Files: 166-2-27491
166-2-27499

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

CLIFF ANTEN

Grievor

and

TREASURY BOARD
(National Defence)

Employer

Before: Joseph W. Potter, Board Member

For the Grievor: David Landry, Public Service Alliance of Canada

For the Employer: S. Maureen Crocker, Counsel

Heard at Medicine Hat, Alberta,
May 27 to 30; July 29; and September 30 to October 2, 1997.

Mr. Cliff Anten is a GL&T, EIM-10, situated at the Canadian Forces Base (CFB) Suffield with the Department of National Defence. He has filed two grievances which the parties requested I deal with in one decision. The first concerns a lengthy suspension and the second grievance concerns the termination of the grievor's employment.

1. Suspension Grievance (Board File 166-2-27491)

The grievor was suspended from November 10, 1995 to February 29, 1996 as a result of an incident which took place on October 26, 1995 and he seeks revocation of that penalty with full back pay.

The Facts

The basic facts of this case are not in dispute and can be summarized as follows.

In September 1995 a reorganization occurred in the Construction Engineering Section at CFB Suffield. This resulted in the appointment of Mr. John Roche as supervisor in an area entitled the "Controls Shop". Some of the employees in the Controls Shop were unhappy with the supervisory style of Mr. Roche and stated as much to Mr. Roche's supervisor, Captain V.K. Banerjee. The parties agreed to discuss this issue at an all staff meeting scheduled for October 18, 1995. Due to the intervening absence of one of the staff members, the meeting had to be postponed; however, Captain Banerjee met individually with the employees to hear their concerns. His notes of these one-on-one meetings were introduced as Exhibit E-1. In general, the employees felt the supervision they were receiving was too specific with respect to work assignments and they felt they were being treated like children, with not enough praise being offered for their efforts. They believed that they were being harassed. Captain Banerjee listened to the complaints but concluded that Mr. Roche's supervisory responsibilities were being carried out in an appropriate fashion and stated as much to the employees. It was agreed, however, that the subject would be raised at an all staff meeting when everyone was present.

On October 26, Mr. Roche went to see Captain Banerjee with two round-trip memoranda (Exhibits E-2 and E-3) he had received from two of his employees, Messrs. Serge Giurissevich and Reme Lantican. Each requested that the harassment by their supervisor stop. Captain Banerjee instructed Mr. Roche to reply in writing and also to reschedule the all staff meeting for later that day now that everyone was present. Mr. Roche advised the employees there would be a staff meeting at 3:00 p.m. that day, although it was agreed that he did not inform them what it concerned.

As both Mr. Giurissevich and Mr. Lantican assumed the meeting concerned their harassment memoranda, Mr. Giurissevich went looking for Mr. Cliff Anten who had recently been elected as the Male Harassment Officer for the bargaining agent, the Public Service Alliance of Canada. Mr. Anten was familiar with the harassment complaints of the employees in the Controls Shop; therefore he sought permission from his supervisor to leave his work area in order to attend the meeting.

At 3:00 p.m., Mr. Anten arrived at the meeting room to find Captain Banerjee waiting outside. The testimony from all witnesses indicated that at that time all Controls Shop personnel were inside waiting for the meeting to get underway. Before Mr. Anten could enter the room, Captain Banerjee told him it was an all staff meeting and he was not to attend. According to Mr. Anten's own statement (Exhibit G-9) concerning the events that day, he stated that Captain Banerjee ordered him not to attend and further cautioned that if he did he would be considered to be insubordinate and would be charged with misconduct. This caution was stated twice before Mr. Anten poked his head into the room to inquire as to whether the employees continued to want him to represent them. When he heard an affirmative reply from some employees, he stated as much to Captain Banerjee who remained outside the meeting room.

At that point, both Captain Banerjee and Mr. Anten moved down the hall and out of earshot of the employees; Captain Banerjee again cautioned Mr. Anten not to attend and stated if he chose to do so the appropriate disciplinary procedure would follow.

Mr. Anten testified he felt the employees had a right to be represented and he stated his view to Captain Banerjee before proceeding into the meeting. Captain Banerjee followed and announced that the staff meeting would proceed as scheduled, although he stated Mr. Anten was there in spite of the fact he had been directed not to attend.

All parties testified that the issues discussed in the meeting paralleled those of the one-on-one meetings held earlier, namely, the employees' perception of the problems they were having with their supervisor. The meeting ended without further incident.

The following day, October 27, the matter was investigated by the Base Construction Engineering Officer, Captain Michael Pieters. After interviewing everyone concerned, he concluded that Mr. Anten should be discharged for insubordination in light of his lengthy disciplinary record (see Board files 166-2-25442; 25873; 25874; 25875 and 25971). He forwarded his recommendation on November 8, 1995 to the Base Commander, Colonel P.G. Kenwood, although the parties agreed that a copy of this document was not given to Mr. Anten.

On November 10, Colonel Kenwood wrote to Mr. Anten (Exhibit E-30) suspending him from duty pending determination of the disciplinary penalty by higher authority.

On November 15, Colonel Kenwood forwarded the recommendation to Major-General C.J. Addy, Commander, for action (Exhibit E-31). In it he stated, in part:

> *2. Since July 1992, Mr. Anten has been suspended on six separate occasions for misconduct. Four separate suspensions were upheld at adjudication. Termination for cause was replaced by a ten month suspension without pay. One twenty day suspension was not grieved. He has been counselled numerous times on ways to correct his behaviour. He has not demonstrated any intent to correct his behaviour since his return on 26 January 1995. I am concerned that a disproportionate amount of time and effort is being expended in attempts to rehabilitate Mr. Anten with no appreciable success. It has been clearly explained, to no avail, what steps are required on his part to overcome his defiant behaviour. Upon his return to duty on 26 January 1995, Mr. Anten was welcomed back by management and again informed*

> *assistance was available if he so required. To date, Mr. Anten has asked for no assistance.*

The parties agreed that this too was not copied to Mr. Anten and in fact on at least two other occasions (Exhibits G-15 and G-17) Mr. Anten attempted to find out what the disciplinary recommendation was, but to no avail.

Finally, by letter dated January 19, 1996 (received by Mr. Anten on February 8, 1996), Major-General Addy informed Mr. Anten that a decision had been made to suspend him from November 10, 1995 to February 29, 1996 for misconduct.

Argument for the Employer

The employer's argument was broken down into three issues: whether insubordination took place; the principle of "Obey now, grieve later"; and the length of the suspension.

For the first issue, counsel stated that the grievor disregarded and failed to comply with management's direction in that he refused to leave a meeting which had been scheduled by the employer for October 26, 1995. The meeting had been called to address two concerns of the employees in the Controls Shop, namely, a lack of understanding of the supervisory responsibilities and a lack of communication concerning what the Controls Shop was trying to achieve. Coincidental with the scheduling of this meeting was the receipt of two round-trip memoranda (Exhibits E-2 and E-3) objecting to harassment by the supervisor.

Counsel stated that at least five times the grievor was clearly advised he was not permitted to attend the meeting and he was directed by management to leave. This, counsel argued, satisfies the essential ingredients necessary to find that insubordination took place as outlined in Canadian Labour Arbitration (Brown and Beatty, Third Edition, 1984, paragraph 7:3612). The instructions were clearly given, they were clearly communicated to the grievor and the grievor refused to comply.

With respect to the principle of "Obey now, grieve later", counsel referred to Board Member Barry Turner's decision relating to this same employee (supra) where the principle is detailed no less than four times. The grievor was therefore well aware

of this principle. Counsel noted that there were some exceptions to this principle but they did not apply to the facts of this case.

With respect to quantum, counsel pointed to a number of factors. The misconduct was serious in light of the grievor's previous record. This was the sixth incident of misconduct since 1992 and was linked to previous misconduct. The grievor had just returned from a ten-month suspension and immediately upon taking up union duties, he reverted to his previous ways. We see a similar pattern of behaviour concerning a disregard for management direction. Also, there was a need to impress upon the grievor the importance of correcting his behaviour but it appeared the grievor did not want to get the message. The grievor accepts no responsibility for his misconduct, nor does he demonstrate any remorse.

Counsel also dealt with the issue of the delay between the time of the letter issuing the indefinite suspension and the letter imposing the penalty. Counsel pointed out there were three months from the time the incident took place to the time the letter of suspension was issued and this was reasonable given the fact the Commander had to conduct an independent investigation. Counsel noted that the intervening period worked in the grievor's favour as the initial disciplinary recommendation was for termination, yet the final decision imposed was a suspension of almost four months.

The last issue dealt with in argument by counsel was that of credibility. Counsel noted the grievor was a long-standing union representative and was well aware of his responsibilities. He knew the October 26 meeting was neither a grievance hearing nor a harassment investigation. He knew that given the confidential nature of both matters, the subject would not be discussed in an open forum such as a staff meeting.

Counsel referred to and cited the following decisions: *Dearnaley* (Board files 166-2-15008; 15009; 15154 and 15155); *Enniss* (Board files 166-2-17728 to 17732 and 17849); *Schuberg* (Board files 166-2-15123; 15159; 15350 and 15424); *Higgins* (Board file 166-2-3578); *Re Clarke Transport Canada Inc. and Teamsters Union, Local 938* (1990), 16 L.A.C. (4th) 160; *Da Cunha* (Board file 166-2-24725); *Quigley* (Board file 166-2-18034); *Brierley* (Board file 166-2-14653); *McDonald* (Board file 166-2-15417);

Skibicki (Board file 166-2-20723); *Chong* (Board file 166-2-16249); *Sarin* (Board file 166-2-15600); and *Tipple v. Canada (Treasury Board)* [1985] F.C.J. No. 818 (Appeal No. A-66-85).

Argument for the Grievor

The grievor's representative stated that the grievor was not engaging in any self-serving behaviour on October 26. He had been asked to attend a meeting by employees of the Controls Shop to represent their interests. In fact, he did so only after receiving permission from his supervisor to be absent from work. The grievor was simply trying to carry out his duties as a seasoned union representative. The grievor was aware that the employees have a right to have a union representative of their choosing and as the October 26 meeting related to union issues, like harassment, the employees were entitled to be represented.

It was argued that the bargaining agent is allowed some presence in the workplace under the provisions of article M-8 of the collective agreement so long as it does not interfere with the employer's operation. In this case, the employees requested a meeting to deal with supervisory problems and the employer agreed. Given the fact the round-trip memoranda (Exhibits E-2 and E-3) were filed before the meeting, and the meeting dealt with the same issues, the employees were entitled to union representation. The grievor did not breach a legitimate rule. He went to the meeting in the belief that the employees were entitled to have a harassment representative there. The representative cited Messrs. Brown and Beatty at 9:1400 of their text where they state:

> *Unions will also commonly negotiate a myriad of other provisions to ensure that they are able to effectively discharge their responsibility to supervise the collective agreement and adequately protect the legitimate interests of their members ...*

It was submitted that this goes to the test of what a union representative is; that person is elected to represent the interests of the members. This is exactly what Mr. Anten was attempting to do and this was stated to Captain Banerjee.

Mr. Anten has held a variety of executive positions within the bargaining agent for some 29 years now and is well aware of the rights of employees to be represented. These positions are detailed in Board Member Turner's decision (supra).

The grievor's representative cited Messrs. Brown and Beatty at 7:3620, page 140, of their text wherein they state:

> *... where the refusal to comply does not affect the employer's ability to maintain production, or challenge its symbolic authority, the conduct of the grievor should not be viewed as serious or even as being insubordinate ...*

As Mr. Anten's actions did not interfere with production, and as the authority of Captain Banerjee was not negated, there should be no discipline attached to Mr. Anten's refusal to leave.

With respect to the issue of delay, the grievor's representative noted that Mr. Anten was notified on November 6, 1995 that the employer believed him to be guilty of misconduct (Exhibit E-7). After that date, the only issue to be determined was the penalty itself and it took from November 6 to February 8 to tell him what the penalty would be. There was no evidence that anything was done after November 6, other than internal correspondence. The delay caused serious prejudice to the grievor in that he had to cash in his life insurance policy and only received Unemployment Insurance on February 5, 1996. In addition to the delay, the Department purposely did not tell the grievor what was being contemplated, which compounded the prejudice of the delay.

The grievor's representative stated, in response to my inquiry, that there is no dispute an order was given and understood by Mr. Anten. However, the problems discussed at the October 26 meeting were essentially the same issues as raised in Exhibits E-2 and E-3, namely, problems with the supervisory manners of Mr. Roche, and as such Mr. Anten believed the employees were entitled to union representation.

The grievor's representative referred to and cited the following decisions: *Evans* (Board file 166-2-25641); *Thibodeau* (Board file 166-2-20955); *Côté and Bissonnette* (Board files 166-2-17654 and 17656); *Marineau* (Board file 166-2-26226); *Lessard* (Board file 166-2-24980); *Cahill* (Board file 166-2-25854); *Rioux* (Board files 166-2-25234 and 25235); *Legère* (Board file 166-2-17971); *Englehart* (Board

file 166-2-9065); *Chafe* (Board file 166-2-13485); *Re Gulf Canada Ltd., Clarkson Refinery, and Energy and Chemical Workers' Union, Local 593* (1982), 3 L.A.C. (3d) 348; *Re Whitaker Cable and International Union of Electrical Workers, Local 574* (1974), 6 L.A.C. (2d) 109; *Re Newfoundland (Treasury Board) and Newfoundland Association of Public Employees (Gillingham)* (1993), 36 L.A.C. (4th) 236; *Re Treasury Board (Transport Canada) and Godfrey* (1989), 7 L.A.C. (4th) 153; *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43* (1990), 10 L.A.C. (4th) 272; *Re FBM Distillery Co. Ltd. and United Brewery Workers, Local 304* (1978), 20 L.A.C. (2d) 161; *Re Canada Post Corp. and Association of Postal Officials of Canada (Harris)* (1992), 27 L.A.C. (4th) 126; *Re Auto Haulaway Ltd. and Teamsters Union, Local 938* (1994), 44 L.A.C. (4th) 77; *Re Dallas and the Crown in Right of Ontario (Liquor Control Board of Ontario)* (1980), 28 L.A.C. (2d) 369; *Peeke* (Board file 166-2-13996); *Rempel* (Board file 166-2-14941); and *Re British Columbia Telephone Co. Ltd. and Federation of Telephone Workers of British Columbia* (1976), 13 L.A.C. (2d) 312.

Rebuttal Argument by the Employer

The exceptions to the "Obey now, grieve later" concept are narrowly defined by Messrs. Brown and Beatty (supra) at 7:3620, pages 7-140, 7-145 and 7-146 of their text. It was argued that the grievor must prove he falls within one of the exceptions, and to do so he must show that there would have been irreparable harm to the interests of other employees if he were to obey the instructions; he must show this belief was communicated to the employer and he must show the harm was serious enough that it justified a failure to comply.

Counsel argued this test was not met by the grievor as his only response to management was that he was going to attend the meeting. Mr. Anten stated he felt the employees were entitled to representation and at no time did he inform management that he felt the circumstances fell within the exceptions to the rule.

Furthermore, as a well versed official of the bargaining agent, he knew that the employees retained the right to file a grievance, or pursue harassment complaints, or complain to the Public Service Commission, or complain to the Public Service Staff Relations Board under either section 8 or 23 of the *Public Service Staff Relations Act*.

These same avenues of redress were also open to Mr. Anten if he complied with the direction and followed the principle of "Obey now, grieve later".

The following decisions were referred to and cited by counsel: *Re Spruce Falls Power & Paper Co. Ltd. and International Brotherhood of Pulp, Sulphite & Paper Mill Workers, Local 89* (1972), 2 L.A.C. (2d) 91; *Re Douglas Aircraft Co. of Canada Ltd. and United Automobile Workers, Local 1967* (1972), 1 L.A.C. (2d) 109; *Re International Woodworkers of America, Local 2-500, and Stancor Central Ltd. (Peppler Division)* (1970), Vol. 22, 184; *Re Canada Post Corp. and Canadian Union of Postal Workers (Matthews)* (1992), 30 L.A.C. (4th) 88; *Re Felec Services Inc. and I.B.E.W., Local 2085* (1986), 28 L.A.C. (3d) 440; *Nelson* (Board files 166-2-12351 to 12353); *Canadian Union of Public Employees, Metropolitan Toronto Civic Employees' Union, Local 43 v. Metropolitan Toronto (Municipality)* (1990), 74 D.R. (2d) 239.

Reasons for Decision

The issue to be decided is whether or not a lengthy suspension (November 10, 1995 to February 29, 1996) was justified as a disciplinary response for an incident that took place on October 26, 1995.

The evidence indicated that there was a meeting of all the Controls Shop personnel scheduled to occur at 3:00 p.m. on October 26. We also know that none of the personnel were made aware of the subject of the meeting and some employees felt it was to deal with the subject of harassment. In this regard, these employees had requested the grievor to represent them on harassment issues as he had been elected Male Harassment Officer, an official of the bargaining agent. We know too that there had been concerns among the Controls Shop employees about the manner in which the supervisor of the Controls Shop had undertaken his supervisory responsibilities.

When the grievor arrived at the site of the meeting, he was ordered by Captain Banerjee not to attend the meeting. In fact, the grievor's own evidence was that he was told if he entered the conference room he would be insubordinate and disciplinary action would follow. Nevertheless, the grievor chose to enter the room and the meeting continued. In the grievor's opinion, the meeting was called to deal with harassment issues. In the employer's opinion, the meeting was a general staff

meeting, not a harassment investigation, and representation of the bargaining agent was not afforded to individuals in these circumstances.

There was also no dispute that on November 10 Mr. Anten was notified that he was being suspended pending referral of the matter to higher authority for the determination of an appropriate penalty. Mr. Anten attempted to discover what the recommended penalty was but the departmental policy was not to reveal this until a final decision was made. It was not until the letter from Major-General C.J. Addy dated January 19, 1996 that Mr. Anten was informed his October 26 actions had resulted in a suspension from November 10, 1995 to February 29, 1996. No evidence was led as to why the Department felt this particular length of suspension was appropriate, although it was clear they did not feel the actions warranted discharge.

There is no doubt that Mr. Anten clearly defied a direct order. There is also no doubt that the order was given clearly and was well understood by the grievor. Mr. Anten chose to ignore the words of caution because he felt the employees were entitled to representation by the bargaining agent in situations involving harassment. Prior to entering the room, Mr. Anten may have believed the meeting was being held to discuss harassment issues. However, when he saw all the Controls Shop personnel present, and when told by Captain Banerjee it was a staff meeting, this seasoned official of the bargaining agent must have realized it was highly unlikely that confidential harassment complaints would be the subject matter and he should not have entered the meeting room.

In a previous decision dealing with the same employee (supra) and much the same subject, Board Member Turner stated, at page 60:

> *... However, the proper approach to this philosophical difference for Mr. Anten would have been to "obey now and grieve later". Mr. Anten should have referred to adjudication any actions, instructions, or restrictions from his employer that he felt violated the collective agreement. In addition he could have filed a complaint under the relevant section of the Public Service Staff Relations Act if he believed any of his rights under the Act were being violated. He did not. Instead he engaged himself in acts of self-help and continued to defy his employer by behaving as if he possessed a blind, philosophical death wish.*

Board Member Turner further stated, at page 61:

> *... Even if the grievor believes the employer is violating the Public Service Staff Relations Act or the collective agreement, the principle he must nonetheless adhere to is "obey now, grieve later". The only exception to this rule relates to "certain urgent circumstances" as expressed by Messrs. Brown and Beatty in their textbook. I am satisfied that the grievor failed to establish that he falls within that exception in relation to any of the grievances before me.*

Board Member Turner's decision was released approximately nine months prior to the events of October 26 taking place. One would have to believe it would be an issue that would still be very fresh in the grievor's mind and the "Obey now, grieve later" concept would be, in this instance, well-known. Mr. Anten stated he was aware there were exceptions to this rule and this too was discussed in Board Member Turner's decision where, at page 27, he stated:

> *Canadian Labour Arbitration (supra) goes on to say* (at 7:3623):
>
> *Put more succinctly by another arbitrator, "when acting in his representative capacity a union steward stands in a position of equality with management". Although there appears to be some variation in the standards to be applied in order for a union official to successfully invoke this exception, it is clear that he will be required to prove that there was some element of necessity in the union matters to which he attended. Such urgency has been established when it was shown that the official was required to attend immediately to the threat of an illegal walk-out, or to the processing of grievances which would otherwise have been barred by the time-limits of the agreement.*

Board Member Turner found in his decision that the exception did not apply to the circumstances before him; I too reach the same conclusion here. Mr. Anten should have followed the axiom "Obey now, grieve later."

There was, therefore, nothing in my view that was of a sufficiently urgent nature to justify Mr. Anten's decision to deliberately disobey a direct order not to attend the meeting.

The question now turns to one of quantum. Departmental personnel felt the initial recommendation for discharge was too harsh and they reduced it to a suspension of some three and one-half months. Ordinarily this would have been within the realm of acceptability given my findings above.

I am concerned, however, with the process the recommendation for disciplinary action followed. On October 27, Mr. Anten received a letter (Exhibit E-6) informing him there would be an investigation into the matter and he would be given an opportunity to present his views at a meeting of October 30. This he did (Exhibit G-9). Then, on November 10, Mr. Anten was suspended "pending determination of the disciplinary penalty by higher authority" (Exhibit E-30). Mr. Anten did not know what the recommended disciplinary response was. At that time, the investigation was complete and on November 15, the Base Commander, Colonel P.G. Kenwood, forwarded his recommendation for termination. Still, Mr. Anten was not notified! At various times in November, December and January, Mr. Anten attempted to discover what the recommendation was. All to no avail.

Between November 15, 1995 and January 19, 1996, nothing that I was made aware of took place with respect to the investigation. All of the employees' statements were in and the only remaining issue was to decide the penalty. In the interim, the employee was suspended indefinitely. I was not made aware of any justification to wait in excess of two months between the time the recommendation was made and a decision rendered in this case. In such a situation the employee does not know whether he should be searching for other temporary work, part-time work or permanent work, in this intervening period. In effect, he is in a state of limbo. He knows he has been suspended but he does not know how long this penalty will last, nor does he know what was recommended.

That Mr. Anten is culpable of misconduct, there is no question. That it is serious is also not in issue, as is the fact that Mr. Anten has a lengthy disciplinary record. However, it is also a fact that in excess of two months slipped away from the time the investigation was finalized until he was informed of the result. I was given no explanation as to why this occurred. Given the circumstances of this case, and the difficulties that have existed between the employer and the grievor in the past, I find it is more than just a coincidence that the suspension almost coincides with the delay

the grievor incurred before he found out what the penalty would be. In light of this, I find a suspension of one month is a more appropriate disciplinary response and Mr. Anten is to be reimbursed for the difference.

To this extent, the suspension grievance is sustained.

2. Termination Grievance (Board File 166-2-27499)

The second grievance was filed by Mr. Anten on June 5, 1996 concerning his discharge, and reads as follows:

> *I grieve my dismissal that was awarded to me, effective 10 May 1996, of which I became aware of 13 May 1996, and my suspension effective 13 March 1996, pending the decision for dismissal.*
>
> *I grieve that I had been previously subjected to harassment, which had affected my judgement and;*
> *I grieve that I was denied E.A.P. to correct this condition.*
>
> *I grieve that natural justice was not applied in that the same person, (Captain W.P. Pieters) who had made me a victim of harassment, also had laid these charges of misconduct, investigated the matter, and recommended the penalty.*

He requests the following corrective action:

> *That I be re-instated in my former position with all back pay and benefits be restored to me, that the Department pay my portion of U.I.C. and medical benefits and union dues, that the department be held accountable for any loss of property, and that I be allowed to participate in an E.A.P. program that would restore and make me whole again.*
>
> *That the Dept. monetarily compensate me additionally for pain suffering.*

I heard from a total of five witnesses and Exhibits E-1 to E-21 and G-1 to G-12 were introduced. A request for the exclusion of witnesses was made and granted.

During the proceedings, counsel for the employer submitted that any violation of the rules of natural justice that may have taken place during the events themselves (as stated by the grievor) was overcome by these proceedings. The grievor's

representative concurred; consequently, I was left with the sole issue of the propriety of the discipline imposed.

In essence, Mr. Anten was discharged for smoking in a non-smoking location, for consuming alcohol during working hours and in consideration of his disciplinary record.

The facts themselves are not in issue between the parties and can be summarized as follows.

The Facts

March 4, 1996 was a relatively cold morning in Medicine Hat, with the temperature being between -14 and -20 (Exhibit G-9). For Mr. Anten, it was his first day back at work following the four-month suspension cited earlier. His work assignments that day entailed activities both inside and outside Building 349. Initially, he worked alone but following his 9:30 morning break, Corporal Plante was assigned to work with him and their instructions were to check the car plugs outside the building as it was felt they might not be working. Mr. Anten testified that this task was accomplished relatively quickly, following which Corporal Plante suggested they go inside to find out what the actual temperature was on the weather channel on the television. According to the testimony of Captain Pieters, the initial reason given by Mr. Anten for going inside was he believed the plugs were thermostatically controlled and he needed to check the breaker switch (Exhibit E-11). During direct testimony, however, Mr. Anten stated they went inside to see if the temperature was sufficiently cold to curtail outside work activities as their next work orders involved being outside.

Whatever the reason, upon entering the building, Mr. Anten had a lit cigarette which he testified he absentmindedly forgot to extinguish. The DND Base Policy on Smoking (Exhibit E-1) has prohibited smoking in all DND workplaces since January 1, 1989. The 1992 Treasury Board Policy (Exhibit E-2) prohibits smoking in the workplace. Mr. Anten testified he was aware of the non-smoking policies. The Accommodation Officer, Ms. Fay Chapman, entered Building 349 on the morning of March 4 and observed both the grievor and Corporal Plante in the Common Room watching television. Ms. Chapman testified there was considerable smoke in the room

and she saw Mr. Anten smoking as well as relaxing on the couch. When Ms. Chapman questioned them as to their reason for being in the Common Room, neither replied initially but, when asked again, Mr. Anten stated he needed to be let into the electrical room to check the breaker switches and he butted out his cigarette. Ms. Chapman used her master key to let him into the electrical room where, according to Mr. Anten's testimony, both he and Corporal Plante checked the breaker switches for the car plugs and then left.

Exhibits E-4 to E-9 were introduced through Ms. Chapman, being photographs taken on September 24, 1997 of the front doors to Building 349 as well as interior shots of the Common Room.

Exhibit E-4 shows two non-smoking signs on the front doors leading into the building and, although Mr. Anten testified he entered through these doors, he does not recall seeing the non-smoking signs. Exhibit E-8 shows a large non-smoking sign on the wall above the television in the Common Room but Ms. Chapman testified that on March 4 there were two small signs in the room, one being by the television and the other on the same wall but on the other side of the doorway. Again, Mr. Anten testified he never observed the signs and Mr. Anten recalls the Common Room being one where smoking was permitted in 1995.

Mr. Herman, the first witness called by the grievor's representative and a union steward at the time in question, testified he went into the Common Room on March 12, 1996 after he became aware of the incident, and saw two non-smoking signs in the location Ms. Chapman identified. However, he stated they looked like they had been there for a short period only as, upon peeling one back, he did not see any discoloration on the wall. Ms. Chapman testified she frequently replaced the signs as people removed them from time to time.

The incident was reported to Captain Pieters, who testified he began his investigation. Mr. Anten was not aware, at this time, that the matter was under investigation and he came to work as usual on March 5. Among his daily work orders was a requirement to find out why there was no heat in Building 206, which is the Crowfoot Junior Ranks Club. On this occasion, he was working with a term electrician by the name of Mr. Russell. The individual who appeared in charge of Building 206

was S.-Sgt. Low and he met Messrs. Anten and Russell on March 5 to describe the problem. The two tradesmen could not resolve all the heating problems that day and further work was required the following day. Before they departed, Mr. Anten testified that they were offered a beer by S.-Sgt. Low. Mr. Anten testified he declined the offer as he was aware of the Base policy which did not permit the consumption of alcohol during working hours.

The two tradesmen returned to complete their work the following day, March 6. After all necessary repairs were made in the afternoon, S.-Sgt. Low, in his written statement says (Exhibit G-4): " ... I offered them a drink. The younger had a diet coke and the other asked for a Budweiser beer which I gave them ... ". Mr. Anten testified he was the one who drank the beer and his colleague, Mr. Russell, drank the coke. Mr. Anten testified he accepted the beer because he felt it was a gracious gesture that showed appreciation for the work he had done. He did not think about the alcohol policy or Base rules at that time as he was feeling somewhat depressed about his recent four-month suspension. There was no dispute with respect to the fact that Mr. Anten continued to work while consuming the beer in that he listened for the various heat cycles to kick in as he was required to do.

He was observed drinking a beer while on duty and this information came to Captain Pieters' attention verbally on the morning of March 9, and confirmed in writing on March 11, 1996 (Exhibit E-11).

On the morning of March 11, Captain Pieters met with Mr. Anten and his union representative to inform him of the smoking incident. A letter confirming this was given to Mr. Anten (Exhibit E-12) and stated that a formal meeting would be held the next day to assemble all facts. Mr. Anten stated there was no need for a formal meeting as he did not deny the fact he was smoking in a non-smoking location.

In the afternoon of March 11, Captain Pieters again met with Mr. Anten and his union representative to inform him of the drinking incident. A letter confirming this was given to Mr. Anten as well (Exhibit E-13). Again, Mr. Anten admitted to consuming alcohol while on duty and stated there was no need for a formal meeting the next day.

In spite of Mr. Anten's admission on both charges, a formal meeting was held on March 12 to discuss each issue. Again, Mr. Anten admitted to both smoking in a non-smoking location and consuming alcohol during working hours. Mr. Anten also admitted to being aware of the non-smoking policies of the Department and the Treasury Board, as well as the policy prohibiting the consumption of alcohol while on duty (Exhibit E-14). In addition, Mr. Anten asked for assistance from the Employee Assistance Program (EAP) for his addiction to smoking.

On March 13, 1996, Mr. Anten was advised in writing he was suspended from duty pending a final determination of penalty (Exhibit E-17). On April 30, Mr. Anten received a letter form Major-General C.J. Addy informing him he was being terminated for the above-referenced infractions in conjunction with his previous disciplinary history (Exhibit E-19). The grievance followed.

Argument for the Employer

The employer's counsel stated that Mr. Anten's disciplinary history has shown that his behaviour has reached a point where he cannot be trusted to follow the most basic work requirements. The grievor's working conditions are such that he is not continually supervised and is expected to complete his work assignments independently. At this point in his career, counsel stated that the employer cannot trust Mr. Anten to follow the work rules as evidenced by his record and the latest two incidents.

Counsel stated Mr. Anten admitted to smoking in a non-smoking location while aware of the non-smoking policy. Furthermore, Mr. Anten admitted consuming alcohol during working hours, while aware of the policy prohibiting this.

In addition, counsel said the credibility of Mr. Anten was in question as he stated in the investigation to Captain Pieters that he came inside on March 4 to check the thermostatically controlled plugs. However, during his testimony he stated he came inside for safety reasons, namely, to see what the weather channel stated the temperature was. The reason stated to Captain Pieters indicated there was no need to be in the Common Room watching television and counsel urged me to accept this version over that stated by the grievor in evidence.

Finally, with respect to this incident, counsel stated it occurred within two hours of his returning following a four-month suspension and there was no evidence to substantiate Mr. Anten's claim that he was depressed or inattentive when he reported for work. With respect to the request for assistance from EAP, the grievor could have sought this on his own and there was no evidence he did so.

Insofar as the drinking incident was concerned, counsel stated the evidence indicated Mr. Anten was offered a drink and he chose to consume a beer. He could have selected a coke like his colleague, but he took a chance. What makes this all the more serious was the fact Mr. Anten had previously been given a five-day suspension on November 30, 1992 for consuming alcohol during working hours (as contained in Exhibit E-13 of suspension grievance and referred in Board Member Turner's decision (supra)).

Counsel stated Mr. Anten was aware of the policy prohibiting the consumption of alcohol during working hours and had even thought of this in declining a similar offer the previous day. It was not permitted to consume alcohol during working hours in 1992 when he was disciplined and it is not permitted in 1996 either.

With respect to quantum, counsel argued that the past record indicates the escalating nature of the grievor's behaviour was so serious that lengthy penalties were warranted. These were all listed in Board Member Turner's decision (supra). Furthermore, management has done all it can in bringing these matters to Mr. Anten's attention and trying to correct his behaviour. He has received in effect a second "last chance" by virtue of the disciplinary letter received in the grievance cited earlier.

Counsel stated that even with a clear record, which the grievor certainly does not have, drinking on duty is a serious matter. In this case, counsel stated that the incident relied upon to support termination does not have to be so serious as to warrant termination itself, but misconduct must be found. This is supported by Messrs. Brown and Beatty at 7-166 of their text.

In the alternative, counsel urged me to award Mr. Anten financial compensation rather than return him to his position.

The following cases were referred to by counsel for the employer: *Toronto Electric Commissioners and Canadian Union of Public Employees, Local 1* (1990), 19 L.A.C. (4th) 105; *National Auto Radiator Manufacturing Co. Ltd. and Canadian Automobile Workers, Local 195* (1988), 2 L.A.C. (4th) 346; *Surrey Memorial Hospital and Registered Nurses' Association of British Columbia* (1979), 24 L.A.C. (2d) 342; *Gourlie and Fawcett* (Board files 166-2-13479 and 13481); *Dearnaley* (supra); *Schuberg* (supra); *Enniss* (supra) and *Higgins* (supra).

Argument for the Grievor

The grievor's representative argued that the evidence indicates Mr. Anten only went inside Building 349 following Corporal Plante's suggestion that they check the temperature on the television. He absentmindedly forgot to extinguish his cigarette and did so as soon as he saw Ms. Chapman. The grievor made no effort to conceal his guilt, readily admitting to smoking in a non-smoking location when asked by Captain Pieters.

His inattentiveness to the fact he entered the building with a lit cigarette could be attributed to the fact Mr. Anten had just returned from a four-month suspension which he did not feel was just and also which caused him some financial hardship. The representative argued that it was reasonable to assume that coming off a four-month suspension Mr. Anten would be very low, irrational and forgetful. This he was and it should be a mitigating factor in deciding penalty. In this light, the representative noted that the *Non-Smoking Health Act* provided for a $50. fine in these situations and suggested this penalty in lieu of disciplinary action.

The grievor sought assistance from the EAP for two reasons, namely, in hopes it might put the disciplinary action in abeyance and to help or assist with his personal problems. These should be considered as well in assessing penalty.

With respect to the second incident, the consumption of alcohol, the representative stated that the grievor was in fact not well aware of the policy. Although Mr. Anten did consume a beer during working hours, he did not do so in specific defiance of the policy. Rather, the representative argued that the offer of a beer was made in appreciation for the extra effort Mr. Anten had made in repairing the heating problem. It was offered and accepted in a gracious way and it was not an

act of misconduct that deserves punishment due to the fact it lacked intent. There was no evidence to suggest Mr. Anten intended to disregard or disrespect management's policy or directives.

The representative stated that the grievor took responsibility for both acts immediately upon being confronted by Captain Pieters on March 11. There was no need for a formal hearing on March 12 because the facts were readily admitted. Mr. Anten did not try to hide anything, which further supports the view that he had no intention of violating rules or procedures. Mr. Anten absentmindedly walked into a building with a lit cigarette. This does not show disrespect for management policy as counsel for the employer suggested. Mr. Anten was offered a beer and graciously accepted. This too shows no disrespect for management policy. Both acts were simply unintentional.

The grievor's representative referred to the comments of Messrs. Brown and Beatty at section 7:4310 of their text, which, he stated, suggests the use of the disciplinary record is discretionary. In this regard, the representative suggested I use my discretion and find a penalty which more accurately reflects the severity (or lack thereof) of the two offenses. I was reminded that Mr. Anten is 52 years old and he is nearing pensionable time. As neither event interfered with the employer's operations, and in light of the described mitigating factors, and in light of case law which suggest a minor penalty for these types of infractions, the representative argued discharge was too severe a penalty.

The representative also stated that were Mr. Anten to be reinstated with conditions which included counselling, these would, in fact, be welcomed.

I was referred to the following cases: *Carmichael and Gilchrist* (Board files 166-2-3013 and 3014); *Cook* (Board file 166-2-13966); *Morrison* (Board files 166-2-19584 and 19585); *Nutter and Wallace* (Board files 166-2-8709 and 8710); *Swinimer* (Board file 166-2-20756); *McNamara* (Board file 166-2-18291); *Krawiec* (Board file 166-2-17822); *MacCullough* (Board files 166-2-22839 and 22840); *Gros-Louis* (Board files 149-2-105 and 166-2-21667); *Edison* (Board file 166-2-19659); *Roy* (Board file 166-2-19519); *Marsh* (Board file 166-2-16486); *Roy* (Board file 166-2-15176); and *Blouin* (Board file 166-2-12632).

Reasons for Decision

The discharge is based on a culminating incident, in this case smoking in a non-smoking location and consuming alcohol while on duty. Since the grievor has admitted to both of these incidents, it is not necessary for me to establish if they in fact took place. Furthermore, the grievor admits to knowing the non-smoking policies and directives as well as the directive prohibiting the consumption of alcohol while on duty.

The grievor's representative argued that the smoking incident should result in, at most, a simple fine and as there was no intent with respect to the consumption of alcohol, it should not result in a penalty. In the alternative, I was referred to many adjudication decisions where alcohol related infractions resulted in a very minimal disciplinary response and I was urged to follow this line of arbitral jurisprudence.

With respect, I simply cannot concur with the suggestion of awarding a minimal suspension in this situation. The facts indicate clearly that the employer has relied on the disciplinary record of the grievor and has used the last two incidents merely as the straw that broke the camel's back, so to speak.

In *Re Culinar Foods Inc. and American Federation of Grain Millers, Local 242*, (1995), 48 L.A.C. (4th), Arbitrator Brandt wrote, at page 106:

> *Cases like this one, where the culminating incident is, in and of itself, relatively minor always appear to involve harsh discipline since it appears, at first glance, that the grievor has been fired for being 35 minutes late!!! However, that is to view the culminating incident out of context. It is better to say that the grievor has been fired because he has reached the last step of a progressive discipline policy that has throughout warned him of the possibility of termination and which (following the last occurrence in August) affirmatively advised that the next infraction "will result in the termination of your employment". Moreover, it may be observed that the grievor has reached this stage of the progressive discipline system over a fairly short period of time. The sunset clause provision of the agreement is one of short duration and affords employees a relatively easy opportunity to clear their records. In that context it is appropriate to view seriously the record of an employee who has, over that short duration, reached the stage of termination.*

The situation Arbitrator Brandt faced is not unlike the situation in front of me.

On May 10, 1994, Mr. Anten received a letter of termination which, together with other suspensions, were the subject of an adjudication decision by Board Member Turner (supra). In November 1994, Mr. Anten was reinstated on what may be categorized as a final opportunity to alter the pattern of unacceptable behaviour.

On November 10, 1995, the grievor was suspended for some three and one-half months. Initially, the recommendation was for discharge but Mr. Anten was given, as the employer's counsel has stated, a second "last chance" to mend his ways.

The grievor returned to work on March 4, 1996 and was observed, a mere two hours after his shift began, smoking in a non-smoking room and watching television! It is only reasonable to expect that, following two "last chance" decisions, Mr. Anten would have been on his very best behaviour. Sad to say, this was not the case as incidents worthy of some disciplinary response took place on the first and third day back.

The grievor's representative urged me to use the discretion permitted to substitute a lesser penalty. In deciding whether or not to do so I have reviewed the mitigating factors established by case law and outlined in *Culinar Foods* (supra), at page 107, wherein it states:

> *The case law has established a number of factors for arbitrators to consider in deciding whether to exercise their remedial discretion to substitute a different penalty for that of discharge. These are the grievor's work record, his length of service, whether or not the offence was an isolated incident in his employment history, whether it was provoked or committed on the spur of the moment as a result of a momentary aberration, whether it was premeditated or unintentional, whether the penalty resulted in any special economic hardship for the grievor, whether the grievor was discriminated against in the application of company rules, whether the offence was a serious one in terms of company policy and obligations and, finally, whether there are any other circumstances (such as an apology or an undertaking for the future) that should be taken into consideration: see Re U.S.W.A., Loc 3257 and Steel Equipment Co. (1964), 14 L.A.C. 356 (Reville).*

I find that it is not appropriate to modify the penalty.

When one examines the grievor's disciplinary record, it becomes apparent that the employer has imposed progressive disciplinary sanctions upon Mr. Anten in the hope that he will mend his ways. Unfortunately, he has been the author of his own misfortune. The record indicates the following:

1. June 1992: one-day suspension - upheld at adjudication.
2. November 1992: five-day suspension - grievance withdrawn.
3. June 1993: ten-day suspension - upheld at adjudication.
4. September 1993: 20-day suspension - upheld at adjudication.
5. May 1994: discharge - reduced to a ten-month suspension at adjudication.
6. November 1995: three and one-half month suspension - reduced to one-month suspension.
7. March 1996: discharge.

What is all the more disconcerting here is the fact the discharge now is based, in part, on the consumption of alcohol during working hours which was also the situation in November 1992 for which Mr. Anten received a five-day suspension. Mr. Anten seems to feel that the instant case is different from the previous offense in that he did not pay for the beer offered by S.-Sgt. Low. I see no difference between paying for an alcoholic beverage or receiving it free if the policy or practice prohibits the consumption of alcohol during working hours. Mr. Anten did not deny this took place, nor did he deny he was unaware of the policy. He took a chance and was caught.

The grievor's representative asked me to consider reinstatement with considerations. In rejecting this possibility, I am mindful of the arbitrator and Divisional Court's decision in *U.S.W.A. Local 12998 v. Liquid Carbonic Inc.* (1996), 29 O.R. (3d) 468, which quotes the arbitrator as saying:

> *... Reinstatement on conditions presupposes and, indeed, requires, more reasonable expectation that the reinstated employee is willing and capable of adjusting his behaviour and attitude to permit the continuation of the employment relationship free of behavioural problems plaguing the employment situation in the past. Without that, reinstatement with conditions is generally considered an exercise in futility and an invitation to further problems and an inevitable further discharge and arbitration. ...*

This finding applies to the situation of Mr. Anten as well. As counsel for the employer pointed out, there was no evidence Mr. Anten sought assistance from the Employee Assistance Program at any time in the past in spite of the fact he could do so of his own accord. In other words, it had never been denied to him but rather he had simply never resorted to it. I am not persuaded that reinstatement with conditions will resolve Mr. Anten's continued defiance of managerial policy and direction.

In the end, I find no reason to alter the decision of the employer and Mr. Anten's grievance is denied.

Joseph W. Potter,
Board Member

OTTAWA, November 7, 1997.