

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

**HARVEY FRANKEL**

Grievor

and

**TREASURY BOARD  
(Transport Canada)**

Employer

***Before:*** Richard Labelle, Board Member

***For the Grievor:*** Michel Gingras, Professional Institute of the Public Service of  
Canada

***For the Employer:*** Janet Ozembloski, Counsel, and Jock Climie, Student-at-Law

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Heard at Ottawa, Ontario,  
March 25, 1996.

## DECISION

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This grievance was referred to adjudication by Mr. Harvey Frankel who is employed by Transport Canada (CH-03), Transport Dangerous Goods Directorate, Ottawa, Ontario. He grieves against a two-day suspension (Exhibit E-2):

*A formal complaint was received on July 17, 1995 from a Transport of Dangerous Goods employee concerning your behaviour on July 13, 1995 in or around the directorate facsimile room. It was alleged that you rigorously shoved this employee into a wall so that you could then gain access to the room. You were duly informed of this allegation and that an internal investigation would be conducted. Interviews were scheduled between July 20, 1995 and July 25, 1995 with all parties privy to the incident and any surrounding activity.*

*With due consideration of all the facts presented, I am inclined to attach credibility to the version presented by the complainant. Witness accounts have corroborated the fact that you were aware the individual was in the doorway, and that the contact was deliberate. This was attested to by your having walked past the door a couple of times.*

*This behaviour is extremely inappropriate; and moreover, physical abuse of a colleague, or of anyone for that matter, will not be tolerated within this directorate. Therefore, because of the nature of the abuse, the potential of serious injury, and your obvious total lack of remorse when confronted, I hereby suspend you from duty for (2) two working days. This suspension will be served on August 1, 1995 and August 2, 1995.*

*It is to be understood that a copy of this letter will be placed on your personal file and will remain there for a period of two years from the date of this letter. Should you exhibit any further incidents of inappropriate behaviour, more severe disciplinary measures will be taken.*

*It is recommended that you seek ways of appropriately dealing with any frustrations you feel. May I remind you that the department offers such assistance through its Employee Assistance Programme. It is indeed unfortunate that you have allowed such behaviour to detract from your professional capabilities.*

*Should you not agree with my decision, your collective agreement outlines a redress mechanism.*

Mr. Frankel's grievance and the requested corrective action read as follows:

*As per the collective agreement, I grieve the suspension imposed on me, as of July 31, 1995. The employer's decision is based on false perceptions, and not on fact.*

Corrective Action Requested

*That the suspension be rescinded, and that I be reimbursed the loss of all pay & benefits, that documents relating to the employer's action be removed from all files.*

Counsel for the employer called three witnesses: Messrs. Gil Fraser, Eric Landriault and Zenon Lewycky. The grievor's representative called two witnesses: Mr. Gerald Taylor and the grievor, Mr. Harvey Frankel.

The exclusion of witnesses was requested and granted.

The Evidence

For the Employer

Mr. Fraser testified that an incident occurred on July 13, 1995 while he was in the facsimile room waiting for a confirmation of a fax that he had sent. Mr. Fraser said that he was standing in the doorway of the room, which is approximately two feet wide, talking to Mr. Landriault when the grievor ran into him and shoved him hard against the wall. The grievor then said: "Excuse me" and told Mr. Fraser to move and not block the entranceway again whenever he wanted to use the fax. Mr. Fraser testified that he did not see the grievor coming because his back was turned at the time.

Mr. Fraser said that the grievor told him to get out of his way. He responded by saying he was not moving and the next time to ask him politely. Mr. Fraser testified that a few years earlier the grievor had thrown coffee at him. After that incident the grievor went out of his way to avoid Mr. Fraser but recently the grievor had once again started to try and provoke him.

Mr. Fraser testified that the grievor walks by his office two or three times a day, staring and smirking at him. The witness said that he had no working or personal relationship with the grievor. He testified that he tried as much as possible to avoid

the grievor. After the shoving incident in the facsimile room, Mr. Fraser filed a written complaint (Exhibit E-1).

Under cross-examination, Mr. Fraser said that he never provoked the grievor in any way. He mentioned that his arm may have been extended over the door frame entrance to the facsimile room but that the grievor did not ask him to move before touching or shoving him into the wall.

Mr. Landriault testified that on the day of the incident he was in the facsimile room and that Mr. Fraser was leaning in the doorway talking to him. Suddenly, the grievor arrived and crashed into Mr. Fraser trying to walk in. The witness testified that Mr. Fraser turned around looking mad or surprised. He heard the grievor ask to enter the room and Mr. Fraser replied to ask him to do so but this was after the event.

The witness testified that after the event and Mr. Fraser was back in his office the grievor walked into Mr. Fraser's office and said in a provoking manner: "What are you going to say about this". Mr. Fraser did not respond.

Under cross-examination, the witness testified that Mr. Fraser had his shoulder against the wall. The grievor was walking fast into the room and did not slow down before shoving Mr. Fraser. The witness said that the grievor did not say "Excuse me" before he pushed or shoved Mr. Fraser. He testified that there was an exchange of words between the parties in the room after the incident but he could not recall what was said but he did recall that Mr. Fraser was tense.

On re-examination, Mr. Landriault testified that he did not remember any profanity being used and he would have remembered if any had been used.

Mr. Lewycky testified that he was made aware of the incident and received a memorandum from Mr. Fraser concerning the alleged assault (Exhibit E-1). The witness testified that he spoke to his Director General to determine what had happened. Upon receipt of the memorandum from Mr. Fraser he met with staff relations.

The witness testified that meetings were arranged. He first met the grievor in order to find out what had happened. He informed him of a complaint received from Mr. Fraser. The grievor told the witness that he was the recipient of abuse from

Mr. Fraser and the grievor portrayed himself as the victim. The grievor alluded to the position Mr. Fraser was in and that Mr. Fraser could have seen him. The grievor said that he excused himself but that Mr. Fraser refused to move away from the entrance.

The witness then met with Mr. Fraser and then with Mr. Landriault. He testified that he was careful in not indicating to Messrs. Landriault and Fraser what was said to him by the grievor.

Mr. Lewycky testified that Mr. Fraser's version of events was different from the grievor's version and that he concluded that Mr. Fraser's version was the credible one. Mr. Fraser's version was supported by the other witness, Mr. Landriault. The witness further testified that the incident was deliberate and this was unacceptable behaviour; for him the integrity of the workplace is important. After reviewing all the facts he decided to impose a two-day suspension without pay.

Under cross-examination, the witness testified that he was generally aware of the relationship between the grievor and Mr. Fraser. He did not have much to do with their day to day work. He would not know if they did not like each other but he knew of past incidents.

#### For the Grievor

The grievor's representative tabled Exhibit G-2 and counsel for the employer objected. The grievor's representative replied that he would note this in his final arguments. I took note of the objection.

At the time of the incident, Mr. Taylor was a staff relations officer at Transport Canada. He testified that at the time of the incident he was returning from annual leave and that he finished the investigation of the incident. He was involved in the questioning of Mr. Landriault who described Mr. Fraser's relative body position at the time of the incident; Mr. Fraser was standing in the entrance with his hand on the divider.

The grievor testified that there was a poor and hostile relationship between himself and Mr. Fraser. He testified that on the day of the alleged incident he went to the facsimile room refrigerator to get his lunch. Mr. Fraser was blocking the entrance with his hand on the divider; it was impossible to pass by. He testified that Mr. Fraser

had his back to the wall and his hand on the divider. The grievor mentioned that the opening was approximately 30 inches wide. He recalled having passed by once and Mr. Fraser was there. He went back to his desk and waited a few minutes. He then went back but Mr. Fraser was still there and so he went back to his office before returning a third time to the facsimile room. The grievor testified that he then said: "Excuse me" in a polite manner but that Mr. Fraser continued his conversation with Mr. Landriault and ignored him. The grievor said "Excuse me" again and then said a third time: "Excuse me, I'm going in". Mr. Fraser apparently replied: "If you want to go by me, go by me". The grievor testified that Mr. Fraser put his arm down after the third time and that he walked into the room from a dead stop.

The grievor testified that he brushed by and that his left shoulder touched Mr. Fraser's right arm. Then Mr. Fraser followed him into the room and became vulgar and provocative. Mr. Fraser stood less than one foot way from him and uttered profane words. The grievor testified that Mr. Fraser invited him to go downstairs to finish the incident. He testified that Mr. Fraser used the "F word" three or four times but he could not remember in what context the word was used. The grievor testified that he asked Mr. Landriault: "Did you hear what he said to me" and Mr. Landriault replied: "I won't be a witness to this". The grievor testified that Mr. Fraser was not shoved into the wall as Mr. Fraser was already leaning against the wall.

The grievor testified that every time he went by Mr. Fraser's office, Mr. Fraser would stare at him with an angry look. With respect to the coffee spillage incident of a few years back, it was an accident. He bumped into him. He spilled coffee on Mr. Fraser, he did not throw it at him. Mr. Fraser grabbed him by the shirt and banged him into the wall.

Under cross-examination, the grievor admitted that there had been physical contact between himself and Mr. Fraser. He said that Mr. Fraser tried everything to provoke him into physical violence. He also testified that he said "Excuse me" several times, that he was being polite and simply wanted to go in to get his lunch.

Counsel for the employer stated that a letter of reprimand was issued at the time of the coffee incident to only one person and that was the grievor. The grievor did not disagree.

In cross-examination, the grievor said that he had had a prior disciplinary problem for assaulting a fellow worker and was given a 10-day suspension at the time. (The grievor's representative's objection was noted.)

### Argument

The submissions made by counsel for the employer can be summarized as follows.

The grievor committed an assault without justification. The grievor's testimony of events differs from that of two other witnesses. He does not have a clean past record; his credibility is poor. The grievor claims he just brushed past Mr. Fraser but that is not correct, he pushed Mr. Fraser. Mr. Landriault testified that he did not hear the grievor say "Excuse me". His testimony is consistent with Mr. Fraser's. The grievor has offered no apology for his actions.

The facts confirm what happened. Mr. Fraser's version is the credible one, not the grievor's. This kind of behaviour should not be tolerated in the workplace. The two-day suspension should be upheld.

Counsel for the employer referred me to the following cases: Cochrane (Board file 166-2-13533) and Berkenkamp (Board file 166-2-16117).

The submissions made by the grievor's representative can be summarized as follows.

The testimony showed that both parties were not tolerant of each other. Mr. Fraser's evidence reflects provocation on his part. The grievor passed by the facsimile room twice. The dispute is, was Mr. Fraser's back against the wall or was his arm over the door divider. Mr. Fraser stated that he never heard the grievor say "Excuse me, excuse me". His arm was blocking the entrance, he could have heard the grievor repeat "Excuse me". Yes there was body contact but the grievor only brushed Mr. Fraser. The contact described by the employer's witnesses is exaggerated. Mr. Fraser could have removed himself. Mr. Fraser is a provoker. The grievor's representative referred me to paragraph 5 of Exhibit G-2. If you are to assault, you do not say excuse me.

Mr. Fraser offered to continue the debate downstairs; this was confirmed by Mr. Landriault.

Aware of the strained relationship between the parties, the grievor is the victim in this case. The employer's investigation reflects its prejudice towards the grievor. No assault occurred; Mr. Fraser provoked the incident. He should be the one apologizing. The two-day suspension should be rejected.

The grievor's representative referred me to the following cases: Thibodeau (Board file 166-2-20955), Lucas (Board file 166-2-22752) and excerpts from Canadian Labour Arbitration, 3rd edition, Brown and Beatty, paragraph 7:3430.

In reply, counsel for the employer stated that whether Mr. Fraser was aware or not of the grievor entering the room is irrelevant. Mr. Taylor's evidence should not be admissible; he did not cast any light on the situation. Mr. Landriault was not clear if Mr. Fraser's arm was raised against the entrance divider or not. He does recall the impact. Both witnesses testified that the words "Excuse me" were not used.

The grievor's representative should consider reading the September 1995 letter (Exhibit G-2). Provocation cannot be used as an excuse in this case.

Mr. Lewycky indicated that he was aware of previous actions in the workplace by the grievor.

In the Thibodeau case there are mitigating factors. Such is not the case in this grievance. The grievor has shown no remorse or regret. He does not have a clean record.

The Lucas case is not the same as this one. The grievor in that case had a clean record. There are discrepancies in this case.

The grievor's representative added that Exhibit G-2 is part of the grievance file. Had the grievor crashed into Mr. Fraser, there would have been a fight. There was no assault in this case.



Reasons for Decision

After considering the evidence and submissions of both parties, I dismiss this grievance for the following reasons.

I am satisfied that on the balance of probabilities that the grievor did push or shove Mr. Fraser into the wall. I recognize the fact that there is animosity between the grievor and Mr. Fraser. I have also taken into consideration the grievor's denial of any wrongdoing and that he has shown no remorse or regret regarding the incident in question. I have to accept the version of events recounted by the employer's witnesses as more credible than the grievor's version of what actually took place that day.

No mitigating factors have been brought to my attention to justify a reduction of the penalty imposed. I have not considered any sanctions imposed on the grievor for incidents prior to July 1995 in concluding that this two-day suspension is warranted. There is no place in the workplace for actions like these. Whatever provocation the grievor perceived cannot objectively justify his actions against Mr. Fraser.

For all of these reasons, this grievance is denied.

**Richard Labelle,  
Board Member**

OTTAWA, October 11, 1996.