

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

TASSO VASILAS

Grievor

and

TREASURY BOARD
(Revenue Canada - Customs, Excise & Taxation)

Employer

Before: P. Chodos, Vice-Chairperson

For the Grievor: Barry Done, Public Service Alliance of Canada

For the Employer: Michel LeFrançois, Counsel

Heard at Ottawa, Ontario,
March 2 to 4, 1998.

DECISION

Mr. Vasilas was employed in the Employer Services Division of the Ottawa Taxation Centre (PM-3) until his dismissal effective June 20, 1997. The grounds for his termination are set out in a letter of the same date from Mr. Pierre Middlestead, the Director of the Ottawa Taxation Centre. The relevant portions of this letter state the following:

(Exhibit E-13)

The investigation into your actions pertaining to overtime payments has been completed. The investigation revealed that you conspired to defraud Her Majesty through false overtime payments. In addition, the investigation also revealed that you willfully made false overtime entries.

These actions of accepting fraudulent overtime to which you were not entitled, conspiring and colluding to defraud Her Majesty, willfully making false overtime entries, and contravening the FAA, constitute repeated instances of willful and premeditated misconduct, and are very serious violations of the Departmental Standards of Conduct. In so doing, you have severed the bond of trust essential between an Employer and its employees. In light of this, your continued involvement in the day to day operations of the Department cannot be considered.

For the most part, the facts in this case are not in dispute. Mr. Vasilas began his career in the Public Service at Revenue Canada in 1983 as a CR-1. He received a series of promotions, culminating in a position as a substantive PM-3 at the end of 1995. Since 1991 his immediate superior was Mr. Don Régimbal, the Assistant Director, Employer Services Division, except for a brief period from April 1997 until his dismissal, when he was seconded to the Individual and Estate Returns Division under the supervision of Christina Harenclak. From February 1996 to April 1997 Mr. Vasilas had also been on French language training.

In April 1997 Mr. Middlestead was advised that Mr. Régimbal had encouraged several employees under his supervision to submit false overtime claims; it was also alleged that Mr. Régimbal had insisted on kick-backs from some of these employees as his share of the overtime compensation proceeds. In response to these allegations Mr. James Wardhaugh, an investigator with the Internal Affairs Unit of the Department, was directed to investigate this matter and submit a report. Mr. Wardhaugh interviewed a large number of persons employed at the Ottawa

Taxation Centre, including the grievor. Mr. Wardhaugh prepared detailed notes of his interview with Mr. Vasilas on May 6, 1997, which Mr. Vasilas had reviewed and signed (Exhibits E-2 and E-3). These notes contain the following:

(Exhibit E-3)

As of April 1, 1997, I was being paid by Christina Harenclak. Have worked in her unit since February 15, 1997 (about).

From about February or March 1996 until mid February 1997, I was in Hull, Quebec, Asticou Training Center.

When I worked overtime, I did not complete forms, Monique Laurin keyed in my hours.

There is a significant amount of overtime which was paid to you. Did you work all of these hours on the specific dates as indicated in AMS reports?

No, I did not.

Why was this overtime claimed?

I didn't claim the overtime. I did get paid.

Since 1991/1992 or when modernization came into effect, I was working 07.15 to 16.00-16.30, 5 days a week. I didn't approach anyone to put in RC 505's to be compensated for these hours.

Whenever Don was away, I was the person who was relied upon to replace him. There was no acting pay forms done. This was done through the overtime process.

What was the payment for?

For the work I had done over and above 37 1/2 hours as well before I went to French language training. I was replaced by Rick Lalonde to work on Staffing Process for acting assignments with Monique Laurin and Christine Larocque.

There was hours I put in between November 1995 until February 1996 working on competition process over and above my 37 1/2 hours week.

In about 1993 or 1994, Don explained to me I was working extra hours, from time to time when I can I will try to compensate you for the hours you put in. On a few occasions, Don and I had the same conversation. I thanked Don for cheques and he told me it was in compensation for hours I put in over the years.

Did you ever think this was wrong?
To be honest with you, no. I was putting in these hours.

Did you work overtime while on French training?
No.

Have you worked overtime with Harenclak at her request?
No. I still work from 7.30 to 16.15 sometimes longer. I don't ask for compensation.

Did Don ask you to share overtime?
No. Absolutely not.

Was overtime in 1994 and 1995 worked according to AMS reports?
No but on some occasions, I was acting during these times or I worked extra hours all day.

What are RC 505's and acting pay forms for?
To control overtime funds and keep records for Aloss and AMS.

Do you have anything else to say?
I didn't put in any insinuation or pressure to be paid. I did work the hours and more and whatever I got I did work. Whether it should have been put on RC 505 or compressed work schedule that goes without saying. I know these forms go everywhere. I didn't accept this not having worked the hours.

Do you know anyone else being paid overtime who hasn't worked the hours?
Specifically I don't know. Don didn't discuss who he was giving overtime to. When I acted for him, I never received any RC 505 forms to authorize.

T. Vasilas (signed original notes of the investigator)

The normal procedure for the receipt of overtime compensation requires that the work be authorized by the appropriate supervisor. Upon completion of the work employees are responsible for completing a form known as RC 505 "Extra Duty Pay Record" which is then reviewed and approved by the employee's supervisor; at the Ottawa Taxation Centre the RC 505s are forwarded to the administrative assistant of the Employer Services Division, Monique Laurin, for input into the computerized system known as the Activity Management System (AMS). This information is then transferred automatically to the employee's monthly Attendance Leave Overtime Shift

Work System (ALOSS) report which is signed by Mr. Régimbal as the Assistant Director, and is then submitted to the Human Resources Division for the issuance of a cheque to the employee. Ms. Laurin testified under subpoena by the employer, that she was directed by Mr. Régimbal to input into the AMS overtime claims for a number of employees including Mr. Vasilas as well as herself, although no RC 505's were prepared or signed by any of these employees.

It is not in dispute that from February 1995 until March 27, 1997, 512 hours of overtime were claimed in the name of Mr. Vasilas, for which he received approximately \$18,000. in overtime pay (Exhibits E-11 and E-5). According to Mr. Wardhaugh, Mr. Vasilas acknowledged that he did not work the specific hours for which the overtime was claimed; however, he did maintain that he had worked at least that amount of overtime on various occasions; as well, the grievor maintained that Mr. Régimbal had told him he was being compensated for periods in which he had acted in Mr. Régimbal's position while he was away, and for which he had not received any compensation. Mr. Wardhaugh stated that Mr. Vasilas made no mention of any record which he kept with respect to overtime hours that he had worked. Mr. Wardhaugh noted that Mr. Régimbal had been fired and was also charged under the *Criminal Code*; he had pleaded guilty to breach of trust and was sentenced to six months' imprisonment.

In cross-examination Mr. Wardhaugh acknowledged that there was no evidence that Mr. Vasilas had paid Mr. Régimbal. It was Mr. Wardhaugh's information that seven or eight people had been involved in the "overtime scam" and had been terminated as a result. He stated that Ms. Laurin, Mr. Melanson and Ms. Larocque had admitted paying off Mr. Régimbal. While Mr. Vasilas claimed that he had worked the extra hours, Mr. Wardhaugh did not investigate the truth of this statement; he noted that it was impossible to have people verify the specific dates of possible overtime worked without any written record to refer to. Mr. Wardhaugh agreed that Mr. Vasilas had freely answered his questions; he had also declined union representation at the interview. Mr. Wardhaugh recalled that Mr. Vasilas made reference to his car pooling arrangements as being the reason why he regularly arrived at work early. Mr. Vasilas stated that he did not make any record of the overtime which he supposedly put in. Mr. Vasilas also told him that he had never submitted any acting pay forms. Mr. Wardhaugh acknowledged that Ms. Laurin had told him that towards the end of

the fiscal year Mr. Régimbal liked to spend the balance of his budget and would use overtime payments to reward employees. He agreed that Mr. Régimbal had approached Mr. Vasilas, that is that the initiative for the “fraud” came from Mr. Régimbal and not from his employees. Mr. Wardhaugh indicated that he did not dispute that from time to time Mr. Vasilas may have acted on behalf of Mr. Régimbal as Assistant Director.

Mr. Pierre Middlestead was in receipt of Mr. Wardhaugh’s investigation report which noted that four supervisory employees - Baron, Vasilas, Lalonde, and Guerin - received overtime for which they were not entitled (page 15 of Exhibit E-4). Mr. Wardhaugh also concluded in his report that “*There is evidence that several employees knowingly and willingly participated in a fraudulent act, therefore obtaining overtime payments to which they were not entitled.*” (page 16 of Exhibit E-4). On the basis of this information Mr. Middlestead concluded that Mr. Vasilas had conspired to defraud the employer of \$18,000. of overtime for which he had not worked, and that he had contravened section 80 of the *Financial Administration Act*. Mr. Middlestead identified Exhibits E-17 and E-18 the ALOSS reports setting out, among other things, overtime hours worked for Mr. Vasilas for the fiscal year 1994/1995 and 1995/1996. He noted that this document was signed by Mr. Vasilas and Mr. Régimbal attesting to their accuracy.

Mr. Middlestead also stated that he gave consideration to Mr. Vasilas’ explanations, as set out in Exhibit E-10, that he had acted on behalf of Mr. Régimbal on several occasions, and he was at work for forty-five minutes a day outside of his normal hours of work for the past five years; when Mr. Vasilas was asked for additional information, he indicated that he had stayed beyond his normal hours of work because he had to wait for a ride home. Mr. Middlestead noted that this was a personal decision and would not constitute authorized overtime; furthermore, there is no record of him being authorized to work overtime, or even that he had done so. Mr. Middlestead also questioned, in cross-examination, whether Mr. Vasilas was in fact acting for Mr. Régimbal in his absence. He maintained that while Mr. Vasilas was asked to perform certain administrative responsibilities, he was never given signing authority or formally requested to take over Régimbal's responsibilities. He acknowledged that Mr. Vasilas did attend a few management meetings when

Mr. Régimbal was away; however, it was Mr. Lalonde who actually replaced Mr. Régimbal and performed most of his duties in his absence.

Mr. Middlestead elaborated on his reasons for concluding that Mr. Vasilas' employment should be terminated. He noted that in the area of taxation, the integrity of the Department's employees is critical; it is important that the public perceives that the Department's employees are at all times honest. In his view a significant amount of money had been improperly obtained by Mr. Vasilas; this breached the bonds of trust between the employer and the grievor. He noted as well that the overtime scam had received a considerable amount of publicity (Exhibit E-16); the Department was very concerned about the attack on its image; he stated that a number of employees had indicated that they would have difficulty trusting the managers again and they were ashamed of what had happened. He also took into account that as a supervisor Mr. Vasilas should have greater knowledge of departmental procedures concerning overtime, and should be more aware of the impact of his actions than other employees. Mr. Vasilas would be well aware that managers are generally not entitled to overtime unless they are assigned as night duty officers during the period from February to June of each year; Mr. Vasilas had never acted in that capacity.

In cross-examination Mr. Middlestead was asked about Mr. Richard Lalonde, another supervisor who was named in the investigation report as having improperly received overtime payments. Mr. Middlestead acknowledged that Mr. Lalonde was reinstated in the fall of 1997. Mr. Middlestead insisted that there were significant differences between the conduct of Mr. Lalonde and Mr. Vasilas. Mr. Lalonde had only claimed overtime for a limited period of four to five weeks; Mr. Lalonde had in fact acted for Mr. Régimbal, and it was considered that Mr. Lalonde was owed something for this work. He also noted that Mr. Lalonde reported to the Assistant Director of Finance and Administration, and therefore his work did not require him to deal with the public to the same extent as Mr. Vasilas in Employer Services. He acknowledged that he was not aware of any problems resulting from Mr. Lalonde's reinstatement.

Monique Laurin testified that at Mr. Régimbal's direction she inputted into the AMS System claims for overtime for many people's benefit, including herself. This input resulted in overtime cheques being issued to these employees. There were no RC 505's issued for the overtime in question.

Ms. Laurin stated that she had no knowledge as to whether Mr. Vasilas had ever inputted his own data into the system. She recalls observing Mr. Vasilas entering overtime data into the system on one occasion; however, she cannot be certain if it was for himself or others and she did not know if the overtime on that occasion had actually been worked. When questioned by Mr. Wardhaugh she did assume that Mr. Vasilas was attempting to input his own overtime, however, she could not be sure of that. She stated that in 1996 she observed Mr. Vasilas enter overtime for Mr. Marcel Guerin; on that occasion she asked Mr. Vasilas why he was inputting overtime for Mr. Guerin, since she knew that he had not worked any overtime; according to Ms. Laurin, Mr. Vasilas replied that Mr. Régimbal had asked him to input the overtime for Mr. Guerin. She herself had entered overtime payments for Mr. Guerin at Mr. Régimbal's request, in order to compensate him for work he had done on an acting basis at the CR-5 level; Mr. Régimbal would calculate the difference between a CR-5 salary level and the CR-3 (Mr. Guerin's substantive classification) and would prorate the salary and have the equivalent amount paid as overtime.

Ms. Laurin also recalled that when Mr. Régimbal was away for a few days, Mr. Vasilas would ask her if she had been instructed by Mr. Régimbal to enter overtime, to compensate Mr. Vasilas for replacing Mr. Régimbal. On approximately five or six occasions, from 1994 to 1997, Mr. Vasilas had replaced Mr. Régimbal for a period of two to five days on each occasion. In accordance with Mr. Régimbal's instructions, she would input overtime to compensate Mr. Vasilas in lieu of acting pay. She recalled entering overtime on behalf of Mr. Vasilas after he left on French Language Training in 1997.

Ms. Laurin also testified that she recalled on one occasion entering overtime on behalf of Mr. Lalonde. She noted that Mr. Lalonde had done a lot of overtime work at home; she would help him print out diskettes that he had brought from home in respect of this work.

In cross-examination Ms. Laurin stated that the request to input overtime hours always came from Mr. Régimbal, not from the other employees. Ms. Laurin herself worked from 7:00 a.m. to 3:00 p.m.; she was often there at 6:30 a.m. to open the door. Ms. Laurin noted that Mr. Régimbal would not take no for an answer with respect to the payment of overtime. She also viewed the receipt of overtime payments as

compensation for not receiving acting pay and for coming in early. Mr. Régimbal was in the habit of giving overtime cheques at the end of every fiscal year in the form of bonuses to all of his staff. At other times it was for compensation for acting work, when money was available in his budget.

Mr. Vasilas testified on his own behalf. He began employment in the Public Service in 1993 as a CR-1, Mail Room Clerk with Revenue Canada. He had several promotions culminating in his current position as PM-3 at the end of 1995. Mr. Vasilas noted that his performance had always been rated either superior or fully satisfactory, and he had never been disciplined before.

Mr. Vasilas testified that from January 1991 until February 1996, during which time his hours of work were from 7:30 a.m. to 3:30 p.m., he would always arrive at 7:15 a.m. and work until 4:00 p.m. At this time he was car pooling with his brother-in-law, Mr. John Maroukas, who was also working in the Department. He would not leave before 4:00 p.m. because Mr. Maroukas was working on compressed hours, that is from 7:15 a.m. to 4:00 p.m. However, according to Mr. Vasilas, about ten to fifteen percent of the time, Mr. Maroukas had to wait for him, sometimes as late as 5:00 or 6:00 p.m., because of Mr. Vasilas' supervisory responsibilities. Particularly during the months of January to June, he had to administer on a daily basis the night shift staff who were working under him in the T-4 program. There could be as many as 400 employees in this program. He was responsible for these employees through his subordinates who were CR-5's or AS-2's, who would report to him. However, there were occasions where these employees would come to him after their supervisors had left for the day and he had to deal with their problems.

Mr. Vasilas stated that he first received an overtime cheque around March 6, 1995; this came as a surprise to him as he had not requested overtime, nor had he completed a RC 505 in respect of any claim for overtime; he asked Mr. Régimbal why he had received a cheque. Mr. Régimbal told him that he knew he had worked the extra hours and wanted to compensate him from time to time in the form of overtime cheques. He was also told by Mr. Régimbal that this compensation was also in lieu of acting pay, as he replaced Mr. Régimbal a number of times prior to February 1995, when Mr. Régimbal would take annual leave for approximately four weeks a year, as well as sick leave and the odd business trip of a week to two weeks. Mr. Vasilas noted

that on these occasions he was “formally” assigned to replace Mr. Régimbal; that is, the staff, including the Director of the Taxation Centre were advised by e-mail that Mr. Vasilas would be responsible for the division in Mr. Régimbal’s absence. Mr. Vasilas stated that he was the only one to replace Mr. Régimbal as he was the most experienced and knowledgeable person under Mr. Régimbal’s supervision. According to Mr. Vasilas, on these occasions, he filled in for Mr. Régimbal in every capacity, including attending all weekly meetings; his presence was reflected in the minutes of those meetings. Mr. Vasilas observed that he had always been a union member and was familiar with the overtime provisions in his collective agreement. He had not put in claims for overtime because he felt the extra hours were part of his responsibilities and he did not expect to be paid overtime.

Mr. Vasilas also observed that neither he nor Mr. Régimbal kept records of overtime he had worked. Furthermore, Mr. Régimbal never filled out a form TPA 151 in respect of acting assignments. Mr. Régimbal had never asked him for any portion of the money and he was unaware of any kick-backs involving other employees, until the investigation had begun.

Mr. Vasilas also denied that he had ever inputted information into the AMS either in respect of himself or anyone else. In particular, he had never made any entries on behalf of Mr. Guerin, who was neither his subordinate nor a friend. He insisted that the kick-back scam was a complete shock to him; he first learned of it when he received a call at home from a colleague, Christine Larocque in May 1997 advising him that she had been kicking back money to Mr. Régimbal. Mr. Vasilas stated he was never approached by a more senior manager concerning his receipt of overtime compensation. He acknowledged that he had signed the ALOSS records (Exhibits E-17 and E-18) indicating that he agrees with the leave credits noted on the front of the documents. He maintained that he hadn't examined the documents other than to check the sick leave and vacation leave credits.

Mr. Vasilas noted that during his last month of language training he had received an overtime cheque. He approached Mr. Régimbal again for an explanation when he returned from training; Mr. Régimbal told him as it was the end of the fiscal year, he was able to compensate him for the extra hours that he had put in earlier; furthermore, Mr. Régimbal stated that as he was about to begin working in a new

division under Ms. Harenclak he would not be able to compensate him. Mr. Vasilas stated that he did not receive any overtime payments after April 1, 1997, and he has had no contact with Mr. Régimbal since June.

In cross-examination Mr. Vasilas acknowledged that he did not mention to Mr. Wardhaugh about staying at work beyond 4:00 p.m. ten to fifteen percent of the time. Furthermore, he also acknowledged there is no reference in Exhibit E-10, a memorandum which he provided to his union, about him working until 5:00 or 6:00 p.m. He agreed that he has no memoranda from Mr. Régimbal about replacing him on an acting basis. He also acknowledged that when employees under his supervision would be required to work overtime they would present him with a form RC 505 and he would sign them off, and he would use a form TPA 151 in respect of acting pay for his subordinates. Mr. Vasilas acknowledged that Mr. Régimbal did not use proper procedures in respect of overtime payments for himself. He agreed as well that he was never required to work overtime, and that he was aware of the ten-day threshold period for acting pay under his collective agreement. Mr. Vasilas insisted that his overtime compensation was in respect of acting periods of more than ten days. However, he did not know with any certainty how often he had acted for Mr. Régimbal beyond the ten-day threshold period. He took Mr. Régimbal's statement that he was receiving compensation for hours of work at face value. He agreed that he did not manage his own employees this way and that, with the benefit of hindsight, Mr. Régimbal's approach was probably improper. He has no idea how much the Department still owes him by way of overtime; when he was working for Ms. Harenclak he did not ask her to be paid the extra 45 minutes a day. He acknowledged that he was not required to work overtime in 1997; the cheques he received in that year were compensation for overtime going back prior to February 1996. He had not stopped to think whether he had worked more or less than what he had been compensated for. He was aware that the logging of overtime hours was necessary in order to keep control of overtime funds, as he observed to Mr. Wardhaugh. He did not know what control Mr. Régimbal was using although clearly he did not use the RC 505's. He agreed that in Exhibit E-10, he did not factor in his annual leave periods. He observed that, knowing what had happened to Mr. Régimbal and his scam, he would have told Mr. Régimbal to use the correct

procedures, that is, he would have insisted that he complete form RC 505 and/or TPA 151 to compensate him.

Argument

Counsel for the employer submitted that, in accordance with the letter of termination, it is the employer's position that there was a common accord between Mr. Régimbal and Mr. Vasilas whereby Mr. Régimbal would compensate Mr. Vasilas with public money, which Mr. Vasilas was not entitled to. This constitutes a conspiracy or collusion to defraud, in accordance with the ordinary definition of that term, as found for example in *The Concise Oxford Dictionary*, Ninth edition. Mr. Vasilas was well aware of the proper procedures to be followed with respect to overtime compensation and acting pay; he applied these rules to the letter with respect to his own employees. Counsel submitted that Mr. Vasilas could not have viewed the overtime payments as proper compensation, as he never kept a tally of his overtime actually worked, except after he was fired.

Counsel submitted that the fact that Mr. Vasilas did not initiate the scheme to pay him false overtime payments, or that the initiative came from his superior, does not diminish the fact that he participated in a fraud in making false overtime entries. He noted Ms. Laurin's evidence that she observed Mr. Vasilas making false entries in respect of Mr. Guerin. Mr. LeFrançois referred to the departmental *Standards of Conduct* which refers to contraventions of paragraph 80(a), (b), (d) of the *Financial Administration Act*.

Counsel noted that Mr. Vasilas had received false overtime payments for a period of over two years, except for a gap of 11 months. The grievor had ample time therefore to reflect and consider his actions. Mr. Vasilas justified his receipt of this money, in part as compensation for his acting status; yet, he could not provide evidence that he was substantially performing the duties of his supervisor, nor did he demonstrate that he had worked more than the ten-day threshold period as required under the collective agreement. Mr. Vasilas was not entitled to overtime payments because he was never required to work overtime. While he viewed this as compensation for his time at work, this does not give it the ring of legitimacy.

Counsel noted the testimony of Mr. Middlestead concerning the breach of the bond of trust as well as the need for utmost integrity among the Department's employees; in these circumstances, there can be no doubt that the bonds of trust had been broken when the grievor improperly accepts \$18,000. which he never questioned until he is terminated.

Mr. LeFrançois submitted that the Board's jurisprudence maintains that for some egregious acts such as theft or fraud discharge is presumptively the appropriate penalty (see *Williams* (Board file 166-2-5097); *King* (Board file 166-2-25956); *Crevier* (Board file 166-2-7947) and *Cole* (Board file 166-2-25466), upheld by the Federal Court, Trial Division in a judgment dated March 22, 1996, Court File T-2671-94). Fraudulent acts have been considered particularly serious when they are committed over an extended period of time as is the case here. Counsel noted that in accordance with *Canadian Labour Arbitration*, 3rd edition, by Messrs. Brown and Beatty, proof of mitigating factors rests with the employee. Mr. LeFrançois argued that there are no mitigating factors here. With respect to allegations of a more lenient treatment vis-à-vis Mr. Lalonde, counsel noted that per the Federal Court of Appeal in *Canada v. Barratt and Clarke et al.*, (1984), 53 N.R. 60 (FCA) evidence of more lenient treatment in respect of other employees is not a mitigating factor. In any event, there is no evidence of discrimination here; the case of Mr. Lalonde is much different; a distinction in treatment is not the same as discrimination. Furthermore, Mr. Vasilas cannot claim mitigation as he has not acknowledged the gravity of what he has done nor has he shown any remorse. A clear message must be sent that such conduct is viewed as fraudulent and will be dealt with accordingly.

The grievor's representative maintained that this case is simpler than as represented by the employer. What happened merely was that the Assistant Director had a practice of rewarding his employees for extra work and acting assignments by means of overtime compensation. Both the evidence of Ms. Laurin, Mr. Vasilas, and Mr. Wardhaugh are consistent on this point. Mr. Vasilas had an ongoing requirement to respond after hours to the needs of the night shift staff which he supervised; he may well have made a proper case for overtime under the terms of the collective agreement. With respect to acting assignments, it was the perception of both Ms. Laurin and Mr. Vasilas that he had replaced Mr. Régimbal on every occasion when he was away.

Mr. Done argued that the employer has the burden to prove the specific allegations set out in the letter of termination. That is, it must prove that the grievor “willfully made false overtime entries”; however, there is no evidence that Mr. Vasilas made any false entries, much less that he did so willingly. With respect to entries on behalf of Mr. Guerin, Ms. Laurin did not know what dates Mr. Vasilas supposedly made entries for the benefit of Mr. Guerin. Ms. Laurin’s evidence was vague and she could not state with any certainty that Mr. Guerin did not work overtime after she left for the day at 3:00 p.m.

Mr. Done also argued that there was no common understanding on the part of Mr. Vasilas and Mr. Régimbal to commit a fraud. While Mr. Régimbal made a decision to provide false information with respect to overtime, Mr. Vasilas did not participate in this misrepresentation. All Mr. Régimbal had told him was that he was going to use the overtime budget to compensate Mr. Vasilas. Mr. Vasilas did not know that Mr. Régimbal was misrepresenting the truth about when Mr. Vasilas had actually worked the overtime. In fact, Mr. Vasilas made no representations of any kind about when he had worked the overtime; nor is there any evidence of any discussions as to the mechanics of how Mr. Régimbal would generate the overtime payments. Mr. Vasilas did not request, apply for, provide input, or approve overtime for himself; he merely accepted in blind faith his boss’s representations that he was entitled to receive these payments. According to Mr. Done, if Mr. Vasilas was wrong in accepting Mr. Régimbal’s assurance, that does not constitute fraud. Ms. Laurin also testified that in her mind the payments which she received was also recognition for work done, as was the case for Mr. Vasilas. The grievor’s representative maintained that it is not unusual for managers to move around items in their budget. Mr. Vasilas did not cook up anything nor did he initiate anything.

Mr. Done submitted that there were a number of mitigating factors; Mr. Vasilas received cheques from a manager who is authorized to provide those payments. Mr. Vasilas had 14 years of service and was considered an extremely good employee who had numerous promotions and very good appraisals, and he had never been previously disciplined. Mr. Done noted that Mr. Vasilas had responded to Mr. Wardhaugh’s inquiries in a forthright manner. Mr. Vasilas had never denied that he did not work the specific hours, nor did he request union representation when he was the subject of the investigation.

Mr. Done also compared Mr. Lalonde's conduct with that of Mr. Vasilas. He noted that at pages 9 and 10 of Exhibit E-4 it states that Mr. Lalonde had denied receiving overtime payments for time that he had not worked; it was only later that he changed his position. Mr. Lalonde received \$3,400. over a period of several weeks, yet he is reinstated. Both Mr. Lalonde and Mr. Vasilas were managers, both knew of the existence of forms RC 505 and TPA 151 and their purpose; in the investigation both are identified as having committed the same misconduct. There is no reason to conclude that in one instance the bond of trust is broken yet it is not in the other.

With respect to remedy, Mr. Done argued that the employer should be barred from recovering the net amount of \$10,000. in view of the fact that the employer had allowed these payments to take place. The employer has not established that the grievor was guilty of fraud or making false entries. While as a manager Mr. Vasilas should have insisted that his supervisor apply the rules properly as Mr. Vasilas himself had done, there is no evidence which demonstrates that he would behave again in the same manner, and accordingly there is no reason to impose the ultimate penalty of discharge.

Reasons for Decision

The issues which have to be addressed in this case is firstly whether the grievor was guilty of the misconduct as set out in the letter of discharge; secondly, if Mr. Vasilas was guilty of misconduct as alleged by the employer, was termination of employment the appropriate response.

In my view the grievor was a willing participant in a scheme to obtain overtime payments which he knew, or ought to have known, he was not entitled to. Mr. Vasilas was a manager who, from time to time authorized overtime payments for his own staff; he was quite familiar with the procedures which have to be followed in processing overtime claims, and in particular, was well aware that form RC 505 is required to be completed, signed and submitted. He readily acknowledged that he was well aware of the overtime provisions in his collective agreement. Mr. Vasilas noted that he had never put in for overtime for the extra hours that he spent at his place of work, and for which he now maintains Mr. Régimbal was compensating him. I believe that he failed to claim overtime for these hours because he knew at the time

that he was not required by the employer to work those hours, and therefore he was not entitled to compensation as set out in his collective agreement. I am also not satisfied that Mr. Vasilas had at any time fulfilled the requirements with respect to entitlement to acting pay. Here again, Mr. Vasilas was well aware of the procedures to be followed in respect of claiming acting pay and made no effort to follow those procedures. His rationalization that the \$18,000. of overtime payments was in part compensation for acting pay rings quite hollow in light of the circumstances.

While Mr. Vasilas did not initiate the overtime payments (which emanated from Mr. Régimbal), not only did he benefit from them, but he played an active role by signing the ALOSS statements attesting to the accuracy of the overtime payments which are recorded therein. I do not accept Mr. Vasilas' evidence that he did not inform himself of the contents of the ALOSS records when he signed these documents. Either he is lying or he deliberately and consciously closed his eyes to the consequences of his actions in order to improperly benefit from them. In either event, his actions constitute serious and willful misconduct from which he wrongfully received a significant amount of money. Accordingly, I find that the employer has substantially proven the allegations set out in the letter of termination.

There is no doubt that the misconduct outlined above is of a serious nature, particularly in view of the large amount of money which the grievor received. The Department's response to such misconduct is understandable, given its mandate and the obvious need for the Department to maintain the utmost public confidence in the integrity of its operations and its employees. Nevertheless, I am required to consider a number of mitigating factors which are relevant in the context of this case.

Arbitrators are almost universally of the view that, even in the face of serious acts of misconduct such as theft or fraud, mitigating circumstances, if present, should be taken into account in assessing the appropriate penalty. For example, in a recently reported decision (*Re Canpar and Transportation Communications Union* (1998), 66 L.A.C. (4th) 1 (M. Picher) the Arbitrator made the following observations in respect of the dismissal of an employee who had stolen a wallet from a customer of his employer:

(at p. 2)

The Company's position is understandable, given the established jurisprudence with respect to the importance of the relationship of trust so fundamental to the bond between employer and employee. In considering such a case, however, boards of arbitration have regard to a number of factors, including mitigating factors which should be taken into account in determining the appropriate measure of discipline. ...

...

(at p. 4)

In the instant case there are compelling factors to consider. The grievor is an employee of some fifteen years' service. In all of that time he has had only two minor disciplinary infractions. In May of 1996 he received a safe driving award certificate from the Company in recognition of his having operated a Company vehicle for fifteen years without incurring a preventable traffic accident. Mr. Nelson is one of the most senior and, it is fair to say, exemplary employees to be found either in the Vancouver establishment or in the national bargaining unit, generally.

See also Brown and Beatty, *Canadian Labour Arbitration* (3rd ed.) (1996) at chap. 7 and Palmer and Palmer *Collective Agreement Arbitration in Canada* (3rd ed.) (1991) at p. 294. In this respect the most weighty mitigating consideration is undoubtedly the grievor's length of service and his previous good conduct. In this instance, the grievor has 14 years of unblemished service; indeed, the grievor received a number of promotions during that period. In my view, this is a significant consideration which weighs fairly heavily in the grievor's favour. In addition, it is clear that the grievor did not take any steps to initiate the overtime payments, nor apparently did he do anything to hide them. He was apparently quite forthright with Mr. Wardhaugh when he first investigated this matter, answering all of his questions without seeking union representation although invited to do so. I am also cognizant of Ms. Laurin's testimony concerning Mr. Régimbal's domineering personality and very freewheeling management style, which is also reflected in Mr. Wardhaugh's investigation report. I am convinced that Mr. Vasilas would not have contemplated accepting these improper overtime payments were it not for Mr. Régimbal's initiative. In addition, I am taking into account that Mr. Vasilas apparently was not involved in any way in the kick-back scheme, nor apparently had any knowledge of it. This is

corroborated, at least in part, by Mr. Wardhaugh's investigation report (see Exhibit E-4, page 6, the fourth bullet).

I have taken into consideration the Department's position that the bonds of trust have been irretrievably broken as a result of the grievor's actions, which was exacerbated by the attendant publicity. While the employer's position is entirely understandable in light of its mandate, I view this submission with some degree of skepticism. In virtually every case where the employer has decided to discharge an employee, it takes the position, no doubt sincerely, that the bonds of trust have been broken. If arbitrators were to accept that submission without question on every occasion that the employer has established the grounds for discipline, there would be no room for considering mitigating factors. In this instance, I am not convinced that Mr. Vasilas could not be successfully reintegrated into the Department's work place, particularly given the circumstances of this case. My skepticism of the Department's submissions in this respect is reinforced by its treatment of Mr. Lalonde. Without suggesting that Mr. Vasilas was a victim of discrimination, nevertheless I agree with Mr. Done that it is difficult to understand why the improper receipt of overtime payments by Mr. Lalonde in the amount of approximately \$3,400. over a four to five week period did not "break the bonds of trust", yet, that is the result of Mr. Vasilas' conduct. One might well ask what is the dollar amount, or time frame, which results in the breaking of the trust barrier! I would also note that unlike Mr. Vasilas, Mr. Lalonde initially denied to the investigator that he had received any improper overtime payments (Exhibit E-4, pages 9 and 10). I would note the observation in Mr. Wardhaugh's report that Mr. Lalonde *"... did not complete RC505 forms nor was he aware of how his overtime hours were being tracked ... he is aware of the requirement to complete RC505 documents when overtime is worked to facilitate the entry of the overtime into AMS by administrative personnel. A review of Lalonde's AMS overtime records indicates that Lalonde received approximately \$3,400.00 in overtime payments to which he was not entitled."* (Exhibit E-4, supra). I agree with the employer that Mr. Vasilas deserves a greater sanction given the fact that he improperly received a considerably larger sum of money, over a longer period of time. However, I do not share the Department's view that Mr. Lalonde can be reintegrated into the Department, while Mr. Vasilas cannot be. In this context, I would note that

Mr. Lalonde received a suspension of approximately four months' duration, according to Mr. Middlestead's testimony.

In all the circumstances I conclude that Mr. Vasilas is guilty of serious misconduct; however, it is also my view that there are a number of factors which militate against imposing the ultimate penalty of discharge. Accordingly, I am directing that Mr. Vasilas be reinstated within two weeks of the date of this decision, but with no compensation for loss salary or benefits. I believe that a suspension without pay of approximately ten months is a more appropriate sanction than discharge in this case. Accordingly, the grievance is partially sustained. I will remain seized of this matter for a period of six weeks from the date of this decision in the event that the parties encounter any difficulties in the implementation of this decision.

**P. Chodos,
Vice-Chairperson.**

OTTAWA, April 24, 1998.