



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

YUSUF HABIB

Grievor

and

**TREASURY BOARD
(Veterans Affairs Canada)**

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Steve Waller, Counsel,
Association of Public Service Financial Administrators

For the Employer: Michel Paré

Heard at Kirkland Lake, Ontario,
March 18 to 21, 1996.

DECISION

Yusuf Habib, a Post-Audit Officer, FI-01 classification level, Ontario Regional Office (Finance), Veterans Affairs Canada, Kirkland Lake, Ontario is grieving a demotion which he alleges is without cause.

Mr. Habib grieves as follows:

I believe that I have been demoted without cause in contravention inter alia of Article 34, Clause 34.03, and Article 39., Clause 39.02 of the Financial Administration Group Collective Agreement; and Section 11.(2)(g) of the Financial Administration Act.

The letter of demotion dated April 27, 1995 from J.D. Nicholson, Deputy Minister, Charlottetown, P.E.I., reads:

This is to advise you that, in accordance with section 11(2)(g) of the Financial Administration Act, you are hereby demoted for cause to the position of Post Audit Clerk, CR-04. This demotion will be effective May 8, 1995.

The reason for this demotion is that you are unable to meet the requirements of your position, Post Audit Officer, FI-01. Specifically, your poor performance in applying policies and regulations and in supervising staff has caused the Department serious concern and has resulted in significant and extraordinary efforts to provide additional training and coaching to assist you in meeting performance expectations. In spite of these measures, you have failed to demonstrate a significant and sustained improvement. Your performance has deteriorated to a less than satisfactory level and has remained so for the last two review periods.

I am satisfied that you were fully informed of your performance expectations through the mutual setting of performance objectives. During regular coaching sessions and quarterly performance evaluations, you were informed that you were not meeting the requirements of the position. In the report of the Appraisal Review Committee dated August 8, 1994, and more specifically in a memorandum from the Regional Director Finance, dated December 13, 1994, you were informed of your deficiencies and the consequences of continued failure to meet the requirements. I am satisfied that you were provided with the opportunity to make the necessary adjustments to meet the requirements of your position. Through regular coaching sessions and at least 50 days of formal training since 1992, you have been provided with assistance to make this adjustment.

I have reached the conclusion that you are unable to perform the full range of duties of a Post Audit Officer and are not suitable for the position. Further, it is unlikely that any amount of additional training would overcome the identified deficiencies.

Details concerning the terms and conditions of your demotion are attached in a separate document provided to you by your Personnel Directorate. You may contact them directly for clarification.

Further, if you feel this decision is unwarranted, you are entitled to present a grievance in accordance with Section 91 of the Public Service Staff Relations Act.

Please sign and return the duplicate copy of this letter as an acknowledgement of its receipt.

Clause 34.03 of the collective agreement between the Treasury Board and the Association of Public Service Financial Administrators (APSFA) covering all employees in the financial administration group, Code: 304/90, reads:

34.03 When an employee is required to attend a meeting, the purpose of which is to render a disciplinary decision concerning him or her the employee is entitled to have, at his or her request, a representative of the Association attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.

Clause 39.02 of the same collective agreement reads:

39.02 Subject to and as provided in Section 90 of the Public Service Staff Relations Act, an employee who feels that he or she has been treated unjustly or considers himself or herself aggrieved by any action or lack of action by the Employer in matters other than those arising from the classification process is entitled to present a grievance in the manner prescribed in clause 39.05 except that,

(a) where there is another administrative procedure provided by or under any Act of Parliament to deal with the employee's specific complaint, such procedure must be followed,

and

(b) where the grievance relates to the interpretation or application of this Collective Agreement or an Arbitral Award, the employee is not entitled to present the

grievance unless the employee has the approval of and is represented by the Association.

Paragraph 11.(2)(g) and subsection 11.(4) of the Financial Administration Act (F.A.A.) read:

11.(2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,

(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;

11.(4) Disciplinary action against, and termination of employment or demotion of, any person pursuant to paragraph 2(f) or (g) shall be for cause.

The grievor is requesting the following corrective action:

I wish to be immediately reinstated to my position of Post Audit Officer (FI-01) with full back pay and benefits, retroactive to the close of business, May 8, 1995.

The authority of an adjudicator under the Public Service Staff Relations Act (PSSRA) to entertain grievances that relate to termination of employment or demotion as in the instant case, arises out of amendments to section 92 of the Public Service Staff Relations Act which came into force on June 1, 1993. At the same time, section 31 of the Public Service Employment Act was repealed. Subsection 92(1) of the PSSRA now reads:

92.(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to

(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,

(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),

(i) disciplinary action resulting in suspension or a financial penalty, or

(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or

(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,

and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.

Veterans Affairs Canada is a department specified in Part I of Schedule I to the PSSRA.

I am being asked to decide whether or not the employer's action was justified in the circumstances.

The hearing lasted four days with nine witnesses and one hundred and two exhibits being submitted into evidence.

A request for the exclusion of witnesses was made and granted.

SUMMARY OF EVIDENCE

Mr. Paré entered on consent the grievor's demotion letter, some organizational charts, a history of review periods for the grievor and a summary of training which Mr. Habib received as Exhibits E-1, E-2, E-3, and E-4 respectively.

1. Albert E. Smith was Chief, Accounting Operations in 1992 when the grievor, as an Accounting Officer (Exhibit E-5) reported to him. He said Mr. Habib had seven to

nine employees reporting to him and that "was a heavy portion of his work time". He noted that when the grievor arrived in Kirkland Lake he became a Supervisor for the first time as far as Mr. Smith knew. He rated his overall performance as satisfactory for the review period January 20, 1992 to September 9, 1992 (Exhibit E-6). Mr. Smith noted on this first Performance Review and Appraisal Report (PRAR), that, "Mr. Habib requires specific training to strengthen his communication and supervisory skills". He added that Mr. Habib took six training courses under Mr. Smith's supervision and that they met weekly, sometimes daily, for coaching sessions. He wrote work objectives for the grievor to December 31, 1992 on page 5, Exhibit E-6, but noted the grievor moved to Financial Planning and Analysis on September 8, 1992. Mr. Habib's duties were reduced upon his return to Accounting Operations in January 1993. He then had only four employees to supervise (Exhibit E-7).

In February 1993 Mr. Smith wrote a memorandum to Mr. Habib (Exhibit E-8) explaining that he wanted to help him achieve a fully satisfactory appraisal and pointing out some areas in which the grievor was experiencing difficulty, particularly "communication and interrelationship with other staff", based on Mr. Smith's observation that employees were not getting good communication from Mr. Habib. Mr. Smith noted on Exhibit E-10, the objectives he set for the grievor in April 1993, that the first one "to supervise, set priorities and objectives, organize and assign work, set standards and resolve operating problems" was important.

Mr. Smith testified in relation to a concern he expressed to Mr. Habib regarding a breach of what the witness called "the chain of command" (Exhibit E-11) regarding the sound level of a subordinate's radio that Mr. Habib dealt with directly and not with Mr. Smith first. The grievor's reply (Exhibit E-12) expressed his own concerns about the radio noise and how the issue was handled by Mr. Smith.

Mr. Smith identified another memorandum he sent to the grievor in July 1993 (Exhibit E-13) that criticized him for not demonstrating "how to lead by example to your staff" regarding the total values of an entry on the Payable At Year End (PAYE) program, when Mr. Habib appeared confused, got up, and left for a cigarette in the middle of an inquiry he was working on with Mr. Smith and Stan Gough, Acting Regional Director, Finance.

The witness identified a second PRAR that he wrote for Mr. Habib for the period January 8, 1993 to July 21, 1993 (Exhibit E-14) that rated him overall as satisfactory but highlighted the grievor's ongoing requirement for "strong improvement in staff relations and communications to improve staff work relationships", as well as some other unsatisfactory areas such as resisting a request to process some Veterans Improvement Program (VIP) cancelled cheques and for not providing "an adequate answer to his staff on queries". He noted that he rated Mr. Habib as unsatisfactory when it came to readily accepting responsibility for his own actions and said the grievor described himself as "innocent". He added Mr. Habib took two training courses under Mr. Smith and that they met weekly to discuss work from January to July 1993.

During cross-examination, Mr. Smith testified that he knew Mr. Habib did not have experience as a supervisor and that this "would take some time to get used to". He added that the grievor came to Kirkland Lake "around three to four weeks before year end and a very busy time of year for us". Mr. Habib won the supervisory FI-01 position in a competition at the Willowdale, Ontario office. He agreed the job description for Mr. Habib (Exhibit E-5) does not give supervision the priority it deserves but added that because of the personnel the grievor had reporting to him, supervision must be done. He also agreed that for the first PRAR report (Exhibit E-6) he did not assign any unsatisfactory rating code to Mr. Habib and that he coached the grievor on how to handle difficulties.

Mr. Smith identified a developmental assignment that the grievor went on in October 1992 as a Financial Planning Officer (FPO) (Exhibit G-1) under Mr. Watchman that was supposed to last a year but ended in January 1993. He did not know if this work period was appraised since it would not have gone to him.

The witness said that the basis for his assessment of Mr. Habib in the administrative memorandum (Exhibit E-8) was only to September 1992. He agreed that between March 1992 and May 1993 the office relocated twice and this would have been disruptive for Mr. Habib.

Regarding the radio incident (Exhibit E-11) and the breach of the chain of command, Mr. Smith said he did not witness the incident but heard about it from Stan Gough. As far as he could recollect, he thought Mr. Habib did not personally move the radio in question. Regarding the problem of adding up the PAYE (Exhibit E-13)

Mr. Smith said that "the Acting Regional Director of Finance was trying to get an answer to a problem and the grievor walked away from the inquiry for a cigarette". The witness acknowledged Exhibit G-2, the grievor's explanation for the amount of work involved in doing the cancellation of VIP cheques.

Mr. Smith agreed that Mr. Watchman's request dated July 2, 1993 for a six month PRAR of the grievor, from January 1, 1993 to June 30, 1993 (Exhibit G-3) was "not a normal routine". He also acknowledged Mr. Habib's temporary reassignment on July 22, 1993 (Exhibit G-4) to the Financial Planning and Analysis section pending the outcome of an investigation into a harassment complaint against the grievor. He agreed that this put a "dent in our plan to make Mr. Habib a fully satisfactory employee". He could not say if Mr. Watchman's request for a PRAR (Exhibit G-3) arose out of the harassment complaint reassignment.

Mr. Smith agreed that one of his comments in the PRAR (Exhibit E-14) "... He has indicated concern on staff interpretation that he was not able to answer due to his lack of comprehension. ..." was not clear and could be improved upon. He added regarding cancelled VIP cheques, Mr. Habib knew what to do but resisted taking on this work and that the grievor did in fact refuse to do some of this work in July 1993. Mr. Smith added that he first saw the grievor's response to the PRAR (Exhibit E-14) for the period January 1, 1993 to July 21, 1993 on Thursday, March 14, 1996, and that he did not see a copy of the investigator's report on the harassment complaint.

During re-examination, Mr. Smith said that he had never seen such a detailed job description as Exhibit E-5 before he joined the Public Service from the private sector. He said that each time the office relocated all staff, including Mr. Habib, they had discussions before the move, and each move was to a better location.

2. Ian Watchman briefly supervised the grievor when he reported to him as a Financial Planning Officer (FPO) in the fall of 1992. The job description for this position (Exhibit E-15) did not include supervisory responsibilities. Mr. Watchman concluded that during the period September 8, 1992 until January 8, 1993 he was unable to assess the grievor's performance (Exhibit E-16) because he thought that according to the collective agreement an employee had to be under his supervision for six months. The witness said that the grievor was having a difficult time doing the accounting role even though he had additional training during this period.

Mr. Watchman said he coached Mr. Habib in the budgeting and analysis of personnel moving to Kirkland Lake.

Mr. Watchman identified the harassment complaint by Nancy Leeney (Exhibit E-17) dated July 4, 1993 and added that he agreed to accept the grievor back in his area of supervision as a Financial Analyst while the investigation was going on into this complaint. He said Mr. Habib resisted this temporary relocation.

Mr. Watchman then identified a memorandum sent to him by Mr. S. Gough, Chief, Financial Planning and Analysis while Mr. Watchman was Acting Regional Director of Finance (Exhibit E-18). Mr. Waller objected since Mr. Gough was not there to testify. I noted his objection. In light of Exhibit E-18, Mr. Watchman said that from July 26, 1993 onward he wanted the grievor to report to Mr. Watchman directly as Mr. Watchman wrote in Exhibit E-19. The witness identified the harassment report (Exhibit E-20) by Mr. Y. Bouchard in September 1993 that concluded there was no harassment. The report added that the grievor's "close supervisory style appears to be excessive and inappropriate" in its conclusion. Mr. Watchman said a meeting took place on October 1, 1993 between himself, the grievor, Mr. Atkinson, Regional Director General, Mr. C. Archambault, APSFA representative and someone from the personnel department, to advise Mr. Habib that he would have to change his management style (Exhibit E-21, notes from the October 1, 1993 meeting). Mr. Watchman felt that the meeting "had a positive outcome" and "all was clear to everyone at the end of the meeting". Mr. Habib then went on leave for a month and returned to his original substantive position of Supervisor, Accounts Payable, in November 1993. Mr. Watchman testified that Mr. Archambault accepted the rationale of the harassment report (Exhibit E-20) but added that Mr. Habib had, "a hard time accepting he was treating staff other than he should be".

The witness identified a memorandum (Exhibit E-23) from B. Jobes to Mr. Habib dated November 9, 1993 that outlined the grievor's four major supervisory weaknesses, and a plan of action and goals that he reviewed with the grievor.

Mr. Watchman wrote a PRAR of the grievor for the period July 21, 1993 to January 24, 1994 (Exhibit E-24) that went to the Appraisal Review Committee (ARC) for some revision (Exhibit E-25). He then identified Mr. Habib's comments Exhibit E-21 and

a memorandum from Mr. Habib sent to personnel with the grievor's comments attached regarding his PRAR (Exhibit E-27).

The witness said Mr. Habib grieved the second version of the PRAR for the period July 21, 1993 to January 24, 1994. The second level reply to his grievance (Exhibit E-28) agreed to make some changes to the PRAR. Mr. Watchman identified a third copy of the PRAR that still gave Mr. Habib an overall rating of unsatisfactory (Exhibit E-29). He commented on some of the notes attached to Exhibit E-29 by saying that "Mr. Habib always became argumentative so staff avoided him". Mr. Watchman added that the grievor's staff had the knowledge that Mr. Habib should have had for his position, and when staff rotated, Mr. Habib was not capable of teaching the new staff what to do so they became stressed out. He referred to the notes on Exhibit E-29, page 43, number 3 where the grievor failed to train a clerk in the Vetcraft reconciliation project. The witness said that "Mr. Habib did not know how to apply what he learned even though he had a lot of training and coaching. He'd always pass the buck off."

Mr. Watchman identified a summary of coaching he had given the grievor during November/December 1993, and January 1994 (Exhibit E-30). He added Mr. Habib was then deployed as a Post Audit Officer (PAO) where he had only one clerk to supervise.

During cross-examination, Mr. Watchman confirmed that in July 1993 he was Acting Regional Director, Finance, from his substantive position as Chief, Financial Planning and Analysis. He added that on July 4, 1993 they were in their new building and Mr. Habib supervised accounting clerks who were spread around the third floor. Ms. Leeney, the harassment complainant, was one of them. Mr. Watchman said before July 4, 1993, the date of the harassment complaint (Exhibit E-17), he had not heard anything about the complaint, but he heard about it a couple of days before he actually initialed the complaint on July 14, 1993. Mr. Watchman voiced his concerns when he was initially assigned to investigate the harassment complaint. This assignment was given to Y. Bouchard as per Exhibit G-6.

Mr. Watchman said that Mr. Smith's memorandum to the grievor dated February 4, 1993 (Exhibit E-8) does not call for a full PRAR in six months, but only by December 1993, so when asked why Mr. Watchman asked for a full PRAR on July 2, 1993 (Exhibit G-3), he responded that Mr. Smith had not told anyone how the grievor was doing so Mr. Watchman wanted to know, and that he was reacting to a

bring-forward (B/F) system. Mr. Watchman was not able to demonstrate that there was indeed a B/F system.

The witness said that when he did an evaluation of the grievor he considered both Mr. Smith's PRAR as well as Mr. Bouchard's harassment report.

Mr. Watchman was not sure if the decision to re-assign Mr. Habib was taken on July 20 or July 22 as per Exhibit G-4, but he agreed the grievor had to move to another desk location on July 22, 1993. The witness agreed that it was not fair under the circumstances for Mr. Gough to have written the critical memorandum (Exhibit E-18) after assessing the grievor's work for only July 22 and 23.

With reference to the harassment report (Exhibit E-20), global analysis section, Mr. Watchman agreed that the grievor's Chief at the time, Mr. Smith, may have contributed to Mr. Habib's problems by allowing staff to routinely bypass their supervisor, Mr. Habib. The witness confirmed the message given to Mr. Habib during the October 1, 1993 meeting to review the harassment report that management would no longer tolerate his supervisory style. Mr. Watchman was not sure if the last PRAR done by Mr. Smith for the grievor was available at this October 1 meeting, or if he had read it by then, but he knew the grievor had been rated satisfactory overall by Mr. Smith. He added that the October 1 meeting just discussed the harassment report results and not his satisfactory PRAR (Exhibit E-14). Mr. Watchman said that, even though he had decided his supervision of the grievor had not been sufficient to assess his performance (Exhibit E-16), especially since he had not supervised anyone while temporarily re-assigned to the Financial Planning and Analysis Section, he still agreed with the comments that the grievor's supervisory style could no longer be tolerated as is written on Exhibit E-21 the notes from the October 1, 1993 meeting.

Mr. Watchman was not sure if management had made an announcement to staff about the findings of the harassment complaint. He did not think they were allowed to discuss such findings.

Mr. Watchman said that he had often discussed problems with the grievor as indicated on Exhibit E-30. He added that he warned Mr. Habib that he might receive disciplinary action if he refused to cooperate with tasks (see Exhibit E-29, EI-5, page 8).

Mr. Watchman agreed that Mr. Habib's comments attached to the PRAR (Exhibit E-29) were not complimentary towards Mr. Watchman. Mr. Watchman identified the Appraisal Review Committee Report (ARCR) for the appraisal period for Mr. Habib from July 21, 1993 to January 24, 1994 under Mr. Watchman as Exhibit G-7 and Mr. Habib's grievance of this appraisal period as Exhibit G-8.

During re-examination, Mr. Watchman said that the grievor had prepared vouchers for returned cheques before he came to Mr. Watchman's unit to work and that Mr. Watchman visits his units at least once a day to see if they have problems.

3. Suzanne Grant supervised Mr. Habib while she was Acting Chief, Financial Review and Control and he was working as a Post Audit Officer (PAO) on January 27, 1994 (Exhibit E-31) with the appropriate job description (Exhibit E-32). He had one Post Audit Clerk (PAC) to supervise, Shannon Galarneau. Ms. Grant identified a training plan (Exhibit E-33) for the grievor with goals attached that were given to Mr. Habib in February 1994.

The witness identified a series of memoranda (Exhibits E-34 to E-44) exchanged between herself and the grievor that were ongoing reviews of his new work. She described her initial working relationship with the grievor as "good" even though he refused to sign all but one of her memoranda. Regarding Exhibit E-40, she said by May, 1994 the volume of Treatment Accounts Processing System (TAPS) work was increasing but the additional Blue Cross reconciliation was a very short task to perform. Ms. Grant said her memorandum Exhibit E-43, shows that the grievor is "not a team player" because of his lack of cooperation to achieve the goals set for him. In mid-May, she and Mr. Habib decided to meet every two weeks. She identified her first quarterly performance review of Mr. Habib (Exhibit E-45) but was unable to assess him. He had taken a nine day financial management level II training course during this period. She noted in her memorandum dated June 3, 1994 (Exhibit E-46) that all the VIP and TAPS reviews had been performed by the PAC and indicated Mr. Habib should also have performed some. Mr. Habib took exception to this memorandum and responded on June 6, 1994 with Exhibit E-47 by saying, "I resent such close supervision", and that their meeting sessions "have turned into inquisition trials". Ms. Grant's response, Exhibit E-48, pointed out some performance problems by the grievor in rebuttal to Exhibit E-47. She reminded him on July 5, 1994 (Exhibit E-48) that not all log sheets for the VIP and TAPS reports were to be done by the PAC and other staff should not be

bothered for explanations regarding these log sheets. Her memorandum, Exhibit E-50, pointed out performance problems the grievor had controlling the workload between himself and the PAC; poor communication with the PAC, as well as his argumentative nature with other staff members. Mr. Habib's response (Exhibit E-51) in Ms. Grant's mind "blamed me for his problems".

The witness identified a second PRAR for the grievor (Exhibit E-52) that she wrote for the review period April 24, 1994 to July 5, 1994 (the day she went on vacation) that also included appraisal comments from Brian Coghlan who supervised the grievor during the period July 6, 1994 to August 31, 1994. She concluded on Exhibit E-52 that a global rating was not assigned because the period of supervision was split between two acting Chiefs. The grievor received further training during this period. The grievor wrote some comments about Mr. Coghlan's positive progress report, namely, that "he (Coghlan) seems to be a bit unexperienced when it comes to preparing a performance appraisal".

Ms. Grant described Mr. Habib's written comments (Exhibit E-53) to her second quarter PRAR (Exhibit E-52) as; "rude, insulting and lacking professionalism" because he was now attacking her. The next quarterly PRAR (Exhibit E-54) done by Ms. Grant for the period July 24, 1994 to October 23, 1994, with two interim progress reports attached, gave the grievor an overall unsatisfactory performance. She noted here that Mr. Habib was now misinterpreting DVA policy; example, for prosthetics and orthotics, disposal policy 3.19 and 3.20 that allows the disposal of prosthetics by the client's family or friends on the client's death, Mr. Habib interpreted differently by wanting to always collect such items. Ms. Grant disagreed with him on this issue since they are not required to recover such things.

She identified Mr. Habib's comments for the appraisal period July 24, 1994 to October 23, 1994 as Exhibit E-55, and said that he attacked her again and had written some false statements. She then identified a series of notes Exhibits E-56, E-57, and E-58, that describe personal comments written by the grievor on the TAPS reports and Ms. Grant's observations on his comments. She said he got so angry with some of her observations that she let the minor observations go through to Head Office (HO) in Charlottetown. She said a response from HO (Exhibit E-59) indicated some of the comments she let go through were "awkward". Ms. Grant said that the grievor continued to show lack of judgment for example regarding the way he interpreted the

prosthetic policy and with his TAPS report comments that she referred to in Exhibit E-59.

She identified a memorandum from Lori Bigelow, Supervisor, VIP, that describes an incident on November 17, 1994 whereby Mr. Habib "became very argumentative" with her (Exhibit E-60) and Ms. Grant's memorandum about this situation to the grievor asking him to "demonstrate tact and diplomacy when approaching staff from other units" (Exhibit E-61). Mr. Habib responded to this memorandum with his own comments (Exhibit E-62) that Ms. Grant found insulting, especially Mr. Habib's comment in Exhibit E-62: "I am wondering why Lori Bigelow, the Supervisor of VIP section decided to write that memo. Was it because she is a good friend of yours and decided to do you a favor of some kind...". She added they deal with veterans who are old and sometimes have difficulty remembering exact dates for services that are provided to them, and that in her opinion all the department needs is a signed statement from a veteran that he received the service.

Ms. Grant identified her memorandum response to the grievor's comments (Exhibit E-55) as Exhibit E-63, as well as the progress report of Mr. Habib for the period October 24, 1994 to December 9, 1994 (Exhibit E-64), that she gave to Mr. Habib. She identified an annual performance feedback report that she wrote for Mr. Habib for the period January 24, 1994 to January 27, 1995 that rated him overall as unsatisfactory (Exhibit E-65). She described his supervisory style as "overbearing".

Ms. Grant was not part of the decision to demote the grievor although she said Mr. Jobes had said that, if Mr. Habib's last appraisal was unsatisfactory, there might be a demotion coming.

Mr. Waller objected to the admission of Exhibit E-66, an investigation report into complaint of harassment, Yusuf Habib v. Suzanne Grant and Bill Jobes, to correspondence regarding this report (Exhibit E-67) and comments by Ms. Grant in response to allegations made by the grievor to DVA auditors (Exhibit E-68), as all being irrelevant and introduced as opinion evidence to influence my decision. I noted his objection and indicated that I would weigh this evidence accordingly.

During cross-examination, Ms. Grant said that she came to Kirkland Lake in November 1991 as a Post Audit Clerk (PAC). She identified a letter from Mr. Jobes to the grievor (Exhibit G-9) from December 1994 indicating he might face demotion. She

said Mr. Jobes told her to closely monitor Mr. Habib when she started to supervise him and that demotion discussion only came up at the end of her supervision. She said the training plan and training workplan (Exhibit E-33) were to be shared equally between the PAO (Mr. Habib) and the PAC (Ms. Galarneau). She added that the reason she referred to his car problem in Exhibit E-37 was because she had to monitor him closely. She said that the first time Mr. Habib refused to do something was when he refused to sign his series of weekly performance memoranda that she referred to in Exhibit E-43. She added that her motivation for these careful reviews was to help coach him in his work but that she did not stand beside him all the time. Ms. Grant said she understood how this may have bothered or hurt Mr. Habib's pride. She said that he would not use log sheets for the TAPS work and that he did not give enough of these at a time to the PAC to keep her busy. Shannon Galarneau came to see Ms. Grant about this problem before seeing her immediate Supervisor, Mr. Habib, so Ms. Grant called them into her office to discuss the problem to try to work it out (Exhibit E-50).

Ms. Grant drafted Mr. Jobes' memorandum (Exhibit G-10) at his request regarding the PRAR done by Mr. Coghlan, because she expressed some concerns to Mr. Jobes about this PRAR. When asked if she felt this would weaken Mr. Coghlan's review, she said: "a monthly appraisal does not constitute a full report". She added that since Mr. Coghlan had never done a post audit review and was not familiar with the TAPS, he was not qualified to do an assessment of Mr. Habib's work even though she believed Mr. Coghlan had some supervisory experience.

Ms. Grant identified a PRAR (Exhibit G-11) for the same period July 24, 1994 to October 23, 1994 as Exhibit E-54. She said Exhibit E-54 has some incidents in it that are not in Exhibit G-11 and is the review she referred to when doing the annual review of the grievor for 1994. She could not remember if she reviewed Exhibit E-54 with the grievor.

Ms. Grant said she was aware of a memorandum (Exhibit G-12) from B. Jobes to the grievor that says she "was deeply offended by your comments" regarding her review of the grievor for the period April 24, 1994 to July 23, 1994 as well as a letter of reprimand sent to Mr. Habib by Mr. Jobes dated December 7, 1994 (Exhibit G-13).

Ms. Grant identified another performance feedback report that she did about the grievor for the period January 24, 1995 to May 4, 1995 (Exhibit G-14) that also rated

him as unsatisfactory. In it she also asked that he re-write the draft performance report that he wrote about Shannon Galarneau (Exhibit G-15). Ms. Grant felt the PAC should have been rated fully satisfactory. She requested that this report for the PAC be referred to the Appraisal Review Committee (Exhibit G-16) but did not ask Mr. Habib to do it over. The Appraisal Review Committee recommended that the draft report (Exhibit G-15) be disregarded and a new one be done by Ms. Grant (Exhibit G-17).

Ms. Grant agreed that there was a lot of writing between herself and Mr. Habib; that he had a right to do this and that she still had to judge how well he did his work even though he was disciplined for his rebuttals to Ms. Grant. She said that even though her memorandum to Mr. Habib (Exhibit E-50) described him as "argumentative", this did not influence her subsequent progress reports. She said she had instructed him in Exhibit E-50 to give part of his work (approximately 2/3) to the PAC.

Regarding the joint PRAR (Exhibit E-52) done between herself and Mr. Coghlan that was "unable to assess" the grievor, Ms. Grant was not aware of any policy that said two supervisors could not rate an employee. Ms. Grant identified the appraisal review committee report of the PRAR (Exhibit E-52) as Exhibit G-18. She thought it was Mr. Jobs who may have told her not to assess a rating to Mr. Habib, not a member of the review committee. She added that all progress reports for Mr. Habib went to the review committee. She said that even though the ARC said in its report for the period April 24 to July 23, 1994, while referring to working goals that "progress on this goal appears to have reached a satisfactory level", this was not sufficient for an overall global rating of satisfactory especially since the ARC felt it was imperative that his "supervisory goals improve during the next review period". The witness concluded that according to the assessment for the period April 24, 1994 to July 23, 1994 Mr. Habib was making some progress. She still however insisted that it was "fair" that he not be assessed for this period.

Ms. Grant testified that she found the grievor's comments (Exhibit E-53) to be inappropriate for a rebuttal; that she felt Exhibit E-55 was a personal attack and she told B. Jobs that she was "deeply offended" by Mr. Habib's comments that he wrote in Exhibit G-12. Regarding the grievor's comment in Exhibit G-62 about Lori Bigelow being a "good friend" of hers, Ms. Grant said she was a co-worker and not a good friend.

When asked if she had used the grievor's various rebuttals as one aspect to assess his performance, Ms. Grant responded: "Yes because he was doing constant arguing". She identified an Appraisal Review Committee report of the grievor's annual review for 1994 as Exhibit G-19 but could not speak on behalf of the report. She added that the PAO could make observations on the TAPS and VIP reports but that Mr. Habib had to learn how to do this with discretion. Mr. Habib prepared three TAPS reports for Ms. Grant. The first one had a few observations; the second one had more but she removed some of them. She did not know if HO was bound to do anything regarding observations on a TAPS report. Ms. Grant said she asked Heather Greenbank at HO to put her comments for the first quarter 1994/95 TAPS report in writing (Exhibit E-59).

During re-examination, Ms. Grant said that she was always polite with Mr. Habib, and that she told him to speak to her first about any concerns before speaking to anyone outside their unit.

4. Lynn Coutts was supervised as a CR-04 Accounting Clerk by Mr. Habib. She described his supervisory style as "domineering, you were told what to do and not to ask questions". She described her communications with him for the most part as "quite good but tense at times". She felt at times as if she was being closely checked. Ms. Coutts described an incident once when she went to the cashier's office for instructions only to be followed there by Mr. Habib who twice denied to her that he followed her there. She told her Chief (Mr. Watchman) about this strange incident who then asked Mr. Habib twice in front of Ms. Coutts if he had followed her. He denied following her twice to her Chief before finally admitting that he did follow her to the cashier's office.

Ms. Coutts noticed that the work she had been doing on the Blue Cross Allocation Assignment had previously been done by a Supervisor (Mr. Habib) or a Chief (Mr. Smith). She discussed this with Mr. Habib who told her to put it in writing. She therefore wrote Exhibit E-69. She said his response to her memorandum attached to Exhibit E-69 was very threatening and she felt he was trying to intimidate her. She was confused that his response read that her query "is a bit misdirected" since she said he told her to put it in writing in the first place.

During cross-examination she said that she became uncomfortable about going to the cashier only after Mr. Habib denied he had not followed her there. Ms. Coutts was aware Ms. Leeney had made a complaint but did not know what for.

5. Ann Sundstrom worked under the supervision of the grievor as an Accounting Clerk. She described Mr. Habib's supervisory style as "intimidating and he would belittle staff". She said the noise from her radio was an ongoing problem for Mr. Habib and that if she left her desk when she came back it was turned down. She testified that he once told her the noise disturbed him and that as a Supervisor he had to think and that she was "only a clerk". She said she was "shocked, surprised and felt worthless". She identified two memoranda that she wrote both on December 9, 1993 to Mr. Watchman requesting a transfer out of her section because of stress there. The first one Exhibit E-71 was copied to Mr. Habib. The second one Exhibit E-70 was not.

During cross-examination she said she is now a Clerk in Personnel Administration. She said the radio incident occurred in late November 1993. She never saw Mr. Habib turn down her radio. She added before he told her that it bothered him, she had heard rumours that he did not like to hear it. She added that she does not have a right to have her radio on at work but Mr. Watchman said it was alright. Ms. Sundstrom said she was shocked when Mr. Habib told her she did not have to think. She added "we all think in the office", and that Mr. Watchman asked her to write the second memorandum requesting a transfer (Exhibit E-70). She was later transferred. Ms. Sundstrom did not discuss a transfer with Mr. Habib, did not tell him she felt intimidated by him, and did not file a harassment complaint against him.

6. Shannon Galarneau joined the Post Audit unit in May 1994 with Mr. Habib as her Supervisor. She had previously been in the VIP section. She felt that there was no communication with Mr. Habib. She said: "We rarely spoke, and he gave me no feedback". She said he gave her a few sample sheets to work on at first and when they were done she had to ask for more but that she never knew if there was a workload or not. She said Ms. Grant, Mr. Habib, and herself met monthly or when there was a problem, and that these meetings were stressful, full of tension and argumentative. She said once she tried to give her opinion to him but he said "don't speak to me like that, you're my subordinate". She added that when she asked questions of him at work she did not get an answer right away or she would not understand it when he gave one

to her. She said that she did photocopying when required for "mostly everyone including Mr. Habib".

Ms. Galarneau said she checked a question with a VIP clerk once and Mr. Habib then re-checked the same question with the same clerk. This frustrated her. She said she asked for a deployment from her job due to stress, and that she did not see her PRAR rating given to her by the grievor although she heard it was satisfactory (Exhibit G-15). She added that Mr. Habib had no management style, no communication, held no meetings, was not helpful and she felt controlled. She never got a straight answer from him.

During cross-examination, she said when she worked in the VIP section, she had plenty of work, but was given very little when she began with Mr. Habib. She agreed that both she and the grievor were new at the time to the Post Audit unit. She said that at the beginning Mr. Habib gave her one and one half days of training but she could not recall receiving any from Ms. Grant. Ms. Galarneau said that Ms. Grant told her that Mr. Habib was also learning the new job. The witness added that she felt tension in the building every morning and that; "Ms. Grant would say white, Mr. Habib would say black and it all started". She said that she began to see Ms. Grant directly since her concerns were not being addressed by Mr. Habib. She added Ms. Grant told her she preferred that Ms. Galarneau talk with Mr. Habib but they mostly had three way meetings.

Regarding the incident with the question for clarification with the VIP clerk, Ms. Galarneau said she was having a hard time understanding something about percentages that she felt Mr. Habib did not understand as well. She asked for verification from the clerk, did the work and passed it on to Mr. Habib who then went to see the same clerk all over again.

She added that Ms. Grant re-assessed her performance as fully satisfactory as opposed to her Supervisor's initial rating of satisfactory.

7. Bill Jobes started with Veterans Affairs in August 1991 as Chief, Financial Review and Control and is now the Regional Director, Finance. He said he wrote his administrative memorandum to the grievor (Exhibit E-23) on November 9, 1993 to identify observed weaknesses from the Y. Bouchard harassment report since at the time Mr. Jobes was to become the grievor's immediate supervisor and he wanted to

help him improve his performance. He added they discussed this memorandum on November 9. Mr. Habib was eager to get back to his substantive position and signed Exhibit E-23. He added the goals attached on Exhibit E-23 were taken from an earlier document the grievor had had in 1993.

Mr. Jobes identified a memorandum from Ms. Pat Desjardins-Perron (Exhibit G-7) (Exhibit E-72) regarding the Appraisal Review Committee Report for the grievor's appraisal period July 21, 1993 to January 24, 1994 that he said he reviewed with Mr. Habib on August 18, 1994. He added that he and the grievor also reviewed "line by line" Mr. Jobes' letter of December 13, 1994 (Exhibit G-9) that advised Mr. Habib that if he did not improve he might be demoted. When asked what Mr. Jobes meant by "alternative solutions", in Exhibit G-9, he said these were similar to discussions he had had with the APSFA during the summer of 1994. He said, while discussing Exhibit G-9 with the grievor, they explored relocation within the department or outside the department even though Mr. Jobes would have been reluctant to give Mr. Habib a recommendation. He also explored a demotion or termination if Mr. Habib did not meet the expectations of the department by January 24, 1995.

The witness identified his handwritten notes regarding a discussion he had with Peter Séguin of APSFA on December 13, 1994 (Exhibit E-73) regarding the letter he gave to Mr. Habib (Exhibit G-9) on the same day. He and Mr. Archambault discussed the possibility of demotion. Mr. Jobes added that in September 1994 he had had a discussion about the grievor with Mr. Archambault and Mr. Séguin, both from APSFA, while they talked about other issues at the time.

Mr. Jobes identified the Appraisal Review Committee Report on Mr. Habib for the period July 24 to October 23, 1994 sent to him by Pat Desjardins-Perron (Exhibit E-74). Mr. Jobes and the grievor reviewed it on December 12, 1994 when Mr. Habib signed it.

He then identified the Appraisal Review Committee Report of Mr. Habib (attached to Exhibit E-75) for the period January 24, 1994 to January 23, 1995, that Mr. Jobes signed on March 30, 1995 and recommended the grievor be demoted. Mr. Jobes faxed the APSFA on the afternoon of April 21, 1995 with a copy of his memorandum (Exhibit E-75) to Mr. Habib before he met with Mr. Habib on April 21, 1995 to discuss the Committee Report with him. Mr. Habib did not sign the

memorandum (Exhibit E-75). Exhibit E-75 was forwarded to the Regional Director General, Mr. Atkinson, for his action.

During cross-examination, Mr. Jobes said that at the time he wrote the grievor on November 9, 1993 regarding four major weaknesses (Exhibit E-23) he was not aware that Bert Smith had written a PRAR with an overall assessment of satisfactory for the period January 8, 1993 to July 21, 1993 (Exhibit E-14). After Mr. Habib returned to his substantive position in November 1993, Mr. Jobes did not know if management announced to staff that the grievor was not found guilty of harassment, because Mr. Jobes was on French language training at the time. He said he got the coaching memorandum (Exhibit E-30) from I. Watchman because he wanted to know what had happened to the grievor after the report on the harassment complaint.

Mr. Jobes said regarding the reference to "combative approach" in Exhibit E-74 that the grievor had been combative with Ms. Grant and Ms. Galarneau when Mr. Habib told her to be quiet once during a meeting. Mr. Jobes said that his December 13, 1994 letter (Exhibit G-9) to Mr. Habib is actually a second warning to shape up since he warned him on August 18, 1993 and wrote him on November 9, 1993 (Exhibit E-23) to tell him to meet the goals of his position.

Mr. Jobes testified that he believed he, Ms. Grant and Mr. Coghlan discussed the combined PRAR done by Ms. Grant and Mr. Coghlan for the grievor (Exhibit E-52) and that it was agreed not to give an overall performance assessment. There is no policy that suggests this was to be done. Mr. Jobes said that it would have essentially been unfair to attach a global rating for the review period April 24, 1994 to July 23, 1994 since Mr. Coghlan was there only seven weeks. Mr. Jobes agreed that the working goals were rated good for Mr. Habib on the Appraisal Review Committee Report (Exhibit G-18) but that overall Mr. Habib's performance still had problems. Mr. Jobes said that he also took into account regarding supervisory skills Mr. Watchman's unsatisfactory rating at the end of 1993. Mr. Watchman only monitored Mr. Habib for three months but also acted as Regional Director, Finance for six months.

Even though the same cover sheets appear on Exhibits E-54 and G-11, two PRAR's for the same period for Mr. Habib, Mr. Jobes said he believed Exhibit E-54 came about as a result of Mr. Habib's grievance that resulted in some changes to the wording

of the PRAR. Mr. Jobes was not sure if the grievor or APSFA were given a final copy of the PRAR but he thought the APSFA was told about the PRAR changes.

The witness acknowledged the grievor's grievance regarding the December 7, 1994 letter of reprimand (Exhibit G-21) and another grievance by Mr. Habib regarding his appraisal for the period July 24, 1994 to October 23, 1994 (Exhibit G-22).

When asked if it was appropriate to have relied on discipline when assessing the grievor's annual review for 1994 in Exhibit G-19, Mr. Jobes said he thought it was; even though performance is different from discipline, he felt in this case they were related because the grievor's behaviour was consistent with his ongoing confrontational style. Mr. Jobes added that Mr. Habib however "would have received a short suspension for attacking someone, not a demotion".

Mr. Paré objected to this line of questioning since I am being asked to review the justification for the demotion not any disciplinary action by the employer. I allowed the questions by Mr. Waller but added that I have to decide if the demotion was actually done because of incompetence or as an act of discipline.

Mr. Jobes identified a memorandum from the grievor complaining about a proposed appointment for Lynn Coutts dated September 12, 1995 (Exhibit G-23); a memorandum from Mr. Jobes to the grievor regarding a meeting to render a disciplinary decision dated September 14, 1995 (Exhibit G-24) and a letter of discipline imposing a one day suspension on the grievor dated September 27, 1995 (Exhibit G-25).

Mr. Paré objected to the last three exhibits arguing they all relate to an action post-demotion and are therefore separate and irrelevant. I said I would weigh them accordingly.

Regarding the recommendation for demotion (Exhibit E-75) Mr. Jobes said that neither Peter Séguin nor Claude Archambault from APSFA responded to his fax sent at 1414 hours on April 21, 1995 so he met only with the grievor. Mr. Jobes believed he had given Mr. Habib one day's notice of their meeting on April 21. After checking his records, Mr. Jobes could not find any earlier notice to the grievor for the meeting.

8. Pat Desjardins-Perron, Regional Director, Personnel, Ontario Region, Veterans Affairs, started at Kirkland Lake four years ago. She said as a member of the Appraisal

Review Committee (ARC) her role is "to make sure performance feedback integrity is maintained". She added that ARC members make sure that goals were given to an employee, that certain objectives were achieved, and that they address deficiencies. She said the ARC members give their opinions to a performance appraisal to the author who can then adjust areas of need before discussing it with the affected employee. An employee can write a rebuttal and speak to the ARC as part of the "going back and forth" that takes place.

The witness said her first involvement in Mr. Habib's performance reviews came at the request of the Regional Director General (RDG). The grievor had written eleven pages of rebuttal to Mr. Watchman's appraisal of him for the period July 21, 1993 to January 24, 1994. She said the RDG wanted three persons who had not been previously involved in the Habib case to review his supervisory performance and his application of Veterans Affairs policies and procedures. Herself (PDP), John Waller (JW) and Bonnie Pavich (BP) comprised this ARC.

Before the first appraisal review meeting on August 3, 1994 to review Mr. Watchman's appraisal (Exhibit E-29) for the period July 21, 1993 to January 24, 1994, the ARC met with Mr. Watchman and Mr. Jobes and came up with some questions for Mr. Habib (Exhibit E-76). They wanted to address all areas of concern in his rebuttal. The meeting went well. The ARC concluded the grievor's performance was not satisfactory and made some recommendations (Exhibit G-7) that were to be conveyed to Mr. Habib by Mr. Jobes. She added that the Treasury Board Personnel Management Component 3 Procedures/Principles (Exhibit E-77) were followed by all of Mr. Habib's supervisors. Ms. Desjardins-Perron concluded that all procedures and principles were followed by the ARC when it appraised the grievor's annual review for the period January 24, 1994 to January 23, 1995 (Exhibit G-19).

Regarding the ARC assessment (Exhibit G-18) for the grievor's appraisal period of April 24, 1994 to July 23, 1994 done by Ms. Grant and Mr. Coghlan, she said the Committee looked at both appraisals separately, noted Mr. Habib had made some progress but was argumentative and had poor communication style. After reviewing the review report of the grievor for the period July 24 to October 23, 1994 she said she and Mr. John Walker saw that the grievor's performance was deteriorating and that he was still combative with co-workers and subordinates and they wanted to warn him

about his ongoing unsatisfactory performance and did so with Exhibit E-74 dated November 23, 1994.

During cross-examination, Ms. Desjardins-Perron said that an ARC is struck when an employee is dissatisfied and that not all PRAR's are referred to the ARC. A review is automatic for all unsatisfactory ratings. She added that the ARC wanted to see all of Mr. Habib's performance appraisals.

When asked if there was a rule to follow when an appraisal is split between two supervisors (Exhibit E-52 Grant and Coghlan) that necessitates an unable to assess rating, the witness said it can go either way, but in the case of Mr. Habib, the ARC was going to see it anyway. Regarding the ARC report of Exhibit E-52, that is Exhibit G-18, the witness said they would not start to interview staff all over again but based their assessment on what they saw in the PRAR. Even though Ms. Grant was unable to assess Mr. Habib in Exhibit E-52, the ARC felt that what she wrote about Mr. Habib was describing an unsatisfactory situation. She noted that Mr. Coghlan had referred to "overreaction" by Mr. Habib as a supervisor. Ms. Desjardins-Perron agreed that Mr. Habib had a combative approach in his communication style. She added that his rebuttals lent support to his combativeness.

When asked if the ARC took the grievor's misconduct into account in their report (Exhibit G-19) on his annual PRAR, Ms. Desjardins-Perron responded: "No, it was based more on his poor communication style in his day to day working".

The witness said she did not give Mr. Habib a copy of their interview with him on August 3, 1994 (Exhibit E-76) and she believed the demotion letter (Exhibit E-1) was hand delivered to the grievor.

When asked if termination was considered as an option for the grievor, she responded: "We thought he could perform the duties of a lower position as he had done before".

9. Claude Archambault has worked at APSFA as a Labour Relations Officer since May 1991, and was involved in the grievor's case from the start. Regarding page 2 of Exhibit E-75, the fax cover page sent to the APSFA Ottawa office where Mr. Archambault works, the witness said that Mr. Peter Séguin had no involvement in the case. Mr. Archambault first saw the fax dated April 21, 1994 sent at 1414 hours,

around 1600 hours on April 21. He did not know that a meeting was being set-up but would have tried to get involved in the meeting if he had known about it. He said he called Mr. Jobes on April 22, 1994 to tell him that according to the collective agreement, an APSFA representative should have been there to which Mr. Jobes responded that the decision was not disciplinary; therefore the collective agreement did not apply.

Regarding the letter of demotion (Exhibit E-1) dated April 27, 1995, Mr. Archambault said about a week prior he had been told by Ms. Desjardins-Perron that Mr. Habib was going to be given something. He said he got about a week's notice before the May 2, 1995 meeting with Mr. Habib. He could not attend, asked for a five day delay, was denied, protested to Ms. Desjardins-Perron but participated in a conference call without prejudice notice to the department, between himself, Mr. Habib, Mr. Jobes, Mr. Atkinson, the Regional Director General, and Ms. Desjardins-Perron. He said Mr. Atkinson said the meeting was not a violation of the collective agreement. The grievor signed the demotion letter and the letter regarding the position to which he was being assigned.

During cross-examination Mr. Archambault said that he had discussed the grievor's PRAR's with management and raised his concerns that he thought they were disciplinary in nature. In the grievor's grievances, Mr. Archambault said that collective agreement references were mentioned *inter alia* regarding discipline. Regarding the grievance dated January 5, 1995 (Exhibit G-21) when asked if this related to discipline, Mr. Archambault said because it reads "inter alia" that he could bring up other issues as well. He believed he mentioned at some level of the grievance that it was a disciplinary problem.

Argument for the Employer

On behalf of the employer, Mr. Paré argued that the grievor was demoted in good faith under paragraph 11.2(g) of the Financial Administration Act. He argued that from his original appointment as an FI-01 in 1991 to May, 1995 the grievor received fifty days of training in his new position, as well as extensive coaching from three supervisors, Mr. Smith, Mr. Watchman and Ms. Grant, who met with him for seven consecutive weeks once a week to give him feedback and monitoring and followed-up

in writing with him. He argued that, since the grievor received a training plan, workplan, goals and an accurate job description, he was fully informed and aware of what was required of him. He also said the grievor got objectives, goals and targets on a yearly basis for the three positions he occupied: Accounting Officer (AO), Financial Analyst (FA), and Post Audit Officer (PAO).

He argued that between January 1992 and January 1995 Mr. Habib received a total of nine PRAR's and seven progress reports; that include four PRAR's and five progress reports as a PAO between January 24, 1994 and January 23, 1995. He said that between 1992 and 1995 the grievor had six PRAR's reviewed extensively by the ARC that spent a lot of time and energy to ensure the integrity of the review appraisal process. He reminded me that throughout all this time the grievor was advised of the nature of his deficiencies. He added that the ARC met with not only the grievor to discuss his rebuttals to his PRAR's but with his supervisors to give him a fair evaluation of his concerns under Treasury Board policy as described in Exhibit E-77.

He reminded me that between September 1992 and May 1995 the grievor was rated satisfactory twice and unsatisfactory four times although Mr. Habib had ample opportunity to make some personal adjustments in his management style to reach the level of performance expected of him. As developmental assignments over four years, Mr. Habib had opportunities as a Financial Analyst and was offered deployment as a Post Audit Officer but all was in vain.

Mr. Paré reminded me that Mr. Jobs warned Mr. Habib twice, on August 18, 1994 and December 13, 1994, that he was not meeting the requirements of his position and that there would be consequences if he failed further. He argued that the grievor's inability and lack of skill to supervise was well testified to by witnesses, especially the grievor's supervisors who confirmed his lack of skill in the following areas: inability to communicate orally; poor interpersonal relationships with colleagues, subordinates and supervisors; lack of tact, diplomacy, courtesy, cooperation and generosity; lack of judgment; failure to provide a harmonious work environment; lack of sensitivity; poor leadership.

Mr. Paré argued that Mr. Habib's three subordinates who testified confirmed this as well. He argued that Ms. Grant also testified that Mr. Habib had shown a poor application of policy and procedure; for example, the recovery process of an artificial

limb as described in the policy 3.19 (Exhibit E-54); his failure to meet deadlines with the VIP and TAPS reports; his inability to understand and apply procedures regarding increased contribution amounts related to the VIP review.

Mr. Paré added that Mr. Habib has serious deficiencies regarding two essential duties: one, supervision and two, application of policies. He reminded me that the department decided not to terminate the grievor because it felt he could still be productive, especially in light of all the time and money it spent to help him become a satisfactory employee. He said the employer has been patient, fair, equitable and has shown compassion throughout the entire Habib affair, but that it is justified in demoting him.

Mr. Paré referred me to: Stitt (Board file: 166-2-25981); Hogan (Board file: 166-2-26360); Laforest (Board file: 166-2-25245).

Argument for the Grievor

Mr. Waller argued that what I have to decide is on the issues brought before me, and not what I would have done if I had been "in the employer's shoes". He argued that there are three issues: one, was the demotion disciplinary in nature, that is, was the employer reacting to deliberate misconduct by the grievor; two, if the demotion was disciplinary, did the employer violate clause 34.03 of the collective agreement? If so, since the law is clear, the demotion must be declared null; and third, if the demotion was not disciplinary, did the evidence justify a conclusion on the basis of a non-willful inability that the grievor was incapable of meeting the job requirements of being a supervisor. Mr. Waller concluded therefore that I must separate misconduct, that is the will not to perform, from incapability, that is not being able to perform. He reminded me that the onus in this case has been on the employer to have acted within the law, not to just show me that Mr. Habib did not perform. He asked that I therefore look closely at the grievor's final year of actual incidents and reach my own independent conclusion regarding the unable to perform argument versus the unwilling to comply argument.

Mr. Waller argued that the Treasury Board policy for non-disciplinary demotion (Exhibit E-77) is not at issue if I find the demotion was non-disciplinary. He felt there

were some specific incidents that the employer relied on but that it did not do enough to help the grievor overcome or understand them at the time. He argued that for the employer to lump disciplinary measures with non-disciplinary measures could be fatal to its case. To support this argument, he referred me to the Lynda Sydenhan case under the Public Service Employment Act, section 31, Appeal Board file: 83-81-TAX-6R(i), (1983) and asked me to apply the same conclusion to Mr. Habib's case that the Appeal Board reached when it "weeded out" the difference between discipline and competence and upheld the Sydenhan appeal. He referred me to a similar conclusion reached in the P.J. Perry appeal under the Public Service Employment Act, section 31, Appeal Board file: 85-31-PEN-1R(i), (1985). Mr. Waller also referred me to the Deering decision (Board file: 166-2-26518) where the adjudicator also recognized the distinction between discipline and incompetence; as well as the Evans (Board file: 166-2-25641) and Johnson (Board file: 166-2-26107) decisions. Finally, Mr. Waller referred me to Re Corporation of City of Toronto and Canadian Union of Public Employees, Local 79 (1995), 77 L.A.C. (4th) 197 that he says is a summary of much of the case law that demonstrates, even if short notice is given by an employer, arbitrators have allowed an employee to have a union representative attend when discipline is handed out. He concluded that this procedure was violated on April 21, 1995 for Mr. Habib.

Mr. Waller argued that the grievor's career passed through three supervisory eras: Mr. Smith, Mr. Watchman and Ms. Grant, and that especially under Ms. Grant there was a clear funnelling towards discipline. He did not allege that the employer ever acted in bad faith.

During the Smith era, that is from the date of the grievor's appointment to Kirkland Lake from the clerical ranks as an outsider from southern Ontario (Willowdale), Mr. Habib had to learn to be a good supervisor and he made some mistakes. The grievor's first PRAR under Mr. Smith rated him overall as satisfactory (Exhibit E-6) and was followed-up by a coaching plan by Mr. Smith (Exhibit E-8), in February, 1993. Then along comes the grievor's removal in July 1993 (Exhibit G-4) to another area until the harassment complaint is investigated. He argued that Exhibit E-14, Mr. Smith's second PRAR of Mr. Habib that covers his employment right up to July 1993 demonstrates alleged willful behaviour starting to creep in even though the grievor was still rated satisfactory. He argued that, since Mr. Habib wrote a rebuttal (Exhibit E-12) to the memorandum about breaking the chain of command

surrounding the radio issue (Exhibit E-11), he was now being seen in July 1993 as an unrepentant employee and the employer began to have difficulty separating discipline from competence. He argued that Mr. Watchman asked for the six month appraisal of the grievor from Mr. Smith (Exhibit G-3) because he was hearing complaints about the grievor, but Mr. Watchman ignored Mr. Smith's satisfactory rating up to July 21, 1993 on Exhibit E-14.

Mr. Waller said that the grievor's rebuttal (Exhibit E-12) to the radio incident contains some statements that "may be insubordinate" but the grievor was beginning to feel unfairly picked on as was proven by his vindication regarding the harassment complaint.

The Watchman era began on July 23, 1993 and went until January 24, 1994. Mr. Waller argued that from here on the grievor was not treated fairly in the procedural sense by the employer even though the Leeney harassment complaint was unfounded. He argued the harassment report (Exhibit E-20) talks of supervisory style but had no mandate to do so. He argued that management now only "picked-up on what was negative to Mr. Habib" as is shown in the notes of the October 1, 1993 meeting (Exhibit E-21) following the release of the harassment report. Mr. Waller noted page 2, paragraph 5 of Exhibit E-21 that talks of "corrective measures" that could mean punishment. He reminded me that Mr. Habib moved to a new work area on July 22, 1993 and "right off the bat gets a nasty memorandum from Mr. Gough (Exhibit E-18) that is simply unfair".

Then came what Mr. Waller calls the "killer appraisal", Exhibit E-29 for the period July 21, 1993 to January 24, 1994 by Mr. Watchman. Mr. Waller argued that in November 1993 Mr. Watchman proceeded to undermine Mr. Habib's dealings with his subordinates by not involving the grievor in what was going on. He argued that witnesses Coutts and Sundstrom testified to this effect. He reminded me that no one told the staff that the grievor had been exonerated in the harassment complaint and "the staff continued to write him off". He argued that Mr. Watchman's coaching memorandum (Exhibit E-30) talks about stressed staff who worked under Mr. Habib, but Mr. Watchman did not discuss this with the grievor as a good supervisor should. He said that Mr. Habib then became his own worst enemy by his eleven page rebuttal (Exhibit E-27) to the PRAR by Mr. Watchman (Exhibit E-24). Both were seen by the ARC.

Mr. Waller argued that the Grant era now began and was influenced by Mr. Jobes who had in turn been influenced by the harassment report. He argued that Ms. Grant monitored the grievor so closely because of a cloud over him. Mr. Habib now had only one subordinate, Shannon Galarneau, and had to learn a new subject area. He reminded me there were no significant incidents between Mr. Habib and Ms. Galarneau except during their three-way meeting with Ms. Grant when he told Ms. Galarneau she was making a "mountain out of a mole hill". He argued that there was a big attitude change from the early months between the grievor and Ms. Galarneau whereby she described him in the end like an absentee supervisor since they did not communicate.

Mr. Waller said the grievor's appraisals by Ms. Grant started to go down because of what Mr. Waller called "rebuttal rockets" sent to Ms. Grant by the grievor during his weekly and then bi-weekly appraisals. He argued that, because of this long series of memoranda, Ms. Galarneau began to see the grievor as a problem just as Ms. Grant saw him.

Regarding the joint PRAR by Ms. Grant and Mr. Coghlan (Exhibit E-52), Mr. Waller argued that the positive comments in this review were not given the credit they deserved and that the decision not to assess the grievor was unfair. Mr. Waller felt that at this point Mr. Jobes had every intention to just get this whole mess over with and be done with it. He reminded me that even Ms. Desjardins-Perron said there was no policy that said a rating could not be given under the circumstances. He argued that the grievor was justifiably upset with all that was happening and replied to Ms. Grant with his comments regarding the appraisal for the period April 24, 1994 to July 23, 1994 (Exhibit E-53). Ms. Grant found his reply rude and insulting. It was sent to the ARC. Mr. Waller said the ARC's report regarding its assessment of Exhibit E-52 showed that management had now turned a corner and now sounded very disciplinary in nature. He argued the Jobes memorandum (Exhibit G-10) is very indicative of how Mr. Coghlan's assessment of the grievor was undercut by management. He argued that the employer was now only focussing on Mr. Habib's rebuttals and not his supervisory responsibilities over Shannon Galarneau except where there were incidents of excessive supervision. He added the ARC only spoke about the "rebuttal rockets" to Ms. Grant and willful misbehaviour by Mr. Habib and was focused not on the job he was doing but on how he dared to attack management.

Mr. Waller reminded me that Mr. Jobes warned the grievor (Exhibit G-12) that he would no longer tolerate personal attacks (Exhibit E-55) against Ms. Grant. He noted that in the "midst of all the fireworks" Mr. Habib responded to Ms. Grant (Exhibit E-62) in an attempt to defend himself in a somewhat aggressive and sarcastic manner regarding the incident with Lori Bigelow. He said Mr. Habib was told that he was not following departmental policy regarding clients' statements but VPPM 3.29c) (Exhibit E-62) shows that there was indeed a need to insert dates on reports. The end result of this was a disciplinary letter sent to the grievor (Exhibit G-13) that Mr. Waller felt was unfair.

Mr. Waller also argued that the grievor's progress report for the period October 24, 1994 to December 9, 1994 (Exhibit E-64) relies on page 2 on the same Lori Bigelow incident mentioned above. Mr. Waller thought that a progress report was supposed to be a review of the grievor's supervision of his subordinate, Shannon Galarneau. He argued that by this point in Mr. Habib's career relationship with Ms. Grant, she now had a "bee in her bonnet" regarding Mr. Habib's performance.

Mr. Waller argued that all of Mr. Habib's rebuttal and/or actions regarding his questioning of policies or practices were in the best interests of the Canadian taxpayer and that Mr. Habib believed they were valid. He argued that Exhibit G-20, a response from HO, proves that Mr. Habib's policy question in this example was in fact correct. He argued that if the demotion is set aside Mr. Habib would probably be disciplined for attacking a supervisor.

Mr. Waller concluded that because of Exhibits E-75 and E-1, the Archambault evidence, and an adjudicator's analysis of clause 34.03 in Evans (supra), the employee has an absolute right to have a representative with him when discipline is imposed. He argued that Exhibit E-1 and its delivery on May 2, 1995 is a violation of clause 34.03 even though Mr. Archambault was on a conference call to the office in Kirkland Lake at the time of imposition of the demotion. He concluded that the demotion is void and I should set it aside and grant the requested action.

In his rebuttal argument, Mr. Paré said that all the evidence supports the fact that paragraph 11.2(g) of the Financial Administration Act has been met. He argued the cases under section 31 of the Public Service Employment Act presented by Mr. Waller were irrelevant because at the time section 31 had different wording than

the Public Service Staff Relations Act now reads. He said there was no need to have APSFA consultation to comply with clause 34.03 especially since management had been very fair all along with Mr. Habib.

He also reminded me that the results of a harassment complaint cannot be discussed with employees.

Mr. Paré concluded that Mr. Habib was demoted only because of poor performance. The grievor's rebuttals were his only way to communicate with anyone. He showed no judgment and no tact as was confirmed by employer witnesses. He said all the incidents referred to as disciplinary by Mr. Waller were in fact really poor performance by Mr. Habib and asked me to deny the grievance.

Decision

After reviewing the evidence that relates to objections by both Mr. Waller and Mr. Paré regarding the admissibility of Exhibits E-66, E-67, E-68, G-23, G-24, and G-25, I have awarded them no weight in my decision since I consider them to be related to issues subsequent to the decision to demote Mr. Habib and are therefore irrelevant.

Also, after reviewing all the evidence including memoranda and subsequent rebuttals by Mr. Habib and others, I am left with the conclusion, based on the balance of probabilities, that Mr. Habib lacks the capacity to continue as a supervisor.

I have therefore concluded that the employer's decision to demote Mr. Habib for cause is justified in the circumstances, was not disciplinary in nature, and is therefore not a breach of clauses 34.03 and 39.02 of the collective agreement. His employer demonstrated patience and a genuine desire to help him become a more effective supervisor within the principles of fairness described in the employer's policy entitled Non-Disciplinary Demotion or Termination of Employment for Cause (Exhibit E-77).

Mr. Habib was a troubled supervisor from the beginning of his new assignment as was indicated by Mr. Smith in his first PRAR of the grievor (Exhibit E-6), when he wrote in September 1992 that Mr. Habib had difficulty providing supervision and effective communication with his subordinates. The last Appraisal Review Committee Report dated March 30, 1995 attached to Exhibit E-75 recommended that he be demoted for similar reasons.

I agree with Mr. Paré's argument and the employer's demotion letter (Exhibit E-1) that significant and extraordinary efforts to provide training and coaching were provided over a continuing period to Mr. Habib by supervisors Smith, Watchman, and Grant. Mr. Habib simply failed to put into practice what training he had received and was incapable of demonstrating the skills required of a supervisor. He received a training plan, clearly outlined objectives for his position and a job description and was fully aware of what was required of him particularly after receiving and signing the administrative memorandum from Mr. Jobes dated November 9, 1993 (Exhibit E-23) and meeting twice with Mr. Jobes, once in August 1994 and again in December 1994. His continued "overbearing" supervisory approach with his subordinates caused them stress, and his "argumentative" approach with not only his peers but with his own supervisor continued to contribute to his failure to demonstrate improvements in his supervisory skills.

Three of the grievor's subordinates testified in relation to his supervisory skills: Ms. Coutts interpreted a memorandum from Mr. Habib to be "threatening"; Ms. Sundstrom was shocked and surprised that Mr. Habib referred to her as "only a clerk"; Ms. Galarneau said they rarely spoke and he gave her "no feedback" and she felt tension in the building every morning.

Although the grievor may have been well intentioned in his efforts to make the department as accountable as possible, Mr. Habib's personal interpretation of a policy and procedure regarding the recovery of a prosthetic or orthotic, and his failure to meet some reporting deadlines, VIP and TAPS reports in particular, caused his employer to conclude that he either did not understand what he was supposed to do, or that he had an agenda of his own that somehow did not correspond to that of the employer. This lack of understanding was also written about by Mr. Watchman in the PRAR he wrote for the grievor for the period July 21, 1993 to January 24, 1994 (Exhibits E-24 and E-25) under F1 comments that reads in part: `

Yusuf has depended largely on his staff to solve the operational and administrative problems of his unit. This has resulted in him having very little working knowledge to perform the functions of the position. He tries to come across as very knowledgeable but when you put him to task he fails.

Supervisor Smith earlier substantiated a similar situation from July 1993 (Exhibit E-13) when he testified that Mr. Habib appeared confused, got up, and left for a cigarette in the middle of an inquiry he was working on with himself and Stan Gough, Acting Regional Director, Finance.

Mr. Habib was correct to argue that exact dates were required on a claim for a service rendered to a veteran as is written on page 2 of Exhibit E-62; however, Ms. Grant pointed out that the department does deal with veterans who are old and have difficulty remembering exact dates. Mr. Gough also treated the grievor unfairly when he was critical of Mr. Habib in July 1993 during a period when the office had just relocated.

Mr. Habib received extensive coaching from supervisors, and various training courses, ranging from Psychology of Self-Motivation, Correspondence Skills, and Team Building, and Conflict Resolution outlined in Exhibit E-4, all of which were intended to improve his supervisory competence. He failed to do so as was demonstrated in the ARC's annual review (Exhibit G-19) that referred to Mr. Habib's confrontational supervisory style. Also, unlike the P.J. Perry (supra) decision, I do not believe that Veterans Affairs has confused misconduct and insubordination with incompetence. Mr. Habib was continually advised that his supervisory style and communication skills needed to be improved in order to be at least a satisfactory supervisor as he was initially rated by Mr. Smith in 1992. Even after he was counselled by Mr. Jobs in August and December 1994 that he was not meeting the requirements of his supervisory position, he did not improve.

Even though Mr. Jobs wrote a letter of reprimand to Mr. Habib (Exhibit G-13) because of his continued confrontational approach with Ms. Grant, I have no doubt that the employer's decision to demote Mr. Habib as the Appraisal Review Committee Report (Exhibit E-75) recommended, was because even after considerable training and coaching, he was not competent enough to continue as a satisfactory supervisor.

The "corrective measures" referred to in the notes from a meeting with the grievor on October 1, 1993 (page 2 of Exhibit E-21), did in fact lead to more training as indicated by the training dates after October 1993, on Exhibit E-4. The grievor received continued coaching from his subsequent supervisors as opposed to any punishment or disciplinary action by his employer.

I believe that the joint PRAR (Exhibit E-52) by Ms. Grant and Mr. Coghlan was not necessarily handled fairly by not assessing the grievor's performance for this period; however, the few weeks in question when taken into the overall picture of his supervisory style, cannot be said as Mr. Coghlan seemed to indicate, to be indicative of a turn around in the grievor's supervisory competence. Even Mr. Habib himself wrote in his rebuttal attached to Exhibit E-52 regarding Mr. Coghlan's positive progress report: "Brian (Coghlan) is a capable individual, however he seems to be a bit inexperienced when it comes to preparing a performance appraisal". If Mr. Habib had not shot himself in the foot before, he did so here. This seems to be a "rebuttal rocket", as they were referred to by Mr. Waller, that backfired.

It is noted that the employer's evidence called for a direct response from the grievor, but none was forthcoming since he did not testify.

In conclusion, as Mr. Watchman said: "Mr. Habib always became argumentative so staff avoided him"; this made the grievor's supervisory life even more difficult to become a team player and work well with not only his subordinates, but with his peers and supervisors. I find therefore that the employer's decision to demote Mr. Habib was appropriate under the circumstances and that it did not violate his collective agreement.

For all these reasons this grievance is denied.

**J. Barry Turner,
Board Member.**

OTTAWA, May 14, 1996.