



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board



BETWEEN

THOMAS C. CAHILL

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

Before: P. Chodos, Vice-Chairperson

For the Grievor: Himself

For the Employer: Judy Hunter, Student-at-Law

Heard at Kingston, Ontario,
May 7 and August 5, 1999.

DECISION

The grievor is employed as Coordinator, Social and Cultural Development Programs (WP-03), at Bath Institution, a medium security penitentiary. His grievance concerns the imposition of a financial penalty equivalent to five days' net pay in response to an incident which occurred on April 16, 1998. While the grievor acknowledges his involvement in the incident in question, he contends that the disciplinary sanction imposed on him was excessive, discriminatory, and motivated by personal animosity towards him on the part of the Warden, Mr. Al Stevenson.

The relevant events are largely not in dispute. On April 16, 1998 Mr. Cahill was in an office with Andra Young and Marilyn Quick, both of whom are Social Development Officers employed in the same unit as the grievor. At the time in question, there were also two inmates present in the room: Mr. Erle MacAulay and Mr. Michael Winter; apparently the door to this office was always kept open and it was not unusual for inmates to wander in and out freely. Mr. Cahill was advising Ms. Young that, unlike the rest of the unit, she had not been "designated" under the *Public Service Staff Relations Act*, and as a consequence she would have the right to join in a strike should one occur. In the course of this brief conversation, Ms. Young commented to Mr. Cahill: "If you would cross my picket line, I would spit in your face." It was Ms. Young's testimony that she made this comment in a jocular fashion; she noted that the atmosphere in the unit was easy-going and that she and the others, including Mr. Cahill, had a good rapport at the time. According to Ms. Young, Mr. Cahill replied: "If you spit in my face, I would punch you in your face." At first, Ms. Young treated Mr. Cahill's retort in a light-hearted way; however, according to Ms. Young, Mr. Cahill then repeated the remark twice; she became upset and left the room.

Ms. Young did not pursue this matter further; however, the inmate MacAulay wrote a letter to the Warden dated April 21, 1998 (Exhibit E-1) in which he referred to this incident, and criticized Mr. Cahill's conduct. Upon receiving this letter, Mr. Stevenson spoke with Ms. Young about the matter. She acknowledged that she had made the statement about spitting, which she indicated was intended in jest, and that Mr. Cahill had in a serious tone responded as noted above, which had upset her.

On April 28, 1998, Mr. Stevenson issued a "Convening Order" directing Mr. R. Charlton, a unit manager from the Regional Treatment Centre, to conduct an

investigation into the conduct of Mr. Cahill in respect of the incident of April 16. On the same day, Mr. Stevenson wrote to Mr. Cahill in which he noted that he had "apparently threatened this staff member with physical violence if you found yourself in a hypothetical situation with her. I have concluded that this reported incident merits further review and have therefore convened a fact-finding investigation into your conduct towards a subordinate." The letter goes on to state: "You are also directed to refrain from entering into any type of communication or contact with Andra Young during the course of this investigation." (Exhibit E-2).

The report concluded that Mr. Cahill had been abusive to Ms. Young in his reply to her comment on April 16; it should also be noted that in her testimony Ms. Young stated that Mr. Cahill has been treating her fairly and professionally since the incident. She also observed that "things could have been done differently" since the incident and that she regretted that the incident had gone to this extreme without first talking to Mr. Cahill, who had gone away on holiday shortly after the April 16 incident.

Mr. Stevenson testified that his decision to impose a five-day financial penalty was influenced by the observation in Mr. Charlton's report that "[T]he events of April 16, 1998 did have an impact on the institutional environment. Tracy Fenton, Marilyn Quick and Andra Young all feel that their working relationship with their supervisor has changed. To use their words, they feel "*uncomfortable working with him*", "*saddened by the event to the point that it will effect [sic] the working environment*", and "*shocked and frightened about the statements made by my supervisor*". " (page 3, Exhibit E-3, bullet number 4). Mr. Stevenson also observed that it was highly inappropriate to allow an inmate to remain in the office while this conversation was taking place. In Mr. Stevenson's view, Mr. Cahill's conduct constituted a violation of part 3 of the departmental Code of Discipline, which notes that:

An employee has committed an infraction, if he or she:

...

- *is abusive, by word or action, to other employees, while on duty or under circumstances related to his or her duties;*

...

According to Mr. Stevenson, at the disciplinary hearing convened on May 13, 1998, Mr. Cahill acknowledged the basic elements of the incident and had observed that if Ms. Young had been offended, she had overreacted. Mr. Cahill had also stated at the disciplinary meeting that Mr. MacAulay had reported the matter to the Warden because he was trying to get even with Mr. Cahill over an incident concerning the purchase of chocolates (the dispute between Mr. MacAulay and the grievor over the purchase of chocolates was corroborated by other witnesses, including the Assistant Keir MacMillan, who testified that he supported Mr. Cahill's decision to prohibit the inmate from purchasing the chocolates). According to Mr. Stevenson, Mr. Cahill also indicated that he was sorry if anyone had been upset, but he did not feel that he had done anything wrong in making the statement and that there had been an exaggeration and distortion of the situation.

Following the disciplinary hearing, Mr. Stevenson issued, on May 15, 1998, a disciplinary penalty equivalent to five days' net pay. Mr. Stevenson noted that in assessing this penalty he had taken into account the repercussions the incident had for the staff involved, that Mr. Cahill had not accepted responsibility for the inappropriateness of his conduct, and that Mr. Cahill was a supervisor and therefore had a responsibility to defuse the situation, but instead had inflamed it. Mr. Stevenson observed that in mitigation he considered Mr. Cahill's good record as a supervisor, and that he had no other disciplinary record on his file. Mr. Stevenson also observed that while he concluded that her statement was inappropriate, he did not discipline Ms. Young since she had expressed regret for making the comment.

In cross-examination, Mr. Stevenson acknowledged that Mr. Cahill had stated at the disciplinary hearing that he was not aware at first that the inmate was present.

In his testimony, Mr. Cahill described the events of April 16, 1998 as follows. On that day Ms. Young, Ms. Quick and himself were sitting at desks located in the office. Mr. Cahill stated that his back was to the door as he was talking to Ms. Young, and that inmates and staff would frequently come in and out of that office. He was explaining to Ms. Young, in what he described was a "light-hearted conversation", that all of the social development staff were designated except for Ms. Young, who was then a casual employee. Mr. Cahill told Ms. Young that he and the rest of the staff would have to cross the picket line in the event of a strike. Ms. Young then replied

that "if anyone would cross her picket line, she would spit in their face". According to Mr. Cahill, he responded: "If anyone ever spit in my face on the picket line, I would punch or slap them on the lips to stop them from spitting a second time". At that point, he heard Mr. MacAulay's voice off to his right, who must have entered the room during the conversation. Mr. MacAulay stated: "You need anger management." Mr. Cahill proceeded to explain that he is a diabetic; he showed him cuts on his hands, and noted that 18 percent of inmates have AIDS, 40 percent have Hepatitis, and that spitting is an assault and he had a right to protect himself. According to Mr. Cahill, Mr. MacAulay went on: "You'd hit a woman?" Mr. Cahill responded that he would protect himself. Mr. MacAulay then said that Mr. Cahill was "worse than we are" and ought to be locked up.

Mr. Cahill testified that had he been told an inmate was present, he would not have made the comment. Mr. Cahill observed that he did not realize that Ms. Young was upset at the time; he himself was shocked at her comment and did not perceive it as being of a jocular nature. Mr. Cahill noted that he is not a line supervisor; he referred to documentation emanating from management, which indicated that his job description received no points for supervisory responsibilities.

In cross-examination the grievor identified Exhibit E-9, a letter he wrote to the Deputy Commissioner, RHQ, dated May 13, 1998, the day of the disciplinary hearing. In this letter, he stated:

After meeting with Warden Stevenson on today's date and a review of the facts I am prepared to withdraw my application of harassment brought against Mr. Stevenson. Based on a full disclosure provided today by Mr. Stevenson I can see the rationale for his actions. I still do not agree with the process followed but I can accept it.

Mr. Cahill indicated that he wrote this letter because he was afraid of losing his job, and that he no longer shares this view.

Mr. Cahill also testified in chief about another incident which began in December 1997 at a Christmas party involving inmates and guests. Mr. Cahill concluded that there were potentially unsafe working conditions and so advised the keeper on duty, indicating that he might invoke Part II of the Labour Code; the keeper then took steps to address the situation. The following Monday, he was called in to

the Warden's office and was advised by the Warden that he was not pleased about Mr. Cahill threatening to invoke Part II of the *Labour Code*. According to Mr. Cahill, Mr. Stevenson then stated that had he been called in, he would have ordered Mr. Cahill to go home. The Warden then directed Mr. MacMillan, the Assistant Warden and Mr. Cahill's immediate supervisor, to conduct a fact-finding concerning Mr. Cahill's threat to invoke Part II. According to Mr. Cahill, Mr. Stevenson made it clear that the fact-finding exercise could lead to disciplinary action against Mr. Cahill. As a consequence of this meeting, Mr. Cahill felt he no longer had the confidence of management at the Institution and sought a transfer from Bath Institution (Exhibit G-5). Notwithstanding Mr. Cahill's numerous inquiries about it (as he felt that this was a sword hanging over his head), Mr. MacMillan never completed the fact-finding exercise. In his testimony Mr. MacMillan expressed regret about this, and explained that it was an oversight on his part. Mr. Stevenson never followed up on the matter.

There is some dispute as to whether, and in what context, the Warden made reference to the grievor's threat to invoke Part II of the *Canada Labour Code* in the disciplinary hearing of May 13, 1998. It is Mr. Cahill's contention that the Warden had referred to this incident as a prior disciplinary matter; Mr. Alain Cloutier, a union official who represented Mr. Cahill at the disciplinary hearing, recalls that the Warden did make mention of this matter and referred to the current incident as being a third disciplinary matter involving Mr. Cahill. Mr. Stevenson, in his testimony, did not recall making reference to the *Labour Code* issue, although he said he might have done so. Mr. Cloutier also observed that at this meeting the Warden had expressed satisfaction with Mr. Cahill's work, and indicated that he wanted his attitude to change.

(It should also be noted that evidence was adduced by both parties concerning a harassment complaint directed at the Warden which was filed by the grievor. As the complaint was filed after the imposition of the disciplinary sanction, I have concluded that it has no bearing on the matter before me.)

Two employees of the Social Development unit testified at the behest of the grievor. Ms. Anne Bisson testified that she has been reporting to Mr. Cahill since January 1997. Ms. Bisson had been summoned to the Warden's office and was questioned about the incident. She replied that she had not been there and could not

shed any light on the matter. She was asked if Mr. Cahill had ever threatened or intimidated her. She replied that she had never been threatened or intimidated by him, nor had she seen him threatening or intimidating any other staff member. Ms. Bisson indicated that, prior to the incident, there was a good working environment in the unit; subsequently, the atmosphere became less personal, not as jovial; she indicated that "the whole situation, how it grew, was intimidating for everyone".

Ms. Tracy Fenton testified that when she arrived for the afternoon shift she heard from the staff about Ms. Young's comment and Mr. Cahill's reply. Subsequently, she was summoned to the Warden's office and in the presence of Andrée Leblancq a personnel officer, and Keir MacMillan, was questioned by the Warden about the incident and about Mr. Cahill generally. She stated that Mr. Cahill was a "great supervisor". Mr. Stevenson told her that she did not have to be overly positive about Mr. Cahill for fear of losing her job; she responded that she was not, nor was she afraid of him. According to Ms. Fenton, Mr. Stevenson then asked her about her involvement with a women's shelter in Kingston; he then stated: "Do you think it is ever acceptable for a man to hit a woman?" She felt at the time that the question had no relevance to the incident and had the effect of confusing her. Ms. Fenton also noted that there were a number of inaccuracies in the investigation report by Mr. Charlton respecting certain comments that she was alleged to have made. She was upset by the report and in a letter to Mr. Stevenson, dated June 1, 1998, she outlined in detail the errors and inaccuracies in Mr. Charlton's report (Exhibit G-2). In his reply to her of June 23, 1998 Mr. Stevenson stated among other things: "It was thoughtful of you to respond with your comments. Your letter displayed an individual with integrity and one who is loyal. In addition, I would like you to be aware that your response was taken into consideration when I and Mr. Cahill's representative met to discuss his recent grievance."

Ms. Fenton noted that she had asked Ms. Young several times, including on April 16th, if she had felt threatened or scared by Mr. Cahill's remarks, and Ms. Young had consistently replied that she had not felt either threatened or scared. Ms. Fenton also noted that, subsequent to the incident, the atmosphere in the office became more tense because of the process the staff went through. Ms. Fenton indicated that she was upset that her comments to Mr. Charlton were taken out of context.

In cross-examination, Ms. Fenton agreed that one of her responsibilities is to provide inmate strategies as alternatives to violent behaviour; she also noted that there are programs in anger management. She agreed that Mr. Cahill, as Chief of Social and Cultural Development, should be an example to inmates and in her opinion Mr. Cahill is a positive role model for her and for others. She agreed as well that it was not acceptable to threaten an employee with violence and if a threat was made, it could adversely affect working relationships. She insisted that, while Ms. Young was upset following the incident, she did not feel threatened. In her view, what had happened was a misunderstanding between the parties.

Mr. Keir MacMillan, the Assistant Warden, Correctional Programs, was also called to testify on behalf of the grievor. Mr. MacMillan noted that Mr. Cahill was a capable supervisor of the unit and had a number of accomplishments to his credit. Mr. MacMillan was in attendance when Mr. Stevenson questioned Ms. Fenton; he has no recollection about any questions at this meeting concerning Ms. Fenton's involvement in a group home. Mr. MacMillan observed that he always viewed Mr. Cahill's position as supervisory in nature. He also noted that he had spoken to Mr. Cahill about when and where he expresses his opinions, and that Mr. Cahill from time to time conveys the appearance of being angry. He observed that he harbours no antagonism towards Mr. Cahill nor has he seen evidence of any from the Warden. He also noted that "he can not envisage Mr. Cahill actually hitting another staff member", although he has found Mr. Cahill to be a rather "volatile" person. He agreed that it is critically important that employees have good relations among themselves.

Argument

Counsel for the employer noted that the issue in this case is whether the employer had just cause to impose a penalty equivalent to five days' net pay. Ms. Hunter maintained that this disciplinary sanction was intended to be corrective in nature and not punitive. She noted that Mr. Cloutier, the union representative, had the impression that Mr. Stevenson was concerned about the incident and was interested in having Mr. Cahill change his behaviour. This was also confirmed by Mr. MacMillan who stated that there was no hidden agenda, and neither he nor Mr. Stevenson were engaged in a vendetta against Mr. Cahill. Ms. Hunter also contended that, despite

Mr. Cahill's objections, it is clear that Mr. Cahill was considered by both Mr. MacMillan and the unit staff as their supervisor.

Counsel for the employer also submitted that there was no link between the investigation of the April 16 incident and Mr. Cahill's complaints concerning allegations of harassment by the Warden. She pointed out that a number of witnesses had stated that there is an onus on the staff at Bath Institution to establish positive role models. Yet, Mr. Cahill's angry comments, particularly coming from a supervisor, runs counter to that objective, especially in view of the fact that there were inmates present at the time. While Mr. Cahill contends that he was not aware that there were inmates in the office, he did acknowledge that the inmates frequently enter that office and were certainly in a position to overhear the conversations. It was incumbent on Mr. Cahill to defuse the situation by not responding; instead, he escalated the matter. In view of the allegations in the letter by the inmate, management had an obligation to investigate it and respond accordingly. Furthermore, the departmental Code of Conduct makes it clear that it is an infraction for employees to be abusive to other employees while on duty. This was a public incident, which will be scrutinized by both inmates and employees; the remarks were repeated three times in a setting which was designed to change improper behaviour. Accordingly, this conduct constitutes a breach of trust and the apparent lack of remorse on the part of the grievor required a serious response, particularly in view of his supervisory responsibilities.

In support of her submissions, counsel referred to two adjudication decisions in which a five-day suspension was upheld: *Tanciu* (Board file 166-2-27712) and *Greeley* (Board file 166-2-12318).

The grievor replied that in this instance the sanction imposed on him bore no relevance to his conduct. In his view, both Ms. Young's comment and his own were inappropriate, but he was merely responding to what she said. Mr. Cahill said he would have preferred to resolve the matter in discussions with Ms. Young; however, the Warden's letter of April 28, 1998 (Exhibit E-2) directed him not to contact her.

Mr. Cahill also maintained that the severity of the disciplinary sanction is due to the Warden's personal antagonism towards him. Mr. Cahill noted the Warden's discussion with Ms. Fenton in which he attempted to, in effect, label Mr. Cahill as an

abuser of women. Mr. Cahill also contended that the Warden's response to this incident was a further attempt on his part to punish Mr. Cahill for threatening to invoke Part II of the *Canada Labour Code*. He maintained that the Warden had referred to that incident as a previous disciplinary matter. He noted that management has not acknowledged that he is a supervisor, except when it comes to receiving disciplinary sanctions.

Mr. Cahill stated that, as a result of disciplinary action, he lost \$570.; rumours have been perpetuating in the Institution that he is a woman beater; as a consequence, his reputation has been ruined, his health has suffered, and management's reaction has created a poisoned work environment for him as well as for others. Mr. Cahill submitted that an oral reprimand would have been more than sufficient, particularly given that the discussion was only of a hypothetical situation and no threat was made. He noted that Ms. Young, who initiated the whole matter, only received oral counselling.

In support of his submissions, Mr. Cahill cited the *Dosanjh* case (Board file 166-2-27262). He noted that in that case there was a physical altercation in a prison environment for which the adjudicator found that a written reprimand was appropriate.

Reasons for Decision

The essential facts can be briefly summarized as follows. Ms. Andra Young, a casual employee who worked under Mr. Cahill's general supervision, upon being told that, unlike the other members of the unit she was not a designated employee and therefore could participate in a strike, stated to Mr. Cahill: "If you cross my picket line, I'll spit in your face", to which Mr. Cahill replied: "If you spit in my face, I'll punch you in the face." An inmate overheard the remark, and immediately questioned the appropriateness of Mr. Cahill's retort. The grievor repeated it and attempted to justify his comment. Ms. Young then left the room where the incident took place, as she was upset by the comment. Ms. Young did not pursue the matter further. However, the inmate reported the matter to the Warden in a letter. Upon receipt of this letter, the Warden questioned the staff of the unit, mandated an investigation, and ultimately imposed a sanction equivalent to the loss of five days' net pay.

The grievor does not dispute in general terms the above description of this incident; he maintains that he referred to hitting Ms. Young on the lips which he regarded as a defensive move to prevent any spitting. It was also his view that Ms. Young's remark was not of a jocular nature. As to these details, I am of the view that Ms. Young's recollection of his words is accurate, and I also accept her testimony that her remark was intended to be merely light-hearted banter. Having said that, no one disputes that the conversation was of a completely hypothetical nature; neither Ms. Young nor any of the staff viewed Mr. Cahill's comments as in any way constituting a threat.

In my judgement the grievor committed a relatively minor act of misconduct. I would characterize this event and its aftermath as a series of escalating overreactions, beginning with Mr. Cahill's comments, which then generated an even greater overreaction on the part of the Warden, the end result of which was the undermining of what had been a harmonious and productive section. Had Mr. Cahill ignored the remark or passed it off in the same tone in which it was made, this decision would not be necessary. However, in view of Mr. Cahill's discipline-free record, the virtually spontaneous reaction by him, which occurred over a matter of at most a few minutes, and the history of good relations between him and his staff, I have concluded that the five-day penalty is totally unwarranted and is both punitive and destructive. The cases cited by the employer's representative to justify the five day penalty in fact underlines and supports this conclusion. In *Tanciu [supra]*, the grievor had a history of abusing both clients and staff at the institution where he worked, and indeed had been subject to previous disciplinary sanctions. In the *Greeley* case [*supra*], the grievor had been found to have knowingly received stolen departmental property, which is a criminal offense. To compare these cases with the current grievance in effect serves to demonstrate the utter inappropriateness of the sanction imposed on Mr. Cahill. I would also suggest that while Mr. Cahill had, in the words of the Warden, the responsibility to defuse the situation, *a fortiori* does management have the responsibility to deal with the events after the fact so as not to exacerbate the damage done to heretofore effective working relationships. I have no doubt that had the Warden attempted to open up lines of communication between Mr. Cahill and Ms. Young instead of imposing a punitive sanction on the grievor, this matter would have had a much more satisfactory resolution for all concerned.

However, I do find that Mr. Cahill assumed responsibility for providing leadership and direction to the staff of the unit. In view of this, he has to be accountable for the injudicious response which he made to Ms. Young on the day in question. While his conduct can in no way be characterized as a threat, nor was it intended to be abusive, it does merit some disciplinary response.

Accordingly, I find that a written reprimand should be placed on Mr. Cahill's file effective the date of the incident, that is, April 16, 1998. The employer is hereby directed to rescind the financial penalty and reimburse Mr. Cahill, and to substitute therefor a written reprimand to be dated April 16, 1998.

**P. Chodos,
Vice-Chairperson**

OTTAWA, August 30, 1999.