

Date: 20100215

Files: 566-02-2351 and 2813

Citation: 2010 PSLRB 24



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

TAYLOR WENTGES

Grievor

and

**DEPUTY HEAD
(Department of Health)**

Respondent

Indexed as
Wentges v. Deputy Head (Department of Health)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Renaud Paquet, adjudicator

For the Grievor: Himself

For the Respondent: Pierre Marc Champagne and Anne-Marie Duquette, counsel

Heard at Ottawa, Ontario,
October 13 and 14, 2009 and January 11, 12 and 18, 2010.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Taylor Wentges (“the grievor”) was a senior policy analyst with the First Nations and Inuit Health Branch (FNIHB) of Health Canada (“the respondent”). His bargaining agent was the Canadian Association of Professional Employees. However, the grievor decided to represent himself.

[2] In the first grievance (PSLRB File No. 566-02-2351), the grievor disputes a one-day suspension that the respondent imposed on him for failing to attend a meeting to discuss his performance development plan (PDP) along with other matters. The suspension was served on June 26, 2008. The first grievance was referred to adjudication on September 25, 2008.

[3] In the second grievance (PSLRB File No. 566-02-2813), the grievor disputes the respondent’s decision to terminate his employment, effective March 9, 2009, for insubordination. The second grievance was referred to adjudication on April 14, 2009.

II. Summary of the respondent’s evidence

[4] The respondent called Debbie Reid, Roger Neufeld, Jeff Klassen, Jon Rogers and Michelle Kovacevic as witnesses. At the time the grievances were filed, all the witnesses were working at Health Canada in the FNIHB. Ms. Reid was the director of the Strategic Policy and Planning (SPP) division, in which the grievor worked. From spring to November 2008, Mr. Neufeld was a team leader in the SPP division. During that period, the grievor reported directly to him. In November 2008, Mr. Klassen replaced Mr. Neufeld as a team leader while Mr. Neufeld was away on language training. Mr. Klassen was still acting for Mr. Neufeld when the grievor was terminated in March 2009. Mr. Rogers was the acting director general of Strategic Policy Planning and Analysis from May to October 2008. He was replaced by Ms. Kovacevic, who became the director general in November 2008. Ms. Kovacevic was still in that position when the grievor was terminated. The respondent adduced 63 documents at the hearing.

A. PSLRB File No. 566-02-2351

[5] The PDP is an annual formal process between employees and their supervisors, in which they discuss and assess employees’ past performance, learning needs and work expectations. In April 2008, the grievor submitted his input for the 2007-2008 PDP to Ms. Reid, who had supervised him for most of that year. Ms. Reid was shocked

when she reviewed the grievor's input to his PDP, which contained a 15-point critique of Ms. Reid's work. Mr. Neufeld contacted the grievor to discuss his 2007-2008 PDP. The grievor refused to meet with him. The respondent considered that the grievor was insubordinate and sent him a letter of reprimand on June 20, 2008. In the discipline letter, the respondent warned the grievor that any repetition of such misconduct could result in further, more severe discipline, up to and including the termination of his employment.

[6] Mr. Neufeld rescheduled the PDP meeting to June 23, 2008 at 11:00. On that day, the grievor emailed Ms. Reid at 11:01, advising her that he would not attend the PDP meeting because he felt that Mr. Neufeld had no authority to discuss the 2007-2008 PDP. Ms. Reid felt that it was inappropriate for the grievor to refuse to attend the meeting. Mr. Neufeld scheduled a disciplinary meeting on June 24, 2008 to deal with the grievor's refusal to attend the June 23, 2008 PDP meeting. The grievor refused to attend the disciplinary meeting. As a result of refusing to attend the June 23, 2008 meeting, the respondent imposed a one-day suspension on the grievor that was to be served on June 26, 2008.

B. Grievor's disciplinary records

[7] Between the June 26, 2008 one-day suspension and the March 9, 2009 termination, the grievor was suspended three times. Those suspensions were not grieved. However, it is relevant to examine the evidence related to those suspensions considering that the respondent claims that they relate mostly to the types of offences for which the grievor was terminated.

[8] On August 18, 2008, the grievor was suspended for three days for the following reasons: his failure to give notice of his absence of July 15, 2008; his failure to produce a medical certificate for his absence of July 16, 2008; his failure to submit formal requests for the days he was absent; and his failure to change his title to "Senior Policy Analyst." The following abstracts from the discipline letter summarize the reasons for discipline and the warning that the respondent gave to the grievor:

...

. . . Specifically, the items discussed were your failure to call to notify that you would be absent on July 15, 2008, your failure to bring in a medical certificate regarding your

absence of July 16, 2008, your failure to submit an ILAM request for days during which you were absent from work as well as your failure to change your title to Senior Policy Analyst, as you had been instructed to do.

...

The four instances above demonstrate your continued refusal to follow management's directions and demonstrate your constant challenges to management's authority. Your continued misconduct is not acceptable and corrective action must be taken.

...

In the future you are expected to follow management's directions. Continued failure to follow management directions, or commission of any additional acts of misconduct will result in further disciplinary action to be taken, up to and including termination of your employment. I hope that you will take the opportunity to reflect on the seriousness of your actions and that this type of incident will not be repeated.

...

[9] On October 29, 2008, the grievor was suspended for 10 days for the following reasons: his unauthorized absences from September 3 to 8, 2008 and on September 15, 2008; his late arrival on September 10, 2008, his working on unassigned tasks on September 10 and 11, 2008; his refusal to attend meetings on September 10 and 12, 2008; and his unauthorized early departure on September 12, 2008. The following abstracts from the discipline letter summarize the reasons for discipline and the warning that the respondent gave to the grievor:

...

[t]he items for discussion at the meeting were your unauthorized absence from the workplace from September 3, 2008, to September 8, 2008, your late arrival at work on September 10, 2008, your work on non-assigned tasks on September 10th and 11th, 2008, your submission of work to Debbie L. Reid, myself, and several others on September 10th and 11th, 2008, your refusal to attend meetings that you were required to attend on September 10th and 12th, 2008, your unauthorized early departure from work on September 12, 2008, and your unauthorized absence from work on September 15, 2008.

...

In the future, you are expected to follow management's directions. Continued failure to follow management directions, or commission of any additional acts of misconduct may result in further disciplinary action being taken, up to and including termination of your employment. I hope that you will take the opportunity to reflect on the seriousness of your actions and that this type of incident will not be repeated.

...

[10] On December 3, 2008, the grievor was suspended for 20 days for the following reasons: his unauthorized early departure from the workplace on November 18, 2008 and his unauthorized absence from November 21 to 25, 2008. The following abstracts from the discipline letter summarize the warning that the respondent gave to the grievor:

...

In the future, you are expected to follow management's directions. Continued failure to follow management directions, or commission of any additional acts of misconduct will result in further disciplinary action being taken, up to and including termination of your employment with the Public Service. I hope that you will take the opportunity to reflect on the seriousness of your actions and that this type of incident will not be repeated.

...

[11] The 20-day suspension was served from December 3 to 30, 2008. The grievor returned to work on December 31, 2008.

C. PSLRB File No. 566-02-2813

[12] From September 2007 to March 2008, the grievor reported to Ms. Reid. She had asked him to examine theories on international development and to consider how they could be implemented in their program. She had also asked him to examine other countries' contributions to aboriginal health programs. The grievor completed that work and provided a list of information about the United States and Australia. Ms. Reid testified about problems she experienced with the grievor when supervising him, including some of the incidents that led to imposing suspensions on him.

[13] Ms. Reid also testified that the grievor amended an article from “The Hill Times” about the top 100 most influential people in government, adding Ms. Reid’s name. He then circulated it to some employees and managers at Health Canada. Ms. Reid was very embarrassed. When she confronted the grievor, he said that it had been a joke. Ms. Reid asked him to circulate an apology to staff and to the managers who had received the article, which the grievor did.

[14] Ms. Reid testified that annual employee turnover is 40 percent in the division where the grievor worked. Ms. Reid no longer works in the division since she left for another position in April 2009.

[15] On April 1, 2008, the grievor began reporting to Mr. Neufeld. Soon after, Mr. Neufeld prepared a work plan for the grievor because he wanted to clarify what the grievor should work on, with timelines and deliverables. Mr. Neufeld felt that the grievor did not collaborate in the discussion concerning the work plan.

[16] On July 3, 2008, Mr. Neufeld met with the grievor and presented him with a “letter of instruction.” The intent of that letter was to clarify the grievor’s responsibilities in the organization and the expectations for his behaviour in his role as a senior policy analyst. In the letter of instruction, among other things, Mr. Neufeld advised the grievor that he had to do the following:

- To comply responsibly with all instructions and directions from management in a timely and cooperative manner and to respectfully accept management’s decisions.
- To comply with his hours of work, which were from 10:00 to 18:00. If he were late or away from the office for any reason, he was to contact Mr. Neufeld by 9:00.
- To provide a medical certificate or a doctor’s certificate for all absences due to illness or a doctor’s appointment.
- During working hours, to work only on the items in his work plan or on the items that management assigned to him.
- Not to copy Ms. Reid or Mr. Rogers or anyone else when submitting work that was required as per his work plan.
- To attend meetings when required by management.

[17] Most of the discipline that the respondent imposed on the grievor between August 2008 and March 2009, including the termination, resulted from the grievor not complying with the letter of instruction.

[18] Mr. Klassen, who supervised the grievor from November 2008 to March 2009, testified that there was no trust in their relationship. The grievor wanted to have his way with everything. It was a constant challenge and battle to supervise him, and he obstructed every little thing. Mr. Klassen commented on several documents adduced in evidence by the respondent to that effect.

[19] On February 4, 2009, the grievor emailed Mr. Klassen, informing him that he had prepared a paper analyzing the last federal budget, which he found indispensable in his work. The grievor attached his paper to the email. On February 5, 2009, Mr. Klassen wrote to the grievor and stated that he had read the budget paper. He also wrote that it was not one of the grievor's assigned tasks and that he had never asked the grievor to work on such a project. He reproached the grievor for once more spending work hours on a very time-consuming project to which he had not been assigned.

[20] On February 20, 2009, the grievor prepared written comments on a Canada-USA comparison for an Indian and Northern Affairs Canada information sheet. Those comments comprised 10 lines and were sent to the administrative assistant, Karoline Latreille. The grievor was not asked to do that work.

[21] On February 24 and 25, 2009, the grievor was absent on sick leave. He did not call the office before 09:00 to advise that he would be absent, as per the letter of instruction of July 3, 2008.

[22] On February 26, 2009, Ms. Kovacevic wrote to the grievor, calling him to a disciplinary meeting that would take place on February 27, 2009. The following abstracts from that letter summarize the purpose of the meeting:

...

This will confirm that a disciplinary hearing concerning the matters outlined below will take place in Boardroom 203A (library boardroom), Jeanne Mance Building at 1:30 pm on Friday February 27, 2009. The purpose of the meeting is to provide you with an opportunity to present facts relevant to the following incidents:

1- On February 4, 2009, contrary to written instructions that you not work on unassigned tasks, you produced a 14-page budget analysis even though this work had not been assigned to you.

2- On February 20, 2009, contrary to written instructions that you not work on unassigned tasks, you prepared written comments on the Canada-USA Comparison for INAC Info Sheet and delivered these to Karoline Latreille.

3- On February 24, 2009, you were absent from the workplace and failed to call your manager or anyone else in your office by 9:00 a.m. as you were instructed to do in your letter of instruction.

...

[23] On March 9, 2009, the respondent advised the grievor that his employment was terminated, effective that day. The following abstracts from the termination letter outline the reasons for termination:

...

As outlined in the meeting invitation you received, the items for discussion at the meeting were your work on unassigned tasks, including a 14-page budget analysis and the Canada-USA Comparison for INAC Info Sheet and your failure to appropriately advise management of your absence due to illness on February 24, 2009.

I have carefully reviewed all the facts surrounding the matter including your comments at your hearing of February 27, 2009, as well as the information you provided and have determined that there is sufficient evidence to conclude the following:

A) On February 4, 2009, you produced a 14-page budget analysis; on February 20, 2009, you prepared written comments on the Canada-USA Comparison for INAC Info Sheet. Neither of these tasks had been assigned to you. This action is contrary to point X of your letter [of] instruction of July 3, 2008, wherein you were instructed not to work on unassigned tasks.

B) On February 24, 2009, you were absent from the workplace and failed to call your manager or anyone else in your office by 9:00 a.m. as you were instructed to do in your letter of instruction.

These recent incidents demonstrate an ongoing failure to follow direction and a disregard for management's authority. It is evident that despite significant corrective action, your behaviour has not improved. Specifically, you have received the following disciplinary reprimands due to acts of misconduct:

- 1- Letter of reprimand on June 20, 2008;*
- 2- 1 day suspension on June 25, 2008;*
- 3- 3 day suspension on August 18, 2008;*
- 4- 10 day suspension on October 29, 2008;*
- 5- 20 day suspension on December 3, 2008.*

In your letter of suspension of December 3, 2008, you were warned that continued failure to follow management's directions, or commission of additional acts of misconduct, would result in further, more severe disciplinary action up to and including termination of your employment with the Public Service.

I must advise you that I consider your actions to be extremely serious as they have irreparably damaged the bond of trust that is essential to your continued employment as a member of the Public Service. I am convinced, therefore, that management can no longer rely upon you in the workplace.

In view of the above and in accordance with the authority vested in me under Section 12(1)(c) of the Financial Administration Act, I hereby terminate your employment for cause, effective March 9, 2009, by reason of your misconduct.

...

[24] Ms. Kovacevic testified that the grievor showed no signs of change at the February 27, 2009 disciplinary meeting. The grievor's defence was that there was no misconduct in his behaviour, and he did not offer any information to explain his behaviour. Ms. Kovacevic testified that the grievor showed a complete disregard for management's authority, and after the meeting, she was convinced that the only alternative was to terminate him. For the previous few months, Mr. Neufeld and Mr. Klassen had worked almost full-time on managing the grievor. Ms. Kovacevic felt that the situation could not continue. In cross-examination, Ms. Kovacevic testified that the grievor was terminated on the three grounds specified in the termination letter but also for the other reasons for which he had previously been disciplined because those reasons still existed.

[25] Most of the respondent's witnesses testified on the likely impact of reintegrating the grievor in the workplace. Ms. Reid testified that it would not be good for the team because the grievor's co-workers did not support his behaviour. Mr. Neufeld testified that it would be close to disastrous for the team. He added that he would look for another job. Mr. Klassen testified that it would have a negative impact on the junior analysts who work in the section and that it would burden the team leader who would have to supervise the grievor. Ms. Kovacevic testified that it would have a huge impact on the team. Her managers would refuse outright to supervise the grievor.

III. Summary of the grievor's evidence

[26] The grievor began working in the SPP division of Health Canada in 2005. His previous position was with the Learning and Literacy Directorate at Human Resources and Skills Development Canada. Before that, he worked at Fisheries and Oceans Canada and at Citizenship and Immigration Canada. He completed his master's degree program in political science at the University of Windsor in 1993. From 1995 to 1997, he followed the PhD program in political science at the University of Toronto. He completed the coursework and the comprehensive exams.

A. PSLRB File No. 566-02-2351

[27] The grievor testified that he refused to attend the PDP meeting because he knew that Mr. Neufeld wanted to discuss more than the PDP, and that there was a risk that the tone of the meeting would be confrontational. The grievor had initiated the PDP, but it was turning into a quasi-disciplinary meeting. Also, the grievor had already indicated to Ms. Reid that Mr. Neufeld had no authority to discuss his PDP, considering that the grievor had reported directly to Ms. Reid during the year to be assessed.

B. PSLRB File No. 566-02-2813

[28] The grievor adduced documents in evidence and commented on them. He also gave his version of the three incidents referred to in the termination letter. The grievor called Veldon Coburn as a witness. From January 2007 to January 2009, Mr. Coburn worked as an analyst in the same section as the grievor. He is currently on education leave without pay and will return to his substantive position in late May 2010.

[29] The grievor admitted that in February 2009 he wrote a paper on the federal budget and that he sent a copy of it to his supervisor, Mr. Klassen, on February 4, 2009. However, the grievor testified that the paper contained 10 pages of text with a summary of 2 pages, rather than 14 pages as mentioned in the termination letter. The grievor felt that the budget information was necessary to performing his assigned task. He had first checked the division's shared hard drive, and he was unable to find enough information on the last budget. The grievor testified that he did most of that work after working hours, except for maybe one hour. For him, it was not a cumbersome task, since he had done federal budget analytical work in the past. On that point, he adduced in evidence a template that he had developed in 2007 for analyzing budgets. At that time, he sent the document to his director, who then circulated it to some employees.

[30] The grievor adduced in evidence an email from Mr. Klassen to Ms. Reid outlining the content of the termination discipline meeting that took place on February 27, 2009. During that meeting, according to Mr. Klassen, the grievor mounted a stronger-than-expected defence about the budget paper. He had explained that he had a need to inform his regular work that he met by analyzing the budget and that he did it on his own time, after work hours. Also, the grievor had related his work on the budget to the instructions and assignments that he had received.

[31] The grievor admitted that, on February 20, 2009, he prepared written comments about the Canada-USA comparison for an Indian and Northern Affairs Canada info sheet. The grievor testified that he had discovered another version of the same document that was not up to the required standards. From his past work experience, the grievor has expertise making Canada-USA comparisons, and he decided to write new comments. Those comments comprised 10 lines and took a few minutes to write. The written comments were sent to Ms. Latreille. The grievor testified that that type of work was in his work plan. For the first quarter of 2009, he was asked to produce a PowerPoint presentation about demographic and chronic disease trends. The grievor produced as evidence one slide from that presentation, entitled "International Priorities," which referred to key priorities in Australia, the USA and New Zealand.

[32] The grievor admitted that he was absent from work on February 24 and 25, 2009 and that he was instructed to call his team leader and the administrative assistant when he was absent. The grievor testified that he was very sick on

February 24, 2009. At noon, he called his supervisor and the administrative assistant and he informed them that he was extremely sick, that he had stomach problems and that he was vomiting. On February 25, 2009, the grievor was still sick, and he called before 09:00 to advise that he would not come to work. He went to the Centre local des services communautaires to meet with a health specialist. Between 09:30 and 10:00, he met Ms. Beausoleil, a nurse practitioner who gave the grievor a certificate confirming that she met him that day. Ms. Beausoleil wrote that the grievor was suffering from diarrhea and vomiting. She suggested some rest and gradual hydration.

[33] On February 26, the grievor returned to work. Shortly after arriving, he met Mr. Klassen and gave him the certificate signed by Ms. Beausoleil. At 10:20, the grievor accessed the automated leave-application system and completed a paid sick-leave request for those two days. On March 4, 2009, Mr. Klassen recommended that the leave request be approved. Ms. Reid approved it on March 9, 2009.

[34] The grievor testified that he never intended to be defiant or abusive to his superiors and that he was always respectful. The grievor also testified that there is high employee turnover in the division where he worked. He added that Mr. Klassen and Ms. Reid do not work there anymore. The grievor feels that he was well-liked by his work colleagues and that his work was appreciated by managers.

[35] The grievor testified that, since he was terminated in March 2009, he had not worked. He has received Employment Insurance benefits. He has not tried to find a job since he thought that the adjudication process would soon end and that he would get his job back.

[36] The grievor called Mr. Coburn as a witness. Mr. Coburn worked two cubicles away from the grievor. It was a quiet working area, and he could hear when people raised their voices. From May 2008 to January 2009, Mr. Coburn officially reported to Mr. Neufeld, but he also did work for other managers. He estimates that 50 percent of his work came from Mr. Klassen.

[37] Mr. Coburn interacted regularly with the grievor as a colleague. The grievor never discussed his problems with Mr. Coburn, and he never gossiped about other employees. The grievor was always respectful and cordial with his work colleagues. In the words of Mr. Coburn, the grievor was a “likeable guy.” Mr. Coburn testified that he would certainly want to work with the grievor again.

[38] Mr. Klassen informed Mr. Coburn that the grievor had been suspended in 2008. He recalled that Mr. Klassen discussed the grievor's case with him several times. In April 2008, Mr. Klassen informed Mr. Coburn that, for the grievor, management's goal was to "manage him out." Mr. Coburn recalled that it was late spring and that there were heavy snowfalls. In July 2008, Mr. Klassen also told Mr. Coburn that his one-man project was to get rid of the grievor.

[39] Mr. Coburn testified that analysts in the SPP must have a good knowledge of the federal budget to do their work. To do a proper policy analysis, an analyst needs to understand the federal budget. After the throne speech, the federal budget is the most important document to understand.

[40] Mr. Coburn testified that there is a high turnover of employees in the SPP section, where he worked with the grievor.

[41] After Mr. Coburn testified, I agreed to calling Mr. Klassen again as a witness to give him the opportunity to reply to Mr. Coburn's comments.

[42] Mr. Klassen testified that he did not remember telling Mr. Coburn that management wanted to "manage the grievor out." He did not remember the specifics of what he might have shared with Mr. Coburn about the grievor. Mr. Coburn might have asked questions about the grievor to which Mr. Klassen would have answered in general terms.

IV. Summary of the respondent's arguments

A. PSLRB File No. 566-02-2351

[43] The grievor was asked to attend a meeting to discuss his PDP. The grievor refused to attend. As a consequence, the respondent reprimanded the grievor in writing on June 20, 2008. The meeting was rescheduled for June 23, 2008. The grievor again refused to attend. The respondent was fully justified in imposing a one-day suspension for that second refusal.

[44] The respondent referred me to *Byfield v. Canada Revenue Agency*, 2006 PSLRB 119, and to *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-02-15583 (19870331).

B. PSLRB File No. 566-02-2813

[45] The respondent imposed progressive discipline to correct the grievor's insubordination. Between June 20 and December 3, 2008, the grievor received a letter of reprimand, a 1-day suspension, a 3-day suspension, a 10-day suspension and a 20-day suspension. The grievor intentionally decided not to obey the directions and not to comply with the warnings that he received, and the respondent terminated him on March 9, 2009.

[46] On July 3, 2008, the grievor was given a letter of instruction, which outlined the respondent's expectations for the grievor's workplace behaviour. The letter of instruction also specified that, if the grievor did not comply with the instructions, disciplinary action might be taken. The letter included specific procedures for reporting absences. It also specified that the grievor was to work only on items in his work plan or that management assigned to him.

[47] After having been disciplined five times, the grievor was terminated for working on unassigned tasks and for not reporting his absence as ordered. First, the grievor wrote a 14-page budget analysis, and he admitted that some of it was done during working hours. During that period, the grievor had a hard time keeping up with his work. Second, the grievor decided to write a one-paragraph analysis about a Canada-USA comparison. He was not asked to do those tasks. Third, the grievor was absent on February 24, 2009, and he did not call before 09:00 as instructed by the letter of instruction. The grievor was warned that continually failing to follow instructions could lead to termination. His actions irreparably damaged the bond of trust with the respondent.

[48] The instructions were clearly communicated to the grievor, and he refused to comply. That constitutes insubordination. If the grievor felt that the instructions were unreasonable, he should have complied first and grieved later. However, the grievor resisted and defied management's authority. The grievor's behaviour viewed in its totality was sufficiently contemptuous of authority to justify his termination.

[49] The grievor gave no sign that he would change his behaviour even after being disciplined five times. He never recognized his wrongdoing and never expressed any remorse.

[50] The respondent submitted that the grievor not be reinstated were I to conclude that he should not have been terminated. All the witnesses called by the respondent testified that the grievor's reinstatement would have a large negative impact on the workplace. The grievor said that there was a high turnover of employees. However, Ms. Kovacevic still leads the division, and Mr. Neufeld's substantive position is still in the grievor's former section. Ms. Reid and Mr. Klassen now work in a section that is not too far away.

[51] In the alternative, the respondent submitted that financial compensation should be awarded. That compensation should align with what is awarded in comparable cases in the case law.

[52] The respondent referred me to the following decisions: *Varzeliotis v. Treasury Board (Environment Canada)*, PSSRB File Nos. 166-02-9721 to 9723, 10273 and 10879 (19831011); *Duske v. Canadian Food Inspection Agency*, 2007 PSLRB 94; *Focker v. Canada Revenue Agency*, 2008 PSLRB 7; *Desrochers v. Canada (Attorney General)*, 2000 CanLII 15224 (F.C.) (QL); *Desrochers v. Canada (Attorney General)*, 2002 FCA 333; *Laflamme c. Garant*, 2006 QCCS 5735; *Lamontagne v. Climax Transportation Services (2747-7173 Québec Inc.)*, 2000 F.C.J. No. 2063(T.D.) (QL); *Hendrickson Spring (Stratford Operations) v. United Steelworkers, Local 8773* (2008), 175 L.A.C. (4th) 376; *Calgary (City) v. Amalgamated Transit Union, Local 583* (2008) 177 L.A.C. (4th) 263; *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 50; *Lâm c. Canada (Procureur général)*, 2009 CF 913; and *DeHavilland Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 112* (1999), 83 L.A.C. (4th) 157. The respondent also referred me to sections 7:3612, 7:3610, 7:3660, 7:4422 and 7:4416 of Brown and Beatty, *Canada Labour Arbitration*, 4th edition.

V. Summary of the grievor's arguments

A. PSLRB File No. 566-02-2351

[53] The grievor argued that he acted in good faith in dealing with his superiors. However, he was a marked man, and the respondent had decided to get rid of him. It is in that context that he was ordered to attend the PDP meeting in June 2008. Initially, the grievor had started the PDP process, but it turned into a quasi-disciplinary process against him.

[54] The grievor also argued that he was disciplined twice for the same offense, namely, refusing to attend the PDP meeting.

B. PSLRB File No. 566-02-2813

[55] The grievor argued that the only three reasons that the respondent can use for terminating his employment are the federal budget paper, the Canada-USA comparison and his late call for his absences on February 24 and 25, 2009. The culminating misconduct should be limited to those three incidents which were the only three incidents mentioned in the letter calling him to the disciplinary meeting and in the termination letter.

[56] The letter of instruction stated that the grievor, during working hours, was to work only on the items in his work plan or on items that were assigned by management. It is reasonable to expect it to include work directly or indirectly required to complete the work plan done only during office hours.

[57] The grievor argued that the budget analysis was related to the tasks in his work plan. He needed to understand the content of the budget to do his work. The grievor completed the budget analysis during personal time and for his own work use. He had already worked in the past on a similar template, which allowed rapid completion. The respondent presented no evidence that the grievor was late in his work when he completed the budget analysis.

[58] The grievor argued that the Canada-USA comparison was related to his work plan. He was directly asked to produce a PowerPoint presentation about demographic and chronic disease trends, and part of that presentation referred to key priorities in Australia, the USA and New Zealand. The grievor found another version of that analysis and felt that it was not up to the normal standards. He decided to write new comments, which were 10 lines long and that took only a few minutes to write.

[59] The grievor argued that he had been very sick on February 24, 2009 and that he had called as soon as he was able. It meant that he called around noon, rather than before 09:00 as per the letter of instruction. The next day, the grievor was still sick, and he called at 08:30. When he returned to work, he produced a medical certificate as per the letter of instruction. At the time, Mr. Klassen did not raise the issue of when

the grievor called in. On March 3, 2009, he recommended that the sick leave request be approved. On March 9, 2009, Ms. Reid approved it.

[60] The grievor submitted that the respondent presented insufficient evidence of culminating misconduct. Consequently, there could not have been culminating discipline, and the termination was unjust and wrongful.

[61] The grievor argued that he should be reinstated. Even though the adjudicator may order compensation in lieu of reinstatement, there is a strong common-law consensus that, at the very least, the rebuttable threshold is very high for not ordering reinstatement in the case of termination without cause.

[62] The division where the grievor worked is large enough to prevent potential labour disharmony if the grievor is reinstated. Furthermore, there is a high employee turnover in that division, and part of the previous management team no longer works there.

[63] It is in the grievor's best interest to return to work in the FNIHB in the position that he occupied. He is 46 years old, and it would be difficult for him to re-enter the workforce. He has known only public-sector employment. The respondent's witnesses testified that his reinstatement would have a very negative impact on the workplace, but they did not call any employees to testify to that point. On the contrary, Mr. Coburn testified that he would certainly want to work with the grievor again. On reinstatement, the grievor would consider looking for new public service opportunities inside or outside Health Canada.

[64] As remedies, the grievor also asked that the timelines to file grievances about his 3, 10 and 20-day suspensions be extended. He also asked for retroactive pay, retroactive bilingual bonus, all leave benefits, all pharmaceutical expenses, professional membership fees, compensation for lost opportunities, compensation for financial hardship and interest on all. If the adjudicator were to choose to not reinstate the grievor, he asked to be paid four years of salary plus all the above amounts.

[65] The grievor referred me to the following decisions: *Bahniuk v. Canada Revenue Agency*, 2009 PSLRB 141; *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489; *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSLRB 66; *Gannon v. Canada Attorney General*, 2004 FCA 417; *Lâm v. Deputy Head (Public Health Agency*

of Canada), 2008 PSLRB 61; *Maan v. Treasury Board (Transport Canada)*, 2003 PSSRB 100; and *Matthews v. Canada (Attorney General)*, [1997] F.C.J. No. 1691 (T.D.).

VI. Reasons

A. PSLRB File No. 566-02-2351

[66] The respondent imposed a one-day suspension on the grievor for refusing to attend a meeting to discuss his PDP on June 23, 2008. The grievor admitted that he refused to attend the meeting. He had already received a written reprimand for refusing to attend the same meeting when it was originally scheduled.

[67] In his defence, the grievor explained that Mr. Neufeld had no authority to discuss the PDP since he had not been the grievor's supervisor for the period covered by the PDP. He also said that there was a risk that the tone of the meeting would be confrontational and that it was turning into a quasi-disciplinary meeting. Faced with those realities, the grievor decided not to attend.

[68] There is no doubt in my mind that the grievor was insubordinate. Maybe the grievor had good reason to not wish to attend the PDP meeting, and maybe he was rightly preoccupied about the direction that the meeting would take. He could have chosen to express those concerns clearly to Mr. Neufeld and to Ms. Reid well before the meeting and to ask that the situation be corrected. He could also have attended the meeting and grieved afterwards. But, he did not. He simply refused to follow the direction given to him.

[69] The grievor had already been disciplined for not attending the June 13, 2008 meeting. When the respondent disciplined him again for not attending the June 23, 2008 meeting, it was for a different infraction, even if both infractions referred to the same topic, namely, not attending a meeting. Thus, the respondent was fully justified in imposing a one-day suspension on June 25, 2008 for the grievor's second refusal to attend a PDP meeting, and this suspension was in no way a double penalty.

B. PSLRB File No. 566-02-2813

[70] The grievor was disciplined five times between June and December 2008 for not attending meetings, for failing to give notice of his absences, for failing to provide a medical certificate to support his absences, for early departures and for working on unassigned tasks for two consecutive days. On March 9, 2009, the grievor was terminated for working on two unassigned tasks, namely, on a federal budget analysis and on a Canada-USA comparison, and for not calling before 09:00 when he was sick on February 24, 2009. In its evidence, the respondent referred to several other incidents in which it had not been satisfied with the grievor's behaviour. However, those were not included in the subjects of discussion for the disciplinary meeting and were not mentioned in the termination letter.

[71] To rule on this grievance, I must answer the following questions:

- 1) Was the grievor guilty of the three incidents referred to in the termination letter and if so, were they acts of insubordination?
- 2) If so, was termination an appropriate disciplinary penalty, given the circumstances and the grievor's disciplinary record?
- 3) If discharge was not appropriate, is reinstatement appropriate in the circumstances of this case?

1. Was the grievor guilty of the three incidents referred to in the termination letter and if so, were they acts of insubordination?

[72] The first two incidents reproached against the grievor refer to unassigned tasks performed by him. In his testimony, the grievor stated that he wrote the budget analysis mostly on his own time. He acknowledged that he might have worked on it for about one working hour. In his testimony, the grievor also stated that it took him a few minutes to write the 10-liner on the USA-Canada comparison, considering his expertise in that field. The respondent did not adduce any evidence to contradict this. Thus, I believe that those alleged unassigned tasks took a little more than one hour of working time for the grievor to complete.

[73] The grievor argued that those tasks were related to other tasks included in his work plan and that he needed to fully understand the budget to perform his duties. Mr. Coburn's testimony was that understanding the budget is essential for an analyst in the SPP to do a proper policy analysis. The respondent did not adduce any evidence

to the contrary. As for the Canada-USA comparison, the grievor testified that it was related to his task of producing a PowerPoint presentation that included international policy priorities in other countries, including the USA. The respondent did not adduce any evidence to the contrary.

[74] The respondent had the burden of proving that the grievor was insubordinate by working on unassigned tasks, contrary to the letter of instruction of July 3, 2009. It did not discharge that burden.

[75] I believe the grievor and Mr. Coburn that it is essential for an analyst, as the grievor was, to fully understand the budget. The grievor went a step further and put his analysis on paper. He did it mostly on his own time. As for the Canada-USA comparison, I believe the grievor that his analysis behind the 10-liner was related to his assigned task.

[76] I agree with the respondent that those two tasks were not directly specified in the grievor's work plan. However, I also agree with the grievor that it would be reasonable to interpret the letter of instruction, when it referred to him working only on the items in the work plan, as including work directly or indirectly required to complete the work plan. The respondent did not rebut the grievor's testimony that those tasks were related to his assigned tasks. In addition, the respondent did not rebut Mr. Coburn's testimony that the grievor's analysis on the budget was necessary for an analyst's work, despite its argument to the contrary. Furthermore, the respondent did not adduce clear evidence to support its argument that, in February 2009, the grievor had a hard time keeping up with his work.

[77] In summary, I conclude that the grievor was not insubordinate by working on those two tasks. The grievor and Mr. Coburn testified that those tasks were related to the grievor's work. For the respondent, they were not. Those tasks represent little more than one hour of work time spent on work that is arguably related to the tasks that the grievor was assigned in his work plan. Furthermore, the grievor did not disseminate the results of his work to Ms. Reid or Mr. Rogers, as he was reproached for doing in the discipline imposed on him on October 29, 2008. One result was sent to Mr. Klassen and the other to the section's administrative assistant.

[78] The third incident relates to the grievor's absences of February 24 and 25, 2009. It seems clear from the termination letter and from the respondent's arguments that

the respondent concluded that the grievor was insubordinate not because he was absent but because he did not call before 09:00 to advise that he would not come to work on February 24, 2009.

[79] The grievor argued that management approved his sick leave for those two days. That simply means that they accepted that the grievor met the conditions to grant him paid sick leave. They did not question whether he was sick for those two days. I find that that approval is irrelevant to deciding whether the grievor was insubordinate in the manner alleged. Rather, the alleged insubordination is related to the fact that, on February 24, 2009, the grievor did not call before 09:00 to advise that he would be absent from work.

[80] The July 3, 2008 letter of instruction was clear: if he were late or away from the office for any reason, the grievor was to contact Mr. Neufeld by 09:00 on the day in question. On February 24, the grievor was absent, and he called around lunchtime. Consequently, the grievor failed to comply with the instruction by not calling by 09:00.

[81] The grievor testified that he was very sick on February 24, 2009. At noon, he called his supervisor and the administrative assistant, and he informed them that he was extremely sick, that he had stomach problems and that he was vomiting. However, he did not testify that it had been impossible for him to call the office before 09:00. If he had been too sick to call or had any other reason for not being capable of calling, he needed to say so at the hearing, but he did not. In not calling before 09:00 and not justifying why, he broke the rules imposed on him by the letter of instruction.

[82] I must say that it seems impossible that a person could always literally obey those instructions. The grievance and the adjudication forms indicate that the grievor's residence is in Wakefield, a small rural community located approximately 30 km from the workplace. Keeping in mind the fact that at the time in question, the grievor began work at 10:00 and would likely leave the house slightly before or after 9:00 for work, any delay caused by traffic problems while on the road would cause the grievor to be unable to call the office before the specified time to advise that he would be late. If early one morning the grievor is extremely sick, is involved in an accident or is confronted with an impossibility of calling before 09:00, he could be accused of insubordination.

[83] Even though the respondent did not submit any evidence to support that the grievor's late call created operational problems in the section, the grievor still committed an offence. He did not submit any evidence that it had been impossible for him to call by 09:00 that morning. He was negligent and called only around noon. The respondent had clearly communicated to the grievor that he was to call by 09:00 when he would be absent, and the grievor did not comply.

[84] Considering all this, I conclude that the essential ingredients of what constitutes insubordination according to *Brown and Beatty* (section 7:3612) were present in the instance of the late call on February 24, 2009.

2. Was termination an appropriate disciplinary penalty, given the circumstances and the grievor's disciplinary record?

[85] According to *Brown and Beatty* (section 7:3660), termination may be appropriate when an employee's conduct, viewed in its totality, is sufficiently contemptuous of authority to justify the conclusion that the employment relationship should be terminated. In this case, the employee's past conduct and disciplinary record also need to be considered. However, even considering the grievor's disciplinary record, I do not conclude that, by calling a few hours late to advise that he was sick, the grievor sufficiently defied management authority in a manner sufficient to justify that he be terminated.

[86] Between June 2008 and December 2008, the grievor was disciplined as follows:

- June 20: letter of reprimand for failing to attend a meeting;
- June 26: one-day suspension for failing to attend a meeting;
- August 18: three-day suspension for failing to call to notify of an absence, failing to bring a medical certificate to justify an absence, failing to submit a leave request and failing to change his title; and
- October 29: 10-day suspension for being absent from September 3 to September 8, being late on September 10, working on non-assigned tasks on September 10 and 11, submitting work to Ms. Reid and several others on September 10 and 11, refusing to attend meetings on September 10 and 12, departing early on September 12, and being absent on September 15.
- December 3: 20-day suspension for leaving early on November 18 and for being absent from November 21 to 25.

[87] The grievor's discipline record shows that his behaviour worsened between June and October 2008. The infractions became more severe. He took another unauthorized 5-day absence in November for which he was suspended for 20 days in December. His behaviour regarding absences and advising when he would be absent did not improve.

[88] After his last suspension, the grievor returned to work at the end of December 2008. The respondent's witnesses testified that the grievor showed no sign of improvement and that the only option was to terminate him. The rest of the evidence and the facts of the case do not support that claim. Contrary to the work absences that justified his three previous suspensions, the grievor did not miss work without authorization, brought a medical certificate to justify an absence, submitted a leave request and called to advise that he was sick. His only infraction to the letter of instruction was being a few hours late in calling in sick. In fact, he had never previously been disciplined for that. After the December 3, 2008 discipline, the grievor's behaviour had improved, and he showed that he understood the direction given to him and that he had decided to comply, with the exception of calling in late on February 24, 2009.

[89] In light of this, the termination of employment is clearly not justified. However, considering that the grievor could have called earlier on the morning of February 24, 2009 and considering his disciplinary record, the grievor should be disciplined for that minor infraction. Following the logic of progressive discipline, I will impose on him a 30-day suspension in lieu of the termination. It might seem harsh to impose such a large penalty, which represents approximately a \$10 000 financial loss for the grievor, who occupied a position classified at the ES-05 group and level. However, I must consider that the December 3, 2008 suspension was for 20 days and that the offence for which I am imposing the suspension is generally related to offences of attendance and failure to follow instructions for which the grievor was previously disciplined.

3. If discharge is not appropriate, is reinstatement appropriate in all the circumstances of this case?

[90] The respondent argued in the alternative that, if I were to allow the grievance, I should grant financial compensation in lieu of reinstatement. The respondent based its

argument on all its witnesses stating that the grievor's reinstatement would have a major negative impact on the workplace. The grievor wants his job back.

[91] In *Lâm*, the Federal Court stated that there is a strong presumption in favour of reinstatement. Even if reinstatement is not an automatic right, the jurisprudence and the doctrine support that reinstatement is the rule, and that compensation in lieu of reinstatement is the exception.

[92] In *DeHavilland*, the arbitrator suggested that the following factors should be considered when deciding to award compensation in lieu of reinstatement: refusal of co-workers to work with the grievor, lack of trust between the grievor and the employer, inability or refusal of the grievor to accept responsibility for any wrongdoing, demeanour and attitude of the grievor at the hearing, animosity on the part of the grievor towards management or co-workers, and the risk of a poisoned atmosphere in the workplace.

[93] The respondent did not call as witnesses any employees who had been the grievor's colleagues. However, the grievor called Mr. Coburn, who testified that he interacted regularly with the grievor in the workplace. He said that the grievor was always respectful and cordial and that he was a "likeable guy." Mr. Coburn also said that he would certainly want to work with the grievor again. On the other hand, almost all the respondent's witnesses testified to the contrary.

[94] I have no doubt that Ms. Kovacevic, Mr. Neufeld, Ms. Reid and Mr. Klassen do not want the grievor back in the workplace. There is a risk that they would lose face in front of employees or fellow managers if the grievor returns to the workplace. All of them disciplined him or were instrumental in disciplining him, and in that sense, their testimonies were self-serving. I believed them when they stated that Mr. Wentges was difficult to manage. His disciplinary record proves it. However, I give a lot more weight to Mr. Coburn's testimony about how the grievor behaved in the workplace. Mr. Coburn had absolutely no personal or professional interest that I was made aware of in saying what he did. In fact, his testimony could haunt him when he goes back to work at the FNIHB.

[95] I would not hesitate to say that, in the vast majority of termination cases, the sole fact of an employee's termination profoundly damages the relationship and creates hard feelings with management. However, in this case, I believe that, with some

effort and good faith on each side, trust and a sound working relationship could be rebuilt.

[96] If I return to the criteria in *DeHavilland*, no evidence was adduced that co-workers would refuse to work with the grievor. The grievor had a positive attitude at the hearing. When he cross-examined the respondent's witnesses, the grievor showed absolutely no sign of animosity toward his former managers or directors and was very polite and courteous with them. He did not say anything demeaning toward his former co-workers except maybe that there was a lot of absenteeism and that late arrivals were common in the workplace. I ruled that those comments were irrelevant to the case, and he accepted it. The grievor admitted that he called late on February 24, 2009. On the other hand, the respondent's witnesses said that they have lost trust in the grievor and that his return would negatively impact the workplace.

[97] When I weigh all those elements along with the Court's comments in *Lâm* about the strong presumption in favour of reinstatement, it becomes clear to me that the rule of reinstatement should apply in this case rather than the exception, which is compensation in lieu of reinstatement.

[98] The SPP is a fairly large division with a high staff turnover. I do not believe that the grievor's reinstatement will have such a negative impact on that workforce. It might create an uncomfortable situation at first, but with goodwill, it will be overcome. In addition, the grievor indicated his openness to be transferred to another division or another department. Perhaps the respondent could help facilitate such a transfer.

[99] When the grievor returns to work, the respondent could impose discipline on him if there are serious problems with his behaviour. At worst, it could lead to a new termination, considering that this 30-day suspension, along with the previous suspensions, will be in the grievor's file.

[100] The grievor asked that the periods to file grievances about his 3, 10 and 20-day suspensions be extended. I do not have the authority to grant the grievor's request. Pursuant to paragraph 61(b) of the *Public Service Labour Relations Board Regulations*, the Chairperson of the Board, in the interest of fairness and at the request of a party, could hear and decide any matter relating to extensions of time. Pursuant to section 45 of the *Act*, the Chairperson normally authorizes a Vice-Chairperson to exercise his powers in that respect. The proper procedure would be for the grievor to file a

separate application to the Board on the question of being granted an extension to file those new grievances.

[101] On the question of other remedies, the grievor also asked for pharmaceutical expenses, professional membership fees, compensation for lost opportunities, compensation for financial hardship and interest on all. The grievor did not produce any evidence that would justify accepting his request. The employer did not make any representation on retroactive salary and benefits that should be paid to the grievor in case of reinstatement. Considering the above, I need to hear further representations from the parties before making a decision on other remedies.

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

(The Order appears on the next page)

VII. Order

[103] PSLRB File No. 566-02-2351: the grievance is denied.

[104] PSLRB File No. 566-02-2813: the grievance is allowed in part. The termination is replaced by a 30-day suspension deemed starting on March 9, 2009.

[105] I order the respondent to reinstate the grievor in his former position within three weeks of this decision and to begin to pay him salary and benefits starting immediately.

[106] If the parties are unable to agree on the issue of retroactive compensation within 60 days of this award, a hearing will be scheduled to decide the issue.

[107] I will remain seized for a period of 90 days to intervene should any difficulties arise in implementing this decision.

February 15, 2010.

**Renaud Paquet,
adjudicator**