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Citation: 2007 PSLRB 71

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

SEBRENA THOMPSON

Grievor

and

TREASURY BOARD
(Canada Border Services Agency)

Employer

Indexed as
Thompson v. Treasury Board (Canada Border Services Agency)

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

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Jennifer A. Lewis, counsel

Heard at Toronto, Ontario,
April 16 to 18, 2007.

I. Grievance referred to adjudication

[1] Following a disciplinary investigation, the Canada Border Services Agency (CBSA) terminated the employment of Sebrena Thompson ("the grievor") effective August 27, 2004. Prior to her termination, the grievor worked as a customs inspector, classified at the PM-02 group and level, at the International Mail Processing Centre in Toronto.

[2] The CBSA communicated its decision to the grievor in a letter of termination signed by John Gillan, Acting Regional Director General for the Greater Toronto Area (Exhibit G-9):

> . . .
>
> *This letter is further to the results of the investigation done by the Canada Border Services Agency's (CBSA) Internal Affairs Division to review allegations of infractions on your part of the Agency's Code of Ethics and Conduct and the Agency's Discipline Policy. The investigation results indicate that you used your position as a Customs Inspector in attempts to coerce Immigration officials into releasing an individual who was known to you, into your custody. When questioned by the investigator in this regard you were found to be untruthful. Further, it was determined that you made numerous unauthorized accesses to the Agency's Integrated Customs Enforcement System (ICES), a confidential computer database. Several of these unauthorized accesses pertained to the same individual as noted above.*
>
> *I have carefully reviewed the evidence in relation to this matter and have determined that your actions constitute an abuse of authority, which violates the Agency's Code of Ethics and Conduct and the Agency's Discipline Policy. Your involvement in these activities is such an affront to the high level of trust, honesty and integrity required of your position as a Customs Inspector, that you have irreparably damaged the bond of trust that is fundamental to the employment relationship. You have engaged in conduct that is irreconcilable with your duties and responsibilities as a Public Servant.*
>
> *Consequently, in light of the seriousness of your misconduct, pursuant to the authority delegated to me under Section 11(2)(f) of the Financial Administration Act, I have decided to terminate your employment . . . .*
>
> . . .

[3] The grievor filed a grievance challenging her termination on January 21, 2005, without success.

[4] On April 1, 2005, the *Public Service Labour Relations Act* ("the new *Act*"), enacted by section 2 of the *Public Service Modernization Act (PSMA)*, S.C. 2003, c. 22, was proclaimed in force.

[5] On May 26, 2006, the grievor referred her grievance for adjudication under subparagraph 92(1)(*b*)(ii) of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former *Act*"). In a letter accompanying the reference to adjudication, the grievor's representative applied, on her behalf, for an extension of time for the presentation of a grievance in anticipation of the possibility that the employer would object to the timeliness of the grievance. The employer did so object, and the Chairperson of the Public Service Labour Relations Board considered the issue of timeliness and the application for an extension of time via teleconferences on March 12 and 26, 2007. At the first teleconference, the Chairperson ruled orally that the grievance was untimely. Following the second teleconference, the Chairperson ruled in favour of the application for an extension of time for the grievor to present her grievance. Written reasons followed in *Thompson v. Treasury Board (Canada Border Services Agency)*, 2007 PSLRB 59.

[6] The Chairperson has referred the grievance to me, under paragraph 223(2)(*d*) of the new *Act*, for a determination of the merits of the grievance. Pursuant to section 61 of the *PSMA*, this reference to adjudication must be dealt with in accordance with the provisions of the former *Act*.

II. Preliminary issues

[7] At the start of the hearing, the grievor's representative raised two preliminary issues. The parties resolved the first preliminary matter, concerning the disclosure of certain documents, without the need for a ruling.

[8] The second issue was a submission by the grievor's representative that I should determine that the discipline imposed on the grievor was void *ab initio* because of the employer's failure to comply with the requirements of clause 17.02 of the applicable collective agreement concerning the attendance of the grievor's bargaining agent representative at a disciplinary hearing:

> ***17.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one (1) day's notice of such a meeting.*

The grievor's representative submitted that the employer's violation of this provision constituted a breach of procedural fairness or of a substantive right.

[9] The parties indicated their preference that I hear the evidence and arguments relating to this preliminary issue as the first order of business, a procedure to which I agreed. After the parties completed their submissions on the preliminary matter, they asked that I issue a written decision on it before considering the merits of the case. I also agreed to this request. This decision, therefore, is limited to the grievor's submission that I declare the termination of her employment void *ab initio.*

[10] The parties also asked, after ending their submissions on the preliminary matter, that I attempt to mediate the outstanding dispute on the merits and that I remain seized of the matter failing a settlement. I accepted this request and conducted mediation on April 19 and 20, 2007, and, subsequently, by teleconference. The mediation process did not result in a settlement.

III. Summary of the evidence

[11] The grievor testified on her own behalf. The employer's representative called two witnesses, James Wardhaugh and Susan Scuglia. Fifteen exhibits were admitted in the course of the hearing.

[12] The grievor recounted that she received a voice mail on June 2, 2004, from Robert Burfield, Director of Postal Operations at the International Mail Processing Centre, directing her to attend an appointment with an Internal Affairs investigator. At the time, the grievor was absent from the workplace on maternity leave. The message, characterized as "bizarre" by the grievor, prompted her to reply the same day via email asking for clarification about the purpose of the appointment and about references in the voice mail to "events" at the Toronto airport involving the grievor, as well as certain documents from "Immigration officials" (Exhibit G-5). The grievor stated in her email that she ". . . did not have any events." Mr. Burfield followed up with an email, on the next day, June 3, 2004, that required the grievor to provide the investigator,

Mr. Wardhaugh, with contact information and to provide Mr. Burfield with follow-up confirmation that she had talked to the investigator (Exhibit G-6). The grievor's email reply later that same day confirmed that she had spoken with Mr. Wardhaugh by telephone (Exhibit G-6). It also repeated her request for the document from "Immigration" mentioned in the initial voice mail.

[13] According to the grievor, Mr. Wardhaugh did not advise her of her rights during their telephone conversation on June 3, 2004. Specifically, he did not advise the grievor that she had the right to be represented by her bargaining agent during their "meeting," or to the presence of an observer. She testified that Mr. Wardhaugh did not state that he would be taking notes of their conversation and did not offer to provide the grievor a copy of his subsequent investigation report. The grievor indicated that she was never given the opportunity to respond to this report or to review the investigator's notes. She had requested the report, without success, from both the investigator and Ms. Scuglia, a staff relations advisor. Furthermore, she never did receive the "Immigration" documents to which Mr. Burfield had referred at the outset.

[14] The grievor expressed her opinion that the investigator did not act fairly nor in accordance with the *Discipline Policy* (Exhibit G-4).

[15] The grievor received her termination of employment letter dated August 26, 2004. She testified that the employer did not provide her a last opportunity to reply, in a meeting with her manager, to any allegations made against her, a procedural requirement outlined in the *Discipline Policy* (Exhibit G-4).

[16] Following her termination of employment, the grievor filed her grievance with a supporting document in which she outlined the events that had occurred, focussing, among other things, on her encounter with Mr. Wardhaugh (Exhibit G-3). She stated in the document that Mr. Wardhaugh ". . . became very aggressive and started to belittle me . . . ." and ". . . made several racist comments to me . . . ." She wrote, "I said I have a Union you can't threaten me like this . . . ." to which Mr. Wardhaugh responded, ". . . this has nothing to do with the Union . . . ." The supporting document concluded with the claim that "I did not get a chance to defend myself against Jim Wardhaugh . . . ." and that "Jim Wardhaugh misquoted me and I was not given the opportunity to get representation by my Union . . . ."

[17] Working with her local bargaining agent representative (Exhibit G-7), the grievor subsequently took steps to secure information pertinent to her grievance, including making an access to information request to obtain a copy of the documentation on which the employer based its decision to terminate her employment (Exhibit G-8). In response to this request, she received a vetted copy of Mr. Wardhaugh's investigation report in May 2005, with considerable portions of the text blacked out. She testified that she had only seen an unvetted copy of that report on the Saturday before this hearing, provided by her representative.

[18] In cross-examination, the employer's representative questioned the credibility of the grievor's comment in her June 2, 2004, email, (Exhibit G-5), that she did not know about the ". . . events at the airport . . . ." to which Mr. Burfield had referred in his voice mail. The grievor responded that she knew that there was an event but that she ". . . was not involved in an event."

[19] Asked about her contacts with Ms. Scuglia, the grievor outlined that she had been required to keep in touch with Ms. Scuglia beginning in 2003 and was still contacting her periodically in 2004, prior to the investigation. She acknowledged that a later email dated August 20, 2004, in which Ms. Scuglia asked the grievor about her availability to attend a meeting to discuss the results of the investigation ". . . looked like one I received." She testified that she opened this email on checking her account after a representative of her bargaining agent told her that she had been fired. She stated that she had not received a voice mail from Ms. Scuglia about the meeting because she was not picking up her voice mail ". . . at this point." According to the grievor, she had not heard from Ms. Scuglia in months, but she always returned her calls promptly. When the grievor sent her email to Mr. Burfield on June 2, 2004 (Exhibit G-5), she was out of the country. She returned "around July 20th to 25th" but did not then constantly check for messages. At the time, she was ". . . looking at other things in my life . . ." and was not expecting to hear from Ms. Scuglia. Asked whether Ms. Scuglia would have had any reason to believe that the grievor had not received the August 20, 2004, email, she replied that she did not talk with Ms. Scuglia until October and did not know about procedures in a termination situation. She repeated that she did not constantly check for messages when she returned from being out of the country despite knowing that there was an investigation.

[20] In re-examination, the grievor testified that she was not aware of the date on which the investigation report had been completed. She stated that it was not clear at that time that the employer would make the report available to her, nor that she would be given a last opportunity to respond to it.

[21] The grievor described herself as having been diagnosed with post-partum depression during the investigation. She experienced a sleep disorder and had had a difficult childbirth in April 2004 following a high-risk pregnancy. After the birth, there were further medical complications; she was breastfeeding her child, and ". . . [her] mind wasn't all there."

[22] Prior to his retirement on June 29, 2006, James Wardhaugh was Manager of the Internal Affairs unit at the CBSA. He had served as an investigator since November 1989 and was appointed unit manager in May 2004.

[23] Mr. Wardhaugh testified that he interviewed the grievor by telephone after the grievor indicated that she was out of town and could not attend an "in-person" meeting. In the case of two other persons interviewed for his investigation, Mr. Wardhaugh had been able to secure signed "Rights, Privileges and Cautions" statements (Exhibits E-2 and E-3). He stated that he never received a signed statement from the grievor because he was not able to interview her face to face. Instead, he made her aware of the contents of the statement during their telephone conversation. He told the grievor that he had been assigned to investigate allegations against her. He testified that he informed the grievor that she could have an observer with her and that he would be taking notes of the interview. He confirmed that she had a right to access any information pertinent to her and provided her the address of the Access to Information Coordinator for the CBSA.

[24] In cross-examination, Mr. Wardhaugh outlined that he had interviewed a total of six persons during his investigation and offered explanations for not requiring or receiving signed "Rights, Privileges and Cautions" statements from several of the interviewees, in addition to the grievor.

[25] Mr. Wardhaugh confirmed that he did not advise the grievor during her interview that she could have her bargaining agent's representative present. He stated that he was familiar with clause 17.02 of the collective agreement on the subject of disciplinary meetings and said that the Internal Affairs Division did not conduct

disciplinary meetings. An investigation is, instead, a fact-finding exercise. Information gathered in the course of an investigation may subsequently be used by management if it determines there has been wrongdoing. At that point, the employer may consider the possibility of disciplinary action. In the words of Mr. Wardhaugh, ". . . I simply turn the report over to the manager."

[26] Mr. Wardhaugh testified that he was not aware of the *Discipline Policy* (Exhibit G-4).

[27] Asked whether he had provided the grievor with an opportunity to review the statements she made during the interview, Mr. Wardhaugh responded in the negative. He conceded that he had not at any time made an attempt to send his notes to her. However, he did provide her a copy of his report "in a roundabout way" by giving her information on how to contact the Access to Information Coordinator. According to Mr. Wardhaugh, information was normally provided in this way to the subjects of an investigation.

[28] Mr. Wardhaugh believed that he spoke with the grievor on three occasions (June 7, 14 and 29, 2004) after their initial conversation of June 3, 2004, although he was unsure of these dates without his notes before him. He acknowledged that there is no reference in his notes or his investigation report to paraphrasing the "Rights, Privileges and Cautions" document. The grievor's representative asked him whether he recalled the grievor requesting to be represented by her bargaining agent. Mr. Wardhaugh replied that she had not, and that, had she asked, he would have tried to accommodate her. Mr. Wardhaugh did, in fact, offer an observer who could have been a bargaining agent representative.

[29] Mr. Wardhaugh stated that he did not know whether the grievor had filed a complaint against him, but confirmed that he did file an incident report because the grievor had accused him of many things, including racism and unfair treatment, during their June 29, 2004, conversation.

[30] Ms. Scuglia has performed the duties of a staff relations advisor at the CBSA since April 2001. Her first experience with the grievor occurred in January 2004 when the Regional Director General asked her to be a contact person for the grievor with respect to certain other issues. From that point on, Ms. Scuglia usually communicated with the grievor either by telephone or email.

[31] The parties agreed that the following notes were filed and emails were exchanged between Ms. Scuglia and the grievor:

- Email from Ms. Scuglia to the grievor dated June 14, 2004, at 12:20;
- Note to file by Ms. Scuglia on June 14, 2004, at 13:25, noting receipt of a voice mail from the grievor;
- Note to file by Ms. Scuglia on June 14, 2004, (no time stamp) regarding a voice mail left by the grievor;
- Note to file by Ms. Scuglia on June 15, 2004, (no time stamp) regarding receipt of a voice mail from the grievor;
- Email from Ms. Scuglia to the grievor on June 16, 2004, at 13:33, regarding receipt of a voice mail from the grievor;
- Email from the grievor to Ms. Scuglia on June 18, 2004, at 11:27, regarding an email that Ms. Scuglia sent to the grievor on June 16, 2004, at 13:33.

[32] Ms. Scuglia testified that the purpose of her August 24, 2004, email to the grievor (Exhibit E-1) was to ask the grievor to contact her in order to set up a meeting with Mr. Gillan, Regional Director General, concerning the investigation report. Ms. Scuglia recounted that she also tried to telephone the grievor several times about the meeting, which contacts are substantiated by excerpts from her notebook (Exhibit E-4). Ms. Scuglia said that she had no reason to believe that the grievor would not receive emails or voice mails as the grievor had always responded in the past. Ms. Scuglia's impression, this time, was that the grievor chose not to respond.

[33] Ms. Scuglia confirmed her familiarity with the *Discipline Policy* (Exhibit G-4) and the standard requirement it expresses that an employee is to have an opportunity to comment on an investigation report at a meeting with management. She expressed her opinion that the employer had given the grievor sufficient notice and opportunity to come in for such a meeting.

[34] Ms. Scuglia identified an excerpt from the collective agreement for the Correctional Services Group bargaining unit (Exhibit E-5). Clause 17.03 of that agreement specifically provides that a correctional officer may be accompanied by a representative at an investigation meeting.

[35] Regarding the proposed meeting with the Regional Director General, the grievor's representative asked Ms. Scuglia whether it was the employer's position to provide the grievor an unvetted copy of the investigation report for discussion at this meeting. She responded in the negative and stated her view that not providing an unvetted version was fair to the grievor as the grievor could comment based on the vetted copy. Ms. Scuglia confirmed that the employer's letter of termination was the result of some of the findings contained in the investigation report. As to whether discipline was to be imposed at the meeting in question, she responded ". . . not to my knowledge."

[36] Ms. Scuglia acknowledged that her notebook excerpts (Exhibit E-4) did not contain a reference to her August 24, 2004, email to the grievor (Exhibit E-1). Ms. Scuglia also confirmed that she contacted the grievor's local bargaining agent representative, Ron Warren, on August 27, 2004, the day following the date of the letter of termination.

[37] In re-examination, Ms. Scuglia explained that it had been her intention to advise the grievor of her right to have a bargaining agent representative attend the meeting with the Regional Director General had she been able to speak to her.

IV. Summary of the arguments

A. For the grievor

[38] The discharge of the grievor was void *ab initio* because the employer failed to comply with clause 17.02 of the collective agreement. Violating this provision constituted a breach of procedural fairness or of a substantive right.

[39] The grievor's evidence in this case established the following facts. At the interviews with Mr. Wardhaugh, the grievor was not advised of her right to have a representative of her bargaining agent present. She was not advised that she was entitled to be accompanied by an observer. Mr. Wardhaugh did not offer to provide the grievor a copy of the investigation report. For her part, the grievor did request to be represented by her bargaining agent, a fact underscored in the supporting document that she later submitted with her grievance (Exhibit G-3). In the grievor's opinion, the investigator did not act fairly or in accordance with the *Discipline Policy* (Exhibit G-4). After the investigation was completed, management never met with the grievor prior to issuing the termination letter.

[40] Mr. Wardhaugh's testimony confirmed that he did not advise the grievor concerning her right to be represented by her bargaining agent. He stated that he was aware of clause 17.02 of the collective agreement but indicated his understanding that it did not apply to a fact-finding meeting during an investigation. Mr. Wardhaugh admitted that he was not aware of the *Discipline Policy.* He testified that he did advise the grievor that she could have an observer present, but conceded that this fact was not documented in either his interview notes or his final report. He admitted that he did not attempt to get his interview notes to the grievor for review. Mr. Wardhaugh did offer her access to his final report but only "in a roundabout way" through access to information.

[41] Clause 17.02 of the collective agreement provides for two types of meetings. The first type is a meeting the purpose of which ". . . is to conduct a disciplinary hearing concerning him or her . . . ." The employer renders a disciplinary decision at the second type.

[42] The meeting between the grievor and Mr. Wardhaugh on June 3, 2004, via telephone, was the first type of meeting outlined in clause 17.02 of the collective agreement. The grievor was required by the employer to attend this meeting. Its purpose was ". . . to conduct a disciplinary hearing concerning . . . her . . . ." The supporting document attached to her grievance clearly confirms the grievor's account that she asked to be represented by her bargaining agent at this meeting (Exhibit G-3). When this request was not granted, the employer breached a substantive right.

[43] The document supporting the grievance (Exhibit G-3) broadens the scope of the grievance, thus allowing the adjudicator to take jurisdiction over issues related to the breach of the substantive right and of procedural fairness.

[44] The *Discipline Policy* (Exhibit G-4) establishes the same right to be represented by the bargaining agent at a disciplinary meeting as the collective agreement. It obliges an investigator to keep written notes of all interviews and to provide the persons interviewed the opportunity to review and amend those notes. Mr. Wardhaugh testified that he did not make an effort to provide the grievor that opportunity. This failure was procedurally unfair.

[45] When the investigation report is completed, according to the *Discipline Policy*, the employee ". . . must be made aware of the contents of the report and be given one last opportunity to respond to the findings, at a meeting with the manager . . . ." Ms. Scuglia was familiar with the *Discipline Policy*. She indicated that the employer believed it had provided the grievor sufficient notice and opportunity to come to the workplace for a meeting to discuss the investigation report. Ms. Scuglia conceded that the employer expected the grievor to respond based only on the vetted version of the report. Mr. Wardhaugh suggested that the grievor obtain the vetted copy through the "roundabout" route of access to information. This, too, was procedurally unfair.

[46] Exhibits G-5 and G-6 prove that the grievor asked for the document from "Immigration officials" relied on by the employer so that she could understand the nature of the accusations against her. The employer did not provide her with this document prior to her conversations with Mr. Wardhaugh, nor after the conversations when she again requested it. The employer's failure to do so was procedurally unfair.

[47] Ms. Scuglia's emails to the grievor of August 20 and 24, 2004 (Exhibit E-1), contain no reference to the grievor's right to have a bargaining agent representative attend the proposed disciplinary meeting with the employer. There is also nothing that states the grievor's right to have ". . . one last opportunity to respond . . ." at this meeting. Ms. Scuglia testified that Mr. Gillan would attend that meeting. It is clear that this was to be a disciplinary meeting at which a decision would be rendered.

[48] *Evans v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-25641 (19941021), found that the right to representation at a disciplinary hearing is substantive ". . . whose breach cannot be cured at some later date by a hearing *de novo*." That decision cited case law from the private sector that discussed the concept of contractual due process and its application to administrative law. *Evans* referred, in particular, to Chertkow, "Mandatory Union Representation at Discipline: An Arbitrator's Perspective", in *Labour Arbitration Yearbook* (1993), at 139:

. . .

> *Contractual due process includes (where the contract language so provides) the right to know in advance the nature of the charges, the opportunity to consult with a union official prior to the "interview" or "hearing", and the right to have the union representative speak for and on behalf of the accused employee. The importation of the*

> *concept of due process into the workplace has been described as penetrating "to the heart of the relationship of the employer and employee".*
>
> . . .

[49] *Evans* described a first meeting between a grievor and an investigator as a disciplinary hearing. *Evans* also emphasized the vulnerability of the grievor as an important reason for the requirement to have a bargaining agent representative present. In this case, the evidence shows that the grievor was suffering from depression and other medical problems.

[50] *Shneidman v. Canada Customs and Revenue Agency*, 2004 PSSRB 133, examined whether a meeting held between a grievor and an investigator constituted a disciplinary hearing. It found in the affirmative as follows:

> . . .
>
> *[285] These facts convince me that Mr. Rodrigue's investigation was a disciplinary investigation and that his interview of Ms. Shneidman was to give her an opportunity to state her case with regards to allegations of misconduct on her part. I therefore find that a disciplinary investigation, that includes meeting with an employee to hear what he/she has to say about an allegation of misconduct on his/her part, qualifies as a "meeting, the purpose of which is to << conduct >> a disciplinary hearing concerning him or her."*
>
> . . .

[51] In summary, the telephone conversation between the grievor and the investigator, Mr. Wardhaugh, on June 3, 2004, was a ". . . meeting, the purpose of which [was] to conduct a disciplinary hearing concerning . . . her . . ." within the meaning of clause 17.02 of the collective agreement. It was a disciplinary meeting at which the employer required the grievor's attendance. Clause 17.02 confers a substantive right on the grievor to have her bargaining agent representative present at such a meeting at "her request." According to that clause, this substantive right is triggered by a request from the employee for bargaining agent representation, and the evidence in this case shows that the grievor did so request. By not acceding to her request, the employer breached the substantive right owed the grievor.

[52] There was no meeting of the second type envisaged by clause 17.02 of the collective agreement; i.e., a meeting at which the employer renders a disciplinary decision. The evidence proves that important requirements of procedural fairness essential for a second meeting, which did not occur, were also breached.

[53] In view of the breach of a substantive right and of procedural fairness, the adjudicator should declare the grievor's termination void *ab initio*, reinstate her to her substantive position, reinstate all leave entitlements to which she was entitled and order payment of all monies owed to her.

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

[54] The preliminary issue raised by the grievor asserts that she was not given the opportunity to have her bargaining agent representative attend the interview between herself and the investigator during the first week of June 2004. The subject of the preliminary issue is thus limited to the alleged breach of a substantive right created by clause 17.02 of the collective agreement. The grievance, as framed, does not encompass the broader grounds of procedural fairness raised in the grievor's argument, such as the right to have an opportunity to respond to a final investigation report. Given *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.), an adjudicator does not have jurisdiction to consider these broader procedural fairness allegations and must confine his scrutiny to the substantive right raised in clause 17.02.

[55] Aspects of the grievor's testimony are not credible. In her email to Mr. Burfield dated June 2, 2004, (Exhibit G-5), the grievor did not say that she had knowledge of the events that triggered the disciplinary investigation. In cross-examination, however, the grievor testified that she did know what events Mr. Burfield was talking about. Her email response to Mr. Burfield was misleading.

[56] In her examination-in-chief, the grievor stated that she promptly returned calls from Ms. Scuglia. In cross-examination, she claimed that, when Ms. Scuglia tried to contact her to attend a meeting to discuss the investigation report, she was not checking either her emails or voice mails. In reply evidence, the grievor reported that "her mind wasn't all there" at that time. During the period following the birth of her child when she allegedly was experiencing depression and medical problems, she nonetheless had no problem returning calls and emails, as stipulated in evidence. The

grievor responded the same day nearly every time she was contacted. It is, therefore, not credible that the grievor, in late August 2004, never picked up her emails or listened to her voice mails from the employer, when she knew that there was an ongoing disciplinary investigation. Her testimony must be viewed as self-serving.

[57] Mr. Wardhaugh's testimony was credible. He stated that he had to interview the grievor over the telephone rather than face to face because she would not meet him in person. Because the interview was not in person, he did not provide the grievor the "Rights, Privileges and Cautions" document (Exhibits E-2 and E-3). He testified that he did summarize this document for her over the telephone. Mr. Wardhaugh also advised the grievor that she was entitled to have an observer present with her. In cross-examination, he further stated that, while he did not offer the grievor the presence of a bargaining agent representative, the observer he did offer could have been a bargaining agent representative. He maintained that the grievor never asked for either an observer or a bargaining agent representative. Had she asked for either, he would have stopped the interview.

[58] Mr. Wardhaugh testified that Internal Affairs investigators do not conduct disciplinary meetings. Investigation interviews are fact-finding in nature. The investigator does not make recommendations to management respecting discipline. What management does with the investigator's report is up to management.

[59] The grievor must prove that the interview conducted by Mr. Wardhaugh was a disciplinary meeting within the meaning of clause 17.02 of the collective agreement. Mr. Wardhaugh's evidence clearly established that it was not. As a fact-finding investigation interview, the grievor was entitled to be accompanied by an observer who could have been a bargaining agent representative. The fact that such a representative did not participate in the interview was not a breach of the substantive right created under clause 17.02. Moreover, even if the meeting in question was found to be disciplinary for purposes of the collective agreement, Mr. Wardhaugh's testimony indicated that the grievor never requested the attendance of a bargaining agent representative, a precondition to exercising the substantive right that an employee has under clause 17.02.

[60] *Canada (Attorney General) v. Shneidman*, 2006 FC 381, set aside the adjudicator's decision in *Shneidman*, 2004 PSSRB 133. Pending a judgment to the contrary from the Federal Court of Appeal, decision 2004 PSSRB 133 is not good law

and cannot be relied upon here. No other adjudication decision has applied the principles enunciated in *Shneidman*, 2004 PSSRB 133.

[61] Case law under the former *Act* and the new *Act* runs contrary to *Shneidman*, 2004 PSSRB 133. The employer referred me to *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, *Arena v. Treasury Board (Department of Finance)*, 2006 PSLRB 105, and *Ayangma v. Treasury Board (Department of Health)*, 2006 PSLRB 64, in which adjudicators declined to view investigation interviews as disciplinary meetings where the substantive right to bargaining agent representation was engaged.

[62] The employer asked me to consider, as well, clause 17.03 of the collective agreement for the Correctional Services Group bargaining unit (Exhibit E-5):

> *17.03 At any administrative inquiry, hearing or investigation conducted by the Employer, where the actions of an employee may have had a bearing on the events or circumstances leading thereto, and the employee is required to appear at the administrative enquiry, hearing or investigation being conducted, he or she may be accompanied by an employee representative. . . .*

According to the employer, the existence of a clause of this type indicates that employers and bargaining agents can, and elsewhere have, included language in their collective agreements that extends the right to bargaining agent representation to investigations. That contract language, additional to the type of provision found in this case in clause 17.02 of the applicable collective agreement, does not operate here.

[63] In the event that I do not accept that *Burchill* precludes me from considering the broader allegations of procedural unfairness raised by the grievor, *Ottawa (City) v. Amalgamated Transit Union, Local 279* (2004), 132 L.A.C. (4th) 198, established that an employee's right to "one final occasion" to question the results of an investigation must be based on collective agreement language that obligates the employer to meet with the grievor for that purpose. The collective agreement in this case contains no such provision.

[64] The *Discipline Policy* (Exhibit G-4) does not establish enforceable substantive or procedural rights. The prevailing case law is clear in finding that an employer policy is unenforceable by an adjudicator unless governing legislation requires an employer to enact the provisions expressed in that policy. The legislation applicable to the CBSA

and, before it, to the CCRA, is permissive rather than mandatory respecting the employer's disciplinary policies: *Canada Border Services Agency Act*, S.C. 2005, c. 38; *Canada Customs and Revenue Agency Act*, S.C. 1999, c. 17; *Endicott v. Canada (Treasury Board)*, 2005 FC 253; *Girard v. Canada (Department of Agriculture)*, [1994] F.C.J. No. 420 (T.D.) (QL); and *Glowinski v. Canada (Treasury Board)*, 2006 FC 78.

[65] In summary, there was no violation of a substantive right in this case. The employer never denied the grievor bargaining agent representation at any stage. Had the grievor mentioned that she wanted an observer at the investigation interview with Mr. Wardhaugh — an observer who could have been a bargaining agent representative — Mr. Wardhaugh would have stopped the interview. The grievor did not make such a request. The interview was a fact-finding process. Mr. Wardhaugh had no role in recommending or imposing discipline. The interview was, therefore, not a disciplinary meeting within the meaning of clause 17.02 of the collective agreement, a fact borne out by the jurisprudence. Any procedural defects in or after the investigation process are cured by the fresh opportunity at this hearing to consider the merits of the grievor's case: *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL); and *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58.

C. Grievor's rebuttal

[66] Regarding the employer's objection concerning the "broadening" of the preliminary matter, the grievor noted that she had stated her position at the outset that the discharge was void *ab initio* because of the failure to comply with clause 17.02 of the collective agreement. *Evans* found that the right to contractual due process includes the right of an employee to know in advance the nature of the charges against her or him. In this case, the grievor requested, but was never provided, the document from "Immigration officials" (Exhibits G-3, G-5 and G-6). The grievor had the ". . . right to know the details of the case . . . ." in accordance with the *Discipline Policy*. The grievor referred to other procedural rights beyond clause 17.02 in the supporting document to the originating grievance (Exhibit G-3), thus broadening the grievance and giving an adjudicator jurisdiction.

[67] In the first sentence of the letter of termination (Exhibit G-9), the employer ties its decision to the *Discipline Policy*. In so doing, the employer itself placed weight on that policy. Arguing now that the policy is unenforceable is a double-edged sword. At

the very least, it should be given the same weight in these proceedings as the employer gave it in the letter of termination.

[68] If *Shneidman*, 2004 PSSRB 133, is bad law, it is nevertheless "good logic."

[69] On the issue of the grievor's credibility, she testified under oath that she requested to be represented by her bargaining agent during her conversations with Mr. Wardhaugh, and the document supporting her grievance (Exhibit G-3) confirms this point. Similar factual evidence also supports the point that the grievor would have asked the investigator for her bargaining agent representative to be involved. The evidence discloses a pattern of the grievor making requests of the employer and of the employer refusing these requests. The grievor does not attack Mr. Wardhaugh's credibility on this point, but she does challenge his recollection. It is noteworthy that he never documented in his notes or in his report having made an offer to the grievor regarding bargaining agent representation.

[70] In response to a question I posed to the grievor's representative, he stated that the grievor accepts that it is her onus to prove that she requested bargaining agent representation at the meeting with Mr. Wardhaugh. She accepted that making such a request is a prerequisite for enforcing the substantive right established under clause 17.02 of the collective agreement.

V. Reasons

[71] My task in this decision is to determine whether I should accept the submission by the grievor's representative that I declare the discharge of the grievor void *ab initio* on the basis that the employer failed to observe the grievor's substantive right to representation by her bargaining agent at a disciplinary meeting, provided for in clause 17.02 of the applicable collective agreement.

[72] A search of adjudication decisions under the former *Act* as well as under the new *Act* reveals that there have been relatively few applications considered in the past to declare a disciplinary penalty void *ab initio.* In the handful of cases where a grievor has done so, only a minority have been determined solely by granting or dismissing the "void *ab initio*" application. This subjects remains, it would appear, fairly novel in this jurisdiction.

[73] Experience outside this jurisdiction with this type of submission is more abundant. Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (2007), summarized the leading arbitral jurisprudence as follows at para 7:2140:

> *Whenever an employer fails to exercise its disciplinary powers according to required procedures, the arbitrator must decide what the effect of the breach will be. If the defect relates to a provision in the agreement that is regarded as critical to the integrity of the process, many arbitrators are inclined to assume that the employee has been irreparably harmed and will treat whatever discipline was imposed as void "ab initio" (from the beginning). Most arbitrators have looked at clauses guaranteeing union representation in this way. Even if they do not say so explicitly, they are read as requiring the invalidation of any disciplinary sanction that is imposed without following their instructions. In some cases arbitrators have come to the same conclusion when employers have not given their employees or the union adequate and timely notice of their intention to exercise their disciplinary powers. The right to discipline has also been lost for inordinate and unjustified delay in deciding to impose a sanction, as well as for failing to adhere to an interview procedure provided in the agreement. Moreover, rights that can be characterized as "fundamental" or "substantive" are regarded by some arbitrators as so important that they can never, or only with the clearest evidence, be waived. In some cases, procedural defects may be remedied by requiring employers to pay compensation and/or by ruling that any evidence tainted by a procedural defect is inadmissible at any subsequent arbitration hearing.*
>
> *Not all procedural irregularities, however, will result in the exoneration of the employee. If, for example, the defect pertains to a provision that is regarded as permissive and purely procedural, some other remedy is likely to be found . . . As well, if the breach is just a technicality and no harm has been done, it is unlikely the discipline will be set aside. . . . On similar logic, arbitrators have refused to nullify disciplinary sanctions in cases where some real prejudice could not be shown . . . .*
>
> . . .
>
> [Footnotes omitted]

[74] In this case, the substantive right that the employer has allegedly contravened arises under clause 17.02 of the collective agreement:

> ***17.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one (1) day's notice of such a meeting.*

[75] There is no submission before me that the wording of clause 17.02 of the collective agreement is ambiguous, although some key terms are undefined, or that the clause must be considered in light of other provisions of the collective agreement. It is appropriate, therefore, to give the words of the clause their plain and ordinary meaning, and to proceed by examining whether each component condition expressed in clause 17.02 has been met.

[76] In my view, the grievor must establish, in the first instance, that she was ". . . required to attend a meeting . . . .", in this case, the conversation between her and the investigator, Mr. Wardhaugh, on June 3, 2004. The issue then is whether this meeting falls within the class of meetings contemplated by clause 17.02 of the collective agreement. Should I find in the affirmative on both points, the analysis would then turn to whether the grievor requested bargaining agent representation for the meeting. I note that the grievor's representative has accepted that the condition that the grievor requested bargaining agent representation must be satisfied in order to engage the substantive right to bargaining agent representation expressed in clause 17.02. If I find that all of the component conditions under clause 17.02 have been met, and that the employer did, in fact, deny the grievor's substantive right to bargaining agent representation at the meeting in question, I then must consider whether a void *ab initio* declaration is the appropriate or required remedy in the circumstances.

[77] Mr. Burfield's email to the grievor dated June 3, 2004 (Exhibit G-6), establishes that an authorized representative of the employer did require the grievor to contact the investigator and provide information to the investigator. There is no disagreement between the parties on this point. This satisfies the initial condition of clause 17.02 of the collective agreement.

[78] The second condition is vital. Was the telephone encounter between the grievor and Mr. Wardhaugh on June 3, 2004, ". . . a meeting, the purpose of which [was] to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision . . . ."? The grievor's representative urges that I find in the affirmative,

describing that the purpose of the meeting in question was indeed ". . . to conduct a disciplinary hearing concerning . . . ." the grievor. The employer counter-argues that a meeting conducted in the context of an administrative investigation cannot be qualified as a disciplinary hearing.

[79] I believe that there are sound reasons to prefer the employer's view. With the exception of *Shneidman*, 2004 PSSRB 133, subsequently set aside by the Federal Court, 2006 FC 381, the view of most adjudicators canvassing this issue in the past has been that collective agreement wording of the type found in clause 17.02 of the collective agreement applicable in this case is not broad enough to encompass meetings between an investigator and an employee during an investigation process. Recently, *Ayangma* reaffirmed this point examining precisely the same collective agreement language:

. . .

> *[53] . . . It is well established that the right to representation does not extend to the investigatory process and this is consistent with the language of clause 17.02. To hold otherwise would be to conclude that an employee is entitled to representation before there has been a finding of wrongdoing. An employee has an obligation to cooperate in a* bona fide *investigation by the employer and there is no legal protection for such an employee to remain silent during the investigation, as there is in criminal law:* Naidu v. Canada Customs and Revenue Agency, *2001 PSSRB 124, at paragraphs 71 to 79.*

. . .

[80] *Naidu*, cited above in *Ayangma*, can be distinguished in the sense that the clause examined by the adjudicator in that case addressed bargaining agent representation only in meetings that are held ". . . to render a disciplinary decision . . . ." The following comments, nonetheless, strike me as quite relevant:

. . .

> *[79] Investigatory meetings, and meetings requesting explanations for the conduct of employees are common occurrences in the work place. Had the parties intended the language of the collective agreement to include the right to representation at these meetings or at all meetings between the employer and its employees, collectively or individually, it would have been a simple matter to include that right in the agreement. . . .*

. . .

Clause 17.03 of the Correctional Services Group collective agreement (Exhibit E-5) appears to be an example of a clause explicitly fashioned to cover investigatory meetings, as suggested.

[81] *Arena*, also cited by the employer, interpreted contract language in a manner that was probably broader in scope than clause 17.02 of the collective agreement at hand but still did not extend the concept of a "meeting on disciplinary matters" to an investigative interview:

. . .

> *[93] . . . a meeting at which the employer is seeking facts about events, normally considered an "administrative investigation", is not a meeting in relation to a disciplinary measure. At such an investigatory meeting, the employer's purpose is to gather all of the facts and to verify their accuracy. A disciplinary process may follow this administrative action, if the facts show, in the employer's assessment, that an employee acted improperly, and if that action warrants a sanction.*
>
> *[94] I can conceive that, in certain circumstances, it may be difficult to determine at what point the administrative action ends and the disciplinary process begins. This issue must be assessed in light of the specific facts in each case. It cannot be concluded* a priori *that the imposition of a penalty on the employee retroactively confers a disciplinary nature on each of the steps taken by the employer to allow it to reach its decision.*

. . .

[82] The "specific facts" in this case offer no basis to qualify the grievor's interview by Mr. Wardhaugh as a "disciplinary hearing," even giving this term its most liberal meaning. The uncontested testimony of Mr. Wardhaugh was that he had no authority to impose discipline or to recommend discipline. He was charged with a fact-finding mandate. Though management subsequently used his report as a basis for its decision to impose discipline, Mr. Wardhaugh testified that consideration of the disciplinary implications of the facts that he uncovered rested in management's hands. I note as well that the grievor did not testify that discipline was discussed during her conversation with Mr. Wardhaugh. The supporting document to her grievance (Exhibit G-3) made serious allegations against Mr. Wardhaugh in relation to their conversation

but did not say that he mentioned or threatened discipline, nor did the grievor in this document contest that the interview was fact-finding in nature. The document does state that "[h]is accusations are false . . . ." but I have nothing concrete before me to show that the alleged "accusations" — which were made on an unspecified occasion — touched on the possibility of discipline, or had the effect of crossing over a line from investigation to discipline.

[83] The grievor's representative cited *Evans* extensively to support his position that the conversation of June 3, 2004, was a disciplinary meeting. *Evans*, I believe, contains important comments about due process and the right to bargaining agent representation. However, as there was no contest in *Evans* that the meeting under examination was disciplinary, that decision cannot readily be used as a precedent for qualifying an investigative interview as a disciplinary encounter triggering the right to bargaining agent representation.

[84] All of this leads me to find that the investigation interview between the grievor and Mr. Wardhaugh on June 3, 2004, did not comprise a meeting, the purpose of which was ". . . to conduct a disciplinary hearing concerning [the grievor] . . . ." As a result, clause 17.02 of the collective agreement did not apply and the substantive right to bargaining agent representation was not engaged.

[85] This analysis of the application of clause 17.02 of the collective agreement to the circumstances of this case need go no further. I do wish to note, nevertheless, that, had I reached the opposite conclusion, I would have proceeded to find that the grievor's representative did not prove to my satisfaction, on a balance of probabilities, that the grievor requested bargaining agent representation at the June 3, 2004, meeting, the further condition to be satisfied under clause 17.02. There was conflicting evidence on this point at the hearing. At best, I consider that the two versions, offered by the grievor and Mr. Wardhaugh, are equally possible and credible regarding whether a request was made. Given that the onus lies with the grievor to prove this fact, on a balance of probabilities, her case falls short.

[86] The grievor's case focussed on other procedural defects and unfairness in the process leading up to her termination of employment. These included the investigator's failure to provide the grievor with a copy of his written notes for comment, the employer's failure to provide her with a copy of the investigation report other than through access to information (and, then, only a vetted version) and the

employer's failure to give the grievor a last opportunity to comment on the results of the investigation before the employer imposed discipline.

[87] The employer contended that I do not have jurisdiction to examine these allegations because they were not an explicit part of the initial grievance, citing *Burchill*. In the alternative, the employer submitted that any procedural faults that may have occurred could be cured by the fresh opportunity that this hearing affords the grievor to have the merits of her grievance considered, as in *Tipple*. The employer argued further that requirements of the *Discipline Policy* that were not met, according to the grievor's representative, are not enforceable in these proceedings, as shown in *Endicott* and others.

[88] I do not believe that I need to rule on those arguments. The grievor's representative was precise when he stipulated that the application that I declare the discharge void *ab initio* was founded on his allegation that the employer had denied the substantive right to bargaining agent representation created by clause 17.02 of the collective agreement. He obviously raised other allegations that suggested procedural irregularities and unfairness, but he did not claim that those allegations formed an additional or alternate basis for a void *ab initio* declaration. Had he done so, I believe that the principle set down by the Federal Court of Appeal in *Tipple* may have applied, presuming (hypothetically) a finding against the employer on the *Burchill* jurisdictional objection.

[89] I wish to state that nothing in this decision should be taken as questioning the potential value of bargaining agent representation at investigatory interviews. My ruling rests on what I believe to be the correct interpretation of the clause that the employer and bargaining agent have chosen to include in their collective agreement. It remains available to them in future negotiations to consider whether different or additional provisions might provide further support for effective and fair investigation and disciplinary procedures.

[90] By way of further obiter, I note that, since the hearing on the preliminary issue, the Federal Court of Appeal has upheld the Federal Court's quashing of *Shneidman*, 2004 PSSRB 133: *Shneidman v. Canada (Attorney General)*, 2007 FCA 192. I did not rely on this additional judgment in making my decision.

[91] For the reasons stated above, I do not accept the submission of the grievor's representative that I must declare the termination of the grievor's employment void *ab initio.*

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

(The Order appears on the next page)

VI. Order

[93] The application for a determination that the termination of the grievor's employment was void *ab initio* is dismissed.

[94] I order the Public Service Labour Relations Board's Director of Registry Operations and Policy to consult with the parties to determine dates for the resumption of the hearing to receive evidence and arguments on the merits of the grievance

July 16, 2007.

Dan Butler,
adjudicator