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*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

BARRY PUGH

Grievor

and

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

Respondent

Indexed as
Pugh v. Deputy Head (Department of National Defence)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: John G. Jaworski, adjudicator

For the Grievor: Amarkai Laryea, Public Service Alliance of Canada

For the Respondent: Christine Diguier, counsel

Heard at Ottawa, Ontario,
March 11 to 13, 2013.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] Barry Pugh (“the grievor”) is presently employed by the Canada Revenue Agency as a senior policy officer. At the time of the events giving rise to the grievances, he was employed as an IS-03 English writer in the Minister’s Correspondence Unit (“MCU”) of the Department of National Defence (“DND” or “the respondent”).

[2] On March 10, 2009, the grievor received a five-day suspension for misconduct arising from alleged breaches of instructions received in a letter dated November 13, 2008, entitled “Management Expectations.” The grievor filed a grievance against that discipline, requesting as corrective action that the suspension be rescinded, that he be made financially whole and that letters pertaining to his discipline be expunged from his file. The grievance was denied at the first, second and final levels of the grievance process and was referred to adjudication on October 1, 2010 under paragraph 209(1)(b) of the *Public Service Labour Relations Act* (“the Act”).

[3] On May 27, 2009, the grievor received a seven-day suspension for misconduct arising from alleged breaches of instructions received in the November 13, 2008 letter entitled Management Expectations. The grievor filed a grievance against that discipline, requesting as corrective action that the suspension be rescinded, that he be made financially whole and that the documentation pertaining to this discipline be expunged from his file. The grievance was denied at the first, second and final levels of the grievance process and was also referred to adjudication on October 1, 2010 under paragraph 209(1)(b) of the *Act*.

II. Summary of the evidence

[4] The respondent called Louise Goneau and Linda Cauchy to testify. The grievor testified on his behalf.

[5] The grievor has an Honours Bachelor of Arts degree in French Language and Literature with a specialization in translation from the University of Michigan. He has attended Georgetown University in Washington and the University of Ottawa, where he has taken courses respectively in simultaneous and consecutive interpretation and translation and interpretation. He came to Canada in 1981 and joined the federal public service. At the time of the hearing, the grievor had approximately 30 years of service with the federal public service. He began working at the DND MCU in 2001.

[6] In or about 2006, Ms. Goneau was appointed as the manager of the DND MCU. This position was classified at the AS-07 group and level. Ms. Goneau had spent a considerable portion of her career since 1985 working in MCUs in the federal government and described the work and expectations in an MCU as demanding.

[7] Before starting in her position, Ms. Goneau met with the director of the DND MCU as she understood there were some functional problems. At the time, the MCU was divided up into three sections: Operations, Control and Reporting Services, and Writing. None of the sections had indeterminate supervisors, and her first task upon being appointed was to staff them. I was provided with an organizational chart of the MCU, which indicated that, when fully functional, there were 40 positions that either directly or indirectly reported to Ms. Goneau. The grievor worked in the Writing section, and at the time of Ms. Goneau's arrival, he reported to the senior English editor.

[8] Ms. Goneau staffed the supervisor's position (chief) for the Writers section, in April or May of 2007 with Ms. Cauchy. Upon Ms. Cauchy's appointment, the grievor began reporting to her.

[9] All three witnesses explained the work carried out by the MCU. The minister receives a large volume of correspondence, all of which is routed through the MCU. The origin and type of correspondence may determine the timeliness and response provided. All incoming correspondence has to be recorded and accounted for. Files are created for the incoming correspondence. Depending on the correspondence, research may have to be conducted before a response is crafted. Certain deadlines are established, as are bring-forward ("BF") dates for processing the responses. A response to a letter is prepared by the Writers section. Each response letter is then reviewed by a senior editor, English or French, depending on the language of the correspondence. Once the editor has completed his or her review, the outgoing correspondence is reviewed by the writer with carriage of the file and amendments, if identified, are made. Corrections are reviewed by a second writer to ensure potential errors are all caught and corrected. Completed files are to be delivered to the senior editor as soon as they are finalized.

[10] Ms. Goneau briefly described the various types of correspondence that may be received by the MCU. The source and content of a letter could determine the priority of the response. For example, all letters on a specific topic may require a standard or

similar reply. Letters and files initially may not be a priority; however, depending on events, they could become a priority.

[11] All three witnesses stated that it was common that by the time the files actually reached the Writers section, the deadlines and BF dates had generally passed, and the writers often worked on short deadlines.

[12] After her arrival, Ms. Goneau determined that one of the functional problems plaguing the unit was file management, specifically location and security. When correspondence arrived, it was recorded, became a file or part of a file, and was logged into a computerized tracking system called “ccmMercury.” As the file moved through the sections of the MCU, a change of possession of the file was supposed to be logged into ccmMercury. This was to ensure that the file could be located and, if necessary, retrieved at any time. This was not happening, and often, when a file needed to be found, the person who was logged in ccmMercury as having it did not have it. In addition, MCU employees would store the files they were working on in their own locked file cabinets. If a file were needed after normal work hours or when a person in possession of a file was away and it was locked in someone’s cabinet, it could not be easily accessed. Coupled with the hit-and-miss of recording file movements in ccmMercury, files were often not where they were supposed to be, and if needed on an urgent basis, they could not be accessed. This could present embarrassing problems.

[13] Ms. Goneau, as part of her management strategy, tightened up the inputting of information into ccmMercury and required all members of the MCU to ensure that their files were locked at the end of their working day in a central file storage unit known as the “DASCO.” The purpose of these changes was to ensure that management would know where every file was and could access any file at all times.

[14] The DASCO was described as an extremely large filing cabinet, which consisted of pigeon holes, slots or cubbyholes, specifically earmarked for either teams or individuals, in which they would store their files. All members of the MCU, no matter the section or their level, were required to place their files in their assigned slots or cubbyholes before they left work for the day. The DASCO was unlocked every morning at around 6:30 to 6:45 am and was supposed to be locked every day at 4:55 pm. Only a select few individuals had the combination to the DASCO, including Ms. Goneau. Neither Ms. Cauchy nor the grievor had the combination to the DASCO.

[15] When cross-examined with respect to what, if any, backup plan or procedure was in place if anyone missed the afternoon locking up of the DASCO, both Ms. Goneau and Ms. Cauchy stated that there was none.

[16] The MCU is located at DND Headquarters (HQ) in Ottawa. While the municipal address is 101 Colonel By Drive, the complex is quite large and consists of a large low-level building, which also consists of and connects two large office towers. The complex borders four major roadways, which are not all accessible from one another, are on different levels and include two bridges. In addition, the complex is protected along the roadways by concrete barriers and in some places by steel fencing.

[17] The work area of the MCU was described for me by the grievor as open concept with cubicles. The grievor described his work cubicle as being down the same corridor as those of both Ms. Goneau and Ms. Cauchy, each being within two cubicles of his in either direction.

[18] Both the grievor and Ms. Goneau testified that shortly after Ms. Goneau arrived, she conducted a team-building exercise. According to Ms. Goneau, she retained a consultant who proposed a tool for the exercise, which included a questionnaire, the results of which would lead to a further team function. The exact nature of the questions was not provided to me. The grievor testified that he took exception to the questionnaire or “personality test,” as he referred to it. The grievor did not participate in the questionnaire and as a result was not permitted to participate in the further team-building function.

[19] The grievor and Ms. Goneau both testified that as a result of this team-building activity, there was a mediation session, which resulted in compensation for the grievor. I was not provided specifics as to whether there was a formal complaint or grievance filed about this issue; however, there clearly was a remedy provided as a result of some process initiated by the grievor.

[20] According to the grievor, it was the team-building activity and its resolution that he felt was the beginning of him being “singled out” and “excluded” by Ms. Goneau and Ms. Cauchy.

[21] Ms. Goneau testified that in the spring of 2007, during the performance appraisal period, she became aware of some minor shortcomings in the grievor's work, described as typos and as holding onto files until the end of the day.

[22] Ms. Cauchy testified that part of her responsibility as the chief of the Writers section was to assess work production. She stated that every Monday morning she would receive a set of data, which outlined each writer's production. She stated that the data would indicate to her what work each writer had carried out and how many files he or she possessed. Ms. Cauchy testified that it appeared to her that the grievor seemed to be the writer who had the most files in his possession.

[23] I was not provided with an example of this data or report that Ms. Cauchy referred to; nor was I provided with any specific statistics with respect to the amount of work the grievor was carrying out in comparison to other writers.

[24] I was not given a specific time frame during which the grievor's performance was being measured; I can only assume that it was sometime after Ms. Cauchy began work in 2007 and sometime before July 28, 2008, when she placed him on a performance management plan.

[25] Ms. Cauchy stated that when she determined that the grievor had an excess file load, she lightened his load by giving some of his files to his colleagues. She stated that she also had a discussion with him about setting priorities, organizing his work and working towards due dates. She stated that these steps did not appear to help and that the grievor still had the most outstanding files on a continuing basis. She indicated that she started to put in writing how the grievor should handle his work when she felt that the informal discussions had not helped.

[26] I was not provided with copies of the written advice or warnings Ms. Cauchy states that she provided to the grievor. I was not provided with any detail as to how much the grievor's workload was lessened or what it was in comparison to the other writers. I was not provided with any indication of the complexity of the work of the grievor or his colleagues.

[27] The grievor testified that he carried a lot of files and that the information contained in the reports about his production of work was inaccurate. He stated that he often carried complex files.

[28] On July 30, 2008, Ms. Cauchy provided the grievor with a letter dated July 29, 2008 and a written plan of action (“Action Plan No. 1”). The letter stated that the grievor’s performance had decreased in the previous 29 days and that the number of outstanding files had increased. It also noted that the quality of his work had decreased. The specific number of outstanding files was not noted; nor were the particulars of the alleged decrease in quality.

[29] Action Plan No. 1 set out that the grievor was to prepare a minimum of 25 new files per week for review and delivery to the senior editor. In addition, the grievor was required to complete proofing and corrections routed to him on the same day. On a weekly basis, he was required to put together a statement of his work and deliver it to Ms. Cauchy by 3:00 pm every Friday. Every Monday morning, the grievor, Ms. Cauchy and Ms. Goneau would meet to review the previous week’s statement of work and discuss the grievor’s progress with respect to the goals set in Action Plan No. 1 and identify any further action if needed.

[30] It was the evidence of Ms. Goneau that 25 files per week would be the norm within the MCU; however, from the evidence it is also clear that this was a subjective estimate as the quantity of the work output was dependent on the substance of the files.

[31] “File” was undefined; however, from the evidence, it was clear that it could refer to quite simply one letter received on one topic that required a response, or it could refer to a series of letters, all on the same or similar topic. The number of letters was not specified; however, again from the evidence, it was clear that there could be multiple letters, even hundreds if not more on any given topic. What was also not clear was the complexity of the topics. What I did gather from the evidence was that a single letter could be about a complex issue requiring significant research and that many letters may be all about one issue that requires limited research and input.

[32] The letter of July 29, 2008, also referred to performance deficiencies in the grievor’s “Civilian Performance Review Report” (“CPRR”). I was not provided with this CPRR or with any of the grievor’s CPRRs.

[33] On August 11, 2008, Ms. Goneau gave the grievor a written reprimand. The reprimand starts by stating, “Despite continued efforts to correct various work-related issues through a collaborative process, efforts have proven unsuccessful.” The letter

does not identify the work-related issues that had been at issue, what the collaborative process was, or what efforts had been undertaken.

[34] The letter of August 11, 2008, goes on to speak of breaches of the *Standards of Conduct* and the *Values and Ethics Code for the Public Service* (“the Values and Ethics Code”) and that the grievor was expected to comply with these codes. It did not set out what or if a specific *Standard of Conduct* and what or if a *Values or Ethics Code* provision was breached.

[35] The letter of August 11, 2008, identifies the misconduct generally as a lack of punctuality and absence from the office without permission. It also states that the grievor was using departmental premises, equipment and electronic network for other than official purposes. No specifics are given with respect to these acts. The only evidence I was provided with respect to this misconduct was by Ms. Goneau. Her recollection was that the grievor was absent without permission, most probably that he was not at his desk during work hours, which was noticed on more than one occasion, and that he was using the office for non-work issues. She provided no specifics.

[36] The letter of August 11, 2008, goes on to give the grievor instructions with respect to what steps were required of him if he wished to take leave. He was instructed to confirm his hours of work, identifying when he would be taking lunch and breaks.

[37] The grievor stated that he grieved this discipline; however, there was no evidence as to what happened to the grievance.

[38] Two days after the delivery of the August 11, 2008 letter, Ms. Cauchy filed a harassment complaint against the grievor outlining 11 different occurrences of harassment, all of which occurred between early June 2007 and August 2008.

[39] The harassment complaint was investigated by Quintet Consulting Corporation, and a final report was sent to Ms. Cauchy on April 15, 2009. The harassment report stated that of the 11 allegations against the grievor, all but one were unfounded. With respect to the one founded allegation, the grievor received an eight-day suspension, which he grieved. His grievance was allowed, and the eight-day suspension was set aside.

[40] Despite the harassment complaint filed by Ms. Cauchy on August 13, 2008, she continued to be the grievor's supervisor and to monitor his work performance. Ms. Cauchy testified that, at some point after her filing of the harassment complaint, she stopped supervising the grievor; however, it is clear from Ms. Cauchy's notes that she participated in the Monday morning meetings to review the grievor's work at least during the month of August 2008 up to and including September 8, 2008. This was also evidenced by a letter dated September 4, 2008 that the grievor was given, notifying him of an investigation into alleged misconduct. The grievor did not sign that he acknowledged receipt of this letter, a point that Ms. Cauchy noted on the bottom of the letter in her own handwriting.

[41] Exhibit E-1, Tab 4, contains Ms. Cauchy's notes to file summarizing the meetings held pursuant to Action Plan No. 1, up to and including September 2, 2008. With respect to the notes identified as "Follow-up Meeting of August 25, 2008," the grievor, Ms. Goneau and Ms. Cauchy all testified with respect to this meeting and the notes reflecting what went on at this meeting. The grievor testified that initially his managers understated how much work he had completed, and it was only after he had brought to their attention the accurate numbers that an amendment was made. He stated that in one case, in which he was being credited for only one file, he had done 10 letters, and in another, he had done 18. He stated that the 25 files per week standard was misleading. He stated that he had a lot of files that were of great importance.

[42] Both Ms. Goneau and Ms. Cauchy admitted in their evidence that the summary for the work the grievor had carried out as set out in Exhibit E-1, Tab 4, under "Follow-up Meeting of August 25, 2008," had been misstated.

[43] On October 28, 2008, the grievor was given a letter notifying him that he was being given a one-day suspension for not attending a meeting on Tuesday, September 2, 2008.

[44] The grievor testified that according to Action Plan No. 1, he was supposed to meet with Ms. Goneau and Ms. Cauchy on Mondays. Action Plan No. 1 is set out at Exhibit E-1, Tab 2, and the relevant section states, "IT IS AGREED that Mr. Barry Pugh and Ms. Linda Cauchy and Ms. Louise Goneau will meet every Monday morning to discuss Mr. Pugh's statement of work and to discuss progress toward the above-noted goals and identify further action." The September 2, 2008 meeting the grievor allegedly missed, and for which he was disciplined, was the usual Monday meeting that had been

moved to a Tuesday, the Monday being the Labour Day holiday. According to Ms. Goneau, she had sent him an email invitation to attend the meeting on Tuesday, given that the Monday was a holiday. The grievor stated that he did not get the email. He stated that at or about this time a new scheduling-calendar program had been set up on the computer system and that, he had not been provided training on it; hence, he did not know how the system worked and did not know the Monday meeting had been moved to the Tuesday.

[45] The grievor stated that he was not told in any way other than via the electronic notice; no one came and got him for the meeting, despite that Ms. Cauchy's cubicle was on one side of his and Ms. Goneau's was on the other, and all three were expected at the same meeting place.

[46] There is no evidence that the grievor acknowledged receipt of the invitation or agreed to the meeting date or time.

[47] In the letter of discipline dated October 28, 2008, Ms. Goneau states as follows:

...

Further to the investigation meeting on September 8, 2008, I find that you have breached the Standards of Conduct and the Values and Ethics Code for the Public Service. On September 2, 2008 you did not attend the meeting scheduled at 11:00 a.m. to discuss your statement of work submitted on August 29, 2008 and your progress. This meeting was scheduled in accordance with the action plan to improve your performance that you signed on July 30, 2008. This behaviour is unacceptable and can be neither condoned nor tolerated. I expect you, as a public servant, to comply with the Standards of Conduct and the Values and Ethics Code for the Public Service, which are the principles by which we carry out our roles and responsibilities and are part of the Terms and Conditions of your employment in the Public Service.

...

. . . I have considered that you denied having received the invitation for the meeting and made no attempt to confirm if a meeting had been scheduled. . . .

...

[48] Ms. Goneau testified that as of October of 2008, the grievor's performance had not improved, and as such, a second action plan was to be put into place. The second action plan ("Action Plan No. 2") was set out in a letter dated October 16, 2008 from Ms. Goneau.

[49] Action Plan No. 2 was identical in substance to Action Plan No. 1, except as follows:

- the date of the plan, which was October 16, 2008;
- the date the plan was supposed to start, which was October 20, 2008;
- the date the first report was to be delivered, which was October 24, 2008;
- the last weekly meeting date, which was February 16, 2008;
- the signature on the letter and the action plan, which was Ms. Goneau's and not Ms. Cauchy's; and
- the plan, in the event that the weekly Monday meeting were not possible on the Monday, was that management would reschedule it for the next available day.

[50] While Ms. Goneau testified that at this time Ms. Cauchy was no longer supervising the grievor, Action Plan No. 2 specified that the weekly Monday morning meetings would be with Ms. Cauchy and Ms. Goneau.

[51] On November 13, 2008, Ms. Goneau sent the grievor a letter entitled Management Expectations. As both grievances are with respect to discipline based on that letter, I am reproducing it in full as follows:

I would like to take this opportunity to provide you with further information on management expectations. More specifically, I would like to reiterate that your supervisor is the Chief or the Acting Chief of the Minister's Writing Unit. All leave requests and absences from the office must be sent for approval to this person. Should there be any confusion as to who should be approving your request, you may send it to me and I will redirect accordingly.

You have previously indicated that your hours of work are from 9:00 to 17:00, Monday thru Friday. Your lunch break is

from 12.30 to 13.30. I am requesting that you respect this schedule. Should you need to modify your working hours for any reasons, this change must be approved beforehand by your supervisor.

In regards to the Weekly Writer's meeting, your presence is mandatory unless you have a scheduled medical appointment or if you are on approved leave.

With respect to e-mails and invitations, I am requesting that when I send you an e-mail that you respond to me directly. I also ask that you acknowledge receipt of all the e-mails that you receive from your supervisor or myself and provide a response immediately or indicate when you will be responding. I will not accept a response from a third party unless it is from your immediate supervisor. Also, you will respond to all invitations set to you by MCU management, in your calendar through Outlook, within 24 hours of having received it in your Calendar.

Furthermore, I am requesting that you attend all training courses for which you have been registered according to your learning plan.

Failure to comply with any of the above conditions may result in further administrative action being taken. Deviation from these conditions will only be permitted upon appropriate authorization from me, your manager, or in my absence, from your direct supervisor.

If you have any further questions, or would like to discuss any details of this letter, please do not hesitate to contact me directly.

Sincerely,

*Louise Goneau
Manager, Minister's Correspondence Unit*

[52] The grievor acknowledged receipt of the November 13, 2008 letter, without prejudice, that same day.

[53] By letter dated November 25, 2008, the grievor was given a three-day suspension for failing to deliver his weekly statement of work by the 3:00 pm deadline on Friday, October 31, 2008. According to the letter, the grievor did not explain why he

missed the deadline; nor did he exhibit any remorse. The letter does not state when the statement of work was delivered.

[54] The letter of November 25, 2008, also refers to the grievor as not complying with the *Standards of Conduct* and the *Values and Ethics Code*; however, it does not indicate which *Standards of Conduct* or which provision of the *Values and Ethics Code* were breached. It further instructs the grievor to become familiar with the *Standards of Conduct* and *Values and Ethics Code*.

[55] The grievor stated he grieved this discipline. However there was no evidence as to what happened to the grievance.

[56] On December 10, 2008, Ms. Goneau received an email from George Ogwel, Acting Chief, MCU, which appeared to be a response by him to an email she had sent to him requesting information. The email from Mr. Ogwel set out a conversation that he stated he had with the grievor two days earlier. In that email, Mr. Ogwel states to Ms. Goneau that he spoke to the grievor and that the discussion centred on Mr. Ogwel's understanding of the grievor's work hours. According to Mr. Ogwel, the discussion took place after 5:00 pm, and the grievor confirmed to him that his workday ended at 5:00 pm and that he was not working at the time the discussion was taking place. Mr. Ogwel states that he did not continue the discussion with the grievor. He does not indicate that he instructed the grievor to leave the office.

[57] In his evidence, the grievor was brought to the December 10, 2008 email that Mr. Ogwel sent to Ms. Goneau and did not agree that the exchange with Mr. Ogwel went exactly in that manner.

[58] After receiving Mr. Ogwel's email on December 10, 2008, Ms. Goneau emailed the grievor that same day and stated that it had been brought to her attention that he had left the office, on more than one occasion, after 17:00 hours. Ms. Goneau goes on to state in her email that according to the letter entitled *Management Expectations*, which the grievor signed on November 13, 2008, she expects the grievor to respect his hours of work and to leave the office shortly after 17:00 hours.

[59] On December 30, 2008, Ms. Goneau emailed the grievor, advising him that it had been brought to her attention that on more than one occasion he had left work after 5:00 pm. The email goes on to state that the letter of November 13, 2008, expects him

to respect his hours of work and to leave the office shortly after 5:00 pm. The email then states, "At that time I requested that you respect this agreement to avoid further administrative actions." The email states that if the grievor wishes to stay after that time, he must receive prior authorization from his supervisor. Ms. Goneau indicates that if the grievor ignores this directive he will be considered insubordinate, and disciplinary measures will be taken. The email also refers to the DASCO being locked at 5:00 pm daily.

[60] The email of December 30, 2008 was copied to Mr. Ogwel. Although a specific start date was not provided, Mr. Ogwel, by this time, had become the grievor's supervisor.

[61] Mr. Ogwel did not testify.

[62] The grievor, when cross-examined with respect to staying past 5:00 pm, responded that one of the occasions referred to by Ms. Goneau in Exhibit E-1, Tab 10, was with respect to December 18, 2008. The grievor stated he recalled this occasion as he was cleaning up his work station and putting on his electronic out-of-office message as he was leaving the office for vacation.

[63] Ms. Goneau did not testify as to what her working hours were; however, the grievor did state that she left work, as a rule, sometime at or around 3:00 pm. He also testified that Mr. Ogwel was often not at the office when the grievor finished work. The grievor testified that he was the only writer who worked until 5:00 pm.

[64] By letter dated March 2, 2009, the grievor was informed of allegations of misconduct against him, which were that from February 18 to February 20, 2009, he failed to store his files in the DASCO before it was locked at 4:55 pm, and that he failed to comply with his hours of work as outlined in the Management Expectations letter of November 13, 2008. The March 2, 2009 letter also advised that a disciplinary hearing would be conducted to determine whether the allegations were substantiated and whether disciplinary action should be taken.

[65] By letter dated March 10, 2009, the grievor was given a five-day suspension as discipline with respect to four alleged acts of misconduct, namely:

1. on February 19, 2009, the grievor left the office sometime after 5:15 pm;

2. on February 20, 2009, the grievor left the office sometime after 5:31 pm;
3. on February 18, 2009, the grievor failed to comply with the MCU internal directive to store his files in the DASCO at the end of the day before it was locked at 4:55 pm; and
4. on February 19, 2009, the grievor failed to comply with the MCU internal directive to store his files in the DASCO at the end of the day before it was locked at 4:55 pm.

[66] It is alleged that the grievor failed to lock his files in the DASCO before 4:55 pm on February 18 and 19, 2009. The evidence in support of this came from Ms. Goneau, who pointed to emails found at Exhibit E-1, Tab 10. With respect to February 18, 2009, Ms. Goneau had to have the grievor's filing cabinet opened to retrieve a file. With respect to February 19, 2009, the grievor requested Mr. Ogwel to store file(s) for him, as the DASCO was already locked. The grievor confirmed in his evidence that this was the case and that he requested Mr. Ogwel to store the file(s), which Mr. Ogwel refused to do. The grievor sent an email to Mr. Ogwel confirming this fact at 5:14 pm on February 19, 2009, which was also the basis of the evidence of him being at the office past 5:00 pm on that day.

[67] On February 19, 2009, there was an email exchange between the grievor and Mr. Ogwel, which arose as the DASCO was locked and the grievor's files were not in it. The grievor testified that when he went to place his files in the DASCO, it was already locked. He stated that he contacted Mr. Ogwel and asked him to lock the files in his cabinet instead of the grievor locking them in his own. Mr. Ogwel refused this option and the grievor stated that he therefore locked the files in his own cabinet and sent Mr. Ogwel the email dated February 19, 2009 at 5:14 pm.

[68] On February 20, 2009, the grievor sent Ms. Goneau an email time-stamped at 5:31 pm. This is the only evidence with respect to the grievor being in the office past 5:00 pm on that day.

[69] The grievor testified that he was under such pressure to produce with respect to his action plans that he would work as close as he could until the DASCO was going to be locked up such that he could comply with his action plans.

[70] I was not provided with the actual times that the DASCO was locked on the days for which the grievor was disciplined for not having his files locked in the DASCO. Ms. Goneau was not responsible for locking the DASCO at the end of the day. The grievor testified that sometimes the DASCO was locked before the 4:55 pm deadline.

[71] The employee responsible for locking the DASCO did not testify.

[72] I was not provided with a copy of the MCU internal directive that the grievor was alleged to have breached about the storage of files in the DASCO.

[73] By letter dated May 2, 2009, the grievor was informed of allegations of misconduct against him, which were that on March 5 and 6, 2009, he failed to comply with the hours of work as outlined in the Management Expectations letter of November 13, 2008 and that on May 4, 2009, he failed to communicate directly with his supervisor to advise that he would not be returning to work on May 11, 2009. The letter also advised that a disciplinary hearing would be conducted to determine whether the allegations were substantiated and whether disciplinary action should be taken.

[74] By letter dated May 27, 2009, the grievor was given a seven-day suspension as discipline with respect to three alleged acts of misconduct, namely:

1. on March 5, 2009, the grievor was still at his desk after 5:15 pm and did not seek prior authorization to remain in the office after his regular hours of work;
2. on March 6, 2009, the grievor sent Ms. Goneau a work-related email at 5:28 pm and had not sought prior authorization to remain in the office after his regular hours of work; and
3. on May 4 2009, the grievor failed to comply with the Management Expectations letter of November 13, 2008 pertaining to requests for leave in that he failed to communicate with his supervisor, the chief of the MCU writers or the acting chief to request leave for May 11, 2009.

[75] The grievor testified that his security pass authorized him to be in the building until 7:00 pm on working days. There is no evidence that that authorization was ever changed or revoked.

[76] There was no direct evidence that the grievor was in the office past 5:00 pm on March 5, 2009. Ms. Goneau stated that she was advised by Mr. Ogwel that the grievor was there past 5:00 pm. The grievor does not recall being in the office past 5:00 pm on March 5, 2009.

[77] On March 6, 2009, the grievor sent an email to Ms. Goneau at 5:28 pm from his work email address. In his evidence, the grievor admitted that he was in the office after 5:00 pm on March 6, 2009 and admitted that he did send the email to Ms. Goneau.

[78] From December 2008 to the end of January 2009, the transit authority in the Ottawa region was subject to strike action by bus drivers. There was no transit service in Ottawa during the strike. The strike ended with a tentative agreement on January 29, 2009; however, full transit service was not resumed in the region until sometime in April 2009.

[79] The grievor testified that during the transit strike he car pooled with a female friend. He stated that their practice was that she would call him when she was leaving her place of work to arrange where and when she would pick him up. He stated that, in most cases, she called before 5:00 pm, but on the odd occasion, she would not call until after 5:00 pm. The grievor did not have a cellular telephone during this time, hence the need to be at his desk for her call to know where she would pick him up.

[80] Exhibit G-1, Tab K, is an email chain between the grievor and his supervisor, Mr. Ogwel. The first email in the chain was sent by Mr. Ogwel on Thursday, January 8, 2009 at 12:05 pm with a copy to Ms. Goneau and another individual whose identity is irrelevant for the purposes of this matter. Mr. Ogwel's email is as follows:

Barry,

Since you were still here yesterday at 2pm when we were given the option to leave, I have been asked to get confirmation from you that you left the office at no later than 5pm. Please confirm by return e-mail.

[81] The grievor responded to Mr. Ogwel as follows:

Hello George,

I did indeed leave the office by 5 p.m. yesterday. I had to wait until then for my transportation from work to home to arrive in this period when I and all other MCU employees are

coping with the OC Transpo strike. From 2 p.m. yesterday until 5 p.m. when I left work yesterday, I was carrying out Public Service related tasks.

...

[82] Exhibit E-1, Tab 10, is a copy of the MCU Writers Meeting minutes dated Tuesday, January 6, 2009; Point No. 7 is "Bus Strike." Under the heading of "decision" for this point, it states the following: "We must continue to contend."

[83] Also at Exhibit E-1, Tab 10, is a copy of a memo signed by Ms. Goneau, dated March 16, 2009 and entitled, "Events surrounding the letter of suspension without pay." In this memo, Ms. Goneau states as follows:

...

Meeting took place on March 4, 2009, between Barry Pugh, Sandra Griffith-Bonaparte (Union Rep), Louise Goneau and Marie-Eve Dore (Staff Relations Officer).

...

- *Hours of Work: Because of the bus strike, he had to remain at his desk until he received a phone call from his ride. However, there was never any mention of this to his supervisor. It was the first time this was ever mentioned.*

...

[84] The grievor was on authorized leave from May 4, 2009, and was scheduled to return to work on May 11, 2009. At Exhibit E-1, Tab 11, there are three pages of notes that were identified by the grievor as his notes with respect to a series of telephone calls from May 4, 2009 through to May 8, 2009 he exchanged with Mr. Ogwel and with Nicole Chamberland, a special projects assistant. The purpose of the calls was that the grievor wished to extend his leave by one day and return to work on May 12, 2009.

[85] The grievor testified that at the time he was on leave, he had heard that Mr. Ogwel had received an appointment and had either left the MCU or was leaving; as such, he stated that his initial call was to Ms. Chamberland as he did not know who was replacing Mr. Ogwel. According to the grievor, Ms. Chamberland confirmed to him that Mr. Ogwel was still the chief of the Writers section.

[86] Exhibit G-1, Tab N, is the minutes of the MCU Writers Meeting for May 7, 2009. The grievor's leave for May 11, 2009 was dealt with by his supervisor at this meeting as it is included in the minutes under heading No. 6, identified as "Announcements, Linda."

[87] The extension of the grievor's leave was authorized, and the grievor was permitted leave for May 11, 2009, returning to work on May 12, 2009.

III. Summary of the arguments

A. For the respondent

[88] The respondent stated that the evidence bears out that it was justified in taking action and giving the grievor the five- and seven-day suspensions.

[89] Ms. Goneau and Ms. Cauchy testified that they became aware of issues with the grievor in 2007. Informal steps, such as verbal coaching and guidance, as well as emails, were unsuccessful, and as such, they were required to put him on two consecutive action plans. There was a clear basis for the action plans; there was no hidden agenda and there was nothing to suggest that he was being targeted. There were work deficiencies that needed to be addressed.

[90] The grievor received a written reprimand in August of 2008, followed shortly thereafter by a one-day and then a three-day suspension.

[91] In November of 2008, Ms. Goneau felt there were still problems with the grievor and that those issues had to be set out in writing. They were in her Management Expectations letter of November 13, 2008.

[92] The grievor needed close supervision, or his work performance would diminish. There is no suggestion that the action taken was done in any way to hurt the grievor. The history of actions taken since Ms. Goneau's arrival demonstrated that management were helping the grievor and at the same time holding him accountable for his actions.

[93] The respondent stated that the grievor's evidence that the email sent to him on December 10, 2008 was the first time he was made aware that he had to seek authorization to stay after 5:00 pm is not accurate.

[94] The respondent explained why it was important for operational and security reasons for all files to be placed in the DASCO every day and locked. These reasons were clear, and the grievor never challenged the legitimacy of this requirement.

[95] The respondent stated that the Ottawa transit strike ended in January 2009. The grievor was never required to stay after 5:00 pm. There was no evidence that management would deny a request to stay after 5:00 pm. There is nothing in the evidence to suggest that management would arbitrarily deny a request to stay past 5:00 pm. The evidence was that the grievor was in the office after the transit strike had ended, on some days until past 5:30 pm.

[96] With respect to the grievor's reasons for not placing his documents in the DASCO, the respondent noted how the grievor tried to have Mr. Ogwel secure the files and that somehow the DASCO personnel were responsible.

[97] Even after receiving a written reprimand and one-day, three-day and five-day suspensions, the grievor continued to not adhere to instructions. The grievor continued to act with impunity in not seeking permission to stay past 5:00 pm. The grievor did not provide an explanation for being in the office until 5:15 pm or 5:30 pm. It was clear that as of March 4 or March 5, 2009, when the grievor was made aware that he was being investigated again for being in the office past 5:00 pm that he should not be there that late. He blatantly disregarded instructions and remained in the office late.

[98] With respect to the leave request for May 11, 2009, the grievor failed to advise his supervisor about wanting to take leave that day. The grievor was speaking with a clerk about getting something, and he advised her that he would not be in on May 11, 2009. The clerk suggested to him that he tell his managers. It was left for Mr. Ogwel to follow up. The grievor decided not to follow clear and simple instructions.

[99] Managers are vested with authority to manage and make decisions about work-related procedures. The grievor's actions were clearly insubordinate. The managers rendered discipline that was progressive and reflective over time of the consistent disregard the grievor had for clearly stated instructions and procedures.

[100] In the case of both the five-day and seven-day suspensions, the grievor clearly disregarded the instruction to seek permission if he was going to stay past 5:00 pm,

and to put his files in the DASCO by 5:00 pm. It was not up to the grievor to stay and work when he saw fit or to advise anyone he wanted to that he would be taking leave.

[101] The respondent cited *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 66, for the following proposition for the grounds to prove insubordination:

1. Was there a clear order, which the grievor understood?
2. Was the order given by a person in authority?
3. Did the grievor disobey the order?

[102] The respondent stated that it is clear that those requirements were met in this case.

[103] The respondent relied on *Mullins v. Deputy Head (Department of the Environment)*, 2013 PSLRB 21, for the proposition that instructions must be clear.

[104] The respondent relied on *Johnston v. Treasury Board (Human Resources Development Canada)*, [1996] C.P.S.S.R.B. No. 52 (Q.L.), to support its position on progressive discipline.

[105] The respondent cited *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, for considering mitigation in discipline cases. The respondent stated that there were no reasons provided by the grievor for continuously disregarding instructions, and he provided no mitigating circumstances as to why the discipline should be reduced.

[106] The respondent relied on *Hogarth v. Treasury Board (Supply and Services)*, [1987] C.P.S.S.R.B. 85 (Q.L.), and *Noel v. Treasury Board (Human Resources Development Canada)*, 2002 PSSRB 26, for the proposition that an adjudicator should reduce a disciplinary penalty imposed by management only if it is clearly unreasonable or wrong. An adjudicator should not intervene just because he or she feels a slightly less-severe penalty might be sufficient.

[107] The respondent cited *Byfield v. Canada Revenue Agency*, 2006 PSLRB 119, as support for the oft-repeated adage of “obey now, grieve later.” There were no instructions to the grievor that were either unreasonable or unlawful. However, there

was a continued failure by the grievor to respect the rules and directions and ample reason to uphold the discipline.

[108] The respondent relied on *Chopra et al. v. Treasury Board (Department of Health)*, 2011 PSLRB 99, for the position that employees can be disciplined even though they may be on leave.

[109] The respondent relied on *Caligo v. C.A.W. Canada, Local 1285*, (1998), 73 L.A.C. (4th) 365, for the proposition that progressive discipline is appropriate in cases in which a number of minor offences occurred.

[110] The respondent also relied on *Duske v. Canadian Food Inspection Agency*, 2007 PSLRB 94, *Cloutier v. Treasury Board (Department of Citizenship and Immigration)*, 2007 PSLRB 42, *Way v. Canada Revenue Agency*, 2008 PSLRB 39, and *Bahniuk v. Canada Revenue Agency*, 2012 PSLRB 107.

B. For the grievor

[111] The grievor argued that the respondent could not rely on the fact that the bus strike ended January 29, 2009, as no evidence was led with respect to the start and end of the bus strike.

[112] The grievor stated that as of late August 2008, through the course of the action plan meetings, all his work was not being accounted for and that even the summary notes of the meetings did not reflect his true work output. Exhibit E-2, Tab 4, contains notes to file prepared by Ms. Cauchy that were supposed to reflect the grievor's work production and the meetings that were held to discuss the grievor's performance.

[113] The grievor argued that he was targeted and singled out by Ms. Goneau and Ms. Cauchy and that this process began when he objected to participating in the team-building questionnaire when Ms. Goneau started as the director of the MCU. The targeting is clear. When one looks at the events involved between July 2008 and May 2009, the grievor was placed on two action plans, was the subject of a harassment complaint from his immediate supervisor, and received a written reprimand and one-, three-, five- and seven-day suspensions.

[114] The grievor referred me to Exhibit E-1, Tab 10, the email sent from Mr. Ogwel to Ms. Goneau, in which Mr. Ogwel recounts for Ms. Goneau a discussion he had with the

grievor on December 8, 2008. Mr. Ogwel stated in his email that he pointed out to the grievor that he (Mr. Ogwel) thought the grievor left at 5:00 pm. The grievor confirmed that this is the time up to which he is supposed to work and then advised Mr. Ogwel that he was not working. Mr. Ogwel stated in his email that he then left. The grievor stated that it is easy to see how he could have misunderstood what Mr. Ogwel was getting at, on the basis of that email; the grievor could not recall that discussion, and Mr. Ogwel did not testify.

[115] The grievor stated, that in all the circumstances, the following questions remain: Was discipline warranted? And if so, was it proportionate and appropriate to the actions of the grievor?

[116] The grievor stated that it is clear that the respondent's argument - that all he had to do was ask to stay late and he would not be denied - is without merit. On March 6, 2009, when the grievor was still at the office at 5:28 pm, and neither Ms. Goneau nor Mr. Ogwel were in the office, he emailed them to advise them that he was still there and that after having a professional discussion with a co-worker, he received his call from his ride. He was disciplined for this.

[117] The grievor pointed out that the respondent's representative, Ms. Goneau, did not act in a timely manner when investigating the alleged misconduct, although she was in fact the main or only witness, or when she clarified the facts that she believed surrounded the misconduct. The grievor cited two examples of this. First, with respect to December 18, 2008, Ms. Goneau testified that she noticed that the grievor was still in the office at 5:45 pm that day. She did not have a discussion with the grievor at that time but waited until the following day to discuss it with Mr. Ogwel by email. This was not raised with the grievor until December 30, 2008, at which time he could not recall why he would have been at work at that time. The second occurrence is with respect to the March 6, 2009 email that the grievor sent to Ms. Goneau. She enquired of Mr. Ogwel the next working day, March 9, 2009, if the grievor had requested permission to stay late, and Mr. Ogwel stated "No," but that he was on French training that day. Ms. Cauchy was copied into the email chain on March 10, 2009, to which she replied that she had not been told the grievor was staying late. Despite having this information by March 10, 2009, two working days after the alleged misconduct, the grievor was not provided notice of the allegations of misconduct and asked to explain himself until May 13, 2009.

[118] With respect to the DASCO, the argument of the respondent was that there was no issue with any employee getting their files put away other than with the grievor; however, the evidence was clear that the grievor was the only employee who worked until 5:00 pm.

[119] The grievor also argued that he was not someone who would knowingly break the rules, a fact that Ms. Cauchy conceded in cross-examination, in that the grievor was someone who, despite not agreeing with something, would follow the rules.

[120] The grievor argued that as set out in Brown and Beatty, *Canadian Labour Arbitration*, at para 7:3612, to establish a case of insubordination, there must be an order, and the person giving the order must have authority to give the order. In addition, the employee must have refused to follow the order.

[121] In *Nowoselsky v. Treasury Board (Solicitor General Canada)*, [1984] C.P.S.S.R.B. No. 120 (Q.L.), the Public Service Staff Relations Board held that there are exceptions to the general principles that establish the essential ingredients to support an allegation of disobedience of a direct order. Those exceptions are that an employee has the right to refuse the order if it would endanger his or her health and safety, require him or her to perform an illegal act, or, in a case of a union official, would result in irreparable harm to the interests of other employees.

[122] In *Azeroual v. Treasury Board (Agriculture Canada)*, [1988] C.P.S.S.R.B. No. 319, the grievor had his five-day suspension reduced to a written reprimand on the basis that the adjudicator found that the grievor had no intention of defying management's authority and, in fact, had every intent of complying with it. The adjudicator looked at whether the seriousness of the act could diminish the penalty.

[123] In *Public Service Employee Relations Commission v. B.C.G.E.U.* (2003), 116 L.A.C. (4th) 193, the grievor was terminated from his employment for unauthorized purchases and for submitting wrongful travel claims. The grievor relied on this decision for the proposition that sometimes not adhering strictly to a policy in place might not be considered insubordination.

[124] The grievor relied on *P&H Foods v. U.F.C.W., Local 175*, 1990 CLB 11415, for the proposition that although hearsay evidence is certainly admissible, it cannot be the sole basis for a finding of fact. Arbitrators have generally refused to base a finding of

critical fact on hearsay evidence when those facts could have been established by calling an employee to give direct evidence in that regard. It is the position of the grievor that all the critical facts the respondent is relying upon are hearsay.

[125] The grievor also relied on *Ontario (Ministry of the Environment) v. Professional Engineers Government of Ontario*, 2005 CLB 10698, which sets out the principles required for an employer to uphold a case of insubordination. At page 218, the Ontario Crown Employees Grievance Settlement Board quotes as follows the decision in *Hunter Rose Co. Ltd. v. Graphic Arts International Union, Loc. 28-B* (1980), 27 L.A.C. (2d) 338, at 344 and 345):

Insubordination is a common type of disciplinary action in labour relations matters and is considered to be of a serious nature because it strikes at the very heart of an employer's prerogative; the right to manage. Generally, it is felt that the right to order employees to carry out work activities without debate or action which causes loss of respect is essential to the role of management. In order to constitute insubordination in law, it has been held that there are three essential components which must be present in the proven version of events. First, there must be a clear order understood by the grievor . . . Second, the order must be given by a person in authority over the grievor . . . Finally, the order must be disobeyed

...

The final criteria to establish insubordination is that an order must have been disobeyed by an employee. The direct refusal of an employee to do something is considered to undermine the managerial functions and, generally, arbitrators have looked for an intention to undermine authority as an element of the offence

[126] The grievor also relied on *Sidorski v. Treasury Board (Canadian Grain Commission)*, 2007 PSLRB 107, and *Focker v. Canada Revenue Agency*, 2008 PSLRB 7.

C. Reply of the respondent

[127] The respondent stated that I have to consider the events from its perspective. The grievor was constantly not respecting the directives issued by the respondent. This is what concerned the respondent.

[128] The respondent stated that the grievor's comments about not understanding why he received the discipline letter of August 11, 2008 are not credible. Ms. Goneau spoke to why he was disciplined.

[129] The respondent stated that if the grievor did grieve the discipline given for the earlier misconduct, he did not pursue it.

[130] With respect to the one-day suspension, imposed because the grievor missed the September 2, 2008 meeting and for which he suggested the reason was due to confusion and for which he did grieve, the respondent determined the conduct warranted discipline.

[131] With respect to the three-day suspension, the grievor was disciplined for failing to observe requirements of his workplace, namely, submitting his report at a particular time.

[132] The grievor complained about the method of how disciplinary letters were given to him. The respondent stated that no other employee would have been aware of what was occurring.

[133] With respect to the five-day suspension, the grievor did not seek authorization to stay late and failed to put his files in the DASCO. The discipline and quantum are both appropriate.

[134] With respect to the seven-day suspension, there was no dispute by the grievor that he remained in the DND premises past 5:00 pm on March 5 and 6, 2009, even though he was supposed to seek permission before 5:00 pm if he were to stay late.

IV. Reasons

[135] Adjudication hearings with respect to discipline under paragraph 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the respondent.

[136] The usual basis for adjudicating issues of discipline is by considering the following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1, referred in *Public Service Employee Relations Commission*, at pages 205, 211): Was there misconduct by the grievor? If there was misconduct, was the discipline imposed by the employer an appropriate

penalty in the circumstances? If the discipline imposed was not appropriate, what alternate penalty is just and equitable in the circumstances?

[137] As stated in *Mullins*, misconduct is a general term that can encompass insubordination (at para 60). Misconduct is defined by the *Canadian Oxford Dictionary*, Second Edition, as “improper or unprofessional behaviour.”

[138] The type of misconduct that the respondent alleged the grievor engaged in is insubordination. In cases of this type, Brown and Beatty state that the essential elements that are required to be proven are as follows:

1. an order was given;
2. the order was clearly communicated to the employee;
3. the person communicating the order had the proper authority to give the order; and
4. the employee receiving the order either refused to acknowledge the order or actually refused to comply.

[139] In *Nowoselsky*, it is stated that the general principle cited in the last paragraph in Brown and Beatty, as well as the case law cited by the parties with respect to insubordination, is subject to specific exceptions, namely, that the employee has the right to refuse the order if this order would endanger his or her health and safety, require him or her to perform an illegal act, or, in the case of a union official, would result in irreparable harm to the interests of other employees.

[140] In *Public Service Employee Relations Commission*, insubordination is defined as constituting “resistance or defiance of authority, disobedience, rebelliousness”; it implies “physical or mental resistance to authority.”

[141] An example of insubordination was set out in *Public Service Employee Relations Commission*, to illustrate exactly what it is meant to define. The arbitrator set out the example of a construction worker failing to wear a hard hat on a construction site and as such being in breach of his or her employer’s policy requiring him to do so. While this may be an offence, a breach of policy and misconduct, it is not in and of itself insubordination. However, if the employee, who is not wearing his or her hard hat, is

given a direct order to put it on by someone in his organization who has authority over him or her, and he or she continues to refuse to put it on, this would constitute insubordination.

[142] The basis of the misconduct alleged by the respondent is set out in the letters of discipline dated March 10, 2009 and May 27, 2009. Both letters state that the discipline is based on the grievor breaching instructions set out in the Management Expectations letter of November 13, 2008, and in the case of the five-day suspension, a breach of the MCU's internal directives (failure to secure files in the DASCO by 4:55 pm). There are a total of seven separate acts of alleged misconduct, of which four are with respect to staying at the office past 5:00 pm; two are for failing to lock file(s) in the DASCO and one is for the grievor failing to communicate with his supervisor to request leave.

A. Performance management (action plans)

[143] It appears that the alleged misconduct that led to the grievor's discipline had its roots in his work performance during the period leading up to and coinciding with the initiating of Action Plan No. 1 by Ms. Cauchy and Ms. Goneau at the end of July 2008. According to them, the grievor's work was subpar, based on their assessment his work compared to other writers in the MCU.

[144] The reasoning behind the action plans was that it appeared that, in the views of both Ms. Cauchy and Ms. Goneau, the grievor was not producing enough work; he was behind his fellow writers in the amount of correspondence he produced and delivered. The action plans, they said, were to improve the grievor's performance. It is clear to me that while that may have been the stated purpose, the action plans could and would only lead to failure and later to discipline.

[145] According to Ms. Goneau, 25 new files per week were what writers were completing, and as such, this standard should have been what the grievor was required to meet. That being said, the action plans were not set up in a manner to allow the grievor to achieve this goal. The normal workday was 7.5 hours, and the normal workweek was 37.5 hours. Given the standard articulated by Ms. Goneau, writers should have completed 25 new files per 37.5 hours of work. There are several problems with this reasoning.

[146] First, the grievor did not have the same 37.5 hours of work that his co-workers had to complete the same task. The grievor's work time was reduced by Ms. Cauchy and Ms. Goneau by the action plans. The grievor's hours of work were from 9:00 am to 5:00 pm. The grievor was the only writer working until 5:00 pm; however, the DASCO was to be locked by 4:55 every day. Assuming the DASCO was locked on time every day, at a minimum, the grievor had five minutes less Monday through Thursday, for a total of 20 less minutes. Twenty less minutes appears on its face to be a *de minimis* amount of time in the scheme of a 37.5-hour workweek; however, it is not in the case of someone who has been identified as having difficulty in completing tasks in a set period, as was the case with the grievor.

[147] In addition, on Fridays, the grievor lost an additional two-and-a-quarter hours of work time because he had to supply Ms. Cauchy or Ms. Goneau (depending on the action plan) with his written report on his work that week by 3:00 pm. Hence, he lost the two hours from the 3:00 pm deadline to his 5:00 pm end of workday. On top of that, he had to produce his report. The grievor's testimony was that it took about 15 minutes to do up his report. The grievor also lost time at the beginning of every week as he was to meet with Ms. Cauchy and Ms. Goneau (or whoever was supervising him instead of Ms. Cauchy) every Monday to discuss his weekly report. While I was not provided any specific evidence as to the amount of time these meetings took, from the evidence I did hear, they did not exceed a half hour and were likely in the range of a quarter of an hour. The grievor, who according to his supervisors was having difficulty getting work done, was expected, as per his action plans, to do the same amount of work as his co-workers (who were not having performance problems) in less time. This, in my view, set the grievor up to fail.

[148] According to the evidence of Ms. Cauchy and Ms. Goneau, the grievor was not achieving the same completion rate as his co-workers; however, their solution was to reduce the number of hours available for him to complete the same number of files as his co-workers. If the grievor was truly having production and performance issues and difficulty producing the same work target as his fellow writers, reducing his work hours was not going to allow him to reach a target he already could not meet. I find that the reasoning that was applied in developing this action plan was, to the say the least, unsound and could only lead to the grievor failing to meet the plan in place. The grievor was entitled to a level playing field, which is not what he received. If in 37.5

hours of work he could not achieve the 25 new files per week, how could he go from 37.5 hours to something less than that and complete the 25 new files?

[149] As set out earlier, “file” was not defined. It is obvious that not all files were equal. Some could be a single simple response to a single letter, while others could be complex. A letter could require research, or not; it could be about a single topic, or many. All may require research, or some may not. If a writer received 25 new files that were single-topic letters requiring no research and simple responses, I expect that he or she would have been able to complete the work in less than the 37.5 hours allotted. However, if he or she had files that were complex and required much more research, it could have taken longer. One complex file may take a lot longer than one simple file. The suggestion that the grievor complete 25 new files per week was simplistic and was not supported with information as to the complexity of the files or the comparative workloads in the MCU. Depending on the circumstances, the requirement could have been unreasonable and it certainly raises the question as to whether or not the performance action plan was warranted or driven by other factors. There was no evidence presented to properly assess the issues related to the grievor’s volume of work. The grievor testified that he often carried complex files for example and this was not disputed. I was not provided any detail as to the grievor’s workload in comparison to the other writers.

[150] It is this same reasoning by Ms. Goneau that permeates the discipline process as it related to the grievor. It is most evident in the facts put forth to support the last alleged act of misconduct as set out in the letter of May 27, 2009 and best illustrates the work environment of the grievor. As such, I will address that alleged misconduct first, following which I will address the allegations about the grievor’s failure to lock his files in the DASC0 before 4:55 pm and his remaining at the office past 5:00 pm.

B. Leave request for May 11, 2009

[151] The second reason given for the imposing of the seven-day suspension in the letter of May 27, 2009 was that the grievor failed to communicate with his supervisor to request leave for Monday, May 11, 2009.

[152] The grievor, who was directly involved, did testify, as did Ms. Goneau; however, she was not at all involved in the request for leave. Mr. Ogwel, the grievor’s supervisor

at the time, did not testify. Ms. Chamberland, who was also involved in the events that led to this alleged misconduct, did not testify.

[153] The November 13, 2008 letter upon which the discipline is based states the following with respect to taking leave:

...

... I would like to reiterate that your supervisor is the Chief or the Acting Chief of the Minister's Writing Unit. All leave requests and absences from the office must be sent for approval to this person. Should there be any confusion as to who should be approving your request, you may send it to me and I will redirect accordingly.

...

[154] Exhibit E-2, Tab 11, contains a series of documents, including a series of typewritten notes, which the grievor identified as pertaining to his request for leave for May 11, 2009.

[155] The grievor was on authorized leave and away from work on Monday, May 4, 2009, and was scheduled to return on Monday, May 11, 2009. The grievor testified as to the series of telephone calls and messages that were exchanged by him and others, including his supervisor, Mr. Ogwel, starting on May 4, 2009, and continuing through to May 7, 2009. It is clear that although the grievor's initial call was to Ms. Chamberland, and subsequent calls were exchanged between them, he did then exchange a series of phone calls with Mr. Ogwel, requesting and being granted leave for May 11, 2009.

[156] While the grievor's initial exchange might have been with someone other than Mr. Ogwel, the grievor explained that, at that time, he was out of the office and had learned that Mr. Ogwel had received an appointment to another position, and as such, it was unclear to him as to whom he was reporting and if he had a new supervisor. He stated that it was due to this that his initial contact was with Ms. Chamberland.

[157] Quite frankly, this is a tempest in a teapot. The only evidence with respect to this matter came from the grievor. He requested leave from his supervisor, who granted it. Neither Mr. Ogwel nor Ms. Chamberland testified. Ms. Goneau was not present for the grievor's exchanges with Mr. Ogwel and Ms. Chamberland. The grievor

testified as to what occurred over a series of voice exchanges with both Mr. Ogwel and Ms. Chamberland, of which he produced a written chronology and summary.

[158] Exhibit G-1, Tab N, the minutes of the Writers meeting dated Thursday, May 7, 2009, confirmed that the grievor would be returning to work on May 12, 2009. The grievor testified that his leave was granted. When this fact (that the grievor was on authorized leave on May 11, 2009) was put to Ms. Goneau on cross-examination, initially, she did not agree; however, eventually, when pushed, she conceded this point.

[159] Ms. Goneau appeared to be of the view that the grievor should be punished because his initial contact point within the organization was not with Mr. Ogwel, despite that he had sought and received authorized leave from Mr. Ogwel. This does not breach the requirements set out by Ms. Goneau in her letter of November 13, 2008; nor is this misconduct. The grievor was required to seek and obtain approval from the appropriate supervisor for leave before taking that leave. He did this.

[160] I am flummoxed by Ms. Goneau's attitude and approach to this issue and find it confounding, and it so clearly illustrated the troubling environment within which the grievor had to work. When one looks at the totality of the evidence, it reveals a work environment in which the grievor was being micromanaged in such a fashion that any step could potentially lead to discipline. He was caught between the proverbial rock and a hard place; he was in a constant no-win situation. He had less time per week to complete the same tasks as his co-workers. At the same time, he was being threatened with discipline if he remained at work after 5:00 pm. He was the only writer to work until 5:00 pm and was up against a deadline of 4:55 pm to put his files away.

[161] Another aspect of this troubling environment, which I will address in detail later is the grievor, like many other federal public servants in the National Capital Region, utilized public transit and was at the mercy of the bitter Ottawa winter, during the transit strike of 2008-2009. If his ride had not called by 5:00 pm, was he to leave the office with no apparent way to locate his ride home? Anyone who lives and works in Ottawa appreciates how cold and nasty the winter can be, and there was no way he could just stand somewhere outside the vast DND HQ complex and hope for the best.

[162] The grievor had, at the time of the alleged misconduct, 27 years of service with the federal public service. After the arrival of Ms. Cauchy and Ms. Goneau in the short span of roughly 10 months, from the end of July 2008 to the end of May 2009, the

grievor was placed on a 7-month performance management program, subject to a harassment complaint by his supervisor, outlining 11 different occurrences of alleged harassment, and disciplined 5 times, for a total of 16 days of suspension, including 1 written reprimand.

[163] In imposing the five-day and seven-day suspensions via the letters of March 10, 2009 and May 27, 2009, Ms. Goneau stated as follows:

...

This behaviour is unacceptable and can be neither condoned nor tolerated. I expect you, as a Public Servant, to comply with the Standards of Conduct and the Values and Ethics Code for the Public Service which are the principles by which we carry out our roles and responsibilities and are part of the Terms and Conditions of your employment in the Public Service.

...

[164] This exact language is also found in Ms. Goneau's letters dated October 28 and November 25, 2008, conveying to the grievor respectively his one-day and three-day suspensions. A similar version of this paragraph was also contained in Ms. Goneau's August 11, 2008 written reprimand.

[165] There was no evidence that any action of the grievor breached any *Standard of Conduct* or any provision of the *Values and Ethics Code for the Public Service*. Neither witness led by the respondent pointed me to any standard of conduct that the grievor allegedly breached; nor was I provided with any value or ethic that the grievor allegedly breached.

C. The DASCO

[166] The second reason for discipline in the letter of March 10, 2009 was that on February 18 and 19, 2009, the grievor failed to comply with the MCU internal directives to store his files in the DASCO at the end of each day before it is locked at 4:55 pm.

[167] I understand and accept the reasoning behind the requirement for all files to be locked in the secure central storage unit known as the DASCO.

[168] The respondent argued that no other writer had any trouble with getting his or her files in the DASCO. This argument is without merit, as the grievor was the only

writer who worked until 5:00 pm. Therefore, locking files in the DASCO obviously was not a problem for any other writer as none worked until 5:00 pm.

[169] This fact begs the question as to why the time the DASCO was locked down was not until sometime after the last writer stopped working, to allow a buffer to complete working and get the files locked up. It could have been quite simple to allow a buffer of 10 or 15 minutes to allow the grievor, the last writer, to get his files to the DASCO. Perhaps the grievor could have been given the responsibility to lock the DASCO. Perhaps the working hours of the grievor or the person responsible for locking the DASCO could have been altered.

[170] The grievor testified that, at times, the DASCO was locked before 4:55 pm.

[171] The burden is on the respondent to demonstrate on a balance of probabilities that the grievor misconducted himself. The respondent has argued that the grievor was insubordinate, which was based on his failure to store files in the DASCO. While the grievor was required to deliver his files to the DASCO, he was not necessarily provided with access to the DASCO. If the DASCO was locked before the 4:55 pm deadline, it was impossible for him to comply. If the DASCO was locked before the 4:55 pm deadline, the grievor, through no fault of his own was, in the eyes of Ms. Goneau, insubordinate. This certainly does not meet the definition of insubordination.

[172] As set out at the beginning of these reasons, adjudication hearings are hearings *de novo*, and in cases of discipline, the burden of proof is with the respondent.

[173] In cases of misconduct, it is the employer who has the burden of proof, not the grievor. While the burden of proof in labour cases is on a balance of probabilities, misconduct is not some form of morphed absolute or strict liability offence in which the grievor is required to prove his or her innocence. It is not sufficient in this case for the respondent to merely state, based on hearsay, that the grievor committed an offence or the fact that an event occurred as proof of the offence. As set out in *P & H Foods*, although hearsay evidence is certainly admissible, it cannot be the sole basis for a critical finding of fact (at page 8).

[174] On a balance of probabilities, the respondent has not established misconduct by the grievor. All it has established is that on February 18 and 19, 2009, the grievor's files were not in the DASCO; however, there is no evidence that the grievor was

engaged in misconduct, let alone insubordination. The evidence adduced does not meet the test as set out in *Wm. Scott & Company Ltd.*

[175] Ms. Goneau certainly had the authority to issue the directive about the DASCO and that files had to be stored in it, and further that the DASCO should be locked by a certain time each day. However, there is no evidence that the DASCO was actually locked at 4:55 pm. Ms. Goneau was not responsible for locking the DASCO. Indeed, the evidence of the grievor was that Ms. Goneau left work as a rule around 3 pm. The person responsible for locking the DASCO on the days that the grievor allegedly did not have his files in the DASCO did not testify. The grievor also testified that the DASCO was sometimes locked before 4:55 pm.

[176] As the respondent has not proved on a balance of probabilities that the grievor was responsible for the non-locking of the files in the DASCO by 4:55 pm, it has not satisfied the burden of proof, and as such, no discipline for these actions is warranted.

D. Remaining in the office past 5:00 pm

[177] Of the seven alleged acts of misconduct for which the grievor received discipline, four acts are of the same nature, namely, that the grievor was in the office after 5:00 pm on a workday without prior authorization from his supervisor. On two of the occasions, the grievor was identified as being in the office at 5:15 pm, and on the other two occasions, at or around 5:30 pm, give or take a minute or two. Two of the alleged acts contributed to the imposition of the five-day suspension, and two contributed to the imposition of the seven-day suspension.

[178] The issue of the grievor's hours of work appears to have had its foundation in the written reprimand dated August 11, 2008 from Ms. Goneau, in which she states as follows at the third paragraph:

I have observed misconduct in the area of your work attendance: lack of punctuality, absence from the office without your supervisor's permission and leaving work without authorization. Furthermore, you have been using departmental premises, equipment and electronic network for other than official purposes. This situation is not acceptable and I am asking you to use departmental premises, during your hours of work, for your official duties only. Given this situation, I must ask you to confirm your hours of work, breaks and lunch. . . .

[179] After that paragraph, the August 11, 2008 letter is divided into three subheadings, as follows:

- a. “Absences at any time for medical, dental, Union business or other related type of appointments/absences”;
- b. “Annual Leave”; and
- c. “Attendance and rest periods.”

[180] The letter of August 11, 2008 does not set out specifics as to what exactly the grievor had done to warrant the reprimand. In her evidence, Ms. Goneau could say only that “he was absent from the office without permission,” “most probably he was not at his desk during work hours which was likely noticed on more than one occasion,” and “he was asked where he was when he was absent and did not give an appropriate answer.” She stated that some of this she witnessed and that some was told to her.

[181] Despite the absence of specifics in the letter of August 11, 2008 and a lack of specifics in her evidence, what can be clearly garnered from the evidence is that Ms. Goneau had determined that the grievor was not present during his scheduled daily work hours and was not accounting for his absences, for whatever reason. In short, the grievor was not at work, working, when he was supposed to be.

[182] This point is what is reiterated in the Management Expectations letter of November 13, 2008. Like the August 11, 2008 letter, the November 13, 2008 correspondence speaks in generalities, but it clearly reiterates the need for the grievor to request leave and report absences to the appropriate supervisor and that he respect his hours of work, from 9:00 am to 5:00 pm, and his lunch break, from 12:30 to 1:30 pm, stating that if he wished to change them, he required approval from his supervisor.

[183] It is clear to me that the problem being addressed both in the August 11 and November 13, 2008 letters is that the grievor did not appear to be at work, working, when he was supposed to be. The problem being addressed was keeping the grievor at work working, not getting him to leave work as soon as possible. Nowhere in the letter of November 13, 2008, which is stated to be the basis for the discipline for remaining in the office past 5:00 pm in both the March 10 and May 27, 2009 letters, does it state

that the grievor could not be in the office past 5:00 pm or that he had to vacate the office almost immediately after 5:00 pm.

[184] I was not provided with any policy, guideline, directive, regulation or rule that states or stated that employees must leave their workplaces immediately upon the expiration of their stated work hours. The grievor's place of work is in a downtown office tower. It is not an industrial setting. Employees do not punch-in a time clock and punch-out when taking breaks or leaving. It is not a setting where one employee must leave a workstation and another take his or her place. There was no suggestion that the grievor, by staying after his scheduled end time of 5:00 pm, was disturbing other employees or keeping them from their work. There was no suggestion that the grievor was attempting to work overtime or to be paid overtime.

[185] The respondent is entitled to get 7.5 hours of work out of each employee. There is no doubt in my mind that if the grievor was arriving late for work due to reasons out of his control, he would still have been required to work his 7.5 hours per day.

[186] The letter of November 13, 2008 clearly indicates that the grievor was expected to respect his work schedule, which was that he was to be at work from 9:00 am to 5:00 pm daily and take his lunch from 12:30 to 1:30 pm. The grievor was asked to request the approval of his supervisor if he wished to change these hours.

[187] There is no evidence that the grievor did not respect his work schedule. There is no evidence that he altered his hours of work. There is no evidence or suggestion that the grievor was looking for overtime pay for the time he remained at the office past 5:00 pm.

[188] The respondent has argued that the grievor was guilty of misconduct by breaching the Management Expectations letter of November 13, 2008. Nowhere in this letter does it state that the grievor had to leave work immediately after 5:00 pm. The letter, which is set out in its entirety at paragraph 51 of this decision, was clearly designed to ensure the grievor was at work on time and that he would honour the employment contract by working when he was supposed to be working and having leave approved. This letter was clearly meant to address a problem that the grievor had received a written reprimand for in August 2008, which was not being at work or being absent without leave. As this letter does not set out any rule, regulation, policy or directive that required employees to vacate their workplace immediately upon the

end of their 7.5 hours of work, the grievor cannot be said to be in breach of this letter, unless of course there is evidence that he was not at work or working during his hours of work.

[189] As both of the letters of discipline clearly state that the grievor was being disciplined for breaching the instructions in the November 13, 2008 Management Expectations letter, and there is no evidence that the grievor did not respect his hours of work by working the hours expected and taking lunch when expected, the discipline is not supported and must fail.

[190] One of the documents that the respondent did proffer in evidence was part of Exhibit E-10, an email dated December 30, 2008 from Ms. Goneau to the grievor and others. The respondent did not rely on this email as the order itself that the grievor was disobeying, rather just as evidence that the grievor was aware of the instruction that had been given earlier in the letter of November 13, 2008.

[191] The December 30, 2008 email, while it admonishes the grievor about staying late on December 18, 2008 and refers to an earlier email about this issue, states as follows:

I reminded you that according to the letter entitled 'Management Expectations' which you signed on November 13, 2008, you are to respect your hours of work thus leaving the office shortly after 17:00. At that time I requested that you respect this agreement to avoid any administrative actions.

....

Security issue. As you know, the Dasco is locked at 17:00 and all files much be properly secured before we close for the day. That being said, MCU management must ensure that all protected documents are stored appropriately before everyone leaves for the day and the fact that you remain in the office after all have left prevents us from conducting the security check in your office like all other offices in DSCS. Since we/you have been advised on at least two occasions that you had left protected documents on your desk and had left for the day, I am concerned that you could again inadvertently leave protected material on your desk.

...

With this e-mail, I am informing you again that you are required to respect your hours of work and to leave the office shortly after 17:00. If you wish to stay longer than 17:00 you must received prior authorization from your supervisor. Should you decide to ignore this directive, it will be viewed as insubordination and disciplinary measures will be taken.

[192] In this email Mr. Goneau ties back the instruction (to leave shortly after 5:00 pm) to the Management Expectations letter of November 13, 2008. As stated before that is not what that letter states, nor was the evidence led in support of that letter related to staying past the end of the work day. Rather it addressed not being at work working during working hours. Also, Ms. Goneau appears to tie in leaving shortly after 5:00 pm with the security of documents issue in the December 30, 2008 email. These are two separate issues that have nothing to do with one another. In fact, the placing of the files in the DASCO has less to do with security than it has to do with being able to always have access to the files. The evidence before me was that all writers had locked cabinets in which, prior to the arrival of Ms. Goneau, they secured documents. While the DASCO provided a secure structure in which to lock files at the end of the day, it was not introduced because the MCU did not have secure facilities in which to safeguard their sensitive documents. As stated in the evidence before me, when the grievor's documents did not make it into the DASCO, he locked them in his office cabinet. The reason provided to me in evidence by Ms. Goneau for establishing the DASCO was the efficiency of having everyone lock their files in one common place where they could be easily accessed by management, not because of security issues.

[193] In the email of December 30, 2008, Ms. Goneau suggests that somehow the grievor's staying in the office past 5:00 pm has some relation to securing documents or contributing to breaching security regarding the documents, as his presence after 5:00 pm somehow precluded someone from conducting a security check of his office. I was not provided with any evidence that this was the case. I was provided with no evidence with regard to security checks of offices; if or when they occurred; and, who carried them out. Whoever was responsible for office or building security did not give evidence. The evidence presented to me was that Ms. Goneau worked until 3:00 pm. If she was aware that security checks took place at a specific time, she did not provide any evidence of it. In any case there is no evidence that the grievor's presence after 5:00 pm would preclude security checks. The evidence given by Ms. Goneau on this did not make sense. If the grievor was in the office and had documents they were secure; if the documents were locked in a cabinet, they were secure; if the documents were locked in the DASCO, which they were supposed to be as of 4:55 pm, they were secure. Indeed, nothing would prevent whomever was responsible for doing the security sweep (if the grievor, or anyone else for that matter was in the office), from reminding people to lock up any documents that required locking up.

[194] As I understand the structure of the organization, Mr. Ogwel was the grievor's direct supervisor, and would, on a day to day basis, oversee the grievor at work. There is no doubt that Ms. Goneau was Mr. Ogwel's supervisor and generally responsible for the day to day operations of the MCU. It is interesting that the grievor was required to seek approval for leave from Mr. Ogwel; one would also assume that Mr. Ogwel could determine if the grievor was to work and be paid overtime. As of 5:00 pm though the grievor was "off the clock", he was not working. As set out in the seminal case of *Millhaven Fibres Ltd. v. Oil, Chemical & Atomic Workers Int'l Union, Local 9-670*, [1967] O.L.A.A. No. 4 (QL), an employer is generally not the custodian of employee's behaviour outside of work. Clearly, the grievor was not being paid after 5:00 pm, and his employer cannot generally dictate his behaviour. That being said, there is no doubt that he was still on his employer's premise which the employer does still control.

[195] As set out earlier, I was provided with no evidence by way of legislation, regulation, policy, direction, rule, or guideline that provides for requiring employees to vacate their workstation or the employer's premises within a fixed amount of time after their scheduled work hours were complete. While all of the letters of discipline given to the grievor refer to the Standards of Conduct and the Values and Ethics Code, I was never provided with any reference to any Standard or Value or Ethic that this rule related to. The evidence proffered by the grievor was that he was authorized to be on the premises until 7:00 pm. While there are certainly instructions that supervisors can give and employees must obey, which can and often do include hours of work; what work is done and in what fashion and order work is to be carried out, supervisors do not have unlimited authority. Depending on the organization, the ability to make and enforce rules for the employees is derived from some authority, and is usually set out in some form of a document. In the federal public service, authority is often held by a Deputy Head and delegated down; depending on the organization and what the authority is. Treasury Board is the employer and as such sets out terms and conditions of employment, negotiates collective agreements and generally establishes the rules for the workplace. For the grievor to be culpable of misconduct by remaining at his workplace past 5:00 pm, there must be a legitimate rule created by someone who has the authority to make that rule. I am not persuaded that Ms. Goneau had that authority. Without that authority, she can no more tell the grievor to leave precisely at 5:00 pm or 5:01 pm as she can dictate what newspaper he can read on his lunch break. While there are certainly obvious rules that every employee, regardless of their

organization should be aware of without having to have it set out in writing; such as being on time for work; actually working while at work; and not stealing from their employer, the requirement to leave the office immediately after the scheduled hours of work are complete is not such an obvious rule.

[196] While this is sufficient to dismiss the allegation that the grievor was insubordinate in staying past 5 pm, I have addressed this further in the section below on the Transit strike and its impact and in the section pertaining to the testimony of Ms. Goneau. I have also addressed the issues raised in the testimony provided by Ms. Cauchy.

E. Transit strike

[197] As of December 2008, the city of Ottawa was subject to a stoppage of the public transit system due to a labour dispute. The labour dispute lasted for just under two months and was resolved at the very end of January 2009. While the dispute was resolved, actual service did not commence immediately, and service was not fully restored for a number of months, in some instances until April of 2009.

[198] The grievor testified that during this time frame, he and his female friend carpooled to work due to the transit strike, she keeping the car and picking him up at the end of the day. He testified that, at this time, he did not have a cell phone and had an arrangement with his friend that she would call him before she left work, such that he would know when and where to meet her. Given the transit strike, and the extreme temperatures that Ottawa is known to experience during the winter months, and given the very large potential area in and around the DND HQ, I find that this was not an unreasonable arrangement to have made. Perhaps it was not the best; however, it was an arrangement made to get to and from work at a time when temperatures often were extremely cold and traffic congestion could have been anticipated.

[199] The respondent urged me to disregard this reason, as the transit strike came to an end on January 29, 2009. The grievor urged me to disregard the respondent's submission on this point, given that no evidence about the start and end date of the transit strike was before me. The transit strike that occurred during this period was a very well-known and well-publicized event that disrupted the city of Ottawa and its environs during December 2008 and January 2009, officially settling on January 29, 2009. Of this, I can take official notice. It was also well known and well

publicized that, while the strike was officially settled on January 29, 2009, transit service in the city and environs remained disrupted and was not fully re-engaged until April 2009. As such, I have no reason to doubt the grievor's evidence that on those days in which he remained at the office after 5:00 pm, he was waiting for his ride to call him.

[200] The transit strike was raised by the grievor with his immediate supervisor as early as January 8, 2009 in an email, when he was asked when he left for the day, as the office had been given the option of leaving early. In his reply, the grievor stated that he had left at 5:00 pm as he had to wait for his ride. At this time, he specifically referred to waiting for his ride in light of the transit strike.

[201] The grievor stated in his evidence that he felt targeted. I have no doubt that he was targeted by his supervisors. The email exchange of January 8, 2009 is so very telling. Mr. Ogwel stated that he was asked to confirm with the grievor that he left before 5:00 pm.

[202] I also take official notice of the fact that the winter months in Ottawa can be particularly cold and snow-filled. I would have had no difficulty in finding that the grievor remaining in the office to wait for a call advising where and when his ride was picking him up, in the winter in Ottawa and during a transit strike, was reasonable and fit into the exception for disobeying a direct order for health and safety reasons, had he done so.

F. Evidence of the respondent's witnesses

1. Evidence of Ms. Goneau

[203] There was no evidence that the grievor was conducting himself inappropriately while on the respondent's premises. In the letter of reprimand dated August 11, 2008, Ms. Goneau suggested that at times the grievor had used the departmental premises, equipment and electronic network for things other than official duties. When Ms. Goneau testified, she could not specify exactly what these allegations amounted to. In fact, there was no evidence that anything the grievor did after 5:00 pm while he was still on the departmental premises was inappropriate.

[204] On December 10, 2008, Ms. Goneau sent the grievor an email stating that it had been brought to her attention that the grievor had left the office after 5:00 pm. She stated as follows:

. . . I would like to remind you that according to the letter entitled 'Management Expectations' which you signed on November 13, 2008, you are to respect your hours of work thus leaving the office shortly after 17:00. I am requesting that you respect this agreement to avoid any administrative actions.

. . .

[205] I find the December 10, 2008 email disturbing. The grievor's hours of work end at 5:00 pm (17:00 hours). If he were to leave before that time without authorization, he would have been in breach of the letter of November 13, 2008, as his work hours were from 9:00 am to 5:00 pm. In addition, it is abundantly clear that the two letters proffered to address the grievor's work hours (dated August 11 and November 13, 2008) imply that he was not at work for the full work period; he was absent without authorization. Nothing in them suggests that he was restricted from being in the office after 5:00 pm.

[206] The email of December 10, 2008 also suggests that the grievor had made an agreement on November 13, 2008, the implication being that the grievor had signified his agreement to its terms by signing the letter of November 13, 2008. I do not find as a fact that the grievor made any sort of agreement. In fact, the signature of the grievor was preceded by the following sentence: "Please acknowledge receipt of this letter by endorsement below. Your signature implies that you understand the content of this letter." The grievor did sign his acknowledgment of the letter and added in writing that he signed it without prejudice. The suggestion by Ms. Goneau that the grievor had made an agreement is false.

[207] Before receiving the December 10, 2008 email, Ms. Goneau requested from Mr. Ogwel a recollection of a discussion he had with the grievor two days earlier. As Mr. Ogwel did not testify, I do not know if Mr. Ogwel's email represents an accurate recounting of the entire discussion. If I accept that the conversation Mr. Ogwel recounts in his email to Ms. Goneau is entirely accurate, all it reflects is Mr. Ogwel and the grievor's mutual understanding that the grievor's daily hours of work ended at 5:00 pm. Mr. Ogwel did not instruct the grievor to leave the office.

[208] Following the December 10, 2008 email, the grievor was sent an email by Ms. Goneau on December 30, 2008, again raising the issue of him still being in the office after 5:00 pm on a workday. Ms. Goneau stated that if he wished to stay longer than 5:00 pm, he had to receive prior authorization from his supervisor. I find the submission of the respondent disingenuous. The grievor started work only at 9:00 am. If he arrived between 15 to 30 minutes before that time, would he not have been allowed to attend at his workstation? What about other employees? Were they required to vacate the premises immediately upon the end of their designated working hours?

[209] The evidence by Ms. Goneau on this was that she had, for safety reasons, a need to know where all employees were at all times, in case of an emergency. I do not accept Ms. Goneau's evidence on this point, as the grievor was authorized by his employer to be in the building until 7:00 pm. He could leave the building and then re-access the building until 7:00 pm.

[210] I have difficulty accepting any of the evidence of Ms. Goneau with respect to this issue, given the manner in which this issue was portrayed before me. The respondent argued that all the grievor had to do was let a manager know that he would stay after 5:00 pm and that this was all that was required. This was both misleading and disingenuous. When the grievor did inform Ms. Goneau that he was in the office late and was engaged in work activities, it was held against him, forming part of either the five-day or the seven-day suspension.

[211] In the case of the five-day suspension, the grievor was penalized not only for not having put his files in the DASCO, but also when he was dealing with it and discussing it with his supervisor, Mr. Ogwel, and 5:00 pm came and went, he was penalized for not seeking authorization before 5:00 pm to stay after 5:00 pm. It is obvious that in this situation, the supervisor must implicitly have given the grievor permission to stay after 5 pm. This simply illustrates yet again, the degree to which the grievor was placed in a no-win situation in this work environment.

[212] In the case of the seven-day suspension, the grievor sent an email to Mr. Ogwel, Ms. Goneau and Ms. Cauchy, stating that he had placed his files in the DASCO at 4:55 pm, had a professional discussion with a Louis-Phillipe and then received his phone call about his ride home. He advised his supervisor that he was at the office past 5:00 pm.

[213] The respondent attempted, during the cross-examination of the grievor, to get the grievor to admit that for him to be allowed to remain in the office after 5:00 pm, all he had to do was advise his supervisor of this fact. Indeed, this argument was advanced by the respondent. This suggestion is also found in a memo at Exhibit E-1, Tab 10, being the notes from a meeting of February 2, 2009, which states as follows:

George reminded Barry that he is required to inform his supervisor if he intends to be in the office later than 5:00 pm.

[214] While this is what the respondent suggested was the case, in fact, unless the grievor sought out in advance of 5:00 pm, authorization to be in the office past 5:00 pm, and it was pre-approved, in Ms. Goneau's view, he would be in breach of the Management Expectations letter. As mentioned above, this is so clearly the case of what occurred on February 19, 2009 and again on March 6, 2009. In both cases, he was in the office past 5:00 pm. On February 19, 2009, he was there due to not having his files locked in the DASCO and was having a discussion with his supervisor about it. It is so patently obvious that his supervisor was aware that he was in the office past 5:00 pm, as they were having a discussion about the fact that the grievor had file(s) to be locked up. This was clearly a work-related issue and problem, regardless of who was responsible; the grievor was engaged with his supervisor over this issue. This clearly demonstrates to me that the grievor was being singled out and targeted by Ms. Goneau.

[215] On March 6, 2009, the grievor was in the office past 5:00 pm, and neither Mr. Ogwel nor Ms. Goneau was there, and as such, upon completing a professional discussion with someone at the office and upon receipt of the call from his ride, he emailed them to advise them that he was leaving. He stated in his evidence he did this because he disbelieved their advice to him that all he had to do was advise them he was staying after 5:00 pm and it would be fine, a fact he did not believe. When he advised them, he was disciplined again.

[216] I also am troubled by the timing surrounding the alleged investigation of the incidents. The argument by the respondent that time passed for a variety of reasons and that a meeting could not be set up sooner, particularly with respect to the March 5 and 6, 2009 incidents, does not withstand scrutiny. The evidence about why the grievor was in the office past 5:00 pm on those days was within Ms. Goneau's hands by Monday, March 10, 2009. The only person who needed to be canvassed about this after March 10, 2009 was the grievor. The allegations were known to Ms. Goneau on

March 6, 2009 (the date she received his email), and on March 10, 2009, the date Mr. Ogwel advised Ms. Goneau that the grievor had been in the office until 5:00 pm. Yet she did not raise it with the grievor until May 13, 2009, when she sent him the letter alleging misconduct. The disciplinary meeting to discuss these incidents took place on May 25, 2009. The grievor stated at the meeting that he could not recall why he was at the office past 5:00 pm on two specific days, two months in the past. This does not surprise me. I am uncertain how anyone could specifically recall what he or she was doing at two very specific times on two very specific days more than two months earlier, when he or she had no reason to make note of the events. In my view, it was incumbent on Ms. Goneau to raise this with the grievor immediately upon having the information on March 10, or shortly after that. She contacted Mr. Ogwel the next business day after March 6, 2009 at 7:39 am, yet she waited more than two months to raise it with the grievor.

2. Evidence of Ms. Cauchy

[217] I was perplexed as to why the respondent led the evidence of Ms. Cauchy. Although Ms. Cauchy was originally the grievor's immediate supervisor, the evidence clearly showed she was no longer supervising him as of early December 2008. The email dated December 30, 2008 from Ms. Goneau to the grievor did not copy Ms. Cauchy; however, she did copy Mr. Ogwel. Although no specific date was given as to when Ms. Cauchy ceased supervising the grievor, the last reference seems to be her notes with respect to Action Plan No. 1, with the last entry being September 8, 2008; more than five months before the incidents before me.

[218] Ms. Cauchy did not impose any of the discipline on the grievor.

[219] Ms. Cauchy did not provide any evidence with respect to the alleged wrongdoing that led to any of the discipline imposed on the grievor.

[220] Indeed, much of the evidence of Ms. Cauchy seemed to surround the strained relationship she had with the grievor, which eventually led to the filing of her harassment complaint. I was provided with a copy of the investigation report with respect to the harassment complaint. All the allegations of harassment leveled against the grievor by Ms. Cauchy, except one, were not founded. For the one allegation that was founded, the grievor was given an eight-day suspension as discipline, which he grieved. His grievance was allowed, and the discipline was set aside.

[221] I am left to speculate as to the purpose of all this evidence as it only appears to me to be an attack on the grievor's character.

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

(The Order appears on the next page)

V. Order

[223] The grievance against the five-day suspension is allowed. The grievor is to be reimbursed all lost salary and benefits, which he would otherwise have earned had he not been disciplined.

[224] I also award interest on the net lost salary with respect to the five-day suspension at the rate of 2.5% per annum, as set out in the table for pre-judgment interest in section 127 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, to be calculated from the date of the first pay period after March 24, 2009. The interest is to be compounded annually up to and including the day on which the payment is made.

[225] The grievance against the seven-day suspension is allowed. The grievor is to be reimbursed all lost salary and benefits, which he would otherwise have earned had he not been disciplined.

[226] I also award interest on the net lost salary with respect to the seven-day suspension at the rate of 2.5% per annum, as set out in the table for pre-judgment interest in section 127 of the *Courts of Justice Act*, to be calculated from the date of the first pay period after June 5, 2009. The interest is to be compounded annually up to and including the day on which the payment is made.

[227] Any record of the five-day and seven-day suspensions shall be removed from any of the files pertaining to the grievor.

October 2, 2013.

**John G. Jaworski,
adjudicator**