Date: 20070619

Files: 166-34-36877
and 36878

Citation: 2007 PSLRB 64

Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

PETER PARKOLUB AND THOMAS HU

Grievors

and

CANADA REVENUE AGENCY

Employer

Indexed as
Parkolub and Hu v. Canada Revenue Agency

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

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievors: Paul Reniers, Professional Institute of the Public Service of Canada

For the Employer: Neil McGraw, counsel

Heard at Vancouver, British Columbia,
June 27 and 28 and November 28, 2006.

I. Grievances referred to adjudication

[1] Peter Parkolub, Financial Review Manager, and Thomas Hu, Research and Technology Manager, are employed in the Scientific Research and Experimental Development Division of the Vancouver Tax Services Office, Canada Revenue Agency (CRA or "the employer"). The grievors filed the following grievances in connection with discipline imposed as a result of incidents on December 2, 2004, alleged to be violations of the employer's *Electronic Networks Policy Guidelines*, the *Code of Ethics and Conduct* and the *Preventing and Resolving Harassment Guidelines*:

PSLRB File No.	Grievor
166-34-36877	Peter Parkolub
166-34-36878	Dr. Thomas Hu

[2] These grievances were heard together.

[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*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*").

[4] Mr. Parkolub filed his grievance on February 4, 2005, in the following terms:

. . .

> *On February 4th 2005, I received a letter of discipline signed by Lorna Gray, Assistant Director, Scientific Research and Experimental Development Division, Vancouver Coordinating Tax Service Office, advising me that I was being suspended without pay for 1 working day for alleged misconduct.*
>
> *I have been wrongly suspended for disciplinary reasons. The discipline is unwarranted and excessive. The discipline process violated procedural rights and my rights under Article 37 of the AFS collective agreement.*

. . .

[5] Mr. Parkolub sought as corrective action that the suspension be rescinded without loss of pay or benefits, that all records of the discipline be destroyed and that he be made whole. On October 28, 2005, at the final level, the grievance was partially

granted and a written reprimand was substituted by Lysanne M. Gauvin, Assistant Commissioner, Human Resources Branch, CRA. His grievance was referred to adjudication on December 19, 2005, under paragraph 92(1)(*a*) of the former *Act*.

[6] Dr. Hu filed a grievance on February 10, 2005, which was also referred to adjudication under paragraph 92(1)(*a*) of the former *Act*, in the following terms:

. . .

> *On February 8th, 2005, I received a letter of discipline signed by Lorna Gray, Assistant Director, SR&ED Division. I have been wrongly reprimanded for disciplinary reasons. The discipline is unwarranted and excessive. The discipline process violated my procedural rights and my rights under Article 37 of the PIPSC AFS collective agreement.*
>
> *I therefore grieve.*

. . .

[7] Dr. Hu sought as corrective action that ". . . the reprimand be rescinded, that all records of this discipline be removed from all files maintained by the employer and destroyed; and that I be made whole. . . ." His grievance was partially granted on October 28, 2005, at the final level of the grievance process by Ms. Gauvin and an oral reprimand was substituted for the written reprimand. His grievance was referred to adjudication on December 19, 2005.

[8] By undated letters faxed by the employer to the Public Service Labour Relations Board ("the Board") on April 5, 2006, Manda Noble-Green, Senior Staff Relations Advisor, raised an issue of jurisdiction with respect to both grievances:

. . .

> *The grievance in question pertains to a one-day suspension for misconduct which was later reduced to a written reprimand through Canada Revenue Agency's internal redress procedure. Under the* Public Service Staff Relations Act, *section 92(1)(c), a CRA employee may refer a disciplinary action to adjudication where such action results in termination of employment, demotion, suspension or financial penalty.*

> *As a written reprimand does not fall under the purview of section 92(1)(c) of the* Public Service Staff Relations Act, *it is respectfully submitted that the Public Service Labour Relations Board does not have jurisdiction in this matter and we therefore request the referral to adjudication be rejected.*
>
> . . .

[9] That letter incorrectly describes Dr. Hu's discipline, which was reduced from a written reprimand to an oral reprimand during the disciplinary process. The bargaining agent's answer to the jurisdictional objection, contained in a separate letter for each grievor dated April 18, 2006, was that the grievance was referred to adjudication under paragraph 92(1)(*a*) of the former *Act* alleging a violation of article 37 of the collective agreement. Although a separate letter was written for each grievor, the letters are similar. The grievors wanted an oral hearing of their grievances.

[10] In an opening statement, the grievors said that these grievances involve an allegation of both a breach of the collective agreement and discipline. The employer indicated that it intended to call no evidence, and its main submission was that I am without jurisdiction to hear these grievances. After hearing opening statements, I heard evidence from the two grievors and then oral argument from each party. Unfortunately, the hearing could not be completed during June 2006 and I heard the employer's argument and the reply argument in late November 2006.

II. Summary of the evidence

[11] Mr. Parkolub is employed as a financial review manager with the Scientific Research and Experimental Development Division, Pacific Region, CRA. He has approximately 21 years of service. Dr. Hu is employed as a research and technology manager with the Scientific Research and Experimental Development Division, Pacific Region, CRA. He has seven years of service with the employer. He is one of three science managers. Both grievors are team leaders.

[12] The work of the division comprises giving away money or tax credits to entities that engage in specific research and scientific development activities that the government wishes to further. To receive money or tax credits, claims are reviewed by the science side of the division, headed at the relevant time by Dr. Hu. The science side determines whether the applicant is eligible to receive money or credits. Mr. Parkolub manages on the financial side of the division, and he looks into the validity of claims.

[13] Mr. Parkolub manages a group of 12 auditors. A large part of his work is interacting with Dr. Hu and other employees on the science side to ensure that the applications for tax credits are processed as quickly as possible.

[14] Mr. Parkolub noted that the division is under tight timelines. When an applicant makes a claim, the service standard is that a cheque be issued within 120 days of the application. The application has to be reviewed on the science side and on the financial side and then the result has to be received by the Taxation Centre in time to draw the cheque. Every file has to be reviewed.

[15] Mr. Parkolub testified that there is considerable tension on the financial side, as the auditors cannot do their work until the science side determines the eligibility of an application. If the science review takes a long time, the auditors are under significant pressure to complete their assessment within the service standard. In summary, the longer the science side takes to do its review, the shorter the time available for the financial work.

[16] According to Mr. Parkolub, in late September 2004, there was significant tension between the science side and the financial side. Mr. Parkolub had implemented very restrictive and comprehensive performance expectations and on the science side there was a rebellion against having concise expectations of employees.

[17] There were some changes in the organization made by Lorna Gray, Assistant Director. Until Ms. Gray arrived, the two sides were physically separated and there was little direct communication between the science and financial employees.

[18] In October 2004, Doug Cline, one of the science side managers (and now the Acting Assistant Director), was involved in organizing a retirement party for a retiring science side employee. (For privacy reasons, I have referred to this employee as "the retiring employee" throughout this decision.) Mr. Cline sent out an email on October 29, 2004, about a retirement party on December 2, 2004, at 13:30. The email message contained a graphic showing a witch flying on a broomstick. Under the graphic were the words, "Yes it is true, [the retiring employee] is flying off soon to start a new career as an ex CRA [*sic*] employee after 26 years of service!" This email was part of Exhibit G-2.

[19] At that time, Ms. Gray was absent from the office and Mr. Parkolub was acting in her stead. There is no evidence before me that Mr. Cline was disciplined for sending that email.

[20] Mr. Parkolub testified that graphics are often used in emails within the CRA. The retiring employee was known by Mr. Parkolub as a science side employee who was not easy to get along with, but "this was science's business and did not affect us on the financial side."

[21] Mr. Parkolub gave examples of graphics that were attached to emails that were sent throughout the organization to all employees at SRED-Melville (Exhibits G-3 and G-9). Some of them, such as the one in Exhibit G-3, which came from the head office, contained animated graphics that consumed more space on the network than those that did not move, such as the witch. There were also copies of emails filed that contain office "banter", such as Exhibit G-4. There was an email included that was sent from head office that contained a graphic (Exhibit G-5).

[22] In February and March 2005, emails were sent from a director to all staff containing photographs without any business purpose (Exhibit G-6), as well as retirement party announcements with photographs and wallpaper (Exhibit G-7).

[23] Graphics appear to have been commonly included in emails for the purpose of grabbing the attention of the reader and introducing humour into a tense workplace. Symbols such as ";+)", representing the phrase "nudge nudge wink wink", appeared in emails. Mr. Parkolub said that he worked in Ottawa for a number of years and emails containing graphics were commonly distributed on the employer's email system.

[24] Mr. Parkolub said that the employer has a common network drive ("the common drive") that is accessible to all employees. One portion of the drive is set up to allow staff members to share documents. On that portion of the drive, there is often placed notice of social events and parties. Mr. Parkolub said that there was two to three years' worth of events posted there. Pictures of staff events are also posted on the drive. In recent years, as digital cameras have become more sophisticated, a greater number of pictures, with larger file sizes, have been posted to the drive by employees. I accept Mr. Parkolub's evidence that Ms. Gray had posted personal pictures of one of her camping trips to the common drive.

[25] Mr. Parkolub testified that he believed that Ms. Gray was aware of the retirement lunch for the retiring employee, although she was out of the office. The party was scheduled to be held during working hours, between 13:30 and 15:30 on December 2, 2004. The deadline for employees to confirm their attendance at the party was November 26, 2004. As of November 26, 2004, Mr. Parkolub noted that very few financial review staff had registered to attend and, in his view, that made the financial review side look bad. It was an indication of deteriorating relationships between the finance and science employees.

[26] As a result of the low attendance of the financial review employees, Mr. Parkolub decided to do something proactive to reduce the level of tension. While he could not force his staff to go to the party, he decided to prepare a PowerPoint presentation and invite his staff to attend it. That would have the effect of creating a send-off from the finance employees and improving morale.

[27] Mr. Parkolub did not know the retiring employee well, but he knew that she enjoyed motorcycle trips and that she was unable to go on them since her husband died. As Mr. Parkolub put it, "this was the fodder" for his presentation. Mr. Parkolub consulted with Mr. Cline and with a friend of the retiring employee, John Kozbial, to "feel them out" about the concept of his presentation.

[28] Mr. Parkolub said that he has prepared hundreds of presentations during the course of his career, that he usually includes humour in them and that he had been giving presentations with humour for at least 15 years. He prepared such a presentation in November 2003 after the first performance review cycle. Some of those presentations had been made to "higher up" program and branch directors and others reporting directly to the Deputy Commissioner.

[29] He often used humour as a tension breaker. He said that the humour he often used was self-deprecating with small graphical items, photographs and text in balloons. Mr. Parkolub said that even when he worked in Ottawa he used "twisted humour." He said that he has had positive responses to his humour.

[30] Mr. Parkolub prepared the presentation and vetted it with Mr. Kozbial on the day of the party. He did that because Mr. Kozbial knew the retiring employee and he did not want to include anything within the presentation that was objectionable to her. Mr. Parkolub testified that Mr. Kozbial thought it was great.

[31] Mr. Parkolub described his PowerPoint presentation that he shared on December 2, 2004. Unfortunately, a copy of his presentation was not available for me to review. Mr. Parkolub presented it at the office rather than at the Keg Restaurant for the purpose of giving a send-off from the financial side to the retiring employee, a science employee. Although attendance was voluntary, Mr. Parkolub tried to round up as many of the financial employees as he could to see the presentation, to look as though the financial side was also giving her a send-off for her retirement.

[32] The presentation took about 10 minutes and approximately 20 employees attended. Brian Boudreau, Acting Financial Manager, also attended. The presentation included slides taking shots at managers, and some of managers taking shots at managers, alluding to the problems between the science and financial side and quasi-derogatory names were used in the slides. Often there were captions on pictures of people. There was a series of approximately 15 slides containing plays on words, such as returning ashes to ashes and dust to dust; a picture of Mount St. Helens with ash; a round dot, which was called an "ash hole"; and a slide depicting three managers with the words "three ash holes." There was also a slide referring to financial reviewers as morons.

[33] Mr. Parkolub testified that the presentation was funny; everyone in the room was laughing. The retiring employee apparently enjoyed the presentation. She asked for a copy of it, as did other employees.

[34] After the presentation, some employees left and Mr. Parkolub went along to the Keg Restaurant for the party. It had the format of a roast, with Doug Cline as the host. "Shots" where taken and given. There were humorous anecdotes; everyone had a laugh, gifts were presented, lunch was eaten and everyone went back to the office.

[35] As a result of requests made by the retiring employee and other employees, Mr. Parkolub posted his presentation to the employee portion of the shared hard drive after he returned to the office. He also sent out an email on December 2, 2004, at 16:04, letting people know where it was located. Mr. Kozbial was going to make a copy of the presentation for the retiring employee by "burning" the presentation to a compact disc.

[36] On December 2, 2004, at 16:12, Dr. Hu circulated an email within the SRED-Melville distribution group, to Mr. Parkolub and to the PAC-Dist. It included a hand drawn cartoon sketch of a musketeer, along with the message:

...

> *Correction in Peter's presentation: Z[...] should be S[...]. The three Assketeers in the presentation should be three Musketeers.*

...

[37] Mr. Parkolub took Dr. Hu's email as a joke and a play on words changing "ash holes" to musketeers then to "assketeers."

[38] Ms. Gray apparently received Dr. Hu's email, but not the graphic, on her blackberry while she was in Ottawa. On December 2, 2004, Ms. Gray asked if there had been a backlash concerning the presentation and queried Mr. Parkolub on what was meant by Dr. Hu's "assketeers" comment.

[39] As a result of Ms. Gray's email, Mr. Parkolub removed his presentation from the shared drive.

[40] On December 3, 2004, the retiring employee sent an email to the PAC-Dist and Mr. Cline thanking Mr. Parkolub and others for the send-off. The email message also contained a graphic that included a picture of a cat.

[41] By December 13, 2004, Ms. Gray returned to the office and Mr. Parkolub's term as acting assistant director was completed. On that day, at a managers meeting, Mr. Cline expressed the opinion that the presentation was a good team building exercise and that "it was the best thing ever done to build morale." Ms. Gray asked if any of the staff were offended by the presentation. Mr. Boudreau stated that the presentation was good but a couple of the financial reviewers did not like the comment that "all FR's were morons." In his evidence at the hearing, Mr. Parkolub said that Mr. Boudreau's "nature is to exaggerate" and nobody complained to him about the presentation.

[42] On or about January 11, 2005, Mr. Parkolub heard from Mr. Cline that Ms. Gray was conducting an investigation.

[43] From Mr. Parkolub's viewpoint, the next step was that he was notified on January 13, 2005, that Ms. Gray was conducting an investigation into an instance of harassment and a breach of the *Electronic Networks Policy Guidelines*. Mr. Parkolub believes that Ms. Gray initiated the investigation because of her own concerns and not because of any complaint.

[44] Ms. Gray held investigation meetings on Friday, January 14, 2004, at 09:30 with Mr. Parkolub and at 13:05 with Dr. Hu. Two versions of the notes of the meeting with Mr. Parkolub were filed: Mr. Reniers, the Professional Institute of the Public Service of Canada bargaining agent representative's notes (Exhibit G-10), and Ms. Gray's notes (Exhibit G-11). Ms. Gray's notes of the meeting with Dr. Hu were also filed (Exhibit G-18).

[45] At the request of Mr. Reniers, Ms. Gray provided documents to Mr. Parkolub with a cover note dated January 28, 2005, including the two anonymous emails. The email that was sent at 14:03 reads as follows:

. . .

> *This anonymous message details concerns from some SR&ED auditors about the offensive slide show presentation and emails from SR&ED managers. This is the topic of a forthcoming disciplinary investigation.*
>
> *We apologize [sic] the anonymous manner in which we are communicating with you. Being a small workplace, the issue of vindictive reprisal is real.*
>
> *At* [the retiring employee's] *retirement, we did not need to view a CRA managerial slideshow displaying giant words across the wall that all SR&ED financial reviews and auditors are both morons and stupid.*
>
> *Also, at the meeting and in subsequent emails, we found it offensive that people were being called assholes and ass-ketteers.*
>
> *We find these insults, jokes, email and callous attitudes deeply offensive and unprofessional at CRA and SR&ED.*
>
> *The union has also been contacted in this regard.*
>
> *We wonder if this is the type of exemplary public behaviour that managers at CRA are expected to have? If so, can auditors also follow suit to call claimants and co-workers morons and assholes?*

> *We believe that CRA's Code of Conduct for professionalism and respect has been knowingly violated at staff's expense by these managers.*
>
> . . .

[46] On January 14, 2005, at 16:25, a further complaint was sent about Dr. Hu's email that reads, in part, as follows:

> . . .
>
> *We would like to add one more concern regarding Thomas Hu's electronic email that he has sent to all SR&ED staff regarding assholes (ass-ketteers) in his email. That email was a childish retaliatory response to a retirement slideshow which poked fun at him.*
>
> *The aforementioned email (referencing assholes) by Thomas Hu has been retained - that is, auditing staff has kept a copy. In addition, the slideshow that has been placed on the J: drive by Peter Parkolub has also been retained (It has since been removed).*
>
> *Since Peter (like Thomas) broadcasted to everyone via email, some staff immediately kept a copy.*
>
> *We find the emails (referencing ass-holes)* [*sic*] *and these individuals insulting conduct during* [the retiring employee's] *retirement event offensive. Their ass-related jokes are an insult to auditor* [*sic*] *that they display using a projector to call us morons.*
>
> *As managers, they should know better.*
>
> *But you should know this. . . .*
>
> . . .

[47] Mr. Parkolub said that he knew who wrote the two emails from the writing style. He said that there are "staff on the science side who send bombs on a regular basis." He said further that "there are certain individuals that will take anything to take us down." By that he meant staff persons that went out of their way to disrupt the organization. He strongly suspects that the complaints were made "after the fact" by employees who did not like the changes that he had made in the division. He was not examined or cross-examined on the identity of the suspects. The employer did not call the authors of the emails. He believes that the two anonymous emails were "internally generated."

[48] Mr. Parkolub has also sent emails in the past that he thought humorous. One of those emails, dated March 17, 2004, was an exhibit (Exhibit G-12). It was an email addressed to staff with copies to persons including Ms. Gray. The email announced a staffing change, contained a graphic of a turkey and read, in part, as follows.

. . .

> *I am sorry to announce that we will be losing a couple of turkeys from the cube farm within the next few weeks. . . .*
>
> *Unfortunately, it appears that I WILL NOT be leaving, so Team 27 is stuck with the big turkey for the foreseeable. . . .*
>
> *All the other farm animals are unaffected.*

. . .

[49] Mr. Parkolub said that he wrote that email to introduce staff changes. He was also taking "heat", or criticism, from staff members for changes; he was not popular with staff at that time and that is why he wrote the line about being "stuck with the big turkey." Mr. Parkolub stated in cross-examination that he had had a meeting with Ms. Gray about that email. As a result of that meeting, he came to the conclusion that instead of "mid-level tolerance", her tolerance level was actually lower. At that time Mr. Parkolub was reporting to Arlene White, the Director, and she did not say anything about that email.

[50] Ms. Gray gave Mr. Parkolub a discipline letter on February 4, 2005, and he served his suspension on February 23, 2005. Mr. Parkolub tried to negotiate a different day but Ms. Gray would not negotiate. The discipline letter reads, in part, as follows:

. . .

> *I have determined that you created and delivered the presentation to a group of employees in the SR&ED division, while acting in my capacity as the Assistant Director of the division. You placed a copy of the presentation on the common drive, accessible to all employees, and notified the entire division via email that the presentation was available for viewing. These activities constitute a violation of the Electronic Networks Policy Guidelines (ENPG), the Code of Ethics and Conduct, and do not reflect the responsibilities of management and employees under the Preventing and Resolving Harassment guidelines.*

In the presentation you referred to some employees as morons and inferred that others were assholes; other language and situations were inappropriate. You explained your actions and behaviour as appropriate, given that the purpose of your presentation was a retirement "roast". You felt the presentation was an appropriate way to address the absence of Finance staff at the retirement party, and you felt the presentation fostered teamwork and cooperation within the division. Additionally, you indicated that you received many compliments on the presentation and that this was the reason you made it available to all staff on the common drive.

The content of the presentation could be considered by some to be offensive or unwelcome. I note that you indicated that you had received feedback that a couple of people expressed concerns about the comments in the presentation. It was inappropriate for anyone to deliver something like this to employees, and especially in your case as a manager and in particular as the acting Assistant Director. It was also inappropriate to place the presentation on the common drive. As a manager part of your job is to ensure employees utilize our systems appropriately. I have had previous discussions with you about the appropriateness of your behaviour, in particular a recent incident in which we discussed the harassment guidelines. In accordance with the Code of Ethics and Conduct you are responsible for your behaviour. Managers are expected to lead by example, exhibit respectful behaviour and create and maintain a respectful work environment. As a manager it is critical that you act in accordance with our corporate values and demonstrate through words and actions the values of our organization. It is also important that you apply good management practices in managing human resources.

I have considered your forthrightness in our meetings, as well as your explanations as they relate to the context of the presentation. I have also considered your years of service with the CRA, your lack of a prior disciplinary record and your rationale behind the presentation. However, I cannot condone this type of behaviour. In order to impress upon you the seriousness in [sic] which I view your actions, and in the interest of correcting your behaviour, I have decided that discipline is warranted. I hereby suspend you without pay for one day. The suspension will be served on February 23, 2005. As a manager I expect that you will model the values of the CRA and adhere to the policies noted above. Further instances of similar unacceptable behaviour may lead to more disciplinary action being imposed.

. . .

[51] Mr. Parkolub was upset by the discipline imposed by the employer. He had not wanted to act for Ms. Gray, but she had begged him to act in her role when she was away and as far as he knew, no one else would accept the acting assignment. He felt that he was a "marked man" because of the changes that he had introduced in the workplace and that staff would take offence to him acting for Ms. Gray. The discipline came one day before he was going on vacation. He said that others, including Ms. Gray, had used the common drive to post personal items, such as pictures of camping trips. He said that other persons included graphics in their email messages. Examples were provided in the exhibits. He said that he had been present in meetings where other managers had used foul language and Ms. Gray did not take exception to the language then used. Mr. Parkolub explained that he used the words "ash hole" as a play on words in the context of staff getting older, a reference to "from ashes to ashes" as opposed to "my staff as assholes." He indicated that it is difficult to know what the standard is within the CRA, as he has heard staff members even in Ottawa who "swore like troopers."

[52] As a result of the discipline, Mr. Parkolub believes he has had fewer acting assignments and that he has not received performance pay for the period from 2005 to 2006. He had received performance pay in a previous year. He questioned Ms. Gray about his lack of performance pay and she said that there was nothing in his performance review that would qualify him for or generate performance pay. Mr. Parkolub's *Employee Performance Management Report* for April 1, 2004, to March 31, 2005, was before me (Exhibit G-16). His overall assessment was "meets" or "met the majority of the performance expectations: may have exceeded some." Mr. Parkolub admitted that he signed off his performance appraisal without making comments and that he did not file a grievance with respect to the failure to receive performance pay.

[53] The *Canada Revenue Agency Performance Pay and Leave Guidelines for the Management/Gestion Group and Equivalent Positions in the Personnel Administration Group* document was filed with me as an exhibit (Exhibit G-15). The criteria for eligibility for performance pay or leave are set out in clause 6.1, at page 9, is as follows:

. . .

> *a) The manager must have performed the duties of an MG position in a substantive, acting or term capacity or an equivalent PE position.*
>
> *b) The manager must have performed the MG duties for at least six consecutive months during the performance management review period.*
>
> *c) The manager must have received a rating of "meets" or "exceeds" in his or her core business responsibility performance assessment.*
>
> *d) The manager must have received a rating of "good," "very good" or "excellent" in his or her ongoing commitment performance assessment and,*
>
> *e) Managers in represented positions must have a performance pay or performance leave clause in their collective agreement.*
>
> . . .

[54] In cross-examination, Mr. Parkolub stated that he believed that Ms. Gray lived in a very sheltered world and took the graphic in Dr. Hu's email and his presentation out of context. He said that his intent in the presentation was to use a fuzzy word such as "ash hole" to poke fun at himself.

[55] Dr. Hu testified that he had been a team leader for five years, and for the two prior years he had been a science advisor reviewing claims. Dr. Hu agreed with Mr. Parkolub's assessment that the relationship between the science and financial sections was very tense. He had complaints from his team about the workload arising from Mr. Parkolub's performance demands on the finance team. He also testified that part of the tension was caused by having had three assistant directors during the two-year period prior to Ms. Gray becoming the Assistant Director in November 2004. At that time, she started to make a lot of changes and Mr. Parkolub made a lot of performance demands on his team. That put pressure on the science team members and there were a lot of complaints from them about workloads.

[56] Dr. Hu said that he received emails as part of the "PC Distrib Melville" email list. He received the email about the retiring employee's retirement. The witch graphic caught his attention and it was "no big deal."

[57] He became aware of Mr. Parkolub's presentation at 11:00 on the day it was given. He recalls the presentation as a happy moment in the office with lots of laughter. He indicated the sequence of slides was a picture of the opening of a volcano with the caption "an ash-hole" and then a picture of the three science managers with the caption "three ash holes." He recalled that people were laughing at that moment; everybody seemed okay, that it was a very good presentation and that the retiring employee asked for a copy of the presentation. Dr. Hu attended the lunch and roast at the Keg Restaurant after the presentation and said that the tone of the humour at lunch was similar to that at the presentation.

[58] Dr. Hu sent the email message with a graphic later in the day because the retiring employee's first name was incorrectly spelled, and he wanted to point that out to Mr. Parkolub. His reference to "assketeers" came from the thought train of three amigos, three musketeers and three little piggies, and he linked musketeers with "ash holes" and replaced a few letters of "musketeer", coining the new term "assketeers." Dr. Hu draws cartoons in his spare time. Dr. Hu obtained the graphic from the Internet; it was not one of his cartoon drawings.

[59] Dr. Hu received no negative feedback from anyone in his section or from Mr. Parkolub until he received an email message on January 12, 2005, from Ms. Gray informing him of a fact finding meeting to discuss the presentation, tentatively scheduled for January 14, 2005. Dr. Hu was informed that the intent of the meeting was to gather facts and to determine if any disciplinary action was warranted.

[60] In reviewing the notes of the meeting (Exhibit G-18), Dr. Hu explained that he saw the three science managers as working together, which made him think of three musketeers, and in the context of Mr. Parkolub's presentation, his characterization became "three assketeers". Dr. Hu said that he enjoyed Mr. Parkolub's presentation, that he did a good job to improve the teamwork between finance and science, that it relieved tension, and that it was a good teambuilding exercise. Dr. Hu saw nothing offensive about Mr. Parkolub's presentation or the email he sent that included a graphic.

[61] Dr. Hu received a letter of discipline dated February 8, 2005 (Exhibit G-20). He was given a written reprimand for sending the email with the graphic. The salient part of the letter reads as follows:

. . .

> *I have determined that the email you sent out to the SR&ED Division referencing "Assketeers" was a violation of the Electronic Networks Policy Guidelines (ENPG) and the Code of Ethics and Conduct. In our meeting you admitted that you were familiar with the Code of Ethics and Conduct, the ENPG, as well as the Preventing and Resolving Harassment guidelines. The content of the email could be considered by some to be offensive or unwelcome and should not have been sent out. In accordance with the Code of Ethics and Conduct you are responsible for your behaviour. Effective interaction among colleagues is critical to achieving our business objectives; as a manager this is critical as you are expected to lead by example and exemplify our corporate values of integrity, respect, professionalism, and cooperation. You are also expected to create and maintain a respectful work environment as outlined in the Harassment guidelines.*
>
> *The graphic used in your email has no business purpose, is a potential risk to the network, and consumes storage. It is a violation of the ENPG. Several months ago I directed you to review the ENPG and to discuss the guidelines with your team. Additionally, you took part in the harassment awareness sessions provided to the division. As a manager part of your job is to ensure employees utilize our systems appropriately. You are expected to model this behaviour.*
>
> *I have considered your forthrightness in our meetings, however I am also concerned that there was no recognition on your part that there was anything inappropriate in any of your actions. I have also considered your seven years of service with the CRA and your lack of a prior disciplinary record. However, in order to impress upon you the seriousness with which management views your actions, and in the interest of correcting your behaviour, I have decided that discipline is warranted. This letter constitutes a written reprimand. As a manager I expect that you will model the values of the CRA, as noted in your performance expectations and adhere to the policies noted above. Further instances of similar unacceptable behaviour may lead to more severe disciplinary action being imposed.*

. . .

[62] Dr. Hu stated that no one has explained to him how his email was offensive or unwelcome. Dr. Hu felt that he offered a subtle change that helped Mr. Parkolub achieve his goal of improving relations between the science and finance side of the division. At the time he sent the email, Mr. Parkolub was his supervisor.

[63] Dr. Hu testified that he deals often with computer software claims during the course of his work. He said that "commonly but not everyday" he received emails with graphics. He said that graphics attract the attention of the reader. He also said that the system has a virus scanner, so the risk of virus contamination is minimal.

[64] Dr. Hu said that after the disciplinary meeting, he found himself under an internal investigation for preferential treatment of a taxpayer and for a team member having altered a travel claim. These allegations were later found to be unsubstantiated.

[65] Dr. Hu testified that after he was reprimanded by Ms. Gray he was not prepared to act in her role when she was away. Ms. Gray was a difficult person to act for as she would use email to change or reverse decisions that he made and Dr. Hu testified that he "did not want to become a puppet."

[66] These grievances allege that the disciplinary actions constitute breaches of article 37 of the collective agreement that reads as follows:

ARTICLE 37

STANDARDS OF DISCIPLINE

37.01 Where written standards of discipline are developed or amended, the Employer agrees to supply sufficient information on the standards of discipline to each employee and to the Institute.

37.02 The Employer agrees to consult with the Institute when existing written Standards of Discipline are to be amended. The Employer further agrees to carefully consider and, where appropriate, introduce Institute recommendations on the matter.

37.03 Where an employee is required to attend a meeting on disciplinary matters, the employee is entitled to have a representative of the Institute attend the meeting when the representative is readily available. Where practicable, the employee shall receive a minimum of one (1) working day's notice of such a meeting.

37.04 When an employee is suspended from duty, the Employer undertakes to notify the employee in writing of the reason for such a suspension. The Employer shall endeavour to give such notification at the time of suspension.

37.05 The Employer shall notify the local representative of the Institute that such a suspension has occurred.

> *37.06 The Employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document concerning the conduct or performance of an employee the existence of which the employee was not aware at the time of filing or within a reasonable time thereafter.*
>
> *37.07 Notice of disciplinary action which may have been placed on the personnel file of an employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken, provided that no further disciplinary action has been recorded during this period.*

III. Application to re-open the hearing

[67] The hearing in this matter did not complete on June 27 and 28, 2006, the dates set for the hearing. On June 28, 2006, the evidence concluded and I heard argument from the grievors. The matter was later scheduled to resume on November 28, 2006, to hear argument by the employer and any reply argument from the grievors. At the hearing on November 28, 2006, the grievors applied to re-open the hearing and to recall Dr. Hu to give further evidence. It was anticipated that Dr. Hu would testify to hearing public comments made by a senior member of the management team since the June hearing. This was argued to be relevant to the issue of workplace culture, which would "make this decision look irrelevant."

[68] The employer objected to the calling of any further evidence on the basis of procedural fairness and that further evidence would delay the hearing as this was brought forward only on the morning of the November hearing.

[69] In reply, the grievors argued that the employer could have an opportunity to address the new evidence by calling further evidence.

[70] I did not permit the application to re-open the hearing as the issues before me related to workplace conduct on December 2, 2004. Both parties had closed their cases, and while I had heard argument from the grievors there was insufficient time to hear the employer's argument or a reply from the grievors on June 28, 2006. There may be discretion in an adjudicator to re-open the hearing but I was not inclined to exercise my discretion in this case as there has to be finality to adjudication hearings, and new evidence, if admitted, had the potential to cause an adjournment of this hearing, and it may have been some time before the hearing could resume.

[71] I indicated at the hearing that I would provide a more detailed ruling in my written decision. In my view, the evidence sought to be tendered, occurring more than 18 months after the filing of the grievances, is of no assistance in deciding the grievances arising from discipline imposed on February 4, 2005, for workplace conduct on December 2, 2004. Further, the main issue advanced in this case is that there was a breach of article 37 of the collective agreement. This was not a case where the employer chose to discipline or not discipline other employees for the same conduct at issue in this case. The employer disciplined both Mr. Parkolub and Dr. Hu and there were no other employees involved in this incident. It is difficult to see how "workplace culture" assists in determining whether there has been a breach of the collective agreement.

IV. Summary of the arguments

A. For the grievors

[72] In an opening statement, the grievors said that the penalties imposed raise a number of concerns related to the reasonableness of the discipline, the level of the discipline imposed and the process used to determine the discipline. The grievors said that these reprimands contravene the collective agreement and are related to discipline. The grievors referred to the employer's discipline policy (Exhibit G-13) in support of their three alleged breaches of article 37 of the collective agreement.

[73] First, the grievors said that article 37 of the collective agreement creates a standard of fairness or natural justice. The clauses of the article provide that the grievors must know the case against them, have the right to respond, have the right to representation and receive notice of the actions and information the employer is relying on. Taking a narrow view would make the provisions meaningless. The wider view is supported by a line of authorities, including *Attorney General of Canada v. Lillian Shneidman*, 2006 FC 381 (FCTD).

[74] The employer breached that duty of fairness, particularly clause 37.06 of the collective agreement, by not disclosing the nature of the allegations against the grievors or documents on which the employer relied. In particular, the employer did not share any witness statements and did not, with respect to the investigation of Dr. Hu's grievance, share the information provided by Mr. Parkolub or, with respect to the investigation of Mr. Parkolub's conduct, did not share information provided by Dr. Hu. Both grievors were surprised by the speed at which the employer provided

lengthy decision letters that imposed discipline. Further, in the case of Mr. Parkolub, the employer refused to consider an alternative date for him to serve his suspension, carrying out a preconceived decision. Dr. Hu was given no clear explanation as to why his action was offensive.

[75] Second, the employer is required to keep written records of all investigations and the grievors were not provided with all of the records. The employer has breached clause 37.06 of the collective agreement by failing to provide the grievors with a copy of a statement from Mr. Cline, and Ms. Gray indicated that she spoke to Mr. Cline at the outset of the investigation. The grievors do no know if Ms. Gray spoke to Mr. Boudreau or to the anonymous complainers. There is no evidence that she conducted a thorough investigation to determine if the conduct was offensive.

[76] The grievors are concerned that Ms. Gray did not give them a fair hearing, as she was the one who initiated the investigation and she was the one who was offended by a presentation that she did not view herself. The grievances should have been investigated by a person other than Ms. Gray, as she had formed her conclusions and proceeded to investigate as a result of her own complaint. The presentation was not considered in context and the comments forming the basis of discipline were taken out of context. There was a breach of the employer's discipline guidelines as the investigator was not neutral, did not keep written records of all the interviews, did not share potentially exculpatory information with the grievors and made use of anonymous hearsay evidence. The investigation was unfair.

[77] Third, the employer breached clause 37.01 of the collective agreement by not providing sufficient information to the employees on the standards of discipline. The grievors provided examples of emails containing either graphics or photographs, including evidence involving Ms. Gray that amounted to a breach of the employer's *Electronic Network Policy Guidelines.* No guidance or discipline was imposed and actions create employee expectations. Such innocent use of the email system is common.

[78] In summary, the grievors said discipline resulted from a process that was procedurally flawed and in violation of the collective agreement. There is no basis for discipline.

[79] The grievors argued that if procedural defects are established, these can be remedied by a hearing *de novo* at adjudication: *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (FCA) (QL), and *McIntyre v. Canada (Treasury Board)*, [1996] F.C.J. No. 900 (FCTD) (QL).

[80] The grievors said that each of them should be made whole. In the case of Mr. Parkolub, there were financial consequences in terms of the loss of acting assignments and the loss of the performance bonus. Dr. Hu also lost acting assignments. A financial penalty can be an indirect loss: *Massip v. Canada (Treasury Board)*, [1985] F.C.J. No. 12 (FCA) (QL), *Lavigne v. Treasury Board (Public Works Canada)*, PSSRB File Nos. 166-02-16452 to 16454, 166-02-16623 and 16624, and 166-02-16650 (19881014), and *Guay* v. *Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-24899 (19950217). A loss of an acting position or acting opportunities is a financial penalty: *Thibault v. Treasury Board (Solicitor General of Canada – Correctional Service)*, PSSRB File No. 166-02-26613 (19960909).

[81] On the merits of these grievances, the grievors said that they felt that the workplace behaviour that they took part in was well tolerated by other employees, had a positive impact in the workplace and there is no evidence of detrimental impact. There are differences in the degrees of behaviour tolerated within a workplace and a clean disciplinary record should not be at stake due to the subtle tastes of managers. Discipline is an unwieldy tool to shape organizational culture and while there is exactly one *Code of Ethics and Conduct*, there are many different workplace cultures within the CRA. Difference in degrees of behaviour may be tolerated within an organization. Ms. Gray removed the actions of the grievors from their context, applied her own standards and set out to discipline the grievors. The behaviour of the grievors ought to be seen in light of the organization where Mr. Cline, who is now an acting assistant director, referred to a retiring employee as a witch and as an employee who was difficult to work with.

[82] This is a case of discriminatory discipline for acts otherwise tolerated in the workplace. There are precedents for the employer condonation of conduct like that of Mr. Parkolub and Dr. Hu: *Laurin v. Treasury Board (Revenue Canada)*, PSSRB File No. 166-02-28147 (19980806), and *Valadares v. Treasury Board (Health and Welfare Canada)*, PSSRB File Nos. 166-02-19596 and 19597 (19910312). The adjudicator must look at the act or language, the workplace culture and the context: *Hiram Walker &*

Sons Ltd v. Distillery Workers, Local 61 (1973), 4 L.A.C. (2d) 291. There must be equality of treatment for employees engaged in similar acts of misconduct: *Partek Insulations Ltd. v. Canadian Automobile Workers, Local 456* (1989), 3 L.A.C. (4th) 193, *Canada Post Corp. v. Canadian Union of Postal Workers (Berdan Grievance, Arb. Brunner)*, [1999] C.L.A.D. No. 42 (QL), and *Boeing Canada Technology Ltd. v. Canadian Auto Workers, Local 2169 (Hoeppner)* (1997), 62 L.A.C. (4th) 395.

[83] If one looks at the context of the grievors' conduct, there is nothing negative, mocking or derogatory about Dr. Hu's email. He responded in a humorous spirit and unlike the allegation in the anonymous email, there is no evidence that Dr. Hu was offended by the presentation. The word "ash hole" is like the word "asshole" but Mr. Parkolub did not say "asshole" because he did not mean it; it was a play on words. Everybody who was at the presentation understood that.

[84] If one examines the words used and the context in which they were used, they were not offensive. "Ass" is a word used in common parlance and is not objectionable. For example, "jaw of an ass" is a biblical reference and a commonly used phrase is "the law is an ass." "Bassackwards" is not an objectionable word and is similar to "assketeers" or "ash hole." It strains credulity to suggest that the language used by Mr. Parkolub was offensive when he and Dr. Hu testified to stronger language used by more senior people and by Mr. Parkolub in presentations to more senior people.

[85] Ultimately, the employer has exercised disciplinary action that was damaging to the grievors and they ought to have recourse to adjudication. The employer applied a disciplinary standard that was not supported by the prevailing conduct in the workplace and the grievors suffered consequences beyond a reprimand. There is jurisdiction and the discipline should be rescinded.

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

[86] The employer argued that an adjudicator is seized only with grievances that are properly referred to adjudication. The former *Act* provides for an internal recourse process before a reference to adjudication. To expand the types of grievances which are adjudicable would fail to give meaning to the grievance process. The claim of a financial penalty is an expansion of the grievance.

[87] At the time of the references to adjudication, as a result of representations made at the final level of the grievance process, the employer reduced the punishment imposed for both grievors. Mr. Parkolub's one-day suspension was reduced to a written reprimand and Dr. Hu's written reprimand was reduced to an oral reprimand as a result of the grievance process.

[88] The adjudicator has no jurisdiction to consider these grievances concerning written and oral reprimands since at the time of the references to adjudication there was no termination, suspension or financial penalty: *Reasner v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26260 (19950607), *Lamarre v. Treasury Board (Fisheries and Oceans)*, PSSRB File No. 166-02-26902 (19960311), *Rajakaruna v. Treasury Board (Revenue Canada, Taxation)*, PSSRB File No. 166-02-23135 (19930414), and *Attorney General of Canada v. Lachapelle et al.*, [1979] 1 F.C. 377 (FCTD) (QL). While the employer concedes that written or oral reprimands can have serious career consequences, these are not penalties which can be the subject of an adjudication decision within the meaning of the former *Act*.

[89] The grievances should be dismissed on jurisdictional grounds. The employer submitted that on the basis of *Lachapelle* these grievances were frivolous matters and that the jurisdictional issues should have been dealt with by written submissions in advance of the hearing, as the Board has limited resources.

[90] Furthermore, the adjudicator should not consider Mr. Parkolub's claims regarding not receiving performance pay. The issue of performance pay was not part of the grievance. It is something which, if it occurred, occurred after the grievance was filed. It is a leap to say that he would have received performance pay but for the written reprimand. Mr. Parkolub generally agreed with his performance appraisal and never questioned its validity. There is no specific evidence to prove that allegation and to tie it to a financial penalty. There is nothing in the *Performance Pay and Leave Guidelines* that would bar someone with a disciplinary sanction from receiving the bonus in question. That allegation changes the nature of the grievance and the grievor is barred from arguing this by virtue of *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109. The grievance should not be expanded: *Burchill* and *Shneidman*. The employer said that this adjudication hearing is not the proper forum to consider whether Mr. Parkolub should be entitled to performance pay.

[91] The employer said that jurisdiction to consider grievances concerning the interpretation of the collective agreement does not give jurisdiction to an adjudicator to review the reasonableness of disciplinary action. There is no evidence of bad faith. If the adjudicator concludes that there is jurisdiction to consider the grievances, then the manager acted appropriately and disciplined the employees at the lower level of the progressive discipline scheme.

[92] The employer said that if there is jurisdiction, then there has been no breach of clause 37.06 of the collective agreement, as the proper interpretation of that clause is that the employer cannot introduce evidence of "prior misconduct" of which the grievor is not aware when the grievor is being disciplined on a current matter: *Nowoselsky v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2001 PSSRB 18. There is nothing in the collective agreement or in the principles of labour relations that prevents an employer from using evidence it collects about the disciplinary incident during an investigation, and later in a decision to discipline. The choice of whether to discipline an employee is a management right; even if no employees choose to complain, the employer may still discipline an employee if an employer considers the employee's actions to be offensive. Ms. Gray did not violate the collective agreement by not providing the names of the persons who sent the anonymous complaints.

[93] The employer said that the grievors have exaggerated the facts and that there was no evidence that Ms. Gray had a closed mind during her investigation.

[94] The employer's *Discipline Policy* is not incorporated by reference into the collective agreement. In any event, a copy of the standards was provided to the bargaining agent as required and there is no breach of clause 37.01 of the collective agreement. Clause 37.02 contains an obligation for the employer and the bargaining agent to consult. The right is the right of the bargaining agent to be consulted and there are no individual rights capable of being grieved. If the bargaining agent alleges it was not consulted, it can file a section 99 reference.

[95] Further, if the bargaining agent felt that Ms. Gray should not have investigated the matter and should not have been the person to impose discipline, it had an obligation to raise the argument at the time of the investigation.

[96] Article 37 of the collective agreement contains no employer obligation to provide an investigative report to the grievors, and the adjudicator should not be adding to the terms of the collective agreement; that would be a violation of the former *Act*. There is simply no evidence of a violation of any of the terms of article 37 of the collective agreement.

[97] If the adjudicator concludes that there is jurisdiction, the appropriate remedy would be a declaration that the collective agreement was breached. The adjudicator should not rescind the disciplinary action, as the adjudicator cannot do this directly by virtue of paragraph 92(1)(*c*) of the former *Act* and there is no indication of bad faith.

[98] On the merits of the grievances, the employer argued that there is no useful purpose in comparing different types of email communications. Both employees were disciplined because the employer considered the presentation and email to be offensive. The employer is not required to ignore the offensive nature of the material simply because it was humorous.

[99] The employer imposed appropriate discipline and considered all relevant mitigating factors. The employer imposed discipline at the lower end of the spectrum.

C. Reply of the grievors

[100] In reply, Mr. Parkolub's representative argued that an adjudicator has jurisdiction to consider whether he met the conditions for performance pay and if he met those conditions, but did not receive performance pay, whether there is a financial penalty: *Bahniuk v. Canada Revenue Agency*, 2005 PSLRB 177, and *Bratrud v. Office of the Superintendent of Financial Institutions Canada,* 2004 PSSRB 10.

[101] The grievors relied on *Shneidman,* at para. 21, for the proposition that if a grievance was intended to encompass a procedural complaint about the violation of a collective agreement, the grievance should be referred to adjudication under paragraph 92(1)(*a*) of the former *Act*, as was done in this case. The grievors also relied on *Canada (Treasury Board) v. Rinaldi*, [1997] F.C.J. No. 225 (FCTD) (QL). The wording of the grievance is important to assess whether an adjudicator has jurisdiction to decide it.

D. Reply from the employer on jurisdiction

[102] In reply on the jurisdictional point, the employer said that while a "process grievance" can be referred to adjudication, *Lachapelle* is clear authority that the issues of due process, fairness and burden of proof do not create an adjudicable grievance on the subject matter itself. It is a clearly understood and longstanding principle that unless the grievance results in a termination, suspension or financial penalty, a discipline grievance is not adjudicable. An adjudicator cannot use the "process issue" to expand his or her jurisdiction where Parliament did not intend written or oral reprimands to be grievable. If the loss of acting assignments and performance pay were penalties, they were not included in the grievances as originally framed and for the reasons expressed in *Burchill* and *Shneidman*, the grievances cannot now be changed. On the basis of *Lachapelle*, there is no jurisdiction.

V. Reasons

[103] A large portion of the evidence in this case was directed towards the grievors' view that their conduct was innocently motivated and not unwelcome or offensive in the context of the organizational culture. The grievors do not agree with the assessment of Ms. Gray or with the discipline she imposed. Further, the grievors believe that the process used by Ms. Gray to impose discipline was unfair and a breach of article 37 of the collective agreement.

[104] The employer has chosen to argue these grievances on a jurisdictional point and has chosen not to call Ms. Gray or any other witnesses to answer the merits of the grievances.

[105] My jurisdiction as an adjudicator to hear the grievance of employees of a separate agency such as the CRA is set out in section 92 of the former *Act*:

> *92.(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*
>
> > *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*

> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the* Financial Administration Act, *or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in the termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

[106] The first question in my view is, What is the true nature of these grievances? The adjudicability of the grievances must be analyzed with respect to section 92 of the former *Act*. The grievors have challenged that the disciplinary process violated procedural rights under article 37 of the collective agreement raising an issue under subparagraph 92(1)(*a*). Each grievor has alleged that the discipline was unwarranted or that they were wrongfully suspended or wrongfully reprimanded. This is a challenge to whether there was just cause and the quantum of discipline accorded. This raises an issue under paragraph 92(1)(*c*) of the former *Act*. After considering the facts, argument and applicable law, it is my view that the true nature of these grievances is the disciplinary action of the employer, but the grievances have been styled as a breach of article 37 of the collective agreement.

[107] One must focus on the facts at the time of the reference to adjudication to determine whether the Board has jurisdiction to hear and decide a grievance under section 92 of the former *Act*. Many grievances are adjusted or settled using the grievance process. It is in the interest of both parties to settle as many grievances as possible in a collective bargaining relationship without adjudication since it can be a time consuming and expensive proposition. The words "not dealt with to the satisfaction of the employee" in subsection 92(1) of the former *Act* are a reference to the fact that grievances may or may not be adjusted during a grievance process. Sometimes the employer will not alter its decision as a result of the grievance process. The employee refers the matter to adjudication seeking relief from a decision that the

employer has made. In this case, by the date of the references to adjudication, the employer had already decided to reduce the penalty for Mr. Parkolub to a written reprimand and for Dr. Hu to an oral reprimand.

[108] There are a number of Board authorities which state that a verbal or written warning is not "disciplinary action resulting in the termination of employment, suspension or financial penalty": *Reasner*, *Lamarre* and *Rajakaruna*. That issue has also been dealt with by the Federal Court in *Lachapelle*. In the context of a progressive discipline scheme, a verbal warning or a written warning may some day lead to a greater degree of punishment if there is further conduct by an employee which merits some discipline. In *Lachapelle* the Court said, at para. 11:

...

> *By expressing itself as it did, Parliament appears to me to have intended to begin with an overall consideration of all grievances involving disciplinary action against individuals and then to eliminate all but those dealing with disciplinary action entailing discharge, suspension or a financial penalty.*

...

[109] Each grievor has alleged at the hearing that he suffered a financial penalty. The employer has argued that these fresh allegations are barred from a consideration by the application of the principles in *Burchill* and *Shneidman*. In order for loss of acting assignments or loss of a performance bonus to be a financial penalty within the meaning of paragraph 92(1)(*c*), it must be a loss that is not "too remote" or one that arises immediately and inevitably from the disciplinary action: *Massip*. I note that a financial penalty was not something that formed part of the allegations on the grievance form by either grievor. In the case of Mr. Parkolub, it is suggested that he lost acting assignments and a performance bonus. In Dr. Hu's case, the suggestion is that he lost acting assignments. The burden of proof, however, rests with the grievors on a balance of probabilities to show that they suffered a financial penalty. Both these grievors were reluctant to act for Ms. Gray before discipline was imposed and neither of them wanted to act for Ms. Gray after discipline was imposed. In the case of acting assignments, I am not satisfied that the grievors have shown that there is a loss arising immediately and inevitably from disciplinary action. With regard to a performance bonus, I am not satisfied that the evidence supports that this is a loss arising immediately and inevitably from disciplinary action.

[110] In my view, I am without jurisdiction to consider the merits of these grievances. The adjudicator must look at the facts at the time that the references to adjudication were made: *Reasner*, *Lamarre* and *Rajakaruna*. An adjudicator does have jurisdiction to proceed with a grievance in which punishment is reduced by the employer after the reference to adjudication; however, before the references were made, the employer reduced Mr. Parkolub's suspension to a written reprimand and reduced Dr. Hu's written reprimand to an oral reprimand. There was no discharge, suspension or financial penalty existent at the time of referral and therefore both of these grievances were not properly referable to adjudication under paragraph 92(1)(*c*) of the former *Act*.

[111] Mr. Parkolub and Dr. Hu argued that there has been a violation of the collective agreement and that the grievances were referred to adjudication under paragraph 92(1)(*a*) of the former *Act*. In my view, *Lachapelle* is persuasive and determinative of the issues raised by the grievors. In *Lachapelle*, the grievor argued that the adjudicator had jurisdiction over a grievance involving a written warning under paragraph 91(1)(*a*) (later paragraph 92(1)(*a*)) of the former *Act*), because of clause 10.01 of the collective agreement that provided that a just cause standard applied. The grievors argued that the clause was violated and therefore a grievance was properly referred to adjudication under paragraph 91(1)(*a*) (later paragraph 92(1)(*a*)) and not paragraph 91(2)(*c*) (later paragraph 92(1)(*c*)) of the former *Act*. The Court said at paras. 11 to 13:

. . .

> *¶11 Firstly, I do not think that paragraphs (a) and (b) of section 91(1) [which became s. 92(1)] of the Public Service Staff Relations Act can be interpreted in isolation from each other. In enacting this provision Parliament clearly intended to limit and define the cases in which an employee, whether or not he was a member of a union, would be entitled to submit his grievance to this method of adjudication which it was establishing and entrusting to the supervision of the Board that it had just created. It is clear that Parliament did not intend all grievances to require the intervention of an official adjudicator in addition to the levels of the ordinary procedure. First, in paragraph (a), it considered cases involving some group interest (whence, moreover, the requirement of subsection 91(2)), and then, in paragraph (b), it dealt with cases of disciplinary action in which individual interest is clearly predominant. By expressing itself as it did, Parliament appears to me to have intended to begin with an overall consideration of all grievances involving disciplinary action against individuals and then to eliminate all but those dealing with disciplinary action entailing discharge,*

suspension or a financial penalty. In my view, this provision of paragraph (b) is specific, complete in itself and applicable to all employees whether or not they are covered by a collective agreement, and it is the only provision applicable when the grievance concerns disciplinary action. My reply to the objection that such an interpretation of paragraph (b) might limit the application of paragraph (a) is that a specific provision often limits the application of a more general provision, especially when the two provisions are enacted successively and when understanding of the legislation as a whole requires that this be the case.

¶12 Secondly, I doubt that the grievance filed by the mis-en-cause in the case at bar can be regarded as actually concerned with "the interpretation or application in respect of him of a provision of a collective agreement" in the sense in which these terms are used in paragraph 91(1) (a) [which became 92(1) (b)]. The requirement that disciplinary action may not be taken without just cause is general and based simply on common sense. In formulating article 10.01 the parties to the agreement certainly did not intend to make this requirement, a specific and precise rule aimed at making their agreement more specific, into a rule whose meaning and significance would in themselves be likely to raise problems of interpretation and application in practical cases. Moreover, the article must not be given significance and an objective that was never claimed for it: article 10.01 of the agreement concerns the burden of proof, which may even be understood in the procedural sense. Giving to such an article (and to others of the same sort, as for example "the employer shall be fair" or "the employer shall not punish an employee without cause", which do not specify a condition of employment, and which furthermore no employer would ever think of disregarding) the effect of causing all grievances concerning disciplinary action - - regardless of the seriousness of that action and even though no group interest was involved - - to come within the scope of the adjudication required by the Act and entrusted to the supervision of respondent Board [sic] appears unacceptable to me because it is not consistent with the Act as I understand it. Moreover, if it were otherwise, we would have to conclude that Parliament left it up to the agreement between the parties to extend at will the right to adjudication and consequently the jurisdiction of the adjudicator . . .

¶13 In short, I believe that only paragraph 91(1) (b) [which became 92(1) (b)] may be applied to determine the right of the mis-en-cause to submit his grievance to adjudication, and consequently to determine the authority of the adjudicator to hear it. The presence of article 10.01 in the collective agreement governing the labour relations of the parties does not allow respondents to cite the provisions of paragraph

> *91(1)(a) as a basis for claiming a jurisdiction that is clearly denied to them by paragraph (b).*

[112] The adjudicator's jurisdiction to hear a grievance is determined by section 92 of the former *Act* and cannot be expanded by general language in a collective agreement. Employers are required to discipline using a just cause approach. A breach of an article in a collective agreement dealing with just cause would not give rise to jurisdiction to consider a disciplinary grievance under paragraph 92(1)(*a*) of the former *Act*, when the grievance is in essence a challenge to the discipline imposed by an employer, and the adjudicator otherwise has no jurisdiction under paragraph 92(1)(*c*) of the former *Act*. Similarly, one would hope that an employer would treat the grievors with fairness or natural justice in a disciplinary matter, but an allegation that "due process" was not provided is still an attack on a disciplinary decision. The matter is still a disciplinary grievance and not a grievance interpreting a collective agreement.

[113] The paragraphs of section 92 of the former *Act* must be read as a whole. The particular argument raised by the grievors was dealt with in *Lachappelle*. An alleged breach of a collective agreement during the course of a disciplinary investigation does not give me jurisdiction to consider an employee's disciplinary grievance and to rule on the merits of the discipline imposed, where otherwise the grievance does not relate to a termination, suspension or financial penalty.

[114] I have considered what impact, if any, the decision in *Shneidman* has on the principle set out in *Lachappelle*, as the grievors have argued that in spite of the lack of jurisdiction under paragraph 92(1)(*c*) of the former *Act*, the adjudicator would have jurisdiction to consider the grievances as they were filed under paragraph 92(1)(*a*) of the former *Act* as a violation of the collective agreement. The grievors rely on *Shneidman*.

[115] I consider that the *Shneidman* decision is of no assistance to the grievors. In *Shneidman* the Court was dealing with a termination decision and the grievance was properly referred to adjudication under paragraph 92(1)(*c*) of the former *Act*. The Court reversed the adjudicator's decision that the employer's decision to terminate was void *ab initio* because of a breach of procedural rights during the investigation, as the grievance originally filed did not raise the issue of a breach of procedural rights. It was a new issue which should have been discussed in the grievance process and then referred to adjudication under paragraph 92(1)(*a*) of the former *Act*. The Court held

that the procedural issue was not included in the reference to adjudication under paragraph 92(1)(*c*) of the former *Act*. The Court applied the principle in *Burchill* and held that the adjudicator erred in determining that the discipline was void *ab initio*. In *Shneidman*, the Court was not required to deal with the argument in *Lachappelle* because the grievor had been terminated and the issue of termination was squarely within the adjudicator's jurisdiction under what is now paragraph 92(1)(*c*) of the former *Act*.

[116] If I am incorrect in my determination on the jurisdictional point concerning paragraph 92(1)(*c*) of the former *Act*, I see no evidence of a breach of article 37 of the collective agreement. Article 37 sets out a progressive discipline scheme in general terms. Certain of the rights contained in article 37 (clauses 37.02, 37.04 and 37.05) are rights of the bargaining agent and not the rights of individual grievors. Both grievors received notice of the date for the investigation meeting and had an experienced bargaining agent representative present. In each case, the grievor was told what the employer was investigating and had a full opportunity to provide an explanation and written materials. Ms. Gray conducted the investigation and she was not a person who had been at the presentation. It appears that Ms. Gray at the relevant time had received complaints about the presentation from persons who were present when the presentation was shown. That does not disqualify her from conducting the investigation. The fact that she had her own concerns about the conduct of the grievors does not require her to assign the investigation to an independent investigator. Article 37 does not require an independent investigation of a grievance. Further, each grievor had full knowledge of what the other had said or done which gave rise to the discipline as Dr. Hu was present at Mr. Parkolub's presentation and Mr. Parkolub received Dr. Hu's email. Each grievor was represented by the same bargaining agent representative, Mr. Reniers. The bargaining agent representative was not constrained and could interview each grievor outside of the grievance process and exchange the necessary information to mount a defence. Clause 37.06 speaks to an agreement not to introduce evidence about earlier disciplinary incidents. There is no evidence of a breach of any of the terms of article 37 of the collective agreement.

[117] Because I have no jurisdiction, I have not considered the nature of Mr. Parkolub's presentation or his conduct in posting the material to the common drive, the nature of the email sent by Dr. Hu, or the merits of the arguments presented.

I make no comment on either party's characterization of the nature of the presentation and email.

[118] Had I been able to decide this case on the merits, I would have had serious reservations as to what weight, if any, to place on the anonymous emails or on Ms. Gray's opinions, as these were advanced in the form of hearsay and the grievors had no opportunity to challenge the issue of whether the comments they had made were capable of being offensive or unwelcome.

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

(The Order appears on the next page)

VI. Order

[120] The grievances are dismissed.

June 19, 2007.

Paul Love,
adjudicator