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Date: 20000720

File: 166-2-29168

Citation: 2000 PSSRB 67



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

DIANE DICKINS

Grievor

and

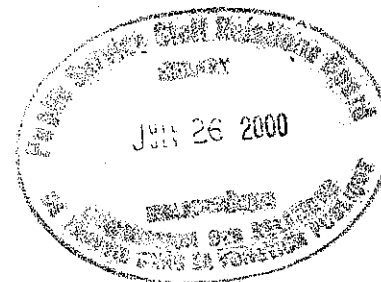
TREASURY BOARD  
(Solicitor General Canada - Correctional Service)

Employer

**Before:** Joseph W. Potter, Deputy Chairperson

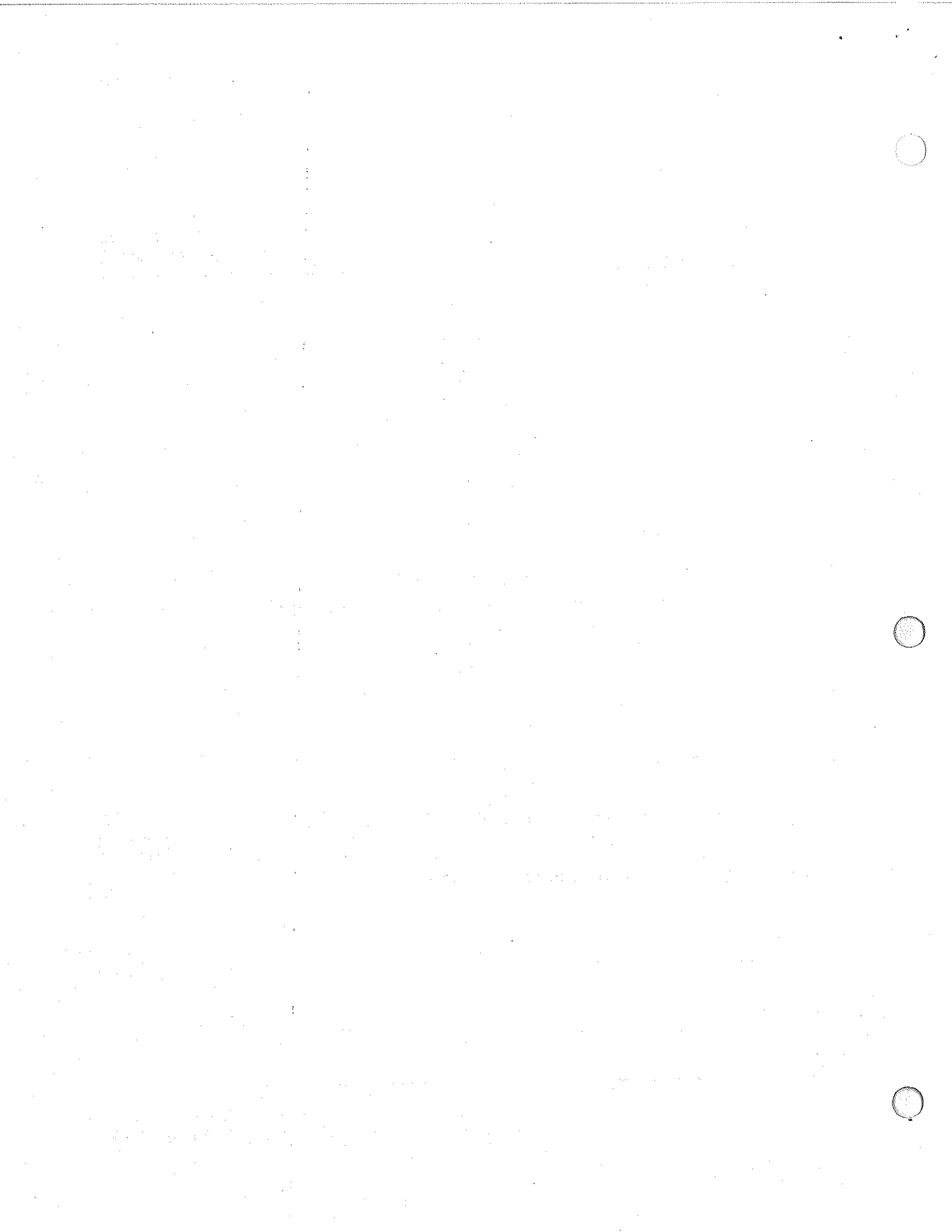
**For the Grievor:** Gail Owen, Public Service Alliance of Canada

**For the Employer:** Harvey Newman, Counsel



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Heard at Abbotsford, B.C.,  
December 14 to 16, 1999 and May 16 to 18, 2000.



## DECISION

[1] On March 29, 1999, Diane Dickins, a level 1 correctional officer at Matsqui Institution, was discharged. She grieved, requesting reinstatement and full restitution. The letter of termination reads as follows (Exhibit E-1):

*On March 26, 1999 at 1900 hours, during a labour dispute and at which time the institution was in a lock down situation, you were directed by the Correctional Supervisor to release the inmates from their cells. You refused this instruction. The Correctional Supervisor explained the reasons for this instruction and gave you a direct order to open the cell doors. You again refused. The Correctional Supervisor ordered you to leave the control room. You again refused this direct order. This behaviour constitutes insubordination.*

*At approximately 0700 hours on March 27, 1999, at which time the inmates continued to be in a lockdown situation, the Correctional Supervisor had received a number of radio transmissions from you requesting relief from post on the first floor. You were advised that relief would be forthcoming. Approximately one half-hour later, you were no longer responding to cell pages at your post. Three Correctional Supervisors approached you at your post to advise you that you were required to remain at your post until relief arrived. Upon their arrival, you tossed the keys on the desk, yelled that you had been relieved and proceeded to leave your first floor post.*

*The Correctional Supervisor informed you that you could not leave your post as it would put people's lives and safety in danger. You did not heed his direction and proceeded to the second floor bubble. You again were informed by the Correctional Supervisor that if you left your post, you would be subject to discipline, up to and including discharge. You continued to ignore the direction, were abusive by word and action and proceeded to the third floor bubble. The Correctional Supervisor again informed you that if you left your post, you would be endangering people's lives and safety. You were given a direct order to stay on your post and were once again informed that if you did not comply, you would be subject to discipline up to and including discharge. You then left your post.*

*At approximately 0745 hours, you then proceeded to the principle entrance and demanded to be let out of the institution. You were told repeatedly by the managers present that you were not to leave the institution and by doing such, would constitute an illegal withdrawal of services and would be subject to disciplinary action. You confirmed with the managers present that you understood their warning and proceeded to leave. The behaviour you have*

*demonstrated is incompatible with the behaviour expected of employees of the Correctional Service of Canada.*

*The behaviour you have demonstrated is incompatible with the behaviour expected of employees of the Correctional Service of Canada (SIC).*

*Therefore, based on the foregoing and in accordance with Section 11(2) of the Financial Administration Act, you are hereby advised that your employment with the Correctional Service of Canada is terminated effective March 29, 1999.*

[2] A total of 17 witnesses were heard over 6 hearing days. The grievor's representative filed 7 exhibits, and 14 were filed by counsel for the employer.

[3] A request was made, and granted, for the exclusion of witnesses.

### Background

[4] Matsqui Institution is a medium-security prison having approximately 370 inmates. The Institution has in excess of 100 correctional officers and in March 1999, the correctional services group was in a legal strike situation following the collapse of collective bargaining. Most correctional officers (including the grievor according to her evidence) occupied positions which had been designated as having duties necessary for the safety or security of the public and these correctional officers were thereby prevented, by law, from going on strike (paragraph 102(1)(c) of the *Public Service Staff Relations Act*). However, at Matsqui Institution, there were some 25 correctional officers whose positions had not been so designated and they were, therefore, in a legal strike position (see Exhibit E-12). In the early morning hours of March 26, 1999, a picket line was set up at the one entrance road leading into Matsqui, resulting in a restricted number of correctional officers being able to cross the picket line to get to work.

[5] In order to prepare for the possibility that a picket line would be established, 23 excluded managers were directed to remain on the site from on or about March 25 until the strike ended (about March 28). Under normal circumstances, the Institution would have 30 to 35 correctional officers, levels 1 and 2, on duty for the day shift, as well as three correctional supervisors, level 3. This shift would run from 0700 to 1500 hours. The next shift (1500-2300 hours) would normally have 15 to 16 staff, which would include two supervisors. The 2300-0700-hour shift normally has 12 staff, which would include one supervisor.

[6] On March 25, 1999, at 2300 hours, the midnight shift commenced and there were nine correctional officers on duty. They remained on duty beyond their normal quitting time due to the commencement of the strike and the inability of other correctional officers to get in to work. The picket line permitted one individual into the Institution for every one person who left. This will be referred to as a "one-for-one trade" in this decision.

[7] With nine staff on duty for the 2300-hour shift and a "one-for-one trade" taking place, this meant the remaining shifts would operate on a much reduced staffing basis. As such, a decision was made by Warden Brock and his management team to keep the inmates locked up throughout the day. Normally the cell doors are opened at about 0630 hours to enable the inmates to prepare for their daily activities. However, on the morning of March 26, the prisoners remained locked in their cells except for washroom needs (not all cells have a toilet inside).

[8] Due to the importance of understanding the layout of the Institution, I was invited to take a view, which I accepted. As well, Exhibit E-5, a diagram of the area where the grievor worked, was introduced into evidence.

[9] On March 26, 1999, the grievor was scheduled to work the 1500-2300-hour shift. She arose at 0630 hours to do some personal daily chores; she then left her home by car, at 1415 hours, to go to work. Upon her arrival at the entrance to the Matsqui property, she encountered the picket line and went into the line-up of cars waiting to enter the Institution.

[10] The grievor did not participate in the picket line, but instead waited in her vehicle until selected in the "one-for-one trade".

[11] At about 1730 hours, Correctional Supervisor Scrivens asked the grievor if she would go in to work. She said she would, and Supervisor Scrivens got in the grievor's car and escorted her across the picket line and into Matsqui Institution.

#### First Incident

[12] The grievor was assigned to work in the first floor "bubble" (also referred to as the control post), which is seen on Exhibit E-5. The "bubble" is, as I observed it, a heavily protected area at the intersecting point of four ranges. (The reader can picture a cross.) Each range houses about 25 cells plus toilet, shower and laundry facilities.

The correctional officer inside the "bubble" can see down each range and can, mechanically, open and close the various cell doors.

[13] Each range also contains three steel barrier doors. The first such door is situated immediately after the rows of inmates cells and just before the washroom, shower and laundry facilities. The second steel barrier is located just after these facilities. Both of these doors are of a lattice-type design and, as a result, when the doors are closed an officer can still look through them and see down the range. The third steel barrier is a fire door and is solid steel with a small window. During the lockdown, the cell doors were locked, as were the two lattice-type steel doors. The fire door remained open to enable the officers to observe the range.

[14] When either or both of the two steel "lattice" doors are locked, the inmates are confined to their range and all four ranges are visible from the control post.

[15] There are three floors housing inmates at Matsqui Institution, and all three have the same design as described above. The control post has an interior curved staircase to enable officers to ascend from the first to the second to the third floor, if necessary. There is also an emergency exit above the third floor, to the roof, where a helicopter can land to remove someone in the event of an extreme emergency. However, the control post itself is extremely secure, with bullet-proof glass and double steel doors as an entrance.

[16] The grievor assumed her post inside the "bubble" at about 1800 hours on March 26. The inmates had remained locked in their cells for the day, although management had discussed allowing them out for one hour in order to shower, etc. Management decided that this release of the inmates would take place one floor at a time, and the inmates would be allowed out on their range only, meaning the first steel lattice-type door would be opened to enable them to have access to the washrooms, etc., but the second steel lattice-type door would remain locked. At some point on March 26, this information was conveyed to the inmates' representatives; therefore, the inmates were aware they would be allowed out of their cells for one hour. This was to commence on March 26 at 1900 hours on the first floor, at 2000 hours for the second floor and, finally, at 2100 hours for the third floor.

[17] Warden Brock testified that he held management meetings daily during the strike and thought the decision to release inmates to their ranges was made at the March 26 morning meeting. However, because management's ability to follow through with the plan would depend on the availability of staff, final confirmation that the inmates would be released would not have been made at that time. Warden Brock was under the impression staff had been told of the plan to release the inmates to their ranges after the morning meeting.

[18] The grievor stated she was not informed about the pending release of the inmates, although she did admit that she had heard something concerning this topic after she began her shift.

[19] Correctional Supervisors Keeping and Montgomery went to the first floor control room shortly before 1900 hours on March 26 to explain the procedure for releasing the inmates and Correctional Officer Lambert and the grievor were inside the first floor "bubble". Supervisor Keeping testified he approached the "bubble" and spoke to Officer Lambert, asking that the cell doors be opened and the inmates be released to their ranges. Officer Lambert did not comply and instead asked Supervisor Keeping to speak to Officer Dickins. In cross-examination, Officer Lambert stated he did not comply with the order because Officer Dickins was in charge of the first floor "bubble". As she was on the phone, Supervisor Keeping waited for her to finish her telephone call; he then asked her to open the inmates' cells and release the inmates to their ranges. He explained they would be released to the ranges for one hour.

[20] The grievor testified that Supervisor Keeping instructed her to open the barriers and release the inmates. She replied: "No, you don't have enough supervisors on duty". Supervisor Keeping responded: "I'm ordering you to release the inmates" and the grievor again refused, saying he could not give her an order which was unsafe.

[21] In *viva voce* testimony, the grievor stated that opening the cell doors without sufficient supervisory staff present meant there was not sufficient staff to intervene if the inmates, upon being released, got into a fight or assaulted another inmate.

[22] After hearing Officer Dickins' refusal to open the cell doors, Supervisor Keeping issued a direct order to Officer Dickins to leave the control room, and she said no. She was told if she did not comply she would be escorted off the property; however, she did not vacate her post. In her testimony, Officer Dickins stated she refused to comply

because she feared she would be charged with abandoning her post if she left the control room. Supervisor Montgomery took Supervisor Keeping aside as the verbal altercation was getting very loud.

[23] At that time, Supervisors Kwok and Harper appeared and asked Supervisor Keeping if there was a problem opening up the ranges to the inmates (see Exhibit E-8). When told of the difficulty with Officer Dickins, Supervisor Kwok asked if he could enter the control room to speak to the grievor. He was admitted into the control room and spoke to the grievor. He testified he spoke to her for about 10 minutes and assured her there were sufficient supervisors and managers on the floor to ensure there would be no problems. She agreed to open the cell doors, and proceeded to do so.

[24] At a management de-briefing later that evening, Warden Brock was informed of this incident. He inquired as to whether or not the decision to open the cell doors had been communicated in advance to staff and Supervisor Montgomery testified that someone in the meeting replied no, it had not been communicated to staff prior to the incident.

[25] The grievor testified that nothing further took place until approximately 2200 hours when Correctional Supervisor Harper contacted her and asked if she would work an overtime shift. She said no. In spite of this, at the conclusion of her shift (2300 hours) she was not relieved and, consequently, she remained at work and stayed in the first floor "bubble". Supervisor Harper testified he did not recall asking the grievor if she would work overtime.

[26] At about 0630 hours on March 27, Correctional Supervisor Alcock was instructed by Warden Brock to deliver letters to all correctional staff instructing them to remain in the Institution until they were relieved (Exhibit E-11). This was delivered to the grievor, as well as to all other staff.

### Second Incident

[27] Supervisor Harper was the individual in charge of all security staff. His functions included deploying staff to relieve others on duty. He stayed in Matsqui during the strike and awoke around 0600 hours on March 27, 1999. He went for breakfast at about 0645 hours and testified the Institution was still in a lockdown



situation. At about 0700 hours, he received a call on his radio from the grievor asking for relief because, she said, she "had been at work for 24 hours". Supervisor Harper had been informed by Supervisor Alcock that there were four staff members who had finished their four-hour sleep rotation and were freshening-up in preparation for starting another work assignment. They would relieve officers on duty, who in turn could catch four hours of sleep. The correctional officers could not leave the Institution but they could get some rest. Warden Brock testified that both management and staff were becoming exhausted by March 27, to the point where, he testified, he was very concerned.

[28] Officer Dickins was told relief was on its way and Supervisor Harper continued with his meal. A few minutes later, Supervisor Harper's radio sounded again and the grievor said she had not been relieved. Supervisor Harper replied relief was on its way, but it would take time. He testified he was not surprised at receiving the radio calls from the grievor and his impression was she was trying to make a difficult situation more difficult. He testified: "Diane was just being Diane."

[29] A total of four or five calls were made by the grievor to Supervisor Harper asking for relief, and eventually he did not respond to her anymore. After he finished breakfast, he proceeded to his office where he received a call from central control saying the first floor control room (where the grievor was located) was no longer responding to pages. The significance of this is that inmates have a pager in their cells that enables them to contact the officer in the control room if they need to have their cell doors opened to go to the washroom, or if there is a problem or emergency or other such issue. The officer in the control room has a specified period of time to respond to the cell pages and if there is no response, the page is redirected to the central control. The officers in central control become aware the officer in the control room is not responding and can send someone to investigate.

[30] This is what happened at about 0720 hours on March 27, when Officer Dickins was not responding to the cell pages. Supervisor Harper, along with Supervisor Montgomery, went to the control room to see what was going on. They were joined en route by Supervisor Keeping.

[31] Upon their arrival at the control room, the three supervisors were let in and the grievor yelled she had been relieved. Supervisor Harper told her she was not relieved and she told him she had to go and he could not keep her there as she had been at

work for more than 16 hours. Supervisor Harper tried to tell her she could not leave until relieved, as she was putting people's safety in jeopardy, but it appeared to him the grievor did not want to listen; she was frantic. She had a key in her hand and tried to unlock the inner of two security doors in order to leave the control room. Supervisor Harper took the key out of her hand. At that point, according to the evidence of Supervisor Harper, the grievor bolted up the spiral staircase to the second floor and the supervisors followed quickly, with the exception of Supervisor Montgomery. He remained on the first floor. Supervisor Montgomery stated that the grievor appeared angry and, in his opinion, she was not fit at that time to operate her position.

[32] The grievor testified she thought the arrival of the three supervisors signalled her replacement. Consequently, she was adamant in maintaining her viewpoint that she did not abandon her position but rather was officially relieved.

[33] Officer Minami was working in the control room on the second floor and Officer Dickins reached the landing and headed for the desk drawer, which contained the keys needed to leave the control room. Supervisor Harper grabbed for them at the same time Officer Dickins did. The grievor was demanding to be let out and Supervisor Harper told her she was endangering people's lives by leaving before being relieved. She was warned she would be disciplined, up to and including discharge, if she left before being relieved. The grievor testified Supervisor Harper wrenched the keys from her hand.

[34] She ran up to the third floor where Officer Khan was working. Supervisor Harper ordered Officer Khan not to let the grievor out, but she managed to obtain the exit keys this time. Supervisor Harper stood in front of the exit door and issued the cautions cited in the above paragraph. She was not to leave, but if she chose to do so, she would be subject to discipline. Contact between the two was made and the grievor managed to open the door and leave the third floor control room. Supervisor Harper testified that he had never seen her in this state before and felt she had lost it.

[35] Correctional Supervisor Elder received a radio call from Supervisor Harper asking him to go to the principal entrance to Matsqui Institution and stop Officer Dickins from leaving. Supervisor Elder proceeded to the main gate and shortly after arriving there, the grievor approached and demanded to be let out. Supervisor Elder told the grievor he had been given a direct order not to let her out, and then the

Associate Warden and Correctional Supervisor Alcock arrived. Supervisor Alcock instructed the grievor not to leave the Institution, as she had not been relieved. He stated, if she did leave, she would be putting the safety and security of the Institution at risk and she would be subject to discipline, up to and including discharge. She was asked if she understood and she replied no, that it was they who put safety at risk by having her work 16 hours.

[36] Ultimately, the grievor chose to leave the Institution and did so on March 27, after the confrontation described above.

[37] Exhibits E-6 to E-11, inclusive, are the statements of the correctional supervisors involved in one or both of the above incidents. Exhibits G-3 to G-7, inclusive, are statements the bargaining agent solicited in support of the grievor's position. The grievor was never asked to provide a written statement to the employer, nor was she ever asked to attend a meeting called by the employer to obtain her side of the story.

[38] Warden Brock received the reports of the correctional supervisors detailing the above events and forwarded them to Regional Headquarters and Treasury Board Personnel, and it was decided termination of employment was appropriate.

### Arguments

#### For the Employer

[39] The discharge was based on three actions by the grievor, and they were:

- 1) insubordination on March 26 concerning her refusal to release inmates to the ranges;
- 2) insubordination and abandonment of position on March 27; and
- 3) insubordination and illegal withdrawal of services as an employee occupying a designated position contrary to orders during a strike.

[40] The information gathered by Warden Brock, in the form of written reports (Exhibits E-6 through E-11), was sufficiently detailed so as not to require any further meeting with the grievor to obtain more information.

[41] On March 26 and 27, 1999, the situation was not, by any means, normal at Matsqui Institution. A strike was taking place and, consequently, only a skeleton staff was present (see Exhibit E-12). It was an emergency or crisis situation, and was unusual.

[42] Management was aware of the tension amongst inmates and decided to make some plans to relieve this tension. The decision was made to release the inmates to their ranges for one hour, on a floor-by-floor basis.

[43] The grievor knew, or ought to have known, that the inmates would be released to their range only. The grievor knew that two steel gates were present on each range, and only one needed to be opened to allow the inmates access to washrooms, showers and the laundry facilities.

[44] The grievor admitted she was aware, after her arrival, of some plan to release the inmates. If she was genuinely concerned about safety, she could have inquired about this from management. Counsel submitted the grievor was the one behind the action of not releasing the inmates and suggested it was a show of support for her fellow officers on the picket line.

[45] The evidence indicated there was a pact amongst the correctional officers to abuse managerial authority.

[46] Insubordination was evident when Supervisor Keeping was rebuffed by the grievor in his attempt to have her open the inmates' cell doors. The grievor should have complied with this request. The general rule is people will obey the commands of their superiors.

[47] It was not appropriate for the grievor to get into a debate with her supervisor and there was no justification given for not complying with the "obey now, grieve later" principle. She was being deliberately difficult.

[48] She could have asked Supervisor Keeping for further explanation if she did not comprehend the instruction. She did not and was, in fact, setting out to be defiant.

[49] The grievor was substituting her judgement as to what should be done, for that of her superiors. There was no *bona fide* belief that there was a safety concern. Exhibit E-6 is Supervisor Keeping's statement and in it he says he explained to

Officer Dickins that the inmates were to be released to the ranges. This is supported by Exhibit G-5, the statement of Supervisor Montgomery. He said he heard the grievor being instructed to release the inmates to the ranges.

[50] As such, the grievor knew the second steel door was to remain locked and there was no danger she could possibly have been in. She was simply trying to put a spanner in the works.

[51] Upon her refusal to obey Supervisor Keeping's direct order, he ordered her to leave the "bubble". She refused. There was simply no basis for her to believe that, if she left her post, she would be charged with abandoning her post. Again, this is defiance.

[52] If these were the only incidents, they would be serious but would unlikely attract termination of employment as the disciplinary response. However, before they could be dealt with, another incident took place.

[53] The next morning the grievor made numerous calls to Supervisor Harper asking for relief. It was known that she had spent in excess of 16 hours at work, and Supervisor Harper told her he was getting her relief.

[54] When Supervisors Harper, Montgomery and Keeping became aware the grievor was not responding to the inmates' pages, they thought there was a problem; therefore, they went to investigate. Supervisor Keeping's statement of what transpired is found in Exhibit E-7.

[55] Supervisor Montgomery said he had never seen anything like that before. The grievor was defiant, obstinate, aggressive and completely insubordinate.

[56] She tried to escape from her duty and had to be blocked.

[57] Finally, it was decided the supervisors were not going to stop her from leaving the "bubble", and they allowed her to leave. She knew she had not been relieved, and she chose to ignore their warnings concerning the consequences she would face if she left.

[58] The type of behaviour she exhibited was extreme and virtually unprecedented.

[59] The last act of insubordination took place at the front gate where she was warned not to leave. She had been provided with written instructions earlier that morning telling her she could not leave until authorized to do so (Exhibit E-11). She did the very opposite, in spite of the fact she was an employee occupying a designated position. This constitutes an illegal withdrawal of service.

[60] Management could do nothing more than it did to avoid this serious disruption. As they could not physically restrain her, they let her leave.

[61] The grievor does not appreciate, to this day, she did anything wrong. She is untrustworthy and a menace. If she is allowed to resume her duties, she will put the Institution in danger.

[62] For all the above reasons, the grievance should be denied.

[63] According to counsel for the employer, the following case is relevant: *Attorney General of Canada and Barry Green* (Court file A-542-97 F.C.A.; Board file 166-2-26720).

#### For the Grievor

[64] The situation at Matsqui, during the strike, was abnormal. There was a much reduced staff and a lot of tension.

[65] On March 26, 1999, the grievor arrived at Matsqui shortly before her 1500-hour shift was to begin. She did not participate in the strike, and waited in her car until escorted in at approximately 1730 hours by Supervisor Scrivins.

[66] The grievor was not advised about the pending release of inmates until Supervisor Keeping's arrival at 1900 hours. Supervisor Montgomery was present as well.

[67] Supervisor Keeping spoke first to Officer Lambert and instructed him to release the inmates to the ranges. Officer Lambert asked him to speak to Officer Dickins, which he did.

[68] Supervisor Keeping explained the situation to Officer Dickens, and asked her to open the ranges. She refused, and was ordered to open the ranges. Again, she refused, saying it was not a safe order, as there were not enough staff on the floor to handle any problems.

[69] With voices being raised, Supervisor Keeping ordered the grievor out of the "bubble", and she answered no.

[70] Supervisor Kwok arrived on the scene and entered the "bubble". After hearing about the grievor's concerns and addressing them, he left and the ranges were opened.

[71] The grievor believed there was a safety issue and told Supervisor Keeping there was not enough staff on the floor. With the arrival of Supervisor Kwok and an explanation of the proceedings, the grievor was satisfied that safety would not be compromised; therefore, she released the inmates as instructed.

[72] As far as Officer Dickins was concerned, the incident was over.

[73] At 2200 hours, Supervisor Harper inquired to determine whether or not Officer Dickens wanted to work overtime. She replied no.

[74] He did not get back to the grievor at the end of her shift, and she accepted that she was going to have to do a double shift. She did not ask for relief, even though she did not want to work the overtime.

[75] The second shift was supposed to end at 0700 hours and she expected relief at that point. When none arrived, she contacted Supervisor Harper and he told her relief was on its way. She waited a few minutes and nothing happened; therefore, she radioed again, asking for relief.

[76] Supervisor Harper told her relief was on its way, but nothing transpired to provide the relief the grievor sought. She remained at her post, although she expected to be relieved. Supervisor Harper remained in the eating area having breakfast while the grievor anxiously sought relief.

[77] Something happened that caused Supervisors Harper, Keeping and Montgomery to go to the "bubble", and when they entered, the grievor stated that her relief had arrived and proceeded to leave.

[78] In order to get out of the "bubble", one needs the key; therefore, the grievor picked up the key and proceeded to the door. Supervisor Harper took it out of her hand; she then went to the second floor.

[79] Because Supervisor Montgomery remained on the first floor, someone was there doing the work. Supervisors Harper and Keeping followed the grievor to the second floor. Again the grievor got the key and, again, it was taken out of her hand. She went to the third floor, and all followed.

[80] The grievor got the key on the third floor and was cautioned about the consequences of leaving. Following this message, management let her leave.

[81] Exhibit E-7 indicates the grievor's behaviour was totally out of control. This is from Supervisor Keeping. If the employer was truly concerned with the operation of the Institution, they would have provided relief. They could have relieved her, sent her home, and another officer would have been permitted in on the "one-for-one trade".

[82] There was no logical reason to keep the grievor at work. This was a situation of someone imposing his authority by saying "you can go only when I say you can go".

[83] Ms. Dickins was let out of the "bubble" and went to the main gate. She would still be out of control; therefore, she could have been sent to the medical area, or sent home. Instead, they tried to force her to remain inside. For what purpose?

[84] There are a number of events that could have been handled better. For example, there could have been better communication at the outset with respect to the releasing of inmates. People should have kept their cool.

[85] This situation does not warrant discipline but in the alternative, if some discipline is warranted, it should be minimal.

[86] I was asked to remain seized if the grievor was returned to her position to address other issues which the parties may not be able to resolve, such as costs associated with a job search.

[87] I was referred to the following decisions: *Carrière* (Board file 166-2-23716); *Bowers* (Board file 266-YG-79); and *Stout and Others* (Board files 166-2-13053; 166-2-13110; 166-2-13114).



Reply

[88] The fact she was tired does not excuse her behaviour.

[89] Because she never mentioned she was sick, referral for medical attention does not make sense.

[90] Management let her out of the "bubble" when they thought she was out of control, but they did not want her to leave the Institution.

[91] She was put on clear notice as to what not to do.

[92] Because there is no rehabilitative potential in the grievor, alternatives to the disciplinary action should not be looked at.

Reasons for Decision

[93] On March 26, 1999, Matsqui Institution found itself in a strike situation when some of the correctional officers proceeded on a legal withdrawal of their services. A picket line was set up restricting the flow of officers into the Institution.

[94] Due to the strike, there were a limited number of correctional officers on duty, and they were supplemented by managerial staff who remained in the Institution throughout the strike.

[95] The limited number of staff caused Warden Brock and the managerial team to decide that, initially, the inmates should be locked in their cells throughout the day. This situation would be reviewed daily but at the outset it was felt this was the best course of action to take.

[96] On the morning of March 26, management also discussed the possibility of releasing the inmates to their range for one hour, on a floor-by-floor basis, in order to relieve some of the tension and allow the inmates access to the washroom and laundry facilities. It was decided to monitor the staffing situation on March 26 to determine if this plan could be put in place.

[97] At some point during the day on March 26, management decided there were sufficient staff to allow the release of inmates to their range for one hour. Although it was unclear at what time this final decision was made, the evidence indicated this was

not relayed to the staff on duty. Supervisor Montgomery's evidence indicated that, in the de-briefing following the incident, Warden Brock inquired as to whether or not the decision to open the cell doors had been relayed to staff and he was told no, it had not been prior to Supervisor Keeping ordering Officer Dickins to release the inmates.

[98] Because the inmate committee was told there would be a one-hour release to the ranges, the inmates were aware this would occur.

[99] The grievor reported for her 1500-hour shift on March 26, but could not enter the Institution due to the establishment of a picket line. The grievor occupied a designated position and was prevented, by law, from engaging in a withdrawal of her services.

[100] The grievor waited in her car until approximately 1730 hours when management escorted her across the picket line, and she was able to assume her post in the control room. She heard some information about inmates being released, but she said the information did not come from management and she did not know the specific details.

[101] At 1900 hours, Supervisor Keeping went to the first floor location where the grievor and Officer Lambert were working and asked Officer Lambert to release the inmates to the ranges. Officer Lambert asked that the instruction be relayed to Officer Dickins, who was on the phone at the time.

[102] When asked why he did not comply with the instruction, Officer Lambert testified the grievor was the person in charge of the first floor; therefore, the order should be given to her.

[103] Obviously, if Officer Lambert had simply complied with Supervisor Keeping's instruction to open the cell doors, none of the incidents involving Officer Dickins would have occurred. Instead, however, Supervisor Keeping waited for Officer Dickins to finish the telephone call; he then requested she open the cell doors and release the inmates to the ranges.

[104] Counsel for the employer suggested that there was a decision made by staff to refuse to let the inmates out of their cells. Counsel suggested this was sparked by the strike itself and was a form of support by the employees who occupied designated positions for their colleagues who were on the picket line. Whether this is true or not has, I believe, no bearing on the disciplinary action itself as the disciplinary notice

refers to the fact the grievor was disciplined for insubordination (among other things). There is no mention in the letter of termination of a concerted effort by staff to support the striking employees.

[105] In any event, the grievor refused Supervisor Keeping's request to open the inmates' cell doors, and Supervisor Keeping issued an order for the grievor to do so.

[106] There is no dispute the order was clearly issued and understood.

[107] Supervisor Keeping testified the grievor told him she would not comply because it was not safe. He testified she did not explain who it was unsafe for, nor did he ask. Officer Dickins testified she told Supervisor Keeping she was not complying because there was not enough staff, and the order was unsafe.

[108] There is no dispute that a loud, verbal altercation took place, which ended with Supervisor Keeping ordering Officer Dickins out of the control room and Officer Dickins refusing to comply.

[109] At that point, the evidence indicates Supervisor Montgomery took Supervisor Keeping aside and Supervisor Kwok, who had just arrived, entered the control room to speak to the grievor.

[110] Supervisor Kwok's testimony was that Officer Dickins told him her concern was that there was not sufficient staff on hand to ensure the release of inmates could be done safely (see Exhibit E-8). Supervisor Kwok explained the procedure to the grievor, stating the inmates would be locked on their range, and there was sufficient managerial staff to handle any problems. This satisfied the grievor and the order to open the cell doors was complied with.

[111] There is no doubt that the operational decision to release the inmates to their range could have been relayed to staff at an earlier stage. If this had been done, perhaps any concerns about staff shortages could have been addressed at that time.

[112] There are two questions in this case that must be addressed to determine if there were *bona fide* reasons, related to health and safety, for refusing the direct order.

[113] Firstly, did the grievor honestly believe that health or safety would be at issue if she complied with the request to open the inmates' cell doors?

[114] Based upon the *viva voce* evidence and the observation I took, I cannot conclude that the grievor honestly believed her safety would be at issue. The inmates would be restricted to their own range and would be behind a locked, steel barrier. If they attempted to try to open the steel barrier, there were other staff, namely managers and supervisors, who could respond to the situation and address it. Finally, if the inmates somehow opened the second steel barrier, I do not see how they could possibly have penetrated the "bubble" where the grievor worked as it was extremely secure, with double steel doors and bullet-proof glass.

[115] The second question concerns the inmates' safety. If the grievor believed the inmates' safety was at issue because of a lack of an adequate number of supervisors to oversee their release to the ranges, this may be a legitimate safety concern because part of her job is to ensure the protection of inmates. She testified releasing inmates to the ranges without proper supervision could result in fights, assaults and the like among the inmates.

[116] With this in mind, I turn to the next question that must be addressed to assess the acceptability of the reason for the refusal to follow a direct order.

[117] The next question to be answered is whether the grievor communicated her belief about the safety concern to the employer in a clear and concise manner.

[118] The answer here is, I believe, no. There is no evidence I was made aware of to indicate the grievor told Supervisor Keeping of the specific nature of her safety concern. She simply said, by her own evidence, "You do not have enough supervisors on duty". She did not tell Supervisor Keeping she feared for the inmates' safety. If she had stated this to Supervisor Keeping, it would then have enabled Supervisor Keeping to address this concern and attempt to resolve the problem.

[119] Since the safety issue was not clearly and concisely stated to Supervisor Keeping, I find the grievor has not discharged the onus of justifying her action to defy the direct order issued. Some discipline is, therefore, warranted for this incident.

[120] The second incident is the grievor's refusal to leave the "bubble" when so ordered by Supervisor Keeping. We must determine, firstly, if insubordination did in fact occur.

[121] A number of decisions state that there are three essential questions to ask in order to determine if insubordination did take place (see, for example, *Pacific Press* (1997), 69 L.A.C. (4<sup>th</sup>) 214.

1. Was the instruction conveyed by a person in authority, and was the instruction clear and concise?
2. Was there a clear understanding, by the grievor, concerning the instruction?
3. Was the instruction disobeyed?

[122] I find the order was clearly given and understood. There was no dispute that Supervisor Keeping ordered the grievor out of the "bubble" upon her refusal to open the cell doors. She refused the order to leave her workplace, and did not dispute hearing and understanding the order. The order was also issued by someone in authority.

[123] However, in this case, there was an intervening factor that took place at the time the grievor was refusing to leave. The intervening factor was the appearance of Supervisor Kwok, who asked Supervisor Keeping if it was permissible to enter the "bubble" and speak to the grievor. This took place and, eventually, Supervisor Kwok secured the agreement of the grievor to open the cell doors. Therefore it was, to state the obvious, no longer necessary for the grievor to have to leave the "bubble" due to her non-compliance, as she had complied. In effect, the order was no longer applicable.

[124] I am reinforced in this belief by the fact that Supervisor Keeping did not maintain his position that the grievor should leave her post. The regular activities continued, and no follow-up was issued on having the grievor leave her post. Therefore, while there was insubordination in not obeying initially, the events overcame this act of insubordination to the extent that I find it so minor as not, in and of itself, to warrant any discipline.

[125] The third incident is the grievor's refusal to remain on the job until officially relieved.

[126] The events of the morning of March 27 are, for the most part, not contested. The grievor contacted Supervisor Harper a number of times asking for relief. Each time she was told relief was on its way. This was the information Supervisor Harper had been given by Supervisor Alcock.

[127] There was no evidence given to suggest Supervisor Harper made any inquiries as to where the relief was or when, exactly, someone would be taking over for the grievor. He simply reiterated the fact that relief was on its way.

[128] The grievor eventually did not respond to the inmates' pages and this failure to respond was made known to central control. This indicated there was a potential problem in the grievor's area, but the extent was unknown. Consequently, Supervisors Harper, Keeping and Montgomery went to investigate.

[129] Upon the arrival of the three supervisors, Officer Dickins announced she had been relieved, and proceeded to obtain the exit key in order to leave.

[130] In her testimony, Officer Dickins stated that, as she believed she had been relieved, she had done nothing wrong.

[131] I do not accept her statement that she believed she had been relieved. I heard no evidence to suggest supervisors relieved officers of their duty. In fact, with the one-for-one trade, officers were let out of the Institution in exchange for other officers being allowed to enter. Officers replaced one another.

[132] Based on the evidence, I find the grievor left her post before being officially relieved. The altercation that took place was not materially in dispute and the grievor was given a clear instruction not to leave her post. She chose to ignore the instruction.

[133] The same can be said in regard to the incident at the front gate. The grievor was given clear instructions not to leave, and the consequences were also clearly stated. Her actions caused management to open the Institution gates to enable her to leave. The illegality of the grievor's action alluded to by the employer's counsel refers to possible quasi criminal conduct under sections 102 and 105 of the *Public Service Staff Relations Act*.

[134] The order to remain at work was given in a clear and concise manner by an individual in authority and was, I believe, clearly understood and disobeyed. Again, insubordination, to some extent, has been demonstrated. She testified she was an employee occupying a designated position and, thereby, prevented from going on strike.

[135] In this situation, the grievor had been at work for in excess of 16 hours (starting with the time she reported for work but was met with a picket line). She stated she had been asked if she wanted to work overtime and had said no. It is not clear to me why the employer did not simply allow the grievor to go home at the end of her shift and have another correctional officer come in to work on the "one-for-one trade". That, to me, would have been the wisest thing to do, given the events of the early evening, and the grievor's stated disinterest in working overtime.

[136] With the benefit of 20/20 hindsight, one can, in most instances, say that, had there been something done differently, the events referred to would not have happened. In this case, if Supervisor Harper had actually inquired as to the exact whereabouts of the replacement personnel, he could have told the grievor specifically how much longer she had to remain before relief arrived. He did not do so, and told the grievor repeatedly that relief was on its way, but obviously it was not as none showed up.

[137] Once again, a communication problem created a difficult workplace situation.

[138] Also, I cannot see why the employer was so insistent on retaining the grievor. Why not let her go home and get a replacement from the employees waiting in line by the strikers? That, however, is not an issue I can deal with.

[139] Is discharge appropriate, in light of the above circumstances?

[140] Generally speaking, the principle of progressive discipline is one that employers adhere to. The reason is that employees are put on notice, so to speak, that a particular action is unacceptable and any further occurrence of that, or other unacceptable action, may draw more severe sanction. It is hoped that this will correct the behaviour, with the result being that the employee is productive and valued by the employer.

[141] In the instant case, the employer felt that discharge was the appropriate response due to the severity of the grievor's actions and the resulting lack of trust the employer had in the grievor. Counsel for the employer argued there was no rehabilitative potential for the grievor.

[142] In *Dough Delight Ltd.* (1999), 74 L.A.C. (4<sup>th</sup>) 144, the arbitrator was faced with a similar issue. The employee had been discharged for insubordination, which consisted of refusing a direct order. The employee did not admit he made an error and attempted to justify his action, which is not unlike the present situation.

[143] However, in *Dough Delight Ltd.* there had been progressive discipline undertaken. In commenting on this aspect, the arbitrator states, at page 160:

*...In most cases, the application of progressive discipline works. It achieves a form of specific deterrence, usually achieving the rehabilitative impact sought in respect of the grievor whose conduct is under review. It coincidentally achieves a form of general deterrence, rendering other employees aware of the imposition of sanction for misconduct, and where consistently invoked, tends to alter the collective behaviour.*

[144] In *Green (supra)* the grievor, an air traffic controller, was discharged for abandoning his position. In that case, he left a control post unmanned for a period of time and there was no one to respond to the pilots' needs.

[145] The circumstances in the instant case are different. Here, the grievor did not leave her post unattended. When the three supervisors arrived, she left; therefore, the post was attended to at all times, albeit by a supervisor.

[146] I believe the circumstances of the situation before me are so unique and unusual as to warrant an alteration to the penalty imposed.

[147] The environment was, to state the obvious, abnormal. A strike is not an every day occurrence, and the tension and exhaustion were felt by everyone.

[148] There was no evidence to suggest the grievor was insubordinate in performing daily tasks under more normal (i.e. non-strike) conditions. Therefore, there is nothing I was made aware of to suggest that, with the application of progressive discipline, the problem will not be sufficiently addressed by the grievor.



[149] I am, therefore, substituting a penalty of a one-month suspension without pay or other benefits in place of the discharge. I believe this penalty is sufficient to impress upon the grievor that defying a direct order is inappropriate but it simultaneously recognizes that the environment at that time was directly related to unprecedented and uncharacteristic behaviour.

[150] To the extent outlined above, the grievance is allowed. The employer is directed to reinstate the grievor forthwith in the position which she occupied at the time of the termination of her employment and to compensate her for all lost pay and benefits in excess of the one-month suspension. I shall remain seized of this matter in case the parties encounter any difficulty in implementing my decision provided either party requests my assistance by no later than September 30, 2000.

[151] One final note, strictly in obiter. In this case, a disciplinary decision was made without having offered the grievor an opportunity of presenting her side of the story. The employer's counsel suggested there was no need for such a meeting, as all the relevant information was available. While it is possible that no new information may have been forthcoming if a meeting had been held, I suggest it is to everyone's benefit to hold such a meeting in any event. I am comforted in this view by the fact both the employer and bargaining agent representatives indicated that they recognize the value of having such a meeting before finalizing any disciplinary action and I encourage the parties to do so in the future.

**Joseph W. Potter,  
Deputy Chairperson**

OTTAWA, July 20, 2000.

