

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

LORRAINE LOCKWOOD

Grievor

and

**TREASURY BOARD
(Human Resources Development Canada)**

Employer

Before: Joseph W. Potter, Deputy Chairperson

For the Grievor: Herself

For the Employer: Vickie Lou McCaffrey, Counsel

Heard at Toronto, Ontario,
December 2, 1998.

(Written submissions filed December 17, 1998; January 25 and February 1, 1999.)

DECISION

On February 11, 1997, Ms. Lorraine Lockwood filed a grievance concerning a three-day suspension. During the grievance process, the employer reduced this to two days and that is where the issue stood when it came before me.

The suspension was imposed because of an altercation the grievor had with her supervisor, Ms. Elizabeth Sala, on April 30, 1996. The disciplinary letter dated July 5, 1996 (Exhibit E-5) was sent to the grievor by her Manager, Ms. Barbara Taylor, and reads as follows:

I am writing to confirm the results of my investigation into the incident which occurred at the Parkdale CEC on Tuesday, April 10 [sic] and in the course of which you physically assaulted your supervisor.

In reviewing the evidence related to this incident I note that, by your own admission, you struck her pushing her backwards. The blow was of sufficient force to cause a bruise on the supervisor's chest.

This type of physical violence will not be tolerated in the work place. As a result of your actions you will be suspended from work for a period of three days. The dates of the suspension will be determined by your supervisor.

In future it is expected that you will conduct yourself in a professional manner. Any recurrence of unacceptable behavior could result in a more serious disciplinary action.

An exclusion of witnesses was requested and granted. In total, four witnesses testified. As the matter was not concluded in the pre-allotted time, the parties submitted written arguments.

Background

The basic facts to this case were not materially in dispute. The grievor was classified as a PM-2 and she was a counsellor with Human Resources Development Canada. Ms. Lockwood's supervisor was Ms. Elizabeth Sala and, on April 29, 1996, Ms. Sala informed Ms. Lockwood that certain incoming work was going to be assigned to another counsellor. Ms. Sala told Ms. Lockwood that the reason for this action was due, in part, to complaints which some clients of Ms. Lockwood had made regarding the way they had been treated.

Ms. Lockwood was surprised to hear of any complaints, as none had been brought to her attention, and she wanted further information on this subject. Ms. Sala was not prepared to discuss the issue further at that time, but agreed to discuss it the next day (April 30, 1996).

This was not the first time there had been some "difficulty" between Ms. Lockwood and Ms. Sala. In February 1996, Ms. Lockwood wrote a memorandum to her manager, Ms. Barbara Taylor, complaining of personal harassment by Ms. Sala (Exhibit G-4). A follow-up memorandum (Exhibit G-5), some four days later, asked that the situation be looked at immediately. Ms. Lockwood testified that management did nothing to review this issue, and she stated that the office tension mounted (see Exhibit G-6). The employer did not dispute the grievor's perception of this escalation of office tension.

In any event, Ms. Lockwood wanted further information on these alleged complaints, and went to see her supervisor around 9:30 a.m. on April 30, 1996. The grievor's version of what transpired that morning is contained in Exhibit G-7 and does not, as I said earlier, materially differ from the evidence the employer advanced as to what took place.

Ms. Lockwood went to Ms. Sala's cubicle to secure a future meeting time to discuss the issue of client complaints. Ms. Sala informed the grievor the only date she had available to discuss the matter was the following week; either Wednesday morning or afternoon.

Ms. Lockwood requested they discuss the issue for 15 minutes right then and there, but Ms. Sala was not prepared to do so. Testifying that she was irritated in being pressured to meet, Ms. Sala stated she then waved a pen and told the grievor to select one time or the other (i.e. Wednesday morning or afternoon of the following week) to meet and discuss the issue.

Under cross-examination, Ms. Sala stated she was about two and one-half feet away from Ms. Lockwood when this exchange took place. She stated she waved the pen in a sideways motion, but agreed it would have been even with Ms. Lockwood's face while it was being waved.

Ms. Lockwood's evidence was that the distance was approximately one foot when the pen was waved in her face, and that the pen was waved in a back and forth motion going directly to her.

We now get to the heart of the issue.

Ms. Sala stated that, as she was waving the pen, asking Ms. Lockwood to select a time to meet, Ms. Lockwood clenched her fist and struck her supervisor in the chest. According to Ms. Sala, the blow caused her to take a large step back.

Ms. Lockwood testified that, as Ms. Sala approached her, waving a pen in her face, she was provoked. Ms. Lockwood said she put her hand up in a manner to stop Ms. Sala from advancing further. Exhibit G-7, which again is Ms. Lockwood's version of the events, states, at page 2:

... I put up my hand and pushed her away to put some distance between us. I want to specify that I did not push her hard, shove her or strike her in any way....

Ms. Lockwood denied, in cross-examination, hitting Ms. Sala or clenching her fist.

The Manager, Ms. Barbara Taylor, contacted a fellow manager, Ms. Heather Young, on April 30 and asked her to investigate the incident. Ms. Young did so and she interviewed Ms. Sala on May 1, 1996. Her typed notes from this interview were tendered as Exhibit E-2, and there is no material difference between them and the evidence of Ms. Sala.

Ms. Sala saw a doctor on May 4, 1996 and a doctor's note (Exhibit E-1) was introduced to indicate Ms. Sala had a bruise below the neck area.

Ms. Young interviewed the grievor on May 7, 1996. This interview was not done on the same day as the one with Ms. Sala because Ms. Lockwood requested she be accompanied by a union official. May 7 was the first available date for all parties to meet. Just prior to interviewing the grievor, Ms. Young encountered Ms. Sala. Ms. Young testified that Ms. Sala showed her a yellowing bruise. In cross-examination, Ms. Young stated she did not use the information concerning the bruise in reaching her conclusions. Also in cross-examination, Ms. Young agreed the evidence of a bruise

was not related to her during her interview with Ms. Sala and she was only made aware of it, in passing, days later. Ms. Young made notes of the interview with the grievor and later typed them into a formal report (Exhibit E-3). These notes were then presented to Ms. Lockwood for her information, and Ms. Lockwood made her personal corrections to them. The exhibit contains these personal corrections.

While interviewing Ms. Lockwood about the incident, Ms. Young asked the grievor to act out the incident. The results were described on page 5 of Exhibit E-3. This exhibit is Ms. Young's record of her interview with Ms. Lockwood, together with Ms. Lockwood's handwritten comments on the points Ms. Young was making. The quotation below is Ms. Young's record of the interview:

...

As Ms. Lockwood pivoted, Ms. Sala moved in close to Ms. Lockwood so that there were about 12 inches space between their feet. She had a pen in her hand and was waiving it in Ms. Lockwood's face....

...

Ms. Lockwood said that she instinctively put out her hand, palm out and flat, (in a motion similar to police halting traffic) and as Ms. Sala was still moving in, she "hit" Ms. Sala somewhere on the collarbone.

... Ms. Lockwood estimated that there was sufficient force to move Ms. Sala back about three feet.

...

Following the completion of the interviews, Ms. Young submitted her report (Exhibit E-4) to the Manager, Ms. Barbara Taylor. The report concludes, at page 4:

...

While it does not appear that Ms. Lockwood deliberately set out to strike Ms. Sala, it does appear that Ms. Lockwood's response was more than that required to protect herself from what she may have perceived as a physical threat.

...

Ms. Taylor received the report and, based on its conclusions, suspended the grievor. In cross-examination, Ms. Taylor acknowledged she did not interview either "combatants" further. In deciding on the quantum of the disciplinary action, Ms. Taylor stated she took into account the grievor's discipline-free record. However, in her view, the action was serious, and she stated she considered the fact Ms. Sala had a bruise.

Ms. Lockwood testified that she did not hit Ms. Sala but, in cross-examination, she acknowledged contact was made.

Employer's Written Argument

On December 17, 1998, counsel for the employer submitted the following written arguments in support of the two-day suspension.

...

I. Issues Before the Adjudicator

The Employer submits that the Adjudicator is faced with two issues:

1. *Did Lorraine Lockwood (hereinafter "Lockwood") assault Elizabeth Sala (hereinafter "Sala") on April 30, 1996?*
2. *Assuming that misconduct occurred, was a two day suspension appropriate?*

II. Evidence of Misconduct

1. Did Lockwood assault Sala on April 30, 1996?

As part of its case, the Employer must initially satisfy the Adjudicator that Lockwood misconducted herself. The Employer accepts this burden. It presents the following evidence and argument in support of its submission that Lockwood assaulted Sala on April 30, 1996 as she "pushed", "hit", "shoved" or "struck" Sala on the chest.

Sala's Testimony and Evidence

Sala testified that she was waving a pen side to side in response to Lockwood's pressuring her to establish a date to meet to discuss performance issues. Sala testified that Lockwood tensed up, blinked and "hit" her in the chest, at the base of her throat, with a closed fist. Sala further testified that the force with which Lockwood "hit" her sent her backwards.

Sala also stated that the “hit” to her chest below her throat caused bruising and soreness. Exhibit E-1 was entered as a copy of the medical report for Sala dated May 4, 1996. The medical report states: “sore/bruise, below neck area. X 4 days, was hit on Tuesday.” It further states that Sala had a greenish contusion to the “upper part of her sternum distal” that was “3” [in] diameter”.

The Employer submits that Exhibit E-1 **collaborates** Sala's evidence that she was “hit” by Lockwood. It also collaborates the **location** and **degree of force** with which Sala claims Lockwood “hit” her.

Heather Young's Testimony and Evidence

The Employer submits that Heather Young's (hereinafter “Young”) evidence is important in three respects.

First, Young's report collaborates the existence of Sala's bruise (Exhibit E-4 at page 3).

Second, Young's interview notes and report are helpful in terms of highlighting that a “punch”, “push”, “hit” or some form of inappropriate “contact” did occur despite the differences between Sala and Lockwood's accounts of what happened. In these contemporaneous documents, Young noted the following:

Young's notes state Sala said Lockwood “**clenched her fist and punched her on the chest (indicating the base of her throat)**” with enough impact to drive her backwards. (Exhibit E-2 at page 3).

Young's May 7, 1996 interview notes state that Lockwood “**said that she instinctively put out her hand, palm out and flat (in a motion similar to police halting traffic) and as Ms. Sala was still moving in, she “hit”*** Ms. Sala somewhere on the collarbone.” (Exhibit E-3 at page 5).

*Note: Lockwood's notes on Exhibit E-3 dispute her usage of this term, and indicate her belief that she told Young “contact was made”.

(emphasis added)

Despite the discrepancies noted above, Young made the following statement in her report: “**There is no doubt that the incident occurred, and that Ms. Lockwood pushed or otherwise struck Ms. Sala.**” (Exhibit E-4 at page 3)

(emphasis added)

Third, and most importantly, the Employer submits that Young's evidence is crucial in terms of assessing whether Lockwood's actions on April 30, 1996 could be characterised as defensive or aggressive. In relation to this, Young noted the following in her report (Exhibit E-4 page 4):

"Ms. Lockwood, claims she took a defensive action in an attempt to put some distance between herself and Ms. Sala, and that she was unable to move away herself because she was backed up against a chair.

*Although the gesture made by Ms. Lockwood appears to be defensive in nature, and made in the heat of the moment, **questions can be raised as to whether or not physical force was the only available response, and whether the degree of force exerted was necessary.***

*Neither employee gave any indication that Ms. Lockwood had attempted to stop the action by expressing her concerns or fears verbally, i.e. by requesting, or even demanding that Ms. Sala move away. Furthermore, **there was sufficient force exerted to move Ms. Sala back about three feet, rather than just stop her.***

*While it does not appear that Ms. Lockwood deliberately set out to strike Ms. Sala, **it does appear that Ms. Lockwood's response was more than that required to protect herself from what she may have perceived as a physical threat.**"*

(emphasis added)

At the hearing, Young was asked whether she felt Lockwood's response could be characterised as an defensive or offensive reaction. After giving the question some thought, Young testified that she felt that there was some "aggressiveness" to Lockwood's action. Although Young admitted that she too would have found "it" (the pen) physically threatening, she stood by her answer that Lockwood's reaction was offensive and concluded her testimony by stating, in part, the following:

"When forced to think about it, and come down on one side or the other, how much force was needed to push her away? My impression was that they were left a couple of feet apart, and that it was a push back and not a stop."

Lockwood's Testimony and Evidence

In describing the tensions that built up to the contact, Lockwood testified that the "festering" situation between her and Sala "resulted in an altercation" on April 30, 1996. When asked in cross examination what she meant by "altercation" Lockwood was evasive and non-responsive.

In cross examination, Lockwood also indicated that she could not move away from Sala because of the chair. However, Lockwood also testified that she did not ask or demand that Sala stop waving the pen in her face; she did not turn her face away; nor did she use either of her hands or arms to shield herself.

In various parts of her evidence, Lockwood indicated that she “pushed” Sala. She made the following written admission in Exhibit G-7 at page 2:

“... she stepped closer to me inches from my face while she waved a pen at me. I we feeling intimidated and threatened by this action so **I put up my hand and pushed her away to put some distance between us.** I want to specify that I did not push her hard, shove her or strike her in any way. She then said you hit me and proceed through the door to the elevator”.

(emphasis added)

At the hearing, Lockwood demonstrated how she “pushed” Ms. Sala away from her. She showed, in a very measured and “controlled” way, that she “pushed” Sala on the “collarbone”. Lockwood demonstrated that she physically by passed the “threat” to her eyes and face. By doing so, the Employer submits that she showed she was not reacting “instinctively”, or by “reflex”, to the “threat” at all.

Argument

Generally, the description of the actual contact varied depending on which witness’s version of events is reviewed. Notwithstanding this variance, the Employer submits that the evidence shows that Lockwood misconducted herself as she “pushed”, “hit” or “shoved” or “struck” Sala on the chest on April 30, 1996. The argument which supports this submission follows.

In her cross examination of Sala, Lockwood did not challenge Exhibit E-1. Additionally, Lockwood never challenged Sala’s testimony on the location of the bruise. Nor did Lockwood question Sala on how she received the bruise. At no time, during Sala’s cross examination, did Lockwood ever put to Sala any possible alternatives for the purpose of challenging either the origins or location or the bruise on Sala’s person.

The Employer submits that Exhibit E-1, and Sala’s testimony concerning the origins of and location of the bruise, are positive evidence of the force with which Lockwood “pushed”, “hit” “shoved” or otherwise “struck” Sala. Notably this evidence went in unchallenged and uncontested. Based on this, the Employer asks the Adjudicator to find as a fact, that Lockwood assaulted Sala on Tuesday, April 30, 1996 with enough force to cause bruising and soreness to that later led Sala to seek out medical attention.

Assuming that the Adjudicator does not accept Sala's evidence as prima facie establishing that the misconduct occurred, the Employer asks that the Adjudicator to accept other evidence which compliments Sala's evidence.

In particular, the Employer asks the Adjudicator to consider Young's statements that Lockwood's physical response was not a defensive action but rather was an offensive reaction. Although Young admitted that she would have found it (the pen) physically threatening, she also testified that she felt there was some "aggressiveness" to Lockwood's reaction. Additionally, once she arrived at this answer, Young stood by her evidence that Lockwood's "reaction" was wrong and offensive.

The Employer further submits that Young had nothing to gain or lose in carrying out her investigation or in describing Lockwood's "reaction" as either defensive versus offensive. The Employer submits that Young's contemporaneous notes, report and testimony are credible and it asks the Adjudicator to assign a large amount of weight to her evidence in assessing whether the misconduct occurred.

Finally, the Employer submits that Lockwood herself repeatedly admits that she "pushed" Sala. Lockwood admitted and demonstrated this fact at the hearing; during her interview with Young (Exhibit E-3); and in the documentary evidence she tendered with the Adjudicator (Exhibit G-7). Moreover, the Employer disputes any argument that her reaction was singularly defensive in nature. In disputing Lockwood's claim that she was defending herself, the Employer asks the Adjudicator to find that Lockwood did not react to Sala's pen hand waving close to her eyes or face out of "instinct" or due to "reflex" to stop Sala's action. The evidence showed that Lockwood chose to by pass the gesture, she described as "threatening" and "intimidating", to "push" Sala on the "collarbone".

The Employer submits that Lockwood was frustrated because Sala would not give her an immediate answer on performance issues that had recently come to light. The Employer submits that the evidence shows that Lockwood struck out at her colleague because she became, not only frustrated, but angry.

Given the totality of the evidence above, it is the Employer's submission that Lockwood "pushed", "hit", "shoved" or "struck" Sala on the chest on April 30, 1996. As such, the Employer submits that it has met its burden of proof in showing that Lockwood misconducted herself by assaulting her supervisor.

III. Evidence Respecting the Quantum of Discipline

2. Assuming that misconduct occurred, was a two day suspension appropriate?

As part of its case, the Employer must also satisfy the Adjudicator that the penalty imposed was appropriate in the circumstances. The Employer accepts this burden and submits the following evidence and argument in

support of its submission that the two day suspension imposed on Lockwood was justified and reasonable.

Evidence of the Designate, Barbara Taylor

At the hearing, the designate who disciplined Lockwood testified about her decision to impose a three day suspension.

Barbara Taylor (hereinafter "Taylor"), the A/Director of the Human Resources Counselling Centre at the time the misconduct occurred, spoke about her decision and submitted in evidence her letter of discipline to Lockwood dated July 5, 1996 (Exhibit E-5).

In her letter of discipline (Exhibit E-5), Taylor noted that the Lockwood by her own admission had struck her supervisor pushing her backwards. Taylor also noted that the blow was of sufficient force to cause a bruise on Sala's chest. In levying a three day suspension, Taylor wrote that this "type of violence will not be tolerated in the work place."

At the hearing, Taylor testified she considered Young's interview notes and report in arriving at her decision. Taylor also testified that she talked with Sala and noted the bruise on Sala's chest. In addition, Taylor stated that she examined Lockwood's personnel file and noted that Lockwood had a clean record.

Despite the fact that Lockwood had no previous instances of discipline, Taylor nevertheless determined that a three day suspension was warranted given her consideration of the above and her view that the Employer could not be seen to be condoning violence in the work place.

Other Evidence Relating to Quantum

Sala, Young and Taylor all testified that Lockwood did not apologise or show any remorse about her actions at the time of, or in the days following, the "push", "hit" or "shove" or "strike" against Sala.

At the hearing, Lockwood did not offer any apologies for her actions. Nor, it is submitted, did she show any remorse.

Quantum per Case law

A review of the authorities indicate that assault, either actual or threatened, is always viewed as a serious disciplinary offence. Arguably the cases show that it is more serious when it is committed against a supervisor because it demonstrates a high degree of contempt for authority. What follows are four cases that the Employer submits show that two day suspension imposed is justified and reasonable.

In Lefebvre v. Treasury Board (166-2-14809) the Grievor, a correctional officer at the Leclerc establishment, grieved his three day suspension arising from an after-shift incident in the parking lot in which he threatened his supervisor with breaking his teeth. Similar to the

problematic relationship in the instant case, the incident in Lefebvre stemmed from an on-shift disagreement over the supervisor's recent assignment of overtime to another guard and from other festering problems in their relationship. The Adjudicator concluded that the infraction was indeed committed and that the disciplinary imposed was not unreasonable in the circumstances. Moreover, in the reasons for his decision, the Adjudicator noted that Lefebvre never apologised for his actions or show any remorse for what had happened.

In Sloker v. Treasury Board (166-2-17589) the Grievor a labourer at Canadian Forces Base in Winnipeg, Department of National Defence, was suspended for three months when he threatened his supervisor and a fellow worker with physical assault. The Adjudicator, on the evidence, reduced the three month suspension to five days on the basis of what occurred resulted from a willingness on the part of Management to act without proper investigation of all of the relevant information.

The Employer submits that Sloker is important because the Adjudicator did not completely remove all of the suspension. In revoking the three month penalty and substituting a five day suspension, the Adjudicator observed that threats in the work place are unacceptable, even though the evidence showed Sloker was provoked and harassed. According to the Adjudicator, "this did not constitute grounds for complete exoneration, but rather convinces me that a substantial reduction in penalty is justified".

The Employer submits that both Sloker and Lefebvre illustrate the low tolerance level that exists in the case law with respect to "threats" of assaults. The Employer submits that it follows that an "actual" assault would require more serious discipline in terms of quantum.

In Giroux v. Treasury Board (166-2-14730), the grievance against a sixteen day suspension for assaulting a supervisor was dismissed. The Grievor was a school teacher on an Indian reserve, who assaulted her supervisor and uttered a racial epithet at him. The Adjudicator concluded on the evidence that the Grievor's misconduct had been proven to his satisfaction and the disciplinary penalty imposed was justified in the circumstances.

In Voyer v. Treasury Board (166-2-16197) the grievor assaulted his supervisor at the end of the work day. No witnesses were present. The victim of the alleged assault immediately reported the incident to his supervisor who viewed fresh injuries and noted a contusion on the knee the next day. The Grievor maintained that the injuries were self inflicted or sustained in a fall or collusion. Despite the Grievor's assertions, the Adjudicator in Voyer concluded that the twenty two day suspension was appropriate as the only plausible explanation for the injuries, on a balance of probabilities, supported the finding that the Grievor struck the supervisor during an altercation.

Voyer factually mirrors the instant matter with respect to the Grievor's attempts to infer that Sala's bruise never resulted from the "push" or "hit" to her chest. The Employer submits that in the instant case, Lockwood's attempts to make a similar inference to that made by the grievor in *Voyer*, show a general intransigence or refusal to accept responsibility for their actions. Further to this, the Employer submits that the absence of any apology and Lockwood's lack of remorse support this submission further.

Argument

The Employer submits that assault is always a serious disciplinary offence. Arguably it is more serious when it is committed against a supervisor because it demonstrates a high degree of contempt for authority. Moreover, the Employer asks the Adjudicator to note that Lockwood has never apologised for her actions to shown remorse for what happened. Additionally, she attempted to lay the blame for Sala's injuries as being due to other events or persons.

The Employer submits that although Lockwood may not like to admit that her behaviour, and even though in her mind her actions were justified, on April 30, 1996 she lost control and acted inappropriately. Lockwood's physical reaction towards her supervisor was inappropriate, insubordinate and showed a high degree of contempt. It is the Employer's submission that Lockwood misconducted herself and that she must accept responsibility for her actions. In view this, the evidence and authorities presented, the Employer submits that two day suspension imposed is justified and reasonable in the circumstances.

In relation to any arguments relating to provocation, the Employer submits that Sala's waving a pen in Lockwood's face does not excuse Lockwood's assault. The Employer submits that provocation can never be held out as a complete excuse for imposing physical violence on a colleague.

Moreover, according to Brown and Beatty, provocation does not excuse the misconduct. Rather it is primarily used to mitigate penalty. Further they argue that its use as a complete justification is limited only to certain instances in relation to certain forms of behaviour:

"There is a consensus of opinion among arbitrators that where an employee is able to prove that his behavior was, at least in part, induced by certain acts of provocation ... on the part of a member of management ... that fact, although perhaps not sufficient to completely exonerate or justify his misconduct, may nevertheless be relied on to mitigate the penalty imposed. For provocation to amount to justification, however, one arbitrator has said an assessment must be made of whether the grievor should have been able to disengage himself from the escalation of events. Another has suggested that severe provocation may completely exonerate an employee's abusive language

on the ground that by so acting the employer has deprived itself of its legitimate authority.”

(emphasis added)

Brown and Beatty, Canadian Labour Arbitration, Third Edition (Aurora: Canada Law Book Inc., 1998) at p. 7-179.

The Employer submits that provocation is not available to justify Lockwood's actions or mitigate her penalty in this instance. She made no attempts to disengage herself from the meeting with Sala. Notably, Lockwood did not leave Sala's office even after Sala made repeated requests for her to do so. Rather Lockwood, by her own admission, was the person who drove and escalated events. The Employer submits that evidence of this is found in Exhibit G-7 at page 2, where Lockwood wrote the following:

“She stated she was too busy to meet with me before then. I stated that if she was questioning my work performance, I should have a better understanding of what she was referring to ... She stated that she had offered me a day and to take it or leave it and just wipe the slate clean and start fresh with John. I asked what she meant by this last statement and she said stated that I was not going to take up anymore of her time. I stated that out of courtesy could she not offer me an explanation. Her phone rang and she took the call, I remained at her desk to finish the conversation. When she finished the call she told me to leave her desk I stated that I needed to know what the problem was with my work she said she already told me she did not have the time.”

(emphasis added)

It is the Employer's submission that Lockwood, despite repeated requests to leave, insubordinately persisted in demanding information from her supervisor and in doing so, she knowingly contributed to the intensity of the situation. Lockwood wanted immediate results. She did not want to leave Sala's office and grieve later. Given her actions, the Employer submits that provocation is not available to Lockwood either in mitigation of penalty or as a complete answer for what happened

...

[Sic throughout] [Emphasis added by the employer's counsel.]

Grievor's Argument

Ms. Lockwood filed her written arguments on January 25, 1999, which read as follows:

As instructed at the adjudication hearing, on December 2, 1998; the following is information in support of my case in addition to a rebuttal of the counsels (Ms. McCaffrey) arguement.

I wish to provide you with background information which you may not already be aware of. When this grievance first reached the adjudication stage on April 24, 1998 a settlement was proposed to me by the employer. To the employer and the union representative this offer undoubtedly seemed fair and just to both parties. It was stated to me by the union representative that if I did not accept the offer that I would not receive any further representation by P.S.A.C. Obviously I did not agree to the proposed settlement as it did not take into account the humiliation and stress that the employer had caused me due in large part to their gross mishandling of my initial concern over Ms. Sala's unprofessional behavior. I have been deeply offended by the unfound criminal accusations that I have been unjustly deemed to be guilty of which was concluded in a haphazard, biased and superficial manner. This is why I chose to pursue my grievance further despite lack of representation.

I do not expect accountability from the employer any longer as my expectations have deteriorated through this lengthy tiresome process to date. I have become more realistic and less idealistic. I will respect your decision no matter what the outcome and do not plan to pursue this unfortunate occurrence any further. I chose to represent myself on December 2, 1998 at the adjudication hearing for the primary reason that I have not felt like I have been listened to or treated in a respectful and professional manner. Managements lack of support, and responsible action once I brought my concerns forward only contributed to festering a poor working environment and the resulting fallout has conveniently been placed on my shoulders through placing blame and rendering discipline. They have refused to take into account how their actions or lack there of allowed a situation to lead up to this grievance. If my voiced and written concerns had been addressed months prior to the date of April 30, 1996 then the resulting events would not have allowed the unprofessional supervisory actions to have continued. And I would not be writing this letter.

I am responding despite the difficulty and stress that I am experiencing in reliving the events and subsequent treatment. I am tired of having to prove my innocence over and over again as I have had to all through the grievance process. I was declared guilty first before proper gathering of all pertinent facts were verified and analysed. I support this grievance out of respect and integrity for myself which I was not afforded by the employer. In addition I would hope that other employees in the future would not be treated with the same disregard.

Note: please refer to the proposed settlement attachment

In April 1998, I requested a letter of apology from the employer as I felt at that time that action would demonstrate respect and accountability. A letter of apology obviously was not offered. This request seems inappropriate and ridiculous to me now as even if it was offered it would not be genuine and have the sincerity demonstrated by true accountability. Simply stated management dropped the ball in not taking expected responsibility in dealing with a unprofessional supervisor. Instead the concerns were ignored and the supervisor was supported.

I now realize that I am not able to get what I need through this process which is accountability and respect from management. I can only expect this from myself and from those who are true professionals I have encountered and enjoyed successful employment since leaving the federal government. This is due to my professional attitude, and actions as well as colleagues and supervisors who have provided excellent references on my behalf.

I will not go any further with this matter as I finally realize that I do not need to prove to anyone that my actions were justified and appropriate given the circumstances. If placed in the same situation I would not hesitate to respond in the same way. No person should have to be placed in the situation of being aggressively threatened and bullied in their work place by a supervisor or for that matter from anybody anywhere.

If I was guilty of assault which is a criminal offence why did the employer offer and allow me to cash out if there was evidence to prove that I was not an employee in good standing. I am not or have ever been an aggressive person or have a history of violent behavior. Actually quite the opposite is the case.

As far as I can understand the whole goal of what transpired that day was not to seek out the truth rather it became a bureaucratic game. An apology would not have any meaning as I have lost all respect for the management team involved with this process in dealing with the abuse that I was privy to by my supervisor Ms. Sala and by the manager Ms. Taylor due to a lack of proper and responsible actions taken by her.

I do not want to continue to dwell on how I was treated by this employer by going over the fine details as it is destroying me to think that such careless judgements are made and probably continue to be made by these same people in charge. I am no longer going to allow myself to be held back by judgements made by an incompetent management team. I have nothing to be ashamed of what so ever. I am not guilty of assaulting anybody. I have a high sense of principles and morals. It is very unfortunate that so much negative energy, time and financial expense has gone towards this process as a result of poor management.

Thank you, Mr. Potter for the respect and guidance that you extended to me on the day of the hearing. I respect myself as I know others aware of the situation do. Standing up for my integrity being truthful and cooperative is what I have to be proud of. I did not go to the lengths that I have just for the possibility of receiving two days pay back. I am certain that I demonstrated a high degree of dedication and professionalism during my entire employment with the Federal Public Service of Canada.

The following points indicate that I have not experienced by any means a fair and just process from the start. In stating my case i have outlined supporting facts that prove that the accusation of improper conduct on my behalf is not substantiated.

Below are the main issues which I have chosen to demonstrate to demonstrate the lack of professional and competent behavior in the handling of this whole matter.

1. Ms Taylor's gross mishandling of my initial complaint of inappropriate behavior which was directed at me by Ms. Sala months before the alleged incident on April 30, 1996 (refer to document G4)

-my memos and e-mails and telephone messages all went unanswered (refer to documents G4, G5, and G6) in these contacts I brought to the attention and communicated to Ms. Taylor the behavior of Ms. Sala in addition to possible solutions to alleviate the unbearable tension and disrespect that I was experiencing

-Ms. Taylor allowed the tension to escalate further between Ms. Sala and myself despite her knowledge of the conflict she did nothing to bring about resolution

2. An example of Ms. Sala's unprofessional behavior was a vague unsubstantiated concern about my job performance which were not brought to my attention before April 29, 1996

-at the hearing Ms. Sala stated that her concerns about my job performance had been ongoing for a period of 6 months; yet nothing was communicated to me

-no documentation exists about this concern and the implied complaints from my counselling clients; yet Ms. Sala makes reference to this documentation several times (refer to document E2 page 2 last paragraph and page 5 top of the page)

-also at the hearing Ms. Sala stated that these records were destroyed- why? or did they exist

-I questioned Ms. Sala about Privacy Legislation regarding the length of time according to this legislation that client documents should be kept she stated 3 years -again why then were the documents if they existed destroyed - I assume that as her apparent concerns dated back 6 months therefore the "complaints" would have been documented 6 months of less from when he concerns started

-Ms. Taylor states in correspondance to Ian Cox the regional privacy coordinator (refer to document G3 under comments) "I have confirmed with Elizabeth Sala that she has no records related to client complaints."

-Ms. Sala failed the employment counselling federal government training therefore why was her concern about my performance as a certified employment counsellor taken as being credible by management; why was a counselling consultant at regional office not contacted if indeed these concerns were valid

3. The fact that Ms. Sala and myself were not separated following the incident for at least another 2 weeks after the occurrence of apparent assault

-also I question why the police was not notified either by management or even by Ms. Sala on her own behalf

-according to the Regional Health and Safety unit regulation indicate that a "Incident, Hazard Accident Report" should most definitely been completed (refer to document G2 section B) by management

4. Discrepancies as to statements made at the hearing on 2.12.98 and what is documented exist

-Ms. Sala indicated in her signed interview (refer to document E2 page 3 paragraph 1) states "as she spoke to Ms. Lockwood she pointed the pen and shook it"

-in Ms. Young's report (refer to document E2 page 2 paragraph 3) "Ms. Sala moved towards Ms. Lockwood holding her pen out and started pointing itin the face of Ms. Lockwood" same document E2 page 3 under conclusion last paragraph" Ms. Sala.....apparently raised her pen and waved it close to Ms. Lockwood's face"

-at the hearing Ms. Sala changed the direction in which she originally shook the pen to being from a pointed motion to a left to right motion

-Ms. Taylor and Ms. Young maintained the pointed motion of the pen which was directed at my face

-Ms. Sala stated at the hearing that there was a foot or 12 inches between us despite this she also stated that she continued to advance closer towards me

-Ms. Sala stated at the hearing that she took a "large step backwards" after the altercation

-where as in the discipline report (refer to document G1 page 1 question 5) Ms. Taylor states "Ms. Lockwood physically assaulted her supervisor....pushing her backwards"

5. The fact that immediately after the alleged assault Ms. Sala met with the manager Ms. Taylor and discussed what transpired: I did not have the same opportunity at any time to meet with Ms. Taylor to state my perception of the series of events

(refer to document E2 page 1 paragraph 1 "Ms. Sala and Ms. Taylor, the manager of the Parkdale C.E.C. had discussed possible disciplinary action, no decision had yet been made regarding the severity of discipline"

-at the hearing Ms. Taylor stated that yes she had met with Ms. Sala directly after the alleged assault and discussed with her what had occurred as well as discipline action

-Apparently I was judged to be guilty by Ms. Taylor before all facts were gathered and analyzed

-Ms. Sala then met with staff relations that afternoon and with Ms. Young the following morning

-Ms. Taylor was present in the office on May 7, 1996 when I was interviewed by Ms. Young however she did not attend (refer to document E3 page 1 paragraph 2

-this can be perceived to be preferential treatment and set up biased opinions as I only was given the opportunity one week later to meet with Ms. Young (document E3)

6. Ms. Sala stated in document E2 makes reference to who initiated the series of events see bottom of page 2 and the top of page 3) "Ms. Sala stated that she closed her agenda book and walked past Ms. Lockwood out of the cubicle. Ms. Lockwood was still standing at the corner of the desk and Ms. Sala turned back toward Ms. Lockwood"

-then she stated that she pointed the pen and shook it in my face

-also worth noting in reference to Ms. Sala's impression of my character (refer to document E2 page 2 top of the page) "Ms. Young asked if Ms. Lockwood had raised her voice. Ms. Sala replied that Ms. Lockwood did not, she does not raise her voice, she's very controlled"

-I interpret this that my character is reserved and that I am professional in my behavior

7. The fact that Ms. Taylor and Ms. Sala initially dealt with my harassment complaint which was against Ms. Sala (refer to document E2 page 4) "Ms. Sala advised Ms. Young that Barb Taylor and she had agreed to do one thing at a time. They were dealing with an harassment issue."

-according to Treasury Board Guidelines and Human Resources Development Canada regulations neither employee should have been involved- especially Ms. Sala!

8. The fact Ms. Taylor rendered disciplinary action against me without interviewing me and made her judgement based on transcript notes

-Ms. Taylor states in document E5 "I am writing to confirm the results of my investigation into the incident" however Ms. Taylor did not conduct the investigation Ms. Young conducted the investigation

-Ms. Taylor also states in document E5 "by your own admission, you struck her pushing her backward" I did not at any time state that I struck Ms. Sala pushing her backwards" (refer to document E3 page 5 last paragraph) "my amendments to the transcript were "I used the word contact was made" also refer to document G7 page 2 middle of the page "I felt intimidated and threatened by this action so I put up my hand and pushed her away to put some distance between us. I want to specify that I did not push her hard, shove her or strike her in any way"

-Ms. Taylor's word used in document E5 "struck" this implies an aggressive action whereas my wording denotes a reflective, protective action

-Ms. Taylor also in document E5 states "The blow was of sufficient force to cause a bruise on the supervisor's chest." How did she come to this conclusion? What evidence did she draw on? In Ms. Young's report Document E4 page 3 she does not make any judgement or state that the bruise was caused by me

- note document G7 was a narrative that I brought to the interview with Ms. Young (document E3) on my own initiative - I therefore cooperated fully with this process
- no discipline hearing took place or explanation as to how she came to her conclusions or any follow up action took place
- only an envelope was given to my on July 5, 1996 (refer to document E5) in this letter Ms. Taylor states "you physically assaulted your supervisor" this is a out and out libelous statement
- in addition there is no mention of Ms. Sala's behavior in this letter or documented anywhere else by Ms. Taylor
- I can only sense that Ms. Taylor condones Ms. Sala's supervisory tactics
- there is no evidence stated in the discipline report (document G1) just "see attached record of interview with E. Sala May 1, 1996" (refers to document E2)
- there is no analysis what so ever (document G1 page 2 question #10)
- she states "nil" under mitigating circumstances (document G1 page 1#9) even though she had knowledge to the contrary

9. The document labelled E1 does not state a physicians name or credentials. Also there are handwritten notes obviously from two different people- no explanation is given regarding this ie. who is who

- as well typed written notes on the bottom of the document are also not signed
- the first time that I was presented or made aware of this document was at the adjudication hearing
- why was this document not previously presented as evidence at any level of the grievance process or mentioned in the disciplinary report (document G1)

10. There appears to be a discrepancy with the location and size of the bruise on Ms. Sala's body

- Ms. Sala stated that she was "punched at the base of her throat" (document E2 page 3 paragraph 2)
- Ms. Taylor stated at the adjudication hearing that she was shown a bruise in the middle of Ms. Sala's chest as well she pointed on her own body this location
- Ms. Taylor stated at the hearing also that the bruise she observed was three inches in diameter one week after in incident
- Ms. Young stated that she also viewed a bruise on Ms. Sala in the same time period which was one inch in diameter
- how was it concluded that this bruise was a result of the altercation on April 30, 1996
- was this the only conclusion made?
- is it not possible that many other circumstances could have brought about this mark

11. An apology to Ms Sala is a inappropriate suggestion. Rather an apology from her to me makes sense. Her aggressive, unpredictable abusive behavior is inexcusable

-continuous disrespectful, unprofessional remarks and gestures were ongoing and not addressed by management

-even at the hearing Ms. Sala stated that she did not talk to me about the supposed client complaints as she was concerned with the clients safety and welfare

-why then if she really came to this conclusion and judgement about me was I allowed to continue to work in the capacity as an employment counsellor fulfilling all duties primarily meeting one on one with people throuout the day on a daily basis

12. At the hearing Mr. Potter posed the question to Ms. Young how she would classify my response to ms. Sala's behavior in as either aggressive of passive

-why did it take her so long to respond to this question

-it appeared as if she really had to think about the "right" response this question in order to support managements case

13. I was asked why I did not consider any other options when I was faced with Ms. Sala pointing a moving pen close to my face approximately twelve inches directly in front of my face while she continued to advance closer. In addition I will add that I was flush up against her desk in essence cornered. Also Ms. Sala had left her cubicle (refer to document E2 page 2 last sentence and top of page 3) her actions were totally unexpected and took me by surprise as her physical actions took seconds

-the spontaneous nature of her actions, the fast action and my position did not leave me any choice but to protect myself in a reflex response

-I should also note that I have a back disability due to a injury which I receive a pension for - due to this injury I lack normal mobility and flexibility which is why I am not able to move quickly and easily

14. On my own initiative I tried several ways to bring about an end to the abuseive behavior of Ms. Sala and resulting escalating tension and stress I experienced I continued this effort even after I realized that management was not going to act on my concern or take action in any way-in other words fulfill the duties of managing staff I tried to make peace and extend the olive branch to Ms. Sala on March 3, 1996 (refer to document G7 page 2 last quarter of the page

15. The case examples from previous grievances do not even remotely relate to this grievance as the examples involved verbal threats to supervisors well being

-violent behavior with the intent to harm

-premeditated physical assault

-grievors credibility questionable as version of events recounted kept changing

-also alcohol impairment or addiction is a factor in one of the cases

-I did not see any reference to an employee protecting themselves against an aggressive supervisor mentioned

-there is no parallel to my case

[Sic throughout]

Employer's Rebuttal

The employer's counsel replied to the grievor's written arguments on February 1, 1999. Her submissions read as follows:

...

I. Irrelevant Submissions

The Employer submits that pages [14, 15 and the first paragraph on page 16] are irrelevant to the legal issues in the instant matter.

Regarding the points raised under numbers 2 and 3 on pages [16] and [17] the Employer submits that these submissions are irrelevant to the issues at hand.

The Employer additionally submits that number 5 at [pages 17-18] is irrelevant as is number 7 at page [18].

II. Unavailability of Provocation as a Mitigating Factor

In relation to the Grievor's submissions made under number 1 on page [16] the Employer stands by its earlier submissions respecting the unavailability of provocation as a mitigating factor (Employer's December 17, 1998 submission at pages [12-13]).

The Employer replies that these submissions also apply to number 6 at page [18].

III. Characterisation of Lockwood's Action as Aggressive

With regard to the submissions made in number 4 on page [17], number 8 at [pages 18-19], numbers 12, 13 and 14 at page [20], the Employer asks the Adjudicator to prefer the evidence of Ms. Young (hereinafter "Young") in characterising whether Ms. Lockwood's (hereinafter "Lockwood") response to the pen was defensive or aggressive (Testimony of Young recounted at page [7] of the Employer's Written Submissions dated December 17, 1998; Exhibit E-2 at pages 3 and 5; Exhibit E-4 at page 4).

The Employer disputes Lockwood's submission that she had no options. In her admissions, Lockwood showed that she contributed to the tension of the situation which led to her "push" Sala. By her own hand, Lockwood statement shows that she insubordinately stayed in Sala's office even after Sala repeatedly requested that she leave (Exhibit G-7 at page 2). The Employer submits that Lockwood had options. She could have followed her supervisor's order, exercised better judgement, and left the situation. She chose not to.

IV. Unwillingness to Accept Responsibility and an Absence of Remorse

In relation to the Grievor's submissions raised under numbers 9, 10 and 11 on [pages 19-20], the Employer again reiterates its objection to the Grievor's challenging either the medical evidence, or Ms. Sala's testimony concerning the bruise's origins, after-the-fact as it offends the rule set out in Browne v. Dunn (1893), 6 R. 67 (H.L.) at 70-1.

The Employer submits that Lockwood's continued attempts to challenge Sala's evidence, after the completion of cross examination, not only illustrates a pattern of denial but also an unwillingness to accept responsibility for what occurred. Factually, Lockwood is attempting to blame the bruise's origins on others persons or events. The Employer submits that her version is implausible (see Voyer v. Treasury Board (PSSRB 166-2-16197)) and asks that it should not be given much weight in relation to the totality of the evidence tendered by Sala, Young and Taylor

Moreover, the Employer also submits that Lockwood's pattern of denying what occurred resulted in inconsistencies in her evidence. In her testimony and submissions, Lockwood denied using the term "struck" in her interview with Young amending the report and using the word "contact" instead (Exhibit E-3 at page 5). In her direct testimony Lockwood stated that an "altercation" between her and Sala occurred. Yet under cross examination Lockwood denied knowing what the term "altercation" meant as she did not have a dictionary. When challenged that the term "altercation" was one that she herself had used, she was evasive and non-responsive. Still later, in another document Lockwood denies that she ever "struck" or "shoved" Sala (Exhibit G-7 at page 2) preferring the term "pushed" in this instance instead.

Finally, like the Grievor in Lefebvre v. Treasury Board (166-2-19990), Lockwood's submissions imply that Taylor's "gross mishandling" of her complaints, Sala's "unprofessional behavior" and Taylor's condonation of Sala's "supervisory tactics" ultimately resulted in Sala's assault (see Grievor's Written Submissions dated January 25, 1999 at pages [16-19]). The Employer submits that Lockwood entirely refused to accept any responsibility for what occurred. She believes she has done nothing wrong and that she is the only victim in this situation. Lockwood has, and continues to show, no remorse.

In light of the above, the Employer asks the Adjudicator to reduce the weight which can be attributed to all of Lockwood's evidence given both her pattern of denial and the presence of self-serving inconsistencies in her evidence.

[Sic throughout]

Reasons for Decision

Ms. Barbara Taylor issued a three-day suspension, later reduced to two days, to Ms. Lorraine Lockwood for physically assaulting her supervisor, Ms. Elizabeth Sala. Although the disciplinary letter (Exhibit E-5) says the incident occurred on April 10, 1996, there was no disagreement that the event took place April 30. The disciplinary letter states, in part:

...

... The blow was of sufficient force to cause a bruise on the supervisor's chest.

...

It is axiomatic to state that employers have the right to discipline and, generally, I do not believe adjudicators should interfere when the penalty imposed is within an acceptable range, if discipline was warranted in the first place, and taking into account any and all mitigating factors.

However, in this situation, I simply cannot support issuing a two-day suspension, given the particular circumstances presented to me.

Firstly, Ms. Taylor stated that, in part, she considered the severity of the assault in deciding on the penalty. More specifically, she stated she considered the fact Ms. Sala exhibited a bruise from the incident. This was not related to Ms. Young (the investigator) during her interview of Ms. Sala and Ms. Young stated she only happened to observe the bruise, in passing, days later. Ms. Young testified she did not base her report, or findings, on the fact there was a bruise. Indeed, the fact that Ms. Sala may have been injured was never brought up when Ms. Young interviewed Ms. Sala on May 1, 1996. I find it strange Ms. Sala never mentioned this injury when she spoke to Ms. Young. The issue of a bruise was not raised at all during Ms. Young's interview with Ms. Lockwood; therefore, Ms. Lockwood never had an opportunity to comment on the injury. In these circumstances, I find it inappropriate for Ms. Taylor to have considered the fact Ms. Sala had a bruise when deciding the appropriate length of the suspension.

Ms. Lockwood appeared to be a placid individual, even in spite of vigorous cross-examination by counsel. Based on my observation of the grievor, and the facts presented in testimony, I believe the grievor misconducted herself and some discipline is warranted. However, I also find that the supervisor did nothing to lessen the tension between herself and Ms. Lockwood. The grievor had just been told that there were some complaints registered against her and she asked to speak to Ms. Sala about these alleged complaints. If there were any, these would have been the first blight against the grievor that I was made aware of.

In my view, Ms. Lockwood's desire to discuss the issue of some type of client complaint at the earliest possible moment was understandable. The grievor had just been told that complaints about her work performance had been received, but Ms. Sala would not discuss the issue further. In this case the supervisor has to shoulder some of the blame for the escalation of the office tension. However, that does not excuse the actions of the grievor completely. To push a supervisor is simply wrong, and some response by the employer is warranted.

An altercation occurred and some force was used by the grievor in repelling her supervisor backwards. Ms. Young concluded (Exhibit E-4, page 4) that more force than was necessary was used and I share her views on this point: the grievor's own written statement says she pushed Ms. Sala away (Exhibit G-7, page 2).

For all these reasons, I feel, in this particular case, a written reprimand is more appropriate. To this extent, the grievance is sustained and Ms. Lockwood is entitled to be reimbursed for the two days' pay.

**Joseph W. Potter,
Deputy Chairperson**

OTTAWA, March 4, 1999.