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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

GRANT GALE

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Martel Popescul, Q.C.

For the Employer: Richard Fader, Counsel

Heard at Saskatoon, Saskatchewan
July 10 to 12, 2001

DECISION

[1] Grant Gale was a correctional officer at the Saskatchewan Penitentiary until the termination of his employment on November 25, 1999. Mr. Gale filed his grievance on December 8, 1999 and the bargaining agent referred the matter to adjudication one year later, on December 18, 2000.

[2] The Public Service Staff Relations Board scheduled a hearing commencing March 13, 2001, but it had to be postponed due to the unavailability of counsel for the grievor. The case was rescheduled for June, 2001 but on this occasion the employer could not proceed due to the unavailability of witnesses. The parties agreed to hearing dates of July 10 to 13, 2001.

[3] The letter terminating Mr. Gale's employment reads, in part:

I have completed a full review of the Harassment Investigation of the complaint by T.C. Brown and R. Nowicki and the Disciplinary Investigation completed by Unit Manager, E.B. Smith and Correctional Supervisor, A. Briere. You have received copies of both investigations. The final Disciplinary Hearing was held, November 16, 1999, with your representative; I have responded to the issues you raised during all hearings. All the above information was taken into account in arriving at my decision.

Through the said investigation and including the Disciplinary Hearing you have consistently denied any involvement in the said sexual harassment of Ms. [X]. You have not presented any mitigating circumstances.

I now find you guilty of sexually harassing Ms. [X] on May 19, 1999, inside the penitentiary. This serious misconduct constitutes a serious breach of the CSC Code of Discipline.

The Correctional Service of Canada has signed a "Zero Tolerance Policy on Harassment" with the Union of the Solicitor General Employees. You are aware, or ought to have been aware, of this policy.

I have carefully reviewed this misconduct and your employment record. Your behaviour has resulted in a situation in which I no longer have the confidence in your ability to maintain professional relationships with fellow employees. You are a peace officer and have sworn to uphold the laws.

The Standards for Professional Conduct state that relationships with other staff members must promote mutual respect within the Correctional Service of Canada and

improve the quality of service. Staff are expected to contribute to a safe, healthy and secure work environment, free of harassment and discrimination. Staff shall respect the rights of all fellow workers, regardless of race, national or ethnic origin, colour, language, religion, gender, age, sexual orientation, or mental or physical disability. Staff shall not participate in, or condone, any form of harassment or discrimination.

Based on the above, I have concluded it is necessary to terminate your employment.

Therefore, by virtue of the authority delegated to me I must inform you that I hereby terminate your employment for cause with the Correctional Service of Canada effective 1600 hours, November 25, 1999.

[4] Five witnesses testified for the employer, and seven for the grievor. A request was made, and granted, for the exclusion of witnesses.

[5] The employer presented a book of exhibits (Exhibit E-1) containing tabs 1 to 14. Tabs 1, 4 and 12 contain a number of alphabetical tabs within each section. Counsel for the grievor objected to the introduction of the disciplinary investigation document at tab 6 and the harassment investigation document at tab 6A. Counsel for the employer decided not to introduce these documents through their authors; consequently, they do not form part of the record.

[6] This matter deals with the termination of Mr. Gale's employment for reasons of alleged sexual harassment. Much of the testimony was quite graphic in nature and, for reasons of necessity, has to be reported here. Due to the sensitive nature of the allegation, counsel for the employer requested that this decision record the individual who reported the alleged sexual harassment as Ms. "X". I agreed to this request.

[7] This case is literally a "he said, she said" type of situation with the termination of the grievor's employment hinging on the outcome. The employer contends the grievor sexually harassed Ms. "X" on May 19, 1999. The grievor contends no such event occurred. There were no witnesses to the event other than the grievor and Ms. "X". The parties were *ad idem* with respect to the issue of penalty, namely the result should be either denial of the grievance (in the event the allegation is proven) or full reinstatement (in the event the allegation is not proven).

Background

[8] The employer contends that the act of sexual harassment took place at the Federally Sentenced Women's Unit (FSWU) of the Saskatchewan Penitentiary, located in Prince Albert, Saskatchewan. This is a maximum security unit and, by all accounts, is a stressful place to work. The employer further contends that the grievor grabbed Ms. "X", another correctional officer, moved her to a desk, bent her over, and, for approximately 30 seconds, ground his pelvic region into her backside despite her protestation. The employer also alleges the grievor told Ms. "X" he might do it again.

[9] The grievor completely denies the allegation. Quite simply, he says it never happened and Ms. "X" is fabricating the story.

Evidence

[10] Ms. "X" began working as a casual correctional officer on February 2, 1998 at the FSWU at Saskatchewan Penitentiary. Ms. "X" was a casual correctional officer in May 1999, the time when the employer states that the incident in question took place.

[11] Mr. Gale began working as a correctional officer at the Saskatchewan Penitentiary in November 1994. In November 1998, he moved to the FSWU and was among the first group of male correctional officers to be assigned there. There were male supervisors at the FSWU before the grievor went there, but no male officers. He was a permanent employee with a discipline-free record up to the time of the termination of his employment.

[12] Ms. "X", being a casual employee, would let her supervisor know if and when she was available for work. She testified she had worked a total of eight 8-hour shifts with the grievor up to the time of the incident.

[13] During one of the first few times she worked with him she testified he lifted up the back of her sweater and commented she had a nice butt. She testified she told him not to touch her.

[14] On another occasion when they worked together, Ms. "X" said the grievor lifted her sweater vest as they approached a barrier in the Penitentiary. As inmates were right there, Ms. "X" did not say anything to the grievor, but rather just looked at him.

[15] One evening shift when they were working together, and otherwise alone, Ms. "X" said the grievor spoke about himself in a sexually explicit manner, and inquired about Ms. "X"'s sexual preferences. She stated she told him he should be discussing those issues with his wife.

[16] Another encounter took place in the coffee room when the grievor came in and tickled Ms. "X". She testified she said to him "get your fucking meat hooks off of me". The grievor acknowledged this incident took place and recalled Ms. "X" telling him not to touch her. He said he complied with her request. Ms. "X" further testified she was becoming more and more irritated by the grievor's behaviour and decided she would not agree to work any more shifts which the grievor was working.

[17] On May 18, 1999, the supervisor, Darrell Dragseth, asked Ms. "X" to work the following day shift, that is 8:00 a.m. to 4:00 p.m. Initially she said no, but relented when her supervisor said they were short staffed.

[18] The FSWU has three tiers housing inmates. On May 19, the grievor was working on Tier I and Ms. "X" was working on Tier II when her supervisor approached her and said that the Unit Manager, Ms. Wilson-Demuth, was interviewing an inmate on Tier I and unit policy required a female officer to be on duty if there was a male officer there alone. Ms. "X" went down the stairs, passed an office and looked into an interview room. She observed Ms. Wilson-Demuth speaking to an inmate. Exhibit E-1, tab 4H, is a copy of the daily log book and it indicates the interview started at 11:10 a.m. and ended at 11:25 a.m.

[19] Ms. "X" proceeded into the office where Mr. Gale was. As she entered the room, she testified Mr. Gale grabbed her by the back of her arms, bent her over a desk and thrust himself onto her rear. She testified she struggled throughout the ordeal, and told Mr. Gale to let her go. However, he had wrapped his arms around her and she could not get away. She estimated the entire episode lasted about 30 seconds; however, it had seemed like two hours to her.

[20] While it was happening, the telephone rang and Ms. "X" was able to struggle free at the third ring. She answered the telephone and it was her boyfriend on the other end of the line. She said nothing about the incident to her boyfriend because, she testified, the grievor was still in the room. However, she remained on the line until Ms. Wilson-Demuth's interview with the inmate was completed. At that point she hung

up the telephone. She estimated she was on the telephone for 5-10 minutes before the interview terminated at 11:25 a.m.

[21] Ms. "X" stated she tried to act as calmly as possible when speaking to her boyfriend and agreed she said nothing to her boyfriend which would indicate anything out of the ordinary had taken place.

[22] Following the completion of the interview Ms. Wilson-Demuth had with the inmate, Ms. "X" saw Ms. Wilson-Demuth but gave no indication anything was wrong. Ms. "X" escorted the inmate back to her cell.

[23] The time was approximately 11:30 a.m. and Ms. "X" went on a scheduled lunch break. She testified she went to the officer's lounge and telephoned her mother to discuss the incident. Ms. "X" stated that her mother advised her to tell her supervisor, but Ms. "X" said she did not want to do that and just wanted to leave the worksite. She said her mother talked her out of leaving, and so Ms. "X" went to the officer's mess for lunch and returned back to the FSWU. Ms. "X" could not recall if she ate lunch with anyone, but she was not crying during her lunch period. She agreed it was a normal lunch.

[24] Upon her return to the FSWU, she rang a bell to get in and the grievor answered, opened the door and Ms. "X" testified he said to her: "So, how was it?". Mr. Gale appeared friendly, and there was nothing unusual about him. Ms. "X" testified she thought he was referring to her lunch, so she replied "not bad". Ms. "X" then testified that the grievor said to her: "Oh, so you'd do it again then".

[25] At that point Ms. "X" realized that the grievor was referring to the harassment incident, and she testified that, because she believed it would not stop, she decided then that point to inform her supervisor.

[26] Ms. "X" was adamant during cross-examination that Mr. Gale said to her "So you'd do it again", following which Ms. "X" went to her supervisor. Ms. "X" suggested the time would have been shortly after 12 noon, somewhere around 12:05 p.m.

[27] Ms. "X" proceeded to Mr. Dragseth's office and repeated what had occurred. Upon hearing the story, Mr. Dragseth stated he had to inform his supervisor, Ms. Wilson-Demuth.

[28] Ms. "X" then re-told her story to Ms. Wilson-Demuth and Mr. Dragseth was also there for the retelling. Ms. "X" told both individuals that she did not wish to work with Mr. Gale anymore, but also did not wish to have her name brought up with respect to the incident. She testified she thought she could handle the matter, and did not want anyone else to know other than Mr. Dragseth and Ms. Wilson-Demuth.

[29] Mr. Dragseth testified that when Ms. "X" came to see him to recount the incident she appeared upset, nervous and close to tears. She recounted her story and he felt if it was true it would be out of his realm for discipline, so he referred the matter to his supervisor.

[30] Mr. Dragseth stated there was a rat code at the Saskatchewan Penitentiary. The code means that in a situation where an officer is involved in an incident, the officer should not be ratted on by a fellow officer. The consequences of ratting on someone would be the silent treatment or vehicle sabotage. Mr. Dragseth testified that as a result of this incident, he himself received the silent treatment from other correctional officers and his vehicle was vandalized.

[31] In cross-examination, Mr. Dragseth stated that Ms. "X" had returned from lunch on May 19, worked a bit and then came to see him about the incident. He thought Ms. "X" came to see him about 2:00 p.m.

[32] A few days later Deputy Warden Brenda Lepage requested a written report on the incident from Mr. Dragseth. He composed his report on the events on June 1, 1999 (Tab 4A). The memorandum states the incident took place on May 20 and occurred while Ms. "X" was "...standing, talking on the phone...".

[33] Mr. Dragseth agreed he heard Ms. "X"'s version of the events twice before he composed his memorandum. He heard the initial complaint, then heard it retold to Ms. Wilson-Demuth. He felt his memorandum was accurate, except for the fact it says the incident took place May 20 and it is known it took place May 19.

[34] Counsel for the grievor asked Mr. Dragseth if he felt an employee's employment should be terminated even if the allegation of sexual harassment is false. The witness replied yes, the person should be terminated.

[35] Ms. Wilson-Demuth testified she was the acting Unit Manager at FSWU when the incident took place. She is a psychologist and at the time of the incident held a Masters degree in psychology. Currently, she has almost completed her doctorate.

[36] When initially informed of the incident, Ms. Wilson-Demuth spoke to Deputy Warden Lepage about it due to its seriousness. She did this in spite of Mr. Dragseth's stated desire to keep the matter between himself, Ms. Wilson-Demuth and Ms. "X".

[37] Ms. Wilson-Demuth thought her meeting with Ms. "X" started "about two-ish" and it took quite a bit of time. She testified Ms. "X" appeared to be quite distraught and Ms. Wilson-Demuth had to prod to get the information out. Ms. Wilson-Demuth said she had no reason to question the sincerity of Ms. "X".

[38] Ms. Wilson-Demuth stated that Ms. "X" was tense and very nervous in recounting the events. Ms. "X" was distraught, almost to the point of visibly shaking. Ms. Wilson-Demuth stated she viewed Ms. "X" as being "quite fragile" at the time of her telling her story, which took her aback because normally Ms. "X" appeared to be pretty tough.

[39] The allegation shocked Ms. Wilson-Demuth. She felt it was sexual harassment and had to be dealt with formally. As such, she felt she had to discuss the matter with Deputy Warden Lepage.

[40] Ms. Wilson-Demuth was asked if she had ever personally experienced any inappropriate touching by Mr. Gale. She replied she had, when, on one occasion, Mr. Gale had placed his hands on her shoulders. She pulled away, and told Mr. Gale the action was inappropriate. Mr. Gale denied this incident ever took place.

[41] On another occasion Ms. Wilson-Demuth saw Mr. Gale talking to a female offender with his leg up on the bars and his hand on one of her shoulders. Ms. Wilson-Demuth stated she counselled Mr. Gale with respect to his body language and put in a request that he take women-centered training (Exhibit 4-F). Mr. Gale did not recall this event occurring, and said the training program he did go on took place when he first started at FSWU.

[42] Counsel for the grievor asked Ms. Wilson-Demuth if she recalled seeing a cardboard cut-out of a male "à la Chippendales" with a reference to Mr. Gale on the cut-out posted in the unit. She replied she did not recall seeing it but someone could

have pointed it out to her. Later on in the proceedings, witnesses Leesa Krahn and Holly Elphinstone said it would be virtually impossible for someone not to have seen the cut-out as it was posted in the office where daily briefings occurred.

[43] Ms. Wilson-Demuth was also asked to submit a written report on the incident and she did so on June 7, 1999 (tab 4B). This report also states Ms. "X" said the incident took place "...while she was in the office on the telephone." However, Ms. Wilson-Demuth stated in cross-examination she may have recorded this incorrectly.

[44] Ms. "X" completed her shift for that day, and worked in the FSWU the next day. Mr. Gale was also working the following day, and at the end of his shift he was told he was required in the acting Warden's office. There, Ms. Lepage told Mr. Gale she had received some complaints from staff about his behaviour on the unit. Mr. Gale wanted to know the details, but all that was revealed to him was that he would be moved out of the FSWU and into the main Penitentiary due to his "flirtatious behaviour". This meant Ms. "X" did not encounter him after that time.

[45] On July 9, 1999, Ms. "X" was called into her supervisor's office and presented with a letter from acting Warden Lepage. Ms. Lepage's letter states that a harassment investigation into the alleged incident would commence. (See Exhibit E-1, tab 4D)

[46] Ms. "X" testified she realized matters would not be good from that time on as she had hoped to handle things herself. She felt people would talk about the incident and she did not want her name mentioned.

[47] She stated that during the harassment investigation some of her co-workers ignored her, and made her feel as if she had done something wrong. This was part of what was referred to as a rat code which was a correctional officer's understanding that internal problems should be resolved without reference to management. She further testified the whole ordeal has been a hard struggle for her.

[48] Ms. "X" testified she had no motivation to get at the grievor.

[49] Ms. "X" was shown a letter Mr. Gale had written on August 3, 1999 (Exhibit E-1, tab 7) and asked to respond to comments Mr. Gale made with respect to Ms. "X"'s sexual behaviour at the workplace. She denied these events as cited in the letter took place.

[50] In response to Mr. Popescul's question as to whether she wanted out of the FSWU due to its high level of stress, Ms. "X" stated she did not want out, and would be working there still if there was a day posting.

[51] Upon reviewing the contents of Mr. Dragseth's June 1, 1999 memorandum (tab 4A) and Ms. Wilson-Demuth's June 7, 1999, memorandum (tab 4B) recalling the events as they understood them from having listened to Ms. "X" tell her story, Ms. "X" agreed the contents of both memoranda did not entirely correspond with her testimony of the events, but she recalled neither took notes while she recounted the events.

[52] Both written memoranda state Ms. "X" was talking on the telephone when Mr. Gale approached her from behind, grabbed her and bent her over the desk and thrust himself repeatedly against her backside.

[53] Ms. "X" stated that both authors got the same pieces of information incorrect. She was not on the telephone when the event took place. She was not approached from behind by Mr. Gale. Ms. "X" acknowledged that both written versions contain differences from the way Ms. "X" recalls the events having transpired.

[54] Mr. Popescul asked Ms. "X" about a series of events which, he stated, goes to the issue of credibility.

[55] He asked Ms. "X" if she recalled telling a co-worker about the proper way to provide oral sex. The witness said no. Later in the proceedings, Wendy Sommerfeld, a correctional officer at the FSWU testified she overheard Ms. "X" and another officer explicitly discuss how they performed oral sex on their spouses.

[56] Mr. Popescul asked Ms. "X" if she ever had a magazine at work with pictures of naked black men in it. Ms. "X" replied no. Again, later on in the hearing, Brenda Cripps, a correctional officer at the FSWU, testified she was with a group of fellow correctional officers, including Ms. "X", and a pornographic magazine was being passed around. The magazine contained pictures of naked black men, and the witnesses testified Ms. "X" saw this magazine.

[57] Mr. Popescul asked Ms. "X" if she recalled making lewd gestures with her baton while she was on cell extraction training. The witness stated no, but Ms. Cripps

testified she attended the training with Ms. "X" and saw her with the baton at her crotch. Ms. Cripps testified: "The actions she did with the baton were embarrassing."

[58] Mr. Popescul asked Ms. "X" if she ever brought a video to work to show other officers and the witness replied she did, and stated it was called "Jerry Springer Uncensored". Mr. Popescul suggested there was another pornographic video which she watched with a number of co-workers and she made lewd comments upon seeing a nude male, words to the effect "let me see his cock". The witness denied making this comment or viewing the pornographic video referred to.

[59] Tracy Bergquist is a correctional officer at the FSWU and testified four officers, including Ms. "X", watched a pornographic video one evening at work. She said it was not a Jerry Springer video. The witness stated that while viewing the video, Ms. "X" stated: "I want to see his cock".

[60] Mr. Popescul asked Ms. "X" if she ever had body piercings and Ms. "X" replied she had a tongue piercing. She testified she showed it to Mr. Gale at one time in response to Mr. Gale's inquiring about it and Mr. Gale grabbed his crotch. Although Mr. Gale did not recall the incident when asked about it, he said it was possible it did occur.

[61] Ms. Sommerfeld testified she saw Ms. "X" stick her tongue out at Mr. Gale displaying her tongue piercing and say to Mr. Gale: "Wouldn't this feel good on your balls."

[62] Mr. Popescul asked Ms. "X" if she had ever spoken to a fellow officer (Mr. "Y") and told him she would have sex with him if his wife was not around. Ms. "X" denied ever saying this.

[63] Dannielle Mohr, a correctional officer at FSWU, testified that in January or February of 2001, she heard Ms. "X" say to Mr. "Y" that she would sleep with him if his wife was not there.

[64] Lisa Barton is a correctional officer at the FSWU and testified Ms. "X" is strong enough to fend for herself and doubted Ms. "X" would make up such a story about being sexually harassed if it were not true. She did agree, however, that she had never seen Mr. Gale do anything with any other colleague that she would regard as being "over the line".

[65] Upon receipt of the written reports from Mr. Dragseth and Ms. Wilson-Demuth, acting Warden Lepage initiated a harassment investigation. This was done in spite of the fact Ms. "X" did not lay a formal complaint. Ms. Lepage stated that from the outset Ms. "X" said she did not want a formal process to go on, but just wished the harassment would stop.

[66] Ms. Lepage identified the employer's policy on Harassment in the Workplace (Exhibit E-1, tab 2) which states that once someone becomes aware of harassment in the workplace, an investigation has to go forward.

[67] On July 9, 1999, Ms. Lepage sent Mr. Gale a memorandum (tab 4E) stating a harassment investigation would begin. Attached to the memorandum was the specific allegation. This was the first occasion that Mr. Gale was told of the specific allegation against him.

[68] The investigation was concluded and a disciplinary investigation followed. Mr. Gale was informed of this by a letter dated July 26, 1999 (tab 5). At that point, Mr. Gale was suspended without pay pending the results of the disciplinary investigation.

[69] Mr. Gale provided a written statement on August 16, 1999 in response to the allegation, denying it ever occurred. (See tab 6H)

[70] Following receipt of the disciplinary investigation report, a meeting was held with Mr. Gale on September 16, 1999 in order to obtain his response to the disciplinary report. Mr. Gale reiterated that the event did not occur, and Ms. Lepage wrote a memorandum to Mr. Gale later that day outlining what took place in the meeting (tab 9).

[71] Ms. Lepage requested they meet again on September 22 and at this meeting Mr. Gale was represented by his legal counsel, Mr. Popescul.

[72] It was not disputed that the employer was seeking a reply to other alleged similar types of behaviour by Mr. Gale, so the disciplinary investigation was not being limited simply to the alleged incident involving Ms. "X". For this reason, it was not in dispute that Mr. Gale thought he needed to respond to all allegations, not simply the one made by Ms. "X".

[73] Mr. Gale sought the release of a number of documents through access to information, and once these were received Mr. Gale provided a written statement in response to a number of issues. Ultimately, the only issue dealt with in these proceedings is the one involving Ms. "X", and Mr. Gale's written statement, dated November 16, 1999 (tab 12), states again that the incident did not occur.

[74] Upon receipt of the November 16 statement, Ms. Lepage issued a letter dated November 25, 1999, to Mr. Gale advising him of her decision with respect to the allegation of his sexual harassment of Ms. "X" (See Tab 13). The letter terminated Mr. Gale's employment.

[75] Ms. Lepage stated in cross-examination that she never spoke to Ms. "X" about the incident, nor had she ever read anything that Ms. "X" may have produced.

[76] Female correctional officers Cripps, Sommerfeld, Bergquist, Krahn, Mohr and Elphinstone all testified that they had never seen Mr. Gale do anything inappropriate at the work site and all felt he was a good officer to work with.

[77] Mr. Gale testified that when he was given an envelope containing the letter dated July 12 from acting Warden Lepage, together with the attachment outlining the allegation, he was shocked and immediately went to see his union representative. They discussed the allegation and Mr. Gale gathered the duty rosters to see where he had been working on May 19, 1999, the date in question.

[78] Upon reviewing the duty roster (tab 4G) Mr. Gale was able to confirm that both he and Ms. "X" worked at the FSWU that day.

[79] Next, Mr. Gale reviewed the logbook for May 19 (tab 4H). This is a daily written record kept on each tier of the FSWU and the officer on duty records significant happenings on the shift.

[80] On May 19, Mr. Gale started work on Tier I at 6:45 a.m. At about 10:40 a.m., an inmate, coming out of an internal review process called "court", was being escorted back to her cell and became very aggressive. She was restrained by other female staff from Tiers II and III, but Ms. "X" was not part of the team that restrained the inmate.

[81] For incidents such as this, officers are required to fill out a report, called an Officer's Statement/Observation Report (OSOR). Mr. Gale had gone back inside the

Tier I unit when the door bell rang and he opened the door to see Ms. "X" there. Mr. Gale explained to Ms. "X" what had just taken place with the inmate and left to go upstairs to Tier II to complete his OSOR, as there is no computer printer on Tier I.

[82] He testified he was there at 11:00 or "within reason". He did not take a break and go back to Tier I while typing his report.

[83] At the computer located on Tier II, Mr. Gale logged on, found the template for the OSOR, loaded it on to the screen and commenced to complete his OSOR (tab 4J).

[84] The date and time box of the OSOR completed by Mr. Gale shows 11:00, 99-05-19. Mr. Gale testified the time indicates the time he did the report, but he stated in cross-examination that he inputs the time himself as it is not done automatically.

[85] Mr. Gale estimated it took him 45 minutes to complete his OSOR as he types with one finger only. The OSOR described the events with the inmate starting at 10:40. The last sentence of the OSOR states "At 12:10 MHU nurse on the unit to speak with (the inmate)". Mr. Gale said he would have completed his OSOR sometime after 11:30, then added this last sentence at a later time.

[86] Mr. Gale was asked about his working relationship with Ms. "X" and he stated there were a number of occasions where discussions between the two of them would be sexual in nature. Ms. "X" would often initiate these discussions.

[87] The grievor had no knowledge as to why Ms. "X" would make up false stories about him.

[88] When asked if he recalled letting Ms. "X" back in the unit after lunch and asking her how she liked it, Mr. Gale replied he did not specifically recall that, but it could have happened.

[89] Mr. Gale was then asked if he said words to the effect "would you like to do it again" to which he replied he did not recall saying those words.

[90] The interview Ms. Wilson-Demuth had with the inmate commenced at 11:10 in Tier I and Mr. Gale stated he was not there when the interview began.

ArgumentsFor the Employer

[91] In termination cases the employer carries the burden of proof, but, as stated in *Evidence and Procedure in Canadian Labour Arbitration* (Gorsky, Usprich and Brandt) the standard of proof is the balance of probabilities. To increase this standard of proof would drive these types of cases underground.

[92] The only issue here is did the grievor harass Ms. "X" on May 19, 1999? The grievor, being a permanent employee, knew the casual employment status of Ms. "X" was less secure than that of a permanent employee.

[93] The evidence indicated that a number of events had taken place involving Ms. "X" and the grievor prior to the date in question, and she was trying to avoid him on the shift schedule. Ms. "X" was asked to work on May 19, and ultimately agreed to the request. Her testimony about what took place on May 19 was credible and should be believed.

[94] Ms. Wilson-Demuth testified she saw Ms. "X" shortly after the incident and she was emotional. Ms. Wilson-Demuth is a trained psychologist, and after hearing the story she had no reason to doubt Ms. "X". She testified she observed Ms. "X" and said she had a believable physical appearance; she was almost shaking; she was distraught and appeared quite fragile. This took Ms. Wilson-Demuth aback as she knew Ms. "X" to be tough.

[95] It is highly improbable that Ms. "X" faked her emotions.

[96] The big question that has to be answered is what motivation did Ms. "X" have to pull this allegation out of the blue, knowing the rat code that existed and the fact she was not a permanent employee. She knew there would be consequences to retelling her story. In going to Mr. Dregseth and Ms. Wilson-Demuth she wanted them to keep it confidential. It took courage for her to come forward and recount the event, and she has suffered the consequences. She testified about the impact this had had on her, so there is really a disincentive to do what she did and relate this story.

[97] In contrast, the grievor's motivation in denying the allegation is to get his job back. His testimony is in contrast to that of Ms. "X" and his unit manager,

Ms. Wilson-Demuth, particularly in relation to her statements about counselling the grievor and stating it was not appropriate to touch her. Is she lying? What would be her motivation for doing so? According to the grievor, two people are lying without any motivation to do so.

[98] The credibility of the grievor, on the other hand, is questioned. He has attempted to provide an alibi, which is not necessary to do if he simply did not do what is alleged.

[99] Additionally, his letter of August 3 in response to the disciplinary investigation is telling. He has responded to the allegation by trying to defame Ms. "X". Why taint her, suggest she invented the whole thing and suggest the events are not so serious due to her character? It weakens the defence to do so.

[100] The issues raised by the defence to try to discredit the credibility of Ms. "X" are peripheral issues. In *Evidence and Procedure in Canadian Labour Arbitration* (ibid) the collateral fact rule is discussed, and it states "... if the only value of the evidence is to contradict the witnesses' denial, it is collateral." It is submitted that Ms. "X" was telling the truth, but in any event, the issues raised by the grievor's counsel are irrelevant.

[101] In *Teeluck* (Board file 166-2-27956) a very similar situation arose. It was a single event situation and issues of credibility arose. The case showed that post event behaviour of the victim was important, as was the lack of motivation to lie.

For the grievor

[102] Weighing evidence, and issuing findings of credibility of witnesses are difficult duties for adjudicators. This is especially so when the case turns on the facts, and most courts do not disturb findings of fact so, essentially, rulings in these types of cases are final.

[103] In the instant case, the allegation is severe, and could be considered criminal in nature. It is essentially sexual assault.

[104] Given the seriousness of the case, the issue of the appropriate standard of proof needs resolution. Boards of arbitration seem to have adopted three types of standards of proof (see, for example, *Canadian Union of Public Employees, local 600-3*

and the Government of Saskatchewan, issued on July 7, 1999, at page 10. [unreported]). These are:

1. Balance of Probabilities test
2. Proof Beyond a Reasonable Doubt test
3. Clear and convincing evidence. A test somewhere in between the first two.

[105] The standard to be applied in the instant case is the third one cited above. This is supported in *Teeluck* (supra).

[106] So the issue here is “has management, upon whom the onus rests, proven, by clear and convincing evidence their case, given the seriousness of the issue”. Only if they have, should the grievance be dismissed.

[107] The standard of proof therefore is not the high criminal standard, but it has to be beyond the 50% balance of probabilities test.

[108] Issues of credibility are important here.

[109] Insofar as Mr. Dragseth is concerned, his credibility was shot when he said false allegations still warrant firing.

[110] With respect to Ms. Wilson-Demuth, her credibility is at issue when she did not admit to seeing the cardboard cut-out.

[111] Ms. Lepage was so fixated on punishment that she failed to see if the allegation was, in fact, true.

[112] What about the credibility of Ms. "X"? She has made false statements to this adjudicator, and these cast doubt on her credibility. She has lied with respect to many areas and, although these are peripheral issues, they should give a trier of fact difficulty in believing her.

[113] With respect to the incident itself she said she was on the unit, but given the requirement for all officers on the unit having to respond to the inmate problem, and given the fact she did not respond, it does not make sense to suggest she was there.

[114] It was stated that Ms. Wilson-Demuth was right next door when the allegation occurred, yet Ms. "X" never called out when the incident was supposed to be happening.

[115] Then the telephone rang, and Ms. "X" says it was her boyfriend. She said nothing to him, and talked normally on the phone. Is this likely if the event had, in fact, taken place?

[116] After the phone call is over she has contact with Ms. Wilson-Demuth. Did Ms. Wilson-Demuth say she observed that Ms. "X" was distraught? The answer is no. At 11:25 a.m., before going to lunch, she appeared normal by her own admission.

[117] The evidence indicated Ms. "X" went to lunch and she spoke to her mother. We do not know what was discussed, but we do know that she then had a normal lunch. Nothing appeared untoward.

[118] It was only when Ms. "X" returned to the unit that she decided to speak to Mr. Dragseth. The time, according to both Mr. Dragseth and Ms. Wilson-Demuth, was around 2:00 p.m. Ms. "X" said it was shortly after 12:00.

[119] The version of the story, as recorded in memo form by both Mr. Dragseth and Ms. Wilson-Demuth, is strikingly similar. Both written documents state Ms. "X" told them she was on the phone when the assault took place. The version offered by Ms. "X" was that the assault took place before the phone even rang. Because it is highly unlikely an assault like this would occur while the person is on the phone, Ms. "X" changed her story to having the phone rescue her.

[120] There is no corroboration to the story of Ms. "X", although it is recognized the employer does not require this. However, there was no evidence Ms. "X" was dishevelled. There was no screaming or crying out. There was no testimony by her boyfriend or her mother.

[121] One can only speculate as to the motive of Ms. "X" in fabricating her story. Did she get some disturbing news, or have a fight with someone? We simply do not know.

[122] This contrasts with the other evidence that no one, at any time, has seen behaviour by Mr. Gale similar to what Ms. "X" alleged. It is totally out of character for him.

[123] The testimony of Mr. Gale was credible, and he has been consistent from the outset in saying the event never occurred. Furthermore, his OSOR says he was typing his report at 11:00 a.m. and was doing so when the alleged incident took place.

Reply

[124] The grievor suggests Ms. Wilson-Demuth should not be believed because she did not recall the cut-out. This is where the application of the collateral fact rule should be applied. The issue is not relevant. It is simply not proper to attach something critical to this case through something else that is three to four years old.

[125] The exercise of questioning the credibility of witnesses by collateral fact is dangerous.

[126] The questions put to Ms. "X" about issues such as oral sex discussions at work, viewing of a video, the baton and the magazine were confusing, and are quite dated. That is why the collateral fact rule is important, and no weight should be attached to these responses.

[127] When a victim is in shock he or she reacts differently than when in a normal state. The fact Ms. "X" did not cry out, or speak to her boyfriend does not mean she is lying. When she finally spoke with her supervisor, someone she trusted, she broke down.

[128] Also, whether this discussion took place at noon, or at 2:00 p.m. is an attack on a peripheral matter, and again irrelevant.

Reasons for decision

[129] Both sides agree this is an extremely serious allegation, one that borders on sexual assault as stated by the grievor's counsel. In these types of cases, counsel for the grievor suggested a higher standard of proof is required by the employer, rather than a mere preponderance of proof.

[130] This issue was canvassed in *Samra* (Board file 166-2-26543) where at page 21 the adjudicator states:

...The existing jurisprudence is rife with cases which support the notion that in cases of serious alleged misconduct, particularly where a person's continued employment and

reputation is at stake, the employer must demonstrate by clear, convincing and cogent evidence that the allegation has occurred. While the standard is not that of criminal cases requiring proof beyond a reasonable doubt, it requires more than a mere preponderance of proof.

[131] This higher onus was accepted by the adjudicator in *Teeluck* (supra) as well, and I too find it is an appropriate standard of proof in this situation. This is particularly so here because, as abhorrent as this alleged incident is in the workplace, it would be devastating for an innocent individual to be found to have committed such an act.

[132] Cases involving serious allegations without witnesses other than the persons directly involved are among the most difficult for adjudicators to deal with. Issues of credibility often arise and adjudicators often refer to the decision of Mr. Justice O'Halloran of the British Columbia Court of Appeal in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 for guidance here.

[133] Justice O'Halloran states at page 356 of his decision:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box.

[134] To restate this more contemporaneously, individuals with acting skills akin to Tom Hanks or Julia Roberts could act with impunity outside the court room, knowing their acting skills would convince any trier of fact that their story, whatever it was, should be believed.

[135] Later on at page 357 his decision, Justice O'Halloran states:

In short, the real test of the truth of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[136] In the instant case there are two diametrically opposed statements. Ms. "X" says the assault took place while Mr. Gale denies it. Obviously one of the two is telling the truth, and the other is lying. In order to ascertain which is which it is necessary for me to review the evidence, and see which facts lead me to a final conclusion.

[137] Ms. "X" states she was on Tier II when Mr. Dragseth told her to go to Tier I as Ms. Wilson-Demuth was involved in an interview with an inmate. The evidence indicated that it was the employer's policy that there could not be a male staff member alone on duty at the FSWU, and if this occurred another female staff member would have to fill in.

[138] The log book indicates that Ms. Wilson-Demuth commenced her interview with the inmate at 11:10 a.m. and when Ms. "X" arrived on Tier I she looked into the interview room and saw Ms. Wilson-Demuth with the inmate. This was not refuted in cross-examination. Obviously this suggests Ms. "X" arrived on Tier I after 11:10 a.m.

[139] Mr. Gale states he was on Tier II typing his OSOR at 11:00 a.m. and it took about 45 minutes to complete. However, he does agree he admitted Ms. "X" into the Tier I unit, but obviously he suggests this had to occur prior to 11:00 a.m.

[140] On these two versions, I prefer the evidence of Ms. "X". She said she looked into the interview room and saw Ms. Wilson-Demuth with the inmate. This interview did not begin until 11:10 a.m. Ms. "X" was told to go to Tier I in order to ensure a female staff member was on duty. This would not be required prior to 11:10 a.m. as Ms. Wilson-Demuth would have been in the unit up to that time.

[141] The grievor's counsel suggested that if the event had taken place surely Ms. "X" would have cried out for help as Ms. Wilson-Demuth was nearby. Counsel for the employer says Ms. "X" was in shock.

[142] No expert testimony was introduced, by either side to indicate how someone would act if they were in shock. While one may wonder why Ms. "X" did not cry out for help while the alleged assault was taking place, I find it equally probable she tried to handle the situation herself.

[143] Counsel for Mr. Gale suggests Ms. "X" would surely have mentioned the event to her boyfriend upon managing to struggle free, if it really took place. Again, one may wonder why she did not do so, but I find it is equally probable she felt she could handle the situation herself and not relate it to someone else.

[144] For the same reason, I find it equally probable that that was why she did not tell Ms. Wilson-Demuth about the assault when she first saw her, at the conclusion of the interview with the inmate.

[145] The grievor's counsel points out that the memoranda written by Mr. Dragseth and Ms. Wilson-Demuth state that Ms. "X" told them the incident took place while she was on the phone. Both admitted they did not take notes while Ms. "X" recounted her story, and both wrote their memoranda in June, sometime after they had heard Ms. "X"'s story. I do not find this discrepancy between what Ms. "X" testified to and what was written to be determinative of its truthfulness or not. Ms. Wilson-Demuth stated she may have recorded this incorrectly.

[146] Ms. "X" went for lunch and telephoned her mother to relate the incident. Assuming this is true, this would be the first person Ms. "X" told about the assault. Up to that point there was no suggestion that Ms. "X" was going to tell her supervisor about the incident, but her mother suggested she should. However, at that point Ms. "X" went to lunch.

[147] Upon her return to the unit it is alleged Mr. Gale opened the door and said words to the effect "so how was it".

[148] Ms. "X", thinking the inquiry referred to her lunch, replied "not bad". This was not contested.

[149] At that juncture, Mr. Gale is reported to have replied "so you would do it again" and, upon hearing that Ms. "X" felt the assault could occur again. That prompted her to speak to her supervisor about it.

[150] Mr. Dragseth testified Ms. "X" appeared upset and nervous. Although his written record of the meetings does not describe the demeanor of Ms. "X", he does note she was hesitant to relate the events as she did not want anything to happen to Mr. Gale, but rather she just did not want to be near him again.

[151] Mr. Dragseth obviously regarded it as serious because he contacted the unit manager Ms. Wilson-Demuth.

[152] The letter written by Ms. Wilson-Demuth does record the appearance of Ms. "X". The memo said she appeared: "...quite upset and nervous." It further states she said an incident had taken place which "...caused her great distress."

[153] From memory Ms. Wilson-Demuth stated Ms. "X", whom she knew to be a strong person, appeared fragile. So much so, Ms. Wilson-Demuth testified she was "taken aback".

[154] Initial observations by impartial individuals, outside the parties concerned, are of value. In this case I place significant value on the evidence of Ms. Wilson-Demuth, who had educational training in psychology. Would someone, whom Ms. Wilson-Demuth regarded as being quite strong, appear quite fragile if they were not subjected to some type of incident? I think not.

[155] With respect to the incident itself I believe, initially, Ms. "X" wished to handle the matter herself. She only chose to tell her supervisor when she feared the assault could be repeated. I believe, but for the fact Mr. Gale spoke words to the effect: "so you would do it again", the incident might well have never been reported. Ms. "X", by all accounts, was reluctant to recount the incident to anyone.

[156] Consequently, the fact no cries for help were made by Ms. "X" when the alleged assault took place, or shortly thereafter when she spoke to her boyfriend, is not, in my view, determinative of whether the incident took place. The evidence indicates she feared it would happen again, and that is what prompted her to tell her story.

[157] Counsel for the grievor asked Ms. "X" a series of questions about sexual references she made at work. She denied some of these and yet other witnesses stated they did occur. I am being asked to draw the inference that Ms. "X" does not tell the truth; therefore her version of the assault should not be accepted.

[158] There is no question that the testimony of Ms. "X" is at variance with the testimony of other witnesses with respect to these, what I would term peripheral, matters, and this would lead me to be cautious in accepting her testimony concerning the alleged sexual harassment. However, that is not, in my mind, determinative of whether Ms. "X" truthfully testified about the alleged incident of sexual harassment. The test of whether that testimony is truthful can be determined, I believe, through a thorough examination of the evidence. This thorough examination would be consistent with the standard of proof required in this case.

[159] With respect to the issue of motive, there is simply nothing I was made aware of that could justify Ms. "X" lying about the incident. Certainly she could not expect to

receive a promotion if she was believed. Naturally, if it was determined she lied she risked losing her position. She was a casual employee, so her employment status was tenuous at best.

[160] A similar situation recently arose in a decision by the Ontario Grievance Settlement Board in *Ontario Public Service Employees Union v. Ontario (Ministry of Transportation) (C.L. grievance)*, ([2001] O.G.S.B.A. No. 40, unreported). The case involved the discharge of an employee for allegedly filing a false allegation of sexual assault in order to secure a job upgrade. The motive for the accusation was clear in that case.

[161] Not only would Ms. "X" risk losing her job if she were lying, but the rat code would surely be invoked even by her lodging a complaint, true or otherwise. These elements provide a disincentive, in my view, for Ms. "X" to speak out and therefore give some credence to the fact she would only speak out if she was telling the truth. There was simply nothing in it to motivate Ms. "X" to complain, other than to ensure she did not have to work with the grievor again. However she could achieve that objective without complaining, simply by selecting other work shifts.

[162] In light of all the above including the conclusion I reached with respect to the arrival time of Ms. "X" on Tier I, I am satisfied, based on a balance of probabilities by clear, convincing and cogent evidence, that the alleged event did take place.

[163] Having so found, it is not necessary to review whether or not the penalty imposed by the employer is appropriate. The parties agreed that if I found the alleged incident had taken place, the penalty imposed was appropriate. The grievance is, consequently, dismissed.

[164] I would like to comment briefly on the employer's response to the incident, and in particular, on the delays. The incident took place on May 19. Mr. Gale was not made aware of the specific allegation against him until he received the July 9 letter. In my view an individual accused of such a serious incident should be so informed at the earliest possible moment so as to enable him or her to adequately respond to the allegation. What if the allegation was false? A timely release of the allegations by the employer would assist the individual accused in gathering data. Perhaps the individual was seen elsewhere at the exact moment the alleged incident was said to have taken

place. It could prove very difficult to confirm this if the person is not informed of the incident until some two months later.

[165] Also, the employer should investigate the possibility and advisability, of having a template for managers to complete immediately upon being told of an alleged act of sexual harassment. This would assist in ensuring an accurate recounting of the victim's statement, as well as recounting the victim's emotional state. Other information deemed important to people more expert in this area than I could also be included in this template.

[166] Fortunately, these, what I determine to be flaws in the investigation procedure, had no impact on the final outcome in this particular case. Other situations may be different and I would urge the employer to review this to ensure fairness to all is achieved.

[167] Finally, I would like to sincerely thank both counsel for their professionalism in handling this matter.

**Joseph W. Potter,
Vice-Chairperson**

OTTAWA, August 17, 2001.