

Date: 20121102

File: 566-02-4370

Citation: 2012 PSLRB 119



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**PIUS BURKE**

Grievor

and

**DEPUTY HEAD  
(Department of National Defence)**

Respondent

Indexed as

*Burke v. Deputy Head (Department of National Defence)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** Augustus Richardson, adjudicator

***For the Grievor:*** Himself

***For the Respondent:*** Allison Sephton, counsel

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Heard at Halifax, Nova Scotia,  
September 5 and 6, 2012.

## REASONS FOR DECISION

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### **I. Individual grievance referred to adjudication**

[1] On October 28, 2009, Vince Covey, a shipwright employed in the Fleet Maintenance Facility at Cape Scott in Halifax, Nova Scotia (“Cape Scott”), complained that he had been assaulted by Pius Burke. The Department of National Defence (“the employer”) conducted an investigation, interviewed a number of people and concluded that the assault had in fact taken place. On November 18, 2009, it imposed a penalty of a three-day suspension (Exhibit E1, Tab 4).

[2] On November 23, 2009, Mr. Burke grieved both the finding of misconduct and the disciplinary penalty. Terming the employer’s action “unfair and unjust,” he sought the reversal of the suspension and the removal of any reference to it from his file. Mr. Burke’s bargaining agent originally agreed to represent him early on in the grievance process, but by the time the “Notice of Reference to Adjudication of an Individual Grievance” was filed with the Public Service Labour Relations Board on September 20, 2010, Mr. Burke was representing himself.

### **II. Hearing**

#### **A. Preliminary matters**

[3] The hearing proceeded before me on September 5 and 6, 2012 in Halifax, Nova Scotia. Mr. Burke represented himself. The employer was represented by counsel.

[4] At the start of the hearing, I learned of another and more recent grievance involving Mr. Burke. I was concerned about the possibility that there might be some overlap between the grievance before me and the more recent one and, if so, whether the hearing of the grievance before me ought to be adjourned and this grievance dealt with at the same time as the other.

[5] Mr. Burke stated that he had been terminated in or about May 2011 and that he had filed a grievance about it in February 2012. Counsel for the employer acknowledged that there was a grievance but submitted that Mr. Burke had not been dismissed or terminated; rather, Mr. Burke had been told not to return to work until he underwent a medical examination. Mr. Burke stated that the employer’s actions amounted to a constructive dismissal, inasmuch as his personal physician stated that Mr. Burke was fit for work. Mr. Burke also objected to any further delay in the hearing of the grievance before me.

[6] Based on the submissions of counsel for the employer and of Mr. Burke, I decided that the hearing of the grievance before me should proceed. The “termination” grievance (as Mr. Burke called it) appears to concern separate and distinct facts and issues, although the grievance before me might form part of Mr. Burke’s employment history.

[7] This is a discipline grievance. Hence, the employer presented its case first. At the opening, it presented a thin book of documents, which included a series of notes made by one of its witnesses, Charles Hawker, during the interviews he conducted of several people. Those interviews dealt with what those people knew or had seen or heard at the time of the incident under investigation. Mr. Burke objected to the admissibility of Mr. Hawker’s notes on the grounds that it was the first time Mr. Burke had seen the notes and on the grounds that Mr. Burke could not read them, and hence, they should be transcribed. Mr. Burke also objected to the fact that the hearing was not being recorded.

[8] I overruled Mr. Burke’s objections. I observed that, as a rule, hearings held pursuant to the *Public Service Labour Relations Act* are not recorded, subject to exceptional circumstances, which did not exist in this case. The fact that a hearing is not recorded does not offend the rules of natural justice: see *Turner v. Canada (Canada Customs and Revenue Agency)*, 2004 FC 1558; and *Nash v. Treasury Board Secretariat (Correctional Service of Canada)*, 2008 FC 1389. With regard to Mr. Hawker’s notes, they were legible in my opinion and did not need to be transcribed. I also noted that, in any event, I would place little if any weight on the notes of interviews with anyone who did not actually give evidence before me.

[9] Both early on in the first hearing day and at the beginning of his case on the second day, Mr. Burke also submitted that he should be allowed to introduce into evidence a CBC radio program that, according to him, dealt with the long delays associated with grievances in the federal public service. I refused his request both times. The radio program had nothing to do with the facts of his grievance. Although the grievance system might have delays and, if they exist, such delays might be regrettable, Mr. Burke’s grievance was now before me. Nor did anything in Mr. Burke’s submission suggest that any delay prejudiced his case in any material way. There was no reason to consider the CBC program relevant or material to the issues before me.

[10] I also explained several times to Mr. Burke that I considered the issues before me to be the following:

- What happened on October 28, 2009 between Messrs. Burke and Covey?
- Did that event amount to an assault?
- If it was an assault, was the employer's discipline reasonable?

**B. Summary of the evidence**

[11] The employer called the following witnesses:

- Mr. Hawker, Group Manager 2 at Cape Scott;
- Roger Barakett, Production Manager at Cape Scott, to whom Mr. Hawker reports, and who approved Mr. Hawker's discipline letter of November 18, 2009;
- Mr. Covey, the alleged victim of the assault; and
- Michel Haché, Work Centre Supervisor, Cape Scott, and the immediate supervisor of Messrs. Burke and Covey.

[12] Mr. Hawker was not on duty on October 28, 2009. On his return to work on October 30, 2009, he learned of the incident. He began his investigation shortly after that. His investigation included interviews with the following individuals:

- Ron Sampson and Greg Slawnwhite, co-workers of Messrs. Burke and Covey;
- Mr. Haché;
- Mr. Covey, the alleged victim; and
- Mr. Burke; see Exhibit E1, Tab 2.

[13] Counsel for the employer began to lead Mr. Hawker through the notes of his interviews with individuals. I asked why it was being done for Messrs. Slawnwhite and Sampson if, as counsel advised, they were in the vicinity of the incident when it

allegedly happened. Counsel advised that the employer had “just” been advised that neither was prepared to attend the hearing to give evidence. At that point, I made an order excluding any other potential witnesses from the hearing room. I also indicated to counsel for the employer that witnesses that the employer thought necessary to its case ought to have been summonsed and that I was not willing to place much if any store in the hearsay statements of material witnesses who were not prepared to give evidence under oath before me. Counsel advised that she would make an effort to have summonses issued. She was able to secure Mr. Slawnwhite’s attendance.

[14] In my opinion, given the nature of the allegation against Mr. Burke, and given what I identified as the issues before me, the only relevant evidence was that of the two alleged participants in the incident of October 28, 2009, Messrs. Burke and Covey; of Mr. Slawnwhite, who was in the immediate vicinity of the incident; and of Mr. Haché, who saw and spoke with both Messrs. Burke and Covey immediately after the alleged assault. For that reason, I will recount their evidence out of the order in which it was presented.

[15] Mr. Covey testified that he was working at a bench on tiles destined for a submarine in the morning of October 28, 2009. He and a co-worker went for their tea break. Upon his return, Mr. Covey passed by Mr. Burke, who looked at Mr. Covey and said, “You’d like to get me fired.” Mr. Covey replied that he did not and asked Mr. Burke “where this was coming from.” What followed was “a few words back and forth” that, Mr. Covey testified, ran along the lines of each calling the other “an asshole.” Mr. Covey also admitted that, at one point, he asked Mr. Burke whether “he was off his meds.” Mr. Covey said having then walked away but decided at that point of reporting the incident to Mr. Haché. Mr. Covey walked toward stairs that led to Mr. Haché’s office. Mr. Covey passed by Mr. Burke and told Mr. Burke about being on his way to “see Michel and let him know about this incident.” While Mr. Covey was walking away from Mr. Burke, toward the stairs, Mr. Burke grabbed Mr. Covey from behind and spun Mr. Covey around and said something along the lines of, “We might as well give Michel something to talk about.” Messrs. Burke and Covey struggled for a moment. Mr. Burke pushed Mr. Covey against a table, and then the two of them fell to the ground. Mr. Covey yelled for help. Mr. Burke’s grip on Mr. Covey loosened in the fall, and Mr. Covey was able to get up. Mr. Covey then “ran to Michel to explain what happened,” according to Mr. Covey. Mr. Covey also testified that when he fell he bit his

tongue somehow, which bled for some time thereafter. Mr. Covey also lost his hat and a utility knife that he kept in a pocket of his coveralls.

[16] Mr. Covey testified that he then went to Mr. Haché's office and asked him to call the military police (MPs). Mr. Covey said doing so because, at that point, he wanted Mr. Burke charged with assault. Mr. Covey later changed his mind because he did not want Mr. Burke "to lose his job over a little incident like that . . . it's a nice place to work."

[17] In cross-examination by Mr. Burke, Mr. Covey denied having any memory retention problems. Mr. Covey admitted that he asked Mr. Burke during the initial "to-and-fro" between them whether Mr. Burke was "off his meds." Mr. Covey said that he asked Mr. Burke that because Mr. Burke was "aggressively angry at me for some reason, I didn't know what." Mr. Covey agreed that on an earlier occasion he and Mr. Burke had had a disagreement over who could use a sander and that Mr. Haché had ended up speaking to Messrs. Burke and Covey about it.

[18] Mr. Slawnwhite testified that he did not actually see any altercation between Messrs. Burke and Covey. Messrs. Slawnwhite and Sampson had been sitting in the back of the warehouse. Mr. Slawnwhite heard "a commotion, banging and crashing." He said that "it sounded like someone had fallen off the shelf, so we went to the front of the building." On their way there, Messrs. Slawnwhite and Sampson ran into Mr. Burke. Mr. Slawnwhite asked Mr. Burke whether he was "OK" and, "Did you fall?" Mr. Burke, who was tugging at his paper coveralls, arranging them, said, "No, I'm OK." Mr. Burke continued past Messrs. Slawnwhite and Sampson. Messrs. Slawnwhite and Sampson continued to where the sound had come from, and when they arrived, they found a table that had been knocked over, a spilled cup of coffee, a utility knife, a piece of a paper coverall and several other items on the floor. They picked up the table, and Mr. Sampson wiped up the coffee with some rags that Mr. Sampson pushed around the floor with his foot. At about that time, Mr. Burke returned and took a can of pop.

[19] Mr. Slawnwhite agreed in cross-examination by Mr. Burke that there were shelves in the area Mr. Slawnwhite had heard the commotion come from and that paper coveralls were stored there. He agreed that employees could from time to time take off their old coveralls and put on new ones in that area. He also agreed that it was not unusual for the coveralls to have rips in them. I note that, in starting his cross-examination, Mr. Burke stated that Mr. Slawnwhite was someone "with integrity."

[20] Mr. Haché testified that he was in his office on October 28, 2009. Messrs. Burke and Covey came into his office. Mr. Covey's first words were a request that Mr. Haché call the MPs. When Mr. Covey was questioned as to why Mr. Covey repeated that request, Mr. Covey eventually stated that he and Mr. Burke had "got into it." Mr. Haché asked Mr. Covey what he meant, and Mr. Covey said that "[I]t just happened." Mr. Covey appeared agitated and shaken. Mr. Haché noticed that Mr. Covey had blood on his lower lip and his lower teeth. Mr. Haché then called the MPs. Mr. Covey told Mr. Haché that Mr. Covey had been returning to work from his break when Mr. Covey "crossed paths with Mr. Burke." Mr. Covey said that Mr. Burke "had a funny smirk on his face like he usually does." Mr. Covey told Mr. Haché that, while Mr. Covey was at the wash basin, Mr. Burke came up behind Mr. Covey and in a low voice said, "You really want to hit me, don't you." Mr. Covey asked Mr. Burke what he was talking about, and Mr. Burke said, "You know, you really want to hit me, don't you." Mr. Covey said having replied, "I don't know what the fuck you are talking about . . . didn't you take your meds today?" Mr. Covey said being scared at that point. He told Mr. Burke that he "wasn't putting up with this anymore, I'm going to see Michel to get this resolved . . . you can come if you want." Mr. Burke said that he would. Mr. Burke was a few feet in front of Mr. Covey. Once they passed the Hazmat lockers, Mr. Burke grabbed Mr. Covey from behind, said "Let's give Michel something to talk about," and swung Mr. Covey around. Messrs. Burke and Covey got into a scuffle. Mr. Burke pushed Mr. Covey against a table, knocking over some items, including a cup of coffee. Mr. Burke got Mr. Covey down on the floor, at which point Mr. Covey said having "hollered for help." Mr. Burke lost his grip. Mr. Covey got to his feet and rushed to Mr. Haché's office.

[21] Mr. Haché testified that it took about 10 to 15 minutes for the MPs to arrive. Mr. Burke showed up after the MPs arrived, and Mr. Haché told Mr. Burke that the MPs would want to talk to Mr. Burke. Mr. Burke said, "No problem," and that he would wait in the lunch room. Mr. Burke did not ask why the MPs were there.

[22] Mr. Haché visited the scene of the incident the next day. He saw a toppled container and some spilled coffee on a workbench as well as a utility knife on the floor and two pieces of coverall material.

[23] In cross-examination, Mr. Haché testified that he was not aware that Messrs. Slawnwhite and Sampson, as Mr. Burke asserted in his questioning, had cleaned up before anyone entered the area of the alleged incident. Mr. Haché said

having noticed a stain on the concrete floor and agreed that his understanding that it was a coffee stain was based on Mr. Slawnwhite telling Mr. Haché that it was coffee and that Mr. Slawnwhite had cleaned it up. Mr. Haché agreed that it was a poor choice of words to say that there was spilled coffee but insisted that there was a stain on the floor. He also agreed in cross-examination that an incident had occurred at an earlier time between Messrs. Burke and Covey when Mr. Covey asked to be assigned to a different work area so that Mr. Covey would not have to work with Mr. Burke. Mr. Haché mediated the dispute, pointing out that “[t]hey were two adult persons in a work place, they were there to work and they had to get along with each other.” When asked whether he thought it strange that at one point Mr. Covey said having been thrown on a table and at another on the floor, Mr. Haché replied, “No, the incident was three years ago . . . he was quite agitated and distraught at the time . . . I’m sure that there are things that he’s not able to recall.” Mr. Haché also stated having a good memory and not being the victim, “So my disposition would be different from Mr. Covey’s state of mind.”

[24] Mr. Burke chose to give his evidence by way of a written “Statement of Events” (Exhibit G4) that he said had been prepared at the time of his initial interview with Mr. Hawker. However, Mr. Burke agreed later in cross-examination that statements in the document made it clear that, and he agreed, it had been presented to the employer sometime around August 2012. However, he insisted that the notes were accurate and that they were based on events (or were written) “well before that time.”

[25] The statement included a history of previous incidents between Messrs. Burke and Covey involving, among other things, a dispute over the use of a sander.

[26] Dealing with the incident of October 28, 2009, Mr. Burke’s statement indicates that he was dragging a 45-gallon drum. Mr. Covey was nearing Mr. Burke, so Mr. Burke stopped to let Mr. Covey by. Mr. Covey asked Mr. Burke what Mr. Burke was looking at. Mr. Burke continued working and asked Mr. Covey what Mr. Covey was looking at. This went on, and then Mr. Covey asked Mr. Burke, in Mr. Burke’s words, “if I had forgot to take my meds this morning.” Mr. Covey then called Mr. Burke a “retard” several times. Mr. Burke went to the washroom, which was beside Mr. Haché’s office. Mr. Burke stated having thought “I should go in and report the incident but I had work to do and hoped it would just blow over.” Mr. Burke returned from the washroom, and Mr. Covey, whom Mr. Burke thought must have thought that Mr. Burke had in fact reported the incident,



said that Mr. Covey would “go up to report what went on this morning.” Mr. Burke thought about going too, and started to walk with Mr. Covey, but then thought of getting his own work done first, and then speak to Mr. Haché. In Mr. Burke’s words, “So I turned around and went back to work.”

[27] The statement goes on to state that the MPs showed up. They asked Mr. Burke if he had had an altercation with Mr. Covey, and Mr. Burke replied, “No.” Mr. Burke repeated in his submissions that there had been no altercation between him and Mr. Covey. Mr. Burke denied having grabbed Mr. Covey or having shoved Mr. Covey onto a table or onto the floor. It simply did not happen.

### **III. Reasons**

[28] The issues before me are the following:

- What happened between Messrs. Burke and Covey after Mr. Covey announced his intention to go to Mr. Haché’s office the morning of October 28, 2009?
- Did the incident constitute an assault?
- If so, was the discipline imposed reasonable?

#### **A. What happened?**

[29] This is a simple matter. The testimonies of Messrs. Burke and Covey indicate that, and I so find, there was a history between the two men. Regardless of who was responsible for the bad feelings between them, the fact is that Messrs. Burke and Covey were not enamoured with each other. Their testimonies also agree on the initial events of October 28, 2009, which were that there were words between them and that, shortly after that exchange, Mr. Covey started toward Mr. Haché’s office to report that exchange. The basic difference between the testimonies of Messrs. Burke and Covey is what happened after that.

[30] Mr. Covey’s account, if accepted, amounts to a statement that a non-consensual struggle erupted between Messrs. Burke and Covey that was initiated by Mr. Burke. Mr. Burke’s account, on the other hand, is that no struggle, no touching of any kind and in fact no contact at all occurred between him and Mr. Covey after Mr. Covey

announced his intention to report to Mr. Haché. That single difference turns on what amounts to a “he-said, he-said” dispute that can be resolved only on the basis of credibility.

[31] I am more than satisfied on a balance of probabilities that Mr. Covey’s account is essentially accurate. I am satisfied and so find that he was grabbed from behind by Mr. Burke; that Mr. Covey was spun around and pushed backwards onto a table; that Messrs. Burke and Covey then fell to the floor; that, during the tussle, Mr. Covey bit his tongue; and that, only after Messrs. Burke and Covey fell to the floor was Mr. Covey able to free himself from Mr. Burke’s grip and escape to Mr. Haché’s office. I arrive at this conclusion for several reasons.

[32] First, Mr. Covey’s account was corroborated by Mr. Slawnwhite, whom Mr. Burke called a witness “of integrity.” Mr. Slawnwhite testified having heard “a commotion” that sounded like someone had fallen. Mr. Slawnwhite went to the area from where he heard the sound and found an overturned table and several items strewn on the floor. All that evidence is consistent with “something” having happened.

[33] Second, Mr. Covey’s account was also corroborated by Mr. Haché’s evidence. Mr. Haché noticed that Mr. Covey had blood on his lower lip and teeth, which is consistent with Mr. Covey’s statement of having bit his tongue. Mr. Covey also appeared agitated and shaken and called for the MPs. Again, all this is consistent with “something” having happened.

[34] Third, the fact that Messrs. Burke and Covey essentially agree on so much of what happened on October 28, 2009, along with the exchange of derogatory words and Mr. Covey’s intention to report to Mr. Haché, give rise to the question of why Mr. Covey would invent a story of an assault. Mr. Burke’s flat denial does not answer the question. Moreover, his evidence that he twice thought about reporting the initial incident to Mr. Haché but then thought that he should complete his work first does not make much sense. Given the bad feelings between Messrs. Burke and Covey, one would think that being asked whether Mr. Burke had taken his meds or being called a “retard” would have motivated Mr. Burke to report the incident immediately, especially when Mr. Burke knew that Mr. Covey said being on his way to report the incident. In such circumstances, one would expect a person in Mr. Burke’s position to go along with Mr. Covey to make sure that his own side of the story was conveyed, not simply return to work and report it afterward.

[35] Mr. Burke submitted that the incident could not have happened because, if it had, it would have been grounds for immediate termination. His submission, so far as I understood it, was that, if the employer believed that the alleged incident happened, it would have had grounds for terminating Mr. Burke immediately. The fact that it chose to suspend Mr. Burke rather than terminate him must mean that, so far as I understood Mr. Burke's submission, the employer did not think that the assault occurred. There are two difficulties with that submission, in my opinion.

[36] First, Mr. Burke's submission is based on a misconception of the applicable adjudicative jurisprudence. Termination for assault is not automatic. Whether an assault is grounds for termination depends on a wide variety of factors, which are well known to most employers. Indeed, this particular assault does not amount to much more than rough housing and, while serious and not to be ignored, it would not in my opinion (without more) have amounted to grounds for termination.

[37] Second, and as I pointed out to Mr. Burke several times, what matters is not what the employer thought happened, but what I, as an adjudicator, find actually happened. The fact that, as Mr. Burke submitted, the employer might have been uncertain as to what actually happened, and that that uncertainty might have been reflected in its decision to suspend rather than terminate him, did not relieve me of my obligation to make a finding of fact as to what happened. And, in my opinion and on a balance of probabilities, I am satisfied that what happened is what I set out above.

**B. Did the incident amount to an assault?**

[38] Based on my conclusion above, I am satisfied that what happened amounts to an assault. There was non-consensual physical contact between Messrs. Burke and Covey and a non-consensual struggle.

**C. Was a three-day suspension a reasonable penalty?**

[39] In my opinion, a three-day suspension was not an unreasonable penalty. The fact that Mr. Burke flatly denied what happened, rather than admit to it and seek to explain it, is a factor that supports the penalty. The penalty is certainly consistent with those in similar cases discussed in decisions of other adjudicators, which the employer relied on; see, for example, *Focker v. Canada Revenue Agency*, 2008 PSLRB 7; *Lachance v. Treasury Board (Agriculture Canada)*, PSSRB File No. 166-02-26840 (19960329); and

*Frankel v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-26879 (19961011).

[40] The only question in my mind was whether provocation, in view of the exchange of words that occurred between Messrs. Burke and Covey, was a factor to be considered and, if so, whether it ought to be a factor in evaluating the reasonableness of the discipline that was imposed.

[41] On that point, counsel for the employer submitted that provocation was not an issue for two reasons. First, there was no corroborating evidence about who started the words between Messrs. Burke and Covey. That being the case, it is impossible to determine who provoked whom. Second, even if Mr. Covey started it, there was a gap between the verbal exchange and the assault. It was not something done by Mr. Burke in the heat of the moment. I agree.

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

*(The Order appears on the next page)*

**IV. Order**

[43] The grievance is dismissed.

November 02, 2012.

**Augustus Richardson,  
adjudicator**