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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

DAVID LEWICKI

Grievor

and

**TREASURY BOARD
(Canadian Grain Commission)**

Employer

Before: [Léo-Paul Guindon, Board Member](#)

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

For the Employer: [Richard Fader, Counsel](#)

Heard at Thunder Bay, Ontario,
March 1 and 2 and November 5 to 7, 2001.

DECISION

[1] By his grievance presented on March 24, 2000 and referred to adjudication on September 7, 2000, David Lewicki is contesting the 20-day suspension without pay imposed on him by the employer for the period of March 27 to April 21, 2000.

[2] The letter of suspension, dated March 23, 2000, reads as follows (Exhibit E-15):

This is further to the investigation of your participation in Grain World on February 28 to February 29, 2000, and your attendance at a meeting of the Canadian Wheat Board (CWB) Board of Directors on Tuesday, February 29, 2000.

The evidence from our investigation substantiates that you were invited to attend Grain World by Terry Hanson, member of the CWB Board of Directors; that you discussed with T. Hanson before you attended this event, having a meeting with the CWB Board of Directors while you were at Grain World to discuss CGC policies and programs; that you spoke against CGC policies during your attendance at Grain World; that you were invited by a member of the CWB Board of Directors to attend, and did attend, a reception arranged by this Board as an "invitation only" event for key grain industry people; that you were invited by T. Hanson to attend a meeting of the CWB Board of Directors; that you attended this meeting, at which you were introduced as a senior CGC inspector from Thunder Bay; and that you discussed CGC policies and programs at this meeting.

In considering these events, I found that you accepted the invitation of a member of the CWB Board of Directors to Grain World, with the expectation that you would have the opportunity to meet with the CWB Board of Directors to discuss issues related to CGC programs and policies which you are not authorized to discuss. During your attendance at this conference, you spoke against CGC policies. You allowed yourself to be represented to the CWB Board of Directors as a key grain industry person and as a senior inspector of the CGC whom they could invite to talk to them about CGC policies. You discussed CGC policies at a meeting of the CWB Board of Directors, and were critical of Canadian Grain Commission policies by stating at this meeting that because of CGC policies huge amounts of money are being lost by producers.

Your actions have embarrassed the Canadian Grain Commission, have brought disrepute upon the credibility of CGC policies and programs and have damaged the relationship of trust between the CGC, the Canadian Wheat Board and the CWB Board of Directors. These actions are in violation of the instructions which you were given in writing by your manager in a letter dated May 19, 1998, which

outlines the activities which you are authorized to undertake as a CGC grain inspector.

You have previously been disciplined for engaging in activities, which are not within your role and responsibilities as a CGC employee. Despite this discipline, you have continued to disregard and act in defiance of the instructions outlined in the letter of May 19, 1998, which clearly state that you are not to represent the CGC at any time, either officially or unofficially, in any capacity whatsoever which has not been authorized by your employer. Your recent activities with the CWB Board of Directors have damaged the reputation of the Canadian Grain Commission and have left me no alternative but to demonstrate to you the seriousness with which your actions are viewed by CGC management. Therefore, it is my decision that you will be suspended from your duties without pay for the period from Monday, March 27, to Friday, April 21, 2000, inclusive.

You are to leave the premises of the CGC immediately upon receipt of this letter. During the period of your suspension, you remain an employee of the Canadian Grain Commission. You are not to appear at any of the CGC premises or at the premises of any of the clients of the CGC while you are suspended from your duties. In addition, during and after this suspension, you are not to make or receive any contacts and/or any other official or unofficial representations either outside or within the CGC, in relation to the Canadian Grain Commission, its programs and its policies. Failure to comply with these instructions and with the letter of May 19, 1998 will result in further disciplinary action, up to and including discharge from your position with the Canadian Grain Commission.

You are not authorized to discuss this disciplinary action and/or any of the information surrounding this action with anyone other than your union representative for the purpose of discussing your right to grieve.

The Facts

[3] Mr. Lewicki has been working for the Canadian Grain Commission (CGC) for the past 20 years and, at the time he received the contested disciplinary measure, he held the position of Grain Inspector in Thunder Bay. Since this incident he has been promoted to a higher position involving the supervision of inspection staff.

[4] Mr. Lewicki was invited to the Grain World 2000 conference by Terry Hanson, a grain producer from Saskatchewan and a Canadian Wheat Board (CWB) elected

director. Mr. Hanson has known Mr. Lewicki since 1986 when they met during a tour at the Thunder Bay terminal. Their relationship was sporadically renewed as a result of business relating to the grain industry. Mr. Hanson called Mr. Lewicki a month prior to the Grain World conference to talk about problems with the control of unregistered varieties of grains in some shipments. Mr. Hanson learned that Mr. Lewicki was going to be laid off at the time of the conference and, knowing his personal interest in the subject on the agenda of the conference, he suggested to him that he go to the conference.

[5] Mr Lewicki's fees were paid by the national level of the Public Service Alliance of Canada, his bargaining agent. He registered under his name only, because he did not want to represent an organization (Exhibit G-13). He testified that he was there for his personal interest and he wanted to take advantage of the conference to investigate the possibility of finding a new job.

[6] He took part in the activities of the conference in the morning and the afternoon of February 28, 2000, and met with Mr. Hanson and Mr. Hartmann Nagel (Assistant Commissioner for the CGC). He saw Mrs. Marilyn Kapitany (Director of Industry Services at the CGC) on the floor of the conference.

[7] Mrs. Kapitany testified that she knew that Mr. Lewicki had received notice of the employer's expectations and had had disciplinary measures imposed on him in the past in relation to comments he had made against CGC policies or for unauthorized representation of the CGC. The notice and the disciplinary measures, sent to Mr. Lewicki, in writing, are as follows.

[8] A letter giving a "final notice of expectations" was sent to Mr. Lewicki on May 19, 1998 (Exhibit E-12) which reads as follows:

This is further to previous conversations and correspondence with you in the past during which I have outlined to you the role and responsibilities of your position as a Grain Inspector with the Canadian Grain Commission.

You are aware that a complaint was received from Saskatchewan Wheat Pool regarding the comments you made at a meeting of the Western Road and Rail Association in Beechy, Saskatchewan. We have been unable to verify exactly what transpired, and as a result will be advising the complainant of this. No further action on this complaint will be taken.

At the same time, I would like to reiterate the Canadian Grain Commission's expectations of you as an employee:

- Your role and responsibilities with the Canadian Grain Commission are those of a PI-CGC-03 Grain Inspector;*
- You are authorized to represent the Canadian Grain Commission only as this representation relates directly to the duties defined by the CGC which you are assigned to perform at a work location designated by the CGC;*
- Except as outlined above, you are not authorized to act as an official or unofficial representative of the Canadian Grain Commission in any other capacity whatsoever. Therefore, you are not authorized to officially or unofficially represent the Canadian Grain Commission, its policies or programs, to the media, to parliamentary or other private committees, to producer groups, or to any other grain industry or client group;*
- You are to adhere to and are bound by the Oath of Affirmation of Office and Allegiance, which states that you "will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment", and the Conflict of Interest guidelines which apply to all employees of the public service (attached).*

While I understand that you have been identifying yourself as a private citizen in speaking to producer and other groups, the participants of those meetings generally know that you are also a grain inspector with the Canadian Grain Commission. As such, your comments are informed by the knowledge and experience you have gained while in our employ, and may be associated by your audience with the policies of the CGC. As a result, if you express opinions, which are not policies of the CGC, these may be attributed to the Commission in spite of your disclaimer.

You are to consider this as final notice of the expectations, which the Canadian Grain Commission has of you in your capacity as a Grain Inspector. Intentional or un-intentional representations of the Canadian Grain Commission made by you in any capacity in which you are not authorized to act as a representative of the CGC and/or which are critical of the policies or programs of the Canadian Grain Commission, will not be tolerated and will result in immediate disciplinary action up to and including discharge.

[9] On December 17, 1998, a letter of reprimand (Exhibit E-13) was sent to Mr. Lewicki which reads as follows:

This is further to our meeting of December 10, 1998, concerning your use of the CGC facsimile machine at Agricore (Man. Pool 1) on October 17, 1998.

You have indicated that you were contacted by a group from Eston, Saskatchewan, who were seeking information on the Canadian Grain Commission's Program Review. You decided to send this information out yourself rather than referring this request to local management and/or to those in the organization whose responsibility it is to represent the CGC on this issue.

I drew your attention to my letter of May 19, 1998, wherein I outlined to you the Canadian Grain Commission's expectations of you as an employee. You were advised in that letter that, except for your roles and responsibilities as a Grain Inspector which were clearly outlined, "you are not authorized to act as an official or unofficial representative of the Canadian Grain Commission in any other capacity whatsoever. Therefore, you are not authorized to officially or unofficially represent the Canadian Grain Commission, its policies or programs, to the media, to parliamentary or other private committees, to producer groups, or to any other grain industry or client group."

You advised me during our meeting that you did not think that your actions contravened anything in my letter of May 19, 1998, as you thought that the letter just covered presentations. I find that the wording "in any other capacity whatsoever", is very clear and does not support the assumption that my directions to you covered only one area of activity. You also stated that the information, which you have indicated you distributed, is not confidential. However, at issue is your role and responsibilities as a Grain Inspector of the Canadian Grain Commission and the expectations outlined to you in my letter of May 19, 1998, and not the security level of the information distributed.

You are to consider this letter as a written reprimand for your failure to comply with the expectations outlined in my letter of May 19, 1998. A copy of this letter will be included in your employee file.

Future incidents of acting in an official or unofficial capacity on behalf of the Canadian Grain Commission in any area, which is not part of the authorized duties assigned to you by the CGC, will result in further disciplinary action.

[10] On December 21, 1998, a three-day suspension without pay was imposed (Exhibit E-14) upon Mr. Lewicki for a telephone conversation that he had with Mr. Allan Holt of the Wild Rose Agricultural Producers and the letter of suspension reads as follows:

This is further to our meeting by telephone of December 3, 1998, concerning a complaint received by the Canadian Grain Commission from Mr. Allan Holt of the Wild Rose Agricultural Producers, Edmonton, Alberta.

Mr. Holt approached the Chief Commissioner, Barry Senft, to advise him that he had been telephoned by you at his home in Alberta. He indicated that you left a message on his voice mail, identifying yourself by name as an inspector with the Canadian Grain Commission and indicating that there were problems in the CGC that you wanted to discuss with him. Mr. Holt decided not to return your call, however answered a second call from you within 5 to 10 minutes of listening to your message.

During your conversation, you indicated to Mr. Holt that you had met with the Chief Commissioner, Barry Senft, that day. This would confirm the date of your call as Tuesday, October 20, 1998, the date on which you met in Thunder Bay with J. Robertson, B. Senft and myself. During this meeting you were made aware of the appropriate lines of communication within the CGC to express any concerns which you have. Mr. Holt reported that you were critical of Mr. Senft for not meeting with you alone; you stated that you had asked for a personal meeting, however Mr. Senft would not do this and had to have someone with him.

Mr. Holt indicated that you told him about activities of the grain companies at the terminals, which increase their profits at the expense of producers. You accused the CGC of catering to industry and not being an impartial third party, therefore not protecting producers. You were critical of the CGC paying \$400,000. per year to rent the building in Thunder Bay, although the number of inspectors has been reduced, and advised Mr. Holt that the CGC's 15 million dollar deficit is only a projected deficit and not a cash shortfall.

Mr. Holt has advised the CGC that he believes that everything you said to him was intended to discredit the CGC and to encourage him as a producer to put pressure on the Canadian Grain Commission. He indicated that he had never heard of you prior to your telephone call to him.

During my meeting with you on December 3, 1998, you indicated that you had received information from another

group that had suggested to you that Mr. Allan Holt would be a good person to call. You stated that you were aware that Mr. Holt has a position with Wild Rose Agricultural Producers, and that you had called his office and been given his home phone number. You declined to comment on the nature of the information you received or the identity of this group. You stated that you could not recall that you identified yourself as CGC grain inspector, whether you talked about activities of the grain companies which benefit the companies at the expense of producers, or if you discussed the CGC's budget situation with Mr. Holt. I questioned how you would know the amount of the rent on the CGC offices at Thunder Bay, and you indicated that you had taken this information from the budget statements. When I asked if you had permission from the CGC to discuss this matter with outside groups, you had no comment.

You indicated that you did not recall speaking negatively about the CGC, that you called Mr. Holt for information purposes and discussed "this and that". When I attempted to clarify what you intended to do with information, which you were able to obtain from Mr. Holt, you declined to comment.

You advised me that your recollections of the conversation with Mr. Holt are very vague, and that, in your opinion, Mr. Holt's perceptions of his conversation with you are not your responsibility. Your representative expressed the view that this was a private conversation, that you could not recall the details of your conversation, and that what was involved was a misunderstanding on the part of Mr. Holt. I advised you that Mr. Holt had never heard of you before you called him, and that he would not know what to think of a grain inspector calling him about internal CGC matters.

I drew your attention to the expectations laid down in the letter sent to you by J. Robertson, Regional Director, Thunder Bay Region, on May 19, 1998. When I asked if you felt you had done anything to contravene this letter by telephoning Mr. Holt, you said no. You indicated that, in your view, the letter applies only to the issue of making presentations. You also stated that it is your philosophy that producers should come first and that, in your opinion, this is not how the CGC is doing things at this time. Your representative indicated that you were "indoctrinated" with the philosophy of producers first as a young grain inspector and that, after 20 years of experience, you have your own opinions about how things should be done. When I attempted to get you to identify specific concerns, you indirectly referred to a difference in philosophy.

With regard to the role of the CGC in protecting the producer, both Mr. Senft and I have pointed out to you many times that the producer will benefit from what is best for the

grain industry as a whole. Very few individual producers have direct interests in grain when it reaches the terminal.

I have reviewed all of the information relevant to this incident to determine the appropriate action to be taken. It is my decision to impose a three-day suspension without pay from your duties as a grain inspector. This decision is based upon your disregard for the expectations clearly laid out in the letter to you on May 19, 1998, which were reiterated during our meeting of October 20, 1998, and your lack of recognition of the effect of your actions in discrediting the Canadian Grain Commission to a grain producer.

Your suspension will be for the period from December 29 to December 31, 1998, inclusive, during which period you are not to be present at CGC work locations. A copy of this letter will be included in your employee file.

Further incidents of using your position, as a CGC grain inspector to publicly criticize and discredit the programs and policies of the Canadian Grain Commission will result in additional disciplinary action.

The grievance contesting that suspension was denied at expedited adjudication.

[11] On February 28, 2000, the first day of the conference, between two panels, Mr. Lewicki told Mr. Hartmann Nagel, Assistant Commissioner at the CGC, that the CGC had lowered the tolerance for ergot and that the producers were getting “screwed” by the evaluation of ergot by weight. No one other than Messrs. Nagel and Lewicki heard the conversation (Exhibit E-1).

[12] Mr. Lewicki admitted, in his testimony, that he talked to Mr. Nagel about the ergot issue and that the producers would lose money following the change from manual counting of kernel size pieces of ergot to weight measurement. Mr. Lewicki admitted that he talked of the ergot measurement and change in tolerance. Mr. Nagel stated that he disagreed with Mr. Lewicki that the tolerance for ergot was lowered from .1 to .6, and that the three kernel size pieces of ergot in a 500g sample did not come to .1.

[13] On the second day of the conference, Mr. Terry Hanson organized an informal meeting to discuss potential problems related to the single grade standard as well as the increasing problem with unregistered varieties in CWB stocks. CWB members and CGC staff were welcome to attend as it appears from the interoffice correspondence (Exhibit E-10):

I have arranged an informal meeting to discuss potential problems related to the move to single grade standards, i.e. ergot, foreign material, etc., as well as the increasing problem with unregistered varieties contaminating CWB stocks.

This meeting is scheduled to take place on Tuesday, February 29, 2000, in the Cambridge Room at The Lombard from 9:00 - 11:00 p.m.

CWB and Canadian Grain Commission staff are welcome to attend.

Mr. Lewicki was invited verbally by Mr. Hanson to attend the meeting.

[14] Mrs. Kapitany was informed of the meeting and that Mr. Lewicki had the intention of attending. With other CGC staff, it was decided to avoid going because someone from the CGC could be put in a bad situation if a debate started in front of a third party about CGC policies, or the presence of someone else from the CGC could give some credibility to Mr. Lewicki's declarations. She did not tell or ask anyone from the CGC to tell Mr. Lewicki about those concerns or that he should not attend the meeting.

[15] At the meeting, Mr. Hanson introduced Mr. Lewicki to the CWB members attending as "a pretty experienced inspector from Thunder Bay." Those members knew that Mr. Lewicki was working for the CGC but they were told that he was off duty at that time and not representing the CGC. Mr. M. Halyk, a CWB member who attended the February 29 meeting, testified that Mr. Lewicki told the participants that he was not representing the CGC or acting as a CGC spokesman. The conversation went around the table and Mr. Lewicki answered questions from the participants on the measurement of ergot, on the single grade standard and unregistered varieties of grain. Mr. Lewicki agreed to give technical information to the participants.

[16] One of the participants (Mr. Nakley) brought in the letter sent to the Western Grain Standard Committee (WGSC) by Mr. Spafford (CWB staff) on April 28, 1999 (Exhibit G-5). That letter reads as follows:

At the April 13, 1999 Western Grain Standards Committee (WGSC) meeting I promised to provide to committee members some financial impact numbers that we at the CWB had prepared with respect to the single standard issue. Please find these numbers attached. I would appreciate it if you

could forward these numbers, along with this covering letter, to the WGSC distribution list.

As we noted in the meeting, the attached numbers present only a "worst case" scenario and they need to be refined further. However, they do indicate the magnitude of this issue and the importance of careful consideration of the potential impact. You will note that the impact calculated in the attached includes a change in test weight. If this factor is removed, it appears the impact would be approximately half of what is calculated. Further reductions in impact may be possible by employing assumptions regarding quality of farmer deliveries (versus terminal unloads), primary elevator competition, etc. Note also that the "tonnes downgraded" numbers assume only a one-grade downgrade in each case. In reality, some downgrading may occur from, for example, 1CWRS to 3 CWRS. This would obviously increase the impact by the amount of the additional price spread between those two grades (\$13 per ton) compared to 1CWRS and 2CWRS (\$3 per ton).

Obviously, the potential impact of this proposed change on farm incomes is huge. It seems clear that careful consideration of this issue will require some key additional information, in addition to what has already been distributed by the CGC. I suggest the following be prepared, prior to the October 1999 meeting, for WGSC members' review.

i) The rationale for moving toward a single standard rests upon the assumption that high throughput elevators (HTEs) will cause an increasing number of logistical problems at terminals because of the HTEs' ability to blend and ship product at quality very close to primary standards. It would therefore be important to examine closely the experience to date with HTE shipments. Have HTEs been shipping quality that is causing terminals problems in achieving export standards? Do the rail car unload data demonstrate this? Are some grades affected more than others? Have terminals been indicating to CGC on numerous occasions that they have had to shut down or slow down due to quality problems caused by this issue? Data and thoroughly explained qualitative commentary on these questions is critical.

ii) Financial impact estimates should be further refined. This includes the numbers I have attached, plus estimates of the benefits to be derived from a single standard. Presumably, if terminals are able to operate more efficiently as a result of a single standard, there must be some currently incurred costs that would no longer be present. How would these be reflected back to farmers? Would terminals reduce their handling fees, and by how much?

Others may well have comments regarding other background that should be prepared prior to the next WGSC discussion on this issue, which I suggest, should be held at the October meeting.

Thank you for forwarding this information to the committee.

[17] The table attached to Mr. Spafford's letter showed an estimated adverse financial impact of \$64 million on the producers (Exhibit G-5).

[18] From the discussion on Mr. Spafford's letter, it was clear that the members of the CWB attending the February 29, 2000 meeting were upset by not having received that information prior to the meeting. The lack of answers to that letter to the WSGC increased the frustration of the CWB members who attended that meeting.

[19] Mr. Lewicki took part in the general debate on the financial loss to be experienced by the producers and gave information on the measurement of ergot by weight or manual, on the single grade standard issue and on the unregistered varieties of grain issue. Following the testimony of the witnesses, notwithstanding the words used by Mr. Lewicki, the comment he made on the amount of money that would be lost by the producers was taken out of Mr. Spafford's letter.

[20] The leading issues of the debate can be summarized as follows. Ergot is a fungus that contaminates wheat and some other cereal grains. The quantity of ergot infecting a sample of wheat is one of the criteria used to give a quality grade to the wheat and determine the value of a shipment.

[21] Prior to August 1999, at the primary elevators which receive grains from the producers, the ergot contamination was measured by a CGC inspector counting manually the number of kernel size pieces of grain which are infected by ergot. This evaluation of the quantity of kernel size pieces of ergot in a sample of grain gives a grade standard to the wheat and determines the value paid by the elevator operator to the producer. A grain inspector is appointed by the CGC to evaluate the quality of the grain. There was a significant degree of subjectivity related to the average size of a contaminated piece of grain because the size of a piece of wheat is variable (Exhibit E-6). The average size is called a kernel size piece. The CGC classified, at the primary elevators, the wheat standards as follows:

- up to 3 kernel size pieces of ergot count per 500 gram sample: first grade;

- 4 to 6 kernel size pieces of ergot count per 500 gram sample: second grade;
- 7 to 11 kernel size pieces of ergot count per 500 gram sample: third grade.

[22] Mr. Len Séguin (Chief Grain Inspector, CGC) explained that a study was made in 1992 on approximately 37,000 samples evaluating the ergot concentration by the kernel count method to establish an average tabulation in percentage by weight (Exhibit E-7). A report of the results was reproduced in Exhibit E-7, as follows:

TABULATION OF PERCENT VS KERNEL COUNT

(ERG, STN, SCL)

FEB - AUG 9:26 Wednesday, September 16, 1992

ERG P

<i>GRAIN</i>	<i>ERG K</i>	<i>N</i>	<i>MEAN</i>
<i>1</i>	<i>0</i>	<i>2</i>	<i>0.008</i>
	<i>1</i>	<i>18461</i>	<i>0.005</i>
	<i>2</i>	<i>9989</i>	<i>0.010</i>
	<i>3</i>	<i>6406</i>	<i>0.015</i>
	<i>4</i>	<i>181</i>	<i>0.021</i>
	<i>5</i>	<i>829</i>	<i>0.025</i>
	<i>6</i>	<i>931</i>	<i>0.031</i>
	<i>7</i>	<i>3</i>	<i>0.041</i>
	<i>8</i>	<i>20</i>	<i>0.042</i>
	<i>9</i>	<i>45</i>	<i>0.045</i>
	<i>10</i>	<i>48</i>	<i>0.047</i>
	<i>11</i>	<i>28</i>	<i>0.053</i>
	<i>12</i>	<i>28</i>	<i>0.054</i>
	<i>13</i>	<i>7</i>	<i>0.062</i>
	<i>14</i>	<i>8</i>	<i>0.066</i>

	15	4	0.084
	16	7	0.079
	18	5	0.078
	19	3	0.074
	20	5	0.081
	21	2	0.060
	22	4	0.077
	23	1	0.119
	24	3	0.121
	25	2	0.010
	33	2	0.065
	38	1	0.146
	44	1	0.198
2	1	3685	0.004
	2	1044	0.009
	3	435	0.014
	4	95	0.019
	5	72	0.034
	6	102	0.036
	7	5	0.033
	8	14	0.041
	9	15	0.042
	10	15	0.044
	11	6	0.048
	12	21	0.058
	14	1	0.058

	15	3	0.072
	17	3	0.071
	19	1	0.074
	20	4	0.080
	22	1	0.081
	23	2	0.114
	24	2	0.111
	25	1	0.007
	38	1	0.200
	45	1	0.200
	55	2	0.170
	90	1	0.400
3	1	2	0.002
	2	1	0.012
4	1	98	0.006
	2	27	0.012
	3	8	0.017
	4	1	0.018
	5	2	0.034
	6	1	0.050
	7	1	0.045
	8	2	0.041
	50	1	0.220
5	1	2	0.002
	2	3	0.010
	3	1	0.010

	4	3	0.018
	5	2	0.020
	6	1	0.040
	7	1	0.030
	8	2	0.040
	10	2	0.035
	13	1	0.040
	15	2	0.050
	16	5	0.064
	22	1	0.080
	23	1	0.100
	24	1	0.060
	26	1	0.080
	46	1	0.100
	48	1	0.110

[23] In that tabulation, we find that the number of kernel size pieces of ergot found in a sample of grain appears under “ERG K”, for example 2 for grain 1. Under “N” will appear the number of samples containing this number of kernel size pieces of ergot: 9989 samples showed 2 kernel size pieces of ergot. Under “MEAN” appears the average percentage of ergot by weight found in samples: the average percentage was 0.010 % for all samples with 2 kernel size pieces of ergot.

[24] Mr. Séguin explained that the tolerance based on the number of kernel size pieces of ergot found in a sample of wheat is less accurate than the percentage by weight; the very specific size of the kernel size piece is somewhat ambiguous. The witness who testified for the grievor acknowledged that the percentage by weight is more accurate than the counting method.

[25] The grading system used to certify grain loaded to vessels and exported from Canada from large terminal elevators in places like Thunder Bay and Vancouver are

equipped with weighing systems that are sensitive enough to weigh the concentration of ergot and give a grade on a percentage basis (Exhibit E-5). This exportation standard applied prior to and after August 1999 is paid to the local elevator operator by the terminal elevator. The export standards are 0.01% for the first grade, 0.03% for the second grade and 0.05% for the third grade.

[26] Mr. Len Sequin testified on the changes implemented to the procedure for assessing ergot (Exhibit E-5). In April 1999, the CGC made a decision to submit a proposal to the WGSC that would eliminate the kernel count measurement process and replace it with the percentage-based tolerance. The WGSC is a committee that makes recommendations to the CGC relating to grain standard. Prior to taking the proposal to the WGSC, a consultation with the CWB was held by the CGC. According to the CWB members who attended the February 29, 2000 meeting, they were of the opinion that the consultation process was not complete at the time of the meeting because they were not aware of the impact of the change in ergot measurement and of the single grade standard issue.

[27] On August 1, 1999, the CGC applied the new evaluation method of the ergot by percentage-based tolerance at the primary elevators, as a result of the consultation process and on the recommendation of the WGSC.

[28] The February 29, 2000 meeting had an impact on the CWB and formal board meetings were held on the issues of single grade standard and the percentage-based evaluation of the ergot.

[29] The CWB submitted their concerns to the CGC who answered by letter dated March 23, 2000, signed by Mr. Séguin (Exhibit E-8) and sent to Mr. Measner, (Executive Vice-President CWB). The letter reads as follows:

I would like to take this opportunity to explain, in detail, the process the Canadian Grain Commission (CGC) undertook in establishing the tolerances for ergot in wheat grades which came into effect August 1, 1999.

The grading system has been criticized for many years for areas in which it is subjective. The CGC has been working to try and make the evaluation of grading factors more objective. One such factor is ergot. The former system involved the counting of pieces of ergot per 500 grams. There was a significant degree of subjectivity related to the definition of a piece of ergot.

In preparation for making this proposal to the WGSC, an in-depth study was undertaken to create the relationship between the number of pieces of ergot per 500 gram sample and the respective percentage concentration by weight. This study included approximately 37,000 samples with pieces of ergot per 500 gram sample ranging from 1 to 24. The range of the number of pieces and the distribution of the samples is outlined in the following table:

Range (pieces/500 g)	Number of Samples
1 to 3	34856
4 to 6	1941
7 to 12	172
12 to 24	49

You will note that the very vast majority of samples fell in the range of 1 to 3 pieces and that there was a significant number also in the range of 4 to 6 pieces. It is this large number of samples that give us confidence in the findings that will be related in the next few paragraphs.

Of even greater significance is the distribution of samples at the specific grade cut-off points and the corresponding percentages by weight of the ergot.

K Count	Number of Samples	Mean Percentage
3	6406	0.015%
6	931	0.031%
12	28	0.054%
24	3	0.121%

From the above table, you can see that once again the greatest number of samples was at the 3 and 6 piece points. These two numbers represent the old tolerances for the grades of No. 1 and 2 CW Red Spring wheat. You will note that the mean percentage of 6406 samples which contained 3 pieces of ergot was 0.015%. The tolerance that was established is 0.01%; the difference being 5 one/thousandths of 1% or 0.005%. In this case, there is a very close relationship between the old and the new tolerance. A very

similar relationship exists for 6 pieces. In the case of 24 pieces, the relationship to the old tolerance is not as direct but the number of samples which contained 24 pieces is also very low and not at all statistically sound relative to the 3 or 6 piece relationship. In addition, this is a very typical distribution of ergot. We normally see downgrading of No. 1 and 2 but rarely do we see downgrading of No. 3 or feed.

The table shows that the existing tolerances for ergot are not significantly different from those that were in place prior to August 1, 1999 for the grades of No. 1 and 2 CWSR. The increased frequency of detection this year at primary elevators, coupled with the change in measurement process from pieces per 500 gram sample to percentage by weight, contributed to a significantly elevated awareness of ergot in the country. In the case of No. 3 and Canada feed, we feel there was some tightening of the tolerances and that the tightening was warranted to ensure a safe feed ingredient and to maintain a differentiation between No. 3 and Canada feed.

In other words, more farmers received lower grades as a result of ergot in the 1999/00 crop because there was more ergot present in the crop.

It was unfortunate that, at the same time, the higher levels of ergot were being detected, the new methods of measurement were in place. Primary elevator managers were not assessing ergot consistently according to the new method. As soon as the CGC became aware that farmers were facing difficulties, we contacted the CEA and instructed them to direct their members concerning correct assessment of ergot. We also did news releases (see attached) to advise farmers of the problem and to remind them that they should use "subject to inspector's grade and dockage" if they did not agree with the grade assigned upon delivery.

[30] The issue submitted by the witness testifying for Mr. Lewicki in regard to the new grading system by weight is that the tolerance for grade No. 1 is lower in the new procedure. The tabulation in Exhibit E-7 shows clearly that the grade No. 1 tolerance established at 0.01% represents 2 kernel size pieces of ergot in a 500 gram sample. The old tolerance applied by the local elevators prior to August 1999 for grade No. 1 is 3 kernel size pieces of ergot in a sample or 0.015%. In other words, the tolerance for grade No. 1 is decreased from 3 to 2 kernel size pieces of ergot in the new procedure by weight. The producers will receive a lower price for a grade No. 2 shipment (3 kernel size pieces of ergot or 0.015%) after August 1, 1999 than before when the same shipment was classified as grade No. 1. The same evaluation can be done for the other categories.

[31] As a producer, Mr. Hanson testified that the primary elevators pay the producers for grade No. 1 in the first application of the new grading procedure by weight, when the sample shows 3 kernel size pieces of ergot per 500 grams or less whatever is the percentage obtained by weighing. The primary elevators suffered a loss because they will receive payment for grade No. 2 from the terminal elevator who applied the 0.01% tolerance. For future shipments, the primary elevators will apply the weighing procedure in a strict manner against the producers and in a short period of time the producers will suffer a loss of income due to the lower grade evaluation. On that point, the witness for the employer stated that the producers saw their grain shipment downgraded because 1999 was a bad year for ergot.

[32] Mr. Lewicki showed no co-operation or remorse in front of Mrs. Kapitany at the disciplinary investigation held on March 10, 2000. At the hearing, he submitted that he would not act in the same manner in the future because he did not want to go through another grievance procedure on the same issue.

[33] He testified that he did not know that he should not attend the conference. He thought that he could give technical points of view and information as a grain inspector and he never associated them with CGC policies in the debate at the February 29, 2000 meeting. The comments he made about the financial impact on the producers were a fact taken out of Mr. Spafford's letter and were not critical of CGC policy. From past disciplinary measures, Mr. Lewicki knew that he could not represent CGC and, consequently, he told the participants at the February 29 meeting that he was not representing the CGC. In his testimony, Mr. Lewicki stated that he did nothing wrong.

[34] Prior to the Grain World conference, Mr. Lewicki submitted the issue of the financial impact of the new grading procedure by weight to his supervisor and received no answer.

Arguments

[35] According to counsel for the employer, Mr. Lewicki talked against CGC policies at the Grain World conference in front of Board Members of the CWB. In the disciplinary inquiry or at the hearing, Mr. Lewicki showed no remorse for or understanding of his misconduct.

[36] Progressive discipline was applied in the present case as appears in exhibits E-12 to E-14. The final notice of expectations is very clear and Mr. Lewicki should avoid to represent the CGC. The second last paragraph of page 2 of Exhibit E-12 states that opinions expressed by Mr. Lewicki may be attributed to the CGC in spite of his disclaimer. The letter of reprimand sent to Mr. Lewicki on December 17, 1998 (Exhibit E-13) and the suspension letter dated December 21, 1998 (Exhibit E-14) are related to the May 19, 1998 expectations letter and the incident occurring at the Grain World conference 2000 was not allowed.

[37] Mr. Lewicki has an obligation of loyalty to his employer and he cannot act against the interest of the CGC by putting the CWB members in a conflictual relationship with the CGC. The comments made by Mr. Lewicki created a tense relationship between the CGC and the CWB and an explanation should be sent out to clarify the issues (Exhibit E-8). The comments were not of public interest. Mr. Lewicki talked only once to his supervisor prior to the incidents and did not give a chance to the employer to explain its actions. Mr. Lewicki did not exhaust the internal procedure in an attempt to clarify the issue internally before going out publicly. The statements made by Mr. Lewicki about the change in tolerance for ergot are not true. Counsel for the employer submitted the following decisions to support his arguments: *Fraser v. Canada*, [1985] 2 S.C.R. 455; *John W. Kroeker*, [1965] INS-A-20 (P.S.C.); *Stewart* (Board file 166-2-108); *Forgie* (Board file 166-2-15843) and *Forgie v. Canada*, [1987] F.C.J. No. 541 (F.C.A.); *Grahn* (Board files 166-2-15093 and 15094); and *Grahn v. Canada (Treasury Board)* (1987), 91 N.R. 394 (F.C.A.).

[38] The representative of the grievor submitted that Mr. Lewicki did not directly criticize policies of the employer but gave technical information to people in a private meeting. Mr. Lewicki did not go to the media. The information relating to the amount of money that the producers would lose following the change in the procedure to classify the grain was taken from Mr. Spafford's letter (Exhibit G-5) and was not from statements made by Mr. Lewicki. The employer did not prove that Mr. Lewicki discussed or directly criticized policies of the CGC.

[39] The employer should have told Mr. Lewicki that he could not attend the conference or the February 29 unofficial meeting. The employer received information that Mr. Lewicki intended to go to the meeting called by Mr. Hanson and they did not try to stop him from doing so.

[40] Mr. Lewicki gave the right information on the change in the tolerance for the ergot. The CGC admitted it in the March 23, 2000 letter sent to the CWB (Exhibit E-8). The employer did not prove that the CWB lost confidence in CGC as a result of Mr. Lewicki's declaration and that he lost his ability to perform his duties as a grain inspector.

[41] The representative of the grievor submitted that the facts in the present case are different from the ones in the following decisions: *Arthur J. Stewart v. P.S.S.R.B.*, [1978] 1 F.C. 133; *Forgie* (Board file 15843); *Ministry of Attorney-General, Corrections Branch and B.C. Government Employees' Union* (1981), 3 L.A.C. (3d) 140; *Grahn* (supra) and *Grahn v. Canada*, [1987] F.C.J. No. 36; *Wilson and Treasury Board*, [1995] C.P.S.S.R.B. No. 23; *Fraser v. Canada*, [1985] 2 S.C.R. 455; *Haydon v. Canada*, [2000] F.C.J. No. 1368; [2001] 2 F.C. 82 (F.C.T.D.) *Laboucane* (Board files 166-2-16086 to 16088); *Larry Dow* (Board file 166-2-22952).

Reasons for Decision

[42] The letter of suspension (Exhibit E-15) states four reasons to issue a disciplinary measure against Mr. Lewicki.

[43] The first one reads as follows:

...I found that you accepted the invitation of a member of the CWB Board of Directors to Grain World, with the expectation that you would have the opportunity to meet with the CWB Board of Directors to discuss issues related to CGC programs and policies which you are not authorized to discuss.

I disagree with that finding of the employer because the evidence received at the hearing does not demonstrate that Mr. Lewicki accepted the invitation with the expectation to meet with the CWB Board of Directors to discuss issues related to CGC programs and policies. Mr. Lewicki accepted the invitation to go to the Grain World conference because of his personal interest in the subjects of the conference. The evidence shows that the decision to have an unofficial meeting with the CWB Board members was made by Mr. Hanson on February 29, 2000 and Mr. Lewicki could not know that at the time he decided to attend the conference. Consequently, Mr. Lewicki did not premeditate his attendance at that meeting.

[44] The second reason to discipline Mr. Lewicki was that during his attendance at this conference he spoke against CGC policies. Mr. Hartmann Nagel was the one who testified about a conversation held with Mr. Lewicki on February 28, 2000 on the floor of the conference, between two panels. They debated the change in the measurement procedure for ergot and the financial impact on the producers. This conversation cannot be held against Mr. Lewicki because Mr. Nagel is Assistant Commissioner at the CGC and nobody else could hear the conversation. Mr. Lewicki is surely allowed to discuss CGC policies with someone in the organization.

[45] The last two reasons to support discipline are related to the February 29, 2000 meeting. The first blame is related to the fact that Mr. Lewicki allowed himself to be represented to the participants as a senior inspector of the CGC whom they could invite to talk to them about CGC policies. Mr. Hanson and Mr. Lewicki deny that he was introduced as a “CGC” inspector but rather as a “pretty experienced inspector” without reference to the CGC. Mr. M. Halyk, a CWB member who attended the February 29 meeting, testified that Mr. Lewicki told the participants that he was not representing the CGC at this meeting. On the same element of “representation” Mr. Lewicki knew from Mr. Hanson the subject of the meeting and he agreed to give “technical information” to the participants. This issue of criticizing policies of the CGC will be considered with the last reason for discipline stated in Exhibit E-15. I have come to the conclusion that Mr. Lewicki acted against the notice of expectation (Exhibit E-12) and against his duty of loyalty when he disclosed “technical information” that had come to his knowledge by reason of his employment.

[46] The fourth and last reason to discipline is related to discussion about CGC policies and criticizing those policies at the February 29 meeting. Mr. Halyk, Mr. Hanson and Mr. Lewicki testified that Mr. Lewicki gave information on the change to weight grading evaluation for ergot and on the single standard issue at the February 29 meeting. From the testimony, I came to the conclusion that Mr. Lewicki expressed at that meeting the opinion that the change from the manual counting of kernel size pieces of ergot in a sample of grain to the concentration in percentage of weight changed the old tolerance considered in the grading procedure. Mr. Lewicki expressed the same opinion on the single grade standard issue.

[47] At that meeting, he also expressed the opinion that the producers would lose a lot of money as stated in Mr. Spafford’s letter brought into the debate by one of the

participants. A three-day suspension was imposed on Mr. Lewicki on December 21, 1998 (Exhibit E-14) partly on the basis that he expressed an opinion related to some benefits to companies at the expense of producers. Consequently, Mr. Lewicki should have known that he could not express opinions on the loss to be endured by producers without being critical of the CGC policy.

[48] It is the CGC which made the decision, after consultation with the WGSC and the CWB, to change from the number of kernel size pieces of ergot to a percentage by weight the method of assessment at the primary elevators. The CGC proceeded to a similar consultation process to implement the single grade standard. After consultation, the CGC drew up policies on those issues and requested its staff to apply them. Consequently, the information given by Mr. Lewicki to the participants at the February 29 meeting and the opinions he gave or supported on the issue of single grade standard and ergot assessment procedures are related to policies of the CGC. Furthermore, Mr. Lewicki was critical of CGC policies when he supported the conclusion in regard to lost income for producers stated in Mr. Spafford's letter. I find that Mr. Lewicki infringed the notice of expectations and his duty of loyalty to his employer when he acted that way.

[49] In doing so, Mr. Lewicki actively expressed opposition to the policies of his employer. Those policies did not jeopardize the life, health or safety of the public servant or others or engage him or the employer in illegal acts. I do not consider that the public disclosure made by Mr. Lewicki embraced a legitimate public concern requiring a public debate. The issue relating to the single grade standard and/or the new assessment procedure for the ergot is not of outstanding importance to the public interest. The amount of money lost by the producers, as estimated by Mr. Spafford, is surely of some consequence for the producers but did not require a public debate and this issue can be resolved through the consultation process already in place for the standardization of grain. I come to the conclusion that Mr. Lewicki's allegations do not fall within the exceptions set out in the decisions in *Fraser (supra)* and *Haydon (supra)*.

[50] Before talking to the CWB members at the February 29 meeting, Mr. Lewicki submitted his concerns to his supervisor without result. He also submitted his concerns to one of the assistant commissioners (Mr. Nagel) on the floor at the conference on February 28, 2000 without getting a hearing. Neither the supervisor or the Assistant Commissioner told Mr. Lewicki that his concerns would be referred to

the proper organisation or authority inside CGC. I am convinced that Mr. Lewicki made reasonable attempts to resolve the matter internally before he went public and a public servant does not have the obligation to submit his concerns to the top of the hierarchical management structure.

[51] The explanations given to the participants at the February 29 meeting and the opinions Mr. Lewicki expressed on that occasion are surely not of outstanding importance and had no impact on his ability to perform effectively his duties or on the public perception of that ability. The fact that Mr. Lewicki was promoted to a more important position since the incidents at the Grain World conference shows that the employer itself made the same evaluation.

[52] Mr. Lewicki acted in a reckless way when he accepted the invitation of Mr. Hanson to the February 29, 2000 informal meeting with CWB members. He was well aware because of previous disciplinary measures that he should not distribute information (letter of reprimand, Exhibit E-13) or publicly criticize the programs and policies of the CGC (three-day suspension, Exhibit E-14). Furthermore, following the denial of his grievance contesting the three-day suspension, Mr. Lewicki should know that further incidents of the same nature may give rise to a more severe disciplinary measure.

[53] For all these reasons, I find that Mr. Lewicki deserved a penalty but the one imposed by the employer was not appropriate because it was too harsh.

[54] Mr. Lewicki made no mistake when he accepted the invitation of a member of the CWB to attend the Grain World conference. He never had the expectation to meet with the CWB Board of Directors when he accepted the invitation to the Grain World conference. Mr. Lewicki did not speak against CGC policies on the floor of the conference. The penalty of a 20-day suspension imposed by the employer has to be reduced because the employer's reasons for discipline were not well founded. The penalty should also be reduced because Mr. Lewicki tried to submit his concerns inside the organisation before he made his declarations at the meeting of February 29, 2000; furthermore his declarations are of low importance and have no impact on his ability to perform his duties. The fact that the employer should have tried to avoid the problem by telling Mr. Lewicki not to attend the February 29 meeting has to be considered as an extenuating factor in the discipline.

[55] Consequently, I come to the conclusion that a six-day suspension without pay is adequate in the circumstances. Accordingly, I hereby substitute a six-day suspension without pay for the 20-day suspension without pay which the employer originally imposed upon the grievor. For all these reasons, the grievance is allowed in part.

**Léo-Paul Guindon,
Board Member**

OTTAWA, March 26, 2002.