Files: 166-2-25038
166-2-25683
to 25686
166-2-25697
and 25698
166-2-26110
to 26112

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

NORMAND CLÉROUX

Grievor

and

TREASURY BOARD
(National Defence)

Employer

Before: Thomas W. Brown, Board Member

For the Grievor: Ted Carmichael, Counsel

For the Employer: Maureen S. Crocker, Counsel

Heard at Ottawa, Ontario,
April 25 to 28, 1995, November 27 to 30, 1995; January 29 to February 2; February 5 to 9; February 12 to 14; May 21 to 24; June 3 to 5; and August 8 and 9, 12 to 15 and 26 to 30, 1996.

File:

The grievor, Mr. Normand Cléroux, was at all relevant times employed as a mechanical inspector, GL-COI-10, by the Department of National Defence, in Ottawa, Ontario, at its Uplands Base. He was covered by the collective agreement between the Public Service Alliance of Canada and the Treasury Board for the General Labour and Trades (Supervisory and Non-Supervisory) Group (Codes: 603/92 and 653/92).

This decision deals with seven separate grievances filed by the grievor against a seven-day suspension; two 10-day suspensions; a 15-day suspension; a 20-day suspension, all without pay, and an indefinite suspension and discharge, all for the reasons set out below. Also before me were a grievance concerning denial of sick leave and two grievances concerning pay deductions. I dismiss these three grievances as the bargaining agent has not signified its willingness to represent the grievor in accordance with section 92 of the *Public Service Staff Relations Act*.

The parties have requested that I issue one decision dealing with all these grievances and that the grievances be heard and determined one after the other, with the evidence given in each to serve as common evidence for each and every one of the grievances as if repeated in the hearing of each. The principles of progressive discipline were followed by the employer in escalating the penalties meted out to the grievor for his alleged misconduct. I rendered an earlier decision dealing with a five-day suspension without pay given to the grievor. In that decision, Board file 166-2-25037, I reduced the penalty of five days to a letter of reprimand for the reasons set out in my decision.

The hearings for these seven grievances were held over the period April 1995 to August 1996, and on 39 hearing days. Fifty-three witnesses were heard in examination-in-chief, in cross-examination, in redirect, and in rebuttal evidence. One hundred and thirty-two documents were submitted as exhibits.

The first grievance to be dealt with at this hearing is that involving a seven-day suspension without pay meted out to the grievor for alleged misconduct on January 27, 1993.

On December 16, 1992, the grievor was contacted by Corporal Stewart of the military police and asked whether he would consent to undergo a polygraph examination in connection with an investigation which he was conducting. The

investigation had to do with the fabrication and installation of railings on the Base. The grievor had been to some extent involved in this installation and had given a deposition in the investigation, it would appear. A polygraph examination is a test of whether a person is telling the truth in connection with certain events and forms part of the investigative instruments available to the military police. The grievor agreed to undergo the polygraph examination at a date to be set. He was later informed that the date would be January 27, 1993. He agreed to that date, but on January 26, 1993, he telephoned Cpl. Stewart to ask for a letter setting out what the polygraph examination would involve. Cpl. Stewart was not there at the time so the grievor went to Cpl. Stewart's office that day, at around 4:00 p.m., and met with him. Cpl. Stewart told him that he was not himself authorized to issue such a letter but that his supervisor, who was then away from the office, was. They agreed that Cpl. Stewart would meet the grievor at the latter's office in the contracts section in 12 Hangar at Uplands Base at 7:50 a.m. the next day, January 27, 1993, and that they would then proceed to the site of the polygraph examination. It is not quite clear whether Cpl. Stewart had said to the grievor that he would go from 12 Hangar back to his own office first, where they would meet with the Corporal's supervisor, who would issue the letter requested or whether the Corporal was to have this letter with him to hand over to the grievor before they left for the polygraph examination.

In any event, upon meeting each other at around 8:00 a.m. inside the entrance to the contracts office, the grievor said to Cpl. Stewart: "Do you have the letter?" Cpl. Stewart said: "No". The grievor said: "No letter, no polygraph". Cpl. Stewart said: "Yesterday, we agreed that I would pick you up and bring you down to the military police section where you could speak to the Base Security Officer and the letter would be provided". Again, the grievor said: "No letter, no polygraph", and started to walk away. The Corporal followed, saying in a louder voice: "Are you declining to take the polygraph?" The grievor confirmed that he was not going to take the polygraph. He continued to follow the grievor and, at his cubicle, asked him if he could use his phone. He phoned the polygraph examiner and told him that the individual had declined to take the polygraph examination and to cancel it. While he was still on the phone, the grievor left his cubicle with his winter coat and boots. The contracts officer, Mr. Paul Bois, and the grievor’s immediate supervisor, Mr. Frank Gaulin, were

nearby at the time and testified to the heated exchange between the grievor and Cpl. Stewart.

The grievor stated that, after leaving his cubicle, he passed in front of his supervisor's, Mr. Gaulin's, office, stopped and said: "I'm going to 5 Hangar to see Joe Allen", his union representative. Mr. Gaulin, who was then on the phone, testified that the grievor had said: "... on union business". He continued on the phone for another 30 or 45 seconds and when his call was over, he looked in the hallway for the grievor but the grievor had left the office. Leaving the office, the grievor wrote in the register book that he was leaving for "5 Hangar and downtown". The grievor went to 5 Hangar and met with Joe Allen for between one and two hours and then went to the personnel office to make some inquiries. From there he went to 8 Hangar to meet with Mr. Doug Heil, another inspector, to examine a refrigeration installation. Prior to January 27, the grievor had agreed to assist Mr. Heil concerning this installation but it is unclear as to when they were to meet. The grievor then returned to the contracts office and did not report his return to his supervisor.

At the disciplinary hearing held by Lt.-Col. G.C. Brown concerning this incident, the only element involved was the grievor leaving his workstation and the contracts office on January 27. Was his departure authorized or not, was the question. The other elements, that is, where he had gone or the length of his absence or his failure to report back to his supervisor upon his return, were not being weighed to determine whether he had misconducted himself in leaving as he did.

Lt.-Col. Brown was told by the grievor that he knew the procedure for requesting leave to go on personal or union business: he must obtain permission from his supervisor prior to leaving. It was not good enough just to inform his supervisor that he was leaving; he must have permission. He acknowledged having received numerous counsellings about needing to have prior permission before leaving on union or personal business. The grievor told Lt.-Col. Brown that he stopped in front of Mr. Gaulin's office and told him that he was leaving to go to see Joe Allen in 5 Hangar. Mr. Gaulin, who was then on the phone, took the phone from his ear and listened to the grievor telling him that he was leaving and where he was going. The grievor believed that Mr. Gaulin understood what he was saying. The grievor also believed that Mr. Gaulin's reaction gave him permission to leave. He left

Mr. Gaulin's office and signed out saying that he was going to 5 Hangar and "downtown".

Mr. Gaulin told Lt.-Col. Brown that the grievor informed him that he was leaving for 5 Hangar "... on union business", as he was passing by his office. The grievor had not stopped and Mr. Gaulin had not had time to, nor did he take the phone from his ear or in any way acknowledge what the grievor was saying to him. He definitely did not give the grievor permission to leave. He continued his phone call, which ended some 30 or 40 seconds later, and went to look for the grievor in the hallway but he had already left the contracts section. Mr. Bois was nearby at the time and testified that Mr. Gaulin had stated to him and Cpl. Stewart, who was also in the area, that the grievor had gone to 5 Hangar without permission.

Lt.-Col. Brown acknowledged the foregoing testimony as having been given to him at the disciplinary hearing. In rebuttal evidence, he stated that at the hearing held on February 15, 1993 he "wanted to learn whether the grievor had received permission to leave, whether he had been granted permission to leave, and whether he understood what was expected of him by his supervisor. I was interested in knowing where he went and whether there were any other extenuating circumstances", Lt.-Col. Brown stated. To the surprise of Lt.-Col. Brown, the grievor had stated that he had never been given instructions on what he was required to do before leaving on union or personal business. Lt.-Col. Brown stated: "The fact that he left was the important thing". He had asked the grievor whether there were any "extenuating circumstances" which might justify his departure and the grievor had replied that there weren't any. Lt.-Col. Brown had wanted to know from the grievor what his "frame of mind was on January 27 and what his demeanor was". He had, accordingly, asked him about the military police and the polygraph examination. "Was the military police rude to you?", he had asked the grievor. "Were you intimidated by the manner in which the military police had come to you and whether there had been a confrontation with the military police?". Mr. Cléroux's answer was "No" to everything, Lt.-Col. Brown testified. The grievor told him that he had met the Corporal who came to pick him up. He had met him before. He had initially agreed to go to the polygraph but had changed his mind because he had requested a piece of paper, a letter, from them but did not get it, so he changed his mind. When asked by Lt.-Col. Brown what were his feelings concerning the polygraph, the grievor was

"aloof", saying: "It's just a polygraph", shrugging his shoulders. Lt.-Col. Brown did not pursue the subject. The grievor had indicated to him that the planned polygraph was not “a big issue” with him.

Lt.-Col. Brown concluded that, based on the evidence given at the disciplinary hearing, he was satisfied that the grievor had not requested permission to leave nor had he been granted permission. He was satisfied that the grievor understood what his supervisors expected of him in terms of leaving the workplace for union or personal business.

With regard to the penalty of a seven-day suspension without pay, Lt.-Col. Brown testified: "I looked at what transpired over the last five or six months with respect to his [the grievor's] performance and general attitude and my initial plan was to ensure that we tried to rehabilitate him and progressively when we realized he wasn't responding we elevated the level of counselling ... My staff was completely exasperated as to what to do next ... I believed he would come around ... The things we were asking him to do were quite simple and straightforward, like reporting to work on time, not leaving before the end of the day, not reading newspapers during working hours, submitting annual leave requests before taking such leave, following very simple procedures, and keeping his supervisor informed of his whereabouts. I also took into account that he had been counselled by the previous management where the problems were similar or the same as he was having with the new management where the problems were related to behaviour or attendance. I also considered the fact that he had twice been given the chance to start over ... I also looked at his disciplinary record and I was aware that he had served a five-day suspension".

In cross-examination in rebuttal evidence, Lt.-Col. Brown stated that Mr. Joe Allen was present at the disciplinary hearing to represent the grievor but did not give any evidence. Lt.-Col. Brown was asked whether if he knew at the time that the five-day suspension meted out to the grievor had been set aside and a letter of reprimand substituted instead, he would have changed his decision to impose a seven-day suspension in the instant case. He answered: "It would have impacted upon my decision if there had been no five-day suspension".

Evidence was advanced through witnesses for the employer of numerous instances of counselling with the grievor during which he was clearly made aware of what was expected of him regarding his absences from the workplace, his attendance at work, the procedure to be followed with respect to absences from the workplace, including annual leave, sick leave, late arrivals and early departures, and leave for personal and union business, hours of work, including break time, and contract procedures to be followed.

At this hearing, the grievor took a different stance with regard to the issues involved. He now stated that he had on December 16, 1992 discussed the polygraph examination with Cpl. Stewart and "I said yes" to the examination. Cpl. Stewart had not said much, just mentioned it. The grievor had contacted Cpl. Stewart on January 26, 1993 to get a letter "to make me feel better". He said he would have one in the morning.

The next morning, January 27, 1993, the grievor met Cpl. Stewart around 8:00 a.m. in the entrance to the contracts office. Cpl. Stewart said: "Good morning. Ready to go?" The grievor said: "Do you have the letter?" Cpl. Stewart said: "No". The grievor said: "If you have no letter, I'm not going". The grievor then turned around and walked towards his office. Cpl. Stewart followed him and put the same question to him: "Are you coming or not?" The grievor replied "No", while walking towards his desk. "The second time his tone was a little louder and I proceeded to my desk and he followed me up to my desk, at which time he raised his voice and said to me", the grievor stated, "What's wrong, Norm, are you chickening out on me, getting cold feet?" The Corporal’s tone was about as loud as the second time above-mentioned. The grievor had replied "No". The grievor was standing at the time and picked up his phone and called Joe Allen but he was not in his office at that moment. He sat down and at that point Cpl. Stewart said: "If you want, I will take you to the police building and you can talk to my boss". The grievor replied "No" in a loud voice. "We had both raised our voices. Cpl. Stewart was loud and pretty firm when he was speaking at the time. Maybe not aggressive but he wanted to make sure that I was getting the message; it was obvious he wanted me to take the polygraph", the grievor stated.

Next, Cpl. Stewart had said: "Well, I have to call my boss in order to cancel this test", while still standing in the entrance to the grievor's cubicle; he had not moved. “Then, Cpl. Stewart walked into my office and walked between me and the desk for the purpose of using my telephone. He had not asked me to use the phone", the grievor stated. He had not given Cpl. Stewart any reason to believe that it was okay to use the phone. "Cpl. Stewart was rude in the way he barged into the office and used the phone", the grievor stated. "He was not happy and was moving at a fast pace, like a person who was not happy", the grievor asserted, and added: "Cpl. Stewart picked up the receiver and at that point I put on my boots and grabbed my coat and left the office". Cpl. Stewart was dialing the phone and the grievor did not hear anything he said on the phone. The grievor had left his office in an "orderly fashion". He had "just got up, put my coat on my arm and left", he stated.

The grievor had stopped at Mr. Gaulin's office and informed him that he was leaving. He said: "I'm leaving for 5 Hangar to consult with Joe Allen". He does not recollect having said the word "union". He had stopped, he insisted. He was walking faster than usual but was not running. He stopped at the counter to sign the register book. He wrote his name and indicated that he was going to 5 Hangar and "downtown".

When asked why he was leaving the office as he did, the grievor replied that he wanted to establish what his rights were with regard to the polygraph examination and the investigation. "Once I would get to 5 Hangar and discuss with Mr. Allen, a senior executive of the Local, he would surely put me in contact with PSAC lawyers", he stated. He had indicated "downtown" because he could need to go to the PSAC building on Gilmour Street for legal advice. He had signed the register at 8:05 a.m.

The grievor had gone directly to Mr. Allen’s office but he was not there at the time so he went to Canex and remained there for 15 to 20 minutes and returned to Mr. Allen’s office. Mr. Allen was then in his office. They had a lengthy discussion. “It had lasted a good hour”, he said. They had discussed the polygraph examination and the grievor told Mr. Allen what had happened. Mr. Allen had told him that he could not be forced to take a polygraph test; it was voluntary and inadmissible in court. He also suggested that the grievor not take the test and it would be a good thing to contact a lawyer and file a harassment grievance.

When he arrived back at the contracts office, the grievor stated that he reported to Mr. Gaulin, his supervisor, and advised him that he had returned. He reported his return in the register book and indicated also that he had been in 11 Hangar (with Mr. Heil).

When asked by his counsel how he felt during the exchange with Cpl. Stewart, the grievor replied: "I was upset. I didn't like the things that had evolved that morning. It was not very healthy for anyone in the office to go through this ... There was no doubt in my mind that this was police harassment ... the fact that he followed me from the entrance and came into my office, just barged into my office, and took my phone. It was a never-ending investigation on the railings. My impression was that there was no problem for Cpl. Stewart to produce a letter. Then, I started believing I wouldn't be getting one".

In cross-examination, the grievor acknowledged that he had been instructed that prior authorization is required when leaving the office for personal or union business and one had "to follow instructions", he added. The grievor stated further had he had always in the past obtained prior permission before leaving on personal or union business. At first, permission could be requested verbally but later in 1992 and 1993, permission to leave had to be requested in advance, in writing. Simply leaving a note that he was leaving on personal or union business was not sufficient. A reply back from his supervisor was required before he could leave the office for personal or union business.

With regard to the incident on the morning on January 27, 1993, the grievor, in connection with Cpl. Stewart attempting to get him to take the polygraph examination, stated: "It was pretty intimidating. I had to take sick leave on account of this. I requested one simple letter. First thing I know, the police was all over me, in my workplace. The letter never came". He added: "I was getting fed up facing the entire situation. I was practically pushed out of my office. It's not the phone, it's the way it was done. He didn't like me not going to the polygraph. He was doing his job .. the intimidation concerning the railings, the polygraph ... I can't stay there ... I was intimidated by the police being in my cubicle". The grievor agreed that he did not follow instructions in place for leaving by receiving authorization but explained that

"the situation was not routine, not a normal day's work". He had gone to see Joe Allen because he was upset, felt frustrated, and was seeking help.

The grievor admits having told Lt.-Col. Brown at his disciplinary hearing that Cpl. Stewart had not been rude or "had imposed himself". He added in his cross-examination at this hearing: "No, well he [Cpl. Stewart] didn't give me any choice but to leave the office". He admits having told Lt.-Col. Brown that the polygraph examination "wasn't a big issue" for him.

Mr. Joe Allen testified at this hearing that he had spent almost two hours talking with the grievor on the morning of January 27, 1993. The grievor had come to him saying things were not going well in 12 Hangar where he worked. The grievor arrived very upset, very agitated. Something had happened at his workplace and he had to get out of there. The grievor mentioned the fact that the military police came to take him downtown to do a polygraph test and that he had refused to go and he wanted to know what they could do to him and he indicated that he felt pressure that he do that and the military police said that he would not leave there until the grievor went with him. That is when the grievor said he left his workplace and came to 5 Hanger to see Mr. Allen. Mr. Allen had only advised him that he could not be forced to take the polygraph test; it was voluntary.

The grievor was very upset at the time and felt he had to have someone to talk to so that what he said would not be used against him, that is, "he felt comfortable talking to me because I wouldn't report it to anyone", Mr. Allen stated. The grievor kept saying that he was being pressured to take the polygraph. Finally, the grievor stated he refused to go to the polygraph test. "Norm was so upset. I tried to calm him down. We had coffee. When Norm left I felt he had calmed down", Mr. Allen added. Later in the day, a supervisor called him to confirm that he had met with the grievor. He had not been called as a witness at the disciplinary hearing but had attended. He had, however, made representations but could not remember what they were.

Argument for the Employer

Counsel for the employer stated that it is the employer's position that on January 27, 1993 the grievor walked past his supervisor's office stating that he was leaving for 5 Hangar on union business and proceeded to leave the office without prior authorization.

Mr. Gaulin, the grievor's supervisor, is credible with regard to the main issue before me. The grievor did not stop at Mr. Gaulin's office, he just walked by. Mr. Gaulin was talking on the telephone so could not reply. He finished his conversation on the telephone, looked down the hall and the grievor had left. The grievor acknowledged during cross-examination that he did not wait for a reply from his supervisor. Mr. Gaulin was not cross-examined on this point. Accordingly, the grievor did not follow directions he had been given. He did not request permission, he did not receive permission, and he did not report to his supervisor upon his return.

Counsel submitted that Mr. Gaulin's testimony is supported by that of Mr. Bois and Cpl. Stewart who were present when Mr. Gaulin stated that the grievor had gone to 5 Hangar and without permission. During his testimony, the grievor at no time said that he had sought Mr. Gaulin's permission. As Lt.-Col. Brown has testified, telling a supervisor that you are leaving is not the same as receiving permission. During the disciplinary hearing, the grievor was asked what he had stated to Mr. Gaulin and he replied that he had told Mr. Gaulin that he was going to 5 Hangar on union business. Again, Lt.-Col. Brown was not cross-examined on this point.

Alternatively, counsel argued, whether the grievor used the words "union business" or "Joe Allen" is basically a red herring. Whether he left the office for personal or union matters, he required the employer's authorization. Based on the evidence, counsel submits that the employer has met the onus on it to establish misconduct on a balance of probabilities.

Turning to the question of quantum, counsel asks that I consider the incident itself and the fact that the grievor was clearly made aware of what was expected of him regarding his absences from the workplace. One of the relevant factors in this respect is the numerous instances of counselling regarding this employee. These discussions centered on four issues: (1) his attendance at work; (2) procedures to be

followed with respect to absences from the workplace, including annual leave, sick leave, late arrivals and early departures, and leave for personal and union business; (3) hours of work, including break time; and (4) contract procedures to be followed. Counsel submits that these prior incidents of counselling are relevant to the matter before me in that they relate to similar situations and simple issues concerning workplace directions. The employer's evidence establishes that the grievor was clearly informed of the standards of performance expected of him. This was not a problem unique to the new management structure. His previous supervisors had given the grievor both verbal and written counselling on the same types of issues and counsel referred to Exhibit E-6 in this regard. There were many incidents of counselling directed at the grievor prior to January 27, 1993, and half of these were to remind the grievor that he required permission for his absences.

Lt.-Col. Brown testified that there was an escalation in the counselling to the grievor in order to bring home to the grievor the seriousness with which management viewed his conduct. The grievor, however, continued to ignore legitimate directions and particularly on January 27, 1993, when he again refused to follow directions that he need get his supervisor's authorization prior to leaving on personal or union business. Counsel submits that this constitutes an act of insubordination. The evidence indicates that the corrective measures undertaken by management were not working. It appears that the grievor did not want to get the employer's message.

Counsel submits that there has been no evidence of remorse, given that the grievor does not acknowledge his misconduct. The evidence of the grievor and Cpl. Stewart establishes one important fact: that the grievor refused to attend the polygraph examination which had been previously scheduled with the grievor's agreement. Counsel submits that Cpl. Stewart's evidence is credible concerning arrangements made, with the grievor's agreement, on January 26, 1993. They were to attend at the Base Security Officer's office to receive a letter requested by the grievor on January 27, the next day. Counsel submits that this evidence logically explains Cpl. Stewart's conduct on the morning of January 27, 1993. He indicated that he arrived at the hangar early in order to bring the grievor back to the Base Security Officer's office to obtain the letter. He also indicated that he did not have the authority to issue such a letter. If the grievor had disagreed with this approach, it would not have been logical for Cpl. Stewart to waste his time by attending at 12

Hangar to pick the grievor up. Secondly, this coincides with the question asked by Cpl. Stewart on January 27, 1993, when he asked the grievor whether he was ready to go. When the grievor responded: "No letter, no polygraph", Cpl. Stewart clarified by saying: "I thought we discussed that I would pick you up to take you over to the station to talk to the Base Security Officer and obtain the letter?" He then followed up with one last question: "Are you declining to take the polygraph?"

Counsel, in support of her position concerning the credibility of Cpl. Stewart, cited the decision in Faryno v. Charney (1952) 2 D.L.R. 354. Cpl. Stewart's evidence is to be believed, she argued. The arrangements agreed upon on January 26 credibly explain Cpl. Stewart's conduct the next morning.

Counsel stated that there is nothing in the evidence before me which condones the grievor's conduct in leaving his place of work without permission. Based on the grievor's response to Cpl. Stewart that "No letter, no polygraph", counsel submits that Cpl. Stewart was justified in clarifying the situation as he did. She suggests that the questions asked of the grievor by Cpl. Stewart were not confrontational or provoking and simply did not constitute harassment. Counsel submits that there is no credible evidence to suggest that Cpl. Stewart was pressuring the grievor to take the polygraph and no credible evidence that he followed the grievor around the office. Rather, he walked with him to his cubicle and on the way asked these questions. Even according to the grievor, Cpl. Stewart remained at the entrance to his cubicle to that point. He then entered the cubicle to use the phone to cancel the polygraph examination. The grievor knew the examination was going to be cancelled and he knew it was voluntary. Shortly after the incident of January 27, 1993, during the disciplinary hearing on February 9, 1993, the grievor was asked whether Cpl. Stewart had been confrontational, rude or intimidating. Counsel submits that his answers at that time and closest to the incident was the most credible evidence he had provided. His answers to each of these questions was: "No". Cpl. Stewart had not been confrontational, rude or intimidating. The grievor indicated that the meeting with the military police and the polygraph was not a big issue. Counsel submits that the grievor is simply looking for an after-the-fact excuse justifying his misconduct on January 27, 1993.

Counsel pointed out some inconsistencies in the grievor's testimony at this hearing for the purpose of aiding in assessing his credibility. The grievor referred in examination-in-chief to Cpl. Stewart's conduct as being harassment yet in cross-examination he said Cpl. Stewart was "just trying to do his job". He also indicated that Cpl. Stewart had barged into his cubicle and he had not indicated that it was okay to use the phone. Although this appeared to be a big issue with the grievor at the time, during cross-examination he was asked whether Cpl. Stewart had asked to use his phone and his response was "No". But when asked: "But you didn't mind?", his answer was: "It was no big issue, but he could have used another phone". The grievor also testified that he was practically pushed out of his office, yet he also testified that he left his office in an orderly fashion and took his time to sign the register. He also testified that he knew Cpl. Stewart had entered his office to cancel the polygraph examination.

Counsel submitted, finally, that management was entitled to expect that the grievor would follow simple instructions he had been given. A strong message is warranted to bring home to the grievor the seriousness of his misconduct. Accordingly, a suspension remaining in the same range as that imposed by Lt.-Col. Brown is warranted, reasonable, and is in the range of appropriate penalties.

Counsel cited in support of her position the following arbitral decisions: Lee (Board file 166-2-22353); Anten (Board files 166-2-25442, 25873, 25874, 25875, 25971); Saint-Jacques (Board file 166-2-22264); Re MacDonalds Consolidated Ltd. and Retail Wholesale Union, Local 580, 14 L.A.C. (4th) 379; Skibicki (Board file 166-2-20723); Moore (Board file 166-2-23658); Wilson (Board file 166-2-25841); Hogarth (Board file 166-2-15583); Re Volvo Canada Ltd. and Canadian Automobile Workers, Local 720 12 L.A.C. (4th) 129; Canadian Labour Arbitration, by Brown and Beatty, paragraph 7:4400, titled "Mitigating factors".

Argument for the Grievor

Counsel for the grievor stated that in his argument he would zero in on the incident of January 27, 1993, and the extenuating factors which might influence my decision as to the number of days of suspension the grievor deserved. Counsel argued that the employer did a good job in showing that when an employee had to absent

himself for union or personal business, the employee needed the permission of his immediate supervisor. The question of whether the grievor absented himself for "union" or "personal business" is not important and is as counsel for the employer has dubbed it, a "red herring". It was obvious in this case, because of the circumstances, that the grievor had left for personal business, in any event.

What was the likely situation for the grievor, counsel queried, given the prospect of a polygraph examination and the ongoing investigation concerning the railings? Harassment and provocation are just words used to express that it was a difficult time for the grievor. The employer brought out what was said at the disciplinary hearing to show that it was not a difficult situation for the grievor. However, look at the testimony of Messrs. Bois and Gaulin, counsel suggested. Mr. Bois, in referring to the events of that morning, said that the grievor and Cpl. Stewart were involved in a heated argument, the duration of which was approximately five minutes. Mr. Gaulin put it at two minutes but there were loud voices and he characterized it as an argument.

The grievor's testimony was that Cpl. Stewart was supposed to provide him with a letter outlining the parameters of the polygraph examination which he was supposed to take. The grievor said that he expected that letter during their meeting in the afternoon of January 26, the day before. Cpl. Stewart said he could not get it because his supervisor was not there at the time to sign it and that he did not promise to have a letter ready for him that day, the 26th of January, when the grievor called at 2:00 p.m. We know that when Cpl. Stewart showed up the next morning he did not have a letter either but said that the grievor had agreed that he would pick him up and bring him back to the Base Security Officer's office to get the letter. Counsel contends that the grievor expected the letter the night before and did not get it. He expected one the next day and did not get it. At this point, he had been promised a letter twice and did not get it. The grievor started to wonder about the good faith of the exercise. Cpl. Stewart said that was just not the case. He did not promise to have a letter for the grievor. There was never a letter.

In relation to the events of January 27, 1993, and the perception of the grievor as to the pressure that was being applied by Cpl. Stewart, we have Mr. Bois' and Mr. Gaulin's statements and Cpl. Stewart's statement that he followed the grievor to

his cubicle and raised his voice in the process and entered without permission into the grievor's personal office. In light of all this, Cpl. Stewart attempts to give us the impression that he gave the grievor a clear idea that the examination was voluntary. If it was voluntary, why did he not just turn around and leave when the grievor said "No" he could not take the examination, counsel asked? He followed him down the corridor and raised his voice and pursued him as to why he was not going to take the lie detector test. Counsel suggests that Cpl. Stewart took a lot of effort to set it up and he was annoyed that the grievor was not going to take the test. He was angry and he acted in a threatening and intimidating manner towards the grievor.

What was the grievor to do in this situation, counsel asked? Counsel thought it was a fair statement that he was not getting a lot of support from his supervisors. There is no love lost between him and his supervisors at this stage. The grievor wanted some answers as to his rights and he wanted some protection from what he perceived as harassing and intimidating procedures. So, he grabbed his coat and boots and moved quickly down the hallway. As the grievor was going by his supervisor's, Mr. Gaulin's, doorway, he says to him: "I'm going to 5 Hangar to meet with Joe Allen". Mr. Gaulin was on the phone at the time. The grievor then went to the front desk and signed out where he was going and, in addition, where he might go: "downtown".

He met with Joe Allen. Mr. Allen testified that the grievor was very upset. They discussed this incident. It took some time for Mr. Allen to calm down the grievor. Upon returning to the contracts office at about 12:30 p.m., he claims that he met Mr. Bois who did not ask him anything about the incident in the morning, although he had heard the commotion that went on between Cpl. Stewart and the grievor.

Although Lt.-Col. Brown testified that during his disciplinary hearing he was interested in hearing any extenuating circumstances surrounding the incident on January 27, 1993, counsel noted that he had not interviewed Cpl. Stewart nor Joe Allen. He questioned the fairness of the disciplinary hearing Lt.-Col. Brown had held. Both Mr. Bois and Mr. Gaulin had heard a confrontation between the grievor and Cpl. Stewart yet they were not interviewed and this because the grievor had told Lt.-Col. Brown that there was "no problem". There was a problem, counsel insisted, and Lt.-Col. Brown should have looked further.

The employer leaned on the fact that the grievor had left without prior authority on union business. As agreed, there is no reason in this case to make a distinction between "union" and "personal" business. This was a distinct situation. Counsel called it an "emergency situation". The grievor had no one to turn to in his immediate office. There was no one there to help him in the situation. He went elsewhere -- to Joe Allen, his union representative.

In any emergency situation there is, apparently, in the office a procedure and in this case, counsel believed, it was followed. Counsel directed my attention to Exhibit E-5 introduced by supervisor Power, paragraphs 20 and 21 on the bottom of page 4, where it is stated that employees will inform their supervisors as soon as possible when there is need to be absent for "... unavoidable emergency". This was such a case for the grievor. He faced an unavoidable emergency because of what was happening around him. He was under pressure from Cpl. Stewart. Cpl. Stewart had investigated him before in another matter. Now he was being investigated on the railings issue. The grievor had testified that "I felt he was in my face in my office". So it is an emergency situation and he advises his supervisor and in advance and not just "as soon as possible", as Exhibit E-5 would require.

With respect to the quantum, counsel submits that Lt.-Col. Brown made his assessment based on an absence from the workplace on the union business criteria. Was the grievor absent, counsel queried? "Yes" he was. Did he ask for permission? "No" he did not, counsel stated. Lt.-Col. Brown had decided that the fact that the grievor was absent for union business called for a seven-day suspension without pay, based on the previous five-day suspension and that if the five-day suspension had not been in place it would have impacted on his decision to award a seven-day suspension. Counsel distinguished the grievor's situation from that found in Faulkner (Board file 166-2-23845) where the grievor was properly suspended for absenting himself without permission. In that case the grievor had deceived his employer by giving a false reason for his absence.

Rebuttal Argument for the Employer

Counsel for the employer pointed to the suggestion by counsel for the grievor that the events of January 27, 1993 should be looked at in a subjective light. Counsel submits that, however, it was up to the grievor to bring to Lt.-Col. Brown's attention any mitigating factors. Lt.-Col. Brown relied on what he was told by the grievor. There is no evidence that the grievor made an issue of the discussion he had had with Cpl. Stewart and there is no evidence that any of the other witnesses referred to any confrontation, intimidation or harassment. Neither Mr. Bois nor Mr. Gaulin heard any of the contents of the discussion between the grievor and Cpl. Stewart.

Counsel submitted that, as the grievor knew the polygraph examination was voluntary and would not be held, there was no reason to leave the office to seek help in determining what his rights were in connection with such an examination. If, in any event, he wanted to leave the office, he should have obtained prior permission. Counsel submits that Mr. Joe Allen had not raised the issue of the grievor's demeanor at the disciplinary hearing because it was not an issue. If it were an issue, he bore the responsibility of raising it at that hearing.

Counsel pointed to the need for an employee to raise information in support of his position. This onus arises whether there is an intentional suppression of evidence or even in cases where an employee does not raise information otherwise in their knowledge. The employee must make disclosure. Counsel pointed to the decision in Skibicki (supra) where the grievor failed to make disclosures to the employer and as a result was denied some measure of the mitigation to which they would otherwise have been entitled.

With respect to the argument of the grievor that this was an "unavoidable emergency" for him, counsel submits that the evidence does not support the conclusion that Cpl. Stewart's conduct either objectively or subjectively constituted intimidation, provocation or harassment to the extent that it becomes an unavoidable emergency, as submitted by counsel for the grievor.

Reasons for Decision

In the morning of January 27, 1993, the grievor left his place of work after walking by the open doorway to his supervisor's office and informing him that he was leaving on personal or union business. His supervisor was on the phone at the time and looking towards the door of his office. It is established and acknowledged by the grievor that the office procedures in place at the time required all employees to obtain prior authorization or permission from their immediate supervisor when leaving the workplace for personal or union business.

Did the grievor obtain prior authorization from his immediate supervisor before leaving the office on January 27, 1993? His immediate supervisor, Mr. Gaulin, said he did not have time to even consider what the grievor told him, as he went by the door of his office and before the grievor had actually left the office. He was on the phone at the time and merely looked up and saw and heard the grievor say that he was leaving on union business. The grievor contended at the disciplinary hearing held by Lt.-Col. Brown concerning this incident that he had stopped in the doorway of Mr. Gaulin's office and told him that he was going to 5 Hanger to see Mr. Joe Allen, his union representative. He had his winter boots on and his winter coat over an arm. After saying this to Mr. Gaulin, he left immediately, signed out in the register at the front desk, indicating that he was going to 8 Hanger and "downtown". He left the office and went to see Mr. Allen. He signed out at 8:05 a.m. and returned to work at 12:30 p.m.

At this hearing, the grievor acknowledged that he had not followed procedures in place and had not obtained prior authorization from his supervisor. He acknowledged that merely informing his supervisor that he was leaving did not meet the requirement that he obtain prior authorization before leaving. In fact, his counsel acknowledged in argument that the grievor had left his workplace without having received prior authorization.

Lt.-Col. Brown stated at this hearing that the only matter he considered when deciding to impose a penalty of seven days suspension without pay was whether the grievor had left without requesting or obtaining prior authorization from his supervisor, Mr. Gaulin. The grievor had maintained before him that he had received

prior authorization. The grievor had not offered any reason to explain why he had left. Was Cpl. Stewart, who had attempted to have him take a polygraph examination, being rude or confrontational, Lt.-Col. Brown had asked him. The grievor had answered in the negative; the polygraph examination had been "no big issue" with him. Lt.-Col. Brown, accordingly, found that the grievor had misconducted himself by leaving work without first obtaining authorization from his supervisor. In the circumstances and having regard to the numerous counsellings given to the grievor, many of which dealt with attendance and obtaining permission before leaving work, and having regard principally to the grievor's disciplinary record, which included a recent five-day suspension without pay, Lt.-Col. Brown, in an attempt to influence the grievor positively, decided to elevate the penalty in this case to a suspension of seven days without pay.

At the hearing, the grievor took the opportunity to explain why he had left work when he did. He had felt crowded by the military police officer, Cpl. Stewart, when the latter followed him to his cubicle after he had informed Cpl. Stewart that he was not going to take the polygraph examination. "He was in my face", the grievor stated. The grievor had felt harassed by being talked into taking the polygraph test and felt intimidated by Cpl. Stewart, who had once before investigated him in another matter. He was upset by it all and just had to get out of the office and talk to someone about his rights regarding the polygraph examination and police harassment. He had decided to go see Joe Allen, a senior union representative working in 5 Hangar, and seek his advice. He left the office and went and saw Mr. Allen. Mr. Allen testified that the grievor was upset when he came to see him and it took a while to calm him down. He assured the grievor of what he already knew: that the polygraph examination was voluntary and the grievor could refuse to take it.

The grievor acknowledged Cpl. Stewart was "just doing his job" but attempted to portray Cpl. Stewart as having barged into his office and having grabbed the phone without asking permission to do so, to cancel the polygraph examination.

Lt.-Col. Brown admitted in cross-examination that, had he known at the time that the five-day suspension had been removed at adjudication and a letter of reprimand substituted instead, it "would have impacted on my decision".

The question to be resolved in this matter then becomes one of quantum. The seven-day suspension was meted out as progressive discipline, based on the grievor's earlier and recent five-day suspension. Were there any mitigating or extenuating factors which might influence in this case. Lt.-Col. Brown had been given no extenuating reasons why he should mitigate the penalty he imposed.

At this hearing, the grievor has advanced reasons why he should not be considered to have misconducted himself. Counsel for the grievor characterized these reasons as subjective rather than objective reasons. The grievor felt upset, harassed, and intimidated by what had transpired the morning of January 27, 1993. The whole matter of the railing investigation and the polygraph examination, as well as Cpl. Stewart's behaviour in chastising the grievor for refusing at the last minute to take the polygraph examination, as well as his actions in following the grievor to his cubicle, shouting at him and barging into the cubicle and grabbing the phone, were too much for the grievor. He had to get out of the office and go and see someone who could advise him of his rights and comfort him. He went to see Joe Allen and in the process did not fully obtain prior authorization before leaving. Accordingly, any possible misconduct is adequately explained with the effect that any penalty should be minimal, particularly having regard to the fact that the five-day suspension had been set aside at adjudication.

I find that the grievor's explanation that he was upset and felt intimidated by what was happening to him is entirely plausible in the circumstances. The grievor, however, for whatever reason decided to withhold this information or explanation from Lt.-Col. Brown when he was questioned at his disciplinary hearing. Lt.-Col. Brown conducted an entirely fair and objective hearing and even asked the grievor whether Cpl. Stewart had been rude or confrontational. The grievor had answered: "No, he was just doing his job". Lt.-Col. Brown properly found that the grievor had misconducted himself for leaving the office without obtaining prior authorization. There remained only the quantum of the punishment to be meted out. Because of the grievor's disciplinary record, showing a five-day suspension for recent misconduct and the fact that the grievor continued his pattern of defying office procedures dealing with absences from the office, inter alia, in spite of numerous counselling sessions held with him, Lt.-Col. Brown decided to impose a progressive penalty of seven days suspension without pay. He had found that Cpl. Stewart had

not been rude or confrontational and had conducted himself on the morning of January 27, 1993 in a proper and professional manner. I have no reason to disagree with Lt.-Col. Brown and I find that Cpl. Stewart conducted himself in a proper and professional manner on January 27, 1993, and was in no way rude or confrontational. The grievor had also expressed the same belief when he was interviewed at his disciplinary hearing before Lt.-Col. Brown.

I do not believe that the grievor can profit entirely by his belated explanation of why he had left the office without the prior authorization of his supervisor. Had he advanced this explanation at his disciplinary hearing, the matter might very well have been resolved in his favour. For whatever reason, he chose to withhold this information. In doing so, he failed to recognize the importance of the grievance procedure and the need to resolve matters at that level and avoid having them escalate to the adjudication level with all its attendant costs, both in time and in money.

The grievor cannot profit entirely from the strategy he may have followed. Because his five-day suspension has already been set aside, the appropriate penalty for the misconduct he was involved in can no longer support a seven-day suspension. I find that a one-day suspension without pay is a more appropriate penalty, the whole having regard to the letter of reprimand on his file and the belated explanation of why he had left work without prior authorization. The grievor is to be paid all lost wages and benefits for the remaining six days of the suspension which he served.

Accordingly, this grievance is partially sustained.

****

In Board file 166-2-25684, the grievor grieves against a 10-day suspension without pay meted out to him by letter of Lt.-Col. Brown dated April 28, 1993, filed as Exhibit E-23, for an incident which occurred on March 8, 1993.

> *A Notice of Investigation was presented to you 8 March 1993 regarding your alleged misconduct in that on 8 March 1993 at or about 0815 hours you were absent from your place of duty without permission from your supervisor for a period of about 25 minutes. A hearing was subsequently held Monday, 26 April 1993 whereby you failed to attend. However your representative, Mr. Allen was in*

> *attendance. Also present were MWO Locke, A/Eng O; Capt. Perrault, CE Adm O; and myself.*
>
> *After carefully considering all evidence presented at the hearing, as well as your disciplinary record, I have determined that you were absent from your workplace without your supervisor's permission. I hereby award you a ten day suspension to be served from 29 April 1993 to 12 May 1993 inclusive.*
>
> *In my letter dated 22 April 1993, I also advised you that your absence on 22 April 1993 was considered to be absence without permission. You were further advised that I would be investigating this matter and would give you the opportunity to be heard on 26 April 1993. Although you chose not to attend, you were represented by Mr. Allen. Also present were MWO Locke, A/Eng O; Capt. Perrault, CE Adm O; and myself.*
>
> *After carefully considering all evidence related to this incident, as well as your disciplinary record, I have determined that you did not obtain your supervisor's permission to be absent from your workplace contrary to instructions given to you the previous day through verbal counselling. I hereby award you a ten day suspension to be served from 13 May 1993 to 27 May 1993 inclusive.*
>
> *I expect that from now on, you will abide by the work procedures that have been presented to you. Failure to adhere to these standards will result in progressive disciplinary action up to and including discharge.*
>
> *Once again I remind you that the intent of these disciplinary measures is not punitive but is aimed at correcting your unacceptable behaviour. I would also like to point out that the Employee Assistance Program is available to assist you should you be experiencing problems of a personal nature.*
>
> *You are reminded of your rights with respect to the grievance procedure. A copy of this letter will be retained on your personal file.*

The letter, Exhibit E-23, also deals with an incident on April 22, 1993, for which the grievor was also given a 10-day suspension.

A number of witnesses testified on behalf of the employer, including MWO Frank Locke, Mr. Paul Bois, Mr. Frank Gaulin, Mr. Paul St-Denis and Lt.-Col. Brown. Mr. Gilles Rochon and the grievor, Mr. Normand Cléroux, testified on the grievor's behalf. Mr. Gaulin testified in rebuttal evidence for the employer.

MWO Locke testified as to the fact that the grievor, in late 1992 and early 1993, had been counselled with regard to following office procedures, including late arrival and early departure procedures, break and lunch periods, leaving the office for the work site, and leaving for personal or union business.

The witness pointed to an incident of February 8, 1993 where the grievor simply left a note on his supervisor's desk that he was leaving the office at a certain time and would be back at a certain time. In the counselling session which followed, he was once again reminded of the need to obtain permission in advance before leaving on personal or union business. The grievor had expressed his willingness to comply with office procedures regarding absences and leave. The grievor was provided with directions in writing concerning office and work procedures at a further counselling session held on March 2, 1993 (Exhibit E-15). He was again, at that meeting, reminded of the need to obtain prior approval before leaving the office for personal or union business and to report his whereabouts in writing to his supervisor when leaving for a job site and indicate his whereabouts during the day and his expected time of return to the office. The grievor indicated at the end of this counselling session that he had no problems with the procedures reiterated to him.

In cross-examination, the witness stated that the grievor was required to request in writing permission to leave for personal or union business and permission would also have to be in writing. In addition, the grievor was required to indicate in writing to his immediate supervisor, Mr. Gaulin, what he was working on and where outside of 12 Hangar. Although the word "permission" is not found in Exhibit E-15, the grievor knew that he needed to have permission to leave on personal or union business.

In re-direct, the witness stated that "permission" is not found in Exhibit E-15 but it had been discussed during that counselling session on March 2, 1993. The grievor was also given at that meeting a copy of clause 8.04 of the collective

agreement, dealing with leave for union business and the requirement that permission was required for leave for union business.

Mr. Paul Bois testified that from as early as 1992, he had held or attended meetings with all the staff where the employees were reminded of their hours of work, lunch and coffee breaks, procedures relating to late arrivals and early departures, requesting annual leave, and the need to obtain prior authorization before leaving for personal or union business. The hours of work and break and lunch times were emphasized. Coffee break was from 9:30 to 9:40 a.m. and 2:30 to 2:40 p.m.; lunch from 12:00 to 12:30 p.m. The witness had his first counselling session with the grievor on December 8, 1992 upon the grievor's return to the contracts section in 12 Hangar from a tour of duty elsewhere. The grievor, at this session, was told that he would be accountable for his arrival and departure times and lunch and break times. He had to inform his supervisors where he was going to be. The grievor's response was that he agreed and would make sure that happened and things would work out fine. On December 23, 1992, the witness had held another counselling session because the grievor had been noticed coming in late on several occasions and had taken breaks when he was not supposed to. The grievor had agreed that this would not happen again.

The next counselling session the witness held with the grievor was on December 29, 1992. The grievor had left the office shortly after lunch without notifying the witness. Upon the grievor's return to the office at around 3:00 p.m., he was questioned by the witness about where he had been and had admitted that he had left on union business. He had not sought or been given permission to leave on union business. The grievor explained that during his lunch break he had run into an employee who had union business to discuss and had elected to remain with that employee to sort out the problem. The grievor stated that he "hoped that he had averted a grievance as a result of spending this time with the employee". The grievor was reminded of the requirement that he first obtain permission to carry out union business. The grievor was very cordial and said that it would not happen again.

On December 30, 1992, the witness was advised by the administrative staff, before 8:00 a.m., that the grievor had called in saying he would be late coming in to work. At about 9:15 a.m., the witness observed that the sign-in log indicated that the

grievor had signed in at 9:00 a.m. that morning. There was nothing unusual about this because the grievor had phoned in saying he would be late. However, on January 4, 1993 when the witness signed the attendance register, he saw that the time sheet had been altered in the grievor's case, from 9:00 a.m. to 7:30 a.m. He then went to the grievor's desk and confronted him with this. The grievor denied changing the time sheet and also denied having come in late, although reminded that he had called in saying he would be late in arriving. The grievor persisted in saying that he was not late and had signed in at 7:30 a.m. The witness told the grievor that altering the time sheet was not allowed and that he would be looking further into the matter. The witness added that he had been in the work area the whole morning and had gone by the grievor's office space and had not seen the grievor prior to 9:00 a.m.

Again, on January 7, 1993, the grievor was 10 to 20 minutes late arriving for work and yet had signed the register for 7:30 a.m. without informing his supervisor, the witness, that he was late. When this was brought to the grievor's attention by the witness, that he was not following the regulation in place, he had responded: "No problem, it won't happen again". He was very cooperative in his reply.

Up to January 14, 1993, the counselling the grievor was given was all verbal. There did not seem to be any improvement in the grievor's behaviour. It became necessary to give him a letter of counselling and this was done by Major R.E. MacCormack, the Engineering Officer, during a counselling session on January 14, 1993; the counselling letter is dated January 13, 1993 (Exhibit E-2). This letter set out what the grievor was found to be doing which was not in keeping with the rules including arriving late and not supplying leave requests.

The witness had spoken to the grievor about his absence during the morning of January 27, 1993 and about his lunch hour on that day, which he had exceeded again. The grievor was very cooperative, again saying he would abide by the rules.

On February 8, 1993, the grievor was giving computer training in his office to Mr. Gaulin. At about 8:45 a.m., Mr. Charron, another supervisor, came into the witness' office and informed him that a Mr. Rochon and the grievor were down in the canteen on the second floor of 12 Hangar having coffee. This had been reported to Mr. Charron by Mr. St-Denis. Mr. Gaulin was the grievor's supervisor at the time and

Mr. Charron was Mr. Rochon's supervisor. Mr. Charron told the witness that the two inspectors had been in the canteen for at least one half-hour from what he could tell. The witness instructed Mr. Gaulin and Mr. Charron to go and get these two employees and bring them to him so he could talk to them. Not long afterwards, Mr. Charron brought Mr. Rochon into the witness' office. The three of them were in the office when the witness asked Mr. Rochon where he had been. Mr. Rochon said he was on his break with the grievor in the canteen. Mr. Rochon said yes, he knew the time of his break, 9:30 a.m., "and any other time he felt like it", he had added. Mr. Rochon explained that he had planned on going out to the job site that morning and had taken coffee break earlier. The witness pointed out to Mr. Rochon that whereas supervisors have a certain latitude in allowing inspectors to take morning and afternoon breaks at different hours, the rule was, as pointed out to Mr. Rochon and all other staff, that coffee breaks were to be taken at the times indicated and only if an employee were stuck at a meeting or on the job site could the break be taken later than that designated. With this, Mr. Rochon "started to get mad and ranted that he wouldn't abide".

The witness continued by stating that he did not speak to the grievor because Mr. Rochon had "gotten out of hand". He asked Mr. Gaulin to speak to the grievor to find out what had happened. He was later told by Mr. Gaulin that he had spoken to the grievor and had asked him what had happened. The grievor had told him what he did. When asking the grievor where he had been, the grievor had lied to Mr. Gaulin on two occasions and the grievor was quite upset and wanted to know who had squealed on him.

The witness had two major concerns about the grievor's conduct on the morning of March 8, 1993. Firstly, the grievor was totally defying any rules or regulations put in place regarding hours of work or break periods. The other concern was that he lied to his supervisor when he was asked where he was while being absent. He had denied that he was in the canteen.

In cross-examination, the witness stated that in his meeting with Mr. Rochon he had told him that while supervisors have latitude to allow breaks after normal times, he was not to take breaks before 9:30 am. Mr. Rochon responded by saying he would take his breaks whenever he felt like it. Mr. Rochon received a Notice of Investigation

and was given a written reprimand because this was his first offense. The witness does not recall asking Mr. Rochon what he was doing in the canteen. "He just told me he was in the canteen with Mr. Cléroux on a break" but could not remember the exact words. He could not recall any mention of coffee.

The witness stated that if there was no boardroom space available, work in the canteen could be authorized but this would "only be on occasion". The witness could not remember where or when he had obtained the information reflected in his memorandum of July 7, 1993, filed as Exhibit E-18, that the grievor was in the canteen on the morning of March 8, 1993. The witness acknowledged that it was "never promulgated as such" that employees could not conduct business in the canteen.

Mr. Frank Gaulin testified with regard to the many meetings held in 1992 with all inspectors, including the grievor, when office procedures were reviewed and repeated dealing with such things as hours of work, leave applications, lunch and break periods, and the need to keep the supervisors informed of where the employee was going to do his work, what the job was, and the anticipated time of return, as well as the need to request and receive prior authorization before leaving on personal and union business. The witness referred to counselling sessions with the grievor in 1992 concerning these office procedures. All employees reporting to the witness were notified that they were required to let the witness know of their whereabouts during the day, either on the locator board or verbally.

On February 8, 1993, he left a note, Exhibit E-14, on his desk saying:

> *15:45 - B-301*
> *See BCPO for info*
> *Back before 1600 hours*

The witness and MWO Locke met with the grievor towards the end of the day on February 8, 1993 to remind him that when he was to proceed to or go on personal business or union business, permission had to be obtained in advance from his supervisor. The witness was present at the counselling given to the grievor on March 2, 1993 by MWO Locke. MWO Locke discussed with the grievor at that meeting the several matters set out in Exhibit E-15, including hours of work, the grievor's whereabouts, and also that he must obtain permission to go on personal or union business.

Early in the morning, at around 8:45 a.m., the witness was receiving computer training from Mr. Bois in MWO Locke's office. Mr. Charron came into the office at that time and notified both of them that the grievor and Mr. Rochon were downstairs on the second floor in the canteen having coffee. Both the witness and Mr. Charron were asked by MWO Locke to go down and find the grievor and Mr. Rochon and bring them to his office; he wanted to see them. The witness proceeded to the canteen with Mr. Charron and on the way down met Mr. Rochon. The witness continued on but when he arrived at the canteen the grievor was not there. The witness returned to the contracts office and found that the grievor had already returned. The witness told the grievor that Mr. Bois wanted to speak to him but at that time Mr. Rochon was already in the office with Mr. Bois and Mr. Charron. While waiting for Mr. Rochon to come out of Mr. Bois' office, the witness had asked the grievor whether he had just come back from the canteen. The grievor replied: "No, I was at the washroom". He asked him the same question again and got the same reply. The witness believes that he had also asked the grievor whether he knew what his rest periods or coffee breaks were and he had replied "Yes". The grievor was somewhat upset at that time and asked the witness who had "squealed" on him. The grievor had not advised the witness that he was going to be in the canteen that morning. Following this, the witness met with Mr. Bois and informed him of the discussions he had had with the grievor. The witness had told Mr. Bois that he had asked the grievor where he had just come from and his reply was that he was at the washroom.

In cross-examination, the witness was asked to explain the procedures to be followed when an employee wished to depart early: he would have to have his supervisor's permission to leave early, and if permission were obtained, the supervisor would initial the register and the employee would be paid to 4:00 p.m. There was no set practice with regard to employees moving between offices in 12 Hangar.

The witness could not recall whether it was on the morning of March 8, 1993 or earlier that he had assigned the grievor the task of the overhead doors. He handed the grievor the specifications for the overhead doors and asked him to revise and amend those specifications for the service contractor. The specifications were outdated and there was urgency in bringing them up to date. The service job on the doors was to be done within a month or month and a half and the grievor was informed of this. The witness discussed the task with the grievor and it was brought to the grievor's

attention where he could get the information, namely at the Preventive Maintenance Office (PM Office) located just down the hall from the contracts office, that is, some 150 feet away, and also from the Hangar Line Maintenance Section, located in another hangar, where an inventory of overhead doors was kept. The witness indicated to the grievor that he could get all necessary information from these two points. He expected that the grievor would be in and out of the office and he might have been but the witness could not recall.

The witness could not recall whether he had any contact with the grievor on the morning of March 8, 1993 before starting his computer training. Mr. Charron did not indicate to the witness and Mr. Bois how he had acquired the knowledge that he had reported to them that the grievor and Mr. Rochon were in the canteen at that moment. On his way down to the canteen with Mr. Charron to get the two inspectors to bring them back to see Mr. Bois, they had met Mr. Rochon in the hallway on the third floor, near the contracts office door. Mr. Charron stopped to talk to Mr. Rochon and the witness proceeded down the stairs to the second floor, to the canteen, near the stairway. He went into the canteen to see if the grievor was still there. He was not. The witness went back upstairs to the contracts office and saw the grievor sitting at his desk. He had returned while the witness was at the canteen. He asked the grievor whether he had just come from the canteen. The grievor answered: "No, I was at the washroom". He asked him the same question again and the grievor gave the same answer. The grievor did not say that he had been in the canteen or had discussions with Mr. Rochon.

The witness then told the grievor that Mr. Bois wanted to speak to him. They both went to Mr. Bois' office and waited outside in MWO Locke's office for Messrs. Rochon and Charron to come out. He had had no further discussions with the grievor while waiting. When Messrs. Charron and Rochon came out of Mr. Bois' office, Mr. Bois was engaged in a phone call. The witness and the grievor continued waiting in MWO Locke's office and while waiting the witness observed Mr. Rochon returning to the area of Mr. Bois' and MWO Locke's offices. Mr. Rochon stated at that moment that he was going into Mr. Bois' office "to give him shit". He then stormed into Mr. Bois' office. He was loud and aggressive. The witness could see Mr. Rochon, as he was standing behind Mr. Rochon and could see into Mr. Bois' office through the sliding

door between these two offices. Mr. Rochon pounded his fist down on Mr. Bois' computer, making reference to a letter that Mr. Bois had given him previously.

The witness stated that ultimately he did not see Mr. Bois that day with the grievor because Mr. Bois told him that he was not going to see the grievor because of the events which had just taken place. The witness was instead told to speak to the grievor himself, which he did immediately afterwards in the grievor's office. The witness brought to the grievor's attention his allotted time for taking coffee and the time at which he was to take his break and, perhaps, his lunch period. When asked whether the grievor had mentioned to him that he was in the canteen working on the assignment with Mr. Rochon, he replied: "No, I don't believe so". The grievor had asked the witness who had "squealed" on him. The witness had answered that he did not know. He did not know at that time that Mr. St-Denis was involved. He had not said to the grievor that Mr. Charron had informed him and Mr. Bois. The grievor had not told the witness that he was in the canteen so there was no explanation given to the witness as to why the grievor was in the canteen. The witness could not remember how he had gotten the information that the grievor was in the canteen which he mentioned in his later memorandum of July 7, 1993, filed as Exhibit E-20. He did not believe that the grievor had ever explained to him what he was doing in the canteen. His memorandum, Exhibit E-20, was written after the second level hearing of the grievance. He does not believe that the grievor had ever said to him that yes, he was in the canteen but that he was there to discuss work related business.

Mr. Paul St-Denis, an inspector in the mechanical cell, testified that he has known the grievor since 1986, and occupied a cubicle about three feet away from the grievor's. He had submitted a statement of what had occurred, to his knowledge, on March 8, 1993, filed as Exhibit E-22. On that morning, he had volunteered to go to the canteen to pick up two pints of milk to serve at the coffee machine in the contracts section. While in the canteen, he observed the grievor and Mr. Rochon sitting there having coffee. When he was being reimbursed by Sgt. Phillips for the money he spent for the milk, Sgt. Phillips received a phone call asking her whether anyone had seen Mr. Rochon. The witness had then said that Mr. Rochon was downstairs in the canteen having coffee with the grievor. He testified that when he arrived in the canteen there were two people ahead of him at the counter. He got in the line-up. He saw from there Mr. Rochon and the grievor sitting at a table having coffee, some 30

feet away. They acknowledged the witness' presence by lifting their cups of coffee to him. The witness had nodded back. The witness proceeded to buy two pints of milk, turned left and went back to the office. He had not spoken to either Mr. Rochon or the grievor. He had just acknowledged them with a nod. He had returned from the canteen to the contracts office by taking two steps at a time, to “keep in shape”.

In cross-examination, the witness stated that he was in the canteen for two or three minutes. He was in a line up to buy the milk and while there looked around. There were only two persons sitting and having coffee: the grievor and Mr. Rochon. About 10 to 15 minutes after returning to the contracts office with the milk, Mr. Charron had asked the witness whether he had seen the grievor and Mr. Rochon downstairs in the canteen. He replied that he had. He had gone to the canteen at 8:20 a.m. and had spoken to Mr. Charron around 8:45 a.m. He had taken over the grievor's work when the latter was serving a suspension.

Lt.-Col. Brown testified that he had attempted to hold a disciplinary hearing involving the grievor and the incident of March 8, 1993 but the original date fixed for the hearing, March 25, 1993, had to be changed to April 1, 1993 due to the grievor's absence from work on sick leave from March 18 to 31. This sick leave was extended to April 8, 1993 so the hearing was again postponed to April 15, 1993. The grievor returned to work from April 9 to 14 but on April 15 the grievor phoned Mr. Gaulin, his supervisor, saying he had lacerated his hand and would not be in to work. The grievor worked on April 16 and on April 19 requested and took annual leave. On April 21, the witness rescheduled the disciplinary hearing for April 26 at 11:00 a.m. The grievor informed management that he would be in on April 26 and so everyone involved, including the grievor's union representative, was informed that the hearing would take place that day, on April 26, 1993, and the witness warned that the hearing would take place even if the grievor or his representative did not show up.

The witness intended to "do all on the 26th", that is, deal with the grievor's grievances and hold the disciplinary hearing. On the morning of April 26, the grievor phoned the Orderly Room and informed a clerk that he would not be in to work. He did not give any reason why he would not be in to work and did not advise his supervisor that morning. He was considered on leave without pay and was not paid for the day.

The witness had proceeded with the disciplinary hearing of Mr. Rochon, as scheduled, on March 25, 1993, for the incident of March 8, 1993 when he was absent from his workplace and was in the canteen. The witness at that hearing had heard evidence from a number of witnesses who had knowledge of what had happened on March 8, 1993 involving Mr. Rochon, including Mr. Rochon himself, Mr. Bois, Mr. Gaulin, Mr. Charron, Mr. St-Denis and Sgt. Phillips. At that hearing, Mr. Rochon admitted that he had been taking a break with the grievor in the canteen. He had left his desk at 8:15 a.m. and thought that he had been in the canteen 10 to 15 minutes. Mr. Rochon did not say anything about performing work during his time in the canteen. He was taking a break and was going out of the Base that morning. He filed a three-page statement as Exhibit E-21.

The witness had concluded that Mr. Rochon and the grievor were in the canteen about 25 minutes, from 8:20 to 8:45 a.m., that they had no good reason to be there, and "for Mr. Rochon, I concluded that misconduct had occurred".

On April 26, 1993, the witness had gone ahead with the disciplinary hearing regarding the grievor when the grievor did not show up. "I didn't want to do this but it was approaching about two months from the incident and it was some unfinished business I thought I had to deal with and get resolved", the witness stated. The grievor was represented at the hearing by Mr. Joe Allen. Also present were MWO Locke, Capt. Perrault, the witness' administrative officer, and the witness. When Mr. Allen arrived he apologized, said he knew about the hearing but that the grievor had not given him any instructions, statements or evidence to present on his behalf. The witness reviewed with Mr. Allen the evidence collected. Mr. Allen had speculated that the grievor had just taken another coffee break and asked that the witness not take any disciplinary action. The witness told Mr. Allen that he would make a decision on the evidence he had.

The witness was concerned that the grievor had been in the canteen from 8:20 to 8:45 a.m. on the morning in question and was not aware that the grievor had any good reason to be there at that time of day, what he was doing there, and whether he understood what management's expectations were of him. Based on the evidence, the witness concluded that the grievor had been in the canteen for roughly 25 minutes, having coffee there with Mr. Rochon, and based on previous counselling sessions, the

grievor knew that he should not be there at that hour of the day. The canteen was not his work area and it was not his break time when he was there. He awarded a 10-day suspension without pay to the grievor for this misconduct.

In deciding to award the grievor a 10-day suspension, the witness had considered the following factors: He looked at the grievor's disciplinary record over the previous six to eight months. He considered the number of times he had been coached and counselled by the various levels of supervisors since 1992. He also considered that he had been more recently counselled on February 8, 1993 and on March 2, 1993. He considered that the matters covered by the coaching and counselling were with regard to quite reasonable and uncomplicated issues which revolved around his conduct, attendance, unauthorized departures from the office, and his overall performance. He considered, furthermore, the fact that the grievor had just recently served a seven-day suspension, from February 16 to 24, 1993, and now, just a matter of days after coming back to work, he was failing to comply with some of the basic issues that he had been counselled on. He also considered the fact that when the grievor was counselled he always indicated that he understood what was being asked of him, always indicated that there would be no problem for him to comply and then shortly thereafter would, for some reason, be unable to comply. The witness believed that the grievor's general response to counselling was that he was defiant and that he himself would decide what to do and when.

In giving the grievor a 10-day suspension, the witness realized that it was a heavy award but he wanted to impress once again on the grievor that his behaviour was not acceptable. The grievor had serious shortcomings and they needed to be corrected. The witness had also considered that the grievor's behaviour was quite irrational and the witness was becoming concerned that there were some other problems that he was experiencing that were causing the grievor to behave as he was. So, in his letter to the grievor, Exhibit E-23, the witness made an offer of EAP in case the grievor needed any assistance in working out any personal problems.

The witness' next involvement following April 26, 1993, was in connection with the grievor's grievance against the imposition of a 10-day suspension on April 26. Because the witness was satisfied that he had investigated everything he could with regard to the incident of March 8, 1993, he waived the first level hearing. The second

level hearing was at the Wing Commander's level, Col. Brando's level. The second level hearing was held on June 23, 1993. In attendance were Col. Brando, the grievor, his union representative, Mr. Giroux, and the witness. As well, several people were called as witnesses to give evidence.

At the second level, the witness had testified that, after conducting the disciplinary hearing, he was satisfied that the grievor had misconducted himself on March 8, 1993. The grievor testified that he had been in the canteen that morning, that he had gone to the Preventive Maintenance (PM) Office on the third floor of 12 Hangar to obtain some advice on overhead door specifications and had then proceeded to the canteen to look for the PM inspector because he was not in his office when he got there. The individual he was looking for was not in the canteen so he sat down and had a coffee with Mr. Rochon, who was then in the canteen. He made no reference to working with Mr. Rochon. The hearing did not conclude on June 23, 1993 because Mr. Giroux had to leave before the hearing was finished and so it was agreed to reconvene on July 5, 1993.

On July 5, 1993, Mr. Giroux advised Col. Brando that neither he nor the grievor would be attending the hearing because they had nothing further to present to him. Col. Brando was disappointed that they had decided not to come because he wanted to finish the investigation. He asked the witness to obtain some written statements from Personnel to convince him that it was not accepted or regular practice to be taking coffee breaks at 8:15 or 8:20 a.m. He also wanted confirmation that all the contracts staff knew what their designated break times and hours of work were. Documents identified as Exhibits E-16, E-19 and E-20 were produced at the request of Col. Brando so that he could conclude his investigation. Col. Brando also wanted confirmation that it was not common practice to conduct business in the canteen. The grievor had stated that as far as he was concerned it was accepted practice. The length of time in the canteen "did not have a lot of play" in the witness' decision, he stated. He was comfortable that the grievor and Mr. Rochon were in the canteen for about 25 minutes from the evidence before him. But, whether 25, 15 or 10 minutes, "they had no reason to be there", he added.

In cross-examination, the witness was asked whether in his disciplinary hearing he had considered the allegation of lying mentioned in the Notice of Investigation, Exhibit E-17, as one of the infractions committed by the grievor. Mr. Gaulin had considered that the grievor had lied to him. The witness stated that he did not agree that the grievor had lied. He was convinced that the grievor had understood the intent of the question that Mr. Gaulin had asked. However, because of the way the question was posed and because of the fact that the witness was not able to interview the grievor, he decided not to pursue the allegation of lying and dropped it. He did not mention it in his letter to the grievor on April 28, 1993, Exhibit E-23, awarding him a 10-day suspension. At the second level hearing, he had informed Col. Brando that it was not normal practice for the staff of the contracts section to do their work in the canteen and that there was no evidence that it was done by others. The grievor had since told the witness that he was doing work in the canteen at the time in question.

The witness had a "gut feeling" that the grievor was having personal problems. He considered his behaviour to be irrational. Management was not happy with the grievor's performance but went to great lengths to rehabilitate him. It was fair to say that there was some stress and tension in the air from the inspectors because of the grievor. The grievor was monitored carefully by his supervisors. They were attentive but there was no concerted effort to watch the grievor. He was counselled concerning requirements. For example, the grievor was counselled to phone Mr. Gaulin or Mr. Locke if he could not attend work and yet the next day he would phone someone else. He was not being monitored. The witness felt there might be something else going on in the grievor's life and it was normal to offer EAP.

The grievor next testified on his own behalf. He stated that his supervisor, Mr. Gaulin, had, on March 8, 1993, instructed him to revise the overhead doors contract and specifications. The grievor next went through the documents and noticed the specifications dated back to 1982. That was unusual for specifications to go so long without being revised. The grievor informed Mr. Gaulin of this and informed him that because of this the entire document had to be rewritten. He told Mr. Gaulin that it would involve more hours having to be put into this task and it would require him to go in and out of the office to get the required information. He told his supervisor that he would have to go to the Preventive Maintenance Office and

to 14 Hangar and various buildings. Mr. Gaulin told him the contract would be tendered soon and he was to give priority to this task.

On March 8, 1993, the grievor had a conversation with Mr. Rochon with regard to the contract and wanted Mr. Rochon's input to this contract, if he had any information with regard to the contract. The top page of the contract, which is the Standing Offer Agreement, contained handwritten notes, in pencil, to the effect that the invoicing or the billing part of the contract needed some rewriting or redefining, the note said. According to Mr. Rochon, the contractor was over-billing, working around the clause, to overcharge. At around 8:00 a.m. that morning, March 8, 1993, the grievor had asked Mr. Rochon if he was available to discuss this matter and he agreed to meet him in 12 Hangar, second floor, in the canteen. He met Mr. Rochon at 8:30 a.m. in the canteen. The grievor had left his desk at about 8:30 a.m. and went to the Preventive Maintenance Office, some 75 to 100 feet down the hallway from the contracts office. The door was closed but not locked. The place was empty and he had found that strange. The Preventive Maintenance Office has files on each building with all necessary information on each building. He looked at his watch and proceeded down to the canteen.

The grievor arrived at the canteen and saw Mr. Rochon there so he approached him. Mr. Rochon went and got two coffees and the grievor proceeded to get the documents out and get to work on the contract. He had the contract, specifications, and a photocopy of the contract and a pad to write down notes. It took one or two minutes for Mr. Rochon to get the coffee and then they got to work on the contract. Mr. Charron came into the canteen about five minutes after the grievor had arrived and looked at the grievor and Mr. Rochon. Mr. Charron nodded his head. He was in line at the canteen counter for two or three minutes. He left with a coffee. The grievor also noticed Mr. Paul St-Denis from his office, who arrived about 10 minutes later and picked up and paid for a carton of milk. Mr. St-Denis nodded his head at them. Mr. St-Denis left the canteen and the grievor and Mr. Rochon also left shortly afterwards. The grievor stated that he completed the legal part of the contract, which is a critical part. Mr. Rochon had given him pretty well the information on the invoicing, of which the contractor was taking advantage. As they left, they were 20 to 25 feet behind Mr. St-Denis. As they got to the stairwell, Mr. St-Denis was seen

running up the stairs. The grievor said to him: "Is the place on fire?", and Mr. St-Denis replied something "funny".

The grievor and Mr. Rochon next arrived on the third floor and proceeded towards the contracts office. When arriving at the Preventive Maintenance Office, the grievor left Mr. Rochon and went into that office to see if its personnel had returned and to get permission to have access to the file. There was no one in that office so the grievor went to the men's washroom near the doors to the contracts office. He entered the bathroom, was in there for about five minutes, and then went into the contracts office. As he entered, he could hear an extremely loud and heated argument from within the contracts office. Just before he got to Mr. Bois' office, he was confronted by Mr. Gaulin who had come up fast and said: "Where did you just come from?" The grievor had replied: "The men's room". Mr. Gaulin then said: "Where did you come from before that?" The grievor had replied: "From the PM Office or canteen". Mr. Gaulin then told the grievor to come with him to MWO Locke's office. Once there, he was told to wait as Mr. Bois wanted to speak to him. He waited in MWO Locke's office. He was on one side of the desk and Mr. Gaulin was standing near the opened sliding door looking into Mr. Bois' office. Mr. Rochon was having an argument with Mr. Bois. The witness was looking through the door at Mr. Rochon. Mr. Rochon left Mr. Bois' office and Mr. Gaulin told the grievor to return to his desk, which he did.

In cross-examination, the grievor acknowledged that he had attended staff meetings with Mr. Gaulin in 1992, during which were covered the subjects of absences from the office, permission being needed to leave on personal and union business, and, if he did not receive a verbal reply from his supervisor, he could not leave. Just leaving a note on his supervisor's desk would not constitute permission to leave on personal or union business. He had been reminded of this all throughout his employment in the contracts section. Also discussed at general meetings and meetings with his supervisor were his hours of work and break periods, as well as the need to ask for annual leave in advance and to call in prior to the start of his shift, if he was not to report in because of sickness.

On January 27, 1993, the grievor returned to work at around 11:30 a.m., he stated. Mr. Bois may at that time have said to him that he wanted to speak to him in the afternoon but he could not recall. He remembers that Mr. Bois spoke to him in the afternoon about returning late that day after his lunch break. He had told Mr. Bois that he had started his lunch break late. He cannot remember why he started his lunch hour late. "It was a pretty hectic morning", he added. The grievor had said to Mr. Bois that he would abide by the rules and he was reminded that he needed his supervisor's permission to go on union business.

The grievor acknowledged the several counselling sessions he had attended when his hours of work and break periods, late arrivals and early departures, were discussed, as well as the need to obtain permission before leaving on personal or union business, and the need to request permission in advance before taking annual leave. He remembered in particular the counselling session held on February 8, 1993 and the directive received from his supervisor on March 2, 1993, Exhibit E-15.

Mr. Rochon testified at the disciplinary hearing held on March 25, 1993, that on the morning of March 8, 1993 arrangements were made for him and the grievor to meet in the canteen to discuss something. The grievor stated that he agrees with this. The grievor added that he normally did his work in his office cubicle but that if he needed more space then he could meet in the conference room, if it was free. He had not checked to see if it was free on the morning of March 8, 1993. Arrangements were made to meet in the canteen. He did not tell Mr. Gaulin, his immediate supervisor, that he was going to the canteen to meet with anyone. He insisted that he had gone to the canteen to meet with Mr. Rochon that morning. When confronted by counsel for the employer that this was the very first time that the grievor was saying that he had gone to the canteen to do business with Mr. Rochon, the grievor replied that he could not recall what was said at any time before. The grievor was shown a written statement of what had taken place on March 8, 1993, made by him at an earlier moment in which he made no mention of having met with Mr. Rochon in the canteen to discuss business, Exhibit E-24. When asked which was the true version of what had actually happened, particularly in the face of a contradictory statement filed by Mr. Rochon, the grievor stated that he was now telling the truth because he was under oath. He denied that he was lying under oath. The grievor added that he had been under a lot of stress at the time of preparing Exhibit E-24. He denied that he had only

been given specifications and not a contract, bills, invoices, by Mr. Gaulin to review and update. The whole thing was a package; it was not just the specifications that he was to review and update, as Mr. Gaulin has testified.

The grievor stated that, after entering the canteen that morning, Mr. Rochon had gone over to buy the grievor a coffee. Counsel for the employer reminded the grievor that Mr. Rochon had testified that he had bought two coffees and then the grievor arrived. The grievor maintained that Mr. Rochon had bought him a coffee after the grievor arrived. The grievor testified that, contrary to his statement in Exhibit E-24 that "we chatted" and "we left with Mr. St-Denis", he did not chat and Mr. St-Denis left ahead of them. The grievor insisted that his testimony at this hearing is the truth, as against what he said in his statement, Exhibit E-24, which is not a reliable account of what actually happened. The grievor agrees that management was indicating its concern that he was not following procedures, etc.

Mr. Gilles Rochon testified on behalf of the grievor. He stated that he no longer works for the Department of National Defence. In 1993, his immediate supervisor was Mr. Charron. Around 8:00 a.m. on March 8, 1993, the grievor had telephoned him and asked him about a particular file concerning OPI, that is, Office Primary Interest for standing offer service. The particular file had to do with overhead hangar doors and their maintenance service. The grievor had been assigned to do the update and also had the specifications to rewrite because it was due out for tender. The witness had been the OPI for over a year and the grievor had asked to meet him to discuss because the witness knew of the problems and there was a need to update. The grievor wanted to meet with him and talk face-to-face in the witness' office. They scheduled a meeting. They had decided to meet at about 8:30 a.m. in the canteen in 12 Hangar.

They met in the canteen. The witness had arrived there at 8:30 a.m. but the grievor was not there. He bought two coffees. The grievor arrived soon afterwards and they talked about what had to be changed on the standing offer. He did not remember all the things they had talked about but the grievor had brought a green file with papers in it and they discussed. The witness saw the specifications and they had laughed because the specifications were over 10 years old and had never been changed.

They remained in the canteen for about 15 to 20 minutes. He had, however, not looked at his watch. While they were in the canteen he noticed Mr. Charron, his supervisor, there also, who picked up a drink and left. Then Mr. St-Denis from their office arrived five to 10 minutes later and picked up something at the counter. "We, me and Norm, knew something was happening because people were coming down from our office, so just as St-Denis was leaving, and we didn't have time to go through half of the papers, we left right after St-Denis left", the witness stated. "When I arrived on the third floor, I could see him [Mr. St-Denis] in front of me", he added. He had walked back to the third floor with the grievor and they separated by the time they got to the contracts office. The grievor "must have gone into another office", the witness stated.

The witness went to the washroom and on his way back to his desk he was stopped by Mr. Charron and Mr. Bois. Mr. Bois asked him where he had just come from and the witness replied "that he had just come from the canteen with Norm". The witness was asked how long he was in the canteen and answered "about 15 to 20 minutes". He added in testimony at this hearing that he had, however, not looked at his watch because he does not normally look at his watch when working. Mr. Bois had then asked him if he knew what time he was supposed to take his breaks and the witness had said he did and that was at 9:30 a.m. The discussion between them got heated, confrontational.

At a point during the witness' discussion with Mr. Bois, the grievor arrived and went into MWO Locke's office. The witness was ordered to give to him in writing his whereabouts at all times: where he would be going, the time of leaving and the approximate time of return. The witness had refused because there was a practice in the office to indicate one's whereabouts during the day on a signing board and Mr. Bois was not his supervisor. He had always been told to follow the "chain of command" and he intended to do that. Mr. Bois had sat down and did not want to talk to the witness anymore. When he started to "see red, I forgot about Mr. Cléroux, didn't see him", he stated.

In cross-examination, the witness stated that he worked in the structural cell and his workstation was in a cubicle within 30 feet of the grievor's. He could not remember whether Carol Boucher had taken over from him as OPI in November 1992. He could not remember when this had taken place.

He stated that on March 8, 1993, he had not told his supervisor that he was going to the canteen at 8:30 a.m. He was not then on his break. It was not the practice to ask for permission to go somewhere to discuss business, even though he had taken a coffee. He had never said to anyone that he was on his break at the time, he insisted. He had gone to the canteen at 8:30 a.m., or quite possibly 8:20 a.m., and was back in his office at 8:45 a.m., or quite possibly after that time.

The witness said the grievor had brought a green folder with him to the canteen; at least he thought he saw a green file. They had looked at some papers that the grievor had brought with him. He insisted he saw Mr. Charron in the canteen that morning. He had not spoken to Mr. St-Denis in the canteen, nor had the grievor. When Mr. St-Denis left the canteen, the witness and the grievor also left. He could not see Mr. St-Denis in the stairwell but saw him upstairs in the hallway when the witness got there. He remembers that he did not chat with Mr. St-Denis in the canteen. Nor does he remember that Mr. St-Denis came over to their table or spoke to either him or the grievor. The grievor did not go and talk to Mr. St-Denis. The witness went into the contracts area. Mr. Bois and Mr. Charron were in MWO Locke's office. It is quite possible that he had walked to his office and that Mr. Charron came there to get him and brought him to Mr. Bois' office. He had told Mr. Bois that he had been in the canteen with the grievor. He had never, he insisted, said that he was taking his break. It was not the practice to say to one's supervisor that you were going to another office, but it might be otherwise if going out of the building. In this case, the witness had gone to the canteen in the same building. He was, however, working so he did not need to inform his supervisor. Mr. Bois had never asked him what he was doing in the canteen so he never told him. He was not on his break and denies telling Mr. Bois that he was.

The witness was shown a written statement he had given soon after the incident, on March 16, 1993, filed as Exhibit E-21. In that statement, written and signed by him, he stated that he was in the canteen on his break. He stated that he

does not remember having said that but added: "It wasn't because we were on break but in the canteen that we were disciplined". He could not explain his statement in Exhibit E-21 that he was on his break at the time of his being in the canteen and insisted that he was never asked by Mr. Bois what he was doing in the canteen. He persisted in denying that he was on his break in the canteen.

The witness stated that it was not possible that Mr. Bois had said he would have to inform his supervisor, not Mr. Bois, when he left his office to go elsewhere. He was shown his statement to the contrary, Exhibit E-21, but insisted that Mr. Bois had said he would have to give it to him. Mr. Bois said this is what "infuriated" him. The witness could not remember having said to Lt.-Col. Brown that he had been in the canteen having coffee. It was fair to say, he added, that he did not know that he had ever said at his disciplinary hearing with Lt.-Col. Brown that he was downstairs in the canteen discussing business. He did not remember being asked what he was doing in the canteen.

In redirect evidence, he maintained that he and the grievor were working when in the canteen.

Mr. Frank Gaulin, in rebuttal evidence, testified that on March 8, 1993, the grievor was already at his own desk when he went to get him to bring him to Mr. Bois' office. He had not asked the grievor where he had just come from and where he had come from before that. The grievor had not told him that he had just come from the washroom and before that the PM Office and before that the canteen.

To the question what assignments he had given the grievor at or around March 8, 1993, the witness stated: "Mr. Cléroux was given, handed a copy of the specifications for the overhead doors service contract. The specifications had to be reviewed and amended and also he was to provide an inventory of the overhead doors... He was not given any other documents. I did not give him a copy of the contract. His assignment did not have anything to do with the contract. No, I did not give him the invoices. His assignment did not have anything to do with the invoices". He had told the grievor where the information could be obtained: the Preventive Maintenance Office or from Hangar Maintenance. He had himself brought to the

grievor's attention that the specifications were 10 years old, they were dated 1982. This was written on the specifications themselves.

Argument for the Employer

Counsel for the employer submits that the employer has met the onus on it to establish the misconduct set out in Exhibit E-23, that is, on March 8, 1993. The grievor was absent from his place of duty for a period of about 25 minutes. The employer has established on a balance of probabilities that the grievor simply decided that he was going to take his break at approximately 8:20 a.m. on March 8, 1993. The grievor did so contrary to established break periods and without management's authorization.

Counsel submits that he had no reason to be in the canteen given that his work area was on the third floor of 12 Hangar and his work assignment related to obtaining information from the Preventive Maintenance Section and Hangar Line Maintenance.

With respect to the evidence before me, counsel referred me to the evidence of Mr. Paul St-Denis and his written statement, Exhibit E-22, and his testimony that he observed Mr. Rochon and the grievor having coffee in the canteen just after 8:20 a.m. Mr. Rochon and the grievor did not return to their work area until after 8:45 a.m., after management was notified of their absence.

Counsel submits that the evidence of both Mr. Rochon and the grievor, Exhibits E-21 and E-24, both support the conclusion very clearly that the two employees took an unauthorized break in the canteen. With respect to the grievor's conduct on March 8, 1993, counsel submits that his credibility is challenged in respect of his answers and conversations with Mr. Gaulin. Mr. Gaulin had asked the grievor if he had just come back from the canteen. The grievor's responses to his supervisor that morning were deliberately evasive and misleading. Counsel submits that any reasonable person would understand the intent of the question. His answers were not credible. He knew what he had done and was attempting to cover his tracks. Mr. Rochon's statement to both Mr. Bois and Lt.-Col. Brown support the employer's conclusion that both he and the grievor were absent without permission. Mr. Rochon indicated that he had been taking a break with the grievor in the canteen. Whether the time period was five, 10 or 20 minutes, the simple fact is that the absence was

without authority and contrary to the established break periods, which was not contradicted by either the grievor or Mr. Rochon.

When we turn to the question of penalty, the employer relies upon previous submissions concerning the background of extensive counselling with the grievor. There were 13 counselling sessions, including verbal and written counselling. Counsel submits that this counselling is a relevant factor given that it related to similar and simple issues concerning workplace direction. The grievor continued to ignore legitimate directions, he was constantly reminded of the procedures expected of him, and, thirdly, management had made it perfectly clear that absenting himself without permission was unacceptable. There was a demonstrated pattern of behaviour which had clearly been brought to the grievor's attention.

Over and above the 13 incidents of counselling just referred to, there followed additional counselling sessions on January 27, February 8 and March 2, 1993 dealing with the grievor's failure to obtain permission to leave on personal and union business and the need to obtain this permission in advance.

Based on these counselling sessions, counsel submits that the grievor was simply refusing his supervisor's authority on an ongoing basis. Despite continual counselling on the same types of simple issues, nothing seemed to be getting through to him. As indicated by Lt.-Col. Brown, he was clearly informed of what was expected of him in terms of break periods and keeping his supervisor informed of his whereabouts. The grievor's conduct constitutes a deliberate defiance of management's authority. Furthermore, the grievor has not indicated any remorse and does not admit to his misconduct. As indicated by Lt.-Col. Brown, the grievor had just completed a period of suspension, between February 16 and 24, 1993, which was intended to correct his behavior. Yet, only two weeks later, on March 8, 1993, there is an immediate repeat of his cavalier attitude.

Turning to the issue of credibility, counsel submits that both Mr. Rochon and the grievor were untruthful in their dealings with management and in their testimony during this hearing. Their testimony was deliberately deceitful on major issues in respect of this grievance and should not be believed. Counsel referred to the grievor's responses to his supervisor on March 8, at the end of which he wanted to know who

had squealed on him. Again, he provided no representations at the disciplinary hearing, neither through himself or through his union representative, Mr. Allen. Also at the grievance hearing, the grievor's only response was that he had gone down to the canteen to look for someone from the PM Office and that when he got there the individual he was looking for was not there and so he sat down and had a coffee with Mr. Rochon. At no time, until this hearing, in February 1996, did he raise any defense that he had been working in the canteen with Mr. Gilles Rochon. His statement, Exhibit E-24, is a direct contradiction of his testimony at this hearing. The grievor's attitude towards the employer is demonstrated by his testimony that he had two versions of the incident on March 8 and when we turn to Mr. Rochon's evidence, his testimony is similarly discredited. In spite of acknowledging that Exhibit E-21 was in his handwriting and prepared at the time of the incident, he presented a new story which was heard by management for the first time at this hearing. His oral testimony is contradicted by the evidence of Mr. Bois and Lt.-Col. Brown.

Counsel submits that the grievor's conduct is not an isolated incident. There is an escalation in his behaviour and there is a lack of mitigating circumstances. Based on the principle of progressive discipline, the 10-day penalty was clearly warranted in the circumstances, counsel argued.

In support of her position, counsel cited the following arbitral decisions: Anten (supra); Skibicki (supra); Sarin (Board file 166-2-15600); Chong (Board file 166-2-16249); Moore (supra); Hogarth (supra); Wilson (supra); and Re Volvo Canada Ltd. (supra). Counsel also referred to Canadian Labour Arbitration, by Brown and Beatty, at paragraphs 7:4420 and 7:3100.

Argument for the Grievor

Counsel for the grievor stated that the grievor maintains that on March 8, 1993 he was in the canteen, meeting with Mr. Rochon to discuss business related matters. He testified that he met with his supervisor, Mr. Gaulin, early that morning. Mr. Gaulin assigned him work with respect to the overhead doors, involving service and maintenance. It was a priority matter the grievor was told. He was also told where he might go to get the required information to complete his task. The Preventive Maintenance Office and the Hangar Line Office were mentioned to him as

likely sources of information. Because of this, the grievor said to his supervisor that he would need to be in and out of the office pursuing this task.

The grievor testified that on March 8, 1993, he went to the PM Office, after scheduling to meet with Mr. Rochon at about 8:30 a.m. in the canteen. He went to the PM Office and found nobody there and so he went to the canteen. Once he arrived in the canteen, Mr. Rochon was there and the grievor purchased a coffee and joined Mr. Rochon. Mr. Rochon had coffee also. Mr. Rochon says that he got coffee before the grievor showed up but counsel does not think that anything turns on this.

Counsel stated that we heard how they both started working on the documents which the grievor had brought with him concerning the overhead doors. It was necessary for the grievor to consult with Mr. Rochon because the latter had good information as to how the contractor had been abusing invoice provisions of the contract. The grievor was not involved in the invoicing but he was concerned about the invoice process which was being abused by the contractor. While there, both the grievor and Mr. Rochon observed Mr. Charron entering the canteen, interestingly enough, counsel added, without making any further comment about this fact.

The next thing that happened is that Mr. St-Denis arrived in the canteen and bought some milk. The grievor and Mr. Rochon leave shortly afterwards and when Mr. St-Denis gets upstairs he goes to see Sgt. Phillips and a call comes into Sgt. Phillips concerning the whereabouts of Mr. Rochon. Mr. St-Denis advises Sgt. Phillips that Mr. Rochon is in the canteen with the grievor, at approximately 8:45 a.m. Mr. St-Denis advises Mr. Charron later that the grievor and Mr. Rochon are down in the canteen. Mr. Charron then advises Mr. Bois of the circumstances and Mr. Bois sends Mr. Charron and Mr. Gaulin down to the canteen to bring back their respective charges. Mr. Charron apparently meets up with Mr. Rochon right at the doorway to the contracts area and they proceed to go deal with Mr. Bois. Mr. Gaulin keeps going down to the canteen, looking for the grievor. When he gets to the canteen nobody is there. He comes back up and finds the grievor in his cubicle.

Now, the famous question is asked of the grievor: "Where did you just come from?". According to Mr. Gaulin, the grievor said: "The washroom". He repeated the same question and got the same answer. Counsel submits that the grievor was

prudent in giving the answer that he gave because he may have been criticized for not saying he was in the washroom. But that answer given by the grievor is the basis for the "lie" allegation in Mr. Bois' Notice of Investigation.

With regard to what Mr. Rochon and the grievor said with respect to some questions by Mr. Bois is of no moment, counsel argued. Lt.-Col. Brown testified that he did not consider the "lie" allegation at the disciplinary hearing. But in his decision where he made the award, he did say that he considered all the evidence in arriving at his conclusions.

When we talk about the obligation of the grievor to provide full and frank disclosure of information or explanations at the first opportunity, it should be remembered that Lt.-Col. Brown held the disciplinary hearing in the absence of the grievor, who was on leave - a mixture of sick and other leave. He could not wait any longer to give the grievor full opportunity; he "had to get to it".

At the second level hearing in the grievance process before Col. Brando, there is the grievor's memorandum, Exhibit E-24, in which the grievor states that he was instructed by his union representative, Mr. Giroux, to frame his statement the way he did. Counsel for the employer argues that Exhibit E-24 is in direct contradiction to his viva voce testimony but, counsel for the grievor stated, "it directly contradicts the evidence of some of her own witnesses".

At the disciplinary hearing which commenced on June 23 but was adjourned to July 5 because the grievor's union representative had to leave on business, the only evidence heard from the grievor was that he went to the PM Office and when nobody was there he went to the canteen to look for the individual from the PM Office but when he was not there, he had a coffee with Mr. Rochon. Why then, counsel asked, did the question of the right to do business in the canteen arise? The grievor had not said anything about doing business at the disciplinary hearing nor at the second level hearing of his grievance. Both Mr. Bois and MWO Locke testified at this hearing that the grievor was never counselled about doing business in the canteen. Counsel submits that the grievor was never told not to do business in the canteen. Business has been done in the canteen, so why wouldn't the grievor and Mr. Rochon do business in the canteen?

Finally, with respect to the issue of progressive discipline, counsel referred to counsel for the employer's statement that "this is not a numbers game" when referring to the penalties being given to the grievor. Counsel submits that it was a numbers game. The number of days of suspension has to be in the proper range and cannot be arbitrary. Because the five-day suspension was not upheld, the 10-day suspension is "over the top", he argued. He stated that he is not commenting on the seven-day suspension given to the grievor.

Counsel cited the following arbitral decisions in support of his position: Lee (Board file 166-2-22357); Belliveau (Board file 166-2-18413) and Godfrey (Board file 166-2-17017).

Rebuttal Argument for the Employer

Counsel for the employer pointed to the evidence of Mr. Gaulin that he tasked the grievor with looking at the specifications only of the overhead doors installation. This had nothing to do with the contract for such works, nor with invoicing. Accordingly, there was no reason for him to be inquiring about the invoicing provisions with Mr. Rochon.

Counsel stated that it is clearly a matter of credibility that we are dealing with at this hearing and the grievor's statements of what he was doing on March 8, 1993.

Concerning Lt.-Col. Brown having proceeded with his hearing in the absence of the grievor, counsel pointed to the fact that on April 15 the hearing was first scheduled after two earlier delays in holding the hearing because of the grievor's absences from work. Again, the grievor applied for annual leave for April 15, 1993, and it became, therefore, necessary to reschedule the hearing for April 26. Again, on April 26, the grievor was absent from work without giving a valid reason for his absence. It was necessary to reschedule the hearing.

Counsel disputed counsel for the grievor's assertion that document Exhibit E-24 was presented by the grievor or on his behalf at the grievance hearing. No verbal or written documents were presented by or on behalf of the grievor at that hearing and there is no evidence to that effect.

Again, the evidence is that it was not "normal" procedure to do business in the canteen. Mr. Bois indicated that he was only aware of one instance when that had occurred and it was sanctioned by management.

Counsel distinguished the arbitral decisions cited by counsel for the grievor in support of his position.

Reasons for Decision

On March 8, 1993, at or around 8:20 a.m., the grievor left his workplace and went to the canteen on the second floor of 12 Hangar. He there met up with another inspector, Mr. Gilles Rochon, and had coffee with him. These two employees then left the canteen and returned to their workplace, which was within 30 feet of each other. The authorized break period of both these employees was from 9:30 to 9:40 a.m. If it were a fact that they had simply taken a coffee break earlier than authorized, then both must be considered to have infringed the well-known to all employees, including the grievor and Mr. Rochon, prohibition against taking coffee break prior to the authorized break period in the morning and would thus have misconducted themselves.

The grievor, when questioned by his supervisor, Mr. Gaulin, immediately after returning from the canteen, told his supervisor that he had “just” come from the washroom and just previously from the Preventive Maintenance Office. He did not say that he had been in the canteen. Meanwhile, Mr. Rochon was being questioned by the contracts officer, Mr. Bois, and when asked where he had been when away from his desk that morning stated: “I was with Norm in the canteen having coffee”. Neither the grievor nor Mr. Rochon made mention of “doing business” together in the canteen at the time. In fact, soon thereafter, Mr. Rochon submitted a written statement of what had happened that morning (Exhibit E-21). In that statement he admits having been to the canteen with the grievor where they had coffee together. There was no mention of business being done between him and the grievor.

At the disciplinary hearing held by Lt.-Col. Brown concerning Mr. Rochon’s absence from work for about one-half hour in the morning of March 8, 1993, Mr. Rochon had submitted his written statement, Exhibit E-21, and had verbally told Lt.-Col. Brown that he had been at the time taking a break with the grievor in the

canteen. He had left his desk around 8:15 a.m. and thought he was in the canteen for between 10 and 15 minutes. He did not say anything about performing work during his time in the canteen; he was taking a break early because he was going elsewhere that morning. Because this was a first offense for Mr. Rochon, he was given a written reprimand for his misconduct.

The grievor's situation was similar to Mr. Rochon's. When the dates for holding his disciplinary hearing kept being pushed forward because of his absence for sickness or annual leave, Lt.-Col. Brown decided to fix the date of April 26, 1993 peremptorily. He considered that he needed to conclude his investigation without waiting any longer. The grievor and his representative agreed to that date but on the morning of April 26, 1993, the grievor called in to say he would not be in to work, without giving a reason why. He was considered absent without pay for the day and Lt.-Col. Brown proceeded with the disciplinary hearing. The grievor's union representative attended the hearing and stated that the grievor had not given him any instructions, statements or evidence to present to the hearing on his behalf. Lt.-Col. Brown concluded that the grievor had been in the canteen from about 8:20 to 8:45 a.m. having coffee and had no good reason for being there at that time of day. Based on the numerous counselling sessions held with the grievor concerning various office procedures, including the taking of coffee breaks at the periods fixed, namely, 9:30 to 9:40 a.m., and his previous disciplinary record, he assessed him a 10-day suspension without pay.

At this hearing, the grievor had a different version to tell of what happened that morning, March 8, 1993. He testified that he had arranged with Mr. Rochon to meet him in the canteen to discuss the assignment that he had to review and revise the Standing Offer Agreement, the specifications, invoices, and bills surrounding overhead doors, which was to be submitted for bidding to contractors. The work was of a priority nature and Mr. Rochon had knowledge of the overhead doors as the "OPI". The grievor was anxious to get Mr. Rochon's advice on this matter. They met in the canteen and went over the documents which the grievor had brought to the meeting. They incidentally had coffee also while in the canteen. While the grievor said they left the canteen after they completed reviewing all the papers he had brought with him, Mr. Rochon testified that they had hardly gone through half of the papers when they felt that there was something happening when they observed a

number of persons from the contracts section entering and leaving the canteen after making purchases and decided to leave the canteen and go back to their workplaces.

The grievor was confronted with his written statement given in March 1993, Exhibit E-24, to the effect that on the morning of March 8, 1993 he had gone to the PM Office but when there was no one there he had then gone to the canteen to see if anyone from the PM Office was there. He then wrote in his statement that since no one from the PM Office was there, "I chatted with Mr. Gilles Rochon, bought a coffee and then Mr. St-Denis arrived at the canteen". The witness stated that while he had given such a statement at that time, he was now telling the truth because he was under oath at this hearing.

Having heard all the evidence, I am prepared to believe that the grievor was assigned the task of reviewing and reassessing only the specifications of the overhead doors and not the contract itself or the invoices or billings. This being so, there was no need for him to consult with Mr. Rochon who was being consulted "because the contractor was overcharging" and Mr. Rochon knew something about this. Again, I accept as fact the statements given by both Mr. Rochon and the grievor as to what had transpired in the canteen the morning in question. Mr. Rochon admitted to taking his break earlier than usual and to having coffee with the grievor who happened to enter the canteen at that time. The grievor admits to sitting down and having coffee in the canteen when another individual which he wished to meet was not in the canteen after he had gone there to see whether he was. There was no discussion of business they both originally admitted and I have concluded that there was no good business reason for them to meet in the first place. They were both taking a coffee but at a time earlier than their scheduled break period, which was 9:30 to 9:40 a.m., and the grievor had been warned on numerous occasions not to do so; it went against office directives and procedures in place. I do not accept as truthful the grievor's and Mr. Rochon's belated explanation of what they were doing in the canteen at the time. The grievor's evidence is self-serving and cannot, in the circumstances, be accepted as being truthful, even though given under oath.

Accordingly, I find that the grievor misconducted himself when he absented himself from work without permission between approximately 8:20 and 8:45 a.m. on March 8, 1993.

The grievor was assessed the penalty of a 10-day suspension without pay for this misconduct, as progressive discipline, based in part on his disciplinary record, which showed a five-day suspension and a seven-day suspension. I ruled in an earlier decision (Board file 166-2-25037) that the five-day suspension should be reduced to a letter of reprimand and because I reduced in this decision his seven-day suspension to a one-day suspension, I find that the appropriate penalty for his misconduct on March 8, 1993 should be a three-day suspension, the whole in keeping with the principles of progressive discipline.

In the circumstances, the grievor is to be reimbursed for all lost wages and benefits for seven of the 10 days of suspension without pay that he has served.

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This decision relates to a 10-day suspension meted out to the grievor (Board file 166-2-25686).

On April 22, 1993, the grievor phoned his office and spoke to his supervisor, Mr. Gaulin, saying that he would not be in to work that morning. When asked for the reason why he would not be in, Mr. Gaulin testified that the grievor said that he had two appointments "downtown". When asked whether they were union related, the grievor had said that he could not say anymore, it was "confidential". If he could make it, he would be in in the afternoon. The grievor did not make any mention of sickness or sick leave. Mr. Gaulin advised MWO Locke of the grievor's phone call. MWO Locke was concerned about the grievor's phone call. It went against everything that management had counselled the grievor on in terms of absence from the workplace. He had just been counselled in this regard on April 13, 1993 and on February 8, 1993. He was told that he needed to have prior permission to take leave and, if sick, notify his supervisor prior to the start of the work day. The grievor, however, had not said that he was sick in this case. Accordingly, MWO Locke considered the grievor to be absent without permission. Leave of any kind was not granted.

The grievor called Mr. Gaulin again at 1:30 p.m. and said he would not be in for the remainder of the day. The grievor mentioned a file which had been missing from MWO Locke's office and so Mr. Gaulin asked him whether he wanted to talk to MWO

Locke. The grievor said he did and so MWO Locke was brought to the phone. He asked the grievor, inter alia, where he was and whether he was sick. The grievor did not respond to his questions but instead said that he had seen a "document" and that there would be serious consequences as a result; MWO Locke "was in deep shit", he told him. MWO Locke responded that that was not the issue. He repeated himself, asking the grievor where he was and whether he was sick. The grievor, again, did not answer and the conversation ended.

After the phone call, Mr. Gaulin considered that, because the grievor would not give any reasons for his absence, he would be deemed to be absent without leave and not paid for the day. The grievor had not requested any type of leave, be it sick leave, vacation leave, family-related leave or any other kind of leave and, therefore, any such type of leave could not be given to him without his asking for it.

On April 25, 1993, the grievor filed a leave application asking for vacation leave for April 22, 1993. The application (Exhibit E-27) was signed April 23, 1993. This request was considered unacceptable as it was received too late, after the fact, for vacation leave. The grievor was deemed to have been absent on that day without permission. He had once again, according to Mr. Gaulin, failed to heed the numerous counsellings given to him about needing to have prior permission before taking vacation or other leaves.

On April 23, 1993, the grievor submitted a memorandum addressed to Mr. Gaulin, filed as Exhibit E-31, which reads:

> *This is* [to] *ascertain and make clear that I did in good order/faith call yourself on April 22, 1993 at exactly 07:31 to inform you sir, that I would not be at my place of work for the said day - / and when you requested the reasons - I replied that it was confidential - End of call.*

At a later date, the grievor submitted a memorandum dated April 22, 1993, filed as Exhibit E-33, which reads:

> *At approx. 07:31, I contacted my Supervisor WO Frank Gaulin to inform him that I would <u>not</u> be at work today due to personal reasons, WO Gaulin wanted to know if it was due to illness. I replied yes but it was confidential.*
>
> *<u>END</u>*

This second memorandum from the grievor was handed by him to Lt.-Col. Brown at a much later grievance hearing involving another matter, so it was not considered by Lt.-Col. Brown when he held his disciplinary hearing concerning the grievor's absence on April 22, 1993. Considered at that hearing, over and above the verbal testimony of Messrs. Gaulin and Locke, were the only two documents thus far submitted by the grievor, namely his application for vacation leave for April 22, 1993, dated April 23, 1993 (Exhibit E-27), and the grievor's statement of what had occurred on April 22, 1993, dated April 23, 1993 (Exhibit E-31). The grievor did not attend this disciplinary hearing, although he had been warned that the hearing would proceed in his absence if he did not attend (Exhibit E-32). He had phoned in on that morning saying he would not be in to work. Lt.-Col. Brown, based on the evidence before him, concluded that the grievor was absent without permission on April 22, 1993, and had thus misconducted himself. He concluded that the grievor knew what was expected of him; he had been counselled and coached numerous times, the most recent time being April 21, 1993. Accordingly, he gave the grievor a 10-day suspension without pay. He had not taken into account the 10-day suspension awarded the grievor for his misconduct of March 8, 1993, as the disciplinary hearing for that infraction was taking place on the same day as that for the April 23 misconduct because of delays occasioned in holding a hearing on the March 8, 1993 misconduct. He considered that, in the circumstances, the grievor did not have an opportunity to gain from or rehabilitate his performance as a result of the first 10-day suspension. So, in terms of the quantum, he did not take that first 10-day suspension into account.

Lt.-Col. Brown testified that he had received the second memorandum from the grievor explaining his actions on April 22, 1993, filed as Exhibit E-33, at a grievance hearing on another matter on June 29, 1993. That was the first time Lt.-Col. Brown had seen this document. Management had never received a <u>sick</u> leave application from the grievor for April 22, 1993.

The grievor testified at this hearing that he knew, through counsellings that he had received, that to obtain sick leave he had to call his supervisor before or around 7:30 a.m. On April 22, 1993, he had attempted to call his supervisor, Mr. Gaulin, at 7:15-7:20 a.m. but Mr. Gaulin's phone was busy. At around 7:30 a.m., he got through to Mr. Gaulin and told him he would not be in that day due to sickness. He had said: "I will not be in today". Mr. Gaulin had asked why. The grievor had answered: "I'm

not feeling good". Mr. Gaulin asked for specifics: "What do you have exactly?" The grievor had replied: "It is confidential". He had said "confidential" because he did not want management to know the specific reason, and added: "Because I was being stressed out and going though what is called a burnout. I didn't want management to know that they were getting to me with their continued harassment". Mr. Gaulin had responded "OK". The grievor did not recall having called back to the office and having spoken to Mr. Gaulin and then MWO Locke. It was possible, but he did not recall. He has no recollection of speaking to MWO Locke at around 1:30 p.m. that day.

The next day, April 23, 1993, the grievor submitted to Mr. Gaulin an application for leave form (Exhibit E-27). "This should have read sick leave", he stated. He had not submitted a sick leave application "due to the circumstances of the previous day", he added. Because of the harassment he was undergoing and through inadvertence he filed the leave application asking for vacation leave for April 22, 1993.

In cross-examination, the grievor stated that he had called Mr. Gaulin at around 7:30 a.m. but got a busy signal at first. He insisted that he had told Mr. Gaulin that he was "sick" and "confidential". The "confidential" was in reference to his sickness. He had never said that he had two appointments downtown. There was nothing in his conversation with Mr. Gaulin about when or where he was going to go that day.

The grievor admitted that he wrote his memorandum, Exhibit E-33, "after the fact", pertaining to events of April 22, 1993, "but I can't say when", he added. "It could be I wrote Exhibit E-33 sometime around June 29. Probably I didn't write it on April 22, as indicated...Exhibit E-33 is more of a personal note. Perhaps I wrote it from my journal, later. It was written sometime later. It said April 22 on Exhibit E-33 because that was the date of the incident", he stated.

The grievor was referred to Exhibit E-36, which is an extract from a "Résumé of Incidents from October 1991 to April 1993, to Form Part of Harassment Investigation 93-C-1000-005" prepared by the grievor. Regarding events of April 22, 1993, it is stated:

> *07:30 called WO Gaulin absent today. / confidential<*
> *WO ask where I was going / whom I was to see what subject.*

The grievor acknowledged that Exhibit E-36 reflects the word "confidential" and that there is no mention of sickness. The grievor, however, questioned these entries, even though it was his own document, prepared by him. The April 27, 1993 entry in this document also indicates that the grievor had attended at his union's (UNDE) office on April 22, 1993. The grievor had earlier denied that he had gone to UNDE that day.

Mrs. Cléroux testified on behalf of her husband and stated that she was standing next to him in her kitchen when he phoned Mr. Gaulin on April 22, 1993. He had tried twice, at 7:15 and 7:20 a.m. approximately, and Mr. Gaulin's phone was busy. He got through to him at around 7:30 a.m. Her husband told Mr. Gaulin: "I won't be in today, I'm sick, I'm not feeling well". Mrs. Cléroux also related that MWO Locke had phoned around 4:45 p.m. and asked for her husband who had just stepped out to go to the pharmacy for medication for a migraine he was suffering. She continued by stating that MWO Locke was rude, impolite, and angry when he told her that her husband was absent without permission and would not be paid for the day. She had written a letter to the Minister of National Defence complaining but had received an answer that MWO Locke was only doing his duty in calling as he did and leaving a message and there was no evidence of harassment on his part or being impolite in enquiring about the whereabouts of her husband, who was considered to have been absent from work without permission.

Argument for the Employer

Counsel for the employer argued that this case is not about sick leave or any improprieties alleged by the grievor against MWO Locke's conduct. What it is about, counsel stated, is whether the grievor followed the right procedure for requesting leave. She added that her reference point was the testimony of Lt.-Col. Brown regarding the time of the grievor's call to Mr. Gaulin on April 22, 1993, the inadequacy of the explanation given for the absence, and the grievor's failure to follow proper leave procedures.

With regard to the time of the call by the grievor, the employer's evidence is that the grievor phoned the office at 7:45 a.m. As indicated by Lt.-Col. Brown, the onus is upon the employee to inform management by the start of the working day,

7:30 a.m., whether he or she will be absent and the reason for the absence. The employee's response will then be considered by management in determining whether there is an authorised or an unauthorised absence.

With regard to the second element, that the grievor failed to provide an adequate explanation to his supervisor, counsel relied on the evidence of Mr. Gaulin, as summarized in the documents filed as Exhibits E-26 and E-30, and his oral testimony. She submits that Mr. Gaulin was credible and consistent. The grievor had referred to two appointments in town. When Mr. Gaulin had enquired as to the nature of the appointments, as he was permitted to do, the grievor would only say that it was confidential and that he could not tell his supervisor anything. The employer's evidence is that the grievor did not say that it was in respect of sickness and he did not say it was in respect to annual leave. He did not say it was in respect to union business. He did not refer to any type of emergency. He simply refused to provide the requested information and abruptly ended the call on his own terms. Mr. Gaulin's testimony is supported by Exhibit E-31, which was the first note prepared by the grievor and presented to Mr. Gaulin on April 23, 1993, one day following the incident. Mr. Gaulin's testimony is also supported by Exhibit E-36, which is a record of events recorded by the grievor himself and provided by him during the harassment complaint investigation. Despite the grievor's reference to illness during this hearing, his notes provided at the time of the incident clearly contradict his oral testimony given at this hearing approximately three years after the incident. Counsel submits that Exhibit E-33, the grievor's later note, as well as his oral testimony at this hearing are not credible. The grievor had the onus to justify his absence to the employer and refused to do so, counsel added.

With regard to the third item, the grievor had been counselled on numerous occasions with regard to the procedure for requesting leave. Annual leave had to be requested in advance of the leave and sick leave procedures required the employee to tell his supervisor that he was sick and would not report for work that day by the start of the work day, indicate the reason for the absence, and submit a sick leave application upon his return to the office. The grievor was reminded, through counselling sessions, on February 8, March 10, April 13 and April 21, 1993, of the correct procedures concerning leave. It was emphasized to him that annual leave was not to be submitted in arrears and despite numerous and timely reminders about the

procedure, two days later, following a counselling session, he submitted a leave application for annual leave in arrears. His request was after the fact and contrary to clear instructions. Counsel submits that the simple fact is that the grievor decided that he was not going to work on April 22, 1993, and he did not think that he had to justify his absence to management.

With respect to Exhibits E-31 and E-33, counsel submits that there is a serious question as to the grievor's credibility. She reiterated that Exhibit E-31 was submitted at the time of the incident and there is absolutely no reference in it to sickness. She submits that the absence of the word sickness is a serious omission and there is no reference to sickness in Exhibit E-31 because the grievor made no reference to illness during the earlier telephone conversation with Mr. Gaulin on April 22, 1993. He provided no further representations at his disciplinary hearing on April 26, 1993. Neither the grievor nor his union representative showed up at his grievance hearing on July 5, 1993, which had been continued from June 23, 1993, because they had nothing further to add, they had advised. Exhibit E-33 only shows up two months after the fact at his grievance hearing on the employer's denial of pay for the day, April 22, 1993.

Counsel submits that the grievor's testimony that he had "inadvertently" stated that he was seeking vacation leave when he submitted a leave application for April 22, 1993 is simply not credible. Counsel submits that the grievor knew what he was doing and did not inadvertently request vacation leave. He did not inadvertently make a reference to the vacation leave code and he did not inadvertently cross out the reference to sick leave. If illness was the reason for his absence, this reason should have been provided to the employer. Counsel submits that it was not provided because it was not the reason.

The grievor's credibility is seriously questioned by his own statements, Exhibits E-31 and E-36. In Exhibit E-36, there is a reference to what happened on April 22, 1993; where he was going, whom he was to see and regarding what subjects, and his attendance at UNDE on April 22, 1993.

With respect to the grievor's telephone conversation with MWO Locke, which the grievor cannot even recall having, the grievor in that call refused to reply to MWO Locke's question to him as to the reason for his absence that day, April 22, 1993. Counsel submits that this attitude was clearly defiant and that the grievor had his own agenda. He was not going to answer his superior's question just as he had refused to tell Mr. Gaulin earlier in the morning of the reasons for his absence.

With regard to Mrs. Cléroux's evidence, counsel stated that her credibility is seriously questioned by her husband's, the grievor's, own statements, Exhibits E-31 and E-36. In Exhibit E-36, there is reference to what happened on April 22, 1993: where he was going, whom he was to see, and what the subjects were, as well as his attendance at UNDE on that date. Counsel added that it becomes a matter of credibility as to whether MWO Locke was rude, impolite, and angry when speaking with Mrs. Cléroux in the late afternoon of April 22, 1993 and asking her to convey the message to her husband, who was absent from his house at the time, that he was considered as being absent from work and would not be paid for the day. MWO Locke denies that he was rude or impolite with her and denies that he was angry at the time. The investigation by the Minister's Office conducted afterwards, after Mrs. Cléroux had complained to the Minister, found that MWO Locke was only performing his duty when he called and that there was no evidence of harassment towards her on his part.

Turning to the issue of quantum, counsel asked that I first consider the numerous counsellings that the grievor had been given regarding workplace procedures and the general issue of absences from the workplace. Counsel referred to these counselling sessions in some detail. She added that the grievor was clearly made aware of what was expected of him and clearly informed that management had serious concerns about his attitude and conduct, yet he simply refused to comply with these instructions. In addition to these counsellings, counsel asked that I consider the proximity of counselling on this very issue to the incident of misconduct. The grievor was reminded on March 10, April 13 and April 21, 1993 as to the procedure respecting leave and immediately refused to follow it. In these circumstances, his conduct on April 22, 1993 constituted a deliberate defiance of management's authority. He simply refused to learn from these corrective disciplinary measures and counselling undertaken by management. As concluded by Lt.-Col. Brown, he was demonstrating

insubordination. The grievor refused to recognize his misconduct and has demonstrated no remorse. He has provided no evidence of any mitigating factors. In addition, his previous disciplinary record is relevant in assessing his misconduct. Lt.-Col. Brown's decision not to increase the level of discipline was more than reasonable. The 10-day suspension was more than warranted in the circumstances given the clear instructions to the grievor and his immediate response to ignore those instructions. Given that his behaviour was not improving, a serious disciplinary measure was more than warranted to reiterate management's concerns.

Counsel referred to the following arbitral decisions in support of her position: Bédard (Board file 166-2-21380); Mitchell (Board file 166-2-16219); Stenson (Board file 166-2-16960); Herrit (Board file 166-2-16664); and Canadian Labour Arbitration, by Brown and Beatty, at paragraph 7:3110, dealing with notification of absences, and paragraph 7:4422, dealing with rehabilitative potential.

Argument for the Grievor

Counsel for the grievor pointed to the grievor's situation prior to April 22, 1993. He had been on sick leave for the best part of that month. He was experiencing stress due to harassment in the workplace. This coloured the events of April 22, 1993, he argued.

Counsel acknowledged the conflicting evidence surrounding the grievor's phone call to Mr. Gaulin on the morning of April 22. The grievor had tried on three occasions to contact Mr. Gaulin and only succeeded on his third try, as the phone rang busy on the first two times. This is important evidence, counsel stated, with respect to following procedures in place at the time. The grievor's evidence is that he advised Mr. Gaulin that he was not feeling well, that he would not be in that day. Mr. Gaulin asked for particulars of his illness and the grievor hesitated to give him particulars because he did not want the employer to know that they were getting to him. Mrs. Cléroux confirmed that her husband, the grievor, advised Mr. Gaulin that he was sick and counsel believes that the grievor's testimony is logical as to why he did not want to give any particulars. His explanation is plausible given the environment in the office at the time, counsel stated.

Counsel mentioned the issue of the phone call which the grievor allegedly made at 1:30 p.m. on April 22, 1993 to the contracts office when he was supposed to have spoken to both Mr. Gaulin and MWO Locke. The grievor's evidence is that it is possible that he made that call.

With regard to the phone call which MWO Locke made to the grievor's residence at 4:45 p.m. on April 22, 1993, counsel stated that this phone call is extremely relevant to this case. It gives an indication of the environment and circumstances in the workplace at the time. Mrs. Cléroux had used the words "rude, mad, angry". This illustrates the animosity emanating from the employer at the time. Her testimony was unshaken in cross-examination. She indicated that she advised MWO Locke that the grievor was sick and, more importantly, that he had advised Mr. Gaulin of that fact that morning. Mrs. Cléroux advised her husband, the grievor, that she would not tolerate any more calls from the office like she received from MWO Locke. Counsel argued that this supportive evidence between wife and husband should be accepted by me as being factual and not any more self-serving than the corroboration that is found in the employer's evidence.

Turning to Lt.-Col. Brown's decision finding the grievor guilty of misconduct, counsel questioned the criteria he used in coming to that decision. He had concluded that the grievor was late in calling in, having called in at 8:45 a.m., yet at the same time he considered Exhibit E-27, an application for vacation leave, and applied the same criteria for asking for sick leave to asking for vacation leave. The procedure for asking for vacation leave is to submit a request two days prior to the proposed vacation leave being taken. Counsel could not understand why Lt.-Col. Brown had applied criteria much more relevant to sick leave procedure than to vacation leave procedure. The decision is irrational because of this, counsel concluded.

The grievor's testimony with respect to Exhibit E-27 was that, due to the events of the previous day, especially the fact of MWO Locke's calling his wife, it caused him mistakenly to complete the form the way he did. The grievor's concerns that morning were concerns with addressing the issue of the phone call by MWO Locke rather than the particulars of the leave application.

Counsel distinguished the decisions in Herrit and Stenson (supra) cited by counsel for the employer in support of her position. He submitted in support of his own position the following arbitral decisions: Barber (Board file 166-2-21173) and Faulkner (Board file 166-2-21456).

Rebuttal Argument for the Employer

Counsel for the employer pointed to the fact that the grievor had never advanced any mitigation based on stress to Lt.-Col. Brown, as he never admitted to Lt.-Col. Brown that he was sick at his disciplinary hearing. To the suggestion by counsel for the grievor that the grievor's description of what had been said in his telephone conversation with Mr. Gaulin the morning of April 22, 1993 is "plausible given the environment in the office", counsel for the employer disputed, firstly, that there was any mention of illness and, secondly, when the grievor is counselled as to the proper procedure to follow for requesting leave, the employer is certainly entitled to expect that he would follow the procedures.

Mrs. Cléroux's testimony about the content of her telephone conversation with MWO Locke is countered by MWO Locke's testimony and also the statements of her own husband which were written in 1993, Exhibits E-31 and E-36.

With respect to counsel for the grievor's comments concerning Lt.-Col. Brown's conclusions, counsel for the employer pointed to Exhibit E-27, the application for vacation leave submitted by the grievor, as being relevant because the grievor knew the procedure to request leave. He had been counselled on it and he still persisted in contravening the procedure. Lt.-Col. Brown did not apply criteria much more relevant to sick leave procedure. Again, with respect to the argument that the grievor mistakenly completed the leave form, Exhibit E-27, counsel stated that she has already commented on that point but adds that that is exactly what the grievor was counselled on and the employer expected that he would follow it.

Counsel distinguished the decisions in Faulkner and Barber (supra) cited by the grievor's counsel in support of his position.

Reasons for Decision

The question to be resolved in this case, I find, is whether or not the grievor had a legitimate reason to be absent from work on April 22, 1993. Of course if he did not, then he will be found to have misconducted himself and there would remain then only to determine the appropriate penalty for his misconduct. If there is no misconduct on his part, then there is no penalty to be assessed against him.

The grievor phoned his supervisor sometime between 7:30 and 7:45 a.m. on April 22, 1993 and informed him he would not be going into work. What reason or reasons he gave for not going to work is the crux of the problem to be resolved. The employer contends that the grievor stated that he had two appointments downtown and that that was the reason why he was not coming to work. When asked whether the appointments were union related, the grievor had replied that he could not say because it was confidential. He also said that if he could make it, he would be in in the afternoon. In the afternoon, at 1:30 p.m., he phoned to say he would not be in to work. The grievor at that time did not reply to MWO Locke's question to him concerning why he was not in to work, that is, was he sick. In the circumstances, because the grievor had not asked for any kind of leave, sick, vacation, family-related, or other kind of leave, the employer took the position that the grievor was absent without permission. To the employer's surprise, the following day the grievor submitted a leave application form requesting vacation leave for April 22, 1993. This application was denied, as being filed contrary to procedures in place which required that vacation leave be applied for in advance, at least two days in advance of the sought after leave.

At a disciplinary hearing held on April 26, 1993 in connection with the grievor's absence on April 22, 1993, in the absence of the grievor who did not report for work that day, April 26, and was also not paid for that day, the employer proceeded with the disciplinary hearing of the grievor, involving several infractions allegedly committed by him. Based on the evidence advanced at the hearing, including the testimony of the grievor's supervisor, who had been the person spoken to by the grievor when he called the morning of April 22 and the grievor's application for vacation leave, the employer, in the person of Lt.-Col. Brown, found that the grievor had been absent without permission on April 22 and had thus misconducted himself.

He assessed the grievor a 10-day suspension without pay based on the grievor's past record, his continued refusal to abide by the work procedures in place, particularly with regard to procedures relating to leave applications and absences from work, and in keeping with the principles of progressive discipline but without taking account of another 10-day suspension assessed against him at the same disciplinary hearing for earlier misconduct.

The grievor at this hearing, on the other hand, claimed that in his phone call to his supervisor at around 7:30 a.m. on April 22, he stated that he was sick, was not feeling well and would not be in for the day. When asked by his supervisor what exactly was wrong with him, he said it was confidential. He explained at this hearing that he was "stressed out" at the time because of what was going on at work relating to himself but did not want to let his employer know that they "had gotten to him". This is why he said it was "confidential". He denied having said that he had appointments to attend in town. There were no such appointments. He denied the suggestion by the employer's counsel that he had attended his union's (UNDE) office that day. His wife testified that she overheard the grievor say to his supervisor on April 22 that he was sick and would not be in to work.

Later, around June 29, 1993, the grievor submitted a document, Exhibit E-33, prepared by the grievor around that time in which he states that on April 22 he had called in to his supervisor to say that he would not be in due to illness.

Reference was made by the employer to a statement made by the grievor in a document prepared by himself (Exhibit E-36) for use in a harassment investigation. The statement in question has to do with what had transpired for the grievor on April 22, 1993. The statement reads:

> *07:30 called WO Gaulin absent today. / confidential*
> *WO ask where I was going / whom I was to see*
> *what subject.*

Again, the same document (Exhibit E-36) against the April 27, 1993 entry reads:

> *UNDE / Allen Murray / meeting for various grievances*
> *Allen Murray info. me that Ken Graham had contacted him to see if I had attended UNDE on 22-4-93. Allen Murray would have confirmed yes I was.*

The action taken by the employer of holding a disciplinary hearing into the grievor's absence on April 22 was consistent with its belief and understanding that the grievor had not given any valid reason for his absence on that day. Had he in any way said that he was sick, it could not have proceeded as it did. It is well-known that it is not permitted in any way to attempt to uncover or ask for any particulars of an employee's illness once the employee declares that he is sick and, as a result, unable to report for work. The grievor's belated statement came two months later, on June 29, that he had told his supervisor in his phone call that he was sick, can only be seen as self-serving and must be disregarded. So also must the grievor's wife's testimony that she overheard the grievor saying to his supervisor that he was sick in their telephone conversation on April 22, 1993. This testimony is not plausible in view of the documentary evidence and oral testimony advanced at this hearing. The grievor's testimony that he told his employer that the reason why he could not report for work on April 22, 1993 was because he was sick cannot be accepted. It runs contrary to the oral testimony and documentary evidence produced at this hearing.

In the circumstances, I find that the grievor misconducted himself on April 22, 1993 by being absent from work without permission. He was assessed for this incident of misconduct a 10-day suspension without pay, arrived at by the employer on the basis above set out. Having regard, however, to my decision in relation to earlier acts of misconduct and following the principles of progressive discipline and abiding by the employer's decision not to take into account its other suspension for 10 days for misconduct dealt with at the same time as the instant misconduct, I find that an appropriate and reasonable penalty is a three-day suspension without pay.

Accordingly, this grievance, Board file 166-2-25686, is partially sustained in that the penalty is reduced from a 10-day suspension to a three-day suspension without pay. The grievor is to be reimbursed all lost wages and benefits for seven of the 10 days of suspension he has served.

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A 15-day suspension was meted out to the grievor for alleged misconduct on April 23, 1993. The facts in this matter appear to be that on April 23, 1993 at around 7:30 a.m., the grievor was told by MWO Locke to remain at his desk because he wanted to see him later in the morning. MWO Locke had a meeting scheduled in his office at 8:00 a.m. with Sgt. Charlotte Carrière, chief investigator with the military police. It was in connection with the grievor's telephone call to him the day before, at around 1:30 p.m., in which the grievor had said that he had a document from a file which was missing and he said that, as a consequence, MWO Locke was in "deep shit" and legal action would be taken. The file had been missing from MWO Locke's office for some time. MWO Locke had called Sgt. Carrière after the grievor's phone call at 1:30 p.m. on April 22, 1993 and arrangements were made for her to meet with MWO Locke at 8:00 a.m. on April 23.

While Sgt. Carrière was in MWO Locke's office, sitting in front of his desk and to the left of the door into his office, the grievor suddenly burst into the office unannounced, and without knocking, and dropped or flung, depending on which version of what occurred is accepted, the grievor's or MWO Locke's version, respectively, a document or papers on his desk and with this the grievor said something like "Don't call me at home and answer the allegations on the papers". MWO Locke immediately told him to leave the office and had to repeat himself before the grievor left. Sgt. Carrière testified that the grievor, in coming into the office as he did, was belligerent in the way he rushed into the office unannounced and without knocking, talking in a loud voice and tossing the papers on the desk. MWO Locke completed his meeting with Sgt. Carrière and then went to see Mr. Gaulin, the grievor's immediate supervisor, and instructed him to bring the grievor to MWO Locke's office. A few moments later, Mr. Gaulin and the grievor appeared at MWO Locke's office, the door of which was then open, and stayed in the doorway to his office and did not enter. The grievor made a sarcastic remark in French: "Vous êtes des beaux", which Mr. Gaulin translated into English as: "You're something else". MWO Locke noticed that the remark was sarcastic from the expression on the grievor's face. The grievor does not deny having made the sarcastic remark. The grievor next said to MWO Locke in a loud, intimidating voice: "If you want to harass someone, harass me. I'm a real man. If you want to see what a real man can do come out of the building and I'll show you what a real man can do". The grievor, in his testimony,

attempted, unconvincingly, to explain that he did not mean to intimidate or challenge MWO Locke but only to invite him outside the hangar where they could continue shouting at each other. Both the grievor and Mr. Gaulin left MWO Locke's office and the grievor returned to his desk. Moments later, MWO Locke came to the grievor's desk and told him to leave the office and that he would not be paid for the day. The grievor replied: "Put it in writing". When MWO Locke repeated his order to leave and that it was not necessary to put it in writing, as all the office could hear the grievor, he was so loud, the grievor again replied: "Put it in writing". MWO Locke left and shortly afterwards the grievor left.

The grievor attempted to explain his actions this way. He was infuriated with MWO Locke having called his home the previous day and having been rude, impolite, and angry with the grievor's wife, in the grievor's absence from his home, when he told her that she was to tell her husband that he was considered absent without permission on April 22, 1993 and would not be paid for that day. The grievor's wife was upset over the call and complained to the grievor that she would not tolerate his supervisors calling her home and treating her in an intimidating way. The grievor decided that he would not accept such harassment by his employer and commenced to prepare a memorandum to Lt.-Col. Brown, MWO Locke's superior, and to the Minister of National Defence, complaining of this harassment and demanding that MWO Locke cease and desist from his intimidating action of calling the grievor at his home.

The next morning, early on April 23, 1993, the grievor completed his memorandum to Lt.-Col. Brown and his letter to the Minister. He sent his letter to the Minister and his memorandum to Lt.-Col. Brown was delivered to Capt. Perrault, Lt.-Col. Brown's administrative officer, for delivery to Lt.-Col. Brown. He had also prepared a copy of the memorandum (Exhibit E-46) for MWO Locke. This is the document which he delivered to MWO Locke at or around 8:00 a.m., when the latter, to the grievor's knowledge, was meeting with someone in his office. He stated that he knocked first and then went into the office and dropped some papers on MWO Locke's desk and said to him: "Please acknowledge that you will not be contacting my home again". He was told to leave the office immediately. He did not leave immediately because MWO Locke had glanced at the papers for some seconds, then he said to the grievor "get out" and the grievor said he left. Later he was told by Mr. Gaulin to follow

him to MWO Locke's office, as the latter wanted to speak to him. They approached the open office door but did not go in. He made the sarcastic remark at that moment, "Vous êtes des beaux", which the grievor acknowledged meant in English: "You're something else". MWO Locke asked him why he had barged into his office like he did earlier and threw papers in his face. The grievor replied that he had not done that and then said: "You called my wife last night and harassed her on the phone". MWO Locke said he did not and asked the grievor to give him credit for being more intelligent. The grievor had then said: "If you want to bother someone bother me, not my wife. If you want to scream at someone, you can scream at me. You should take on a man. If you ever want to step outside just let me know", or something to that effect, he stated.

A few moments later, MWO Locke went to the grievor's cubicle and said, pointing his finger at him: "You are dismissed. Leave the office. You will not be paid for today". The grievor replied: "Put that in writing". MWO Locke repeated that he was dismissed and added: "Go ahead, shout so everybody can hear you in the office".

The grievor explained that although he had in writing informed Lt.-Col. Brown of the telephone call by MWO Locke to his home and wife the day before and had written to the Minister about this, claiming harassment, he wanted to make sure that all of management, and in particular MWO Locke, was made fully aware that he would not tolerate any further calls to his home, that they must cease and desist from that practice. This is why he delivered his note to MWO Locke, to make sure that he understood that he must stop calling his home immediately. He had awaited an opportune moment to deliver his note and did so when someone else was with MWO Locke to act as a witness of his delivery of the note, in case there was need later to prove that he had.

The grievor did not attend the disciplinary hearing held by Lt.-Col. Brown with regard to the incidents of April 23, 1993. Lt.-Col. Brown assessed the oral evidence given at the hearing by Messrs. Gaulin and Locke and Sgt. Carrière and reviewed the written statements submitted by these persons and Messrs. Pellerin, Arnott and Boucher. Lt.-Col. Brown recognized that MWO Locke had made a call to the grievor's residence and had spoken to his wife, in the grievor's absence, but accepted MWO Locke's statement that he had not been rude, angry or impolite with her.

Knowing MWO Locke for some time, Lt.-Col. Brown believed him, as it would have been out of character for MWO Locke to have acted in an improper way. Lt.-Col. Brown questioned, however, making a phone call, as MWO Locke had, and added that he himself would not have made such a phone call.

Lt.-Col. Brown found, upon the evidence before him, that the grievor had misconducted himself in barging into MWO Locke's office when he was having a meeting with Sgt. Carrière, of the military police, dropping or throwing papers on MWO Locke's desk as he sat at the desk, and demanding that MWO Locke read the papers and say that he would never again call his residence.

When the grievor was brought back to MWO Locke's office, he had uttered a sarcastic remark, aimed at both Mr. Gaulin, his immediate supervisor, and MWO Locke, the contracts officer, and in a loud, shouting manner, challenged MWO Locke and invited him outside to settle the issue.

Lt.-Col. Brown found this behaviour on the part of the grievor to be disrespectful, threatening, and challenging to MWO Locke as an individual, but he also found his actions to be challenging towards management, per se.

Lt.-Col. Brown found that the grievor had misconducted himself in that he had threatened his supervisor and showed extreme disrespect for management and MWO Locke. He recommended a 15-day suspension, as progressive discipline for this serious misconduct, but he took into account the fact that the two previous 10-day suspensions had not been awarded at the time of the misconduct, so the grievor had not had an opportunity to learn fully from these suspensions.

Argument for the Employer

Counsel for the employer submits that the evidence simply demonstrates that on April 23, 1993 the grievor rudely interrupted a private meeting between his superior, the contracts officer, MWO Locke, and a member of the military police, Sgt. Carrière. In addition, the grievor subsequently that same day challenged and threatened MWO Locke. He showed extreme disregard, was insubordinate, and openly threatened a supervisor in the presence of other employees.

MWO Locke and Sgt. Carrière testified that the grievor barged into the office unannounced, interrupting a private meeting, and proceeded to toss documents across his superior's desk. "He flung the papers onto my desk, in front on my face", MWO Locke testified. The grievor then improperly gave directions to his superior, saying words to the effect: "Don't call me at home and answer the allegations on the paper". The grievor was very forward and abrupt. His voice was raised and his tone intimidating. MWO Locke had to tell the grievor twice to leave his office. Rather than comply, the grievor remained in the office and eventually left of his own volition, when he decided he was finished. Sgt. Carrière testified that there was no knock on the door; he simply pushed in the door, which slammed against the wall, and went quickly to the desk. He tossed papers on the desk, was talking in a very loud voice and adopting a belligerent tone. Despite repeated directions to leave the office, the grievor did not leave until he finished saying what he had to say and in his own time. Later that day, when asked by MWO Locke to explain his behaviour, the grievor denied barging into the office and proceeded to challenge him with words to the effect: "I'm a real man. Come outside and I'll show you what a real man can do". His tone was very loud and the statement was provocative. MWO Locke testified that he had felt a sense of intimidation and a challenge to engage in a physical confrontation. The grievor was ordered to return to his cubicle and, again, did not respond without a further direction. MWO Locke then went to the grievor's cubicle and ordered him to leave the office. Counsel submits that this was a reasonable decision given the events of the morning, as MWO Locke was afraid other things might develop and did not know what the grievor might do next.

Again, however, the grievor further resisted his superior's directions for him to leave the office by refusing to leave unless the directions to leave were put in writing. He repeated twice "Put it in writing". He then failed to respond to a third request to leave.

Counsel asked that I consider the testimony of MWO Locke and Mr. Gaulin and the statements entered as Exhibits E-41 through E-45 concerning the subsequent exchange between the grievor and MWO Locke. The grievor proceeded to utter sarcastic comments and then challenged MWO Locke to go out of the building in a provoking fashion.

Counsel submits that based on the evidence, the grievor's credibility must be seriously questioned. His testimony was inconsistent and he deliberately downplayed his behaviour on that morning. Although he suggest that his conduct was provoked, he maintains that he went into MWO Locke's office and politely asked him to acknowledge that he would not be contacting his house anymore. The grievor, in cross-examination, agreed, however, that his words to MWO Locke might have been more direct. "If you ever want to step outside", his words may have been, he acknowledged. He could not remember many of the words that were said that morning but he did not deny that the incidents occurred.

Counsel suggests that on April 23, 1993 the grievor had a plan to confront MWO Locke and simply put him in his place. He knew Sgt. Carrière was in the office and thought that was the best time to hand the documents over. His conduct was deliberate and intentional and although he had already delivered a letter to Lt.-Col. Brown, referred to in Exhibit E-96, the grievor testified that he wanted to make sure management and MWO Locke got the message. Given this attitude, as well as the direct evidence of the employer's witnesses, counsel submits that the grievor, in both his manner and tone, was much more aggressive than he would have me believe.

Counsel submits that the employer has established the grievor's misconduct on the balance of probabilities and that his conduct constitutes extreme insubordination.

Concerning the question of the penalty assessed by Lt.-Col. Brown against the grievor, that is, a 15-day suspension without pay, there were the following factors considered by Lt.-Col. Brown in arriving at that penalty. There was the factor of the seriousness of the misconduct itself. The grievor had continued to disparage his superior, challenged and threatened him, and showed extreme disrespect through public and loud comments and repeatedly refused to respond to management's directions. Another factor was that the grievor demonstrated a defiant attitude towards management and an attitude contrary to the requirement of respect inherent in the employment relationship. The grievor's conduct must be viewed in terms of its impact on MWO Locke as an individual, in terms of his authority as a supervisor, and in terms of its impact upon the workplace, the public display of the grievor's actions and the determination to see him leave the workplace. Counsel argued that apart

from the grievor's previous disciplinary record, these incidents of April 23, 1993 by themselves warrant a severe disciplinary penalty.

Secondly, counsel submitted, the grievor's disciplinary record must be considered and the numerous counselling sessions concerning his attitude and refusal to adhere to management's directions. In keeping with the principles of progressive discipline, counsel submits, the penalty imposed of a suspension of 15 days without pay is more than reasonable and should be maintained by me. The grievor demonstrated repeated and similar misconduct. In spite of numerous counselling sessions, he continued to refuse to follow workplace directions. His behaviour, following the summer of 1992, indicates escalating incidents of insubordination and a deliberate flaunting of management's authority.

With respect to mitigating factors, counsel noted that the onus was on the grievor to establish persuasively any mitigating circumstances. Counsel argued that the telephone conversation the previous day between the grievor's wife and MWO Locke could not in any way condone the grievor's unacceptable and disturbing conduct on April 23, 1993. In any event, the grievor's claims of harassment by this telephone conversation were investigated and found to be groundless. Again, in Exhibit E-46, the grievor's letter to Lt.-Col. Brown, the grievor stated: "...*Since all my telephone conversations are automatically recorded, it* [MWO Locke's call] *will be sent to my solicitor for his comments*". With regard to the credibility to be ascribed to both the grievor and his wife, counsel referred to the fact that if the tape demonstrated rude behaviour on the part of MWO Locke, then it should have been presented at this hearing. Counsel submits that it was not presented because there was no improper conduct by MWO Locke.

With regard to the element of provocation, counsel pointed to the fact that the grievor's reaction on April 23, 1993 was not a "spur of the moment" reaction or an unpremeditated", action, which are elements found by arbitrators to be necessarily present when provocation is advanced as a defense to an employee's misconduct. The grievor had not immediately confronted MWO Locke when he first met him the next morning on April 23, 1993. Rather, he calculated his impact by interrupting a meeting with Sgt. Carrière. By his own testimony, the grievor, forcefully, was going to

personally advise MWO Locke and make sure he understood the message. This is not a man intimidated or otherwise provoked.

Furthermore, counsel asked that I consider the grievor's unwillingness to accept responsibility for his actions. He failed to demonstrate any remorse during his disciplinary hearing and before this Board. His resistance is demonstrated by the fact that he has never apologized and maintains the same attitude in this hearing. Counsel stated that, finally, she would ask that I consider management's attempts to deal with this employee's behaviour, both through counselling and formal discipline. Lt.-Col. Brown imposed a second 10-day suspension rather than progressive discipline and, as well, in the present case, as indicated by Exhibit E-48, he again did not increase the penalty as much as he could have, recognizing the proximity between instances of misconduct. Essentially, he stayed within the same range as for the previous suspension.

Counsel submits that the grievor's repeated misconduct within such a short time frame is, in fact, an aggravating factor and together with the incident of April 23, 1993 justifies the maintenance of the 15-day suspension. Lt.-Col. Brown, in assessing the penalty, considered the circumstances of the telephone call to the grievor's home on April 22. Accordingly, there is no basis to interfere with the penalty on the ground that he did not consider all relevant factors.

In support of her position, counsel cited the following arbitral decisions: Dearnaley (Board files 166-2-15008, 15009, 15154 and 15155); Fraser (Board files 166-2-14316, 14389 and 14390); Brind'Amour (Board file 166-2-10161); Taylor (Board files 166-2-16205 and 16206); Hepburn (Board file 166-2-6141); Re MacDonalds Consolidated Ltd. (supra); Martyr (Board files 166-2-29346 to 29351); Benard (Board files 166-2-8953 and 9330); Wilson (supra); Gauthier (Board file 166-2-6393); British Columbia Railway and Canadian Union of Transport Employees, Local 6; Volvo Canada Ltd. (supra); Canadian Forest Products Ltd. and I.W.A. Canada, Local 1-924 36 L.A.C. (4th) 400; Maritime Paper Products Ltd. and Canadian Paperworkers Union, Local 1520 19 L.A.C. (4th) 1; Canada Safeway Ltd. and Union Food and Commercial Workers Union, Local 401 34 L.A.C. (4th) 401; and 157 Albert Reports 195.

Argument for the Grievor

Counsel for the grievor pointed to the fact that counsel for the employer touched only briefly on the issue of provocation. Counsel for the grievor argued that provocation is an essential factor in this case. The phone call to the grievor's home is what preceded the events of April 23, 1993. This was a call placed after-hours and contributed clear provocation of the grievor. It clearly provoked the events which followed. Lt.-Col. Brown has said that he would not himself have made such a phone call had he been in MWO Locke's position. Even MWO Locke admitted that this was the first time he had made such a call to an employee, explaining that he wanted to advise the grievor right away that he would not be paid for the day. Counsel submits that this was a totally inappropriate response on the part of MWO Locke to the events that preceded the phone call on April 22, that is, the alleged phone call by the grievor to the office that day.

The evidence of Mrs. Cléroux, the grievor's wife, to the phone call was that MWO Locke was rude and that his tone was raised and that she was extremely upset. She remained upset throughout the evening. When the grievor arrived back at home, his wife advised him of what had happened. After everything that had occurred previously, the counselling, the disciplinary hearings, the isolation to different work areas, the investigation by the military police, he was absolutely outraged that on top of all that had gone on the employer had the audacity to violate the sanctity of his home. It was not the case where MWO Locke could have phoned and chewed him out on the phone. It was a call to his wife, in an inappropriate tone, which upset her very badly.

In these circumstances, on the evening of April 22, the grievor gets it in his mind that this is an unacceptable action by the employer and he is going to address it right away, on the first chance he gets. He is angry at the events which had taken place and this is coloring the approach he is going to take in addressing the matter.

The next morning, April 23, during the first contact with MWO Locke, the grievor is given an order not to leave the office because he wanted to speak to him later. The grievor, according to MWO Locke, did not respond other than to

acknowledge what had been said. There was thus a very brief interaction between the two.

MWO Locke testified that his meeting with Sgt. Carrière was for 8:00 a.m. and that the meeting had been called as a result of the grievor's call at 1:30 p.m. on the day before, April 22, saying that he had the missing file. MWO Locke was in his meeting with Sgt. Carrière when, at 8:15 a.m., the grievor charged into his office and threw papers right in front of him, in his face. Sgt. Carrière testified that he "dropped" the papers on his desk. Counsel argued that it was not as dramatic as MWO Locke would have us believe. Sgt. Carrière is an impartial witness of what went on and her evidence should be relied on.

According to MWO Locke, the grievor then said: "Don't call me at home and answer the allegations on this paper". The grievor's manner was forward, abrupt, and his voice was raised and he was intimidating, MWO Locke testified. MWO Locke said he did not look at the papers and that he told the grievor to get out of his office. A few seconds later, he had to say it over again and then the grievor left his office.

At the end of the meeting with Sgt. Carrière, MWO Locke advised Mr. Gaulin of what had happened. This was around 8:45 a.m. At approximately 9:00 a.m., he told Mr. Gaulin to go get the grievor and bring him back to his office as he wanted to speak to him concerning the events of the preceding day and with respect to the events of that morning. Mr. Gaulin and the grievor went to MWO Locke's office and the evidence is that they did not proceed into the office but remained in the doorway. That is when the alleged sarcastic remark in French was made: "Vous êtes des beaux". Then, according to MWO Locke, he asked the grievor a question: "Why did you barge into this office?" At which point, the grievor denied barging into the office. According to MWO Locke, the grievor accused him of calling and harassing his wife and he said: "If you want to harass somebody, harass me". According to MWO Locke, the grievor said: "I'm a real man, come outside and I'll show you what a real man can do". MWO Locke also stated that, when confronted with the allegation that he had harassed the grievor's wife, he asked the grievor to give him credit for some intelligence. MWO Locke then told the grievor to go back to his cubicle. There was some hesitation on the part of the grievor and then he did leave and returned to his cubicle. MWO Locke got up from his desk and went to the grievor's cubicle and

advised him to leave the premises and that he would not be paid for the day. MWO Locke said he said this maybe once, maybe twice.

The grievor, to the order to leave the premises, responded, according to MWO Locke: "Put it in writing". MWO Locke replied: "You don't need it in writing, the whole office can hear you". MWO Locke said that he then went to the office of the administrative officer, Capt. Perrault, and that while there the grievor appeared and advised Capt. Perrault that he was leaving to see his doctor and his MP.

Mr. Gaulin, in his testimony, when dealing with the words spoken by the grievor and MWO Locke at the latter's office, stated that MWO Locke's words were not a question but an instruction. "In the future you are not to barge into this office" and not as MWO Locke says: "Why did you barge into this office?" This is to show that MWO Locke's recounting that he had a reasonable approach to the grievor could quite easily have been more aggravating and intense than he would have us believe.

The grievor's position on the events of the day are largely similar to those recounted by MWO Locke, Mr. Gaulin and Sgt. Carrière. The grievor stated that the first thing he did when he arrived that day was to clear things up about what had occurred the previous day, by giving a round-trip memorandum (Exhibit E-31) and a leave application to Mr. Gaulin. The next thing he did was to provide a round-trip memorandum to Capt. Perrault, addressed to Lt.-Col. Brown (Exhibit E-46), requesting relocation and an accompanying letter describing the events of the previous day, particularly with respect to the phone call. According to the grievor, at 8:20 a.m. he knocked on MWO Locke's door and he handed him the round-trip memorandum concerning not contacting him at his residence. The grievor said he knocked on the door. MWO Locke said he barged in and Sgt. Carrière said he opened the door without knocking.

The grievor's reason for entering the office when Sgt. Carrière was present was to have a witness present when delivering the memorandum because if the activity of calling his home persisted, he was going to take further steps. In addition to making Lt.-Col. Brown aware of the situation, he wanted to make it clear to MWO Locke that his conduct was unacceptable. The grievor said he asked MWO Locke to please acknowledge that he would not contact his residence any further. MWO Locke told

him to leave and, according to the grievor, after telling him to leave, he glanced down at the papers, so the grievor did not leave immediately because he thought there might be something further arising out of MWO Locke's perusal of the letter. At that point, MWO Locke looked up and repeated his instructions to leave the office, which the grievor did, and returned to his cubicle.

Mr. Gaulin then went to the grievor's cubicle and requested him to accompany him to MWO Locke's office. This was at about 8:45 a.m.; Mr. Gaulin says 9:00 a.m. but nothing turns on this. When they arrived at MWO Locke's office, the grievor says he remained outside the doorway and Mr. Gaulin just inside the doorway. Mr. Gaulin's testimony places the grievor outside or just at the doorway. The grievor admits to making the remark in French: "You guys are really something". At that point, MWO Locke said: "You interrupted a private meeting with Sgt. Carrière. When you have papers for me don't just walk in and put them on my desk". The grievor said he responded: "Isn't that what you did last night when you called my wife and harassed her on the phone. Never call my home again. If you want to bother someone, bother me, not my wife". He threatened: "If you want to step outside, just let me know". He then left the office just as MWO Locke was getting up from his chair.

The grievor returned to his cubicle and in a matter of seconds MWO Locke was there and came just inside the doorway to the grievor's cubicle. He was hot on the grievor's heels. The grievor took a position just inside his cubicle. MWO Locke told the grievor he was dismissed for the day and the grievor asked for it in writing. MWO Locke refused to give it in writing and reiterated he was dismissed for the day and the grievor again asked him to put it in writing. MWO Locke said: "You do not need it in writing. The whole office can hear you". The grievor then said that a formal complaint had been made to the Minister's Office. MWO Locke said that that was the grievor's business and once again ordered him to leave.

Before leaving, the grievor drafted a round-trip memorandum which he gave to Mr. Gaulin, saying he was leaving work to see a doctor and that he would submit a proper certificate, but the date of return was not known. The grievor then went to Capt. Perrault's office, as MWO Locke has testified, and advised Capt. Perrault that he was going to see his doctor and his MP and then left the office.

Those are the facts in this case, counsel stated. The real issue is how I perceive the causal link between the events. In his review of the matter, Lt.-Col. Brown made a recommendation of a 15-day suspension and in so doing he made a finding that there was absolutely no indication of provocation. He said there were two occasions on the morning of April 23 when the grievor met up with MWO Locke and that on neither occasion did the grievor raise the issue of the phone call. MWO Locke's evidence was different. He had met the grievor only on one occasion that morning and at that time he issued a brief, short, instruction to the grievor: "Don't leave. I want to see you later", and then MWO Locke left.

Lt.-Col. Brown was aware of the grievor's activities on the morning of April 23, with the exception that he thought he had one too many meetings. He said that on reviewing the mater and coming to his conclusion, he did not believe that the grievor's unhappiness with the phone call justified his actions. It is a very important point that in making that statement Lt.-Col. Brown does not know what the right test is because in a situation where there is an element of provocation, the provocation does not have to justify the actions of the one provoked. It can and should be used in the context of mitigation. Does the provocation mitigate the actions of the grievor in this case, counsel queried? You are never going to get an arbitrator to say that if an employee slugged his boss it was justified. It is never justified, counsel stated. The bulk of the cases speak of mitigation and when the phone conversation itself is considered, Lt.-Col. Brown concluded that MWO Locke was not impolite, that he was not rude, and that his intentions were good. This is not surprising because the only person he asked about it was MWO Locke. He did not ask Mrs. Cléroux and he does not appear to have taken anything from the letter to the Minister and the round-trip memorandum submitted by the grievor.

Counsel argued that, in reaching his decision, Lt.-Col. Brown applied the wrong test and he failed to consider the evidence before him. It must not be forgotten that, in addition to Mrs. Cléroux' side of the story, the grievor came in the very next morning and, after reporting to his supervisor about his previous day's absence, which we know is paramount in the contracts cell, he fires off his letter and round-rip memorandum to Lt.-Col. Brown and then he goes and deals with MWO Locke and that is when things start to get heavy, counsel stated. He added that the conduct is clearly not normal employee-employer relationship acceptable conduct. But the question that

has to be asked is what precipitates the conduct and in this case it is clearly a phone call. What the law says about a provocation by the employer is that it undermines legitimate authority and, therefore, you can not dump everything on the actions of the employee. MWO Locke's phoning the grievor's wife the previous evening was inappropriate and is so doing MWO Locke diminished for only a brief period his legitimate authority in the workplace. The grievor's response to MWO Locke's actions must be viewed in that light.

Counsel stated that the employer raised the issue of the immediacy of the provocation and the response by the employee. In this situation, there are two things. The law does not say that in all cases you have to have a close connection. There can, in certain circumstances, be a long time lapse between the provocation and the actions of the employee. He referred in support to the decision in Douglas Aircraft Co. of Canada Ltd. (1972) 1 L.A.C. (2d) 109.

The events of April 23 did not involve any profanity or any physical contact or threatening gestures.

Counsel for the employer has pointed to escalating incidents of insubordination on the part of the grievor. Counsel stated that this is really the first time insubordination has been used against the grievor. If anything has excalated, it was management's harassment of the grievor. This is evidenced by the one and only file that MWO Locke kept on the grievor and the telephone call made by MWO Locke to the grievor's home. Counsel suggests that the more one looks at the phone call, it has to be viewed as escalating harassment by MWO Locke. It was the only phone call that he has ever made to an employee. Lt.-Col. Brown has acknowledged that it was not something he would have done.

Counsel stated that he is willing to consider that in extreme situations provocation can justify the actions taken. But it is more often the case that provocation mitigates the action of the employee. In considering the grievor's situation, the mistake that Lt.-Col. Brown made was in applying the test that it must justify the action instead of looking also at whether it was mitigating and recommending a 15-day suspension. Lt.-Col. Brown concludes that the telephone call did not play any part in mitigating the circumstances and that it was not a

provocation. If I find, however, that it was a provocation, counsel suggests that I should at least reduce the suspension to the extent that I find that the provocation mitigates as against the grievor's conduct. If I find provocation, then I should find mitigation and a reduction of the suspension. Lt.-Col. Brown concluded that it did not have any merit.

In support of his position, counsel for the grievor cited the following arbitral awards: United Brotherhood of Carpenters, Local 2537 and KVPG Ltd. 12 L.A.C. 386; Monarch Knitting and Textile Workers, Local 1278 13 L.A.C. 210; Newmont Mines Ltd. and Canadian Association of Industrial, Mechanical and Allied Workers, Local 22 30 L.A.C. (3d) 396; United Automobile Workers, Local 676 and Hayes-Dana Ltd. 20 L.A.C. 410. These decisions stand for the proposition that a finding of provocation will result in a reduction in the severity of the penalty. Counsel also referred to Canadian Labour Arbitration, by Brown and Beatty, at paragraph 7:4412.

On a final note, counsel stated that he wished to reiterate the continuity of the reaction by the grievor to the phone call. If one looks at what went on before the phone call and then looks at the existence of the phone call, Mrs. Cléroux' reaction to it, a reaction which continued on throughout the evening. The grievor followed through with his memoranda and letters the next day. There was the abrupt interaction between MWO Locke and the grievor the first thing in the morning and instructions by MWO Locke not to leave, that he wanted to see the grievor. If I were to consider all of these events, counsel argued, I can find the requisite continuity between the event of the phone call, provocation and the grievor's conduct. A man's home is his castle and when there is an intrusion like that it is not just something you can call off or disentangle yourself from, counsel argued.

Rebuttal Argument for the Employer

Counsel stated that she would be addressing two aspects of counsel for the grievor's argument, namely, the question of provocation and, secondly, the assessment of the evidence.

On April 22, 1993, the grievor, in the morning, phoned his supervisor, Mr. Gaulin, but refused to justify his absence. He persisted in this refusal in his telephone conversation with MWO Locke at 1:30 p.m. Rather, in that call he became

defiant and insubordinate. In reference to a missing file, the grievor confronted MWO Locke with the comment: "You are in deep shit and legal action will be taken". MWO Locke tried to page the grievor throughout the afternoon, without success.

He finally attempted to contact the grievor at home to discuss the issue of his absence. The simple fact is that we are dealing with an employee who is deliberately playing cat and mouse games with the employer. In his testimony, the grievor conveniently did not recall the 1:30 p.m. telephone conversation but he did not deny that it had occurred. This circumstance, along with the numerous counselling sessions, is the background of MWO Locke's telephone call.

Counsel submits that MWO Locke had every right to expect the grievor to justify his absence. He had the responsibility to warn the grievor that he was absent without permission and that he would be subject to disciplinary action. We now have the benefit of hindsight, but on April 22 MWO Locke did not know whether the grievor would continue with his behaviour on April 23 and not show up for work. It was the only time he had made such a phone call.

In explaining why he had contacted the grievor's residence, MWO Locke stated that he felt the call was warranted in the circumstances. This conclusion is borne out in Exhibit E-34, showing the results of the harassment investigation on this issue. The grievor simply should not be permitted to rely on MWO Locke's legitimate response to the grievor's insubordination on April 22, 1993.

With respect to the content of MWO Locke's telephone call to the grievor's residence, counsel asked that I consider MWO Locke's testimony under cross-examination and, generally, his demeanor in testifying at this hearing. Counsel submits that MWO Locke was not aggressive and he was unshaken in cross-examination. Even on the morning of April 23, he maintained his composure in response to the grievor's confrontation and this is supported by the evidence of Mr. Gaulin and Sgt. Carrière. Counsel submits that the grievor was the author of his own misfortune when he decided to deal with management in a very cavalier manner. With this background, counsel submits that it is simply an exaggeration of the evidence to suggest that MWO Locke violated the sanctity of his home. The grievor, by his representative's own submission, has demonstrated premeditated conduct.

According to counsel for the grievor, the grievor was going to address management and had an approach which he was going to take to address the matter. That approach included the confrontation of MWO Locke.

With regard to the evidence, counsel pointed to the fact that the grievor did not testify about counselling, isolation or investigation by the military police as factors in his mind on April 22 and 23. With respect to Sgt. Carrière, it is to be noted that she was an important witness and as such her evidence should be preferred as to what took place in MWO Locke's office on April 23. Her evidence corroborates that of MWO Locke. She was quite clear in her testimony that she considered the grievor's conduct to be "belligerent". There was no knock on the door by the grievor. The door slammed against the wall. The grievor went directly to MWO Locke's desk, talking in a loud voice, and tossed the papers. The grievor did not stop talking until he left on his own time and, even while MWO Locke directed him to leave the office, he kept talking until he finished saying what he had to say. According to Sgt. Carrière, all of that added together equaled being "belligerent". There was absolutely no evidence that MWO Locke was in any way aggressive towards the grievor on the morning of April 23. In fact, counsel submits, he maintained his composure throughout, just as he did at this hearing.

There is no evidence that the grievor knocked on MWO Locke's door on the morning of April 23. Both MWO Locke and Sgt. Carrière testified that he did not and even the grievor stated that he did not think he had knocked. There is no evidence whatsoever that MWO Locke looked at the papers put in front of him on April 23. MWO Locke testified to two earlier meetings that had taken place between him and the grievor before the grievor barged into his office at 8:20 a.m. With respect to the telephone call made by MWO Locke to the grievor's residence on April 22, Lt.-Col. Brown clearly addressed the evidence as it related both to the issue of establishing the misconduct as well as going to the issue of quantum or mitigation. Lt.-Col. Brown addressed the concern alleged by the grievor and his wife, as outlined in Exhibit E-46. He considered other relevant evidence, as set out in Exhibits E-39 to E-45. Counsel noted that the onus was on the grievor to establish mitigating factors and the evidence shows that the grievor simply failed to attend the disciplinary or grievance hearings in respect to this incident. Despite this cavalier attitude, counsel submits Lt.-Col. Brown clearly considered all relevant factors. He knew the test to be

applied, both relating to the issue of misconduct and mitigation, and considered them in recommending the 15-day suspension.

Counsel distinguished the arbitral awards cited by counsel for the grievor in support of his position. These decisions also point to the fact that any provocation, to be effectively relied on, must be "spur of the moment" or automatic conduct and have some proximity to the event which it is claimed provoked the grievor's misconduct.

Counsel cited in response the following arbitral decisions in support of her own position: City of Lethbridge and Canadian Union of Public Employees, Local 70 10 L.A.C. (4th) 150; Burns Meat, Division of Burns Food (1985) Ltd. and United Food and Commercial Workers, Local 832 23 L.A.C. (4th) 98; and Pitman Manufacturing Co. Inc. and Canadian Automobile Workers, Local 303 32 L.A.C. (3d) 362. Counsel also referred to the definition of provocation in Black's Law Dictionary which speaks of "without time to cool" as being a required element in considering whether there is provocation.

Counsel stated that she has already made reference to the principles of provocation in cases she provided earlier and, in reference to counsel for the grievor's reference to the grievor's continuity of his actions, counsel submits that such a conclusion is not reasonable where the grievor's own testimony indicates that he had an agenda to make sure that management got the message. She submits there is no continuity in the sense of provocation because the grievor broke that necessary link. That necessary factor of a lack of premeditation is broken by the grievor's own testimony, by the break in time between the call and the incident, and by his calculation to confront MWO Locke.

Again, Lt.-Col. Brown had considered the grievor's behaviour to be insubordinate behaviour. Insubordination refers to both a failure or refusal to follow directions and abusive conduct, which was the situation in the grievor's case, counsel submits. She referred to Canadian Labour Arbitration, by Brown and Beatty, in support of her position, at paragraphs 7:3600 and 7:3612.

Reasons for Decision

On April 23, 1993, at around 7:30 a.m., the grievor was told by supervisor, MWO Locke, not to leave the office, as he wanted to speak to him later. Just after 8:00 a.m., MWO Locke was having a meeting with Sgt. Carrière, investigator with the military police, in connection with a file which MWO Locke had been missing for some time. Suddenly, the grievor came into MWO Locke's office, unannounced and without knocking, and stepped up to the desk and threw a letter on the desk in front of MWO Locke. The grievor told MWO Locke not to call his home again and to sign the letter on his desk that he would not call again. MWO Locke was surprised at these developments and immediately ordered the grievor to leave his office. He had to repeat this order before the grievor finally left.

Thus, the evidence before me, particularly that of Sgt. Carrière whose testimony should be believed, as counsel for the grievor has stated, because disinterested and objective, shows that the grievor barged into MWO Locke's office, with the door of the office slamming against the wall, and flung the papers on the desk, in the face of MWO Locke, and demanded that he refrain from calling the grievor's residence and instructing him to sign the paper. Sgt. Carrière testified that the grievor was belligerent in his tone with MWO Locke and the latter had to repeat himself before the grievor heeded his instruction to leave his office.

The grievor's version of what happened on April 23 is not essentially different from the above but he tones down the vehemency of his actions and even states that he knocked before entering the office, simply placed the paper on the desk and asked MWO Locke to "please" sign the paper.

However, the grievor explains his actions in going into MWO Locke's office as stemming from a telephone call which MWO Locke had made to his home on the previous day, April 22, after working hours, at about 4:45 p.m. In the grievor's absence, MWO Locke had spoken to his wife and told her emphatically that the grievor, who had not reported for work on April 22, was considered absent without permission and would not be paid for that day. According to both the grievor and his wife, MWO Locke was both impolite and rude to Mrs. Cléroux and upset her very much. When the grievor returned home, his wife, who was very upset at that moment,

told him about the phone call and that she could not and would not tolerate such phone calls again. She continued to be upset all evening. The grievor was himself also furious at MWO Locke and commenced planning what he would do about this upsetting phone call. He prepared a draft of a letter to Lt.-Col. Brown, bringing to his attention the phone call, and also prepared a letter to the Minister of National Defence claiming harassment, as well as round-trip memoranda, including the one he placed on MWO Locke's desk. He had commenced his plan on what he would do the next day.

The next day, on April 23, when he first met MWO Locke and was told not to leave the office as he wanted to speak to the grievor, he was in full control and was polite in agreeing to stay in the office and wait to be called by MWO Locke. But the grievor had a plan. He decided to go to MWO Locke's office while he was holding a meeting behind closed doors and confront him with the paper he wished to have him sign that he would never again call his residence and to tell him just that. He believed that this would be the best time because there would be a witness, in the person of Sgt. Carrière, to the fact that he had warned MWO Locke not to call his house again. A witness, in case the matter went further. He had not barged into the office but had knocked, he believes, before entering and had merely placed the paper on the desk in front of MWO Locke and had asked him to "please" sign the paper and asked him not to phone his home again. He had not left the office immediately upon being ordered to do so because he noticed MWO Locke glancing at the paper and so awaited his comment. He left after being ordered a second time to leave.

After MWO Locke had completed his meeting with Sgt. Carrière, he went to see the grievor's immediate supervisor, Mr. Gaulin, and instructed him to bring the grievor to his office, as he wanted to speak to him. Mr. Gaulin and the grievor approached MWO Locke's office and remained in the doorway. At that moment, the grievor made a sarcastic remark in French, "Vous êtes des beaux", which he agreed meant: "You're something else", in English. MWO Locke asked the grievor why he had barged into his meeting with Sgt. Carrière and the grievor replied that he had not and added that: "You called my wife at home and harassed her. If you want to harass somebody, harass me. I'm a real man, come outside and I'll show you what a real man can do", or words to that effect. MWO Locke replied that the grievor should "give me more intelligence. I wouldn't do something like that", in reference to the phone call.

The grievor's voice was very loud. He felt his statement to be provocative; there was a sense of intimidation, MWO Locke testified: "I felt it was a direct challenge to me to somehow get involved in a physical challenge with him", MWO Locke added. He ordered the grievor to go back to his cubicle, but he did not leave before five or ten seconds.

MWO Locke then went to the grievor's cubicle and told him to leave the office and that he would not be paid for the day. The grievor, sitting at his desk, said: "Put it in writing". His voice was loud. MWO Locke then said that he did not need it in writing because the whole office knew what was going on because of the grievor's loudness. The grievor did not respond and just sat there. MWO Locke left and went to the office of Capt. Perrault, the administrative officer, to inform him of what had happened. While there, the grievor entered Capt. Perrault's office, again unannounced, and informed Capt. Perrault and MWO Locke: "I'm going downtown to see my doctor and my MP", or words to that effect. The grievor then left the building.

It is obvious, I believe, from the facts in this case, as elicited from the witnesses and documents submitted as exhibits, that the grievor was involved in serious insubordination on April 23, 1993. In fact, he showed no remorse for his conduct and even stated in cross-examination: "No, I never apologized for this. Nor do I now". The grievor misconducted himself on several occasions on April 23, 1993. But are there any mitigating circumstances which could justify his actions or, perhaps, mitigate any penalty which should follow such conduct?

Counsel for the grievor argued that the lead up to the grievor's conduct on April 23 was the phone conversation that MWO Locke had had with the grievor's wife on the day before, April 22. In that conversation, he said that MWO Locke was impolite, rude, and harassing and need not have made the phone call, as he could have spoken to the grievor upon his return to work and have told him then that he was considered absent without permission and would not be paid for the day. The grievor's wife was very upset and so was the grievor when he learned of the phone call when he returned home. They continued to be upset all through the evening. Counsel allowed that unless there is some proximity between provocation and an employee's subsequent conduct, arbitrators do not often find, except in exceptional circumstances, that the provocation justifies the subsequent action. However, the

proximity test often does not have full application when there is provocation established and the question of mitigation of penalty is considered. In the present case, he argues that there is, nevertheless, a continuity between the event of the phone call, provocation, and the grievor's conduct. "A man's home is his castle and when there is an intrusion like that, it's not just something you can call off or disentangle yourself from", counsel added. Counsel argued that I take this provocation into account and reduce the penalty of 15 days meted out to the grievor.

Counsel for the employer argued that Lt.-Col. Brown had taken into account all evidence before him, including the phone call the previous day, in recommending a 15-day suspension. He had felt that MWO Locke had good intentions in making the phone call, although he would not have made such a call himself, and was not rude or impolite with Mrs. Cléroux.

Counsel for the employer pointed to the grievor's agenda, late on April 22 and early on April 23. He had an agenda to make sure that management got the message, as he admits, that they were not to call his home again. There is no continuity in the sense of provocation. The necessary link between the phone call and the grievor's actions the next day was broken. It was no longer unpremeditated action by the grievor. He had time to plan his attack on management during the evening and early the next day.

As I have found, the grievor was guilty of serious insubordination on April 23, 1993. His misconduct on that day attracted a suspension without pay of 15 days. This award was made following the application of the principles of progressive discipline, the whole having regard to the grievor's past disciplinary record. There is no question but that the telephone call to the grievor's residence on April 22, 1993 triggered his actions on April 23. The phone call should not have been made. Management should have awaited his return to work to inform him that he was considered absent without permission on April 22 and would not be paid for the day.

The phone call was the reason for the grievor's action but can it be seen also as provocation which could explain his actions of severe insubordination the next day? He had time to plan his strategy, course of action. He wrote letters to Lt.-Col. Brown, to inform him of the phone call, and to the Minister of National Defence to complain

of harassment. But he was not finished. He wanted to impress very vividly on MWO Locke that he was not again to phone his home. He planned to and did do so when there was another person there in MWO Locke's office, Sgt. Carrière of the military police, so there could be a witness to his giving the papers to MWO Locke, advising him that he was not to call his home again. There was a reason for the grievor's actions on April 23, 1993 but there was no provocation which might mitigate against the penalty of 15 days suspension without pay meted out to him.

I have, however, reduced the penalty of 10 days awarded to the grievor for his previous misconduct of April 22, 1993 to a suspension of three days without pay. In the circumstances, I find that an appropriate and reasonable penalty for his misconduct on April 23, 1993 is a suspension of seven days without pay.

Accordingly, this grievance is partially sustained. The grievor is to be reimbursed for all lost wages and benefits for eight of the 15 days of suspension which he has served.

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The incidents of misconduct alleged against the grievor in this case (Board file 166-2-26110) relate to two dates: December 9, 1993 and December 21, 1993. For these incidents of alleged misconduct, the grievor received a 20-day suspension without pay.

MWO Frank Locke testified that the grievor was absent from work on April 26, 27 and 28, 1993. He had simply phoned in late on each of those days without giving any reason or explanation why he would not be reporting for work. He was considered on leave without pay for those days. From April 28 to June 15, 1993, the grievor was away from work serving the periods of suspension meted out to him, namely, two 10-day and one 15-day suspensions without pay. Between June 15 and August 11, 1993, the grievor, at his own request, worked in another cell in the construction engineering organization.

The grievor returned to the contracts section on August 12, 1993. On that day a counselling session was held with the grievor, the purpose of which was to welcome him back to the contracts section and to explain to him what was expected of him

regarding work performance and his relationships with management. The grievor was provided with pages 4 to 8 of Exhibit E-51, which were the minutes of the meeting held with him on August 12, 1993 and which covered items dealing with hours of work, work procedures, attendance at work, late arrivals, early departures, reporting to and departing from work, attendance register, leave for personal and union business, sick leave; all of these subjects had been discussed with the grievor at this meeting. It was emphasized to the grievor that coffee or break time was from 9:30 to 9:40 a.m. and 2:30 to 2:40 p.m. If an employee could not take his break at the appointed time for whatever reason, it was emphasized that it could be taken at another time but never before the scheduled time. The grievor had stated that he understood what was being presented to him at the meeting. He had no questions with respect to the information given and explained to him in detail. The only change in procedure in the office was in respect to work procedures. A notice board was now in place. All employees had to indicate all information on the notice board and not give it to the immediate supervisor in writing as was previously required. This did not change the requirement that employees had to obtain prior permission before leaving on personal or union business. All employees had been given copies of Exhibit E-51 between the fall of 1992 and the spring of 1993.

By September 30, 1993, the grievor's immediate supervisor, Mr. Gaulin, had some concerns about the grievor's performance of his duties. On that date, a further counselling session was held with the grievor. It was brought to his attention that he was taking too long to complete his work tasks, in spite of a light work load, and that he failed to keep his supervisor informed of work delays that might impinge upon work projects or work orders. He was also told that he must communicate more often with SSC regarding the status of the contracts he was working on, as the information he would provide SSC was needed on a timely basis. The grievor was reminded that he was not permitted to change the scope of his work; only his supervisor could do that. He was reminded that deadlines set for contractors to complete their work had to be met. He was told that he must not remove files from the contracts office area. He had been warned of this on August 12, 1993, and again he was observed removing such files from the office. He was told he would have to respond more promptly to requests made of him by his supervisor; his supervisor had to go back to the grievor with his requests two or three times before getting a response to his inquiries. The

next point raised at this September 30, 1993 meeting with the grievor was his use of his phone to make personal calls during working hours and often for extended periods of time. The last point raised with the grievor was his personal mannerisms: tapping his pencil on his desk, loud communications on the phone. Complaints had been received from inspector Mr. Al Miner, located in the cubicle next to the grievor's, that he could not concentrate on his work due to the noise coming from the grievor's cubicle.

The grievor, at this meeting of September 30, 1993, never disputed any of the items raised. He was receptive to what was presented at the meeting. On October 13, during a verbal counselling session with the grievor during which he was informed of a written complaint (Exhibit E-53), dated October 6, 1993, received from Mr. Miner, about being disturbed by noises coming from the grievor's cubicle, the grievor simply said he would stop the disturbance, the noise, and the tapping of pencils.

On October 11, 1993, WO Remillard replaced Mr. Gaulin as the grievor's immediate supervisor.

In November 1993, a planned follow-up counselling session with the grievor took place. Discussed were the grievor's mannerisms, that is, disturbances in the office, and to bring him up to date on the status of his work performance. There was his use of profanity in the office, noticed by his supervisor, WO Remillard. With regard to work performance, since WO Remillard had taken over there was a noted improvement in the grievor's work performance. The timeliness of his responses to his supervisor had improved and he appeared to be following up on work related matters. WO Remillard felt that the grievor's attitude and conduct had improved somewhat and he showed a willingness to accept direction from a supervisor. The grievor at this meeting did not ask any questions. He acknowledged what was discussed and had no follow-up discussions concerning the matters raised.

On November 18, 1993 (Exhibit E-55), the grievor again failed to abide by instructions to notify his supervisor that the union/personal meeting he was to attend on that day would cause him to return later than 10:00 a.m. He returned to work at 11:13 a.m. but had failed to call his supervisor to say that he would be late in returning. The grievor's explanation was simply that he could not get away from the

meeting to call. This had occurred after being counselled on August 12, 1993, that he must call his supervisor immediately upon knowing that he would not be back on time.

On December 6, 1993, the grievor requested permission to attend the Snow and Ice Control (SNIC) committee meeting to be held at 2:00 p.m. on December 9, 1993 (Exhibit E-56). He was to attend on behalf of his union. The grievor's supervisor, WO Remillard, came with this request to his own supervisor, the witness, on December 7, 1993, who in turn spoke to the contracts officer, Mr. Bois. Mr. Bois told the witness that a Mr. St-Aubin, another employee working as a driver in the transport section on the Base, normally attended these meetings on behalf of the union. The witness got back with this information to WO Remillard. WO Remillard, by minute number 2 on Exhibit E-56, a Minute Sheet on which the grievor requested permission to attend the meeting, advised the grievor to find out if Mr. St-Aubin would be able to attend the meeting and to inform WO Remillard of such findings. Minute number 2 was written and given to the grievor on December 8, 1993.

On December 9, 1993, at about 1:50 p.m., the grievor received from WO Remillard two minute sheets, one dated December 8, 1993 and filed as Exhibit E-57, and the other dated December 9, 1993, filed as Exhibit E-58. WO Remillard was "a bit upset" over the fact that the grievor had gone to the SNIC meeting. WO Remillard said that he had not given the grievor permission and the witness confirmed that he had not either. WO Remillard told the witness that he had not received a reply from the grievor to Minute number 2 on Exhibit E-56 asking him why Mr. St-Aubin could not attend the meeting. Mr. Bois overheard their conversation and joined in, asking why the grievor had to attend the meeting when Mr. St-Aubin was the normal union representative at such meetings. It was agreed that the grievor had not been given permission to go to the meeting.

The witness participated in the preparation of a Civilian Performance Review Report on the grievor, dated August 30, 1993 (Exhibit E-59). The witness' view of the grievor's attitude, set out in that Report, was that he did not have a good attitude towards the performance of his duties or in fostering a good working relationship with his supervisor or management. His work ethic was undesirable and he needed constant supervision with regard to work follow-up.

The witness testified that the grievor's performance from August 12, 1993 to the moment when WO Remillard replaced Mr. Gaulin as the grievor's immediate supervisor on October 11, 1993, was still well below that of other inspectors in the contracts section. His workload was not heavy and his supervisor was not always kept informed of the work he was responsible for. There were also problems with mannerisms and behaviour with respect to the grievor and Mr. Al Miner, another inspector. From October 11, 1993 to December 21, 1993, the grievor's performance improved slightly under WO Remillard but soon deteriorated to previous levels. Again, there were problems with the grievor responding to his supervisor's requests and his mannerisms and behaviour, the witness stated.

In cross-examination, the witness stated that permission to leave for union business was given verbally if the request was verbal and was given in writing if the request was in writing. This was the normal but not an absolute procedure. Sick leave procedure, on the other hand, was set out in the Civilian Leave Policy, a copy of which is provided to each employee.

The witness acknowledged that he had not spoken to Mr. Al Miner about his complaints about the grievor.

WO Remillard, a warrant officer since four years and with 23 years of service in the Canadian military, testified next on behalf of the employer. He became mechanical cell supervisor on October 11, 1993, replacing Mr. Gaulin. As such, he was the grievor's immediate supervisor. He supervised five employees in all. Upon arriving in the mechanical cell he had discussions with the contracts officer, Mr. Bois, in the latter's office, during which he received a description of what was expected of him as a supervisor in that cell. Also discussed was a counselling session document (Exhibit E-52) prepared in reference to the grievor. The witness commented to Mr. Bois that he felt he would like to take this opportunity to start at ground zero in his relationship with all his personnel. He wanted to continue his style of having a close, open, trusting relationship with all his personnel. On one early occasion in talking to the grievor he had told him that what had transpired in the past was completely irrelevant to the approach he wanted to pursue. The grievor was very receptive to this, the witness stated.

The witness was referred to Exhibit E-51 in which was set out the guidelines dealing with office procedures. All inspectors, including the grievor, were well aware of these procedures, including the need to inform the witness, as supervisor, of their whereabouts during the day and whether the job they were on was going to take longer then anticipated. All the other inspectors would keep the witness informed but the grievor would simply not communicate with the witness, in any manner, outside of the occasional time. He had on numerous occasions discussed this with the grievor, explaining that he needed to know the grievor's anticipated time of return in order to communicate any information to him or the other way around. He had on those occasions asked for the grievor's cooperation in this matter. The grievor would simply reply "OK, Buds, no problem".

From the very beginning of his supervision of the grievor, the witness had stressed with the grievor that the procedure for obtaining leave for personal or union business was for the grievor to put his request in writing and then wait for the witness' response in writing.

On November 4, 1993, the grievor and the rest of the witness' staff were informed verbally (Exhibit E-62) that there would be a meeting of all staff in Building 347 on November 15, 1993. On November 15, 1993, it was necessary for the witness to page the grievor at 11:00 a.m., as he had not shown up for the meeting. At 11:15 a.m., the grievor returned his paging, saying that he had completely forgotten about the meeting. The witness instructed him to report immediately, which he did, arriving some five minutes later. At 1:00 p.m., he had a brief discussion with the grievor in the conference room and asked him to explain why he had been absent from the meeting. The grievor again told him that he had been caught up in the Monday morning work. When asked why he had not paged the witness, the grievor replied that he did not know that his supervisor now had in his possession Mr. Gaulin's pager. The witness told the grievor that he had Mr. Gaulin's pager since he started in October and that the grievor should have known this. The witness stated that he had then told the grievor that he felt they were building a workable working relationship and wanted that to keep progressing. The grievor, according to the witness, seemed genuine in admitting that that was just an honest mistake and the witness felt, by the grievor's tone of voice and sincerity, that his "was just a human error and I accepted that but again stressed to him the need for communication".

During the grievor's counselling session on November 11, 1993, at which the witness was present, they discussed, inter alia, the grievor's use of profane language in the office, which they considered very unprofessional and unpleasant to personnel who might be walking by. They discussed as well his mannerisms, which were offensive to staff and the witness, including his picking his nose in the presence of others, loud burping, and "passing of ripe body gases", as well as tapping his pencil on his desk, which annoyed the inspector in the cubicle next to his, Mr. Al Miner.

On November 16, 1993, Mr. Joe Healy, an inspector in the structural cell, reported to the witness at 3:30 p.m. that he had observed the grievor at about 2:30 p.m. on that day with his hand on the witness' briefcase. As a result of this, the witness issued a memorandum (Exhibit E-65) to all of his staff that as of that date, November 17, 1993, when he was not in his office, all paper work or messages for him were to be left in his mailbox at the front office.

The witness was referred to Exhibit E-55, which is a Minute Sheet on which the grievor requested and was granted leave to attend at UNDE headquarters. He had failed, however, to return at the anticipated return time but more importantly had failed to call his supervisor, the witness, when he could not return at the time indicated in his request and agreed to. The witness was disappointed in the grievor's continued failure to abide by procedures in place and felt that he could have taken a minute or so from the meeting and called to say he would be late because the meeting was taking longer than anticipated. The grievor, in being spoken to about this, apologized and said it would not happen again. Similarly, on November 30, 1993, the grievor had been granted leave to attend a union meeting, subject to his advising the witness where the meeting was to take place. He had simply gone to the meeting without providing the requested information.

The witness was referred to Exhibits E-67 and E-68, which have to do with the contract and specifications for work to be done on boilers and heating and plumbing systems in military bases at Cornwall, Ontario. The grievor was to update the specifications for this job which was to be put out for tender. The grievor had, by mistake, prepared the tender as if the job were to be done in Ottawa instead of Cornwall. The witness was able to correct this mistake (Exhibit E-68).

On December 7, 1993, the grievor had departed the office in the morning on union business. Although he had been given permission to do so on December 6, 1993, at 7:30 a.m. on December 7, 1993 his permission was made conditional, the witness considered, by a requirement in writing placed on the grievor's desk that he inform whether this was a union meeting on the preparation of a grievance by an employee. Upon his return, the grievor simply explained to the witness that he had gone to the meeting because he had been granted permission and felt he did not have to reply to the query, which he had read in advance of departing for the meeting.

The witness was referred to Exhibits E-56, E-57 and E-58. He had received Exhibit E-56 on December 6, 1993, in the afternoon. Only minute number 1 appeared on it, that is, the grievor's request to attend the SNIC meeting. The witness, on the morning of December 7, went to see his own supervisor, MWO Locke, with the grievor's request. He left the request with MWO Locke at the latter's request. The witness returned to MWO Locke's office in the afternoon and asked whether he saw a problem in approving the request. MWO Locke indicated that a Mr. St-Aubin from the SPV section was the normal representative from Ottawa South (the Base) and could the witness find out why the grievor had to attend the meeting. MWO Locke then gave him a yellow slip of paper, found at bottom of Exhibit E-56, on which he wrote: *"St-Aubin SPV usual rep. Should be there".*

The witness had then, in the morning of December 8, 1993, spoken to the grievor in the conference room and relayed to him that the witness' superiors were wanting to know why Mr. St-Aubin could not attend. The grievor had then said "OK, no problem Buds" and left the witness. The grievor would find out why Mr. St-Aubin was not able to attend. The meeting was very brief.

The witness had then written the following note, note number 2, on Exhibit E-56:

> *As per our discussion in the conf rm. on this date, pls. find out if Mr. St-Aubin SPV will be able to attend and info me on SITREP.*

The witness testified that he had not given the grievor permission to attend the meeting during their conversation in the conference room.

At approximately 1:00 p.m. on December 8, 1993, the grievor submitted a further request to attend the SNIC meeting (Exhibit E-57) saying: "*...I will attend meeting at 14:00 hrs. -- 09 Dec. 93. Reply Soonest*". Upon receiving this request in his basket and reading it, the witness immediately went to the grievor's desk and informed him that "we had just gone up this road a few hours ago". The grievor replied "OK" and the witness returned to his desk. There was no doubt in his mind that the grievor knew exactly what they were talking about. Nothing had changed. The grievor was to follow up on the morning request to him in the conference room. During this discussion, the witness testified that he did not give the grievor permission to go to the meeting; "absolutely not".

At approximately 1:50 p.m. on December 9, 1993, the witness was disappointed and frustrated at receiving from the grievor a document at his desk, filed as Exhibit E-58, which read:

> *As per permission granted -*
> *depart 13:50*
> *meeting 14:00*
> *Over at: 16:00 latest or before*

The witness stated that this document was "a flagrant lie", as he had never granted permission. He stated: "I found it very insulting to discover Mr. Cléroux attempting this on me, to suggest that I had given him permission". He then went to MWO Locke's office and told him that he had never given permission to the grievor. He had counselled the grievor on the procedures to be followed when requesting leave for personal or union business and here he was again flaunting these procedures. He had always told the grievor that he needed permission in writing prior to leaving on union or personal business.

The witness referred to his notes made on December 6, 1993, and filed as Exhibit E-70. These notes reflect that the grievor had noted on the board that he would be returning to the office by 11:00 a.m. but he returned only at 12 noon without even reporting to him. The witness was concerned that he did not know the grievor's whereabouts during that morning and also that he was losing his managerial control over the grievor. The grievor, although repeatedly counselled, was ignoring the minor and major office procedures. The witness began losing his confidence in fulfilling his mandate as the grievor's supervisor. The grievor was simply refusing to

be part of the witness' team. He was not allowing himself to assist in the cell becoming an effective unit. "He was an obstacle", the witness stated.

The witness' second note on Exhibit E-70 reflects the grievor's refusal to put any order in a project file no matter how often he was shown how to do it by the witness.

On December 21, 1993, the witness arrived at work at 6:45 a.m. as usual. At 7:30 a.m., he noticed that the grievor was not at his workstation. He then went to the contracts officer's, Mr. Bois' office, and asked Mr. Bois if the grievor had called in. Mr. Bois said that he had not received a call from the grievor. The witness then went to the front office to verify the time sheets and observed that the grievor had not signed in. At 9:27 a.m., his phone rang and he immediately looked at his watch and noted the time. It was the grievor calling him. The grievor told him that he would not be in because he was sick. The witness then went to Mr. Bois to advise him that he had just finished talking to the grievor and that he would not be in that day due to illness.

The witness summarized the grievor's behaviour as follows.

“When I initially took over the mechanical cell and following my brief discussion with Mr. Cléroux, explaining to him that basically we were starting at zero and wanting to build from there, Mr. Cléroux' attitude encouraged me to believe that we could possibly reach a good working relationship. However, as time progressed and as a result of these incidents, the SNIC meeting, the December 21 incident, I felt as if all my efforts were being mocked at. All the energy, my patience had only served to be thrown back in my face and I felt hurt by that, that is, his work performance during that period. Initially, it was encouraging. As we evolved towards December 21, I started noting a definite deterioration in his willingness to cooperate with my efforts. There were occasions when he would submit improperly assembled project files and I would go back and say: ‘Norm, this is not the way it's done. This is the way we do it’, and we would sort of do it together in order to ensure that he understood what we were after. But as time went on, I found this to be a useless exercise on my part because he would simply acknowledge, ‘OK, no problem’ and proceed to do the same thing all over again”.

In cross-examination, the witness stated that there was no follow up with the grievor with regard to his call at 9:27 a.m. on December 21, 1993 saying that he would not be in because he was sick. He did not know whether sick leave has been granted for that day.

With regard to the staff meeting on November 15, 1993, the grievor had explained to the witness that he had not shown up for the meeting because he was tied up with certain work matters. The witness did not accept that this alone was grounds for not attending the meeting without first communicating with the witness and obtaining authorization to continue with his work and not attend the meeting. The grievor had not made any attempt to communicate with the witness or his superiors for the necessary authorization.

With regard to the briefcase incident when the grievor was observed by another inspector touching the witness' briefcase, the witness stated that he had not spoken to the grievor about this and there was nothing missing from the briefcase.

The witness stated that the required procedure for obtaining authorization to leave on union business for the employee was to request the leave in writing and wait for the approval to come back in writing before leaving on such union business. This was the accepted procedure in the contracts office. The witness agreed that the written down procedure did not spell out that the authorization need be in writing, however, "if submitting it in writing, then the authorization must be in writing. Everyone knew this. This is the procedure even if it was not in writing", the witness stated.

The witness stated that he believes he was aware of the fact that the president of the local could not attend the SNIC meeting. During his meeting with the grievor in the conference room on December 8, 1993, the witness had informed the grievor that his immediate supervisor wanted to know why Mr. St-Aubin could not attend the meeting. Mr. St-Aubin had been identified by his supervisor as the person who normally attended. The grievor had then replied "OK, no problem Buds". The witness had, in front of the grievor, written minute number 2 on Exhibit E-56, the grievor's request for permission to go to the meeting, and had handed Exhibit E-56 back to the

grievor. It was clear to the witness that the grievor understood what was being asked of him.

The next thing that happened in this regard was that the grievor deposited in the witness' basket Exhibit E-57, a second request for permission to attend the same meeting. The witness immediately went to the grievor's cubicle and showed him Exhibit E-57. The grievor at that moment did not say anything about Mr. St-Aubin. The witness then said to the grievor: "Norm, we were just up this road a few hours ago". The witness insisted that he had never said to the grievor that if he could not reach Mr. St-Aubin that it would be okay for him to go to the meeting.

In re-direct, the witness stated that at no time did the grievor make any statements to the witness why or if Mr. St-Aubin could not attend the SNIC meeting. He had not received any reply whatsoever from the grievor to his request in minute 2 of Exhibit E-56.

On April 12, 1993, the grievor had placed on the witness' desk Exhibit E-72, which was a request for permission to put a notice over the PA system. The grievor was gone from the contracts office from 9:00 a.m. to 11:35 a.m. to do this task. When he returned, the witness asked him why it had taken him so long. The grievor had replied that he understood that the witness had also verbally authorized him to attend to union business. The witness had then reported to Mr. Bois that he had given the grievor permission to make the PA announcement but had not authorized him to attend to union business.

The witness stated that by April 1993 he had reached the point of realizing that the grievor would fabricate any story that would counter the reality of what had transpired. He felt as if the goodwill towards the grievor, the trust that he had given him, had been "abused, stepped on, and spit right back in my face", the witness stated. Both he and the grievor knew that the grievor was lying in saying that he had verbal permission to leave the office on union business. This was the frustration he was being made to suffer, the witness added.

Mr. Paul Bois, the contracts officer, next testified. He referred to Exhibit E-73, which is a letter of recommendation, dated March 1, 1993, prepared by the grievor in favour of a certain contractor doing business with the mechanical cell. The witness

was concerned about this letter for two reasons. One, it was not the proper format for a letter of recommendation by DND and, secondly, inspectors were not authorized to issue such letters on behalf of the Department. Again, the contracts section did not know whether this contractor had the credentials to work on some of the systems indicated in the letter (Exhibit E-73) because there were new licensing requirements coming out at that time. The witness had spoken to the grievor about this letter on August 12, 1993 and had told him that he was not authorized to send letters out on behalf of the Department. At the August 12, 1993 meeting with the grievor, the witness had emphasized that the policy in the office was that any meetings had to take place between other people in construction engineering or contractors preferably in the contracts office area in the conference room. There could be exceptions but inspectors would have to have their supervisor's consent to hold meetings elsewhere. It was also indicated to the grievor at this meeting that, because some personal items had been reported missing by employees in the contracts section, it was important to respect the privacy of others by not going into their cubicles when they were not there. Finally, at this meeting, the grievor was informed to funnel all his work through his immediate supervisor.

Concerning the SNIC meeting which the grievor attended, the witness in discussing with MWO Locke the grievor's request to attend that meeting, realized that there would be a certain union involvement in the meeting. He did not at the moment remember who was the union representative at such meetings so told MWO Locke that he would get back to him. The witness learned that a Mr. St-Aubin was the normal union representative at SNIC meetings. Accordingly, the witness asked MWO Locke to find out if Mr. St-Aubin would attend and, if not, why not.

On December 21, 1993, WO Remillard came into the witness' office just after 7:30 a.m. and asked him whether he had heard from or seen the grievor that morning. He replied that he had not. The witness told WO Remillard to let him know when the grievor came in. At about 9:30 a.m., WO Remillard came back into the witness' office and informed him that the grievor had just phoned him and would not be in for the day due to illness.

There was no cross-examination of this witness.

The next witness heard was Lt.-Col. Brown. He testified that by letter of June 23, 1993 he informed the grievor that, in keeping with his request, he would be relocated to the PM Section pending the results of an independent investigation into the grievor's claim of harassment. On July 15, 1993, by the second level reply to his grievance rendered by the Wing Commander, Col. Brando, following the independent investigation conducted on the instructions of Col. Brando, the grievor's grievance alleging harassment was denied. The investigation was conducted by the Wing Command personnel services officer with the president of UNDE, Local 70603, and was held over three and one-half months. It was concluded that the 11 allegations of harassment made by the grievor against contract management persons were unfounded.

By letter of August 6, 1993, Lt.-Col. Brown informed the grievor that, as a result of Col. Brando's decision on his harassment grievance to deny the grievance, the grievor was being returned to the contracts section. Since the grievor had now been away from that section for over three months, Lt.-Col. Brown felt it important that he be welcomed back into the contracts section and re-indoctrinated into the organization. Lt.-Col. Brown first met with Major Fortin, Mr. Bois, MWO Locke and WO Remillard to discuss the grievor's return and instructed them to meet with the grievor on August 12, 1993 to re-emphasize and make it clear to him what they expected of him in terms of attendance, attitude, work procedures, and performance. He informed Messrs. Fortin, Bois, Locke and Remillard that he was pleased with the results of the harassment investigation but that he did not view it as a victory and he did not want them to view it as a victory. He made it clear to them that he did not want them to relax the procedures that were in place but also did not want them to be more stringent than they had to be. He told them that he was still convinced that the grievor could be salvaged, could be rehabilitated, and that he wanted them to continue with the counselling and coaching that had taken place prior to the grievor's leaving for the PM Section. He told them, finally, that he viewed this as another opportunity for the grievor to start afresh.

The witness then met with the grievor, early on August 12, 1993 with Capt. Perrault, the witness' assistant, to discuss certain points before the grievor physically moved back into the contracts section. He told the grievor that it was now time to move back to the contracts section since his harassment grievance had been

dealt with. He emphasized that he did not view the decision as a victory, although he was pleased that the investigation had concluded that there was no harassment. He told the grievor that his supervisors would be meeting with him with respect to management's expectations concerning his performance. They would not be relaxing the procedures in place within the section but would not, on the other hand, be making them more stringent.

The witness, during his meeting with the grievor on August 12, 1993, told him that he had a great deal of concern about what had gone on in the past year and also had a great deal of concern about the fact that, with all the counselling that had taken place to date and the number of times he had been disciplined up until that point, he had never once admitted to any wrongdoing or shown any remorse for his actions. He told him that there were many occasions when he felt he had not been forthright and honest with his supervisors, which was only making matters worse with his relationship with his supervisors. He told him that he was having a great deal of difficulty understanding why he was unable to comply with management's directives because the things being asked of him to do were simple and were not unrealistic. He indicated to the grievor that he felt that there must be something else which was triggering his behaviour and that, if he needed assistance of a professional nature, it could be arranged through the employer's Employee Assistance Program (EAP). He added that he did not know what the nature of his problems were; they could be related to health, personal problems, family problems, financial problems, abuse of alcohol or drugs; he was just using these as examples. He added that he did not know what the nature of the problems were or that he was experiencing any problems but felt that something was causing him to behave and act the way he was and that if he did need professional assistance he would have to admit that he had a problem and seek help. He told the grievor that he hoped that he viewed his return to the contracts section as yet another opportunity for a fresh start.

The grievor was receptive to Lt.-Col. Brown's comments but insisted that he did not have any problems. That his only problems were with management and the fact that in his view he had been set up with the issue of the fraudulent claims that had led to his first suspension, a five-day suspension, one year prior to August 12, 1993.

The witness told the grievor that he was really tired of hearing of these allegations of a set up, that he had personally investigated the allegations a year ago and found no evidence of a set up, and that the harassment investigation team had also thoroughly investigated these allegations of a set up and also concluded that there was no substance to the allegations.

The meeting ended with the grievor's comments that he did view his return to contracts as an opportunity to start over and then left to meet with Major Fortin and his contracts team.

In the fall of 1993, the witness had occasion to deny a further harassment grievance filed by the grievor (Exhibit E-78). He had been encouraged when he received reports that the grievor's performance had improved under his new supervisor, WO Remillard, who had replaced Mr. Gaulin in October 1993. The results of the independent investigation caused him to believe that the grievor's further claims of harassment were unfounded.

In November 1993, the witness was confronted by the French version of the examination held in a competition which had been held in October, 1993, which the grievor claimed had been compromised because the people who had written the exam had knowledge of it before writing it. The document had been given to the witness by a management member of a labour-management committee, a Mr. MacDonald, who had been given it by the grievor. When confronted by the witness, the grievor denied having provided the exam to Mr. MacDonald and he denied having advised Mr. MacDonald that the exam had been compromised. The grievor denied having a copy or the original of the exam in his possession then, November 22, 1993. The witness met with the grievor and Mr. MacDonald together on November 25, 1993, at which meeting the grievor admitted that he had mislead the witness on November 22, that he in fact did have the original of the exam but that he would not show it to the witness or give it to him. The grievor admitted that he had raised the issue with Mr. MacDonald and that he, the grievor, had knowledge that the exam had been compromised. Following that, the witness investigated further but could find no evidence that indicated that anyone, other than MWO Locke, who had developed the exam and the word processing operator who had typed it, had in fact seen the exam prior to the competition. The grievor indicated that the union would be pursuing the

entire issue of the competition and that some people who had written the exam had seen it prior to the competition. In the lead-up to the competition, great care had been taken to ensure that the whole competitive process was clean. The grievor could not explain how he had come into possession of the exam and could not provide any hard evidence that anyone had seen it prior to the competition. The witness had, therefore, decided that the grievor's entire story was flawed and he advised the civilian personnel officer that the eligibility list for the competition could stand. To his knowledge, the witness stated that the issue was not pursued by the union.

The witness was concerned that the grievor had mislead him in spite of the fact that on August 12, 1993 he had spoken to the grievor about being forthright and honest with management. He was meddling in affairs which had nothing to do with him; he was not a candidate in the competition. Even if he had been given some credit in the earlier part of November 1993 for improvement in his performance, he was now playing cat and mouse games with the witness personally, the witness stated.

The witness held a disciplinary hearing on January 12, 1994 involving alleged misconduct by the grievor, set out in Exhibits E-74 and E-79. The grievor and his union representative, Mr. Faulkner, were present at this hearing. With regard to the first four allegations listed in Exhibit E-74, a Notice of Investigation, the witness found that in the evidence before him, while the incidents of misconduct had occurred, because of the delay incurred in investigating and taking action on these incidents, he would not impose a disciplinary sanction. In his letter to the grievor on January 21, 1994 (Exhibit E-80), the witness had dealt with these four items of misconduct and stated that he was not impressed with his behaviour and actions. These four incidents had no impact whatsoever on the witness' decision to impose a 20-day suspension on the grievor, he stated emphatically. He had dealt with these four issues separately in Exhibit E-80 and then moved on to address the remaining allegations in Exhibit E-74.

On January 21, 1994, the witness addressed a second letter to the grievor, Exhibit E-81. It dealt with the incidents of alleged misconduct on December 9, 1993 and December 21, 1993. The witness heard testimony from WO Remillard and had before him statements regarding the 6, 7, 8 and 9 of December 1993, which related to the grievor's attendance at the SNIC meeting, that is, Exhibits E-56, E-57 and E-58.

WO Remillard elaborated on what had transpired on December 6, 7, 8 and 9, between himself and the grievor. He was emphatic that he had at no time given the grievor permission to attend that meeting. The grievor, on the other hand, stated that he had been approached by Mr. Joe Allen, the union local president, to attend the SNIC meeting on his behalf and he contended that WO Remillard had given him permission to go. The witness indicated at that moment to the grievor that it did not really matter who had requested him to go as he still required his supervisor's permission. The witness also stated that he found it strange that the union president would be attending the SNIC meeting as it was not a joint labour-management committee meeting.

The witness stated that he was given no evidence at the hearing to indicate that the grievor had received permission to attend the SNIC meeting. In fact, his supervisor was very emphatic in stating that he had not given him permission to go. From the grievor's initial request on December 6 (Exhibit E-56), WO Remillard had requested additional information and did so again on December 8 when the grievor submitted his second request for permission to go to the meeting. There was nothing presented at the hearing that could explain why WO Remillard would give him permission and then say later that he had not given him authority to go. In fact, when WO Remillard received the grievor's second request (Exhibit E-58) he indicated to the witness at the disciplinary hearing that he immediately went to see MWO Locke to confirm if, perhaps, he had given authority to the grievor to leave.

The grievor had been counselled numerous times by his supervisors about the requirement to request and receive authorization or permission to attend union related business. Furthermore, in the latter part of November, early December 1993, the grievor had indicated that he knew what the procedures were through previous requests and responses from his supervisors (Exhibit E-66).

The witness stated that during the disciplinary hearing on January 12, 1994, the grievor had not mentioned that he did not understand the request made by WO Remillard to find out why or if Mr. St-Aubin could not attend the SNIC meeting. Nor did he state that he could not contact or "get a hold of" Mr. St-Aubin. Again, the grievor had not stated during the disciplinary hearing that WO Remillard had said to

him to go to the meeting to see if Mr. St-Aubin was there and to come back if he ran into Mr. St-Aubin.

Turning to the incident of December 21, 1993, the witness heard evidence from Mr. Bois, WO Remillard and the grievor at his disciplinary hearing held on January 12, 1994. The evidence advanced by WO Remillard and Mr. Bois is exactly as they testified at this hearing and as is recorded earlier in this decision; the grievor called in only at 9:27 or 9:30 a.m. to advise that he would not be in to work because he was sick. The grievor stated that he called in at 7:27 a.m. and not 9:27 a.m.

The witness knew that the grievor had been counselled on numerous occasions on the requirement to inform his supervisor prior to the start of the workday if he was going to be unable to attend work due to sickness. The evidence before him of both Mr. Bois and WO Remillard indicated to the witness that the grievor was not at work at 7:30 a.m. and had not called in at that time. They both also gave evidence that he had called in at 9:27 or 9:30 a.m.

The factors that the witness had considered in recommending a 20-day suspension for the grievor were as follows.

He had considered both incidents together; the incidents of December 9 and December 21, 1993. Although they were separate incidents, they both related to attendance. He could have considered them separately, he stated, but decided to look at them both together. In reaching the recommendation on quantum, he considered the grievor's previous disciplinary records, the fact that he had been previously awarded a suspension for failing to request permission to attend union business, and he had also been suspended for failing previously to advise his supervisor of his whereabouts or of his failure to attend work prior to the start of the workday. He also considered management's wholehearted and exhaustive attempt to rehabilitate him through counselling and coaching and he considered the fact that they had gone out of their way to reassign him to the PM cell during the harassment investigation. The witness had personally met with the grievor. He was also counselled by his immediate supervisor to ensure that he understood what management's expectations of him were. The witness considered the fact that he had been given an opportunity for a fresh start in October 1993 with a change in supervisors and in spite of all this

nothing seemed to be working. He also considered his 1993 performance evaluation report, which was not good. The fact that early in the fall of 1993 management saw a marginal improvement, now in December 1993 the grievor had gone back to the same issues. He also took into consideration that the grievor had shown absolutely no remorse, had admitted to no wrongdoing, and was continuing with his defiant and insubordinate behaviour, which was completely unacceptable, especially in view of the grievor's disciplinary record. The witness considered it a serious defiance of management's right to manage.

The witness had found the grievor's explanations given at the disciplinary hearing to be unbelievable and they lacked credibility. He had learned later that Mr. St-Aubin had also attended the SNIC meeting.

There was no cross-examination of this witness.

The grievor, Mr. Normand Cléroux, next testified on his own behalf with regard to the SNIC meeting on December 9, 1993. The grievor stated that he was approached by Mr. Joe Allen, the president of the union local, who asked him to attend the meeting in his place. Mr. Allen indicated that it was a "one time" sit in. The union's interest in this meeting was that it wanted to know which persons would be responsible for each hour of the day and which persons would be on call on a 24-hour basis. So the grievor wrote minute number 1 on Exhibit E-56 and gave it to his supervisor, WO Remillard, on December 6, 1993. He got a response on December 8, note 2 on Exhibit E-56. He had submitted Exhibit E-57 on December 8 since he had not received a reply on December 6 (Exhibit E-56) and then he received note number 2 on Exhibit E-56 on December 8.

With regard to the words "as per our discussion" in note 2 on Exhibit E-56, the grievor stated that WO Remillard, in the conference room, instructed him to find out if Mr. St-Aubin would be present at the SNIC meeting and to get back to him "once I had contacted Mr. St-Aubin". The grievor stated: "I wasn't able to contact Mr. St-Aubin", and so advised WO Remillard who then said to the grievor he "was to attend the meeting and if Mr. St-Aubin was present, I was to return to the office and I was to leave a memorandum on my departure that I was gone to the meeting; in other words, to advise him". "In my mind, I had authorization from WO Remillard to attend

the meeting", the witness testified. "This was so even though it was not written authorization", he added.

The grievor stated that he had attended the SNIC meeting as well as Mr. St-Aubin. However, as soon as he had made contact with Mr. St-Aubin he returned to the office. The meeting had started before he met Mr. St-Aubin, who he did not know before. It was during the recess period that he approached the individuals at the meeting and met Mr. St-Aubin and left immediately and returned to the office. He did not meet WO Remillard that day. He met him on the next day, December 10.

To the statement that "If you don't have written authority, you don't have authority", the grievor responded: "I don't recall having been told that I needed to get written authority. I know I needed authority".

At the disciplinary hearing on January 12, 1994, with regard to his attendance at the SNIC meeting, the grievor had told Lt.-Col. Brown that there was no doubt in his mind that he had permission to attend the meeting. He had told Lt.-Col. Brown that he was told to attend the meeting and if Mr. St-Aubin were there to return to the office. With regard to the presence of Mr. St-Aubin at the SNIC meeting, it was never raised during the disciplinary hearing, the grievor stated.

With regard to the incident of December 21, 1993, the grievor insisted that he called the office at 7:27 a.m. to inform that he would not be in due to sickness. He had spoken to WO Remillard. He had looked at the time of the call and had also asked his wife to do so; it was 7:27 a.m. He had given the same statement to Lt.-Col. Brown at his disciplinary hearing on January 12, 1994.

In cross-examination, the grievor agreed that he had been advised of the expected reporting procedures in the office, that he had been counselled on numerous occasions concerning the issue of hours of work, contract procedures, and reporting procedures. The counselling had begun prior to the change of supervisors in the summer of 1992. He agreed also that the issues on which he was counselled were quite simple procedures. He agreed also that general meetings were held in the fall of 1992 with the new management team and inspectors. He agreed there were "numerous meetings of all kinds" and some of those meetings touched on the same issues: office procedures and leave procedures. He had also had meetings on these

same issues with Mr. Gaulin, his supervisor at the time. He agreed that management had asked employees to call in prior to the start of the workday and give reasons for their absences. He also agreed that sick leave applications had to be submitted on the day following his return to work. Annual leave, he agreed, had to applied for in advance of the leave in order to be authorized. With respect to late arrivals, he had to notify his supervisor and obtain his authority if he were going to be paid for the time not at work. He had to obtain his supervisor's authorization in advance before taking an early departure from work. With regard to attendance at work site or meetings outside the office, the grievor acknowledged that he had to sign the logbook and later the notice board which was put into effect indicating the work site, time of departure, and estimated time of return. It depended on the period of time, he explained. First, it was the logbook, then the board on the wall, and then both and the board and verbally advise the supervisor, giving time of departure and estimated time of return. During all periods, employees had to verbally advise supervisors of whereabouts, etc. There was also a need to have proper authorization or permission from his supervisor to leave on personal or union business.

The grievor agreed there were numerous counselling sessions held with him by MWO Locke in the spring of 1993 dealing with leave procedures and the requirement to obtain permission in advance.

With regard to the incident of December 9, 1993 involving the grievor's attendance at the SNIC meeting, the grievor stated that he had submitted Exhibits E-56 and E-57 prior to any discussions with WO Remillard. When confronted with the testimony of WO Remillard that Exhibit E-57 was received by him only after their meeting on December 8, 1993 and that the grievor had already been given note number 2 on Exhibit E-56, the grievor simply answered "Well that's his story", maintaining that Exhibit E-56, with note number 2 on it requiring him to ascertain whether Mr. St-Aubin would be at the meeting, was given to him at the same time as he gave WO Remillard, who was then angry at him because he would not sign an invoice presented to him, Exhibit E-57. He did not have a reply for the assertion by WO Remillard that he had gone to see the grievor in the afternoon to confront him with Exhibit E-57 and having then said to the grievor: "We've been up that road a couple of hours ago".

The next witness was the grievor's wife, Mrs. Germaine Cléroux. She testified that on December 21, 1993 the grievor had called her over and said: "It's 7:27 a.m. I'm calling the office". She had also looked at the time on her phone at it read 7:27 a.m. The grievor on the phone then said: "It's Norm, I won't be in today. I'm sick, not feeling good at all". "That's it", she stated. She had then marked down in her book "7:27 absent, sick" in French ("absent, malade"). Her husband was sick with "some kind of a migraine", she added.

In cross-examination, the witness acknowledged that the time of the call she gave had been contradicted by both WO Remillard and Mr. Bois.

Lt.-Col. Brown testified in rebuttal evidence. He was categoric in stating that at no time during his disciplinary hearing did the grievor state that he returned to work, to the office, when he confirmed that Mr. St-Aubin was at the SNIC meeting. He was also categoric in stating that at no time during his disciplinary hearing did the grievor indicate that he had a witness or document which would corroborate the time of his call on December 21, 1993.

There was no cross-examination of this witness.

Capt. Eric Perrault next testified in rebuttal evidence. He testified that he was present at the January 12, 1994 disciplinary hearing at which he took notes as Lt.-Col. Brown's administrative assistant. He referred to his notes prepared at the time of the hearing and to the question: "Did Mr. Cléroux at any time during this hearing state that WO Remillard had told him to go to the SNIC meeting to see if Mr. St-Aubin was there and to come back if he ran into Mr. St-Aubin?", he answered: "No, he did not". “Did the grievor at any time state that he returned to the office after confirming that Mr. St-Aubin was at the meeting?”, the witness was asked. He answered: "No".

In cross-examination, the witness stated that it was not possible that the grievor had made the above-referred to statements because "it would have changed the outcome of the hearing", he stated. Had the grievor said at the hearing that WO Remillard had told him to attend the meeting and see if Mr. St-Aubin was there and return if he was there, "that would have been significant and could or may have changed the outcome of the hearing. This was so because it would have had to be

verified in more depth", he stated. "He didn't say it, so it didn't happen. I didn't take it down", the witness stated.

WO Remillard next testified in rebuttal evidence. He reiterated that he had not told the grievor to attend the SNIC meeting and to return to the office if he found Mr. St-Aubin at the meeting. He testified that he had absolutely never said to the grievor to leave a memorandum of his departure, which the grievor referred to as Exhibit E-58. Nor had he met with the grievor on December 10, 1993, with Exhibit E-58 in his hand, and state that he was interested in knowing what time he returned from the meeting and did he make contact with Mr. St-Aubin. "No such meeting ever occurred", the witness stated.

Argument for the Employer

Counsel for the employer stated that the employer has the onus upon it to establish, on a balance of probabilities, that the grievor was absent without permission on December 9, 1993, and failed to follow proper reporting procedures on December 21, 1993.

Counsel reviewed the evidence advanced at this hearing with regard to the incident of December 9, 1993. She referred to Exhibits E-56, E-57 and E-58. The employer's evidence is that on December 6, 1993, sometime in the afternoon, the grievor submitted Exhibit E-56. WO Remillard followed up with MWO Locke on December 7, 1993. Given that the grievor was not a member of the SNIC committee and management was aware that Mr. St-Aubin was the normal representative, WO Remillard provided instructions to the grievor on the morning of December 8, 1993, in the contracts conference room, that further information was required. He requested the information verbally and confirmed in writing on Exhibit E-56, minute number 2. Despite this request, the grievor prepared a further minute sheet, Exhibit E-57, without providing the requested information. WO Remillard immediately reminded him that they had "just been up this road a few hours ago". He required the information as to why Mr. St-Aubin could not attend and, essentially, what would justify the grievor's attendance.

Counsel submits that the grievor knew exactly what was expected of him and that WO Remillard at no time granted him permission to attend the meeting. Despite

instructions on two occasions, the grievor proceeded to record in Exhibit E-58 that permission had been granted and simply left the note, Exhibit E-58, on WO Remillard's desk while he was away and attended the SNIC meeting without authorization. Counsel submits that WO Remillard's testimony is credible. The evidence demonstrates that employees were expected to submit written requests for such absences; this is demonstrated in Exhibit E-51, page 8. The evidence also established that management provided written replies to written requests. This procedure is demonstrated by Exhibits E-55, E-61, E-66 and E-69. The evidence also demonstrates that WO Remillard also hoped for and attempted to foster a good working relationship with the grievor throughout the fall of 1993 and if we look at the evidence, he reminded the grievor on numerous occasions of the need for communication. He focused on counselling the grievor on these matters and attempted to encourage his performance, as set out in Exhibit E-71. WO Remillard reacted immediately on December 9, 1993 to the content of Exhibit E-58 by picking up the three documents, Exhibits E-56, E-57 and E-58, and going straight into MWO Locke's office. He wanted to clarify the situation and asked MWO Locke whether he had granted permission to the grievor. When he found out that that was not the case, he demonstrated immediate concern about the grievor's actions and untruthfulness. WO Remillard's testimony is corroborated by MWO Locke.

Based on the evidence, counsel submits that this was not the approval of a supervisor who had granted permission or was out to get an employee. He was concerned and upset by the fact that the grievor went to the meeting without permission. He was concerned by the grievor's attempt and, in fact, deceit to suggest that permission had been granted. Counsel submits that these were the immediate and natural reactions of a supervisor who is disappointed, stunned, and frustrated by an employee's actions. For the record, it is to be noted that WO Remillard was not contradicted during cross-examination on his recollection of the sequence of events concerning his receipt of Exhibit E-56, discussions in the conference room, and drafting of minute number 2 on Exhibit E-56, and his later receipt of Exhibit E-57. Why, counsel queried, would WO Remillard write the content of minute number 2 on Exhibit E-56 if he had already had Exhibit E-57, as the grievor suggests? Why would he waste his time having the grievor submit Exhibit E-58 if he had already verbally authorized him to go to the meeting? Why would he not do as he did in Exhibits E-55,

E-66 and E-69, something to the effect that permission was granted but come back if Mr. St-Aubin is at the meeting? Counsel submits that the grievor's explanation of the sequence of events was simply vague and does not ring true. The grievor presented absolutely no evidence that WO Remillard ever verbally authorized written requests. WO Remillard emphasized that his instructions and practice were simple: put the request in writing and wait for his return correspondence. This is demonstrated, as earlier indicated, by Exhibits E-55, E-66 and E-69, and was utilized by WO Remillard and MWO Locke. In fact, in earlier testimony in these proceedings, the grievor was asked about the issue of obtaining permission to leave for union business. His reply was that he would give as much notice as possible; at first verbal and then written. He indicated that in 1992 he was told by Mr. Gaulin to put the request in writing. In that context, the grievor commented that it was also that way all the way through with Mr. Gaulin. "I would get his written approval", the grievor stated. Counsel submits that this same practice continued under WO Remillard and that the grievor knew full well what the office procedure was. The grievor simply refused to recognize his supervisor's authority and chose instead to play a game which he has continued to do at this hearing. A serious question of credibility arises in the grievor's position at this hearing and his representation at the disciplinary hearing on January 12, 1994, over almost two and one-half years ago and close in time to the incident in question.

Again, counsel submits, the employer is hearing excuses which were not raised during the disciplinary hearing and in the grievance process. According to Lt.-Col. Brown, the grievor did not at any time state he could not locate Mr. St-Aubin. He did not state that WO Remillard said he could go to the meeting but return if Mr. St-Aubin were there. Furthermore, he did not tell Lt.-Col. Brown that he returned to the office 30 or 40 minutes later after confirming that Mr. St-Aubin was at the meeting. These items were raised at this hearing on June 4, 1996 for the very first time. The only logical, reasonable conclusion from that is that they were not raised before because they are recent fabrications. Lt.-Col. Brown's testimony is corroborated by that of Capt. Perrault. The latter made reference to contemporaneous notes and indicated that the grievor at no time during the disciplinary hearing stated that WO Remillard said he could go to the meeting but to return if Mr. St-Aubin was there. Again, the grievor did not state that he returned to the office after confirming that Mr. St-Aubin was at the meeting. Capt. Perrault was not shaken during

cross-examination and indicated that any such representations by the grievor would have been significant and something he would have recorded in his notes because they could have affected the outcome of the disciplinary hearing. This makes sense, counsel submits, because when you look at the record of discipline, as outlined in Exhibits E-81 and E-82, there is reference to an absence without permission for a period of two hours and, as indicated by Capt. Perrault, if those representations had been made by the grievor, further verification would have been required, first, with respect to the issue of permission and, second, with respect to the administrative deduction for the two-hour period the grievor was absent. That did not occur because the grievor did not raise the issue.

It is a serious matter to assess in considering the grievor's credibility. With respect to this incident of December 9, 1993, the grievor's misconduct was established solely by the fact that he was absent without permission. His misconduct is aggravated by the fact that despite two clear directions he failed to respond to WO Remillard's request for further information. His misconduct is aggravated by his false statement in Exhibit E-58, when he had not received permission. His misconduct and credibility are aggravated by his games with management and raising excuses for the first time on June 4, 1996, at this hearing.

On December 21, 1993, the grievor failed to tell his supervisor until approximately 9:30 a.m., that is, two hours after he was supposed to report for work, that he would not be in because he was sick. With regard to the testimony before me, counsel submits a finding of credibility is required in respect of WO Remillard and the grievor. Counsel asked that I consider WO Remillard's clear recollection of the circumstances and timing of the telephone call. He noted at 7:30 a.m. that the grievor had not arrived and the workday had already started. He then went to see Mr. Bois to check whether the grievor had telephoned him. He proceeded to check the attendance register and the time sheets in case the grievor had already signed in. All of these actions took place after 7:30 a.m. and prior to the grievor's call at 9:27 a.m.

WO Remillard's evidence is corroborated by that of Mr. Bois. Upon Mr. Bois' own instructions to let him know when the grievor phoned in, WO Remillard proceeded to his supervisor's office following the call from the grievor at approximately 9:30 a.m. and relayed the message that the grievor had just called in.

WO Remillard's evidence is consistent. He appeared before Lt.-Col. Brown at the disciplinary hearing which followed in January 1994 and he clearly recalled and testified as to the time of the grievor's phone call on December 21, 1993. He was not shaken in cross-examination during this hearing and was both forthright and honest. The grievor offered absolutely no explanation to suggest why WO Remillard would be untruthful. To the contrary, counsel submits, WO Remillard hoped that the grievor would respect his authority. Instead, the grievor's conduct on December 21, 1993 was like a slap in the face to their working relationship.

Again, the employer heard evidence for the very first time at this hearing. If what makes sense is considered, counsel asked that I consider the circumstances of the disciplinary hearing. The grievor heard WO Remillard say the time of the call was 9:27 a.m. He heard Mr. Bois corroborate that evidence. The grievor at no time indicated that his wife was aware of the time of the call. Now, again, two and one-half years later, Mrs. Cléroux, the grievor's wife, arises to corroborate her husband's testimony. With respect to Mrs. Cléroux, where was her evidence before this hearing, counsel asked? If it was such an important fact, where is the note she allegedly made on December 21, 1993? Counsel suggests that it was not raised because it is a recent fabrication and must be viewed as such and a self-serving account by the grievor's wife who now attempts to discredit the evidence of WO Remillard and Mr. Bois. No weight at all should be given to this so-called corroborative evidence advanced by the grievor's wife.

Counsel submits that I should also consider the grievor's propensity to contravene simple directions. From 1992, the grievor was counselled on approximately 27 occasions concerning office procedures, leave procedures, and absence procedures. He was also disciplined in respect of these very same issues of absences without permission and failure to follow proper reporting procedures. As recently as April 26, 27 and 28, 1993, the grievor called the office well after his starting time and failed to contact his supervisors, as directed. On the third occasion, April 28, he was asked by the administrative clerk, who had taken the call, whether he wished to speak to his supervisor, MWO Locke, who was nearby at the time. The grievor had simply said "No" and hung up the phone. This constituted a deliberate flaunting of management's authority which, unfortunately, had become a theme of the grievor's behaviour and attitude in respect of both his work performance and

adherence to workplace directives. His escalating disrespectful behaviour towards his supervisors' authority is demonstrated by WO Remillard's uncontradicted testimony.

Counsel referred to Exhibit E-55, by which the grievor was given permission to be absent for two hours. He was given a direct request to notify WO Remillard if the meeting went beyond 10:00 a.m. And what does he do, counsel queried? He simply returns to the office at 11:15 a.m. without having notified his supervisor and without any explanation for his continued absence. He did not excuse himself from the meeting to either page or telephone WO Remillard. Even though the grievor had been put on notice that his behaviour was unacceptable, he demonstrated increasing unwillingness to respond to his supervisor's directions. Despite clear instructions in August 1993, the grievor proceeded into WO Remillard's workstation in November 1993 and was seen touching his briefcase. The grievor further failed to respond to his supervisor's request on Exhibits E-66 and E-69. None of the employer's evidence concerning the issues of work performance, attitude, and failure to follow instructions during the fall of 1993 were contradicted by the grievor.

Turning to the issue of quantum, counsel asked me to consider first the seriousness of these two incidents of misconduct, on December 9 and 21, 1993, in light of the grievor's employment record. Firstly, his conduct demonstrates a flagrant disregard for established, legitimate, office procedures. Secondly, it is a serious disregard of his supervisor's authority. Thirdly, it constituted a serious breach of trust in respect of relations with his supervisor and management. Quite simply, they were serious acts of insubordination.

Also, in respect of quantum, counsel submits that it is necessary to consider a progressive link with the grievor's earlier disciplinary record in respect of similar and persistent misconduct. It is also important to consider the necessity of impressing on the grievor the importance of correcting his behaviour. The employer recognized the purpose of discipline to be both corrective and progressive in order to bring home to the employee that his actions were unacceptable. This principle is clearly addressed in the disciplinary letters addressed to the grievor, Exhibits E-13, E-23 and E-49. The grievor's disciplinary record demonstrates his deliberate refusal to learn from previous misconduct or to demonstrate any genuine willingness to cooperate with management. We are not dealing with an isolated incident, counsel submits. Rather,

there is a demonstrated pattern of behaviour that was clearly brought to the grievor's attention.

Counsel submits that further factors to be considered are the previous counselling sessions prior to these two incidents of misconduct and the proximity of these incidents to prior discipline and counselling. Counsel reiterated her submissions in earlier hearings concerning the background and content of counselling. This was not a problem unique to the new management team. The situation was indicated by MWO Power to be intolerable in March 1992, as shown in Exhibit E-6. By December 1993, management had gone out of its way to assist the grievor, only to find that he was blatantly ignoring its authority. We are dealing with a person who was counselled on the same matters but refused to follow those procedures over and over again. Counsel submits that management upheld its responsibilities to ensure that the grievor was made aware of what was expected of him. Some 27 counselling sessions and discussions were held with him and counsel referred to them specifically and in detail.

Counsel submits that the grievor has established no mitigating factors in respect of his behaviour. The evidence concerning his deteriorating work performance was not contradicted. The grievor's demeanor and attitude constitute aggravating factors. While reminded by Lt.-Col. Brown of the need for honesty in his relations with management, the grievor continued to ignore the directions of every supervisor, starting with his first supervisors, Messrs. Power, Fisher and Gaulin, and then Messrs. Locke, Bois and Remillard. He pursued his element of dishonesty even to his dealings with Lt.-Col. Brown, as evidenced by the uncontradicted evidence concerning the French competition exam. The grievor failed to demonstrate any remorse or willingness to accept responsibility for his actions. His disruptive influence and interference in the workplace is demonstrated by WO Remillard's concern that he was losing his managerial control. The procedures were simply being washed aside by him as being irrelevant. In light of his disciplinary record and the other factors outlined above, counsel suggests that management's response was well within the range of reasonable disciplinary measures. It was neither discriminatory, arbitrary or made in bad faith. Given his blatant behaviour, the penalty was more than reasonable. In fact, Lt.-Col. Brown could pursue corrective discipline for each of the incidents, resulting in two separate progressive penalties from the previous 15-day

suspension. In order to find in favour of the grievor, I must, counsel argued, make credibility findings against WO Remillard, Mr. Bois, Lt.-Col. Brown and Capt. Perrault. Counsel submits that such a conclusion is simply not supportable by the evidence before me and that the grievor must bear the responsibility for his own misconduct.

In support of her position, counsel referred to the following arbitral awards: Higgins (Board file 166-2-3572); Ennis (Board file 166-2-17728); Crawley (Board file 166-2-14067); Herrit (supra); Anten (supra); Martyr (supra); Campbell (Board file 166-2-9323); Payeur (Board file 166-2-15250); Skibicki (supra); Varzeliotis (Board file 166-2-9721). Counsel also referred to Canadian Labour Arbitration, by Brown and Beatty, at paragraphs 7:3110, 7:440 and 7:4472.

Argument for the Grievor

Counsel for the grievor pointed to the great number of counselling and coaching sessions held with the grievor and the fact that none or few of them constituted disciplinary measures. He argued that I should not take these into account when assessing the alleged incidents of misconduct on December 9 and 21, 1993, and deciding, if I found necessary, on the appropriate penalty to be determined for any proven misconduct on those dates.

With regard to the grievor's attendance at the SNIC meeting on December 9, 1993, we have two different versions. The grievor says that he provided Exhibit E-56 on December 6, with only one minute notation. Then, after receiving no response, he delivered Exhibit E-57 on December 8, which is a fresh request for permission. On December 8, WO Remillard gets back to him with minute number 2 on Exhibit E-56. The grievor attempts to contact Mr. St-Aubin, with no success. He advises, verbally, WO Remillard of his inability to contact Mr. St-Aubin and then, according to the grievor, WO Remillard says to him to go to the meeting and if Mr. St-Aubin was there, to come back. On December 9, the grievor provides Exhibit E-58 to WO Remillard and goes to the meeting, meets Mr. St-Aubin at the break, and returns to the contracts section.

WO Remillard says that on December 6 he received Exhibit E-56, with minute number 1 on it. He then had a conversation with MWO Locke and then in a meeting with the grievor on December 8 he discussed the issue of the grievor's attendance at

the SNIC meeting and advised the grievor to find out why Mr. St-Aubin could not attend. WO Remillard says that he then, immediately after this meeting with the grievor, provides Exhibit E-56, with minute number 2, and rather than stating in minute 2 “why" Mr. St-Aubin can not attend the meeting, the note says: "*As per our discussion in the conf rm. on this date, pls. find out if Mr. St-Aubin SPV will be able to attend and info me on SITREP"*. According to WO Remillard, the grievor drops Exhibit E-57 in his basket while WO Remillard was sitting there and then the grievor leaves WO Remillard's area. The latter recovers the document (Exhibit E-57) and takes it directly back to the grievor and says: "Haven't we been up that road already". Then on December 9, the grievor goes to the SNIC meeting and at some point in WO Remillard's absence leaves Exhibit E-58, confirming permission, on WO Remillard's desk.

Counsel stated that he thinks minute 2 on Exhibit E-56 is very important in determining whose version of the facts is correct. Everyone, except the grievor and his counsel, believes that the question "that moved down the line" from MWO Locke to WO Remillard was that he was to find out why Mr. St-Aubin could not attend the meeting. This, however, counsel argued, does not jive with the note WO Remillard writes immediately after the meeting with the grievor. However, minute 2 on Exhibit E-56 does jive with the grievor's explanation because the grievor says that WO Remillard told him to find out if Mr. St-Aubin could attend. The grievor then made efforts to do that but could not reach Mr. St-Aubin and then, after advising WO Remillard of that fact, that is, that he could not find Mr. St-Aubin, WO Remillard told him to attend the meeting and come back if Mr. St-Aubin was there.

Counsel argued that the grievor's explanation is more consistent with the written documentation provided by WO Remillard. The grievor had asked for permission to leave, it is clear from Exhibits E-56 and E-57, and insists that permission was granted to him to leave as a union representative on union business.

At this point, I advised counsel for the grievor that any argument that the employer's refusal to grant leave to attend to union business would constitute a violation of the provisions of the collective agreement governing the grievor, which stipulates that such leave may not be unreasonable withheld, is beyond my jurisdiction to evaluate. This is so because the bargaining agent has lent neither its

support nor representation to this grievance and the collective agreement, therefore, cannot be before me. In any event, the grievor has never alleged that permission was unreasonably withheld, as he claims that permission was actually granted to him to attend the meeting.

With regard to the incident of December 21, 1993, counsel submits that it comes straight down to a matter of credibility. There is no basis for counsel for the employer to characterize evidence by the grievor or his wife as fabrication. His submission is that the only challenge to the grievor's testimony is with respect to what the employer's witnesses have said on the point of when the phone call was made. Was it 7:30 or 9:30 a.m.? What was said in the call was not in issue; only the time of the call. Once again, if I chose to prefer the employer's evidence, then counsel asks me to consider Exhibit E-8, which is the Civilian Leave Policy, which at section 3 deals with sick leave and states at section 3(b) that if an employee can not come to work because he/she is sick, the employee must call his supervisor "as soon as possible" and “before the shift” if the employee is a shift worker and at the beginning of the absence if a day worker, such as the grievor is. MWO Locke, when asked by counsel for the grievor whether the policy was binding on employees to follow, replied "Yes" and when asked whether there was any other procedure or policy, had said "No". There is no mention in Exhibit E-8 of any requirement to call in "prior to" the work day. This makes a big difference.

Counsel argued that if the grievor only called in at 9:27 a.m., then this falls within "at the beginning of his absence". Counsel cited in support of his position the decision in Barber (supra).

Counsel submits that if you take into consideration all of the Civilian Leave Policy and the fact that 7:31 a.m. is not fatal, nor is 9:27 a.m. fatal, you have no misconduct. The reason why this is so in that there is no prejudice to the employer in calling in late. Moreover, the fact that the grievor was paid for his absence in accordance with the sick leave policy under the Civilian Leave Policy is recognition that the grievor was on legitimate leave that day.

Counsel argues against the employer putting something in writing, that is, the Civilian Leave Policy, and then derogating from it. This is not fair, he argued. It is

not reasonable and the employee is entitled to follow the terms of the Civilian Leave Policy. MWO Locke said that policy was applicable and was the only documentation in place. Calling in at 9:27 a.m. was as soon as possible as against, say, calling in at the end of the day.

Finally, with respect to quantum, counsel stated that if I were to accept his alternative argument regarding both the SNIC meeting and the telephone call at 9:27 a.m., then the discipline meted out to the grievor would have to be erased totally. If I do not accept this, the suspensions are "in line with what's gone on before, in accordance with the principles of progressive discipline", counsel stated. However, if I find that at the disciplinary hearing, Lt.-Col. Brown failed to consider the reasonableness of the employer's conduct in disciplining the grievor, then the discipline meted out has to be reduced drastically.

Rebuttal Argument for the Employer

Counsel for the employer agrees with counsel for the grievor that the counselling sessions referred to throughout this matter were not disciplinary in nature and the sole purpose of referring to the counselling was to show that the grievor was made aware of what was expected of him. They do not form part of the grievor's disciplinary record and she at no time attempted to use them for that purpose.

Whether the word used by WO Remillard in Exhibit E-56, minute number 2, was "why" or "if" is unimportant, counsel stated. The whole point was to find out why, given the fact that Mr. St-Aubin was the normal representative at SNIC meetings, the grievor had to attend. When WO Remillard was asked about his discussion with the grievor, he testified that he told the grievor that his supervisors were wanting to know why Mr. St-Aubin could not attend. WO Remillard also indicated quite clearly that he asked the grievor to put his request in writing and wait for return correspondence. That return correspondence was evidenced very clearly in other cases, such as in Exhibits E-55, E-66 and E-69, and MWO Locke said this was the drill and MWO Locke did it in Exhibit E-61. Counsel submits that there is no such thing as a qualified permission, as suggested by counsel for the grievor. Again, whether the grievor was

asked by Mr. Joe Allen or anybody else to go to the meeting is irrelevant as he had to obtain permission from management before going to the meeting.

Counsel referred to the fact that counsel for the grievor referred to and relied on the Civilian Leave Policy, Exhibit E-8, to justify the grievor's failure to call in prior to the start of his workday. The fact is that the grievor has admitted in this hearing that he was asked by management to phone in prior to the start of the workday and to give the reason for his absence. So, counsel argues, the grievor was not confused as to what he was required to do and, she submits, counsel for the grievor's constant reference to "day worker", "shift worker", and "at the beginning of the absence" are not supported by the evidence.

With regard to counsel for the grievor's objection to the use by counsel for the employer of the term "fabrication" in connection with the evidence of the grievor's wife regarding the time of the grievor's phone call on December 21, 1993, and the "note" she allegedly made about that phone call, counsel pointed out that Mrs. Cléroux was clearly put on notice that her credibility concerning her testimony was questioned. Again, if the "note" existed, the grievor had every opportunity to present it, both at the disciplinary hearing and at this hearing.

The policy applied with respect to leave is clearly set out in Exhibit E-51 and was brought to the grievor's attention. Notwithstanding the grievor's own acknowledgment that he was asked to phone in prior to the start of the workday, counsel for the grievor, nevertheless, has attempted to make something of the words "beginning of the absence" found in the Civilian Leave Policy, Exhibit E-8. Accordingly, if the grievor phoned in at 9:27 a.m. he directly contravened the employer's procedures and, although the grievor contends no wrongdoing, his counsel's alternative argument appears to address the mitigating aspects. Counsel submits that the grievor can not have it both ways. The reference to the Barber (supra) decision is absolutely distinguishable even though the grievor in that case admitted to calling in late. Again, counsel for the grievor should not be permitted to speculate as to the prejudice to the employer by the grievor calling in late as this issue was not put to any witnesses and has nothing to do with the issue of discipline.

Counsel noted counsel for the grievor's statement that if I found that the grievor had acted as alleged by the employer, he had no argument to present because the penalty was in line with previous discipline and his alternative argument, counsel understands, is that counsel for the grievor argues that I could erase the sanction totally if I found that management unreasonably withheld permission or did not consider that a late call could be explained by the fact that he was sick. Counsel stated that she had three comments to make in connection with counsel for the grievor's position. Firstly, no finding can be made concerning an alleged violation of the collective argument since I have no jurisdiction to do so; secondly, they are irrelevant to the issue of discipline; and, thirdly, consideration would constitute a denial of natural justice given that these issues were not put to the employer's witnesses.

Finally, with regard to counsel for the grievor's query why WO Remillard had not responded in writing to the grievor following receipt of Exhibit E-57, counsel states that WO Remillard had already returned his request in writing in minute number 2 of Exhibit E-56 and also verbally reminded the grievor of that fact minutes after receiving Exhibit E-57.

Reasons for Decision

The grievor, as a union representative, wanted to attend a snow and ice control (SNIC) meeting to be held on December 9, 1993. In the normal course, management would not have refused his request to attend the meeting except that, in this case, it believed that his attendance was, perhaps, not necessary because the union would, as in the past, already be represented at the meeting by Mr. St-Aubin, an employee in the transport section at the Base. Prior to granting permission, it was management's intention to find out if Mr. St-Aubin was going to attend and, if not, why not. Accordingly, it asked the grievor to verify whether Mr. St-Aubin was going to attend the meeting, and, if not, why not.

The grievor did not know Mr. St-Aubin and was unable to contact him prior to the meeting. The grievor believed that permission had been granted to him to attend the meeting, subject to his returning to the contracts office if Mr. St-Aubin was also in attendance. According to the grievor, it was only half-way through the meeting that

he learned that Mr. St-Aubin was there and so he immediately returned to his work place.

This all took place over a period of four days, December 6, 7, 8 and 9, 1993. On December 6, the grievor presented his request for leave to attend the meeting. This is reflected in note number 1 on Exhibit E-56. On December 7, his supervisor, WO Remillard, wrote note number 2 on Exhibit E-56 and returned Exhibit E-56 to the grievor. In his note, note number 2, the supervisor asked the grievor to verify "if" Mr. St-Aubin was to attend the meeting and if not, why not. The grievor, perhaps because he could not contact Mr. St-Aubin, did not reply to his supervisor's note number 2 but submitted a second request for leave to attend the same meeting on December 8, Exhibit E-57. There is a dispute between the two employees as to whether Exhibit E-57 was provided to WO Remillard prior to or after he met with the grievor on December 8, 1993.

WO Remillard testified that the meeting on December 8 was as a result of receiving Exhibit E-57 from the grievor, a second request for leave for the same reason, when the grievor had failed to reply to the query he had posed in his note number 2 on Exhibit E-56. He had gone to the grievor then to tell him, "Haven't we been up that road already", meaning that his first request had not been finalized and WO Remillard was still waiting for a response to his query in note number 2 on Exhibit E-56. WO Remillard was categoric in denying that he had given permission to the grievor when they met on December 8 to go to the meeting and, of course, he denied that he would have imposed a condition, namely, that the grievor was to return to the office if Mr. St-Aubin were there. In the circumstances, WO Remillard was appalled to learn the next day, in Exhibit E-58, that the grievor had left for the meeting "as per permission granted".

The grievor, on the other hand, claims that his meeting with his supervisor, WO Remillard, took place on December 8 after he had provided his supervisor with his second request for leave, Exhibit E-57. He denies that his supervisor had said to him, "Haven't we been up this road already" at that meeting. He insists, however, that Exhibit E-56, without note number 2, and Exhibit E-57 were considered at their meeting and that WO Remillard had said to him that he had permission to attend the meeting but would have to return if Mr. St-Aubin were also at the meeting. This is

why, the grievor insisted, he had left note Exhibit E-58 on his supervisor's desk on December 9 saying he had gone to the SNIC meeting at 1:50 p.m. and would return at 2:00 p.m. or before.

It does not appear to me to be logical for supervisor WO Remillard to draft note number 2 on Exhibit E-56 after he would have met with the grievor on December 8, when he allegedly gave the grievor verbal permission to attend the meeting subject to his returning to the office if Mr. St-Aubin were also there. WO Remillard explained that he went to see the grievor on December 8, after receiving Exhibit E-57 and not before, to tell him that he was still awaiting a response to his request to find out whether Mr. St-Aubin was to attend the meeting and, if not, why not. This question still remained to be answered by the grievor on December 8. It is logical that WO Remillard's note number 2 on Exhibit E-56 would have been delivered to the grievor before Exhibit E-57, a second request for permission to leave, was received by WO Remillard.

In the circumstances, I am not prepared to believe that WO Remillard gave verbal permission to the grievor on December 8 to attend the meeting on December 9, with or without a condition attached. Again, written requests for leave for union business were always responded to by WO Remillard in writing in the past. Why, it must be asked, would he give a verbal permission in this case? WO Remillard denies giving the grievor permission of any kind to attend the meeting. He was still waiting for further information from the grievor before deciding on granting him permission to leave to attend the SNIC meeting.

Accordingly, I find that the grievor absented himself without permission on December 9, 1993, and thus misconducted himself. The grievor appears to have continued his past and seemingly unending habit of failing to conform to strict procedures which had been put in place and which were almost constantly being reminded to him. Management saw in this episode of December 9, 1993 a further flaunting of procedures, which the grievor readily admitted were well-known to him. Everything must be in writing: the application or request to leave the workplace on union business and the response of management. Here the grievor had requested permission in writing but never got a response in writing. He claims he got verbal permission on December 8, 1993 to leave for the meeting during his discussion with

WO Remillard. I accept WO Remillard's testimony that he never gave such verbal permission, the whole having regard to the surrounding facts in this matter and the only logical conclusion that is available to me, having regard to these facts.

With regard to the incident of December 21, 1993, the issue is whether the grievor phoned into the office prior to the start of the workday at 7:27 a.m. to inform management that he would not be in for work due to sickness or whether, in fact, he phoned in only at 9:27 a.m., that is, some two hours after the start of his workday.

The evidence is that at 7:30 a.m. the grievor's immediate supervisor, WO Remillard, noted that the grievor had not reported for work. After verifying the attendance registers and with his own supervisor, Mr. Bois, whether the latter had been called by the grievor, WO Remillard was asked by Mr. Bois to let him know when the grievor called or reported for work. WO Remillard testified that at 9:27 a.m. he received a call from the grievor saying that he would not be in due to sickness. WO Remillard immediately reported this to Mr. Bois. At the disciplinary hearing before Lt.-Col. Brown held in this matter, the grievor simply maintained his position that he had called in at 7:30 a.m.

At this hearing, the grievor maintained his position that he had called only once on December 21, 1993, and that that was at 7:27 a.m. The grievor's wife testified on his behalf and corroborated his testimony that he had called in at 7:27 a.m. In fact, she testified she was very conscious of the call being made at that time of the day and even noted the time on a pad next to the phone. That note, however, was not advanced in evidence by the grievor or his wife.

Obviously, the issue is one of credibility as between the grievor, his wife, and the grievor's supervisors, WO Remillard and Mr. Bois.

I have no reason to disbelieve the evidence advanced by WO Remillard and Mr. Bois with regard to the time the grievor called in to the office on December 21, 1993 to say he was sick and would not be in to work. They both testified that the grievor's telephone call was received at 9:27 a.m. and I accept this as a fact in this case. They were both waiting for his call from 7:30 a.m. when he did not show up for work and it did not come in until some two hours later, at 9:30 am. When the grievor did call, the time of the call was important to them, in the circumstances.

The grievor, for whatever reason, called, I believe, at 9:27 a.m. He has never attempted to establish that he was unable to call before that time and insists only that he called in at 7:27 a.m. The grievor's testimony simply cannot be believed and his wife's support of his position can only be seen as self-serving for the grievor and cannot be believed either. I find that the grievor's insistence that he called in at 7:27 a.m. is unsubstantiated and is contradicted by the evidence of WO Remillard and Mr. Bois.

Counsel for the grievor argues that if I were to believe that the grievor phoned in only at 9:27 a.m., some two hours after the start of the workday, the employer, in any event, did not suffer any prejudice, and that any infraction which could be ascribed to him should be met by only a token response.

While it is a fact that the grievor was legitimately absent on December 21, 1993 due to illness, he, nevertheless, continued his usual pattern of ignoring well-established and well-known procedures in place and did not advance any excuse for not having or not being able to comply with these procedures; he was to phone in prior to the start of his workday and did not. I believe that the procedures in place legitimately varied the earlier issued Civilian Leave Policy, which provided that the call need be made "at the beginning of the absence". The need to call in "prior to the start of the workday" was well-known to the grievor and he was required to follow this procedure.

Again, the grievor has misconducted himself, flaunting the employer's procedures well-established and well-known to the grievor for calling in prior to the start of his workday, if unable to report for work due to sickness. There was no excuse advanced by the grievor and his only explanation is that he called in at 7:27 a.m., which I do not accept as fact.

The employer had chosen to deal with these two items of misconduct, that is the misconduct of December 9, 1993 and that of December 21, 1993, as one and has meted out a suspension of 20 days without pay based on the principles of progressive discipline and the fact that he had previously been awarded a suspension of 15 days without pay as a result of his misconduct on April 23, 1993. I have ruled earlier in

this decision that, for the reasons given, the 15-day suspension should be reduced to a suspension of seven days without pay.

In the circumstances, and having regard to the principles of progressive discipline, I find that a suspension of 10 days without pay would be reasonable and appropriate for these two items of misconduct, on December 9, 1993 and December 21, 1993, which might very well have been treated separately by the employer and have attracted progressively increasing disciplinary penalties.

Accordingly, the 20-day suspension without pay meted out to the grievor is hereby reduced to a suspension without pay of 10 days. The grievor is to be reimbursed for all lost wages and benefits for 10 of the 20 days of suspension he has already served.

This grievance is, thus, partially sustained.

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The remaining grievances relate to the grievor's indefinite suspension without pay and the termination that followed.

On January 10, 1994, the grievor's immediate supervisor, WO Remillard, pointed out to the grievor, both in a memorandum and in a meeting with him, that a last minute request for time off work to attend to union business interfered with WO Remillard's ability to properly schedule the work to be done by those reporting to him. While agreeing to the grievor's latest last-minute request, he asked him to, in the future, give, if possible, at least two days notice of such a need to leave on union business. These late requests had become a pattern for the grievor. The grievor was also reminded to contact his supervisor by phone or pager once his union meeting was finished. This the grievor continued to fail to do.

On January 25, 1994, WO Remillard was informed by CWO Bolduc that the grievor had failed to show at a meeting scheduled for 8:00 a.m. that day at Connaught Ranges. The grievor had finally arrived at the Ranges at 9:45 a.m., long after the parties, who were employees of other government departments, had left the Ranges. When WO Remillard confronted the grievor with this development, the grievor stated that his delay in arriving at the meeting was caused by the fact that WO Remillard had

asked him to do other work on an immediate basis. WO Remillard protested during his testimony at this hearing that the grievor had not told him of his meeting at Connaught Ranges that morning and he had tasked him, as he did, because he did not know of that meeting. Had he known, he would have postponed the work that he wanted done and allowed the grievor to attend the meeting. WO Remillard stated that he felt deeply offended and insulted that the grievor would "have the character to offer up such a flagrant lie. I felt the grievor was being irresponsible to his employer, to his contractors, and to other departments". The grievor was given a letter of counselling by Mr. Bois, Exhibit E-88, because of his actions surrounding his missing the meeting. This letter is dated January 25, 1994.

WO Remillard testified that the grievor's first day back at work after serving a 20-day suspension without pay was on February 23, 1994. On that day, WO Remillard assigned him the work of seeing to the installation of an eyewash system in one of the washrooms on the third floor of 12 Hangar, the same floor on which the witness and the grievor had their workstations. The grievor acknowledged this assignment and said that he would be leaving at 9:30 a.m. for his coffee break.

The witness was acting as Duty Warrant Officer, which meant that he was acting as the Base Chief Warrant Officer's representative regarding disciplinary conduct of military personnel throughout the Base, for a 24-hour period. Following his briefing of the grievor that morning and performing other tasks, WO Remillard left 12 Hangar to proceed to the Base CWO's office. Upon exiting 12 Hangar at approximately 10:15 a.m. and pausing to smoke a cigarette and chat with another military person, the witness noticed the grievor exiting 12 Hangar. The witness found this to be rather unusual in that all of the grievor's assigned work was to be done in 12 Hangar. The witness noted the time and proceeded to the Base CWO's office and upon arriving there, phoned Mr. Paul Bois, the contracts officer, and enquired whether he had dispatched the grievor on some other task. Mr. Bois stated that he had not and so the witness asked him to note the time of the grievor's return. Upon returning to 12 Hangar at approximately 11:00 a.m., the witness asked and was told by Mr. Bois that he had seen the grievor walk by Mr. Bois' office with his overcoat on at 10:37 a.m.

The witness and Mr. Bois had earlier decided on holding a "Welcome Back" meeting with the grievor, the purpose of which was to restore communications with the grievor, to reinforce administrative procedures, and to ensure that the grievor's concerns were heard and discussed. MWO Loranger, the contracts supervisor who had replaced MWO Locke, was also to attend the meeting which was to be held on February 24, 1994. It had been decided, in advance, to take this opportunity to incidentally ask the grievor to explain his absence from 12 Hangar on the day before.

The witness, at approximately 11:00 a.m., had gone to the grievor's workstation to ask him to come to the conference room. When the grievor asked "What's up?", the witness had told him that the meeting was just to establish clear guidelines and communications. As the grievor, with the witness, approached the conference room, the grievor noticed Mr. Bois and MWO Loranger and stated in a sarcastic tone: "You've got the whole gang here". The meeting then proceeded with a description of the procedures which were expected to be followed by the grievor. Upon conclusion of the meeting, Mr. Bois asked the grievor if he had any questions. The grievor replied that he knew the procedures and asked if there was still a witchhunt on. When asked to clarify, the grievor stated that the Wing Construction Engineering Officer, Lt.-Col. Brown, had told him in January of 1994 that there were investigations ongoing and they were pointing to the grievor. Those at the meeting informed the grievor that they had no knowledge of any ongoing investigations involving him.

At the end of the meeting in the conference room, the grievor was asked to explain his absence from 12 Hangar from 10:15 to 10:37 a.m. on the day before. The grievor had replied that he had simply missed his coffee break as per the schedule at 9:30 a.m. and had taken it from 10:15 to 10:37 a.m. When reminded by Mr. Bois of the coffee break hours, the grievor, in a very sarcastic and mocking manner, looked at Mr. Bois and, with a chuckle, stated: "Jesus Christ, I just went for coffee". The meeting ended after the grievor was asked whether there was anything further he wanted to discuss. He had replied that there was nothing further he wanted to discuss.

The witness stated that he wished in all sincerity to have things work out well with the grievor. He was just returning from a 20-day suspension but he was an employee under the witness' supervision and because it had not been a healthy

situation in the workplace for any of those involved, a real effort had to be made to get things back to normal. This was why the meeting in the conference room was being held with the grievor. Management wanted to put the past behind them and the grievor. The witness had felt, however, that the grievor was confrontational towards the end of the meeting and that this was a setback in their plans to get things back to normal.

On the same day, February 23, 1994, upon returning to his workstation at approximately 12:40 p.m., WO Remillard was asked by MWO Loranger the whereabouts of the grievor. He had replied that he had been out of the office and did not know. The witness then went to the men's washroom to see if the grievor was there but he was not. At approximately 1:00 p.m., MWO Loranger poked his head into the witness' cubicle, pointing towards the grievor's cubicle. The witness knew what MWO Loranger meant: that the grievor had just arrived. The witness whispered to MWO Loranger: "Does he have his coat on?" MWO Loranger, with a smile, acknowledged this with a nod of his head and MWO Loranger returned to his desk. About 30 seconds later, Mr. Bois looked into the witness' cubicle. The witness had looked at him and acknowledged Mr. Bois' pointing to the grievor's cubicle and said: "Yes, I'm aware of it". MWO Loranger had noted the grievor's departure at approximately 11:55 a.m.

The witness departed his office on duty the next morning, February 24, 1994, at approximately 9:15 a.m. During his absence, the grievor had informed MWO Loranger, the witness' supervisor, that he would be leaving for a coffee break. The time was 9:27 a.m. As the witness returned to 12 Hangar and paused outside the entrance to smoke a cigarette, he noticed the grievor and another employee, a Mr. Jooste, enter 12 Hangar at 10:09 a.m. Later, on that day, he had gone to the grievor's cubicle to deliver a Notice of Investigation (Exhibit E-90) involving alleged misconduct by the grievor for absences from his work without permission on February 23, 1994, from 10:20 to 10:40 a.m. and from 12:30 to 1:00 p.m., and on February 24, 1994, from 9:40 to 10:10 a.m. The witness was also to get the grievor's signature on the Notice but the grievor had refused to sign it saying, "I don't sign nothing", which was the grievor's normal reaction when given such a document to sign.

On March 8, 1994, the witness, WO Remillard, was tasked with delivering a Notice of Investigation (Exhibit E-90) to the grievor. The witness had asked a Sgt. Williamson to accompany him to be a witness to the handing over the Notice to the grievor. The witness had preferred to hand the Notice to the grievor in privacy because of the presence of other employees passing by but the grievor had refused his invitation. The grievor had looked at the witness and had laughed and, in a mocking manner, had said: "If you have another letter for me, just put it on my desk and stop bugging me". A short while later, at 12:45 p.m., the witness overheard the grievor saying to Mr. Gaulin: "You guys are in big shit now". No one but the witness and Mr. Gaulin were within hearing distance of the grievor and the witness felt the remark was directed at Mr. Gaulin and the witness. Mr. Gaulin had replied to the grievor in French that the grievor was "a real shit disturber".

The witness had, as immediate supervisor, been involved in preparing the performance appraisal report on the grievor for the period 1 April 1993 to 25 February 1994 and had written the words therein about the grievor that "he constantly ignores regulations and requires constant supervision". This was a "special" performance appraisal as against the usual annual appraisal. A "special" appraisal is called for when an employee's performance is very high or very low in order to let the employee know where he stands.

The witness stated that when the grievor was absent from work serving his 20-day suspension, another employee was assigned to do the work which had been tasked to the grievor's workstation. This replacement employee discovered a large number of work orders which had not been processed in the normal way. The grievor had in those cases simply telephoned the contractor involved in the work order and authorized the contractor verbally to do the work. This was contrary to procedures in place. There was a need to fill out Form 942 granting authorization to the contractor and having it approved before sending it to the contractor.

Exhibit E-95 was produced through this witness. It is a letter from Volcano Energy Systems Inc., dated February 18, 1994, in which that company sets out the problems that it had encountered. It complained that it had sent invoices for the inspections that it had made, which were accompanied by a list reporting all deficiencies encountered, yet the company had not received any feedback from BCEO

Contracts to proceed in repairing the deficiencies. The remainder of the letter reads exactly as follows:

> *We also did not receive any follow-up from BCEO Contracts from our report faxed on every Mondays for all call-outs performed during week-ends and night calls during week-days meaning work orders. A lot of nuisance calls could be avoided if a follow-up procedure was in place.*

This letter from Volcano Energy Systems Inc. had been addressed to the witness at his request after numerous administrative faults in the grievor's workstation had been discovered during his absence. The witness had instructed the grievor's replacement, who had received some harsh verbal comments from Volcano, to write to Volcano to provide something in writing as to what were the problems. This resulted in the letter filed as Exhibit E-95.

The witness added that the grievor was responsible for the feedback referred to in Volcano's letter. The grievor was to ensure that all the paperwork was in order and this was not being done by the grievor.

On March 16, 1994, the grievor came in late for work but failed to report to his immediate supervisor, the witness, as required by the rules in place. In such circumstances, the supervisor may request a leave application from the employee depending on the reasons given by the employee for his lateness. Accordingly, the grievor was given a verbal warning for being late and the rules in place were repeated to him.

The witness stated that the grievor was questioned in February of 1994 as to why he had used a contractor who was not authorized to do work under the Standing Offer Agreement (SOA) which covered work to be done by the mechanical cell in which the grievor and the witness worked. The contractor was one governed by a separate SOA covering another work cell, that is, the structural cell. It was common knowledge in the mechanical cell in the contracts department that one would never do that unless permission was given by the cell supervisor, that is, the witness, or if he were not available, then from the structural cell supervisor before engaging a contractor from outside the mechanical cell SOA. The grievor, when this was brought to his

attention and told that it was not to happen again, simply replied: "OK Buds", the witness stated (Exhibit E-97).

On March 25, 1994, however, the same thing occurred when the grievor again used a contractor covered by a SOA from another cell without permission, the witness stated. When confronted, the grievor merely stated that he had sought the witness' permission to use a certain contractor and had been given permission from the witness to do so. When the witness stated that in giving permission he was not aware nor informed by the grievor that the contractor was not under the mechanical cell's SOA but was from another cell, the grievor replied that it was the witness' duty to do this verification and not his own and that, accordingly, he had acted with permission. The witness had replied that he relied on the expertise of each of his inspectors to advise him fully of all pertinent facts so that he could make a proper decision and that it was up to the grievor to point out to him that the contractor was from another SOA before he could decide on giving permission to use an outside contractor. The witness stated that he was frustrated with the grievor's stance and reflected this in his memorandum to the contracts officer (Exhibit E-98). Following this, the grievor continued playing "mind games" with the witness, his supervisor, with regard to the choosing of contractors to do the jobs assigned to him (Exhibit E-99). The grievor was now insisting that the witness provide him with a choice of contractors rather than the other way around. It was the grievor's job to select and recommend contractors to his supervisor (Exhibit E-100).

The witness stated that his view of the grievor's performance was that the grievor was "rebellious to simple directions". This is reflected in minute number 8 of Exhibit E-101 where it is indicated that the grievor was not willing to prepare the project file to indicate transfer of the file from one station to another. This rebellious attitude is reflected again in Exhibit E-102.

The witness stated that he believes that he had gone way beyond what could be expected of him as the grievor's immediate supervisor. He stated further: "I tried compassion, I tried discipline, I tried negotiation. I tried by example, leadership, only to be set up for the next encounter we were to have. Whenever I tried any of these approaches, I felt that Mr. Cléroux would basically acknowledge and almost leave me standing there and saying to myself, 'Yeah, this time I think we have an

understanding'. Mr. Cléroux would then at times, hours later, at times days later, completely ambush me on some other administrative procedures. In other words, I would explain it to him and hours or days later he would be back to the same 'mind games' that we had just covered. I recall, in general discussions with my superiors, defending Mr. Cléroux only to go back to my office to discover another slap in the face waiting for me by Mr. Cléroux".

The witness stated that he would not work with Mr. Cléroux again and this "for my own health". He had spent long hours in the evening and on weekends attempting to correct work from Mr. Cléroux or "simply having to mentally wind myself down deliberately, simply because of Mr. Cléroux", the witness stated. His past relationship with Mr. Cléroux, regrettably, left no room for any type of trust with him.

In cross-examination, the witness stated that he had decided, after discussing the matter with his supervisor, Mr. Bois, to require the grievor to give, if possible, two days advance notice of his need to leave for union business. This was done because the latest notice given was 55 minutes prior to the grievor's need to depart. This prevented the witness from planning his work distribution properly and effectively. No written notice of this requirement was given to the grievor but it was done during a conversation with him, as they met on an hourly basis. The grievor's need to leave on union business was rapidly increasing at the time. The witness always allowed the grievor to leave on union business when he requested. He never ever refused permission, "but I wanted him to give me as much notice as possible so I could achieve my goals", the witness added.

With regard to the meeting at Connaught Ranges which the grievor missed attending and for which the grievor was counselled (Exhibit E-88), the witness denied that he had himself arranged the meeting and that he had ordered the grievor to attend. The witness had later asked the grievor why he had missed the meeting and the grievor had replied simply that at the time the meeting was to be held he was performing work assigned to him by the witness. The work to be performed and assigned by the witness was not identified by the grievor to the witness and, in any event, no priority to have this work performed instead of attending the meeting at Connaught Ranges was mentioned by the grievor or known to the witness.

At the time of the grievor's return to work after serving his suspension on February 23, 1994, as a result of the Budget Speech, serious cutbacks had been ordered by the Government, including the closing of the Base at Uplands. The witness denied, however, that as a result of this the grievor had advised him that he would need to be away from his workstation often on union business over the next few days. The witness was shown a Minute Sheet, filed as Exhibit E-103, showing that on February 23, 1994 the grievor had requested permission to attend a meeting with the Base Commander to be held at 8:00 a.m. and showing also that permission had been granted by the witness. The witness stated that he did not remember this document or the request and permission granted but insisted that his recollection of all other happenings on that day are as he has testified to in his examination-in-chief. He could only recollect what he could recollect and could not recollect Exhibit E-103. The witness could not be shaken in recounting the events of February 23, 1994 as he had testified in examination-in-chief. He repeated them almost verbatim. The "Welcome Back" meeting held the next day was to make sure both the grievor and management knew what to expect of each other.

With regard to the events of March 8, 1994, the witness stated that he was not trying to provoke the grievor in insisting that he sign documents delivered to him when he knew that the grievor in the past had never signed such documents. He was simply hoping that he would sign having received the document, as was normal; it was his duty to seek the grievor's signature acknowledging that he had received the document.

The witness had instructed the inspector who had replaced the grievor during his absence on a 20-day suspension, Mr. St-Denis, to contact Volcano Energy Systems Inc., saying that if they had a complaint to send it to the Base.

Mr. Paul Bois next testified at the request of the employer. He stated that he found it necessary to send the grievor a letter of counselling (Exhibit E-88) because he had failed to attend a pre-arranged meeting at Connaught Ranges, some 35 to 40 kilometres from the Uplands Base, and the grievor had driven that distance knowing that he would be late for the meeting and had arrived there after the person he was to meet had left the Connaught Ranges when the grievor had failed to show. When he presented the counselling letter to the grievor at a meeting with him, the grievor

refused to read the letter so the witness read it to him. The grievor had no comment to make upon hearing what the letter stated.

On February 24, 1994, the witness sent the grievor a Notice of Investigation (Exhibit E-90) setting out that he had been absent without permission twice on February 23 and once on February 24, 1994, and that he would be called to a meeting to hear the grievor on these absences and to determine whether there was misconduct on the part of the grievor and whether disciplinary action should result.

The witness stated further that on February 23, 1994 he received a phone call from WO Remillard saying that he had seen the grievor exit 12 Hangar at about 10:20 a.m. and asked whether the witness had tasked the grievor with work outside 12 Hangar which would require him to go out of the building. The witness had answered in the negative and told WO Remillard that he would watch for the grievor's return. The witness then checked the locator board, found the grievor's name there and the word "Canex" next to his name. The witness assumed that the grievor had gone for coffee at the Canex canteen, which is located in another building, 8 Hangar. The grievor was not then in the contracts section of 12 Hangar or in his cubicle.

The witness was in the contracts office close to the main entrance at 10:40 a.m. when he saw the grievor come in with his coat and boots on - it was winter time. There was a big clock on the wall and the witness observed the time on it.

The meeting with the grievor on February 24, 1994 was to let the grievor know what was expected of him; he had been away serving a 20-day suspension. Present at the meeting were himself, WO Remillard and MWO Loranger. When the grievor arrived at the meeting, he looked surprised and said: "Holy Gee, the whole gang is here". After the grievor sat down, the witness told him that this was not a disciplinary meeting but was simply a review of rules and procedures. A number of issues were covered, as set out in Exhibit E-89 which is a note of what was discussed at the meeting. With regard to union business, the grievor was told he would request permission to leave for such business in writing. This was only a repetition of what the grievor had been told in the past. He would also need to have approval in writing from his supervisor before leaving. The grievor agreed at this meeting that he would try to give management 24 hours' notice of meetings to leave on union business

whenever possible. The grievor would have to apply for and take leave to attend union executive meetings. The letter of counselling on January 25, 1994 was reviewed briefly at the meeting with the grievor and it was emphasized to the grievor that if he could not keep a meeting appointment, to attempt to advise the other party. Hours of work and break and lunch times were reviewed. The grievor was told that he would not have to do any of the outstanding work that he left behind when he started his suspension because this was looked after by other inspectors. Procedures to be followed by the grievor when leaving the office were reviewed. The grievor was to note his leaving on the locator board and his expected time of return and also he was to inform his supervisor that he was leaving the office, where he was going, and the expected time back. This was nothing new, as the other inspectors were doing this with their supervisors. The witness wanted to make sure that the grievor knew his chain of command for any problem he had and was so informed. This was one of the reasons why MWO Loranger was also at the meeting, as he had not had many dealings with the grievor because he was new to the Section.

At the meeting, the grievor was also presented with a copy of the notes taken at an earlier counselling session with the grievor and filed as Exhibit E-51.

The witness stated that at the meeting with the grievor on February 24, 1994, the latter agreed to giving his supervisor a minimum of 24 hours notice whenever possible of any union business meeting.

After going through the procedures during the counselling session on February 24, 1994, and when the meeting was basically over, the witness had asked the grievor whether he had any questions. The grievor stated that he did understand everything and that he was aware of the procedures. The only question he had for the witness was whether there was still a witchhunt on for him. The witness asked him to explain further and the grievor said that Lt.-Col. Brown had told him in January that there were investigations ongoing. The grievor assumed, therefore, that it was a witchhunt. The witness had answered that he had no knowledge of any witchhunt and that the only investigations he knew about were the ones he himself had initiated and the witness then requested the grievor to follow the procedures and do his work.

Before the meeting ended the witness asked the grievor where he had been on the morning of February 23, 1994, between 10:20 and 10:40 am. The grievor answered that he was on coffee break during that period. The witness started to point out to him that the coffee break was to be between 9:30 and 9:40 a.m. when the grievor interrupted him by saying: "Jesus Christ, I only went for coffee". The grievor was obviously upset with this because the witness had not heard him raise his voice in that manner for quite some time. The witness again advised the grievor to follow procedures and the meeting came to an end.

The witness added that he wanted to know why the grievor had taken his coffee break late. He wanted to investigate further and the matter was taken up later on by a Notice of Investigation sent to the grievor (Exhibit E-90). The witness had witnessed the grievor enter the contracts office at 1:00 p.m. on February 23, 1994, with his overcoat and boots on. He had then, a few minutes later, gone to WO Remillard's office to inform him of the grievor's return. WO Remillard told him that he already knew of his return. He had also observed the grievor coming into the contracts office at approximately 10:10 am. on February 24, 1994. The grievor at the time was wearing his overcoat and boots. The witness had looked at his watch to verify the time because of what had occurred the previous day.

The witness had reviewed the Performance Appraisal Report, Exhibit E-93, prepared on the grievor. He was the reviewing officer and his comments appear at the bottom of page I of the Report and state that the grievor had "*failed to meet any of the objectives set out in his last PRR and he has become progressively less reliable with regards to his work habits and work loads...*". He explained his remarks by stating that the grievor's work habits were not getting any better. Some of his work remained unfinished. He did not seem to have time to carry out the work load that was given him. He did less work than he had done previously.

His further comments on the grievor's Performance Appraisal Report were that "*His working relationships with co-workers and contractors has deteriorated dramatically*". The witness explained these remarks by stating that he had personally received from some of the grievor's co-workers, from talking to them, statements of their displeasure at working in the contract cell because of the difficult atmosphere and finding it very difficult to work with the grievor. Management had received two

or three complaints from contractors stating that they would prefer not having to work with the grievor.

On March 16, 1994, the witness had written a note to WO Remillard (Exhibit E-96) asking him whether the grievor had advised him that he had reported late for work on March 14, 1994. The witness suggested that WO Remillard give the grievor a verbal counselling to advise him of the requirement to report to his supervisor when reporting late for work. The grievor had signed in at 8:00 a.m. and the witness wanted to know why he was late and why he had not applied for leave for the time he was not at work. WO Remillard spoke to the grievor who told him that he was late due to fog conditions. The witness considered this a reasonable excuse. The witness was, however, concerned because two days had passed and the grievor's supervisor had not been made aware of the fact that he had reported late. This was contrary to what the grievor had been advised during the meeting of February 23, 1994.

When the witness learned through Exhibits E-98 and E-99 that the grievor did not appear to know what his responsibilities were when selecting a contractor under the SOA for his own cell, he was concerned. He added that it was the contract inspector who was responsible to select the proper contractor to do a job and he advised the grievor of his responsibility to do the research and provide his supervisor with the name of a proper contractor. There should be no confusion. The witness added that supervisor Gaulin, MWO Locke and WO Remillard were some of the best supervisors within the construction engineering branch and "I felt fortunate to have supervisors of that caliber working for me", he stated. He felt that with regard to their supervision of the grievor, these supervisors "did their job exceedingly well and exercised a lot of patience when dealing with Mr. Cléroux". He no longer could trust the grievor to follow work procedures; he had given up hope. He could not work with the grievor again.

In cross-examination, the witness said he did not know that the grievor was at Canex at or around 10:30 a.m. He thought he was there because the word "Canex" was written opposite his name on the locator board. He saw the grievor at 10:40 a.m. He may have been somewhere else. The grievor was not in the contracts area during the

period 10:20 to 10:40 a.m. The witness was told by WO Remillard that he saw the grievor leaving 12 Hangar at 10:20 a.m.

During the "Welcome Back" meeting held that morning, February 23, it was mutually agreed with the grievor that whenever possible he would give his supervisor 24 hours notice of a union meeting to be held. The witness believed that WO Remillard had requested in January that the advance notice, where possible, be 48 hours, that is, two days notice. That was fine if they agreed to that period of notice, the witness stated. A notice period was being sought to avoid last minute requests for permission to leave to attend union meetings. In February, the witness had agreed with WO Remillard to shorten the notice to 24 hours. The grievor had also agreed at the meeting on February 23, to give, where possible, a 24-hour notice of union meetings he had to attend.

The witness had asked the grievor at the end of the "Welcome Back" meeting about his absence from his work site that morning between 10:20 and 10:40 a.m. The witness had concerns about asking such a question at a "Welcome Back" meeting but felt it better to ask him then and there. When the grievor "got defensive" when asked about his absence, the witness had "backed off".

With regard to Exhibit E-89 which are the minutes of the "Welcome Back" meeting of February 23 prepared by the witness, the witness acknowledged that there was no reference in those minutes to the exclamation by the grievor, as he entered the meeting, "Holy Gee, the gang's all here", nor any reference to the agreement by the grievor to give 24 hours notice of any union meeting. There was no reference in the minutes also to the grievor's statement: "Jesus Christ, I just went for coffee". The witness explained that he had simply not put these items in his minutes, perhaps because he did not think to do so.

The witness stated that he had not seen the grievor during his three absences on February 23 and 24. The grievor was not then in the contracts section.

Lt.-Col. Gordon Brown testified that he had held a disciplinary hearing on March 12, 1994 with regard to several incidents regarding the grievor, Mr. Cléroux. He had at the hearing received testimony from WO Remillard and Mr. Bois which was exactly as they testified before me with regard to the grievor’s absence from his

workstation during the period 10:20 to 10:40 a.m. on February 23, 1994. The witness was told by Mr. Bois that the grievor, when asked by him where he had been between 10:20 and 10:40 a.m., replied: "Jesus Christ, I just went for coffee".

The witness assumed from the testimony he received that the grievor had gone to Canex for coffee between 10:20 and 10:40 a.m. on February 23, which is outside the usual break period. The grievor had not been seen at Canex so the witness could not conclude that he had been at Canex.

The grievor, on the other hand, denied that he was in Canex between 10:20 and 10:40 a.m. on February 23 and added that he was in 12 Hangar and had never left it during that period. He had been working on the third floor of 12 Hangar. The grievor was firm in stating that he did not go to Canex for coffee and the word "Canex" opposite his name on the locator board had not been placed there by himself. He reiterated that he was in 12 Hangar between 10:20 and 10:40 a.m. The witness was "completely flabbergasted" with the grievor's explanation. "I was not expecting this outright denial", he stated. The stories given by Mr. Bois and WO Remillard, on the one hand, did not "jive" with that given by the grievor. Based on what he had heard and his previous experience with the grievor, the witness decided that the grievor's version of the events was not believable. He had before him testimony from WO Remillard that he had seen the grievor leaving 12 Hangar and Mr. Bois stating that he had seen the grievor returning to the contracts section with his overcoat and boots on. Mr. Bois had also testified that he had observed on the locator board the word "Canex" opposite the grievor's name and, finally, Mr. Bois had testified that later that morning, when questioned by him about his whereabouts, the grievor had indicated that he had just gone for coffee. In addition, WO Remillard had testified that earlier in the morning the grievor had indicated to him that he would be leaving the Hangar for coffee.

The witness had not expected an absolute denial from the grievor. The previous day, February 22, 1994, the Budget Speech had announced the closure of the Base. This caused a lot of concern for everyone, including the union. The witness thought that the grievor would, perhaps, explain his absence on his preoccupation with the closure and his union concerns and that "he just had to have a coffee". This was the grievor's first day back after a 20-day suspension and the "Welcome Back"

meeting had not yet been held. The witness made a synopsis of this hearing which is reflected in Exhibit E-106. Summaries of the notes taken at the meeting are set out in Exhibits E-90 and E-92.

After considering all factors, the witness was satisfied that, in spite of the grievor's denial, he had left 12 Hangar between 10:20 and 10:40 a.m. He had not sought his supervisor's permission to do so. The witness concluded that the grievor had been absent without permission and that misconduct had occurred.

With regard to the second incident mentioned in Exhibit E-106, the witness stated that MWO Loranger had indicated to him that he witnessed the grievor leaving the office at approximately 12:00 noon, on February 23, 1994. At between 12:30 and 12:40 p.m., MWO Loranger spoke to WO Remillard saying that the grievor had not returned from lunch and he asked WO Remillard to look for the grievor. MWO Loranger told the witness that he observed the grievor returning to the contracts office at approximately 1:00 p.m., wearing his winter coat and boots, and he proceeded to advise WO Remillard of the grievor's return. Mr. Bois had indicated to the witness that he also had witnessed the grievor returning to the office at that time, wearing his winter coat and boots. Mr. Bois had also informed the witness that a "Welcome Back" meeting had been held with the grievor at 11:10 a.m. that day, at which meeting the grievor was informed of management's expectations of him with respect to lunch and break times, hours of work. MWO Loranger and WO Remillard were also present at the meeting.

The witness was informed at the disciplinary hearing on March 15, 1994 by WO Remillard that he had returned to the contracts office from his acting Base Warrant Officer duties at between 12:30 and 12:40 p.m. and was told by MWO Loranger that the grievor had not returned from his lunch period and was instructed to look for him in 12 Hangar. WO Remillard indicated to the witness that he had checked the grievor's workstation and the washroom closest to the contracts office. He then proceeded down the hall to check a work site where an eyewash system was to be installed and this was a project assigned to the grievor that very morning. WO Remillard testified that he had failed to locate the grievor at any of these places. WO Remillard indicated to the witness that both Mr. Bois and

MWO Loranger advised him that the grievor had returned to his workstation at approximately 1:00 p.m.

The grievor told the witness at this hearing that he had gone for lunch from 12:00 to 12:30 p.m. and that during the period 12:30 to 1:00 p.m. he was either at his workstation or at the work site where the installation of the eyewash system was to proceed.

The witness stated that, again, as in the first incident on February 23, the story given by the grievor contradicted that of witnesses MWO Loranger, Mr. Bois and WO Remillard. However, in the witness' view the matter was not as clear as in the first event. Could the grievor have actually returned to his workstation unnoticed by 12:30 p.m., he considered? WO Remillard was not convinced that he had because he had done a physical check for the grievor and could not locate him.

The evidence established that the grievor was seen leaving at noon and the grievor does not deny this. The grievor was seen returning with his outerwear on at approximately 1:00 p.m. by both MWO Loranger and Mr. Bois. WO Remillard had tried to locate the grievor in 12 Hangar but without success. The grievor offered no explanation of his whereabouts and the witness felt it unrealistic to believe that he had wandered around 12 Hangar from 12:30 to 1:00 p.m. with his winter coat and his boots on. The witness concluded that the grievor had not returned to his workstation as he claims because neither MWO Loranger nor WO Remillard had observed him in that area between 12:30 and 1:00 p.m. The witness concluded that misconduct had occurred and he advised the grievor of his finding by letter on April 11, 1994 (Exhibit E-109).

With regard to the allegation that the grievor had been absent from his place of duty without permission between 9:40 and 10:10 a.m. on February 24, 1994, the witness heard testimony at the hearing held on March 15, 1994 from MWO Loranger, WO Remillard, Mr. Bois, Mr. Jooste, Mr. Béland, and from the grievor. MWO Loranger told the witness at the hearing that the grievor had told him at approximately 9:30 a.m. that he was leaving for coffee with Mr. Jooste. WO Remillard indicated to the witness that he had seen the grievor returning to 12 Hangar along with Mr. Jooste at 10:09 a.m. Mr. Bois testified that he had seen the grievor returning to the contracts

office wearing his winter coat and boots at approximately 10:10 a.m. MWO Loranger had verified that the grievor had dropped into the accounts section office and had a conversation with Ms. Lise Bélanger somewhere between 10:05 and 10:10 a.m. The accounts office is next to the contracts office.

The grievor testified at that hearing that he had gone to Canex for coffee with Mr. Jooste at 9:30 a.m. and had returned at 9:40 a.m. The witness explained that the Canex facility is about one kilometre from 12 Hangar and one would not normally walk to it, especially in winter time. Lt.-Col. Brown had asked the grievor who had driven to Canex and whether their coffee was taken there or whether they had picked up their coffee and returned to their work sites. The grievor's responses to these questions were very vague. In some instances he could not remember and offered no further explanations.

Mr. Jooste was not of much help, the witness stated. Mr. Jooste stated that he could not remember even having gone to Canex that day with the grievor and, therefore, could not remember who drove or where they took their coffee. When the witness told Mr. Jooste that he found it strange that he could not remember because the witness had been informed that Mr. Jooste's supervisor had brought his absence to Mr. Jooste's attention immediately upon his return to the office that morning, Mr. Jooste stated that he remembered being counselled that morning by his supervisor and that he probably had been at Canex for coffee with the grievor that morning.

Mr. Béland, Mr. Jooste's supervisor, stated at that hearing that on the morning of February 24, 1994, Mr. Jooste was absent from his office from approximately 9:30 to 10:10 a.m. He questioned Mr. Jooste upon his return and Mr. Jooste told him that he had been at Canex for coffee with the grievor and that on the way back he had stopped to inspect a roof at 1 Hangar. Mr. Béland did not believe that Mr. Jooste had stopped to inspect the roof at 1 Hangar because there had been a snow fall that day and one would hardly inspect a roof on a day when it had snowed. Mr. Jooste had no projects at that time which involved the roof of 1 Hangar. Mr. Béland counselled Mr. Jooste that morning and reminded him that his break period was from 9:30 to 9:40 a.m.

The witness, Lt.-Col. Brown, stated that once again he was faced with conflicting stories. Mr. Jooste, as a witness, was not very helpful and the grievor's story was not very believable. From the evidence before him, the witness concluded that Mr. Jooste and the grievor were gone from the office from approximately 9:30 to 10:10 a.m. MWO Loranger had told him that the grievor had told him that he was leaving at 9:30 a.m. The grievor had, in fact, admitted that he had left at 9:30 a.m. Both Mr. Jooste and the grievor were seen by WO Remillard returning to 12 Hangar at 10:09 a.m. The grievor was witnessed returning to the contracts office at approximately 10:10 a.m. by Mr. Bois, and Mr. Béland witnessed Mr. Jooste returning to his office area at approximately 10:10 a.m. On the balance of probabilities, based on the evidence he had been given, the witness had concluded that both Mr. Jooste and the grievor were gone from their offices from 9:30 to 10:10 a.m. and that misconduct had occurred.

The witness advised the grievor that he had been found to have been absent from his work site from 9:30 a.m. to 10:10 a.m. without permission (Exhibit E-109).

With regard to the incidents identified as events 4 and 5 in Exhibit E-106, involving alleged failure by the grievor to submit a leave pass for February 24, 1994 for union business and his alleged failure to advise his supervisor upon his return from a union meeting on March 7, 1994, respectively, the witness testified that he had concluded that no misconduct had occurred and he so advised the grievor by letter filed as Exhibit E-108.

Event number 6 set out in Exhibit E-106 involved allegations that the grievor on March 8, 1994 had: (a) refused to follow directions; (b) was disrespectful to his supervisor, WO Remillard; and (c) made intimidating comments to Mr. Gaulin. The testimony the witness received at the hearing was that the grievor's supervisor, WO Remillard, had invited the grievor into the contracts office to give him a Notice of Investigation, to be witnessed by Sgt. Williamson. This was to ensure a certain privacy for the grievor when being handed such a notice. The grievor had merely laughed and in a mocking manner stated: "If you have another letter for me, just put it on my desk". WO Remillard repeated his request and again the grievor had once more looked straight at him and began laughing in a disrespectful manner and again stated: "If you have a letter for me, just leave it on my desk and stop bugging me". The grievor

was then overheard to say to his supervisor and Mr. Gaulin who was nearby: "You guys are in big shit now". Sgt. Williamson corroborated WO Remillard's testimony.

The grievor explained to the witness that, when asked to enter the contracts office, he had asked why and requested union representation. He agreed that he had refused to go into the office. He agreed that he had laughed but that he did not mean to be disrespectful. He agreed also that he had made the statement to Mr. Gaulin, "You guys are in deep shit", or words to that effect. However, he contended that both WO Remillard and Mr. Gaulin had misunderstood him and that his statement was referring to a contractor.

WO Remillard indicated to the witness that there was no request by the grievor for union representation at the time of their first meeting that day at about 11:30 a.m. It was only when he and Sgt. Williamson were attempting to deliver a further Notice of Investigation, Exhibit E-92, at around 2:00 p.m., that the grievor had asked for union representation. This evidence was corroborated by Sgt. Williamson. The witness told Lt.-Col. Brown that the request for union representation had no relevance to the issue because management was not obliged to provide union representation when presenting a Notice of Investigation to an employee.

At around 12:45 p.m. on the same day, Mr. Gaulin was discussing a matter with the grievor when the latter, at a moment when WO Remillard was passing by, said to Mr. Gaulin: "You guys are in deep shit", or words to that effect. Mr. Gaulin had felt that the grievor was referring to himself, that is, Mr. Gaulin, and to contracts management.

Upon reflecting whether it was proper for management to attempt to give the grievor his Notice of Investigation behind closed doors, Lt.-Col. Brown had decided that it was "quite appropriate action". The letter and its contents to the grievor were "Protected B", meaning confidential, and since there would be some discussion about its contents, it was appropriate and reasonable, he concluded, to attempt to deliver it behind closed doors. He added in his testimony at this hearing: "We had also had some previous experience, some difficulty getting Mr. Cléroux to acknowledge receipt of correspondence and also admit later on that he had received that correspondence".

There was no evidence before the witness that WO Remillard had been rude in requesting the grievor to enter the contracts office and he found no evidence that the grievor had in any way been provoked.

From the evidence the witness received at his hearing and his further investigation, he concluded that the grievor did in fact refuse a reasonable request made by his supervisor, a request that was made not once but twice. He did mock and laugh at his supervisor. Although he claimed that he did not mean to be disrespectful, he had in fact been disrespectful and his supervisor and a witness, Sgt. Williamson, had felt that disrespect. The witness also concluded that he did make the statement to Mr. Gaulin, a statement which was made within earshot of WO Remillard, "You guys are in deep shit", or words to that effect. The grievor's contention that he was referring to a third party or a contractor when he made that statement, "didn't fit the discussion, based on the evidence I was given and based on the words "You guys", the witness believed. The two witnesses to the statement, WO Remillard and Mr. Gaulin, both believed that the comment was made about them or management in general. The witness had therefore concluded that the grievor had been insubordinate in refusing to follow his supervisor's reasonable request; that he was disrespectful to his supervisor and later made intimidating comments. He concluded further that misconduct had occurred and he so advised the grievor in a letter to him on April 11, 1994, filed as Exhibit E-109.

On March 29, 1994, after holding his hearing on March 15 and completing his investigation, the witness addressed a memorandum, filed as Exhibit E-111, to his immediate supervisor, his Wing Commander, setting out that he had concluded that the grievor had misconducted himself on four of the six events set out in Exhibit E-106. In his memorandum, Exhibit E-111, the witness was recommending the termination of the grievor's employment and was requesting his Wing Commander's support. The matter was to be forwarded to Air Command for approval and decision.

The witness explained that Exhibit E-106 was a synopsis or summary of his personal notes that he took at the disciplinary hearing held on March 15, 1994. He added: "It does not include all of the conclusions that I reached. It is not a transcript of the evidence that I received on the 15th of March. It is a document that I prepared

for my use to assist me in furthering my investigation of the incidents and in reaching final conclusions".

The witness was referred to Exhibit E-111 concerning his recommendation that the grievor's employment be terminated. He explained that he was dealing in Exhibit E-111 with four separate but somewhat related events. Events numbered 1, 2 and 3 followed immediately on the heals of the 20-day suspension for similar misconduct. Events 2 and 3 followed immediately on the heals of a meeting and a coaching or counselling session which took place at 11:10 a.m. on February 23, 1994. In each case, the grievor had shown a defiance of the authority of management, disrespect for his supervisors, and insubordination towards those same supervisors. The compliance management was asking of him was with regard to very simple things but the grievor refused to comply. When confronted by his non-compliance, he was deceitful.

In view of the grievor's disciplinary record, the witness had viewed this misconduct as very serious. He felt that management had gone out of its way over the previous 20-month period to coach and assist the grievor to overcome his problems. In spite of the progressive counselling and progressive discipline which resulted from his misconduct, management had gotten nowhere. The witness believed that management made a very serious effort to try to rehabilitate the grievor over that 20-month period. However, the witness by now had reached the conclusion that there was no hope in rehabilitating the grievor.

The grievor had reached the stage where he could not be trusted to represent the best interests of the Section, the Wing, and the Department. His overall performance had deteriorated. His 1993 Performance Review Report (PRR) was marginal. His 1994 PRR was very poor and the witness felt that his overall attitude made him untrustworthy and his defiance, disrespect, insubordination, and deceitfulness, left the witness no choice, he stated, but to recommend his termination.

Throughout the course of the investigation of these four incidents and the previous allegations, the grievor never once showed any remorse for his actions. He never once admitted to any wrongdoing and the witness, therefore, recommended his termination. As a mitigating factor, the witness had considered the grievor's length of

employment. Although he was not a long-service employee, the grievor had been with the Department since about the mid 80's.

The witness referred to the letter of Col. E.A. Findley, his Wing Commander, dated April 7, 1994, and filed as Exhibit E--112, requesting a decision by the Commander, Air Command, to terminate the employment of the grievor.

By letter dated May 10, 1994 (Exhibit E-113), the grievor is informed by Wing Commander Col. Findley that he is suspended from duty without pay until a decision is received to terminate his employment. The witness pointed to the fact that Col. Findley's letter was based on the witness' earlier letter to him on April 11, 1994 (Exhibit E-109) setting out the witness' findings of misconduct. While Col. Findley could have suspended the grievor pending a decision on termination, he preferred to await the decision from the Commander, Air Command, on his request for termination. On May 10, 1994, Col. Findley had received confirmation from Air Command that a decision to terminate would be forthcoming and so he decided at that time to suspend the grievor indefinitely without pay.

The second paragraph of the letter of indefinite suspension without pay (Exhibit E-113) reads:

> *While it was previously decided to allow you to continue working until the Commander's decision was made, your continued unsatisfactory behaviour and disruption to the workplace have caused you to become a gross administrative burden. I am not prepared to permit you to be an unproductive member of the Defence Team. It leaves me no choice but to suspend you from duty without pay effective on receipt of this notice.*

The grievor was advised of his termination of employment by letter of the Commander, Air Command, dated June 28, 1994, filed as Exhibit E-114.

The witness added that he did not feel that he or his Department could trust the grievor to follow work procedures. The witness felt that he could not work with the grievor again.

The witness did not recall ever having made the statement to the grievor that there were ongoing investigations and that they were pointing to the grievor. He did

recall, however, that on one occasion, or perhaps on two occasions, he had mentioned to the grievor that with all the incidents and allegations management had investigated there was one common character in each incident and in each event and that common character was him, the grievor himself.

In cross-examination, the witness explained his last statement in examination-in-chief by stating that each investigation involved different members of management but that the grievor was the common character in all those investigations. There was no conspiracy to set up the grievor. Management was trying to indicate to the grievor his continual involvement in incidents which required investigation by management. The witness acknowledged that it was possible that he said to the grievor on January 12, 1994 that there were ongoing investigations involving the grievor.

The witness explained that his role as chair of a disciplinary hearing, as he sees it, is to provide an opportunity for the individual, with his union representative, to come to a meeting to explain to him the circumstances surrounding the allegations involving the individual. It was an opportunity also for the witness to allow the employee to see any written statements in the witness' possession and to hear the evidence of any other witnesses called to the meeting. The role of the meeting is to try to establish the facts which surround the event or the allegations.

His function as chair is to establish the facts, maintain an open mind to the evidence presented, and maintain his objectivity. He was required to make a decision based upon the evidence provided and assess that evidence and reach a conclusion based on the balance of probabilities. He has had training and experience in labour relations and grievance and disciplinary hearings. He has delegated authority to hear grievances and to discipline.

In Exhibit E-106, the witness was questioned as to whether the use of the words "previous experience" with the grievor did not show a bias against the grievor. He replied that so often in the past the grievor's version of what had happened on any particular occasion contradicted that advanced by other individuals that the witness had decided, for the incidents described in Exhibit E-106, that the grievor's version was not credible. He had maintained his objectivity throughout, the witness stated.

The witness stated that the document filed as Exhibit E-106 was a synopsis, a summary of the meeting held on March 15, 1994. It was not a verbatim report but "a pretty accurate representation of the evidence. There is nothing crucial missing in the document", he stated. The words "Jesus Christ, I just went for coffee" were not recorded because the grievor had not admitted saying that to the witness.

The witness had expected that the grievor would admit that he had gone for coffee. The witness had been told that the grievor had already admitted to this when he said: "Jesus Christ, I just went for coffee". The witness was "floored" when he did not hear from the grievor that he had gone for coffee. In fact, the grievor told the witness at the hearing that he had not gone for coffee. After weighing the evidence from the other witnesses who appeared before him, the witness stated that he had no reason to disbelieve them.

Col. Findley, the witness stated, was not asked to weigh any evidence and decide whether misconduct had occurred. He was provided with a copy of Exhibit E-106 but was asked only to support Lt.-Col. Brown's recommendation to terminate the grievor. This was true also for Air Command. Air Command was not asked to find that there was misconduct but only to authorize the grievor's termination for misconduct found by Lt.-Col. Brown.

The witness stated that he was not aware that a 20-day suspension was "one step away from termination". After hearing the grievor's testimony during the March 15, 1994 disciplinary hearing, the witness still did not know who had driven his vehicle to Canex -- the grievor or was it Mr. Jooste who had driven his own vehicle, or someone else. Nor was the witness told by the grievor that he had stopped to inspect a roof or had called upon Ms. Bélanger in the accounts office.

The witness had decided on March 8, 1994 that the grievor was not entitled to have union representation simply for him to receive a letter from management. He had denied that WO Remillard's insistence that the grievor go into the conference room to receive the letter he wanted to give the grievor was harassment. WO Remillard was doing only what his position as supervisor required him to do. His request was reasonable, in the interests of privacy and confidentiality, and did not in

any way constitute harassment. The grievor had refused to go into the conference room.

The witness stated that he had never before this day seen Exhibit E-116, produced on behalf of the grievor, which is a Minute Sheet dated March 28, 1994, containing a note signed by the grievor complaining that another employee, Mr. St-Denis, was seen by the grievor photocopying the *grievor's "personal file with grievances - he info me that he was ask* (sic) *to do this by his supervisor - invasion of privacy*". The witness acknowledged that he would not agree that this was proper, if it actually happened. "A personnel file is a 'B' protected file", he added.

In re-examination, the witness stated that he believed that he has always been fair, open-minded, and objective in dealing with the grievor on any issues, whether they be grievances or disciplinary hearings. He always allowed the grievor to present his case and to provide any information which he had and which could be useful in arriving at a decision. The witness believes that this is true also for the disciplinary hearing he held on March 15, 1994. The witness was objective and did not pre-judge before hearing all the evidence, he stated.

The grievor was next to testify on his own behalf. He produced as exhibits Exhibits E-117, E-118 and E--119, his Performance Evaluation Reports covering the period September 1988 to May 24, 1992, with the exception of the period October 1990 to June 1991 when he did not receive such a report. Report Exhibit E-117 showed a "superior" rating and report Exhibit E-118, ending in October 1990, showed a "fully satisfactory" rating, while report Exhibit E-119, covering the period June 1, 1991 to May 29, 1992, showed an "acceptable" rating. The grievor attributed his deteriorating rating, shown on Exhibit E-119, to his refusal to agree to sign certain invoices which he alleged were not substantiated by work actually done while the grievor was away from work, on strike, in 1991.

Referring to the events of February 23, 1994, the grievor stated that after attending a union meeting the first thing in the morning, he returned to his workstation around 9:00 a.m. He was informed by his supervisor, WO Remillard, that work that had previously been assigned to him before his suspension had been assigned to someone else and that he was to familiarize himself with the work that

was on his desk. He informed his supervisor that he was going on coffee break at 9:30 a.m. He then went to his desk and saw documents pertaining to an eyewash system which was to be installed. The work order for this job came without specifications and he was to investigate where the system would be installed in the washroom on the third floor of 12 Hangar, down the hall from the contracts office. He then went to the washroom at about 9:20 or 9:30 a.m. and proceeded to take notes and trace the necessary pipe system. He drove in his vehicle to Canex in 8 Building. He wore his winter coat and boots. He picked up a cup of coffee and returned to 12 Hangar, arriving there by 9:40 a.m., and went immediately to the eyewash installation site, starting, however, on the first floor of 12 Hangar, examining there the possibility of installing a drain that would drain the area of the eyewash system on the hangar side of the building. This was a cold area where aircraft are cleaned, repaired, and painted. The grievor was looking for the easiest and cheapest way to install the eyewash system. He was looking for a clean-out in the plumbing system that he could connect into.

The grievor stated that he was on the first floor for about 20 minutes. From there he went to the second floor and there examined the area to see if he could find any sanitary plumbing and water pipes to hook up to. At one point he went outside to his vehicle to get some equipment. He then went from the second floor to the third floor washroom where he again looked at the job site and then went back to the contracts office.

With regard to the "Welcome Back" meeting on February 23, 1994, the witness stated that, as he entered the meeting with supervisors Bois, Loranger and Remillard, he was astonished and surprised that they were all there. He stated that he never made the comment: "You got the whole gang here". He had made no comment at all. During the meeting there was a discussion about hours of work, hours of breaks and lunch, starting and quitting times, and the normal day routine. He was reminded that coffee break was from 9:30 to 9:40 a.m. He was asked where he had been between 10:20 and 10:40 a.m. and he replied that he had been working on the eyewash system.

The grievor denied saying to anyone at the meeting: "Jesus Christ, I just went for coffee".

The grievor stated that the "Welcome Back" meeting had ended at around 11:30 a.m. and he had then gone to his desk and from there left at noon for Canex to have lunch. His lunch period was from 12:00 to 12:30 p.m. He returned to 12 Hangar and went directly to the eyewash installation, working his way up from the first floor to the second floor and then to the third floor of 12 Hangar. This was the second time he had done this, looking for electrical conduits which could be used. He had worked up to the contracts office by approximately 1:00 p.m. and went to his desk to carry on with his routine work.

On the morning of February 24, 1994, the grievor had received a call from Ms. Lise Bélanger in the accounts office on the third floor of 12 Hangar asking him to pass by and see her in connection with a leave application form (Exhibit E-126). He then left for coffee with Mr. Jooste, another inspector, driving his own vehicle to Canex where they each picked up a cup of coffee. Mr. Jooste had asked him to help him inspect the roof of 1 Hangar. It was snowing at the time and so the roof was hard to see. They took about 10 minutes to look at the roof. They then drove back to 12 Hangar but were stopped by a military group conducting a defense exercise and were asked questions about where they were coming from and going to. They arrived back at 12 Hangar at about 9:50 or 9:55 a.m. They then took the elevator to the third floor and parted, Mr. Jooste going one way and the grievor going the other way to Ms. Bélanger's office, where he spent from five to six minutes.

On March 8, 1994, at about 9:15 a.m., WO Remillard had come to the grievor's desk holding a letter in his hand and told the grievor that he would have to be available at 11:00 a.m. to receive this letter. The grievor informed WO Remillard that he would call a union representative to be present at 11:00 a.m. but was informed that there was no need for a union representative just to receive a letter. The grievor stated that WO Remillard had then said: "You don't need a union rep", and added: "Your time is almost done here anyway". WO Remillard had then just walked away without further comment.

When later that morning WO Remillard had come to the grievor and asked him to go to the contracts officer's office, the grievor had informed him that if he had anything for him to "just leave it on my desk". The grievor added: "If I did laugh, it was certainly not my intent to laugh at my supervisor or management. If it was done,

it was done under stress". WO Remillard responded by asking the grievor a second time to go to the contracts officer's office. "I again refused to go to the contracts officer's office", the grievor stated. WO Remillard asked the grievor to acknowledge the letter by signing it and the grievor had replied: "I don't sign anything". When the grievor had indicated his refusal, he had done so in "the usual manner, firm manner", he stated.

The grievor stated that at the time he was being pushed around by management. He needed some union representative assistance but was told he did not need a union representative just to go into the office to receive a letter. WO Remillard then signed the letter and placed it on the grievor's desk. This was witnessed by Sgt. Williamson.

Subsequently, the grievor was said to have said to Mr. Gaulin: "You guys are in deep shit". The grievor acknowledged that he had had a conversation with Mr. Gaulin that morning in the contracts section. At that time the news was out that one of the big contractors, R.J. Nichols Construction, was going into receivership and the grievor was discussing this with Mr. Gaulin when he said to Mr. Gaulin: "Those guys are in deep shit. How are they going to get their money?" He was referring to subcontractors who had done work for R.J. Nichols Construction, he stated. The grievor did not see WO Remillard during the course of this conversation. He insisted that he had never said to Mr. Gaulin: "You guys are in deep shit".

The grievor stated that he had received the document filed by him as Exhibit E-116 through Access to Information. This document attests, the grievor insisted, to the fact that Mr. Paul St-Denis, the person who had replaced him during his 20-day suspension, was photocopying documents, including some confidential documents dealing with the grievor, including grievances. When he took these documents from Mr. St-Denis, after going into the conference room where the photocopying was being done, Mr. Gaulin stepped in and retrieved these documents from the grievor and ordered him out of the conference room. The comments appearing at the bottom of Exhibit E-116 by the grievor were added by the grievor after he had received Exhibit E-116 through Access to Information.

On May 10, 1994, the grievor was ordered to appear and appeared in Lt.-Col. Brown's office. Lt.-Col. Brown was not there but a Major Denis Fortin was standing behind the desk. Major Fortin handed the grievor a letter (Exhibit E-113) advising the grievor that he was indefinitely suspended, with immediate effect. The grievor read the letter and exited that office and the administrative office and was met there by a military police officer. This officer followed the grievor into the hallway and then told the grievor that he was to escort him off the Base. As he was about to go into the elevator, the grievor observed WO Remillard with another military police officer. WO Remillard pointed at the grievor and said: "There's your man".

The military police then indicated to the grievor that he was to go back to his desk and take all his personal belongings and then he and the police would leave the building. The grievor walked down the hallway with a policeman on each side. WO Remillard, Mr. Bois, Major Fortin and Capt. Perrault were noticed by the grievor to be following behind. He retrieved his personal belongings while the police stood in the doorway of his cubicle and those who were following stood behind the police. The grievor squeezed between all of them to leave his cubicle and hurried out. He went down the stairways, which was the fastest way out of the building, and was followed by the military police. The grievor was told to enter the police car parked at the entrance to 12 Hangar.

The grievor was shown by the military police the notice set out at the bottom of Exhibit E-113, advising him that he was denied access to the Base and other departmental facilities. The grievor then left the police vehicle and got into his own to drive away. At that moment, he noticed WO Remillard and Mr. Bois walking in the direction of his vehicle with a smile on their faces. He believed they were trying to provoke him.

The grievor added that when in his office and surrounded by police and management, he felt that he was trapped and that an attempt was being made to provoke him into doing something. He had hurried to get out of the building.

The grievor stated that the incidents which had occurred between 1992 and 1994 had an impact on his health. He had to see his doctor on numerous occasions and received from him documents acknowledging need for medical leave. He had

received medical certificates for medical leave for periods of two weeks, three weeks, and twice for periods of one month for reasons of stress because of management's harassment and questioning by military police. "The stress was just too much", he stated. It had impacted on his family. He would get home at night in terrible condition. He was in a bad mood with everybody, he stated. He attributed his running into the rear end of a truck one night to his stress. The effects of these incidents in which he was involved at work were "terrible on me and on my family", he stated.

In cross-examination, the grievor agreed that the only work assigned to him for February 23, 1994 was the installation of an emergency eyewash system in the bathroom on the third floor of 12 Hangar. With the announcement of the Base closure on February 22, it was business as usual on the 23rd and 24th of February but his union business was "a little bit out of the ordinary", he stated.

On February 23, 1994, after seeing the work order for the eyewash system on his desk, the grievor went through the documentation and then went to the actual site to try to picture where this installation would be. When he first looked in the washroom he did not, at first glance, find what he needed. He needed to find a source of water and a drain and, as well, he would have to install a curb on the floor to keep the flowing water in the corner of the room where the system would be installed. He needed one water pipe and one drain pipe. The drain pipe would be connected to the floor below. For the water pipe, he was thinking of going into the pipe-chase on the third floor but there was a problem in doing this: the space in the pipe-chase was very limited, as there were many pipes located there. He had learned this through looking at the pipe-chase on the 23rd or 24th of February. His main concern was the drain pipe; it could only go downwards whereas the water pipes go up and down. He could not look up or down the pipe-chase on the third floor. He would need to do so from the second floor. He needed access from the third to the second floor.

The grievor insisted that, after viewing the third floor bathroom, he went for coffee at Canex. On coming back, he went to the first floor, on the hangar side of the building, and then worked himself up through the building to the third floor. He did not recall seeing the drain pipes in the second floor pipe-chase. He was just investigating. The eyewash system was never installed in 12 Hangar.

The grievor stated that he had investigated the possibility of running the drain pipe, exposed, on the hangar side of the building. The building was old and he did not want to make any openings in ceilings or walls to accommodate the drain pipe, with a clean-out pipe. The approach made sense to him, the grievor stated. He did not have confidence in any existing blueprints of the building, as these were old and could not be relied upon, even though they are supposed to be updated after each job done. He did not look at any blueprints of 12 Hangar.

On the morning of February 23, he had gone to Canex, during his coffee break, and there picked up a cup of coffee and immediately returned to 12 Hangar within his coffee break period time. He had gone to the hangar side of the building and had then worked up to the third floor, looking for electrical conduits, vent pipes, etc. He could not recall seeing anything which would help in the installation of the eyewash system. He was, perhaps, five to 10 minutes on the second floor and then went to the third floor. He was trying to get firsthand knowledge.

The grievor had checked the pipe-chase on the 23rd and 24th of February, he reiterated. The sewer, drain, and vent pipes would run up and down in the pipe-chase. Ideally, the drain pipe would be connected to the drain pipe in the pipe-chase and run straight down. As he went from floor to floor, starting with the first, the grievor stated that he was basically looking for electrical conduits and drain pipes.

At one point, the grievor had gone out of 12 Hangar on February 23 to go to his vehicle to get a measuring tape and a Polaroid camera, which had been supplied to him to take pictures and make measurements. He admitted, however, that he had not told Lt.-Col. Brown during his disciplinary hearing that he had left the building. He was reminded that WO Remillard had seen him leaving the building. At this the grievor stated: “At that point it didn't matter what I told Lt.-Col. Brown. His mind had been made up. I don't recall telling Col. Brown that I had left the building”.

Between 12:30 and 1:00 p.m. on February 23, the grievor had once again gone from floor to floor in 12 Hangar, looking for the same things as the first time, that is, drain pipes, water pipes, and conduits. He had looked on the different floors of the building in the morning, had gone to lunch when he thought about the work to be done and went back again through the building to once more investigate concerning

the installation of the eyewash system. He acknowledged that he had not told Lt.-Col. Brown during his disciplinary hearing about going from the first floor, through the second and third floors. He had told him that he was either on the third floor or in his work cubicle. He agreed that it would have been relevant information for Lt.-Col. Brown to hear that he had gone from the first to the second and then to the third floor of the building during the time of his absence from his work cubicle.

Turning to February 24, 1994, the witness acknowledged that he did not tell Lt.-Col. Brown during his disciplinary hearing that upon returning from coffee break, which was from 9:30 to 9:40 a.m., that he had gone to 1 Hangar and then had been stopped and questioned by a military defense exercise team. He agreed that this would have been relevant information for Lt.-Col. Brown to hear.

On February 24 the grievor had gone with Mr. Jooste in the grievor's vehicle to pick up a coffee at Canex. It took about one minute, in and out, at Canex. He acknowledged that he had not advised his supervisor of his going to 1 Hangar to view the roof before returning to his workstation.

The grievor acknowledged that on March 8, 1994 he did not trust WO Remillard nor the rest of management.

With regard to the incident involving him on April 12, 1994, the grievor was sent a Notice of Investigation, dated April 14, 1994, and filed as Exhibit E-121. The grievor stated that he does not recall having received this notice. He does not recall having grieved a subsequent decision finding that he had misconducted himself by being absent for two hours on April 12, 1994. This decision is filed as Exhibit E-122. The grievor did not recall having attended a disciplinary hearing concerning this matter held on April 25, 1994. The grievor's grievance against the finding was filed as Exhibit E-123. He could not recall having filed that grievance until shown the actual grievance signed by him.

Returning to his evidence concerning the pipe-chase, the grievor was asked whether he had looked in the pipe-chase on the different floors. He stated that he had but had not noticed any electrical conduits there as it would not be a safe practice to place them there, near the water pipes. He could, with a flashlight, look up and down in the pipe-chase but could not himself get in the pipe-chase, as it was too crowded

with pipes, especially the opening to the pipe-chase on the third floor. The grievor could not remember whether he had looked in the pipe-chase through the opening on the second floor but would have before calling a contractor, which he had done. He had found a clean-out pipe on the first floor.

In re-examination, the grievor stated that he had taken pictures at the eyewash installation site on February 23 and 24 and had taken measurements at that time. Sometime after February 24, he had contacted a contractor to do the eyewash system installation job.

Mr. Douglas Heil testified that he worked in the preventive maintenance and structural cell and had observed the grievor at work in the mechanical cell. At different times he had received help from the grievor in preparing his own work because of the grievor's knowledge of procedures to be followed, materials and equipment to be used in completing a job. He stated that he believed the grievor was being harassed "towards the end" by being segregated from the other inspectors because of the location of his workstation or cubicle, which had cubicles used by management surrounding it. The witness stated that he was at a meeting of inspectors called by management in November 1992 at which the inspectors were told by WO Remillard "not to speak to Mr. Cléroux". Another inspector, Mr. Miner, had said to the witness also: "Are you looking for trouble by talking to Norm [the grievor] in the morning...and there was also the same words from another inspector, Mr. Constantino Pliscia".

The witness stated that he had heard rumours of complaints by contractors against the grievor but that this was "because Norm [the grievor] was too strict in his application of plumbing and other codes". The witness expressed some difficulty in working with the locator board, which the inspectors were expected to use to inform management of their whereabouts during the day. There had been a change from the locator board to a logbook or register for this purpose and then back to the locator board when the logbook proved not to be acceptable to one and all. The witness had felt that being required to sign in and out in the logbook was displeasing to him and other inspectors; it was treating them like children and the witness complained to Messrs. Bois and Locke. The witness was told by Messrs. Locke and Bois that the new

procedure was being put in place because of Mr. Cléroux and Mr. Rochon; Mr. Rochon was always late but, the witness stated, Mr. Cléroux was always early.

The witness stated that whereas his normal working hours were from 7:30 a.m. to 4:00 p.m., after he got married, some eight years ago, he was allowed by management to change these hours to 7:15 a.m. to 3:45 p.m. This accommodation continued to be allowed when Mr. Bois and MWO Locke replaced the former management in the summer of 1992.

In cross-examination, the witness acknowledged that he did not have a lot of dealings with the mechanical section in which the grievor worked. He acknowledged also that there could be some good purpose for the use of a logbook or locator board to assist the contracts administration office in knowing the whereabouts of inspectors during the day but stated that there were other methods available to contact inspectors during the day, such as pagers and cellular phones, which were later provided to inspectors.

The witness stated that at the meeting in the late fall of 1992 when WO Remillard told inspectors not to talk to the grievor, Inspectors Healy, Charron, Rochon and, he believes, Inspector Pliscia were in attendance; this was at a weekly structural section meeting. The witness had attended a meeting of inspectors held at the Highlands Golf Course in the fall of 1992. All the inspectors were involved and the meeting took place with management's full agreement. The meeting was called by the inspectors. He did not attend any follow-up meeting with management. Following this meeting at the Golf Course, the logbook or register was removed at the request of the inspectors and the locator board came back into use. The witness stated that he always spoke to his supervisor or left him a note as to where he was going when leaving the office. He agreed that it was necessary to let management know an inspector's whereabouts during the day.

In re-examination, the witness stated that at the Highlands Golf Course meeting the only thing discussed was "people coming in late...they were coming in at all kinds of time.. it had to be corrected".

Mr. Carol Boucher testified that he had worked in the contract cell for two and one-half years, ending on October 27, 1993. He had started work with the Department of National Defence, it would appear, as a term employee, some one and one-half years before being employed in the contracts cell. He stated that as an inspector his hours of work were from 7:30 a.m. to 4:00 p.m. and he was required to sign on a board his "comings and goings and your whereabouts and estimated time of return". He added: "We were issued beepers and could be reached at any time". Inspectors were specifically told that they could take one one-half hour for lunch and a 15-minute break in the morning and a 15-minute break in the afternoon. Because his workstation was located close to the grievor's he was aware that the grievor had been given specific directions on how to do his work. "Not any more, not any less, and he was given a specific time frame within which to do it", the witness stated.

In cross-examination, the witness stated that with regard to the requirement to sign in and sign out he was given "some leeway" by management because of the specific work he was doing.

The witness stated that he did not have any working relationship with the grievor; they worked at different places. He did not socialize in the office with the grievor "and so, therefore, we didn't cross paths". When asked whether he had any problem with the grievor, such as attitude, personality, the witness replied: "It came to me indirectly ... whenever management and Mr. Cléroux had a disagreement ... whatsoever transpired ... Mr. Cléroux's files would be transferred to me by management ... when it appeared differences were resolved the files would be given back to him".

When asked: "Would you say you avoided Mr. Cléroux when in contracts section", the witness replied: "Yes, I would say I would have nothing to do with him". The witness stated that he had had a problem with a sarcastic comment put on a file by Mr. Cléroux. The witness did not like this comment and had returned the file with an additional sarcasm. "Proper paperwork which should have been done by Mr. Cléroux had not been done. My general impression was that Mr. Cléroux had screwed up. I added my own sarcastic remark back", the witness added.

Mr. Raymond Fauteux, Regional Manager of Volcano International Inc., testified that he was familiar with the letter written to WO Remillard by his company on February 18, 1994 and filed as Exhibit E-95. He was not the author of the letter. It was signed by Mr. Marc Villeneuve, a service representative. His company, after signing a contract to do work for the Base, found there was a lack of communication or procedures between it and the Base. A meeting was, therefore, agreed to. He did not attend that meeting. He stated that after the meeting the Department (Base) asked the company to put its complaint in writing and to send it to WO Remillard. The witness added that Mr. Fournier, his assistant, attended the meeting and it was he who was asked by WO Remillard to put this letter, Exhibit E-95, together.

When asked what concerns his company had with the grievor's conduct or performance, the witness answered: "As far as I know, we had no problems with Mr. Cléroux but with the system". Asked what specific complaints were made by his company against Mr. Cléroux, he answered: "Well, as I see it, there was no complaint against Mr. Cléroux, but trying to get the system to work together". Again, he did not think his company had any problems trusting Mr. Cléroux. He added that some of the difficulties which arose were from "our end". "We weren't properly set up. But after the meeting, it went well".

In cross-examination, the witness agreed that he had not drafted Exhibit E-95 and that he was not present at the meeting with Base management. When asked whether he was aware that inspectors are required to provide feedback and follow up, he replied that he was not aware that Mr. Cléroux had this responsibility for providing feedback and follow up. He stated: "No, I was not aware because I was not handling this contract".

Mr. Harold Joseph Healey testified that he has been employed as a contract inspector with DND for seven years. Prior to 1992 he was under the supervision of Messrs. Power and Fisher and then under the supervision of Messrs. Bois and Locke. When under the supervision of Messrs. Power and Fisher, there was an attendance register and a board on the wall where employees could write down their whereabouts and sign in and out of the office each day.

In the period under Mr. Bois and MWO Locke there was an attendance register, a book for signing in and out, and a locator board and locator book. This continued in effect even after the termination of the grievor, Mr. Cléroux.

The witness was present at the meeting of employees held at the Highlands Golf Club in February 1993. The meeting was held because a group of employees felt they should meet together as a group to discuss whatever they thought they could improve upon and to try to work together as a team, the witness stated.

The witness' view of the team of Messrs. Bois and Locke was that of a very professional attitude and good team effort. As a result, the "team" achieved better customer service, became more efficient, and became more of a team. The employees under Messrs. Bois and Locke were provided with computers, cellular phones and day timers. A car was provided as a duty vehicle. All of this greatly improved customer service and had great impact, resulting in faster and more reliable and better personal relations with their customers. There was a positive reaction on morale.

During the meeting at Highlands Golf Course, discussions were held with regard to the signing register. It was felt by those present at the meeting that the signing register could be left out longer and could also be put back on the counter before the end of the day. After discussing this with management, management agreed to these changes. The witness believes that the meeting had asked for the removal of the locator or logbook because it was felt that the inspectors should be able to inform their supervisors, when required, that they may not be back in time to sign out. The witness stated that he believes that management was understanding and eventually removed the registry book. The witness had no problem with the procedures in place in the office.

The witness was categorical in stating that he was never at any time advised by WO Remillard not to talk to the grievor, Mr. Cléroux. Nor was he ever present at a meeting between WO Remillard and Messrs. Charron, Rochon, Pliscia and Heil when WO Remillard is alleged to have advised those present "don't talk to Mr. Cléroux". The witness never at any time said to Mr. Heil: "Are you looking for trouble by talking to Normand in the morning".

The witness stated that following WO Remillard's arrival in the office, Mr. Baizana replaced Mr. Gaulin in the office space occupied by Mr. Cléroux, Mr. Milner and Mr. Carol Boucher. In the witness' opinion, he felt the grievor, Mr. Cléroux, was not being harassed by management.

After the meeting in Highlands Golf Course, the employees had further discussions amongst themselves. The employees felt that there was a "negative attitude amongst us with one or two employees", namely Mr. Cléroux, the grievor, and Mr. Rochon.

The witness stated that he could not work with the grievor again and this because the grievor would not work with him. The grievor "would not show any initiative working with a fellow employee. He wouldn't help if I had a question to ask", the witness added. The grievor did not, in the witness' opinion, work as part of the team.

In cross-examination, the witness stated that he may have signed a statement with other inspectors setting out that there was a poisonous atmosphere in the contracts office between management and two employees. Morale was being affected adversely and improved once the two employees left.

The witness stated that on November 17, 1993 he had observed the grievor with his hand in a briefcase but did not see him take anything out of the briefcase. He had hesitated giving such evidence at a disciplinary hearing held because he did not want to create friction between the grievor and himself. Management had not put any pressure on him to testify as to what he had seen. He had himself approached WO Remillard to tell him that he had seen the grievor tampering with his hands on the briefcase.

Mr. Frank Gaulin, testified in rebuttal evidence from Calgary, Alberta, during a teleconference held in Ottawa in the presence of the undersigned adjudicator, the grievor and his legal counsel, the grievor's wife, and legal counsel for the employer. The witness stated that he had gone to Camp Borden on a course in October 1993 and was replaced as supervisor of the mechanical cell by WO Remillard. He returned to Uplands Base in January 1994 and was assigned as supervisor in the structural cell.

The witness was referred to the incident of March 8, 1994 when the grievor was alleged to have said to him: "You guys are in big shit". The witness had taken this comment to have been directed at the witness and at management. The witness was asked to comment on the grievor's testimony that the comment was actually "Those guys are in deep shit. How are they going to get their money", referring to subcontractors of R.J. Nichols, a large contractor who was going into receivership. The witness stated that he does not know the company R.J. Nichols and does not recall the grievor's comment being made that way. WO Remillard happened to be walking by at the time.

The witness had always given the grievor his assignments in writing and specific instructions as to how they should be completed. The reason for doing so was because of the grievor's performance "and other things going on and he asked to have just about everything in writing, everything that was handed to him", the witness stated.

In cross-examination, the witness stated that he believes the grievor, in his comment to him on March 8, 1994, had said "big shit" and not "deep shit" but allowed that it may have been "deep shit"; he could not recall whether it was "big" or "deep". He was certain, however, that it was "you guys" and not "those guys" because the comment was directed "to us, to management", he added. He was sure and positive of this. "It was directed to me, management. I was part of management".

Mr. Paul Bois testified in rebuttal evidence. He stated that when he started in the contracts section on June 1992, Messrs. Power and Fisher were the supervisors in that section. In place was an attendance register for all employees and a locator board. After a few months, problems with the locator board developed and the witness had it removed and replaced it with a hard covered book.

A few months after the meeting of employees at Highlands Golf Course in February 1993, the black locator book was removed and replaced by a locator board at the request of the employees. The locator board remained in place after June 1994 and until the section changed buildings at the end of 1995. The witness denied ever saying that the work procedures, such as signing in and out, and the locator board

procedures were in place because of Mr. Cléroux, the grievor, and Mr. Rochon's performance or conduct.

The witness denied ever being asked by Mr. Heil: "Why don't you talk to Mr. Rochon and Mr. Cléroux instead of putting everyone in the same kettle?" He denies ever being asked a similar question by Mr. Heil. The witness added: "The attendance register is a daily thing for all construction engineering employees. There was no way that I had control to take it away. Any statement like that by me would be ridiculous".

The witness stated that after Mr. Gaulin had gone on course in Camp Borden, Mr. Baizana, an inspector, moved into Mr. Gaulin's cubicle.

The witness stated that he had never ever refused to repay an inspector for telephone calls made back to the contracts office, whether the inspector was paged or not. He had had a discussion with Mr. Heil who had requested that a method be put in place to reimburse him for telephone calls he had made in the past or would have to make from a pay phone for business purposes. He had told Mr. Heil that he could put those charges on his mileage claim and he had also offered him a roll of quarters, as he was complaining that he was spending money out of his pocket to make business calls from a pay phone. Mr. Heil had never asked to be reimbursed prior to this, that is, at least not to the witness. Mr. Heil had at first declined the quarters but then accepted them to tide him over until his claim was processed. It would take one or two weeks to process. This was the first time this question was brought to the attention of the witness by any inspector "and I did something about it", he stated. To the best of the witness' knowledge, it was not an issue with the other inspectors.

The witness was referred to his testimony concerning the issue of the grievor's absence in the morning of February 23, 1994. The witness had received a telephone call from WO Remillard at about 10:30 a.m. and that he had seen the grievor returning to the contracts section with his coat and boots on at around 10:40 a.m. At the time the witness saw the grievor carrying his day timer. That was the only item he noticed.

With regard to May 10, 1994, the grievor had left 12 Hangar with the military police and the witness left shortly afterwards. When he emerged from the building, the grievor was standing directly in front of 12 Hangar, next to the military police

vehicle, speaking to one of the military police officers. The witness had then walked by the grievor, who was on the witness' left side. The witness was going to his vehicle. He was late for a meeting. He had not walked towards the grievor. WO Remillard was with the witness as he exited the building. As soon as they came out of the hangar, WO Remillard went to his left and the witness went to the right. The witness was not smiling at the time.

The witness stated that throughout the office section of 12 Hangar, the temperature was normally between 72° and 90° F, depending on the type of day and how the equipment was working. There was no need for employees to wear winter coats when in the building, either in the stairwells, washrooms or office area. Normally, no one would wear an overcoat in those areas unless just coming into the building, the witness stated.

In cross-examination, the witness stated that on February 23, 1994 he was watching for the grievor because of the phone call he had received from WO Remillard and he saw that the grievor was carrying a little black book, his day timer. This was the only thing he saw in the grievor's hands. The grievor was wearing his grey winter overcoat, brown boots, and no hat.

Prior to the witness going to get the grievor to have him attend a meeting in the BCO's office, the grievor was advised of that meeting to be held later that day. The grievor at the time was in a room speaking to personnel from Air Command. The witness walked part way down the hall with the grievor. The witness had been instructed to have the military police waiting by the door of the BCO's office after the meeting. The witness did not go into the meeting but waited at a distance away. He saw the grievor come out of the BCO's office and approached and told the grievor that there was a military police officer who would escort him out of the building. The military police officer took over from this point and escorted the grievor down the hallway. At that point, WO Remillard and another military police officer emerged from the elevator and they brought the grievor to his cubicle. There were lots of people in the hallway, the witness stated. He did not believe that anyone was following the grievor and the police officers in the hallway but there were people everywhere in the hallway from the offices there. The witness returned to his own cubicle near the grievor's, who was retrieving his personal belongings. He left his

cubicle about three to five minutes after the grievor had left his own. He could not remember whether he had used the elevator to go down to ground level. He did not witness any possible exchange between WO Remillard and the grievor outside 12 Hangar. He had gone straight to his car and presumed WO Remillard did so also.

Argument for the Employer

Counsel for the employer stated that the employment of the grievor was terminated effective June 30, 1994, for disciplinary reasons, as set out in Exhibit E-114, which followed Lt.-Col. Brown's recommendation for termination (Exhibit E-111) and the support for same by the Wing Commander (Exhibit E-112).

Counsel stated further that she would in argument be dealing with the allegations of misconduct in respect of the four incidents and the appropriateness of the penalty of termination arising from the culminating incident.

The first incident is that concerning the grievor's alleged absence from his workstation from 10:20 to 10:40 a.m. on February 23, 1994. It is important to note that this was the grievor's first day back to work after serving a 20-day suspension. That morning, WO Remillard advised the grievor that he would get a fresh start with the only work he had to do being the paperwork on his desk, including the installation of an emergency eyewash station in the men's washroom on the third floor of 12 Hangar.

Mr. Cléroux, the grievor, was observed leaving 12 Hangar by WO Remillard, his supervisor, at 10:19 a.m. WO Remillard testified that he felt this to be unusual given the earlier discussion between them and the fact that the grievor's work was on the third floor of 12 Hangar. At approximately 10:40 a.m., Mr. Bois, the contracts officer and WO Remillard's supervisor, saw the grievor enter the contracts section wearing his winter coat and boots and carrying his day timer. At the disciplinary hearing on March 15, 1994, and after hearing the testimony of Messrs. Bois and Remillard during the hearing, the grievor contended that he did not leave 12 Hangar, that the only work he had to do was on the third floor and, therefore, that he had no reason to leave 12 Hangar. When asked to explain Mr. Bois' evidence that the grievor had earlier admitted to Mr. Bois that he had gone for coffee in respect of this time period, the grievor's response was that he did not go to Canex for coffee, that he did not admit

that he had, and that he did not write the word "Canex" on the locator board. Counsel stated that the grievor's explanation at this hearing directly contradicts the explanation given in 1994. The grievor allegedly did leave the building that morning and upon his return at 9:40 a.m., allegedly worked his way up through 12 Hangar from the first floor on the hangar side of the building where aircraft are kept, to the second floor washroom, to the third floor washroom, and back to the contracts office. He allegedly did go for coffee that morning outside 12 Hangar. Counsel submitted that the grievor's recent evidence is simply self-serving and must be seriously questioned on the issue of credibility. Counsel asked that I consider what makes sense. The grievor hears the evidence of his supervisors at his disciplinary hearing, yet offers up a contradictory explanation at that hearing. What makes sense and what would be reasonable is that the grievor would have offered the explanation provided at this hearing in March 1994, if it were true, counsel argued.

Secondly, on the issue of credibility, while the grievor suggests that Lt.-Col. Brown had his mind made up, the grievor was presenting false information to management and presenting a different explanation at this hearing and that is a theme which began as early as the disciplinary hearing in respect of the seven-day suspension concerning January 27, 1993.

Major Fortin and Capt. Perrault were also present at the disciplinary hearing on March 15, 1994 and the grievor had also available to him the grievance process. The grievor offered absolutely no evidence that he had raised this other recent version with the employer at all. Counsel submits that the grievor is simply looking for an excuse to present self-serving evidence at this stage and that it is too late. He should not be permitted to benefit from playing games with the employer.

The grievor's version also changed from the questions put to him at the counselling interview concerning his whereabouts on February 23, 1994. His answer changed again at the disciplinary hearing before Lt.-Col. Brown on March 15, 1994, and changed again at this hearing. The grievor's explanation for his whereabouts was also inconsistent and misleading. Counsel asks that I consider the grievor's evidence during cross-examination. He needed a water pipe, a drain pipe, and a vent pipe which were available in the pipe-chase. Had the grievor looked in the pipe-chase, as

he contended he did at this hearing, he would have found the required water, drain, and vent pipes there in the pipe-chase.

The grievor contended that room in the pipe-chase was very limited, that one could not get into it, and it was pretty crowded. Counsel asked me to consider the testimony of WO Remillard that the pipe-chase on both the second and third floors was accessible at that time, as is demonstrated by Exhibits E-127, E-128 and E-129.

When contradicted on the layout of the utilities, the grievor quite dramatically stated: "Imagine the commotion if I had opened up the walls and the ceiling". Again, it is submitted that there would be absolutely no need to do any of this in relation to opening up walls and ceilings, requiring repairs, if the grievor had actually looked in the pipe-chase. However, if he had actually done that, that is, looked in the pipe-chase, he would have seen the utilities he needed and, as Exhibit E-125 shows, he would have seen a clean-out. The employer's position is that the issue of a clean-out is essentially a red herring, in any event, as indicated in WO Remillard's testimony. The point is that if the grievor had actually looked where he said he looked, he would have seen the clean-out and his evidence of having to break open walls is simply an exaggeration, is untrue and, it is submitted, was an attempt to deflect away from the issue of his credibility. Likewise, the grievor referred to the ceiling. The evidence of both Messrs. Locke and Remillard was that there was no need to break open ceilings, requiring repair. Both MWO Locke and WO Remillard referred to Exhibit E-130, showing the view from the pipe-chase door up into the open space underneath the third floor. Alternatively, the grievor could have loosened screws in the ceiling from the second floor washroom, if he had actually been in the second floor washroom as he claims. The grievor also claimed that it might be cheaper and easier to drill through the ceilings and floors, providing an exposed piping which goes into the hangar area where the aircraft are kept which, according to MWO Locke, would also entail going through a fire wall. Again, on the issue of credibility, what makes sense, counsel asked? The grievor, right from the start, was allegedly exploring a completely separate utility system for an eyewash basin separate from the existing utility system already in place for washroom fixtures. Again, this makes absolutely no sense given Exhibit E-125, which shows all the required utilities within a 10-foot radius of the emergency eyewash system. In addition, while accepted procedure was to locate the

blueprints which would show the original installation of utilities for the building, the grievor denied absolutely that he should look at the blueprints.

The grievor also acknowledged that he did not see any drain pipes or electrical conduits during his alleged exploration on the morning of February 23. He also went through the same motions between 12:30 and 1:30 p.m., looking for drain pipes and electrical conduits. It is submitted that this alleged wandering around the hangar for approximately one and one-half hours during the morning and afternoon did not take place. Even if the first hour, between 9:40 and 10:40 a.m., is accepted, which counsel submits is not credible, it is simply more unbelievable that the grievor went through the same motions - working his way up 12 Hangar - again in the afternoon between 12:30 and 1:00 p.m. The only thing the grievor's evidence suggests is that he wandered around the hangar and through a heated office area for approximately one and one-half hours with his winter coat on. Furthermore, although counselled and reminded of keeping his supervisors informed of his working locations, the grievor went for coffee and lunch on February 23, did not return to his workstation and did not inform any of his supervisors of his whereabouts. Therefore, even if the grievor's new version is accepted by me, misconduct remains, counsel argued. The grievor should not be permitted to benefit from playing games.

Turning to the second incident on February 23, 1994, concerning a second absence without permission from 12:30 to 1:00 p.m., counsel stated that, again, it is important to note that this was the grievor's first day back following a suspension of 20 days and also important to note that the grievor had been briefed on his hours of work, coffee and lunch breaks, reporting procedures in respect of work locations, and absence from the office. At approximately 11:10 that morning, he was explicitly reminded of the necessity of keeping his supervisors informed of his whereabouts, as was also expected of other inspectors. Despite this simple direction, the numerous reminders provided to him, and the timely reminder on February 23, 1994, the grievor proceeded to return to the office when he wanted and without informing his supervisors of his whereabouts. Again, the evidence of MWO Loranger is that the grievor was not back from his lunch break after 12:40 p.m. WO Remillard checked the grievor's cubicle and the work site of the emergency eyewash station on the third floor and he was not in any one of these locations. At 1:00 p.m., the grievor was seen returning to the contracts section with his winter coat and boots on and WO Remillard

was advised of his return. The grievor claimed before Lt.-Col. Brown that he was either at his workstation or at his work site, that is, the eyewash station.

Based on the evidence presented before Lt.-Col. Brown, the grievor's explanation at that time was not credible with respect to the version presented at this hearing. The grievor's evidence is self-serving and should not be accepted by me, counsel argued. The grievor should not be allowed to benefit from playing games with the employer. Again, it is necessary to consider what makes sense, what is believable. The grievor heard the evidence of Messrs. Bois and Remillard at the disciplinary hearing yet provided a contradictory explanation. At this hearing, in respect of this absence from 12:30 to 1:00 p.m. and the earlier absence from 9:40 to 10:40 a.m., the grievor offered a new and different explanation from that provided to Lt.-Col. Brown. If the versions presented at this hearing were true, they should have been provided in March of 1994. The grievor offered absolutely no explanation for the fact that he was seen with his winter coat and boots on returning to the office. He simply contradicted the supervisors which is, again, a theme which runs through his evidence.

Secondly, as indicated earlier, counsel stated the grievor's explanations were inconsistent and misleading concerning the setup of the utility system, the pipe-chase and concerning what would be reasonable conduct of an inspector given the assignment. Again, even if I were to accept the grievor's evidence given at this hearing, misconduct remains, counsel argued. The grievor simply failed to return from lunch and advise his supervisors of his whereabouts or work location.

The third incident of misconduct relates to an absence without permission on February 24, 1994, between 9:40 and 10:10 a.m. The background to this incident is that on February 23, 1994 the grievor was reminded that his break period was from 9:30 to 9:40 a.m. Again, despite this timely reminder, the grievor did not return to the office until approximately 10:10 a.m., without any prior indication of his whereabouts. On the issue of credibility, WO Remillard saw both Mr. Jooste and the grievor returning to the contacts section at approximately 10:09 a.m. Mr. Bois observed the grievor returning to the contracts section, again, with his winter coat and boots on at approximately 10:10 a.m. Whether the grievor went to the accounting office immediately before his return is irrelevant and is essentially a red herring. The point is that the grievor's coffee break was for a period of 10 minutes. The point is

that his supervisors were again not informed of his whereabouts. Again, the grievor provided a completely contradictory story before Lt.-Col. Brown. What he told Lt.-Col. Brown was that he went for coffee at 9:30 a.m. and returned at 9:40 a.m. His answers were vague, as were those of his colleague Mr. Jooste. There was no mention by the grievor of an attendance at 1 Hanger and absolutely no mention of a Base Defence Force (BDF) exercise which stopped and questioned the grievor and Mr. Jooste. Likewise, there was no evidence that Mr. Jooste made any reference to 1 Hangar before Lt.-Col. Brown. The only evidence was that Mr. Béland, Mr. Jooste's supervisor, had expressed skepticism towards Mr. Jooste's explanation that he was late in returning to work because he had stopped to look at 1 Hangar.

Again, the grievor's explanation before Lt.-Col. Brown was not credible and even if his stories about 1 Hangar and the BDF exercise are accepted by me, misconduct also remains in this case. Despite returning from a period of suspension and being counselled on management's expectations, the grievor simply refused to keep his supervisors informed of his whereabouts over and over again.

Counsel turned to the fourth incident of misconduct. It is the employer's position, she stated, that the evidence demonstrates that the grievor was insubordinate and disrespectful to the authority of his supervisors on several occasions that day, March 8, 1994. WO Remillard testified that he was following procedures, as he had been taught, in asking the grievor to enter the contracts officer's office for privacy. Normal procedure was to go into a private area and read or provide the document to the employee. The grievor had attended in a conference room as recently as February 24, 1994 in respect of a similar request. In addition, WO Remillard fulfilled procedures, as he had been taught, in requesting that an employee sign an acknowledgment of receipt of a document. Again, the fact that the grievor declined to make this acknowledgment meant that management required a witness to the delivery. Management's intention to carry out this procedure in confidence was reasonable. Management is not required to dispense with normal operating procedures simply because of the grievor.

Counsel for the grievor's suggestion that the grievor had essentially given a direction that should be followed is unreasonable. The grievor's counsel's question to WO Remillard after the grievor told him to put it on the desk was: "What didn't you

understand about that?" WO Remillard had replied that he understood that the grievor was essentially directing him to leave it on his desk. Counsel for the employer submits that this was simply not an acceptable response or demand from an employee. The grievor was ignoring a legitimate request from his supervisor and doing so in a disrespectful manner. The grievor aggravated the situation by laughing and speaking in a mocking tone. His unacceptable direction was: "If you have a letter for me, just leave it on my desk and stop bugging me". That is simply not the approach of a person who meant no disrespect. Likewise, the grievor's behaviour demonstrated disregard for management's authority and the attempt by WO Remillard to exercise that authority.

Counsel submits that WO Remillard was forthright and consistent concerning all events, including March 8, 1994. With respect to March 8, 1994, counsel noted that WO Remillard was consistent both during cross-examination and when questioned again by counsel for the grievor when the employer presented rebuttal evidence. WO Remillard testified that at no time, up to and including the incident described in Exhibit E-91, did the grievor raise the issue of union representation. In addition, the employer submits that this issue is essentially a red herring. There is no entitlement to union representation in such circumstances.

Within one hour on March 8, the grievor was again demonstrating disrespect for his supervisors and management. Although he was speaking to Mr. Gaulin, the grievor deliberately raised his voice as WO Remillard walked by. WO Remillard indicated that he and the grievor had eye contact and that immediately afterwards the grievor's voice became raised and aggressive stating words to the effect that: "You guys are in big shit now". His comment was totally inappropriate and taken by both WO Remillard and Mr. Gaulin to be directed against them and management. Counsel asked that I consider the evidence of Mr. Gaulin in which he recalled that the words were directed at management. It was: "You guys...". WO Remillard heard the same words: "You guys are in big shit". At the disciplinary hearing, the grievor admitted to Lt.-Col. Brown that he did make such a statement. He could explain, however, his allegation that it related to a contractor. At this hearing, however, a new explanation is offered. Mr. Gaulin did not recall any reference to R.J. Nichols. Before Lt.-Col. Brown, the grievor at no time stated that what he allegedly said was: "Those guys are in deep shit. How are they going to get their money". For the fourth time in

respect of the incidents of misconduct, the grievor is offering self-serving evidence which was never raised before and which the employer, respectfully, submits is not to be believed. It is the employer's position that the incidents of misconduct, as outlined in Exhibits E-90, E-92 and E-109, have been proven on a balance of probability.

The unnecessary and disrespectful language used by the grievor on March 8, 1994 demonstrates the negative attitude the grievor was taking in his day-to-day contact with the employer.

Turning to the issue of quantum in respect of the culminating incidents, counsel asked me to consider the following practice. First of all, the grievor's disciplinary record. This is the seventh incident of misconduct and discipline for the grievor over an approximate 20-month period. The serious nature of the grievor's behaviour is demonstrated by the progressive penalties. The employer properly followed the principles of progressive discipline to encourage the grievor to correct his inappropriate behaviour. This principle is clearly addressed in all letters of discipline throughout this proceeding, beginning with Exhibits E-13, E-23, E-49, E-81 and E-83. The grievor's disciplinary record demonstrates his deliberate refusal to learn from previous misconduct and demonstrates that he had no willingness to cooperate with the employer. Secondly, counsel asked that I consider the similarity of the incidents. The three incidents of February 23 and 24, 1994 relate to absences without permission just like the incidents of January 27, 1993, giving rise to a seven-day suspension, the incident of March 8, 1993, giving rise to a 10-day suspension, and just like the incident of April 22, 1993, giving rise to another 10-day suspension, and the incidents of December 9 and 21, 1993, giving rise to a 20-day suspension. The incident of March 8, 1994 relates generally to the issue of insubordination and disrespect, just as the incident of April 23, 1994, which gave rise to a 15-day suspension. The essential nature of the grievor's misconduct relates to a persistent refusal to follow legitimate and simple instructions. They demonstrate an escalation in insubordination and a flaunting of management's authority.

The grievor, apparently, seems to believe that he is entitled to do what he wants, when he wants, without any explanation or permission from his supervisors. The third factor counsel asked me to consider is the counselling afforded to the grievor. Management attempted to stress two main things in respect of the

counselling sessions. First, was a reminder of management's expectations, and second, a reminder of the importance of correcting his behaviour. The grievor was clearly made aware of management's expectations.

Counsel stated that she had already dealt with a list of 27 counselling sessions given to the grievor in earlier submissions. She stated that she again relied on these earlier counsellings to demonstrate the fact that management's expectations were brought to the grievor's attention. Counselling sessions 1 to 13 were presented by counsel in her submission on the seven-day suspension; counsellings 14 to 16 on the 10-day suspension; counsellings 17 to 19 on the 15-day suspension; and counsellings 20 to 27 on the 20-day suspension submissions. With respect to the evidence concerning the grievor's termination, the counselling relates to Exhibits E-101 and E-102 and the relevant dates are January 10 and 18, 1994. These last counsellings concerned issues of work performance, specifically the dating of project files.

Counselling 29 (Exhibit E-87) on January 10, 1994 was a counselling in respect of communications by the grievor with his supervisor. Counselling 30 on January 26, 1994 (Exhibit E-88) concerned acceptable procedures when unable to make a previously scheduled meeting. Counselling 31 on February 22, 1994 (Exhibit E-89) was a counselling on work procedures. Counselling 32 on March 16, 1994 (Exhibit E-96) was in respect to a late arrival by the grievor. Counselling 33 on February 15, 1994 (Exhibit E-97) concerned work performance on the issue of use of a SOA from another work cell without permission, and counselling 34 on March 25, 1994 (Exhibit E-98) concerned the same issue as in counselling 33. In respect, therefore, of counsellings on both work procedures and performance issues are six counselling sessions following absences from the office in order to reiterate procedures with the grievor. The grievor received four letters of counselling and approximately 19 counselling sessions took place following his failure to follow procedures. The remaining counselling sessions concern issues of work performance. Counsel briefly mentioned the relevance of the proximity of the incidents of misconduct to both counsellings and suspensions. Unfortunately, she stated, this is a theme which runs through the evidence. The grievor returned from suspension on February 24, 1993, was counselled on March 3, 1993, only to misconduct himself on March 8, 1993, that being the first 10-day suspension. He was counselled on

April 21, 1993, only to misconduct himself on April 22 and 23, 1993, that being the second 10-day suspension and the 15-day suspension, respectively. The grievor was counselled in August, November and December 1993 and served periods of suspension only to misconduct himself on December 9, 1993. He received a Notice of Investigation in respect of the incident of December 9, 1993 and proceeded to misconduct himself on December 21, 1993, giving rise to the 20-day suspension.

A further aggravating factor is the absence of any remorse or responsibility. The grievor has either refused to recognize any impropriety in his conduct or he excused his behaviour. His inability to admit wrongdoing leads to a conclusion that he refuses to learn from his mistakes and has provided no indication that he was willing to change his unacceptable behaviour and cooperate with the employer. He was provocative with all his supervisors in disregarding both counselling and progressive discipline. Management had absolutely no confidence that he would conduct himself appropriately in the future. There was no reasonable expectation or hope of rehabilitation. He has never apologized and maintains the same obstinate attitude at this hearing.

A further aggravating factor relates to the issue of credibility and honesty, counsel argued. The grievor presented different versions. He has presented evidence at this hearing which was never heard before, starting with the first seven-day suspension and continuing through to the incidents in respect of the termination. In respect of January 27, 1993, the grievor was asked whether the military police officer had been rude, confrontational or intimidating. His response was: "No". At this hearing, however, he provided evidence in complete contradiction. The grievor's evidence in respect of several incidents of misconduct demonstrates internal inconsistencies in his own evidence. For example, in respect of the incident of March 8, 1993, the grievor's own statement (Exhibit E-24) indicated he was having a break in the canteen. His position at the disciplinary hearing contradicted that statement and he provided a different explanation at this hearing. In respect of April 22, 1993, the grievor's statements at Exhibits E-31 and E-36 contradicted another statement of his in Exhibit E-38. Furthermore, on the issue of credibility, it is important to note that where the issue of credibility arose, it arose as between the grievor and other witnesses. His approach was to directly contradict his supervisors, beginning with Messrs. Power and Fisher, moving to Messrs. Gaulin, Locke, Bois, and

Remillard. We are not dealing with a simple personality conflict between two individuals. We are dealing with defiance of management's authority at every turn.

Counsel argued that the seriousness of the misconduct is twofold: it indicates an unacceptable pattern of behaviour and, secondly, strikes at the very issues of trust and respect in the employee-employer relationship. It served to undermine the legitimate authority of his supervisors and management. His conduct reasonably leads to a loss of confidence which management must be able to place in an employee holding the position of a contract inspector. The grievor had to deal with contracts of considerable amounts and work independently at various locations and work sites. An essential element of that position is the trust that he will follow departmental procedures. When that trust is gone, as it is in this case, there is simply no hope of salvaging the employment relationship. Management clearly met its responsibility to inform the grievor that his behaviour was unacceptable. It attempted counselling, discipline, offered the EAP program, and, it is submitted, was more than reasonable in dealing with the grievor's attitude.

The grievor bears the burden of establishing mitigating factors and, it is submitted, he has not met that onus. His work performance is outlined through the evidence of his supervisors and his performance appraisal reports, Exhibits E-117, E-118, E-119, E-59 and E-93. These reports indicate a deterioration in his work performance. It is not a mitigating factor. Furthermore, on the issue of credibility, counsel asked that I consider the evidence that the grievor continued to demonstrate his defiant and insubordinate behaviour after the incident relied upon in support of his termination. This evidence is relevant in assessing the grievor's attitude and credibility and is also relevant in respect of the issue of rehabilitative potential. This evidence is outlined in respect of Exhibit E-96, March 16, 1994, Exhibits E-97 and E-98, in respect of March 25, 1994, Exhibits E-99 and E-100, in respect of work performance and attitude on March 25, 1994, Exhibit E-72, April 11, 1994, in respect of a further absence without permission.

Furthermore, on the issue of credibility, counsel referred to the incident of April 23, 1993 wherein the grievor attempted to downplay his misconduct and that is a theme similar to the incident of March 8, 1994. The grievor did not recall using language or behaviour as indicated by MWO Locke, Mr. Gaulin, Sgt. Carrière, and the

statements of other employees in respect of the incident of April 23, 1993, but did not deny that it occurred. He did not recall a telephone conversation with MWO Locke with regard to a missing file and a comment that MWO Locke was "in deep shit", but did not deny that it occurred. In respect of March 8, 1994, the grievor presented evidence at his disciplinary hearing which directly contradicted his evidence at this hearing.

There are several credibility issues which arise in this case. Counsel submitted that the evidence of Mr. Heil should be seriously questioned given that it was contradicted by Messrs. Bois, Locke, Remillard, Healy and Charron. Counsel submitted that these people had no reason to lie and that there is no basis for a finding against their credibility. Mr. Heil suggested that he was told to return to the office, which he felt was a waste of time, and when questioned about that in cross-examination, it became not that his supervisor had asked him to come back but it became: "I told Mr. Remillard, if you don't pay me, I'll come back to the office". Counsel submits that Mr. Heil's evidence was exaggerated. WO Remillard testified that he never refused payment. Mr. Bois testified that he simply advised Mr. Heil to put it on his mileage claim and offered him a roll of quarters, which Mr. Heil refused. Messrs. Bois, Healy and Charron made reference to reporting procedures that were in place prior to the summer of 1992 and from that time through 1994. Subsequent to 1994, these procedures did not change. What the new management team introduced was related through the evidence of Messrs. Healy and Charron concerning issues of equipment, office accommodation, and customer service, which resulted in more efficiency and effectiveness and made them feel more professional. Mr. Heil and Mr. Boucher, counsel submits, were essentially disputing management's right to manage. Messrs. Healy and Charron testified to a negative attitude in the office relating to two employees, namely, Mr. Rochon and Mr. Cléroux, the grievor.

Counsel stated that at the end of this hearing, it has become evident that there was one person out to get the grievor and that was the grievor, Mr. Cléroux, himself. He refused to follow simple procedures. He became committed to contradicting his supervisors and constantly provided self-serving evidence at this hearing which had never been raised before. Counsel submits that the essential element of the employee-employer relationship has been destroyed. The employer has proven the incidents of misconduct on the balance of probabilities. The evidence demonstrates

that the termination of the grievor's employment is the appropriate penalty. In the alternative, the employer requests that I exercise my discretion not to return the grievor to the workplace.

Counsel referred to the following arbitral decisions in support of her position and indicated their application to the instant case, particularly with regard to the principle of progressive discipline: Dearnaley (supra); Enniss (Board files 166-2-17728 to 17732 and 17849); Shuberg (Board files 166-2-15123, 15159, 15350 and 15424); Martyr (supra); Higgins (Board file 166-2-3578); Payeur (supra); Varzeliotis (Board files 166-2-9721 to 9723, 10273 and 10879, maintained by the Federal Court of Appeal No. A-1482-83); and Russo (Board files 166-2-15576 to 15578, 16095 and 16096).

With regard to the granting of a monetary award in lieu of reinstatement: Lester (Board file 166-2-26706); Deigan (Board files 166-2-25992 and 25993 and 161-2-743); Hébert (Board files 166-2-21575 and 21666); McMorrow (Board file 166-2-23967); Champagne (Board file 166-18-15650, upheld by the Federal Court of Appeal No. 3722-360); Skibicki (supra); and Canadian Labour Arbitration, by Brown and Beatty, dealing with insubordination, at paragraph 7:3600, refusal to follow instructions, and at paragraph 7:4420, dealing with rehabilitative potential.

Argument for the Grievor

On February 23, 1994, the evidence shows that the grievor made a request to attend a meeting first thing that morning. The meeting related to the fallout of the Budget announcement. WO Remillard testified that the grievor returned sometime after 9:00 a.m. The grievor made a request to attend at 5 Hangar to review some work that he had been assigned prior to his 20-day suspension. WO Remillard advised the grievor that the work had been assigned to another inspector. The grievor testified that it was Inspector St-Denis. The grievor then was advised to consider the paperwork left on his desk and the grievor advised his supervisor that he was going for his break. We then hear the first "Johnny-on-the-spot" with regard to WO Remillard, counsel stated. WO Remillard, counsel added, seemed to have an uncanny knack of being right there when the grievor misconducts himself. Counsel had in mind the two "smoke-shack" sightings of the grievor by WO Remillard - one on the 23rd and the other on the 24th of February 1994 - and the incredible timing he

was having to just be walking by when Mr. Gaulin and the grievor were having a conversation on March 8, 1994. WO Remillard relates that just as he passes by, he makes eye contact with the grievor and the grievor says just then: "You guys are in big shit". So the first of these coincidences involving the grievor and WO Remillard occurs around 10:30 a.m. on the 23rd when WO Remillard observes the grievor exiting 12 Hangar. The grievor has his winter coat and boots on and WO Remillard observes him for the three or four steps the grievor takes. That is all he sees because WO Remillard is leaving for other duties that morning. WO Remillard is concerned, however, because he felt the grievor had no reason to be exiting 12 Hangar. Once he gets to Headquarters, WO Remillard calls Mr. Bois and asks whether he had given the grievor any tasking that would require him to be out of 12 Hangar. Mr. Bois said no he did not. Mr. Bois then goes to check the locator board and tells this hearing that he saw the word "Canex" written on the board, in the grievor's handwriting. Mr. Bois makes the assumption that the grievor left the hangar at the time WO Remillard saw him, that is, at 10:20 a.m. Mr. Bois was in the contracts office, close to the main entrance to that office, when he observed the grievor returning, entering. As a wall clock was located in front of Mr. Bois, he easily identified the time. This, counsel argued, is another coincidence; that there should be a big clock in front of Mr. Bois so he could nail down the time. He marked it down at 10:37 a.m., counsel noted. WO Remillard stated that the grievor told him at 9:30 a.m., or just prior to that, that he was going on his break. The way management explained what happened is that the grievor went for his break, came back, and went again when WO Remillard saw him at 10:20 a.m. and then he came back. Just in case it was not clear enough that he was misconducting himself, the grievor wrote "Canex" on the board. Other than three or four footsteps WO Remillard saw the grievor take at the entrance to 12 Hangar, no one saw the grievor anywhere. The grievor explains that he went outside at one point to go to his vehicle to get his camera and tape measure, which he was going to use in assessing the emergency eyewash system. Counsel stated that he found Lt.-Col. Brown's treatment of this somewhat baffling, mind boggling. In Lt.-Col. Brown's notes in Exhibit E-106, he specifically writes that Mr. Bois indicated to him that "Canex" was written on the board. Lt.-Col. Brown testified that later that morning Mr. Bois advised him at the hearing that the grievor had admitted that he had gone to coffee that morning, yet that appears nowhere in Lt.-Col. Brown's summary (Exhibit E-106). Lt.-Col. Brown's assumption in Exhibit E-106 was that the

grievor went to Canex for coffee, yet when asked in examination-in-chief, Lt.-Col. Brown stated that the issue of Canex was totally irrelevant. Counsel stated that Lt.-Col. Brown "was a pretty good witness" but submitted that he was doing "a little bit of patchwork to cover up the inconsistencies in management's allegations". The grievor had stated that on that morning, when he came back from break, he set to work assessing the installation of the eyewash system. The grievor had stated that in order to do this he covered floors one, two and three of 12 Hangar and no one can say that he did not, counsel emphasized. The grievor testified that he took pictures and that he met with contractors. Counsel submits that in order to do this he had to do a complete inspection of the installation.

The grievor left for his break at 9:30 a.m. that morning. The employer has him leaving again at 10:20 a.m. and believes that he would have written "Canex" on the locator board to incriminate himself, counsel observed. Lt.-Col. Brown relied on the Canex issue in his summary, Exhibit E-106. Counsel suggested that when the ridiculousness of this became apparent to Lt.-Col. Brown, he threw it out as being totally irrelevant.

Mr. Bois sees the grievor returning at exactly 10:37 a.m., coat and boots on, and says that he only sees a day timer in his hands. Counsel suggests that it was entirely possible that the camera and measuring tape were in his coat.

The grievor said that he was in the hangar area that morning, where it is cold, where they bring the aircraft in. In addition, he said that he went to his vehicle to get his camera and tape measure. We heard about no prohibitions in contracts, counsel stated, about wearing one's winter coat indoors, and as the grievor went straight to his work upon return from break, it is entirely possible that he did not take his coat and boots off until he returned to his cubicle.

The employer, counsel argued, does not have any evidence of where the grievor was. It should have accepted the grievor's statement of where he was. It is clearly erroneous for Lt.-Col. Brown to find that the grievor was absent from 10:20 to 10:40 a.m. This was not a clear cut situation, as Lt.-Col. Brown found.

As regards the second incident on February 23, 1994, the grievor left 12 Hangar at 12:00 noon for lunch. MWO Loranger observes him leaving. At approximately 12:40 p.m. when WO Remillard returns to the contracts office, he is asked by MWO Loranger whether he knows of the grievor's whereabouts. Mr. Bois also wants to know. WO Remillard proceeds to look for the grievor and looks on the second and third floors and even looks under the toilet stalls where he calls out "Norm". In Lt.-Col. Brown's summary, Exhibit E-106, there is mention only that WO Remillard checked in the third floor washroom. This is relevant because, if the grievor was moving between the first and third floors, as he says he was, and WO Remillard only checked the third floor, as is recorded in Exhibit E-106, then the grievor's contention is more plausible, counsel argued. Mr. Bois is right there again with his watch at 1:00 p.m. when he sees the grievor returning to contracts with his winter coat and boots on. Subsequently, both Mr. Bois and MWO Loranger came to WO Remillard's cubicle and indicated by gesture by MWO Loranger that the grievor had just arrived and Mr. Bois confirmed. At the disciplinary hearing, the grievor indicated to Lt.-Col. Brown that he returned at 12:30 p.m. and that he was either at his workstation or work site, the eyewash station. Lt.-Col. Brown took this, counsel suggested, as the grievor standing in the left corner of the washroom or wherever the eyewash system was located in the washroom. The work site could easily mean assessing the installation in general but the grievor was not given any benefit of the doubt. For Lt.-Col. Brown this was not as open and shut as the first incident. Is it possible, he queried, that the grievor returned unnoticed? By virtue of the fact that WO Remillard checked the third floor washroom and did not see the grievor at his work cubicle, he concluded somehow that on the balance of probabilities the grievor was absent without permission. Nobody saw the grievor in the disputed time frame and yet Lt.-Col. Brown is able to conclude on the balance of probabilities that he was absent from the hangar.

The third incident occurred on February 24, 1994. The crucial point, counsel stated, is that here again that "Johnny-on-the-spot", WO Remillard, observed the grievor and Mr. Jooste entering 12 Hangar at 10:09 a.m. The time is crucial. WO Remillard testified that he was wearing a digital watch at all times. He made a written statement to Lt.-Col. Brown that he saw the grievor entering 12 Hangar at 10:09 a.m. Lt.-Col. Brown relied on this timing. Now, one minute later, Mr. Bois, who

is at the entrance to the contracts office and observes the grievor entering, made a mental note because, he said, every time he sees the grievor with his coat and boots on it triggered him to look at his watch. There is, however, a bit of a problem, counsel stated. We also have the grievor in the accounts office with Ms. Denise Bélanger at 10:05 a.m. It must be recalled that the grievor, on February 23, 1994, had submitted a leave request and his evidence was that he had been contacted by Ms. Bélanger who asked him to come see her about his leave application. In his summary, Exhibit E-106, Lt.-Col. Brown notes that the grievor was in accounts at 10:05 a.m.; that is all he notes with respect to accounts. Lt.-Col. Brown also testified that MWO Loranger had indicated that he had verified with Ms. Bélanger that the grievor had been in to see her between 10:05 and 10:10 a.m. Lt.-Col. Brown testified in cross-examination that he had sought further information and was satisfied that there was a "wider range" than just 10:05 a.m. Counsel noted that the grievor is supposed to be out with Mr. Jooste at Canex and then supposed to be in accounts with Ms. Bélanger between 10:05 and 10:10 a.m. and then he is supposed to be out again with Mr. Jooste at 10:09 a.m. and then he is right back into contracts at 10:10 a.m. Counsel stated that we know that it is 10:10 a.m. because every time Mr. Bois saw the grievor with his coat and boots on, it triggered him to look at his watch. We know that Lt.-Col. Brown preferred WO Remillard's statement of the time he saw the grievor, 10:09 a.m., because it was a written statement. How can the grievor be in accounts and be with Mr. Jooste outside the hangar where he is seen by WO Remillard and then by Mr. Bois at the same time, counsel queried? The employer's evidence breaks down here and is not credible, counsel asserted. It should not have been relied on by Lt.-Col. Brown who did not notice the discrepancy in the times the grievor was supposed to have been seen by his supervisors.

Concerning the events of March 8, 1994, the grievor was invited by WO Remillard into the contracts officer's office in order to hand the grievor a Notice of Investigation. Sgt. Williamson accompanied WO Remillard as a witness. The grievor had said to WO Remillard: "If you have something to deliver to me, leave it on my desk". At that point, WO Remillard thought that he should repeat his request and did. The grievor again responded the same way: "If you have a letter or something to give to me, leave it on my desk". WO Remillard added to this second response by stating that the grievor had added: "Stop bugging me". Some time later on the same

day, it is alleged that the grievor made a statement to Mr. Gaulin and/or WO Remillard: "You guys are in deep shit". Mr. Gaulin and WO Remillard said he had said: "...big shit". The grievor agrees that he made a statement using words to that effect but they had taken it entirely out of context. His intention in using those words was to demonstrate the predicament of subcontractors of R.J. Nichols which had been petitioned in bankruptcy at the time and the subcontractors would be left out in the cold. Now, again, WO Remillard was "Johnny-on-the-spot" when he walked by the spot where the grievor and Mr. Gaulin were conversing. That is great for the employer, counsel stated, for it is corroboration. They seem to have a knack for corroboration, he added. Interestingly, in Exhibit E-106, there is no mention of WO Remillard being in the area, hearing the statement made to Mr. Gaulin and to himself, WO Remillard thought. One explanation to this whole episode, counsel suggested, is that it never happened at all. The other possibility is that it happened and Lt.-Col. Brown heard this evidence but decided to omit it in his summary, Exhibit E-106.

Lt.-Col. Brown makes mention in his summary, Exhibit E-106, of the refusal of union representation for the grievor but he does not mention that the grievor had told him also that he did not intend to be disrespectful to his supervisor, WO Remillard. Nor is the retort by Mr. Gaulin to the effect "You, Norm, are a real shit disturber" found in Lt.-Col. Brown's notes, Exhibit E-106. Could this be because such a statement would not appear useful in a report which was to form the basis of a recommendation for termination, counsel queried?

Counsel discounted the employer's contention that WO Remillard was trying to protect the grievor's privacy by wanting to give him his Notice of Investigation in private. This is not borne out by the way WO Remillard looked under the toilet stalls when trying to locate the grievor and the fact that another inspector was photocopying personal documents pertaining to the grievor, which were classified "Protected B". If WO Remillard were merely following procedures, how come then Lt.-Col. Brown, in his summary, Exhibit E-106, expressed concern that it could be questioned that management wanted to deliver the Notice behind closed doors? How could the procedure be standard if Lt.-Col. Brown questions it and expresses concern, counsel wondered? Lt.-Col. Brown was also concerned that it could be argued that the grievor's responses to WO Remillard were provided by management's conduct that morning and, in fact, that is exactly what happened, counsel stated. WO Remillard's

persistence in the face of the overwhelming fact that the grievor never signed any of these documents, is harassment, plain and simple, and is provocative.

In the "dilemma" section in Lt.-Col. Brown's summary, Exhibit E-106, at page 5, item D, he notes:

> *Previous experience with Cléroux showed that he consistently refused to acknowledge receipt of letters.*

Counsel stated that he does not intend to present any law on the absences without permission, that is, the first three incidents, nor on the insubordination issue, event 6 in Exhibit E-106. The reason for this is that we have been through this earlier in the other suspensions, when law was supplied and the same principles apply, counsel added.

Throughout these proceedings we have covered the issue of performance and management's implementation of revised procedures. In Exhibit E-93 management states that the grievor's working relations with coworkers and contractors deteriorated dramatically. There is no question, when you listen to the evidence of Mr. Heil, Mr. Boucher, Mr. Healy and Mr. Charron, that there was a very negative atmosphere in the contracts section in the period 1992 to 1994. These witnesses attributed the cause of this atmosphere to a number of specific problems but they consistently referred to the relations between management and the grievor as being the primary factor. Counsel does not dispute that Mr. Boucher advised us that: "I feel management was dogging Mr. Cléroux". Counsel submits that management was "way over the top" in its treatment of the grievor and that led to a very poisonous atmosphere. Counsel believes the changes in procedures were not well received by a number of employees and that that led to a negative atmosphere. We are not just talking about the grievor but about Mr. Heil, Mr. Boucher and Mr. Rochon. Management throughout would have us believe that morale in the contracts section was just about as rosy as you can get. They brought in program changes which increased efficiency and performance and all the employees were overjoyed to have this happen. But morale was not at an all-time high. Morale was low: the grievor said so, Mr. Healy said so, Mr. Boucher said so, Mr. Heil said so, and Mr. Charron said everybody was just about ready to quit.

The other allegation made by management with respect to the grievor's performance is that he had managed to lose the trust and angered various contractors working with the contracts section. We have been told that the relationship between the contractor and inspector is of the utmost importance. We have been told the grievor had problems with contractors. Mr. Bois told us that two or three complaints from contractors, that they preferred not to work with the grievor, had been received by him. We were told that Volcano International had expressed an extreme distress by the grievor's conduct. Counsel stated that there is not one shred of evidence before me, not one letter or memorandum, specifying any difficulty had by any contractor with the grievor. The only thing the employer advanced was the Volcano letter and we heard that it was requested by WO Remillard; he actually requested it to have it on file. But Mr. Raymond Fauteux told us that he knew of no complaints against the grievor, that there was an issue of trust involving the grievor, and added that the difficulty expressed lay in part with the contracts people and in part with his own company. This contractor complaint notion is pure fabrication. It is an unsupported smear made by the employer against the grievor and the employer had the audacity to put it in a performance evaluation. An extremely positive performance evaluation existed prior to the fall out of the grievor with Mr. Power, described by the grievor to repose on his refusal to sign a document relating to some work that had been done in his absence, during a strike, when the grievor saw no evidence of the work having been done. It is of note that the first poor performance appraisal was rendered in the presence of Messrs. Locke and Power at precisely the time of the changeover to the new guard.

We were told that when Messrs. Bois and Locke took charge they affected a whole lot of technological changes. The more impressive was the increased accessibility of cell phones and computers to increase efficiency. It is quite clear from employees called to testify that not everybody had a cell phone. In fact, few people had. Mr. Charron testified that the computers came in around 1994-1995. Mr. Heil and Mr. Boucher told us that they were not permitted to receive training for the computers. The fact that computers may have been available, they were not available to some employees and could not, therefore, have increased their efficiency.

Counsel next addressed the discipline meted out to the grievor, firstly, with respect to the indefinite suspension. He submits this indefinite suspension is invalid. Lt.-Col. Brown testified that he made a recommendation to Col. Findley for the grievor's termination. He also recommended that the grievor be suspended until a decision on termination was made by Air Command. We heard that Col. Findley was not prepared to suspend the grievor immediately and that he was waiting for a green light from Air Command to terminate, at which time he would then suspend the grievor. Lt.-Col. Brown indicated that the "green light" came on May 10, 1994. Accordingly, Col. Findley directed that Exhibit E-113 be prepared and delivered to the grievor. In the second paragraph of Exhibit E-113, Col. Findley indicated that while it was previously decided to allow the grievor to continue working until the Commander's decision was made, the grievor's continued unsatisfactory behaviour and disruption to the workplace has caused the grievor to become a gross administrative burden. Col. Findley stated in Exhibit E-113 that he was left with no choice but to suspend the grievor without pay effective on receipt of this notice. The important thing here, counsel stated, is that Col. Findley is citing additional misconduct as being the reason for the suspension when in fact Lt.-Co. Brown told this hearing he was simply waiting to get an indication from Air Command as to its intention. There was no new misconduct and, therefore, there was no right to suspend, counsel argued.

Counsel argued that the grievor had a substantive right as an employee, a basic and fundamental right, to union representation which exists with the collective agreement. He cited in support of his position the decision in Evans (Board file 166-2-25641). He acknowledged that the grievor did not have the support and representation of his union in his grievances, which involved only disciplinary action and not the interpretation or application of the collective agreement.

Counsel also cited in support the decision in MacMillan Bathurst Inc. (Rexdale Plant) and Canadian Paperworkers Union, Local 1497 29 L.A.C. (4th) 415. Cited also were three recent articles in the Labour Arbitration Yearbook 1993 (Lancaster House) which show that representation rights are viewed as substantive and not merely procedural. A breach of such a right will, therefore, bring about a voiding *ab initio* of any disciplinary sanction imposed. This would be so in regard to the indefinite suspension: the grievor was called out of a meeting to Lt.-Col. Brown's office where

Capt. Perrault and Major Fortin were present and the letter of indefinite suspension was handed to the grievor by Major Fortin. Counsel added that his argument with regard to failure to allow union representation has to do only with the grievor's indefinite suspension.

Counsel turned to the grievor's termination. He analyzed Exhibit E-111, which is Lt.-Col. Brown's recommendation to Col. Findley that the grievor be terminated and Col. Findley's own recommendations to Air Command to terminate the grievor's employment. He argued that because Exhibit E-111 was based principally on Lt.-Col. Brown's notes or summary, Exhibit E-106, which Lt.-Col. Brown acknowledged was incomplete and contained inaccuracies, Air Command's decision to terminate was, as a result, itself tainted.

Again, with regard to the grievor's termination, Lt.-Col. Brown's conduct of the disciplinary hearing on March 15, 1994 violated two of the most fundamental principles of fairness and natural justice, counsel asserted. The first of these principles was the requirement that he remain unbiased. However, Lt.-Col. Brown testified that he had taken into account the grievor's previous misconduct in assessing the grievor's evidence given during the hearings surrounding the culminating incidents. He communicated in an indirect fashion with witnesses prior to their giving testimony and this in reference to his notes about Mr. Healy's ability to stay the course (Exhibit E-133). He testified that he had directed the note to Major Fortin and he suspected that Major Fortin had discussions with Mr. Healy. The other fundamental principle that Lt.-Col. Brown violated, counsel argued, is the *audi alteram partem* rule because, after hearing the grievor at his disciplinary hearing on March 15, 1994, Lt.-Col. Brown, upon his own admission, continued his investigation and gathered further information and provisions, thus preventing the grievor from knowing all the evidence and an opportunity to reply to this new information.

These fundamental breaches committed by Lt.-Col. Brown, counsel submitted, are such as to render his decision invalid and, as the information and the conclusions on the events in Exhibit E-106 are clearly the basis for Air Command's consideration of the culminating incident leading to termination, "the whole process breaks down".

Counsel referred in support of his position to Canadian Labour Arbitration, by Brown and Beatty, under the heading "discipline" at paragraph 7:0000 and following and the footnote reference to Wellington County Board of Education (1979) 24 L.A.C. (2d) 431 and Nicholson and Haldemand - Norfolf Regional Board of Commissioners of Police (1978) 88 DLR (3d) 671, 78 CLLC 14, 181 (SCC). Counsel distinguished the decision in Skibicki (supra).

Counsel stated that the relief sought in this case by the grievor is his salary from the date of his suspension to the date of my decision and, if I have authority to do so, interest, as well as the removal of all references to discipline and investigations concerning the grievor from his file. Counsel is not asking for reinstatement but rather damages in lieu thereof.

Rebuttal Argument for the Employer

Counsel for the employer addressed, firstly, the issue of corroboration concerning the incidents of February 23 and 24, 1994 and March 8, 1994. Mr. Bois, WO Remillard and Mr. Gaulin gave testimony at this hearing and before Lt.-Col. Brown which was, counsel submits, credible, forthright, and consistent. The simple fact of corroborating evidence is absolutely no basis for counsel for the grievor's allegations of coercion. In contrast, we have the grievor's statements at the disciplinary hearing which directly contradicted every other witnesses' statements and which were vague. When the grievor testified at this hearing his evidence, again, was totally contradictory to what he had said at the disciplinary hearing. Counsel submits that that is where the serious question of credibility arises in this case.

Counsel stated that, with respect to the morning of February 23, 1994, WO Remillard testified that he felt it strange to see the grievor leaving 12 Hangar because all his work was in 12 Hangar, on the third floor. With respect to the word "Canex" written on the locator board, the grievor had simply denied having written that word on the board. Lt.-Col. Brown saw this as one piece of evidence that the grievor had left 12 Hangar. There was the evidence before him of WO Remillard that he had seen the grievor leave 12 Hangar and Mr. Bois saw him return to contracts. After accepting this evidence and the grievor’s denial that he had left 12 Hangar, the word "Canex" became irrelevant to Lt.-Col. Brown and he made findings of credibility

and concluded that the grievor was absent without permission. He had simply failed to let his supervisors know of his whereabouts in spite of very clear office procedures.

It is submitted that counsel for the grievor exaggerated the coincidence that Mr. Bois "was right there with the clock in front of him". Mr. Bois had just been telephoned by WO Remillard and simply noted the time of return.

The grievor presented evidence at this hearing that he covered floors one, two and three of 12 Hangar. This is evidence which was never presented before this hearing. The grievor's counsel suggested that no one can say he did not do that. That is exactly what the employer is saying. This is a clear issue of credibility. It was not raised before and it is the employer's position that it is self-serving and recently fabricated. Both WO Remillard and MWO Locke testified that the utilities needed for this installation were indicated on blueprints and were all located in the pipe-chase. They both questioned any need to be in the hangar area. The grievor also made very definitive statements about having to break out the ceiling of the second floor washroom and said that it would require repairs. He also made very definitive statements about what was or was not in the pipe-chase. Counsel submits that the grievor could not have been in those areas, the second floor washroom or checking the pipe-chase, because his explanations of what he saw and what he would have to do based on what he saw are false. Furthermore, it was not an issue of expertise. The only explanation that the grievor gave in respect of the pipe-chase was that it was packed and he could not get in. Exhibits E-126, E-127 and E-129 quite specifically, as well as WO Remillard's testimony concerning what was in the pipe-chase, establish that the grievor's statement was false.

Counsel stated that there has been no evidence advanced that any drawings of the eyewash installation system were made by the grievor and no evidence of any quotes for the work to be done received by management or the grievor.

Counsel met the grievor's counsel's speculation that it was possible that the grievor's camera and tape measure were in the overcoat he was wearing by stating that it was also possible that they were not. No evidence to that effect was advanced by the grievor. Counsel for the grievor's suggestion is mere speculation.

Counsel stated that the whole reference to the coat issue goes to credibility. The evidence at the disciplinary hearing demonstrated that the grievor left the office with his coat on and returned with his coat on at particular times. At the disciplinary hearing, the grievor directly contradicted this information and presented different testimony before me at this hearing. Based on the evidence Lt.-Col. Brown received at the disciplinary hearing, his findings of misconduct on the balance of probabilities cannot be questioned. The new evidence presented at this hearing was simply not provided to Lt.-Col. Brown for consideration and, in any event, as counsel has indicated earlier, even if I were to accept the grievor's recent evidence, misconduct remains.

Again, there was no inconsistency in the evidence which WO Remillard advanced at this hearing that he had checked the hall and washroom on the third floor when looking for the grievor and the evidence he gave to Lt.-Col. Brown during the disciplinary hearing. His testimony was consistent.

Mr. Bois' evidence concerning looking at the clock or his watch was given in the context of what was occurring on those two days, February 23 and 24, 1994. The grievor was absent from the office with no indication of his whereabouts. Management was entitled to know where he was and had given instructions as to what procedures to follow. The grievor refused to do so.

In respect of the evidence concerning the absence from 12:30 to 1:00 p.m. on February 23, 1994, what the grievor had advised Lt.-Col. Brown was that he was either at his workstation, his cubicle or the work site on the third floor. He also indicated that he had returned by 12:30 p.m. Counsel submits that this becomes another issue of credibility. The grievor heard the evidence of his supervisors at the disciplinary hearing. He heard that they saw him come back at 1:00 p.m., wearing his coat and boots, and he heard WO Remillard say that he had checked the two areas where the grievor said he was. The grievor had every opportunity to state his case and he simply preferred to give contradictory testimony.

With respect to the incident of February 24, 1994, Lt.-Col. Brown testified that he considered the timing he received for the grievor's whereabouts and he properly considered those timings, attempted to verify them, and reached his conclusions on a

balance of probabilities. He indicated that he had a precise time from WO Remillard and that the time provided from accounts was an estimate. The bottom line was that the grievor had told him he was back at 9:40 a.m. Again, there was a clear contradiction. Lt.-Col. Brown did not rely on this timing discrepancy. He checked it out and properly reached an informed conclusion.

With respect to the incident of March 8, 1994, Lt.-Col. Brown indicated that he had been given statements, that he was familiar with Exhibit E-91, and that the evidence WO Remillard presented at the disciplinary hearing was in accord with Exhibit E-91 and in that statement he made reference to both his attempt to deliver the Notice of Investigation and the statement made by the grievor to the effect: "You guys are in deep shit". Lt.-Col. Brown testified that he had this evidence before him in 1994. Lt.-Col. Brown also testified as to the evidence of all the witnesses presented to him at the disciplinary hearing. The grievor heard the evidence presented by the various witnesses both at the disciplinary hearing and at this hearing. He heard also Lt.-Col. Brown reiterate the evidence he received in 1994. At no time did the grievor contradict Lt.-Col. Brown's evidence and say: "No, they didn't say that at the disciplinary hearing". Counsel submits that the grievor had every opportunity to do so if he disagreed with Lt.-Col. Brown's reference to the evidence given at the disciplinary hearing. With respect to the comment "You guys are in deep shit", again, the grievor admitted saying that at the disciplinary hearing. It has now become a different statement, as it was not presented to Lt.-Col. Brown. When the grievor said at the disciplinary hearing that he was referring to a contractor, he did not explain it. Yet, there was quite an explanation presented during this hearing.

With respect to Lt.-Col. Brown's summary, Exhibit E-106, counsel would take issue with the allegations that it was a summary prepared to support an employee's termination. Lt.-Col. Brown simply made the note summary in pursuing the evidence presented at the disciplinary hearing and was then called upon to reach conclusions. Lt.-Col. Brown did not agree that it was full of omissions and inaccuracies.

With respect to alleged photocopying by Mr. St-Denis, this was not put to WO Remillard in cross-examination, which it should have been. In any event, there is absolutely no evidence of any bad faith. The grievor failed to call Mr. St-Denis as a

witness and, in any event, this is irrelevant to whether the grievor misconducted himself on March 8, 1994.

With respect to the dilemma outlined at page 5 of Exhibit E-106, Lt.-Col. Brown did not testify that these were concerns but rather that they were issues that had to be considered and after considering them, he reached his conclusions: one being that it was reasonable to deliver such documents in confidence, that the grievor's behaviour supported that conclusion, and, secondly, with respect to the issue of provocation, after deliberating on the issue, found no evidence that WO Remillard had in any way been rude in requesting the grievor to enter the office and, accordingly, any finding of provocation was not warranted, in the circumstances.

Counsel submits that WO Remillard's two questions or requests that the grievor accompany him into the office do not constitute persistence, were not provocative, and simply did not warrant the grievor's laughing, mocking tone. His statement "Stop bugging me" and his later statement "You guys are in deep shit" must be considered by me in rendering my decision, counsel suggested. The grievor was disrespectful, made inappropriate comments, and refused a legitimate request.

Evidence concerning reporting procedures in the office demonstrate no revision, as suggested by counsel for the grievor. What changed was in the area of customer service and equipment, as noted by the evidence of Mr. Healy and Mr. Charron. The reference to negative attitude must be viewed in the context in which it was given. Mr. Healy and Mr. Charron both referred to the grievor and Mr. Rochon and they indicated that was discussed at the Highland's Golf Course meeting. Mr. Heil's evidence to the contrary must be seriously questioned in light of counsel's earlier submission concerning his credibility, counsel submits. It was inappropriate to generalize that witnesses Messrs. Healy, Charron, Boucher and Heil attributed the cause of the atmosphere to a number of specific problems or that they consistently referred to the relationship between management and the grievor as being a primary factor. Mr. Healy and Mr. Charron made reference to the attitudes of the grievor and Mr. Rochon. Counsel submits that Mr. Healy, Mr. Boucher, like Mr. Cléroux, the grievor, and Mr. Rochon did not like to follow rules.

Mr. Gaulin was quite straightforward in indicating that the grievor was given assignments in writing because of his performance and his request to have almost everything in writing and counsel makes that comment in reference to Mr. Boucher's evidence concerning instructions by Mr. Gaulin to the grievor.

With reference to Volcano Construction and Exhibit E-95, counsel referred to performance problems of the grievor and this was testified to by WO Remillard. The grievor called Mr. Raymond Fauteux as a witness. Mr. Fauteux did not write the letter the employer had received from Volcano, was not at any meeting between the company and the employer, and was not aware of the grievor's responsibility in terms of providing follow-up and feedback to the company. Accordingly, his evidence has no relevance in the situation.

Counsel for the grievor has stated that he was not going to address the question of union representation other than to say it has absolutely no relevance to the letter of termination.

With respect to Lt.-Col. Brown's reference to EAP in Exhibit E-111, this practice has been recognized in numerous adjudication decisions.

With respect to the enclosures sent to Air Command, it must be said, counsel submits, that Lt.-Col. Brown heard the evidence, reached a conclusion, and made a recommendation. What Lt.-Col. Brown received as evidence at the disciplinary hearing was that the grievor contradicted the evidence of the other witnesses. That was the bottom line. A finding of misconduct on a balance of probabilities was reasonable, counsel submits. Lt.-Col. Brown also testified that he considered the evidence, assessed issues of credibility and had to reach conclusions on those issues of veracity and credibility. In that light, counsel submits, he properly considered the evidence, provided the grievor with an opportunity to be heard, and provided him an opportunity to be aware of the allegations and the evidence. While Lt.-Col. Brown made reference to previous experience with the grievor, he did not state that he took into account the grievor's previous misconduct. Lt.-Col. Brown considered the direct contradictions between the evidence of the grievor and other witnesses and properly reviewed the information before him. He had every right to clarify issues. He brought issues to the grievor's attention and asked for explanations. In any event, the conduct

of the disciplinary hearing must be viewed in the context of this hearing before me, counsel submits. Lt.-Col. Brown's evidence demonstrates what was presented to him in 1994 and counsel asked that I compare it to the evidence presented at this hearing in assessing credibility. This hearing, however, is not meant to be a general review of Lt.-Col. Brown's disciplinary hearing. The cases referred to by counsel for the grievor, particularly the Nicholson (supra) decision, dealt with a judicial review application of a finding of a Board of Commissioners, the equivalent of a judicial reference to the Federal Court of Canada of an adjudication decision rendered by an adjudicator under the *Public Service Staff Relations Act*. Again, any procedural unfairness which may have occurred, and counsel strenuously argues that there were none, were in any event cured by this hearing before me. Counsel referred to the decision in Tipple (Federal Court of Canada A-66-85) in support of her position. This same view is reiterated in the McIntyre decision (Board file 166-2-25417). In any event, the principle of a*udi alteram partem* was met in this case. The grievor was given the opportunity to hear the evidence and be heard. Unlike in Skibicki (supra), the grievor here spoke up but provided contradictory information and now provides different information at this hearing. If the evidence provided by the grievor at this hearing is accepted, then he was making a mockery of the discipline and grievance procedures by providing false and inaccurate information. This pattern began not at the disciplinary hearing on March 15, 1994 but as early as his seven-day suspension and continued through these proceedings.

Counsel referred to the decision in Dahl (Board file 166-2-25535) and in Puxley (Board file 166-2-22284) in support of her position that the awarding of interest was not within the jurisdiction of an adjudicator under the Act.

Counsel submits that with respect to the corrective action sought by the grievor, if I find misconduct occurred and that the employer has established a basis for termination then there is no legal basis to award any monetary compensation. It is only if I find the termination not to be an appropriate penalty that a monetary award can be made. Counsel submits, however, that there is no basis to interfere with the termination. It was within the range of parameters opened to the employer and was not arbitrary. Furthermore, on the question of monetary compensation, counsel submits that the amount requested by the grievor is inordinately high and simply not warranted in this case. Counsel asked, in that connection, that I take into account the

grievor's length of service, that is, from 1987 to 1994 - he is not a long-service employee - his performance, which constitutes an aggravating factor, and his lack of credibility, honesty, and remorse. There also has been no accounting for any possible earnings by the grievor since he was terminated.

Reasons for Decision

These reasons relate specifically to the grievances against indefinite suspension and termination. The other grievances dealt with in this hearing are the subject of six previous “Reasons for Decision” in this decision.

With regard to the incident involving the grievor's alleged absence from his workstation from 10:20 to 10:40 a.m. on February 23, 1994, his supervisor, WO Remillard, observed the grievor leaving 12 Hangar at 10:15 a.m. and the contracts officer, Mr. Bois, observed him returning to the contracts section in 12 Hangar at 10:40 a.m., wearing his winter overcoat and boots. During a meeting the next day with Messrs. Remillard, Bois and Loranger, his supervisors, the grievor had explained that he had simply missed his coffee break and had taken it from 10:20 to 10:40 a.m. When reminded that his coffee break time was from 9:30 to 9:40 a.m., the grievor had replied: "Jesus Christ, I just went for coffee". The incident became the subject of a disciplinary hearing held by Lt.-Col. Brown on March 15, 1994. Lt.-Col. Brown testified that the grievor's affirmation that he was at coffee break during the period 10:20 to 10:40 a.m. was testified to by Mr. Bois at the disciplinary hearing. He was told that the grievor had explained his absence by saying: "Jesus Christ, I just went for coffee". Lt.-Col. Brown thus expected to have the grievor tell him that he had just gone to coffee and that was why he was not at his workstation. But, to the contrary, the grievor denied that he was absent from his workstation during the period in question and denied having used the words ascribed to him to explain any absence. In light of all the evidence before him, Lt.-Col. Brown concluded that the grievor was absent from 10:20 to 10:40 a.m. without permission and had thus misconducted himself.

The grievor testified at this hearing that on the morning of February 23, 1994, he informed his supervisor, WO Remillard, that he was going to take his coffee break at 9:30 a.m., his scheduled hour for this break, and left in his own vehicle to go to Canex in 8 Building, where he picked up a cup of coffee and returned to 12 Hangar at

9:40 a.m. and went immediately to the eyewash system installation, starting, however, on the first floor of 12 Hangar, examining there the possibility of installing a drain that would drain the area of the eyewash system on the hangar side of the building. It was a cold area where aircraft are cleaned, repaired, and painted. He was on the first floor for about 20 minutes and from there went to the second floor to examine that area for the needed utilities: water pipes, sewer-pipes and vents to hook up to. At one point, he went outside to his vehicle to get a Polaroid camera and a measuring tape to use in his investigation. He then went from the second floor to the third floor washroom where he again looked at the job site and then went back to the contracts office.

The grievor claimed that at the "Welcome Back" meeting on February 24, 1994, with Messrs. Remillard, Bois and Loranger, when asked where he had been between 10:20 and 10:40 a.m. on February 23, he had replied that he had been working on the eyewash system. He denied saying to anyone at the meeting: "Jesus Christ, I just went for coffee". In cross-examination, he admitted that he had not told Lt.-Col. Brown at his disciplinary hearing that he had left the building to go to his vehicle to pick up some equipment. He added: "At that point it didn't matter what I told Lt.-Col. Brown. His mind had been made up. I don't recall telling Lt.-Col. Brown that I had left the building".

Counsel for the employer pointed to the fact that this incident occurred on the grievor's first day back from serving a 20-day suspension. Counsel stated that the grievor's explanation at this hearing directly contradicts the explanation he gave at his disciplinary hearing before Lt.-Col. Brown in March 1994. She argued that the grievor's evidence at this hearing is self-serving and must be seriously questioned on the issue of credibility. What makes sense and is reasonable must be accepted. What would be reasonable is that the grievor would have offered the explanation provided at this hearing in March 1994, if it were true. The grievor admittedly presented false information at his disciplinary hearing and different evidence at this hearing. This has been the theme for him as early as the seven-day suspension disciplinary hearing in January 1993. The grievor is simply looking for an excuse to present self-serving evidence at this stage and it is too late. He should not be permitted to benefit from playing games with the employer. The grievor's alleged wandering around 12 Hangar for approximately one hour in the morning of February 23, 1994, looking for utilities

to be used in the eyewash system installation, is simply not credible, in light of all the evidence with regard to the proximity of these utilities in the pipe-chase on the third floor.

In the Skibicki (supra) decision, the adjudicator maintained the three-day suspension meted out to the grievor even though the facts advanced by the grievor were sufficient to explain his alleged absence from work. The grievor, in that case, admitted in testimony that at his earlier disciplinary hearing he had at his disposal all of the facts which he placed in evidence before the adjudicator. He had chosen, however, to withhold those facts from the employer because he was angry at his supervisor. The adjudicator found that he had acted vindictively in withholding the facts from the employer and could not benefit from this at adjudication. The adjudicator held:

> *To permit the grievor to come away unscathed after what he had done would be to reward his action ... that would be intolerable, it could have the effect of bringing the whole of the grievance and adjudication process into disrepute and making it an object of ridicule ... Accordingly, I have decided that the grievor ought not to be permitted to obtain any benefit at adjudication from an information which was in his possession on 6 December 1989 (the date of the disciplinary hearing) but which he chose to withhold from the employer.*

I adopt entirely the adjudicator's decision in Skibicki (supra) and find that the grievor must be kept to the position he took at the disciplinary hearing before Lt.-Col. Brown. At that hearing, he maintained that he had not gone for coffee and had been investigating the eyewash system. This position runs contrary to his earlier affirmation to Messrs. Remillard, Bois and Loranger that "... I just went for coffee" and cannot be believed, I find, the more so because his investigation of the eyewash system did not follow conventional lines and failed to take into account existing blueprints of the utilities in 12 Hangar, which was a very important and, seemingly, mandatory starting point. So much so that, had he looked at these blueprints at the start, he would have been immediately informed of the proximity of the existing drain and water pipes to which could have been connected the eyewash installation. The grievor did not attempt to refute his supervisor's contention that the grievor's account of his investigation made no sense in contemplating breaking into ceilings and walls, requiring later repairs, to provide for a drain pipe and clean-out. The grievor's failure

to discover the needed utilities in the pipe-chase and his statement that the pipe-chase was too crowded and could not be easily accessed runs contrary to the evidence advanced at this hearing and supported by photographs of the pipe-chase and existing utilities, filed as exhibits.

Accordingly, I find that the grievor misconducted himself by being absent from his workplace without permission between 10:20 and 10:40 a.m. on February 23, 1994.

On the same day, February 23, 1994, the grievor is alleged to have once again been absent from his workstation without permission and this from 12:30 to 1:00 p.m. At 12:40 p.m., the grievor was noticed absent by his supervisors. WO Remillard went looking for him in the men's bathroom on the third floor where the eyewash system was to be installed but could not find him there. At 1:00 p.m. he was seen returning to his workstation with his winter overcoat and boots on. The grievor had been seen leaving for his lunch break with his winter overcoat on at 11:55 a.m.

The grievor told Lt.-Col. Brown at his disciplinary hearing that he had gone for lunch from 12:00 to 12:30 p.m. and that during the period 12:30 to 1:00 p.m. he was either at his workstation or at the work site where the installation of the eyewash system was to be installed. Lt.-Col. Brown concluded that, again, as in the first incident earlier on the same day, February 23, 1994, the story advanced by the grievor contradicted that of the supervisors, Messrs. Remillard, Bois and Loranger. None of these had seen the grievor in the area of his workstation between 12:30 and 1:00 p.m. and Lt.-Col. Brown concluded that it was unrealistic for the grievor to have wandered throughout 12 Hangar for one-half hour with his winter coat and boots on, investigating the eyewash system installation. He concluded that the grievor had misconducted himself by being absent without permission between 12:30 and 1:00 p.m. on February 23, 1994.

The grievor testified that on February 23, 1994, he had left for Canex to have lunch. His lunch period was from 12:00 to 12:30 p.m. He returned to 12 Hangar and went directly to the second floor and then to the third floor. This was the second time he had done this, looking for electrical conduits which could be used. He had worked

up to the contracts office by about 1:00 p.m. and went to his desk to carry on routine work.

Counsel for the employer argued that it is simply not believable that the grievor wandered around 12 Hangar a second time that day, February 23, 1994, looking for utilities to be used for the eyewash systems installation. That he went through these same motions for another half-hour after spending, as he claims, one hour doing so earlier in the morning is just not credible and is unbelievable, counsel argued. The grievor's explanation suggests that he wandered around this heated building for one hour and a half that day with his winter coat and boots on. Furthermore, the grievor had failed to inform his supervisors of his whereabouts.

In this second incident, the grievor maintained at this hearing his stance at the disciplinary hearing to a large extent by reiterating that he had returned to work at the end of his lunch period at 12:30 p.m. He added details to what he was doing during the half-hour between 12:30 and 1:00 p.m. but did not change his explanation of his whereabouts essentially. The problem here is, again, one of credibility. The grievor maintains his story of going through 12 Hangar looking for utilities needed for the eyewash system when all of these utilities were available in the proximity of where the eyewash system was to be installed. As I have found in the first incident involving the grievor that day, his explanation is not credible and cannot be believed. There is no evidence that he actually looked in the pipe-chase on the third and second floors, which it is expected he would do if he were conducting a sensible search for the needed utilities. Nor did he look at the existing and available blueprints which would have been a natural starting point and which would have shown the needed utilities available nearby. Continuing to wear his winter overcoat and boots in the heated 12 Hangar does not make sense and is incredible. It points towards his continued absence outside 12 Hangar until his return to his workstation at 1:00 p.m., I find.

Accordingly, I find also that the grievor was absent without permission from 12:30 to 1:00 p.m. on February 23, 1994.

On February 24, 1994, WO Remillard was told by the grievor at 9:27 a.m. that he would be leaving for coffee. WO Remillard observed the grievor and another inspector, Mr. Jooste, entering 12 Hangar at 10:09 a.m. Later on that day, he had gone

to the grievor's cubicle to deliver a Notice of Investigation involving alleged misconduct by the grievor on the previous day when he absented himself without permission on two separate occasions. He had attempted getting the grievor's signature on the document acknowledging receipt but the grievor had refused, saying "I don't sign nothing", which was the grievor's normal reaction when requested to acknowledge receipt of a document.

Mr. Bois testified that he had seen the grievor entering the contracts office with his winter coat and boots on at 10:10 a.m. on February 24, 1994. He had not seen the grievor in the contracts office between 9:40 and 10:10 a.m. The grievor was not in the contracts office during that period, the witness added in cross-examination.

At his preliminary hearing on March 15, 1994, Lt.-Col. Brown heard from MWO Loranger that the grievor had told him at approximately 9:30 a.m. that he was leaving for coffee with Mr. Jooste. WO Remillard stated that he had observed the grievor entering 12 Hangar with Mr. Jooste at about 10:09 a.m. Mr. Bois testified that he had seen the grievor returning to the contracts office at 10:10 a.m. MWO Loranger had verified that the grievor had attended on Ms. Bélanger in the accounts office, next to the contracts office, at a time around 10:05 and 10:10 a.m.

The grievor stated at that disciplinary hearing that he had gone to Canex for coffee with Mr. Jooste at 9:30 a.m. and had returned to 12 Hangar at 9:40 a.m. He had offered no further explanation. Mr. Jooste was of less assistance at that hearing, stating that he could not remember even having gone to coffee at Canex that morning, even though reminded that he had been reprimanded by his own supervisor for arriving late from coffee break that morning. Mr. Béland, Mr. Jooste's supervisor, testified that he had reprimanded Mr. Jooste for being absent that morning from 9:40 to 10:10 a.m. Mr. Jooste had told Mr. Béland that he had been at Canex with the grievor taking coffee and that on the way back they had stopped to look at the roof of 1 Hangar. Mr. Béland did not believe Mr. Jooste because there had been a heavy snowfall that day and one would hardly inspect a roof on a day when it had snowed. Again, Mr. Jooste had no projects which involved the roof of 1 Hangar.

Lt.-Col. Brown once again was faced with conflicting stories. From the evidence before him, he concluded that Mr. Jooste and the grievor were gone from the office

from approximately 9:30 to 10:10 a.m. without permission and that, accordingly, misconduct had occurred.

Counsel for the employer argued that the grievor's explanation to Lt.-Col. Brown was not credible and, even if his stories about stopping at 1 Hangar and being stopped by a military defence force are accepted by me, misconduct remains in this case because the grievor once again failed to keep his supervisors informed of his whereabouts.

Counsel for the grievor attempted to place some importance on the discrepancy between the exact time of the grievor's return to the contracts office as testified to by the employer's witnesses: one had that exact time at 10:05 a.m. and another had the exact time to be 10:10 a.m.

At his hearing, the grievor testified that on February 24, 1994 he had received a call from Ms. Lise Bélanger in the accounts office near the contracts office on the third floor of 12 Hangar, asking him to pass by and see her in connection with a leave application. He then left for coffee at 9:30 a.m. with Mr. Jooste, another inspector, driving his own vehicle to Canex, where they each picked up a cup of coffee. Mr. Jooste had asked him to help him inspect the roof of 1 Hangar. It was snowing at the time and so the roof was hard to see. They took about 10 minutes to look at the roof. They then drove back to 12 Hangar but were stopped by a military police group conducting a defense exercise and were asked questions about where they were coming from and going to. They arrived back at 12 Hangar at about 9:50 or 9:55 a.m. They then took the elevator to the third floor and parted, Mr. Jooste going one way and the grievor going the other way to Ms. Bélanger's office, where he spent from five to 10 minutes.

The Skibicki (supra) decision applies here again, I find. The grievor advanced the story before the disciplinary hearing that he had not been absent from work past 9:40 a.m. At this hearing he admits to have returned to 12 Hangar at about 9:50-9:55 a.m. and elaborates a detailed explanation of why this was so. A story he had not advanced at his disciplinary hearing, at which Lt.-Col. Brown came to a conclusion of misconduct based on the facts before him and the grievor's statement that he had in fact been back at work at 9:40 a.m. The grievor cannot profit from

hiding this information from his employer, which, even if true, I cannot accept. The grievor's version of what took place between 9:40 and 9:55 a.m. is simply not acceptable as evidence of what really happened during that period. His companion during this period could not even remember that he had gone to coffee with the grievor although he, apparently, did admit that he had to his own supervisor, Mr. Béland.

I find that the grievor was in fact absent from work without permission from 9:40 to 10:10 a.m. on February 24, 1994 and, accordingly, misconducted himself on that occasion.

As regards the fourth incident of alleged misconduct on March 8, 1994, the grievor is alleged to have refused to follow instructions, was disrespectful to his supervisor, WO Remillard, and made intimidating comments. The circumstances were that on that date the grievor was invited by WO Remillard into the contracts officer's office in order to hand him a Notice of Investigation. Sgt. Williamson accompanied WO Remillard as a witness. The grievor had said to WO Remillard: "If you have something to deliver to me, leave it on my desk". At that point, WO Remillard repeated his request. The grievor again responded the same way: "You have a letter or something to give me, leave it on my desk". He is said to have added the words "Stop bugging me", which the grievor denies having said. The grievor is alleged to have responded in a laughing, mocking way to his supervisor.

Sometime later that same day, the grievor is alleged to have said to Mr. Gaulin, when WO Remillard was within hearing distance: "You guys are in deep shit", or words to that effect. Mr. Gaulin and WO Remillard saw these words as being directed at themselves, management. The grievor testified that he was not referring to them or management but to subcontractors of a large construction firm which was going into bankruptcy.

Counsel for the employer argued that in refusing to go into the contracts office to receive the document, a Notice of Investigation, the grievor was ignoring a legitimate request from his supervisor and did so in a disrespectful manner. The grievor aggravated the situation by laughing and speaking in a mocking tone. "...just leave it on my desk" was the direction given by the grievor to his supervisor. Counsel

argued that this was not the approach of a person who meant no disrespect, as the grievor contends. The grievor's behaviour demonstrated disregard for management's authority and the attempt by WO Remillard to exercise that authority.

Counsel for the grievor discounted WO Remillard's contention that he was attempting to protect the privacy of the grievor by handing him the Notice of Investigation in private. Knowing the grievor's past history of refusing to sign acknowledgments of receipt of such documents, counsel argued that WO Remillard's insistence could be seen as provocative and the grievor acted as he did in face of this provocation. In addition, the grievor had testified that he did not intend to be disrespectful to his supervisor, WO Remillard. Counsel argued that I should accept the grievor's testimony that his comment was "Those guys" and not "You guys" are "in deep (or big) shit" and was directed not at management but at the subcontractors of the big construction firm which was going into bankruptcy and they could not hope to be paid what was owing to them.

With regard to the first incident on March 8, 1994, it has been established that the grievor refused a request of his supervisor to go into an office to receive a Notice of Investigation. This was normal practice when delivering such a document to an employee to ensure privacy to the employee. The grievor thus refused a legitimate request of his supervisor. In addition, however, he did so in a disrespectful manner. He does not absolutely deny having expressed his refusal in a laughing, mocking manner but explains that if he did so he did not intend to be disrespectful to his supervisor.

I find the grievor misconducted himself by refusing a legitimate request by his supervisor and doing so in a laughing, mocking manner. His comments later that day that someone was in "big" or "deep shit" could only have been directed at Mr. Gaulin and said loud enough to include his supervisor, WO Remillard, I find also. Mr. Gaulin testified that at the time he and the grievor were having a conversation which did not include discussion of R.J. Nichols construction company, which he knew nothing of, in any event. He could only understand the grievor's remarks as being directed at him and management in general. He had said in retort, in French, words to the effect: "You, Norm, are a real shit disturber".

Counsel for the employer argued that, having regard to the grievor's past disciplinary record, which included seven suspensions without pay of five, seven, 10, 10, 15 and 20 days over a 20-month period, together with numerous counselling sessions held with him, the employer was entitled to consider his misconduct of February 23 and 24 as culminating incidents which justified his termination. Progressive discipline principles were followed in escalating the penalties meted out to the grievor in an attempt to correct the grievor's behaviour. The grievor's disciplinary record demonstrates that he had no willingness to cooperate with the employer. Counsel pointed to the similarity of the incidents in which the grievor was involved and for which he was suspended without pay. Most of them related to absences without permission and the latest incidents of March 8, 1994 related to insubordination and disrespect. The essential nature of the grievor's misconduct relates to a persistent refusal to follow legitimate instructions. They demonstrate an escalation in insubordination and a flaunting of management's authority. Management has lost confidence in the grievor and can no longer trust the grievor to perform his duties as an inspector, which require him to work away from his workstation, unsupervised, and dealing on behalf of the employer on important matters involving large public expenditures.

Counsel argued that the culminating incidents of March 8, 1994 are sufficient, following progressive disciplinary principles, to warrant the grievor's termination. In the alternative, the grievor should not be reinstated in his position as inspector because the employer can no longer trust him; he has compromised his employment relationship.

Counsel for the grievor argued that the incidents of February 23 and 24, 1994, as well as the incidents of March 8, did not constitute misconduct on the part of the grievor and so could not be used as culminating incidents on which the employer could justify his termination. The grievor had been over-supervised and as a consequence harassed into reacting as he did in the poisonous atmosphere which existed in the contracts section. Additionally, the process by which he was judged by management, the disciplinary hearing of March 15, 1994, was fatally flawed in that it was not objective, was biased, and failed to follow the principles of *audi alteram partem*. Additionally, as regards the grievor's indefinite suspension, there was no evidence advanced at this hearing of any misconduct by the grievor after

March 8, 1994 and, accordingly, there was no basis for suspending the grievor indefinitely on May 10, 1994. Furthermore, the decision to suspend the grievor indefinitely was taken at a disciplinary meeting when the grievor was denied union representation.

With regard to the disciplinary hearing by Lt.-Col. Brown on March 15, 1994, I find that in that hearing all parties were given the opportunity to testify and to be heard. There was no violation of the principles of *audi alteram partem*, even if this was a necessary condition for the "hearing". This "hearing" was not a hearing in the sense of a judicial enquiry. It was simply an investigation by management to learn what it could of the facts surrounding incidents of alleged misconduct. Management in such "hearings" is not fettered by the ordinary rules governing judicial enquiries because the "hearing" need not even be held prior to management taking a decision on perceived wrongdoing by an employee. Of course, any decision to mete out a penalty to an employee is subject to being grieved and ultimately to be reviewed by third-party adjudication, where the principle of *audi alteram partem* has complete application. Any procedural unfairness that may have occurred was wholly cured by the hearing *de novo* before me: Tipple v. Canada (Treasury Board), Federal Court File No. A-66-85.

The grievor was indefinitely suspended on May 10, 1994 pending the decision on Lt.-Col. Brown's recommendation that his employment be terminated. The basis for this indefinite suspension, as set out in Col. Findley's letter to the grievor on May 10, 1994, was: "*While it was previously decided to allow you to continue working until...decision was made, your continued unsatisfactory behaviour and disruption to the workplace have caused you to become a gross administrative burden*". No evidence of the grievor's alleged continued unsatisfactory behaviour and disruption to the workplace after March 8, 1994 was advanced during this hearing. Accordingly, there is no basis for the grievor to have been indefinitely suspended on May 10, 1994 until his ultimate termination on June 28, 1994. The grievor is, therefore, entitled to be compensated for all wages and benefits lost between May 10, 1994 and June 28, 1994.

I have found the grievor to have misconducted himself on all four occasions cited in this decision, that is, on February 23 and 24, 1994 and March 8, 1994.

The principles of progressive discipline were followed throughout by Lt.-Col. Brown in assessing penalties against the grievor. He had commenced by assessing a five-day suspension without pay, followed by a seven-day suspension, two separate 10-day suspensions, a 15-day suspension, and then a 20-day suspension without pay. Lt.-Col. Brown, in recommending the discharge of the grievor for the four incidents of misconduct on February 23, 24 and on March 8, 1994, considered that these items of misconduct constituted culminating incidents. Because of his belief that no further discipline would have the effect of correcting the grievor's behaviour, which had become intolerable, and that he was beyond any possibility of rehabilitation, Lt.-Col. Brown considered that the grievor had irreparably ruptured the employee-employer relationship and called for his discharge.

In an earlier decision (Board file 166-2- 25037), I reduced a first suspension of five days without pay to a letter of reprimand. In this decision, for the reasons set out above, I reduced a seven-day suspension without pay to a one-day suspension, a 10-day suspension to a three-day suspension, a separate 10-day suspension to a three-day suspension, a subsequent 15-day suspension to a seven-day suspension, and a 20-day suspension to a suspension without pay of 10 days.

In the circumstances and following the principles of progressive discipline adopted by the employer, I find that the incidents of misconduct on February 23 and 24, 1994 and on March 8, 1994 do not constitute culminating incidents which would allow for the termination of the grievor. They attract rather a further suspension without pay of 15 days. Accordingly, the grievor's suspension and termination are set aside and a 15-day suspension without pay is substituted in their stead.

The grievor has, however, asked not to be reinstated in his position but asks instead to be compensated for all wages and benefits lost from the date of his termination to the date of my decision, together with damages, and interest, if available. With regard to interest, I must state that it is not within my jurisdiction to award interest against the Crown, unless stipulated in legislation, which is not the case here.

This hearing took place over the period April 1995 to August 1996, and involved the review of copious notes and 132 documents filed as exhibits, as well as hearing testimony from 53 witnesses. Because the grievor has not requested reinstatement, there is a need for me to assess an appropriate compensation for any wages and benefits he has lost.

The grievor was employed by the employer since 1987. While his performance throughout much of the following period prior to his termination was acknowledged as being "superior", it gradually deteriorated to a point where it was "unacceptable". In the circumstances, I find that a reasonable and adequate compensation for having been terminated as he was is that he be paid all lost wages and benefits for a period of 18 months starting from the date of his termination on June 28, 1994.

As requested, I remain seized of this matter should the parties express difficulty in applying my decision.

Thomas W. Brown,
Board Member

OTTAWA, April 23, 1997.