail can mean only one thing: the Grievor was aware that he had a previously scheduled meeting with Mr. Meggetto on that date.

6. As a result of this conflicting evidence, the Board must decide whether to believe the Grievor's oral evidence given at the hearing, or the e-mail which the

Grievor wrote at the time of the incident. In the Employer's submission, the Grievor's e-mail is clearly the more reliable evidence. The e-mail was written contemporaneously. Furthermore, there is no plausible reason why the Grievor would have sent that e-mail to Mr. Meggetto if he was, as he now claims, confused about whether or not they had planned to meet on that date.

7. The inconsistency of his evidence was put directly to the Grievor in cross-examination. He had the opportunity to recant his oral evidence, and admit that there was no confusion about the date of the meeting, as evidenced by the e-mail. The Grievor did not recant.

8. The issue of credibility is very important, because the Grievor's theory of the case is based almost entirely on his own oral evidence. Without the Grievor's oral evidence, there is no evidence before the Board that the Grievor's prior health concerns had any connection to his refusal to attend the meetings. Based solely on the documentary evidence, this Board must conclude that the Grievor refused to attend the action plan meetings because, ironically, he could not find the time.

9. The Employer submits that the Grievor's claim that Mr. Meggetto's notes generally caused uncertainty with respect to the schedule of meetings, and specifically caused him to believe that his next meeting with Mr. Meggetto would not take place on March 25th, is a fabrication intended to advance his own theory of the case. Furthermore, if he was willing to give false evidence on this issue in order to advance his theory of the case, he likely gave false evidence on other points as well.

3) Factors to be considered in the determination of the appropriate penalty for the Grievor's misconduct

10. The Grievor argues that there were mitigating factors which should have been considered. We will address each alleged mitigating factors.

a) Isolated Incident

11. This was an incident that took place over the course of several days, during which time the Grievor failed to attend three meetings scheduled by Mr. Meggetto. While this may have been an isolated incident within the context of Grievor's overall employment record, the facts before this Board show that there were three meetings for which the Grievor inexplicably failed to attend.

b) Provocation

12. The suggestion that the Employer "provoked" the Grievor into refusing to attend the meetings is simply not borne out by the facts. There is nothing in the evidence before the Board which would support a finding that Mr. Meggetto provoked the Grievor's insubordination;

c) Lack of Premeditation

13. The Grievor admitted that he received notice for the 9:30am meeting on March 29th more that 72 hours before the meeting. Therefore, the Grievor had 72 hours in which to mediate over his position and plan his response. The suggestion that the Grievor's act was not premeditated is simply not supported by the facts before the Board.

d) Relative Seriousness of the Grievor's Conduct

14. The Employer submits that the Grievor's act of insubordination goes to the heart of the Employer's ability to manage the Grievor's performance. It was therefore a serious act of insubordination to refuse to attend the action plan meetings. Furthermore, the management of an employee's performance is, by its nature, a sensitive task which is not generally performed in the full view of the Grievor's peers. If it were, the Grievor would have cause to complain. Therefore, the Grievor's argument that his insubordination caused no serious prejudice to the Employer, presumably because there were no witnesses to the insubordination, is completely without merit.

4) <u>Conclusions</u>

15. The Grievor is attempting to justify his insubordination on the basis of his dissatisfaction with his poor performance review, his dissatisfaction with the imposition of the action plan and his dissatisfaction with implementation of the action plan. These are all matters which the Grievor has already filed separate grievances. None of those grievances are currently before this Board. With all due respect, none of those grievances are even within this Board's jurisdiction. The Grievor is attempting to circumvent the established jurisdiction of this Board. The Grievor should not be permitted to obtain an indirect remedy for an issue which cannot be directly referred to this Board.

16. Furthermore, those other grievances were outstanding at the time of the insubordination. The Grievor did not even wait until those grievances were

> *fully resolved by the Employer before he took matters into his own hands and "did what he had to do". Such conduct flies directly in the face of the "work now – grieve later" rule.*
>
> *17. Finally, even if the Board accepts the Grievor's evidence concerning the health problems caused by the meeting, the fact remains that the Grievor did not raise those concerns to Mr. Meggetto when he refused to attend the meetings. Therefore, it is not a circumstance which this Board should consider.*
>
> *18. The Grievor's conduct was unacceptable, and fully warrants the one-day disciplinary suspension imposed. The Employer respectfully requests that the grievance be dismissed.*
>
> . . .
>
> [Footnotes omitted]
>
> [*Sic* throughout]

Reasons for decision

[16] In determining grievances against the imposition of discipline two questions must be answered:

1) Has the employer established on the balance of probabilities that the grievor is guilty of the alleged misconduct?
2) If misconduct is proven should the discipline be sustained?

Was there misconduct?

[17] Clearly there were issues between the grievor and his supervisor, Mr. Meggetto, as early as March 17, 2004 (Exhibit E-3). On that date the grievor took exception to a file he had been assigned. This dissatisfaction continued as an irritant through March 25, 2004, culminating in the grievor placing the issue before Mr. Renaud (Exhibit E-15).

[18] As well, there was disagreement concerning the meeting with the auditor in Barrie, Ontario, over who would attend, where it was to be held and agreement on the questions to be asked of the auditor. But, according to Mr. Meggetto, he understood these differences and was only aware there was a problem of any magnitude on March 25, 2004 (Exhibit E-16).

[19] It was then that the grievor dictated the terms under which he would meet. These clear and unequivocal terms were clearly non-negotiable, and here the gauntlet was thrown down. The grievor stuck to that position throughout his exchanges with Mr. Meggetto, which resulted in his shutting down the action plan, in effect granting the corrective action he sought in his grievance against the action plan (Exhibit G-3): ". . . that the action plan be set aside or abandoned".

[20] Of course, this predates the final level reply of August 15, 2005, denying this grievance: ". . . in view of the foregoing, your grievances are hereby denied, and the corrective actions you have requested will not be forthcoming" (Exhibit G-3).

[21] The grievor refused to attend four consecutive meetings, all of which were to be with Mr. Meggetto, whom the grievor testified was never abusive during the meetings. The grievor said he was anxious, afraid even, that discipline up to and including discharge might befall him if he failed, during the period covered by the action plan, to improve his performance. What stronger motivation could there be to attend and be seen to have a positive attitude towards self-improvement? Moreover, his tone, as seen in Exhibit E-22, was disrespectful concerning the scheduling of the meetings, the provision of reports prior to the meetings and the attendance at the meetings of a colleague of his choosing.

[22] The inescapable answer to the first question is in the affirmative. This pattern of behaviour does amount to insubordination.

Should the discipline be sustained?

[23] The oft-repeated adage of obey now, grieve later applies, absent an unlawful order or some danger to one's health or one's safety. There has been no suggestion that the requirement to attend weekly meetings as set out in the action plan was in any way unlawful.

[24] There has, though, been a suggestion that the grievor, at least in part, refused to attend these meetings out of concern over his emotional health. He said that he had seen a doctor and that he was prescribed medication (Exhibit G-7). But that was Friday, January 23, 2004, more than two months before these events. I have no evidence other than that and the grievor's testimony that he felt anxious to justify the grievor's repeated refusals.

[25] Absent any evidence from the grievor's doctor concerning an ongoing situation, what medication was prescribed, for how long, and to what result, I cannot excuse his repeated refusals on the basis of his health. Nor have I any evidence from the Employee Assistance counsellor to corroborate advice the grievor says he was given not to attend these meetings, or to only attend with an observer.

[26] Faced with that situation and no indications whatever by the grievor to Mr. Meggetto of his medical condition to explain his inability to attend, I cannot intervene unless, of course, the discipline chosen, a one-day suspension, was out of all proportion to the misconduct. Exhibit E-27, the discipline policy, at table 2, provides the range of discipline for a group-three offence such as insubordination. That range is from one to 30 days for single acts of misconduct [Emphasis added].

[27] In Mr. Eadie's conclusion, he states that the grievor "failed to attend a meeting [Emphasis added]". Clearly, that understates the grievor's behaviour. He did not simply fail to attend, he refused to attend. He didn't fail to attend a meeting, but four consecutive meetings. This, of course, elevates the grievor's behaviour from an isolated incident to a pattern of behaviour, one that was both deliberate and defiant.

[28] The grievor's reaction to two earlier warnings (that if he did not attend he would be disciplined) provides ample reason why the one-day suspension should not be reduced to yet another written warning. Those warnings, although not disciplinary, convey clear expectations together with the consequences should the warning not be heeded. The grievor chose to disregard these warnings, and I am not convinced he would have treated a third written warning in the form of a reprimand any differently.

[29] It seems logical that if a single act of insubordination could result in a range of from one to thirty days' suspension (Exhibit E-27) then repeated acts of insubordination would warrant some greater range of sanction. Regrettably, the grievor set himself up as the sole determining authority on how, when and if the action plan would proceed. This he did at his peril. The consequences of such action in this case were, in my opinion, modest, conservative perhaps. Nor am I persuaded that the discipline should be mitigated. I don't accept that the grievor was provoked into behaving in the manner he did. He did not have a right to have a union representative attend non-disciplinary meetings whose sole focus was to help him improve his performance. Also, the absence of prior discipline does not assist him in this matter as, even considering the principles of corrective and progressive discipline, I do not

believe that a reprimand is appropriate in the circumstances, especially given the grievor's past behaviour and attitude.

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

(The Order appears on the next page)

Order

[31] The grievance is dismissed.

November 2, 2006.

Barry D. Done,
adjudicator