Date: 20071015

File: 166-02-36723

Citation: 2007 PSLRB 107

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

STEPHEN SIDORSKI

Grievor

and

TREASURY BOARD
(Canadian Grain Commission)

Employer

Indexed as
Sidorski v. Treasury Board (Canadian Grain Commission)

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

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Laurin Mair, Public Service Alliance of Canada

For the Employer: Robert Lindey, counsel

Heard at Thunder Bay, Ontario,
August 29 to August 31, 2007.

I. Grievance referred to adjudication

[1] On November 29, 2004, Stephen Sidorski ("the grievor") filed a grievance against his employer's decision to impose a disciplinary five-day suspension. As corrective action, the grievor requested:

> 1) *That the disciplinary suspension be removed immediately*
>
> 2) *That all record of this matter be withdrawn and destroyed*
>
> 3) *That I be made whole. That I receive financial reimburse* [*sic*] *immediately.*

[2] At that time, the grievor worked as a grain inspector for the Canadian Grain Commission (CGC or "the employer") at Thunder Bay, Ontario, classified at the PI-03 level (Primary Products Inspection Group).

[3] Unsuccessful in challenging his suspension at the first, second and final levels of the grievance procedure, the grievor referred his grievance to adjudication on November 9, 2005, with the support of the Public Service Alliance of Canada (PSAC).

[4] 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.

[5] Two previous attempts by the Public Service Labour Relations Board ("the Board") to schedule this hearing were unsuccessful when, first, the employer and then the bargaining agent requested postponements.

[6] The Chairperson of the Board has appointed me to hear and determine this matter as an adjudicator.

[7] At the beginning of the hearing, the parties requested that I assist them as a mediator to determine whether a voluntary resolution of the matter was possible. The mediation effort was unsuccessful, and so the hearing proceeded.

II. Summary of the evidence

[8] On the request of the employer's representative, supported by the grievor's representative, I issued an order for the exclusion of witnesses.

[9] The employer's representative led evidence through four witnesses. The grievor was the sole witness on his behalf. Thirteen exhibits were admitted.

[10] The employer's first witness was Allen Coffey. As manager of inspection services for the CGC at Thunder Bay, a position that he has occupied for four years, Mr. Coffey is responsible for supervising the technical inspection program in all of the CGC's Thunder Bay locations.

[11] Mr. Coffey testified that he chaired a selection board in 2004 in a competition to fill grain inspector positions at the PI-04 level in Thunder Bay. The other members of the board were Dennis Caruso, Supervisor of Inspection Operations, and Linda Brown, a CGC human resources representative. After the candidates received the results of the competition, two of them — the grievor and David (known as "Rocky") McConnell — filed appeals.

[12] Mr. Coffey, Mr. Caruso, Ms. Brown, the two appellants and their union representative, Judith Monteith-Farrell, attended a disclosure meeting arising from the appeal process. At the meeting, the board members provided the competition examination papers and grades for all of the candidates to the appellants for their review. Mr. Coffey testified that he explained at the beginning of the meeting that the disclosed information was confidential. He told the appellants that they could pose questions once they had examined the information. Mr. Coffey then left the room. When he returned, he again mentioned that the information was confidential and that ". . . these marks don't go out." At the conclusion of the meeting, Mr. Coffey reinforced the message by saying that the information was "100 percent confidential." He testified that the appellants and their representative nodded to indicate that they understood.

[13] Mr. Coffey reported that Mr. Caruso came to see him several hours later that day. Mr. Caruso told him that Peter Duda, one of the successful candidates in the competition, had contacted him asking why his marks ". . . were on the waterfront." Mr. Coffey followed up by calling Mr. Duda. Mr. Duda reported that an employee had told him that the first-ranking candidate in the competition had not received the

highest mark on the personal suitability factor. Mr. Duda was upset and asked Mr. Coffey why this information had been revealed given that board members had given assurances that everything would remain confidential. Mr. Duda identified Jacklynne (known as "Jacki") Barnes as the employee who had conveyed the information to him.

[14] Mr. Coffey related that he called Ms. Barnes after talking to Mr. Duda. She told him that the revealed information came from the grievor. Asked for specifics of what the grievor said, Ms. Barnes told Mr. Coffey that the grievor mentioned several marks from the competition as well the personal suitability issue. At Mr. Coffey's request, Ms. Barnes confirmed her account in an email dated November 10, 2004 (Exhibit E-2). Mr. Coffey testified that the marks Ms. Barnes referenced in the email were correct. In a second conversation, Ms. Barnes outlined to Mr. Coffey that the grievor's conversation with her occurred at the Western Grain Byproducts ("Western 10") office. Referring to the disclosure meeting earlier that day, she had asked the grievor, "How did it go?" After the conversation, Ms. Barnes went to her regular work site where she encountered Mr. Duda and passed the remarks made by the grievor on to him.

[15] Mr. Coffey testified that he asked the grievor to come to his office to discuss the allegation. Ms. Brown participated by telephone. The grievor, accompanied by Ms. Monteith-Farrell, denied that he had revealed information. Mr. Coffey reported that either the grievor or Ms. Monteith-Farrell had suggested that the leak came from management and specifically that Mr. Caruso had spoken to Carol Coffey and revealed the information.

[16] Mr. Coffey investigated this suggestion with Mr. Caruso who denied orally and by email that he had disclosed any information (Exhibit E-3). Ms. Coffey sent an email to Mr. Coffey stating that there had been no such conversation with Mr. Caruso (Exhibit E-4).

[17] Mr. Coffey discussed the results of his investigation with Jim Ball, Manager of Operations, Rick Bevilacqua, Regional Director, and Ms. Brown. Mr. Coffey felt that the grievor had not told the truth and was, in fact, the person who leaked the information. Mr. Coffey and his colleagues discussed their response options and determined that a five-day suspension without pay was the appropriate disciplinary penalty.

[18] According to Mr. Coffey, management considered several factors in reaching its decision. The grievor had received a letter of reprimand dated November 5, 2003, for improper use of email (Exhibit E-8). The employer then imposed a one-day suspension without pay on the grievor on June 24, 2004 (Exhibit E-5). That discipline was reduced to a written reprimand at the final level of the grievance procedure in June 2005 (Exhibit E-6). Management also issued two counselling letters to the grievor, the second of which, dated September 16, 2004, made specific reference to maintaining confidentiality (Exhibit E-7). Mr. Coffey stated that they also took into consideration Ms. Barnes' testimony and the fact that the grievor had lied at his meeting with Mr. Coffey when he denied that he had said anything. Given that the management team felt that the grievor had not responded positively to the previous discipline and counselling, they concluded that a more serious penalty was required.

[19] Mr. Coffey issued a letter of discipline to the grievor dated November 24, 2004, imposing a five-day suspension without pay (Exhibit E-9), the key section of which read as follows:

. . .

> *After having reviewed all of this information and your responses to my question, I have come to the conclusion that you wilfully continue to exhibit insubordinate behaviour. In spite of my previous counselling and discipline, you have chosen to disregard the instruction that has been given to you and have flagrantly shown disrespect for the confidentiality of sensitive matters. The severity of this problem must be addressed.*

. . .

[20] In cross-examination, the grievor's representative asked Mr. Coffey whether there was a difficult relationship between the grievor and Ms. Brown. Mr. Coffey answered that there may have been problems "down the road" between the two but that he was not involved and did not have direct knowledge of any difficulties.

[21] Mr. Coffey confirmed that the list of successful candidates was established before the incident involving the grievor occurred and that it was likely that many employees would have known at that time the identity of the candidates who succeeded.

[22] Asked to recall exactly what he said about confidentiality at the disclosure meeting, Mr. Coffey testified that he could not recall everything but did remember clearly stating at the end of the meeting, "Does everyone understand 100 percent confidentiality. The information in this room stays in this room." Mr. Coffey indicated that the "information" to which he referred were the marks from the competition exams. He reconfirmed that the appellants then indicated that they understood the instruction by nodding their heads. The grievor's representative asked whether Mr. Coffey had stressed anything in particular, such as stating that the appellants were not to disclose their own marks or that they could not reveal the marks of other candidates. Mr. Coffey replied that he could not remember exactly the other statements he made at the meeting.

[23] Mr. Coffey stated that he did not take notes of his conversations with Ms. Barnes nor of his meeting with the grievor and Ms. Monteith-Farrell on November 15, 2004. Questioned further about the latter encounter, Mr. Coffey stated that he did not recall the grievor admitting that he had talked about his own marks but that it was possible that the grievor mentioned being disappointed with the weighting of his grades.

[24] Mr. Coffey confirmed that it was the grievor revealing marks that was the most important issue to him.

[25] The grievor's representative challenged Mr. Coffey to agree that he held an anti-union animus towards the grievor. Mr. Coffey denied the charge. He did not accept that the June 24, 2004, counselling letter represented discipline and maintained that it instead addressed technical grading issues in the grievor's work for which Mr. Coffey was responsible (Exhibit E-5). He mentioned that he himself had served as a bargaining agent representative earlier in his career.

[26] In re-examination, Mr. Coffey identified the first counselling letter sent to the grievor on May 20, 2004 (Exhibit E-10). The subjects of that letter and the meeting with the grievor to which it referred were technical grading errors on the grievor's part. Mr. Coffey testified that he left the meeting feeling that the grievor had been forthright in the discussion and had accepted the counselling. Following the session, the grievor called Mr. Coffey to inform him that he had a letter for him that he then delivered (Exhibit G-1). In Mr. Coffey's opinion, that letter was a problem because he had instructed the grievor to communicate concerns by speaking to him in person. The

principal problem with the letter, however, was its contents. Mr. Coffey's concerns led him to issue discipline in the form of a one-day suspension without pay on June 24, 2004 (Exhibit E-5).

[27] Mr. Coffey denied singling out the grievor with respect to technical errors or treating him differently than other employees. He outlined that he had talked with a number of other employees about grading problems and that he had issued counselling letters similar to what he sent to the grievor. He also refuted the reference in the grievor's letter that there were only four errors (Exhibit G-1) and stated that the number was considerably larger.

[28] The employer's second witness, Mr. Caruso, confirmed that he was a member of the selection board for the PI-04 competition in 2004 and that he participated in the disclosure meeting involving the board members and the two appellants and their bargaining agent representative. Mr. Caruso testified that he talked with the PI-04 supervising inspectors at the waterfront sites before the meeting that morning, as was his practice every morning. The normal purpose of those conversations was to identify workload issues or other problems and to determine staff deployment needs. On the day in question, some of the supervisors with whom Mr. Caruso talked mentioned concerns about the disclosure meeting to be held that morning. Mr. Caruso took the opportunity of his conversations with all of the supervisors to assure them that the disclosure meeting was to be confidential and that no information disclosed at that meeting was to be revealed afterwards.

[29] At the disclosure meeting, Mr. Caruso spoke only a couple of sentences. At the outset, he told the appellants and their representative that he hoped that they all were aware that the meeting was "100 percent confidential" and that any information should stay in the room and not be disclosed afterward. Mr. Caruso testified that the three persons nodded and said yes and posed no questions about confidentiality. He outlined that Mr. Coffey made his own comments about confidentiality three or four times during the course of the meeting, including after a 20 to 30 minute absence and at the end. Mr. Caruso stated that Ms. Brown also made statements about confidentiality.

[30] After the meeting, Mr. Caruso talked again with some supervising inspectors about the importance of confidentiality in all staffing competitions.

[31] Mr. Caruso indicated that he received a call from Mr. Duda after lunch. Mr. Duda was upset and told him that Ms. Barnes had talked to him about information disclosed at the meeting. Mr. Duda reported that Ms. Barnes mentioned that he had had the highest marks on the written examination but had not ranked first on personal suitability. Mr. Caruso told Mr. Duda that he wanted to have a conversation in private with Ms. Barnes. Mr. Caruso indicated that he then asked her what information she had given to Mr. Duda. She replied that she told Mr. Duda about marks and what the grievor had said about personal suitability. Mr. Caruso told her not to talk with anyone else about the matter and alerted her that he might require confirmation of the details by email and that he would have to bring the issue to Mr. Coffey's attention.

[32] Mr. Caruso testified that he met with Mr. Coffey and explained what both Mr. Duda and Ms. Barnes had told him. Apart from making one further call to Ms. Barnes asking her to email him the details (Exhibit E-2), Mr. Caruso said he had no further involvement in the matter, which was left to Mr. Coffey.

[33] In cross-examination, Mr. Caruso clarified that it was he who introduced the issue of confidentiality in discussions with the supervising inspectors. Some of the inspectors, however, did ask whether information about the competition was going out into an open forum. Mr. Caruso reaffirmed that it would not.

[34] Asked what he meant when he said "100 percent confidentiality" at the disclosure meeting, Mr. Caruso replied that confidentiality applied to 100 percent of the information disclosed and to all of the documents produced at the meeting.

[35] The grievor's representative questioned Mr. Caruso about his knowledge of Mr. Duda's reputation. Mr. Caruso replied that he had not worked with Mr. Duda but understood that he was a very good worker who took his job seriously. Mr. Caruso had no knowledge of Mr. Duda being upset or irate frequently. Of his conversation with Ms. Barnes, Mr. Caruso testified that he believed that she had said orally what she later confirmed in her email (Exhibit E-2).

[36] The employer's third witness was Ms. Barnes. She confirmed that she was a PSAC member and that she attended the hearing under a summons issued by the Board.

[37] Ms. Barnes confirmed that she started her day on November 9, 2004, at the Cargill elevators and then was sent at approximately 08:30 to the Western 10 elevators to relieve the grievor. When the grievor returned to Western 10, Ms. Barnes was standing at the door waiting to leave. She asked him, "Well, how did it go?" She testified that the grievor pulled a piece of paper from his pocket and told her about candidates' marks, who was at the disclosure meeting, what their emotional state was and "some other stuff." She had not expected any details and reacted by saying, "Oh really." She then left and had no further conversation with the grievor about the disclosure meeting.

[38] Ms. Barnes recounted that she returned to Cargill between 12:00 and 12:30, where she encountered Mr. Duda and told him that the grievor had talked to her about the disclosure meeting. She specifically mentioned to Mr. Duda that the top candidate in the competition had not received the highest mark on personal suitability. Ms. Barnes reported that Mr. Duda reacted with surprise. She confirmed that she was not aware at the time that the information was confidential. She had no further discussion with Mr. Duda about the matter.

[39] Later that day, Mr. Caruso called Cargill and asked to speak to Ms. Barnes to hear from her what the grievor had told her. Mr. Caruso later asked her to commit her recollection of the conversation to writing (Exhibit E-2). Ms. Barnes confirmed that Exhibit E-2 accurately recorded the information that the grievor related to her.

[40] In cross-examination, Ms. Barnes testified that she was a candidate in a competition for promotion to a position at the PI-03 level in fall 2004 but could not remember the precise dates of the competition. She received a letter from the employer early in 2005 indicating that she had been successful.

[41] Concerning her conversation with the grievor on November 9, 2004, Ms. Barnes clarified that he did not reveal specific marks other than the two reported in Exhibit E-2; i.e., the grievor's score on personal suitability (58%) and Mr. McConnell's personal suitability result (67%). Pressed about the latter grade, Ms. Barnes reported that she was positive that the grievor talked about "Rocky's mark." She also confirmed that the grievor mentioned that Rocky attended the meeting and was upset and in tears. Ms. Barnes denied that she asked the grievor about the process or that she said to him that she hoped that ". . . they don't appeal the position I'm competing for."

[42] Turning to her conversation with Mr. Duda, Ms. Barnes related that she felt it necessary to speak to him about her conversation with the grievor because that conversation had surprised her. She could not remember her exact comments to Mr. Duda and could not recall whether he asked her any questions about what the grievor had said. She related that Mr. Duda was upset and mentioned something like "Wait a minute, no one is supposed to know."

[43] The final employer witness was Mr. Duda, who also confirmed that he was a PSAC member and that he was attending the hearing under summons. Mr. Duda testified that he was working at the Cargill elevators on November 9, 2004, where he received the regular call from Mr. Caruso early that morning asking his normal questions about the situation and status at Mr. Duda's site. Around 09:00, Mr. Caruso telephoned again and informed him that some people were going to a disclosure meeting that day. Mr. Caruso assured him that everything to be discussed would be kept confidential and asked Mr. Duda to notify him immediately should he hear anything about the meeting.

[44] Mr. Duda related that Ms. Barnes returned to Cargill from Western 10 around noon. He testified that she told him that he ranked first in the competition but had not received the top grade on personal suitability. Mr. Duda, who did not know his own marks at the time, was surprised and particularly upset that Ms. Barnes also mentioned that Rocky had done so poorly that he was in tears at the disclosure meeting, a comment that Mr. Duda felt was insensitive. Mr. Duda then reported the conversation to Mr. Caruso who asked for clarification. Mr. Caruso said that he was going to have to act on the matter and talk with his superiors.

[45] The grievor's representative asked for and received confirmation from Mr. Duda that November 9, 2004, was not a busy day at Cargill. Asked for clarification, Mr. Duda could not recall with certainty whether Mr. Caruso mentioned the confidentiality issue in his first or second call that morning but did remember that Mr. Caruso specifically stated that he was phoning the "whole waterfront."

[46] Mr. Duda testified that he did not recall exactly how his conversation with Ms. Barnes began but that he was certain that he had not posed any questions to her. He indicated that he considered Ms. Barnes' comments about Rocky a breach of confidentiality. He confirmed that he had not heard from her what his mark was, only that he was the top-ranking candidate overall but not first on personal suitability.

[47] The grievor's representative asked Mr. Duda about his relationship with the grievor, about Mr. Duda's reputation as a hot head and about the nickname "thermometer head" that some employees had used in referring to him. Mr. Duda stated that he had had disagreements with the grievor and that the latter had told him that there were people in the workplace who did not like Mr. Duda. He denied knowledge of any formal harassment complaints against him and of having a long history of unpleasant dealings with the grievor. He mentioned that he had disagreed with the grievor from time to time on union local matters but that he respected the grievor as a person who stood up for employees.

[48] The grievor was the final witness. He testified that, at the time of the incident, he had worked 29 years for the CGC at Thunder Bay, advancing to the PI-03 level as a grain inspector. In recent years, he had acted on occasion as a PI-04 inspector-in-charge.

[49] The grievor and the other candidates in the PI-04 competition held in 2004 learned the results of the staffing action when they received a letter that reported the ranking of candidates (Exhibit G-2). The grievor testified that he stood sixth among the seven successful applicants. He filed an appeal.

[50] Accompanied by Mr. McConnell and Ms. Monteith-Farrell, the grievor attended a disclosure meeting with Mr. Coffey and Mr. Caruso. The grievor stated that he could not recall whether Ms. Brown was also present at the meeting. The appellants were provided copies of all of the candidates' examinations and marks as well as the candidates' grades on four questions used by the interview board to measure the personal suitability factor. The grievor stated that he did not take notes during the disclosure session and did not have a piece of paper with him. He remembered that Mr. Coffey said that the information ". . . was of a confidential nature" but did not recall him saying that it was "100% confidential." The grievor testified that Mr. Caruso said nothing.

[51] After the meeting, the grievor returned to Western 10 where he was working that week as an acting PI-04. He explained that he encountered Ms. Barnes, who was preparing to leave. She asked him, "How did it go?" The grievor replied that it had not gone as well as he thought it would and that he was very upset with what he had seen concerning his own marks. According to the grievor, Ms. Barnes then stated that she had just finished a PI competition and was wondering why it was taking so long to get

to the personal suitability interview stage. She also asked about the personal suitability questions. The grievor answered that those questions would probably be formatted differently for her competition. He told her that his own personal suitability mark was 58% and that he was unhappy with the weighting of the different components for this factor. The grievor testified that Ms. Barnes then asked about Mr. McConnell. The grievor replied that Mr. McConnell was very upset at the meeting. The conversation ended, and Ms. Barnes left.

[52] The grievor denied that he told Ms. Barnes that Rocky had scored 67% on personal suitability or that the top-ranking candidate in the competition had not received the highest grade on personal suitability.

[53] Concerning the November 15, 2004, fact-finding meeting with Mr. Coffey, the grievor denied that he told Mr. Coffey that he said nothing to Ms. Barnes. He maintained that he admitted to Mr. Coffey that he had talked to Ms. Barnes about his disappointment with his personal suitability result, had told her his own mark on that factor and had mentioned that the other appellant was upset. He insisted that he did not reveal Rocky's mark to Ms. Barnes.

[54] The grievor stated that, in his own mind, he did not believe that revealing his own mark was a breach of confidentiality. He felt ". . . entitled to talk about my own business." Revealing someone else's mark, by contrast, would represent a breach of confidentiality.

[55] The grievor outlined his involvement with the local union's business. He testified that he had been trained by both the CGC and the PSAC in handling confidential information and had represented union members with the employer in sensitive situations where preserving confidentiality was very important.

[56] The grievor discussed a situation where, as a bargaining agent member of the Threat Assessment Team (TAT), he had brought to management's attention on a confidential basis threats that had been made at the work site by an elevator employee to a CGC employee. The grievor expected that management would deal with his TAT report confidentially, but he was later confronted by the person who had been accused of the threatening behaviour. In a follow-up email to Gordon Miles, Chief Executive Officer of the CGC, the grievor stated that a manager had broken confidentiality by sharing the report with the accused employee (Exhibit G-3). Subsequently, the PSAC

withdrew its participation from the TAT given its concerns about confidentiality. The grievor reported that there were several other incidents dealing mostly with union matters where management had breached confidentiality, although the grievor said that he could not provide another specific example.

[57] The grievor testified that he became involved with the union local in 2000. At that point, his previously good relationship with management changed. As his union representation responsibilities grew, he felt that he was increasingly under greater scrutiny by management to his own detriment. He testified that he was subjected to threats and intimidation by ". . . pretty well everyone on the management team," including Mr. Bevilacqua. The grievor recounted an incident in 2002 when, as union local president, he met informally with Mr. Bevilacqua and Ms. Brown. During the meeting, he told Mr. Bevilacqua that he ". . . was talking the talk but not walking the walk." The next day, according to the grievor, Mr. Bevilacqua called the grievor into his office, took offence with he had said the previous day, and told him that he had no authority to talk to him that way as a union representative given how Mr. Bevilacqua had "walked the walk" with the grievor personally in a previous event. On another occasion, the grievor testified that Mr. Coffey called him into his office and told him that if he continued to push forward with a certain harassment complaint management would push back against him. The grievor maintained that there were a number of other similar incidents indicative of a bad relationship caused by his union role, though the grievor reported that he was not disciplined for his union activities. He also referred to the circumstances surrounding a performance review meeting convened by Mr. Coffey to which the grievor was told to bring a union representative. The performance review meeting resulted in a one-day suspension for approximately eight "performance errors" that he had allegedly committed (Exhibit E-6), a suspension that was subsequently reduced to a written reprimand.

[58] In cross-examination, the grievor again denied that he took any notes during the November 9, 2004, disclosure meeting and stated that he did not write anything down when he returned to the elevator. He denied that he had a piece of paper with him when he spoke with Ms. Barnes or that he had taken a piece of paper from his pocket.

[59] Counsel for the employer asked the grievor whether he had revealed Mr. McConnell's mark. The grievor maintained that there would have been "no advantage" to him in talking to Ms. Barnes about Mr. McConnell's grade. The grievor

was happy with his ranking in the competition and had nothing to gain by talking about the results of someone (Mr. McConnell) who fell lower on the list. He stated that his only objective in filing an appeal was to extend the effective period of the eligibility list to two years.

[60] Asked about his confidentiality training with the PSAC, the grievor outlined his understanding from that training that any information received from a member in the course of representational contacts must remain confidential prior to any decision to grieve. The grievor agreed with the employer's counsel that it was not proper, along the same vein, to release confidential information in a staffing process. The grievor also at first accepted that he would not reveal that a member was emotional in a meeting but then stated that ". . . it may or may not be . . ." improper to reveal the emotions of a fellow employee in a competition. The decision to do that was within ". . . his discretion as a union representative." In the specific instance of his encounter with Ms. Barnes, the grievor stated that he thought it was proper for him to talk about Mr. McConnell's emotional state because Ms. Barnes had asked a question about Mr. McConnell and had expressed concern for him. Asked by counsel for the employer whether he should have checked first with Mr. Coffey or Mr. Caruso, he replied that he ". . . would never never request any guidance from management about confidentiality issues based on [his] past experience with them." Pressed further on this point, the grievor stated that he would probably go to the union rather than management to discuss confidentiality concerns. He said, "Whether I take direction [from management] is my decision. I would never take advice."

[61] In re-examination, the grievor clarified that remark by stating that he took direction at all times but ". . . whether I seek advice or not remains in my prerogative." The grievor also commented further on the issue of discussing Mr. McConnell's emotional state by saying that, if asked by anybody at any time whether a person was upset, he would not consider it a breach of confidentiality to respond.

III. Summary of the arguments

A. For the employer

[62] Counsel for the employer argued that the evidence proved that the employer instructed the grievor not to disclose the confidential information shared at the November 9, 2004, disclosure meeting. The disclosure process took place as mandated by the *Public Service Employment Regulations (2000)* ("the *Regulations*"):

> . . .
>
> ***26.(1)*** *An appellant shall be provided access, on request, to any information, or any document that contains information, that pertains to the appellant or to the successful candidate and that may be presented before the appeal board.*
>
> *(2) The deputy head concerned shall provide the appellant, on request, with a copy of any document referred to in subsection (1).*
>
> . . .
>
> *(6) Any information or document obtained under this section shall be used only for purposes of the appeal.*
>
> . . .

[63] By the grievor's own admission, he revealed to Ms. Barnes his own mark on the personal suitability element as well as the fact that Mr. McConnell was upset at the disclosure meeting. He denied that he disclosed either Mr. McConnell's personal suitability grade or that the top-ranking candidate in the competition had not received the highest score on personal suitability. Ms. Barnes' contrary testimony on this point was clear and forthright and must be preferred. She stated that the grievor revealed Mr. McConnell's personal suitability grade in addition to his own and the status of the top-ranking candidate with respect to the personal suitability factor, as well as the fact that Mr. McConnell was upset and in tears at the meeting. Compared to the vagueness and generality of the grievor's version, the employer's counsel maintained that Ms. Barnes provided credible details about how and where the meeting occurred and was absolutely clear that the only question she had posed to the grievor was "How did it go?" Soon after the encounter, she recorded in her email exactly what had ensued and sent the email to Mr. Caruso and Mr. Coffey (Exhibit E-2). Mr. Coffey confirmed in his testimony that the marks Ms. Barnes cited were correct. No evidence adduced at

the hearing suggested any animosity between Ms. Barnes and the grievor; Ms. Barnes was herself a union member.

[64] When the employer's representative asked the grievor whether he had told Ms. Barnes anything about Mr. McConnell's marks, he curiously answered that he had no reason to say anything about Mr. McConnell's results ". . . because there was no advantage to [the grievor]" in doing so. The employer's representative indicated that he would have expected a very different answer. Instead, what the grievor said revealed an employee ". . . who plays the percentages" and ". . . calculates what was to his advantage to release." The grievor's comment suggested the possibility that he performed a similar calculation in deciding what to say at the hearing about his conversation with Ms. Barnes.

[65] Given that there was solid evidence that the grievor disclosed confidential information to Ms. Barnes, the onus shifted to the grievor, according to counsel for the employer, to rebut or provide a logical explanation. He did neither.

[66] The grievor alleged that Ms. Barnes asked him a series of questions about the disclosure meeting at their encounter on November 9, 2004. Even if this were true — and Ms. Barnes emphatically stated that she did not pose more than the simple question, "How did it go?" — her posing questions to the grievor could not justify his disclosing confidential information.

[67] In summary, the employer's representative maintained that the employer had met its onus to establish on a balance of probabilities that the grievor disclosed the specific confidential information outlined in Exhibit E-2. The grievor was insubordinate. Management advised him not to disclose any information, but he then proceeded to do exactly that within an hour after the disclosure meeting ended.

[68] Concerning the disciplinary penalty, the employer's representative argued that there was no question that the grievor understood both the need for confidentiality and how to deal with confidential information. The grievor testified that he had received extensive training on the subject and had considerable experience managing confidential information in his representation work on the bargaining agent's behalf. Moreover, on September 16, 2006, less than two months before the incident, Mr. Coffey sent the grievor a counselling letter in which he emphasized his expectations regarding confidentiality (Exhibit E-7):

. . .

> *2. Confidentiality must be respected when dealing with matters of a sensitive nature. It is my expectation that you will present yourself in the workplace as an individual who will respect the privacy of others by refraining from sharing confidential matters with those who are not directly involved in the situation at hand.*

. . .

[69] The employer's counsel outlined that management considered the principle of progressive discipline in assigning a five-day suspension without pay. In the two previous years, the grievor received a letter of reprimand (Exhibit E-8) as well as a one-day suspension (Exhibit E-5), later reduced to a second letter of reprimand (Exhibit E-6). The employer was also influenced by the negative impact of the grievor's disclosure of confidential information on the workplace. The breach of confidentiality clearly upset Mr. Duda, a newly appointed supervising inspector whose personal suitability for the role was possibly put in question by the information that the grievor revealed. The grievor's misconduct also occurred within a context where the employer was making special efforts to assure employees that a disclosure process would not open the doors to the dissemination of confidential staffing information.

[70] Turning to the grievor's anticipated condonation argument, counsel for the employer maintained that the grievor did not provide specific examples where management breached confidentiality. The grievor testified that he could not speak to the many times that a breach occurred without his documents and offered nothing further to support his contention other than the unsupported allegation made in Exhibit G-3. There was no further information offered at the hearing as to how management dealt with the grievor's allegation or as to what occurred. The grievor, accordingly, failed to establish condonation as a relevant factor in weighing the five-day suspension.

[71] As to the question of anti-union sentiment, the employer's counsel contended that the grievor made statements and inferences about an anti-union animus during his testimony but provided little in the way of specifics. The first example that the grievor cited, involving Mr. Bevilacqua, was sketchy. Mr. Bevilacqua's alleged remark to the grievor in private that Mr. Bevilacqua had indeed "walked the walk" in a situation involving the grievor should be viewed as reasonable given that the grievor had

challenged him openly in a meeting the previous day to do more than "talk the talk." The employer did not discipline the grievor for anything to do with this occurrence, nor was there discipline in the second example that the grievor cited, an alleged statement Mr. Coffey made about management "pushing back" against the grievor. Such a statement, if it was made, can be readily interpreted as indicating management's determination to defend itself against an allegation made by the bargaining agent, and nothing more. The employer's representative noted that Mr. Coffey emphatically denied holding any anti-union animus, testifying instead that he himself had served as a bargaining agent representative. As with the condonation argument, the employer's counsel maintained that the evidence did not support the alleged anti-union bias and that it should not factor into my evaluation of the discipline that the employer imposed.

[72] Counsel for the employer argued that I should view the grievor as an employee who did not take direction well. He was not forthright or honest about what occurred on November 9, 2004. At the investigation meeting with Mr. Coffey on November 15, 2004, the grievor tried instead to blame the disclosure on Mr. Caruso. Mr. Coffey's subsequent inquiries with both Mr. Caruso and Ms. Coffey (Exhibits E-3 and E-4) established that the grievor's allegation was without foundation. The grievor did not accept any responsibility for his conduct, acknowledged no wrongdoing and did not apologize. He remarked in cross-examination that he would ". . . never never request guidance from management" on confidentiality issues and then that he considered it within his own discretion whether or not to reveal the emotional state of a person involved in a confidential meeting. Those remarks, from the employer's perspective, were very telling. Despite counselling about confidentiality, the two previous disciplinary interventions and the five-day suspension at issue in this hearing, the grievor came before the adjudicator and made comments that indicate a continuing refusal to take direction on this subject.

[73] The employer's representative commended to me three adjudication decisions: *Brecht v. Treasury Board (Human Resources Development Canada)*, 2003 PSSRB 36; *Labrie v. Treasury Board (Health Canada)*, PSSRB File No. 166-02-26301 (19950918); and *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124.

[74] In closing, the employer's representative argued that the evidence proved that management was fully justified in imposing a five-day suspension on the grievor, a

penalty that fell well within the range of appropriate responses to the grievor's misconduct, given his prior disciplinary record.

B. <u>For the grievor</u>

[75] The grievor's representative opened his argument by stating that counsel for the employer had mischaracterized elements of the evidence. The grievor's uncontested testimony was that his previously good relationship with the employer deteriorated after he became active in the union in 2000. After that, the grievor was disciplined on a number of occasions. The grievor's representative contended that it was much easier to understand the situation as reflecting management's negative reaction to the grievor's increased union activity than to believe that the grievor's personality suddenly changed in and after 2000.

[76] The grievor's representative disputed the argument that the employer's representative made that no persuasive examples of the employer's condoning the release of confidential information were placed before the adjudicator. He insisted that the grievor had described in detail the situation in August 2003 when he forwarded management information about reports of a threat of physical violence against an employee only later to be confronted by the person accused of that threatening behaviour, who could only have learned of the grievor's confidential report from management (Exhibit G-3). The employer's counsel did not challenge this testimony. According to the grievor's representative, it should be accepted as proof that management abused confidentiality in a highly sensitive situation.

[77] The grievor's representative pointed out that on the morning of the disclosure meeting, the only elevator that Mr. Caruso did not call to convey his message about the confidentiality of that day's disclosure meeting happened to be the site to which Ms. Barnes was assigned. As a result, she did not learn about management's concern or assurances regarding confidentiality. Management knew about the climate of rumour mongering in the workplace and that Ms. Barnes, who was herself a candidate in a staffing competition at the time, would be anxious to ask the grievor about his disclosure experience when he returned to Western 10. It was strange, according to the grievor's representative, that management then sent Ms. Barnes back to the Cargill site even though the evidence disclosed that the Cargill elevator was not busy. Mr. Duda was working that day at Cargill. Management knew that Mr. Duda was volatile. If Ms. Barnes gave him confidential information, management could expect that Mr. Duda

would obey Mr. Caruso's instructions to report the breach of confidentiality immediately.

[78] At that juncture, I asked the grievor's representative directly whether he was arguing that management had consciously conspired to arrange the situation on November 9, 2004, so as to entrap the grievor. The grievor's representative confirmed that that was the inference that his client wished me to draw from the evidence. The grievor's representative argued that the reality of rumour mongering in this workplace was well and widely understood and was substantiated, for example, by Ms. Coffey's November 17, 2004, email (Exhibit E-4). Moreover, Mr. Caruso's message to inspection supervisors on the morning of November 9, 2004, about confidentiality and his instructions to report a breach of confidentiality immediately were normally not part of his morning round of calls. Taken in context, the evidence suggested that Mr. Caruso anticipated that there would be "scuttlebutt" that day.

[79] The grievor's representative accepted that the grievor did say something to Ms. Barnes on November 9, 2004, about the disclosure meeting. The grievor's representative acknowledged that the grievor's version of that conversation and that of Ms. Barnes were quite different. He stated that this difference left the adjudicator with a "Faryna v. Chorney" witness credibility dilemma referring to *Faryna v. Chorney*, [1952] 2 D.L.R. 354. He made no further comments on that point.

[80] The grievor's representative argued that the grievor's information disclosure in his encounter with Ms. Barnes was of such miniscule importance that it did not warrant discipline.

[81] The grievor's representative referred me to three authorities: *Diversicare Management Inc. v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada) Local 1941*, 137 L.A.C. (4th) 138; *West Park Hospital v. Ontario Nurses' Association*, 37 L.A.C. (4th) 160; and Brown and Beatty, *Canadian Labour Arbitration,* 4th ed. (2007), at para 7:4400. In *West Park Hospital*, he drew my attention, in particular, to the common law principle concerning privileged information that holds that the ". . . element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties." From Brown and Beatty, the grievor's representative urged that a number of the mitigating factors around discipline listed by the authors applied to the circumstances of this case.

[82] The grievor's representative concluded by asking that I rescind the five-day suspension without pay and order the employer to reimburse the grievor for lost salary. In the alternative, should I find that there was cause for discipline, the grievor's representative urged that I substitute a written reprimand as the most appropriate penalty in view of the very minor nature of the alleged misconduct.

C. Employer's rebuttal

[83] Counsel for the employer reiterated that the employer's treatment of the grievor was related to his actions as an employee, not to his role as a union local representative. The employer's counsel contended that management would have taken similar action against any employee who exhibited similar behaviour.

[84] Counsel suggested that it was understandable that Ms. Barnes did not receive the message about confidentiality on November 9, 2004, because Mr. Caruso's calls that morning were to the supervising inspectors. There was no supervising inspector at the Western 10 site that morning when Ms. Barnes was there.

[85] The employer's representative maintained that the grievor's conspiracy theory was simply too far-fetched to deserve consideration.

[86] Concerning *West Park Hospital*, the employer's counsel noted that the common law principles expressed in that decision applied to situations of privileged communication, as between a doctor and a patient or a lawyer and a client. He cautioned against taking the leap that any of those principles were relevant to the situation before me.

IV. Reasons

[87] The employer's burden in this matter was to establish, on a balance of probabilities, that the conduct for which discipline was imposed did occur, that it warranted discipline and that the discipline awarded was appropriate and proportionate to the nature of the offence given the aggravating and mitigating factors at play.

[88] The core reasons the employer gave for disciplining the grievor, as expressed in the employer's letter of November 24, 2004 (Exhibit E-9), established the parameters for my analysis:

. . .

> *After having reviewed all of this information and your responses to my question, I have come to the conclusion that you wilfully continue to exhibit insubordinate behaviour. In spite of my previous counselling and discipline, you have chosen to disregard the instruction that has been given to you and have flagrantly shown disrespect for the confidentiality of sensitive matters. The severity of this problem must be addressed.*

. . .

A. Did the grievor disregard an instruction and fail to respect the confidentiality of information?

[89] I find, as a matter of fact, that representatives of the employer instructed the grievor to maintain in confidence the information they disclosed to him about the staffing competition at the November 9, 2004 meeting.

[90] Both Mr. Coffey and Mr. Caruso testified consistently and unequivocally on that point. The grievor disputed the evidence by stating that Mr. Caruso said nothing at the meeting and that Mr. Coffey did not at any point use the words "100 percent confidential." The grievor testified that he only recalled Mr. Coffey saying that the information was of a confidential nature.

[91] Given the grievor's later testimony about the training that he undertook concerning the management of confidential information and the experience he had in representing employees in sensitive situations, it does not stand to reason that he misunderstood the concept of confidentiality nor Mr. Coffey's instructions about confidentiality at the disclosure meeting, even if the only words said were that ". . . this information is of a confidential nature." When he heard the word "confidential" mentioned, he should have known its importance and understood the nature of the caution that management gave him in the context of a disclosure session. I take particular note of the fact that the grievor's representative made no submission in his closing arguments that suggested that the grievor misunderstood what was confidential at the meeting.

[92] On balance, then, I prefer the reinforcing testimony of the two employer representatives. The statements they made and remade about confidentially were strong and apparently all-encompassing. I believe that Mr. Coffey or Mr. Caruso, or

both, did use the words "100 percent confidential." While the onus to prove this and other facts lays with the employer, I note that the grievor could have called either of the other two persons who attended the meeting with him, Mr. McConnell and Ms. Monteith-Farrell, to offer different testimony as to exactly what was said about confidentiality and by whom, but he did not. Had other witnesses reported, for example, that the instructions given by the employer were vague or inexact, I might have reached a different conclusion.

[93] I find, as a further matter of fact, that the grievor then disclosed confidential information to Ms. Barnes in their encounter at the Cargill site. Obviously, the accounts that the grievor and Ms. Barnes gave about their conversation differed substantially. The grievor's representative submitted that these differences required that I weigh the credibility of the two witnesses within the model outlined in *Faryna and Chorney*. Curiously, the grievor's representative then said nothing more about witness credibility.

[94] I do not believe that I need to conduct a full-scale *Faryna and Chorney* analysis on this point. The grievor himself admitted that he disclosed information from the meeting to Ms. Barnes. The grievor conceded, if nothing else, that he revealed a precise mark from the competition — his own grade on the personal suitability test. That admission, in my view, constituted sufficient proof that the grievor failed to respect the instructions that the employer gave him that morning. I concur with the employer's representative that this disclosure could not have been justified by any questions that Ms. Barnes may have posed to the grievor. I also do not believe that a reasonable argument can be made that the information that the grievor admitted disclosing fell outside what could be viewed as "confidential" within the sense of the instructions given at the disclosure meeting. Revealing his own mark did not render the employer's instructions about confidentiality inoperative.

[95] Should I be in error that the grievor's own testimony proved his disclosure of confidential information, I am confident that there was strong support for that finding elsewhere in the evidence. Apart from the conspiracy theory advanced by the grievor, to be addressed later in this decision, the grievor's representative did not offer any convincing basis for challenging Ms. Barnes' testimony. Her contemporaneous email to Mr. Caruso outlining what the grievor said to her represented powerful confirmation of her oral evidence. Testimony given by both Mr. Caruso and Mr. Coffey concerning their

conversations with Ms. Barnes also indicated that she never wavered in her account of what the grievor said. Nor did Mr. Duda's evidence undercut her story in any significant way. The fabric of Ms. Barnes' testimony regarding the grievor's conversation with her remained strong, intact and persuasive at the end of the hearing. It established to my satisfaction that the scope of what the grievor revealed was broader than what he claimed in his testimony.

[96] In summary, I find on a balance of probabilities that the grievor disregarded instructions by revealing confidential information from the disclosure meeting.

B. Did the grievor's action merit discipline?

[97] As a general principle, an employer has the right to expect that an instruction given to an employee will be obeyed if the instruction falls within its legitimate authority. An employee who disagrees with an instruction is subject to the normal "obey and grieve" rule, other than in exceptional circumstances. In my view, the evidence led in this case did not reveal any such circumstances.

[98] The employer's argument was, at its heart, very simple. The grievor disobeyed a lawful order. His insubordinate misconduct represented just cause for invoking discipline.

[99] What did the grievor's representative offer by way of counter-argument? I note that he did not contend, for example, that the employer's representatives acted outside their authority when they instructed the grievor at the November 9, 2004, disclosure meeting not to reveal the information shared at that meeting. He also did not suggest that it was either unreasonable or somehow unconscionable for the employer to require the grievor to comply with its "100 percent confidentiality" instruction. The primary argument presented to me on the grievor's behalf was, instead, that the information he disclosed was of such "miniscule importance" as to not merit discipline.

[100] With respect, I believe that this argument speaks more to the proportionality of the five-day suspension without pay than to the prior issue of establishing cause for discipline. In any event, the employer did, in my view, establish that there was substance and consequence to the grievor's misconduct. At the very least, the misconduct certainly did impact Mr. Duda who relied on the assurances that

management gave him that the disclosure process would not result in a breach of confidentiality. More generally, the evidence that Mr. Coffey and Mr. Caruso gave regarding the employer's interest in ensuring the integrity of disclosure proceedings within the staffing process offered a reason for management's view that the grievor's actions had more that just "miniscule importance." Most observers, I believe, would recognize the employer's interest in this regard as legitimate.

[101] The grievor's representative did advance one other argument: he alleged that management engaged in a conspiracy to entrap the grievor, setting up a situation where management reasonably expected that Ms. Barnes would encounter him after the November 9, 2004, disclosure meeting and pose questions to him that would reveal his unwillingness to comply with the confidentiality instructions given to him earlier that day. Viewed against the evidence, this theory of the case is entirely unconvincing. To support such a theory, I believe that the grievor's representative would have had to offer, at the very least, some clear evidence establishing the intent of one or more managers to manipulate the situation on November 9, 2004, in the alleged fashion, or more concrete proof that the events of the day were a necessarily linked chain that revealed the alleged entrapment plan. There was no credible evidence to either effect.

[102] I find, on balance, that the grievor's action was insubordinate and did represent misconduct. The employer had just cause to invoke discipline.

[103] I wish to note that my finding that the employer had just cause to discipline the grievor should not be interpreted as a conclusion that the grievor's actions breached subsection 26(6) of the *Regulations* as cited by the employer's representative. The employer's representative did not argue that I should draw such a conclusion nor do I see any need to rule on the application of the *Regulations* in this decision.

C. Was the discipline imposed by the employer appropriate and proportionate?

[104] Of the possible mitigating factors at play this case, two in particular provided reason to consider modifying the five-day suspension without pay to a lesser penalty. The first factor was the grievor's long service with the employer, the great majority of which, according to the evidence, was characterized by satisfactory performance and passed without disciplinary incident. The second and more important factor was the seriousness of the misconduct. On this element, the employer did not establish to my satisfaction that the misconduct that occurred was sufficiently serious as to warrant

progression from two written reprimands directly to the moderately heavy penalty of a five-day suspension without pay.

[105] I recognized in the previous section the immediate personal impact of the grievor's actions on Mr. Duda as well as the challenge that the grievor's actions posed to the employer's legitimate interest in ensuring the integrity of disclosure meetings in the staffing process. That said, the employer did not offer any further evidence or argument that the grievor's conduct harmed Mr. Duda in a more lasting way nor that the event had a broad tangible impact in the workplace. It is conceivable that the grievor's actions could have affected the way other employees behaved in subsequent disclosure proceedings or that it could have undermined workforce confidence in management's ability to preserve the confidentiality of sensitive staffing information. Without concrete evidence of such effects or stronger testimony that suggested their possibility or probability, I am left to conclude that the actual impact of the grievor's misconduct was limited and somewhat isolated. To the extent that the quantum of discipline should reflect the real or potential harm caused by the misconduct, there is reason here to question the appropriateness of a five-day suspension.

[106] Although he did not make either argument in his final pleadings, the grievor's representative led evidence that suggested that the employer's past actions condoned the release of confidential information and that the employer was motivated in its treatment of the grievor by an anti-union or personal animus.

[107] Regarding condonation as a possible mitigating consideration, I cannot detect in the evidence before me a pattern in the employer's behaviour sufficient to lend it weight. The situation that the grievor described to management concerning his role in reporting a threat in the workplace to management was disturbing on its face but not conclusive. The grievor's representative did not offer other substantiating examples.

[108] As to an anti-union animus, I accept that the grievor sincerely believed that management's decisions affecting him since 2000 have been influenced by the roles he has played as a union local representative. I certainly cannot discount entirely the possibility that the grievor might have some reason for concern, but the actual evidence adduced at the hearing fell substantially short of convincing me that a valid argument was credibly made for the existence of an anti-union bias directed toward the grievor. The two examples cited, involving Mr. Bevilacqua and Mr. Coffey, would have required more detail and much closer scrutiny before any serious conclusions

could have been drawn. As it is, I did not find the evidence sufficiently compelling to persuade me that an anti-union animus existed as a first-order factor explaining what occurred nor that that there was a demonstrated nexus between any such animus and the specific decision made to discipline the grievor on November 24, 2004.

[109] Balanced against this analysis of possible mitigating factors, one aggravating factor, in particular, led me to reject the grievor's alternate argument that discipline should be confined to a written reprimand. The cumulative effect of the grievor's testimony left me with the strong impression that he holds the management of his workplace in disrespect. The grievor's attitude towards management was most palpable in cross-examination when he first stated categorically that he would ". . . never never request any guidance from management on confidentiality issues based on my past experience with them" and then followed with the comment that ". . . whether I take direction from management is my decision but I would never take their advice." The latter remark, even as later modified in the grievor's re-examination, suggested to me the strong possibility that this grievor is predisposed to be insubordinate by his own negative views about management. If nothing else, his comments convinced me that the grievor was a person who would likely resist management efforts to correct his comportment in the workplace. When management decided that a more serious disciplinary penalty was required to press its message on the grievor in this case, it strikes me that it may well have been making a realistic assessment of how the grievor would react to lesser measures. At that, I strongly suspect that even a more aggressive disciplinary response by management would not have had the impact on the grievor that management desired.

[110] That said, I remain of the view that the disciplinary penalty chosen by management in this case was somewhat disproportionate to the gravity of the grievor's misconduct. Following the normal course of progressive discipline, escalation from written reprimands to a five-day suspension would have been justified if the grievor's new offence was at least moderately severe. Measured in terms of its actual impact on either Mr. Duda or the employer, however, the grievor's insubordination was not major. Therefore, I have decided to modify the discipline imposed on the grievor to a two-day suspension without pay as opposed to a five-day suspension without pay. Had the grievor demonstrated an appreciation at the hearing that this situation was not entirely black versus white or had he not evinced in some of his comments an

apparent disrespect for management's authority, some further reduction of the penalty might have been warranted.

[111] The grievance is thus allowed in part.

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

(The Order appears on the next page)

V. Order

[113] The five-day suspension without pay is replaced by a two-day suspension without pay. The employer shall reimburse the grievor, accordingly, for lost salary.

October 15, 2007.

Dan Butler,
adjudicator