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File: 566-02-3933

Citation: 2011 PSLRB 100

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FRANKLIN ANDREWS

Grievor

and

DEPUTY HEAD
(Department of Citizenship and Immigration)

Respondent

Indexed as
Andrews v. Deputy Head (Department of Citizenship and Immigration)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Kate Rogers, adjudicator

For the Grievor: Andrew Raven, counsel

For the Respondent: Richard Fader, counsel, and Garett Hisko, advisor

Heard at Ottawa, Ontario,
April 18 to 20, 2011.

I. Individual grievance referred to adjudication

[1] Franklin Andrews ("the grievor") was employed as a senior analyst/policy advisor, classified FS-03, in the Department of Citizenship and Immigration ("the employer" or CIC), with 27 years of seniority, when his employment was terminated on November 3, 2009. The employer alleged that he used government property and equipment for inappropriate and non-work-related activities, including viewing pornographic material, and that he misused government property and equipment through the excessive use of its Internet services and electronic network systems for non-work-related purposes.

[2] The grievor filed a grievance against the termination of his employment on December 15, 2009, and as corrective action asked that he be reinstated with no loss of pay and benefits. The grievance was referred directly to the third level of the grievance process. It was heard on April 6, 2010. It was referred to adjudication on June 23, 2010. The third-level grievance response, which denied the grievance, was issued in August 2010.

[3] The grievor does not dispute the essential facts that led to his discharge. The issue between the parties is the appropriateness of the penalty of discharge.

II. Summary of the evidence

[4] Lynn Leblanc, Manager, Workplace Investigations and Ethics; Erica Usher, Senior Director, Geographic Operations; Anna Mae Grigg, Immigration Program Manager; Claudette Deschênes, Assistant Deputy Minister, Operations; and Elaine Courchesnes, Regional Administrative Officer, testified for the employer, and the grievor testified on his own behalf. Ms. Courchesnes was called as a rebuttal witness by the employer.

[5] The employer adduced 2 exhibit books containing 27 documents, numbered 1 through 10 and then "A" through "Q", and 3 other documents. The grievor adduced 1 exhibit book, containing 7 documents, and 2 other documents.

[6] From the evidence, it is clear that the employer became aware that there was an issue about the grievor's Internet use on August 21, 2009. As part of her responsibilities, Ms. Leblanc oversees the Investigations section, which conducts administrative investigations of employees as required. She testified that she received

a call on August 21, 2009, from IT Security, notifying her that the grievor's non-work-related Internet usage was very high and that their review had indicated that he was viewing pornographic materials. Ms. Leblanc testified that IT Security carried out routine spot-checks of bandwidth usage. She explained that no firm threshold has been set of usage that would trigger an investigation because some personal use of the Internet is accepted. She also testified that she was not aware of any system used to identify and warn heavy Internet users of their usage. In this case, she was contacted by IT Security because of the sexual content of the web browsing.

[7] Ms. Leblanc testified that IT Security downloaded a copy of all the images in the grievor's computer cache. She explained that the cache is a temporary storage area on the computer's hard-drive of images from visited websites. The cache can hold only a limited amount of material, so it is continually overwritten. On August 20, 2009, IT Security copied the material in the grievor's cache as of that date. There were 335 sexually explicit images (Exhibit E-1, tab D; Exhibit E-2, tab 10, reproduces the same images but in colour). For the most part, the images depicted naked people involved in sexual activities, including some images of bondage.

[8] Ms. Leblanc verified that the grievor's computer password was secure and that he had been at work when the images were viewed to ensure that the grievor had viewed them. She also testified that the cached images were reviewed by corporate security and the police to ensure that there was no potential criminality, such as child pornography. There was not.

[9] On September 11, 2009, the Director General of the International Region and the Director for Workforce Management met with the grievor to provide him with a copy of the allegations. At the meeting, the grievor admitted to excessive personal use of the employer's Internet services and to viewing sexually explicit materials while at work. He undertook to cooperate fully with the investigation and explained that he was acting partly through boredom and insufficient work (Exhibit E-1, tab B).

[10] Ms. Leblanc interviewed the grievor on September 25, 2009 (Exhibit E-1, tab C). Her interview notes were shared with the grievor, who made some corrections. She prepared a draft report, which was also shared with the grievor. He prepared a written response to the report that did not dispute the essential elements of the allegations but that provided some contextual explanations (Exhibit E-2, tab Q).

[11] Ms. Leblanc's investigation revealed that, in September, October and November 2008 and again in May, June, July and August 2009, the grievor spent large amounts of time in the office browsing the Internet. From January to May 2009, the grievor was on language training, so that period was not included. In his interview with Ms. Leblanc, the grievor acknowledged spending between 50% and 100% of his day browsing the Internet. According to Ms. Leblanc, he initially took the position that between 25% and 50% of that time was spent on non-work-related browsing, but after reviewing the time with him, he admitted that his non-work-related browsing was closer to between 50% and 75% of his time, viewing mainly news and sports sites, among others.

[12] The investigation found that, not only did the grievor spend large amounts of time browsing news and general interest sites, he also spent large amounts of time looking at sexually explicit images on a website called "Flick'r", which is a photo-sharing site, and on Wikipedia. The grievor had a Flick'r account (Exhibit E-1, tab F) and was a member of several discussion groups on Flick'r that were sexual in nature. Through his account, the grievor also made comments of a sexual nature during working hours on two photographs posted on Flick'r. Ms. Leblanc testified that the grievor also emailed links to sexually explicit photographs and practices from work to his home email address and that he did so as early as June 29, 2009 (Exhibit E-1, tab G).

[13] Ms. Leblanc testified that she and her investigators randomly chose 4 days from August 2009 as examples of the grievor's Internet browsing while at work, which were set out in her report (Exhibit E-1, tabs I through L). August 20, 2009, was chosen because it was the day on which the matter came to the attention of IT Security. On that day, the grievor engaged in almost continuous Internet surfing between 08:00. and 13:00. This included about two hours on Flick'r, looking at about 43 pornographic images. Ms. Leblanc testified that, overall, 70% of the Internet browsing on that day was not related to work. A similar pattern occurred on August 18, August 10 and August 7, 2009. However, Ms. Leblanc acknowledged that while the grievor did access some inappropriate sites, the bulk of his Internet browsing was on news and sports sites.

[14] Ms. Leblanc agreed that the grievor was very forthcoming and cooperative when she interviewed him (Exhibit E-1, tab C, interview notes). He answered all questions put to him and expressed remorse and embarrassment. She also testified that, although

she did not interview his co-workers, she was not aware of any complaints about the nature or amount of his Internet use.

[15] Ms. Leblanc stated that the grievor told her during her interview with him that he was undertasked. He also responded to the draft investigation report that Ms. Leblanc shared with him on October 16, 2009 (Exhibit E-2, tab 8), with a written submission dated October 22, 2009 (Exhibit E-2, tab Q). While acknowledging the substance of the allegations against him, he explained in that statement that there were extenuating circumstances. In particular, he suggested that from May 2009, when he returned from language training, until the time of the investigation in August and September, 2009, he was underworked.

[16] Both the grievor's supervisors testified. Ms. Usher became Senior Director, Geographic Operations (RIO), in September 2009. At the time of the events in question, she was Director of Operational Coordination (RIM) in the international region. (Witnesses could not explain what these acronyms actually stand for.) The grievor reported to her from May 2009 until October 2009. At that time, three employees, including the grievor, reported directly to her. The other employees were middle managers who had specific portfolios and staff reporting to them, but the grievor did not. Unlike the other employees, he was not in a specific position and did not have ongoing duties. Instead, she assigned specific projects to him.

[17] Ms. Usher testified, that from May 2009 until the grievor went on holidays in July 2009, he worked on a specific project about the building of a new office in Mexico. The grievor worked on project planning and put together a document for officers in Mexico to use when assessing visa applications. When the grievor went on holidays, his work on the project was largely completed and was handed over to her. Just before he went on leave, she assigned him a smaller project on the Olympics, which she characterized as half a job. However, she pointed out that when the grievor was reporting to her, he was also reporting to Ms. Grigg, Senior Director, RIO.

[18] Ms. Usher stated that she did not closely supervise the grievor. She testified that it was her belief that officers at the grievor's level should be able to work without guidance or close supervision. She said that she identified the projects he was to work on and that they agreed on the completion dates. She expected that he would tell her how much time he needed for each project. However, she noted that, in September 2009, when she became Senior Director, RIO, the grievor came to her more often to

find work and that there were more written instructions on assigned tasks. Before that time, there had been very few written instructions.

[19] Ms. Usher stated that she was surprised that the grievor felt undertasked. She thought that if he needed more work, he should have come to her. However, she agreed that summer can be difficult as that is when personnel generally rotate to their new posts. She also acknowledged that she was on vacation for most of August and that she was then busy preparing to take up her new position as senior director. She said that she knew that the grievor was also working with Ms. Grigg, and she assumed that he had work. She said that she and Ms. Grigg met to discuss whose work had priority, but she acknowledged that she had no real idea of the total volume of his workload. She did not dispute anything in the grievor's statement of extenuating circumstances (Exhibit E-2, tab Q).

[20] Ms. Grigg currently works at the Canadian Consulate in New York City. At the time of the grievor's discharge, she was Senior Director, RIO. She was the grievor's supervisor from June 2008 until August 2009. From January to August 2008, Ms. Grigg was the program manager for a project to implement Parliament's Bill C-50. During that period, the grievor reported directly to her. She testified that she had no complaints about his work performance on that project.

[21] When Ms. Grigg became Senior Director, RIO, in August 2008, the Bill C-50 implementation project continued to fall within her responsibilities, and the grievor continued to report directly to her, although he worked with the Bill C-50 implementation group until he went on French language training in January 2009. At that point, the Bill C-50 project was concluding.

[22] On the grievor's return from French language training, he reported to both Ms. Grigg and Ms. Usher at the same time. The two supervisors met from time to time to discuss his work. Ms. Grigg testified that, although she spoke to the grievor every day, she did not supervise him closely. She expected him to be self-sufficient and to manage his own work.

[23] Ms. Grigg testified that, although the Bill C-50 implementation project was completed, there was still a lot of work within the international region division. She assigned the grievor to work on a project developing a resource centre for researchers preparing background material on different countries that was required by policy

analysts. Although he prepared the paper as required, she noted that he did not want to take on further work on the project as he was planning to leave and did not want to take on projects that he could not finish. Ms. Grigg took issue with any suggestion that there was a lack of work. She stated that, from May to mid-July 2009, employees in the division were working 12 to 14 hours per day because hundreds of hours of extra work arose from the newly implemented Mexican visa requirements. The grievor was more than qualified to do the work and could have volunteered to take some of it on.

[24] Ms. Grigg was asked to comment on the grievor's response to the investigation report (Exhibit E-2, tab Q). Other than noting that, because he anticipated leaving his job he had refused her suggestion to develop the data resource centre project further and that he wrote slightly more than a "next steps" paper, she did not dispute anything that the grievor said in his statement about his assignments.

[25] Ms. Grigg was posted to the Canadian Consulate in New York City and was away in August 2009 on a combination of house hunting and annual leave. She assumed that there was a director acting in her position in August 2009, but she could not say whom it was or what work was assigned to the grievor after she left.

[26] Both Ms. Usher and Ms. Grigg testified that, while the grievor would have been required to use the Internet for research, the actual amount of Internet use required would have been low. Ms. Usher thought that, between May and August 2009, only two matters that she had assigned to him would have required Internet research, amounting to about a week and a day. Ms. Grigg thought that the work that she assigned the grievor would have required no more than an hour of Internet use a day. Neither supervisor knew of the grievor's activities, and both expressed shock that the grievor would view inappropriate material at work.

[27] Ms. Deschênes is Assistant Deputy Minister, Operations, CIC. She made the decision to discharge the grievor and signed the letter of discharge. She testified that she considered the findings of the investigation report and the grievor's statement in response to it. She reviewed the *Values and Ethics Code for the Public Service* (Exhibit E-2, tab 2), the *Code of Conduct* (Exhibit E-2, tab 3) and the *Policy on the Use of Electronic Networks* (Exhibit E-2, tab 4) when determining the penalty. She weighed the seriousness of the offence against such mitigating factors as the grievor's years of service, clear disciplinary record and previous performance appraisals, as well as performance issues that she knew of that were not subject to performance appraisals.

[28] Ms. Deschênes testified that, when she made the decision to terminate the grievor's employment, she believed that he spent large amounts of time looking at pornographic images, at least in 2009. She stated that she believed that 50% of his time was spent looking at such images. She testified that the quantity of pornography viewed was a concern.

[29] Ms. Deschênes believed that the grievor had not lived up to the ethical expectations of CIC employees. She stated that the grievor had not earned his pay. He should have sought out work if he did not have enough to do. She testified that she believed that it was essential to be able to trust a visa officer, and she could not trust the grievor. Although she acknowledged that he was forthcoming and open during the investigation, she found incredible his statement that he did not know how much time he was spending on the computer.

[30] Ms. Deschênes acknowledged that the grievor had asked to become a non-rotational employee and that, as a result, he was on an assignment in RIM rather than occupying a position. She assumed that the grievor's taking language training was part of the employer's commitment to assist him to become non-rotational. She explained that all FS positions are rotational, meaning that incumbents must agree to be posted abroad. If the grievor wished to become non-rotational, he would have had to move to a position in a different classification.

[31] The grievor began his career as a foreign service officer with the CIC in October 1982, when he entered the Foreign Service Developmental Program. He became an FS-01 in 1983 and began his first overseas posting in 1984. From 1984 until 2000, he had regular overseas postings. Other than some short-term overseas assignments, after 2000 he worked mainly in Ottawa.

[32] Because of events in his personal life, he asked to become non-rotational. He recognized that he would have to leave the FS category but hoped to remain employed with the employer. Following a meeting in October 2006 with the personnel director, Ninon Valade, he agreed to accept an assignment in RIM that was to begin in January 2007 and that was expected to last between a year and 18 months. The employer agreed to assist him in his goal to find a non-rotational position. As part of that agreement, it was agreed that he would go on language training at the end of the RIM assignment (Exhibit G-1, tab 5). The grievor acknowledged that he applied for a

rotational position at the FS-04 level in summer 2009. It would have been a promotion. Ultimately, he was screened out of the competition.

[33] The grievor believed that his assignment in RIM would end and that he would begin language training in summer 2008 because most movement within the department took place in the summer months, when foreign service officers usually move to their new postings. In fact, he did not begin his language training until January 2009.

[34] The grievor began working as a senior analyst in RIM in January 2007. He was assigned to work on implementing the changes to the *Immigration Act* introduced by Bill C-50. He testified that the project required him to do workload projections, modelling of hypothetical situations and cost assessments. This work required some Internet access.

[35] The grievor's work on the Bill C-50 implementation project lasted longer than initially expected. His language training was postponed, at first until fall 2008 and then until January 2009. The grievor testified that, because it was known that he was going to go on language training, he was not given longer-term assignments.

[36] The grievor explained that, when he returned from language training in May 2009, he was not assigned to a particular position but that he worked on projects. He reported directly to two different supervisors, Ms. Usher and Ms. Grigg, who both assigned work to him. He stated that, while he worked on particular projects, such as the project planning for the implementation of visa requirements in Mexico and the Czech Republic, by the end of July 2009, those assignments were largely completed, and he had very little other work. He was assigned some liaison work for the 2010 Olympic Games, but it was part-time work. He was given another assignment by Ms. Grigg in July 2009, this time to develop a proposal for a statistical analysis unit to assist analysts when preparing background papers. He explained that he prepared a proposal and a "next steps" paper and that he needed decisions from his superiors before it could go further. He testified that he completed all the tasks assigned to him on time and that no one raised any concerns with him about his work or complained about his performance.

[37] The grievor acknowledged that, although he was required to use the Internet for work-related research, he also used it for non-work-related purposes. He said that he

was interested in the news and that he frequently browsed news and sports sites. He also accessed the schedules of the soccer team that he coached and found it convenient to do his banking online. He said that he saw other employees at work accessing news sites or doing their banking online and that he felt that, as his work was complete, it would be acceptable. He also said that he frequently left the computer on an Internet site. He did not know whether there was a mechanism by which the computer would close or "time out" a site if it were left on that site for more than three minutes without some activity.

[38] The grievor testified that he did not realize that his Internet use was heavy. He said that in the past he had been told by the director at that time, Bruce Scofield, that his internet usage was high and that he should tone it down. He said that he had no further contact with anyone about his usage and was never told that there was no monitoring system. Following the discussion with Mr. Scofield, he cut his usage. He said that he did not know when it started to rise again. He stated that he believed that accessing Internet sites did not impact his ability to do his assigned work.

[39] Toward the end of July or the beginning of August 2009, the grievor testified that he came across the Flick'r website while browsing the Internet at home. He stated that he is not exactly certain when he found it but that it was sometime in the middle of the summer. The grievor stated that is when he began looking at sexually explicit materials at work. However, during cross-examination, he acknowledged that he sent an email link to Wikipedia from work to his home email address that referred to a sexually explicit practice on June 29, 2009 (Exhibit E-1, tab G).

[40] Flick'r is a photo-sharing site that requires users to register. He registered while at home, using his home email address, and created an account and a password. Although Flick'r is not in itself a pornographic site, members can and do post sexually explicit material. The grievor acknowledged that he accessed such sexually explicit material while at work, although he was adamant that he never sent the images to anyone else and that none of his co-workers were aware of his activity or complained. However, he acknowledged that, as a member of Flick'r, he had the ability to make comments on photos, which he did on two occasions. He was also a member of three chat groups and had contacts within Flick'r. He also acknowledged that he sent Internet links to material about sexually explicit practices by email from work to his home address.

[41] The grievor testified that the investigation came as a shock. He said that he had no issue with the investigation. He believed that the investigators were sensitive and fair. He tried to be honest and forthright and to answer all questions truthfully. He could not explain his behaviour. He stated that at some point he allowed his personal life to spill over into his work life but that there was no real explanation. He said that it was just a "very stupid act" and that he was very embarrassed. After being notified of the investigation, the grievor closed his Flick'r account and was careful about his Internet use as he wanted to ensure that his conduct was appropriate.

[42] Concerning his office layout, the grievor testified that the computer screen faced the window. No one looking into the office from the door would have been able to see the screen. In her testimony, Ms. Leblanc suggested that it was not acceptable to have a computer monitor facing the window. However, when asked, the grievor stated that, to the best of his recollection, the office was configured that way when it was assigned to him. Despite the suggestion put to him by the employer at the hearing, the grievor maintained that he could not remember moving the computer monitor himself.

[43] Ms. Courchesnes was called by the employer as a rebuttal witness on the issue of the grievor's office layout. She is Regional Administrative Officer, responsible for procurement and office stations, among other things. She has 18 years' seniority and has known the grievor since mid-1990. She identified the floor plans showing the grievor's office and computer workspace configuration (Exhibits E-5 and E-6).

[44] Ms. Courchesnes testified that she received an email (Exhibit E-4) on June 2, 2008, advising her that the grievor would be moving into his new workspace on June 9, 2008. She stated that she stopped by his office that day because he had special requests. She noted that he had moved the computer workstation. She stated that it was unusual for staff to move computers themselves and that it was normally her job to submit the request to IT to have computers moved. She stated that, although she was irritated that he had moved it on his own, it was one less task for her to do. She did not ask him to move it back.

III. Summary of the arguments

A. For the employer

[45] The employer submitted that the material facts of this case are not in dispute and that the issue to be resolved is whether the discipline it imposed was reasonable. This is an important case because it will establish jurisprudence on the appropriate disciplinary response for time theft and for viewing pornography while at work.

[46] Among other things, this is a clear case of time theft. There is no doubt that some use of the employer's Internet services for non-work-related purposes on an employee's own time while at work is acknowledged and accepted. Further, not all unacceptable use of the employer's Internet services constitutes time theft; a distinction can be made between unacceptable use of the Internet for personal reasons and time theft. However, it is not necessary to determine where to draw the line between unacceptable use and time theft in this case because the amount of time the grievor spent browsing the Internet for non-work-related purposes was so extreme that there can be no question that time theft occurred. The following cases on time theft were reviewed: *Canada Safeway Ltd. v. United Food and Commercial Workers, Local 401,* [2003] A.G.A.A. No. 95 (QL); *Maple Leaf Meats (Brandon) v. United Food and Commercial Workers Union, Local 832* [2004] M.G.A.D. No. 31 (QL); *Invista Canada Inc. v. Kingston Independent Nylon Workers Union* (2005), 142 L.A.C. (4th) 435; *TRW Canada Ltd. v. Thompson Products Employees' Assn* (2005) 83 C.L.A.S. 131; *CUPE (Ottawa-Carleton Public Employees' Union), Local 503 v. Ottawa (City),* [2010] O.L.A.A. No. 23 (QL); *William Osler Health Centre v. CUPE, Local 145,* [2011] O.L.A.A. No.75 (QL); and *PGI Fabrene Inc. v. Northern Independent Union,* [2011] O.L.A.A. No. 84 (QL).

[47] Time theft cases should not be confined only to those circumstances in which employees have fraudulently altered time cards. Sitting at a desk surfing the Internet for half a day while being paid for a full day's work is just as fraudulent as falsifying a time-card, because the basis of the offence is claiming pay for time not worked. In this case, the evidence showed that the grievor sat at a desk surfing the Internet for half the day, day after day and month after month, claiming pay for time not worked, which was as fraudulent as falsifying a time-card.

[48] The employer noted that the grievor offered two main excuses for his behaviour. First, he claimed that he did not know that his Internet usage for personal reasons was outside the norm, as others also surfed the Internet, and second, he stated that he did not have enough work to keep himself busy. Neither defence is acceptable.

[49] As for the grievor's excuse that he did not know that his Internet usage was outside the norm, the employer argued that common sense should have told him that spending half a day on non-work-related material is neither reasonable nor acceptable. The employer cited *Gannon v. Treasury Board (National Defence),* 2002 PSSRB 32 (overturned on other grounds in 2004 FCA 417), for the principle that there is a personal code of good conduct based on common sense that employees ought to understand without direction.

[50] With respect to the suggestion that the grievor was undertasked, his supervisors both testified that there was more than enough work in both sections to which the grievor was attached, as everyone around him was working 12- to 14- hour days. Had he needed more work, all he had to do was ask. He did not.

[51] On the second ground for the discharge, viewing pornography at work, the employer argued that there can be no doubt that such conduct justifies discipline. In this instance, the material being viewed was particularly offensive in that it included images of explicit sexual acts, including bondage. Furthermore, this is not a case of the grievor simply viewing pornography on one occasion. There were 335 images in his cache when it was examined, and the evidence was clear that the cache would be overwritten constantly as new content was added. Although the grievor tried to minimize his behaviour at the hearing by suggesting that he began viewing pornographic images only after August 4, 2009, the evidence showed that he was transmitting pornographic images to his personal email account from work as early as June 29, 2009.

[52] The grievor's behaviour went beyond just viewing pornographic images. He actively sought out like-minded groups and formed like-minded contacts. He commented on the pornographic images posted by others and emailed pornographic links to his personal account. This was not a momentary aberration of behaviour but a consistent pattern of abuse that alone justified discharge. The employer cited the following cases on the inappropriate use of the Internet: *Briar et al. v. Treasury Board (Solicitor General Canada-Correction Service),* 2003 PSSRB 3; *Nova Scotia Teachers' Union v. Chignecto-Central Regional School Board (*2004), 126 L.A.C. (4th) 267; *Owens Corning Canada Ltd. v. Union of Needletrades, Industrial and Textile Employees, Local 1350* (2005), 142 L.A.C. (4th) 62; *Ontario Public Service Employees Union v. Ontario (Ministry of Natural Resources)* (2005), 143 L.A.C. (4th) 14; *Petrucelli v. Canadian*

National Railway Co., [2005] C.L.A.D. No. 113 (QL); *Backman v. Maritime Paper Products Ltd.*, 2008 NBQB 219 (affirmed in 2009 NBCA 62); and *Health Sciences Assn. of Alberta (Paramedical, Technical and Professional Employees) v. Alberta Health Services* (2010), 198 L.A.C. (4th) 77.

[53] The employer contended that the time theft alone justified discharge. Taken with the evidence of viewing pornography at work, termination is clearly warranted. Both behaviours violated several sections of the *Values and Ethics Code for the Public Service* (Exhibit E-2, tab 2), the *Code of Conduct* (Exhibit E-2, tab 3), and the employer's *Policy on the Use of Electronic Networks* (Exhibit E-2, tab 4). Both behaviours were clearly incompatible with his position as a foreign service officer. Furthermore, the grievor's defences when faced with the time theft charge, which were that he did not know that his Internet usage was excessive and that he did not have enough work to do, are aggravating factors.

[54] The employer also questioned the grievor's credibility and forthrightness. The grievor attempted to minimize his Internet usage for non-work-related purposes, until he was pushed by the investigator. Furthermore, the evidence at the hearing suggested that his non-work-related Internet use might have been higher and over a longer period than the grievor admitted, since his supervisors testified that there were few work-related reasons for him to use the Internet. The grievor also attempted to minimize the time during which he viewed pornographic materials. At the hearing, he put forward the suggestion that his behaviour took place only in the month of August 2009, but it is clear from the evidence that it took place over a longer period, going back to at least June 2009.

[55] The employer asserted that the grievor's lack of credibility was also evident when he testified in his testimony-in-chief that he did not move his computer screen. However, reply evidence established that the grievor moved his computer screen to a position where it was hidden from view as soon as he moved into that workstation in 2008. The employer argued that the fact that the grievor moved his computer screen to a position where it was hidden from view shows a guilty mind.

[56] The employer submitted that the grievor's actions justified termination and asked that the grievance be dismissed in its entirety.

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

[57] The grievor did not dispute the essential facts set out in the letter of discharge but argued that the penalty of discharge failed to take into account significant mitigating factors and that it was disproportionate to the offences charged.

[58] When he summarized the facts pertinent to his case, the grievor noted that he had 27 years' seniority in the public service, a clear disciplinary record and exemplary performance appraisals. He was forthcoming and candid during the employer's investigation. He was apologetic and remorseful both during the investigation and in his testimony at the hearing and accepted responsibility for his actions.

[59] The grievor explained that his statement of extenuating circumstances in his response to the investigation report (Exhibit E-2, tab Q) offered lack of work as an explanation, not as a defence. He argued that the fact that he had little assigned work is relevant because discipline usually follows some prejudice to the employer, and in this case, there was little evidence of prejudice. He noted that, at the time of the events at issue, there were no complaints about either the quality or production of his work. He pointed out that he was in a supernumerary position and that he had no ongoing job responsibilities but was assigned specific projects. He noted that neither of his supervisors disputed his summary of his workload in his response to the investigation report (Exhibit E-2, tab Q).

[60] The grievor argued that, in cases in which employees have been disciplined for accessing inappropriate materials on the Internet, arbitrators and adjudicators have developed a series of mitigating factors that include such issues as whether the materials depicted violence or child pornography and whether the materials were transmitted through the employer's email system or otherwise circulated in the workplace, in addition to the usual questions about seniority, disciplinary and performance records, behaviour during the investigation, remorse, and acceptance of responsibility. Citing *Briar et al..; Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-TCA) Local 100,* [2002] C.L.A.D. No. 233 (QL); *Thompson and Rainer v. Treasury Board (Solicitor General Canada–Correctional Service),* PSSRB File Nos. 166-02-26560 to 26562 (19960820); *Westcoast Energy Inc. v. Communications, Energy and Paperworkers' Union of Canada, Local 686B* (1999), 84 L.A.C. (4th) 185; *Dupont Canada Inc. v. Communication, Energy and Paperworkers Union of Canada, Local 28-0,* [2001] O.L.A.A.

No. 676 (QL); and *Hydro One Networks Inc. v. Power Workers' Union,* [2001] O.L.A.A. No. 758 (QL), the grievor argued that, in light of the mitigating factors applicable to him, discharge was disproportionate.

[61] The grievor stated that, in those cases in which discharge for using an employer's Internet services to access inappropriate materials has been upheld, other considerations are usually involved, such as circulating the materials, failing to accept responsibility, neglecting work responsibilities or downloading unlicenced software. The grievor cited *Telus Mobility v. Telecommunications Workers Union* (2001), 102 L.A.C. (4th) 239; *Canadian Union of Public Employees, Local 37 v. Calgary (City),* [2003] A.G.A.A. No. 30 (QL), and *Krain v. Toronto-Dominion Bank,* [2002] C.L.A.D. No. 406 (QL), as examples in which some of those factors were considered in upholding discharge.

[62] The grievor argued that this is not a time theft case. He submitted that the employer was attempting to change the grounds of the discharge by arguing that it was in fact a time theft case. The grievor noted that the letter of discharge identified two allegations - misuse of government property and equipment, and inappropriate use of government property. Inappropriate use of government property is not time theft, he argued. Citing *Maloney v. Parks Canada Agency,* 2003 PSSRB 35, and Brown and Beatty, *Canadian Labour Arbitration,*4th edition at 7:2200, the grievor argued that the jurisprudence is clear that an employer may not alter the specified grounds of discharge at adjudication.

[63] The grievor further argued that the concept of time theft does not apply to this case because generally time theft cases clearly involve an element of fraudulent activity, such as altering time cards. The grievor cited *Coquitlam School District No. 43 v. Canadian Union of Public Employees, Local 561,* [2011] B.C.C.A.A.A. No. 28 (QL), as one example in which unauthorized personal use of the employer's Internet services was found to constitute time theft, but that allegation and others resulted only in a one-day suspension.

[64] The grievor argued that this case is more akin to cases in the public service in which employees were disciplined for misusing the employer's long-distance service. He cited *Gagné v. Treasury Board (Labour Canada),* PSSRB File No. 166-02-18356 (19890421) and *Quigley v. Treasury Board (Employment and Immigration Canada),* PSSRB File No. 166-02-18034 (19890328) as examples of cases in which employees were disciplined for misusing the employer's telephone system.

[65] In summary, the grievor argued that, given the significant mitigating factors, discharge was excessive. He proposed further that, since there was no demonstrated damage or prejudice to the employer's operations, any period of suspension imposed in substitution for discharge should not be lengthy.

C. Employer's reply

[66] The employer submitted that there was no alteration of the grounds for discharge. The letter of discharge clearly outlined the reasons for the discharge, so the grievor cannot argue that he did not know them.

[67] The employer also pointed out that, although there may have been no child pornography among the images looked at by the grievor, it cannot be said that there were no violent images, as there were images of bondage. That fact was considered an aggravating factor.

[68] The fact that there was no criticism of the grievor's performance does not mean that there was no prejudice to the employer. In the context of a workplace in which employees were swamped with work, the grievor was negotiating time frames for his assignments that allowed him a great deal of free time. To suggest that there was no impact on the grievor's performance is wrong; there was an obvious impact on performance. Other employees were working overtime while the grievor was surfing the Internet, so there was an impact.

IV. Reasons

[69] The grievor was discharged from his employment as a senior analyst/policy advisor in Geographic Operations, International Region, CIC, on November 3, 2009. The allegations against him were as follows:

> *1. Inappropriate use of government property and equipment, including the use of the Department's internet and electronic network systems for non-work related purposes including viewing and/or searching of objectionable material including electronic images of a sexually suggestive nature; and*
>
> *2. Misuse of government property and equipment, including the excessive use of the Department's internet and electronic network systems for non-work related purposes* (Exhibit E-2, tab 5).

[70] The grievor acknowledged that he engaged in the behaviour alleged in the letter of discharge. The evidence clearly established that he did so over a protracted period. Between September 2008 and November 2008 inclusive, the grievor spent between 49% and 56% of his time at work browsing the Internet. Between May 2009 and August 2009 inclusive, he spent between 55% and 64% of each workday browsing the Internet (Exhibit E-1, tab 1). He admitted that up to 75% of that time was used for non-work- related purposes. He also admitted that, in summer 2009, he accessed sexually explicit materials, such as images of nudity, sexual acts and bondage, while at work (Exhibit E-1).

[71] Because the grievor admitted that he committed the acts alleged by the employer, the substantive issue between the parties is the reasonableness of the penalty of discharge. At the hearing, the employer argued that this case was very important because it will create jurisprudence about the appropriate penalty for time theft and for accessing pornography while at work. The employer argued that the grievor's behaviour was chronic, persistent and offensive and that the bond of trust necessary between employer and employee was irretrievably broken.

[72] The grievor took the position that the employer failed to take into account significant mitigating factors that would normally serve to reduce the penalty. Leaving aside the usual mitigating factors, such as long service, a clean record, good performance appraisals, an acknowledgement of wrongdoing and remorse, all of which were present in this case and argued, the grievor also argued that the employer suffered no prejudice as a result of his behaviour. He noted that there were no complaints about his work performance and that all the work assigned to him was completed in a timely fashion. Because he was in a supernumerary position with no real assigned duties, he was undertasked, so no one was really affected by his behaviour. Furthermore, although he acknowledged viewing inappropriate images at work, he did not download them, transmit them or otherwise share them. No one complained and no one saw them, so there was no prejudice.

[73] The employer focused a great deal of attention at the hearing on the allegation of excessive use of its Internet services for non-work-related purposes, which it characterized as time theft. The thrust of the employer's argument was that surfing the Internet for personal reasons for more than half a day, while being paid for a full day's work, is as fraudulent as falsifying a time card.

[74] The phrase "time theft" is not used in the letter of discharge, and the grievor argued that time theft is not the same thing as misuse of the employer's property and equipment. Time theft, the grievor argued, requires a fraudulent act, such as altering time cards. The grievor alleged that the employer was attempting to alter the grounds for dismissal by arguing that he was guilty of time theft.

[75] Is excessive use of the employer's Internet services for non-work-related purposes the same offence as time theft? I do not believe so. At the hearing, the employer acknowledged that not all excessive use of computer equipment and networks for non-work-related purposes would constitute time theft. The employer suggested that it is not necessary for the purposes of this case to determine the point at which the misuse of computer equipment and networks becomes time theft because the grievor's behaviour was so extreme. However, it seems to me that this argument implicitly recognizes that time theft is different in nature from the misuse of property and equipment.

[76] I do not think that the grievor's excessive use of the employer's Internet services for non-work-related purposes can or should be characterized as time theft, as that phrase seems to be used in the case law. I agree with the grievor that time theft as it is generally understood involves an overtly fraudulent act, such as altering a time card, having employees punch in for each other or failing to record or falsely recording attendance on an attendance management system. All the cases but one cited by the employer on time theft involved such behaviour. In *Maple Leaf Meats (Brandon)*, the grievor's behaviour was less overtly fraudulent, but the application of the company rules and collective agreement mandated the charge of time theft.

[77] In another exception, cited by the grievor, *Coquitlam School District No. 43,* the employer in that case suspended the grievor for one day for a number of offences, including an allegation of theft of time for excessive Internet use for personal reasons. The characterization of the offence as time theft was not an issue considered by the arbitrator; rather, the question was whether the employer had established the grounds given for the suspension and whether those grounds were sufficient to justify discipline. The arbitrator found that the personal use of the Internet was significant and was misconduct justifying discipline but made no comment as to whether it constituted time theft.

[78] I believe that what sets the time theft cases apart from the facts of this case is that in the time theft cases the intent to commit the act can be inferred from the act itself. For example, there can be no mistaking the intent to steal time when an employee has another employee punch his or her time card. But in an environment in which personal use of the employer's Internet services is permissible on an employee's own time and in which employees do not punch time cards or actively record their working hours, it becomes much more difficult to infer the requisite intent for a charge of time theft. I simply do not see excessive use of the employer's Internet services for non-work-related purposes as the beginning of a continuum that ends with time theft. I believe that fraudulent intent is a fundamental element in the offence of time theft, but it is not in an allegation of misusing the employer's Internet services.

[79] The grievor admitted to misusing and inappropriately using the employer's property and equipment. He acknowledged to the investigator and again at the hearing that he spent hour after hour, day after day, month after month, surfing the Internet for personal purposes. As an example, August 20, 2009 was one of four days used by the employer to illustrate the grievor's behaviour. The evidence was unchallenged that on that day he browsed the Internet continuously from 8:00. to 13:47, viewing such sites as sportsillustrated.cnn.com, dilbert.com, and soccer.on.ca, along with the websites of newspapers such as the *Globe and Mail*, the *Star* and the *Denver Post*, among others (Exhibit E-1, tab 1). His behaviour was, as the employer described it, egregious.

[80] The seriousness of the grievor's offence is compounded by the fact that, not only was he looking at news and sports sites, in summer 2009 he also accessed sexually explicit materials while at work. Although the grievor initially suggested that he began looking at that material in August 2009, I think that the evidence is clear that, as early as June 29, 2009, he forwarded to his home email account a link to a sexually explicit Wikipedia site. Therefore, it seems clear that he viewed sexually explicit material before August 2009.

[81] The grievor offered as an explanation for his behaviour the fact that he did not have enough work to do. He also argued that his behaviour did not prejudice anyone. He pointed out that he had consistently good performance appraisals, that there were no complaints about his work and that no one knew or complained about the materials that he was accessing, so no one was affected. In the written response that he provided

to the investigation report (Exhibit E-2, tab Q), and in his testimony, he explained that he was a supernumerary employee with no specific job duties. In summer 2009, he reported to two supervisors, both of whom assigned work to him. He completed all the assignments given to him, and neither complained about his performance.

[82] Neither Ms. Usher nor Ms. Grigg, the grievor's supervisors, took serious issue with the grievor's explanation when asked at the hearing to comment on his written response to the investigation report (Exhibit E-2, tab Q). However, both contended that, if the grievor did not have enough work to do, he should have come forward to ask for more. Ms. Grigg testified that, over the summer of 2009, there was a great deal of work to do on the imposition of new visa requirements and that most employees were working 12- to 14-hour days. She was of the view that the grievor could have, and should have, provided assistance if he felt that he did not have enough work to do.

[83] It seems clear to me that there was some failure on the part of the grievor's managers to manage him. While both his supervisors contended that they should not have to supervise minutely an employee at the grievor's classification level, I believe that they have some responsibility to supervise, which they do not seem to have done in this case. I find it surprising that an employee could spend the amount of time that the grievor did on non-work-related activities for months without his supervisors noting a lack of production or engagement. The employer argued that the grievor negotiated the time - frames for the projects assigned to him and that he also refused long-term projects on the grounds that he would soon be leaving. Even so, it seems to me that the grievor's supervisors had a responsibility to regularly review his work and production and to assess his workload, which clearly they did not do.

[84] Despite this, I believe that the grievor's conduct prejudiced the employer, and I cannot absolve him of responsibility. The evidence was unchallenged that, in summer 2009, there was a great deal of work and that employees in the grievor's directorate were working overtime. The grievor could have assisted, which may have lessened some of the overtime requirements. His failure to carry a full workload undoubtedly prejudiced the employer. Furthermore, I agree that an employee at the grievor's classification level has some responsibility to work independently and to seek out work. The grievor did not.

[85] I am also troubled by the grievor's suggestion that, because no one else saw the pornographic images he was viewing, there was no prejudicial impact to the employer

and therefore no basis for significant discipline. That argument falls under the "what you don't know won't hurt you" category, and I do not accept it. The grievor's behaviour was by any rational criteria objectionable. It explicitly violated the employer's *Policy on the Use of Electronic Networks* (Exhibit E-2, tab 4), and it unquestionably violated any common sense standard of behaviour at work.

[86] The employer and the grievor engaged in a debate at the hearing as to whether the materials he viewed contained violent images. At the heart of that debate was the implication that the more violent and disturbing the image, the more serious the offence. I do not intend to enter the fray. Measuring the level of offensiveness of the images seems to me both subjective and irrelevant. It is sufficient, in my view, to find that the grievor viewed pornographic images while at work. Such behaviour is inappropriate and offensive. While distributing or sharing such images adds another layer to the offence that is not present in this case, I am not prepared to find that there is no prejudice in simply viewing pornographic images at work.

[87] I have no difficulty concluding that the grievor is guilty of the offences set out in the letter of discharge (Exhibit E-2, tab 5), and I have no difficulty accepting that the offences were serious and that they justified discipline. The fact that I do not believe that the grievor's behaviour can be characterized as time theft is not an indication that I do not consider the offences serious. The grievor violated a number of employer policies, clearly misused the property and equipment that he was entrusted to use for work purposes, and engaged in behaviour that has no place at work. I simply cannot accept the grievor's suggestion that there was no prejudice or identifiable damage to the employer's operations. The fact that the grievor's behaviour took place not once or twice but daily over many months is an aggravating factor, in my view, and one that makes significant discipline necessary.

[88] I accept that deterrence plays an important role in determining discipline, and I understand that the employer wishes to establish a precedent in this case to send a strong message to employees that the kind of behaviour engaged in by the grievor will not be tolerated. That is a legitimate purpose of discipline but it is not the only one. Rehabilitation and correction should also be important considerations in determining the quantum of discipline. Discipline should not be so heavy-handed that those goals are lost.

[89] Several cases cited by the parties, such as *Maple Leaf Meats (Brandon), Ontario Public Service Employees Union* and *Westcoast Energy Inc.,* make the point that discharge is appropriate only if there is no rehabilitative potential. In the *Ontario Public Service Employees Union* case at page 18, the arbitrator observed the following:

> *. . . the purpose of discipline is to correct inappropriate employee behaviour. Arbitrators have held that discharge should not only fit the offence, but also that it should only be utilized where it is unlikely that a lesser penalty would be sufficient to correct the inappropriate behaviour.*

[90] The assessment of rehabilitative potential is, I think, the same as any determination of factors that would serve to mitigate a disciplinary penalty. Over the years, the weight of arbitral jurisprudence has determined that such factors as length of service, a grievor's disciplinary and performance records, the nature of the offence, the grievor's remorse, and the grievor's forthrightness or credibility, among other factors, should be considered when assessing the appropriate penalty. See, for example, *Dupont Canada Inc.* and the cases it cites on that point. Similarly, in *Canadian Union of Public Employees (Ottawa-Carleton Public Employees Union), Local 503,* the arbitrator also analyzed the relevant jurisprudence on mitigation and quoted extensively at page 10 from an earlier decision, *Canadian Broadcasting Corp v. Canadian Union of Public Employees* (1979), 23 L.A.C. (2nd) 227, in which the following was written:

> …
>
> *. . . But these factors, while helpful, are not components of a mathematical equation whose computation will yield an easy solution. Rather, they are but special circumstances of general considerations which bear upon the employee's future prospects for acceptable behaviour, which is the essence of the whole corrective approach to discipline. . . .*
>
> …

[91] In the circumstances of this case, and for the reasons that follow, I believe that discharge was not appropriate. At the time of his discharge, the grievor had 27 years of seniority. He had a clean disciplinary record. Although Ms. Deschênes alluded in her testimony to an apparent performance issue, there was no direct evidence on that point, and the only performance appraisals submitted in evidence (Exhibit G-1, tabs 1 to 4) were very positive. Therefore, from the documentary evidence, I can only conclude that the grievor's work performance was good. If past behaviour is a

reasonably good predictor of future behaviour, then, based on the grievor's past performance over many years, the grievor is capable of being a good employee in the future.

[92] Other factors weigh into the balance. Acceptance of responsibility, admissions or acknowledgement of guilt, and remorse are frequently identified as important factors in mitigation, for obvious reasons. An employee who frankly and openly acknowledges his or her fault is less likely to repeat the offence than one who denies having done anything wrong.

[93] The employer argued at the hearing that the grievor was not sincere or credible. In support of that argument, the employer pointed to the grievor's underestimation of the amount of time he spent browsing the Internet for non-work-related purposes, his claim that he did not start viewing inappropriate materials until late July or August 2009 when, in fact, the evidence showed that he was sending home email links to inappropriate materials at the end of June 2009, and his denial that he moved his computer workstation when the evidence clearly established that he did.

[94] There is no doubt that, when he could, the grievor tried to put a positive spin on his Internet use, such as pointing out that much of his browsing was on news sites. He also underestimated the amount of time that he spent surfing the Internet, and he underestimated the time he spent viewing sexually explicit materials. But I believe that his expressions of remorse and his admission of guilt were genuine. In the notes of his interview with Ms. Leblanc (Exhibit E-1, tab C), he is quoted as saying that "you don't realize that you're doing stupid stuff until you step back and say wait a minute. Clearly it was exceedingly stupid."

[95] Ms. Leblanc testified that the grievor was forthright during the investigation and that he expressed remorse. At the hearing, he testified frankly about his sense of embarrassment and about his recognition that his behaviour was not something that he would even attempt to justify. I think that his tendency to try to minimize the extent of his behaviour sprang from that embarrassment, which can be a powerful deterrent in the future.

[96] Similarly, I am not prepared to give much weight to the testimony as to who moved the grievor's computer screen at his workstation. There are many reasons the

computer screen might have been moved, and there is no particular reason for it to be relevant as it happened months before the events in question.

[97] Given the grievor's length of service, clear disciplinary record and acceptance of responsibility, I believe the penalty of discharge should be mitigated in this case. However, there is no doubt that the grievor was guilty of serious misconduct. Therefore, it is necessary to determine the appropriate penalty. I do not find the case law cited by either party helpful to that purpose.

[98] The grievor acknowledged that, for four months in fall 2008 and for three months in summer 2009, he spent more than half his workdays surfing the Internet for non-work-related purposes and, part of that time, viewing pornographic images. While I do not agree that it constituted time theft, there is absolutely no doubt that the grievor spent seven months being paid for work he was not doing, using the employer's equipment and electronic network for purposes unrelated to his job. Given that fact, I am reluctant to impose any disciplinary penalty that would result in him being paid for any time not actually worked.

[99] Therefore, it is my determination that, although the grievor should be reinstated, the period of suspension will be the time served up to the date of this decision. In other words, the grievor should be reinstated with no back pay. I am mindful that it is a long suspension, but I believe that it reflects the seriousness and nature of the offence and the employer's need for deterrence.

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

(The Order appears on the next page)

V. Order

[101] The grievor is to be reinstated into his position effective the date of the signing of this decision.

August 4, 2011.

Kate Rogers,
adjudicator