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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

CARL. S GANNON

Grievor

and

TRESURY BOARD (National Defence)

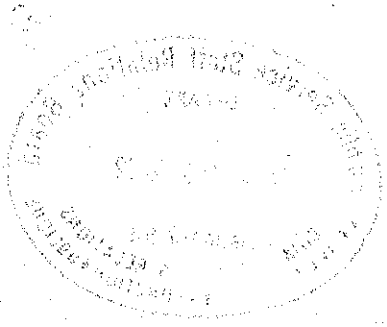
Employer

Before: Anne E. Bertrand, Board Member

For the Grievor: B.A. "Rocky" Jones, Counsel

For the Employer: Richard Fader, Counsel

Heard at Halifax, Nova Scotia,
June 11 to 13 and September 25 to 28, 2001.



Facts

[1] On July 13, 2000, Carl S. Gannon was suspended without pay pending the outcome of an investigation into allegations of abuse of authority, and he was later terminated from his employment on October 26, 2000. He grieves both suspension and termination.

[2] This is the letter of termination of October 26, 2000:

> *As you are aware, based on Mme Laflamme's letter to you dated 28 September 2000, termination of your employment has been recommended for disciplinary reasons.*
>
> *Mme Laflamme's findings and recommendation are based on: your misrepresentation of your academic qualifications on resumes submitted to at least four Federal Government Departments; your inappropriate preferential treatment with regards to the hiring of casual employees, including the hiring and subsequent intimidation of Ms Paula Robinson; and your use of your departmental computer and email systems for unauthorized personal and inappropriate material. The position you hold necessitates a high level of trust, honesty, and integrity in the performance of your duties and responsibilities as a Human Resources professional. Within the last year, in December 1999, you were awarded a five-day suspension for submitting a forged letter to legal authorities as official departmental correspondence. That unethical behaviour was a serious breach of trust that compromised the employer/employee relationship. Your more recent misconduct, that resulted in the recommendation before me, has betrayed irreparably your integrity and the confidence and trust that the Employer can place in you. Pursuant to the authority delegated to me under Section 11(2)(f) of the Financial Administration Act (FAA), I hereby inform you of my decision to terminate your employment from the Federal Public Service of Canada. The termination of your employment is effective 14 July 2000, when you were suspended indefinitely without pay.*
>
> *You have the right to submit a grievance regarding this decision, pursuant to Section 91 of the Public Service Staff Relations Act.*

[3] The grievor is a Black person, and allegations of racial discrimination were raised at the outset of the hearing. It was made clear that issues of racial discrimination would not be dealt with in this forum, that being the domain of the Human Rights Commission.

[4] I heard from several witnesses over the course of some seven days of hearing. Those witnesses were Christine A. Bent, Staff Officer with the Department of National Defence ("DND"), Paula T. Robinson, employee, Bonnie L. Hutchinson, Human Resource Assistant with DND, James R. Stewart, Assistant Director of Human Resource Service Centre (Atlantic) with DND, Ginette Laflamme, Director General of Human Resource Service Centre (Atlantic), Robert Downey, Human Resource Staff Officer with DND, Barry Boehmer, Information Officer for Formation Logistics, Kelley Dunfee, past President of the Union Local, PSAC, USDE, and the grievor, Carl S. Gannon.

[5] The employment of Gannon was held at the Naval Base in Halifax. In this workplace, civilians offer staffing support to the military and both civilians and military work side by side in their daily duties. Some civilians even have military supervisors and managers.

[6] The Human Resources division conducts all staffing for civilian personnel who work on the Base. In February of 2000, Christine Bent requested the hire of a casual or term position for a clerk to assist her in a heavy workload period. She set out the skills required of this position and filed her request with the staffing division, and further, Bent referred the matter to an administration officer who looks after staffing. Together, they agreed the request could be made through the Employment Equity funding, i.e., funding specially in place for persons hired from four groups: women, persons with disabilities, visible minorities and designated groups. Paula Robinson was hired to fill this position.

[7] Paula Robinson had known the grievor Gannon for a long time and she said they had a brief romantic relationship which resulted in her having a daughter. Gannon describes the relationship as a one-night affair, the resulting pregnancy not being disclosed to him until the child was four years old. That is when Robinson sued Gannon for child support and an ensuing unpleasant court battle lasted one year, ending in December 1999. The result: Gannon was determined to be the father of the child and ordered to pay child support and arrears. There remained outstanding child care issues which the parties would have to deal with later on in court.

[8] According to Robinson, she called Gannon to tell him she did not wish to return to court but rather to work on the relationship between he and their daughter.

While they spoke, she told the grievor she was not working and asked whether there were any job opportunities at the dockyard. The grievor informed her there was possibility of a job for a period of six weeks and for her to send in her résumé. She did so, and the résumé was re-worked to include more details at the request of Gannon and re-submitted. Later, Gannon telephoned Robinson to inform her she had obtained the six-week position, and that she was to attend his office to sign documents. The position would be at Formation and Logistics at the dockyard. The human resources offices are in a separate building altogether and in Statacona.

[9] Robinson testified that she was happy to get the job but nervous as to the help the grievor was giving her, especially given the difficulties she had caused him in court. When they met, she asked him why he was helping her and he stated that her job would help lessen the child support, though Robinson admitted on cross-examination that she was at all times represented by legal counsel for her family court matter and that she would have known that child support is not a function of the parent's income due to the new guidelines. Therefore, Robinson could not see how the grievor could derive a benefit by helping her get a job.

[10] The grievor apparently told her not to tell anyone of their relationship because she could lose her job as a result. This made Robinson feel uncomfortable and cautious of the grievor. Robinson found the work enjoyable and her supervisors really helpful, however, she felt "stressed" that she might lose her job because of her undisclosed relationship with Gannon. Her term position was extended twice. The stress of the deception was becoming too much for Robinson so one day in May of 2000, she told her supervisor Bent of her relationship with Gannon. Robinson testified that she knew she would lose her job because of this but she no longer cared given all the grief she had endured.

[11] According to Bent, a distraught and visibly upset Robinson asked to see her in her office, and in doing so, asked Bent which authority did the grievor have over staffing. Bent explained that Robinson had been hired for 30 days, but that position could be extended to a maximum of 120 days through normal staffing process. Bent explained to Robinson how the grievor's work in human resources fit into Bent's work at Formation and Logistics. Bent stated Robinson asked many questions. Then,

Robinson who appeared scared and upset to Bent, told Bent that it took her a while to muster the courage to speak to her but that she did not want to tell her about a prior relationship with Gannon, though she did. Bent was surprised to hear that Gannon had a child with Robinson.

[12] Robinson told Bent she wanted someone to take care of her, to look after her. Bent reassured Robinson that she could not fire her because of her prior relationship, and notwithstanding same, Robinson filled the requirements of the job.

[13] According to Bent, Robinson was of the impression that Gannon had more authority over Robinson's position and that he could remove her. Bent assured her that this could not happen because the position, the extension or termination was as per Bent's requests, not Gannon's. Robinson by then was crying, very upset and nervous. Bent informed Robinson that she did not need her as a clerk any longer but that she would make sure others did, and that she would make sure any other staffing requests regarding Robinson would go through Bent. As it turned out, there would be no further staffing request for Robinson as a clerk.

[14] Bent does not deal directly with staffing and did testify that the position filled by Robinson through the grievor met all of the requirements of the position and her work was quite satisfactory. The grievor did not contact Bent at all in regards to this placement. Bent stated that Gannon always conducted himself professionally in the past.

[15] Bent knew that Gannon had acted professionally in the past, and she had no knowledge that he had acted in this fashion before, and that he had no power to block any aspect of Robinson's job, yet she did not telephone him to find out what this was all about. Instead, she went to her supervisor, Commander Siew. Bent complained that Robinson felt strongly that the grievor could block her job extensions and Bent wanted simply to ensure that staffing went through Bent instead. Bent testified that she was merely asking for direction from Commander Siew, not lodging a complaint, but she realizes that Gannon was suspended as a result of this complaint.

[16] Bent did admit on cross-examination that casual employees know the system, and they know that they will be unable to work beyond the 120-day limit. In the case of Robinson, the 120 days would end in May. In that workplace, Bent stated "it is not what you know but who you know" to get a secure employment; therefore, to get your position extended, you must please your immediate supervisor. For Robinson, that was Bent.

[17] Two months later in July, Donna Stringer was brought in to assist in the investigation. She asked written statements of both Bent and Robinson (see Exhibits E-2 and E-8).

[18] On the strength of those statements, and having heard the grievor in a meeting on July 13, 2000, the grievor was suspended without pay pending investigation into alleged abuse of authority and harassment of Paula Robinson.

[19] To her obvious surprise, Robinson was shown the grievor's letter of suspension for the first time at this hearing, and she testified she had no idea that the employer had used her name as the cause of his suspension. She has equally surprised to learn that she was being used as a harassment complaint against Gannon.

[20] James Stewart, the Director of Civilian Human Resources Service Centre - Atlantic, testified that Personnel Officers such as the grievor have a variety of tasks but the bulk of their work is staffing. Also known as Staffing Officers, they receive a vigorous training and are required to be certified to enable them to properly review and fill personnel needs. This is an important duty as it is a delegated authority from the Deputy Minister's power to hire personnel. Once the Personnel Officers have this certification (at the PE III level) and thus the delegated duty to hire, they can exercise it liberally, hence the importance of their good training. The training therefore includes knowing the do's and don'ts of what managers can do for hiring purposes, the applicability of statutes and regulations, the definition of "merits", and so on. Having said this, the staffing officers must respond to managers' request for personnel in a quick manner thus making their overall task a balancing act.

[21] Gannon was so qualified and certified and he was part of a team of six staffing officers who reported to Paul Hartigan, Senior Officer. Each staffing officer has a client base of various units on the Base, and in Gannon's case, his included Formation and Logistics. Staffing officers get to know their clients well so they can understand their personnel needs and meet with them often. They often deal with managers who have less experience in the field of hiring, and because the hiring is for the public service and thus open to an appeal process, the staffing officers must conduct their work in a fair, honest, and straightforward manner. The nature of their work also requires them to be away from the office, to be working independently, and not be under any direct supervision, except exchanges with their direct supervisor. The level of trust in this type of position is therefore very high.

[22] Staffing officers must also adhere to staffing policies, and particular to this case, to the hiring practices for casual employment [see CPAO 4.03 and CPAO 4.44 (civilian personnel administrative order), Exhibits E-19 and E-20, respectively].

[23] Gannon would have received training on the casual employment policy (Exhibit E-20). This enables staffing officers to cover short term absences – for instance, sick leave – in a very quick fashion. Potential candidates are identified quickly and selection is not based on the same standards for hire as the rest of the public service, which one is based on merits and a wealth of considerations. The policy provides in part as follows:

> ***SOURCES OF RECRUITMENT***
>
> *Whenever appropriate and feasible, it is recommended that casuals be recruited through the Public Service Commission or Canada Employment Centres. However, they may also be recruited through other sources such as departmental inventories, call-back lists, and advertising.*
>
> *Hiring of casuals is to be fair and non-discriminatory, and demonstrably free of any favouritism, nepotism, or undue influence, or appearance thereof.*

[24] The key to this type of hire is that it be fair and demonstrably free of any favouritism, nepotism, and so on. Thus in the case where a manager wants his or her daughter to be hired, the employer must point out the problem, the potential conflict

and have the manager refer the matter to another officer. A non related human resource officer can remove the perceived bias in the matter while not disqualifying a daughter whose candidature could be suitable for a particular job.

[25] Casual hire is a staffing option to meet short term needs for additional help. Casual employees are hired for 90 days, but their hire can be extended for another period of time to a maximum of 125 days. It is the managers of the organizations who determine the need for casual staff and they make requests for such to the staffing officers. Staffing officers then must act quickly but fairly. They must assess candidates and make a recommendation in writing for the candidate. The manager makes the decision whether to hire. Request for extensions of the appointment are made to the staffing officer who has the delegated authority to approve the extentions.

[26] Staffing officers often receive many résumés for work including casual work and then maintain them in their individual offices. To reach some form of standardized approach, a new procedure for casual hire was set up in April of 1999 by a committee. All résumés for casual hire were to be kept in a central location so that anyone involved in staffing could access this inventory of résumés. Résumés would be kept for one year. The grievor had been on leave when this new system was implemented. In any event, much ado was made of this central inventory but this so-called new system was nothing more than a filing cabinet where résumés were kept. The committee had no upper management who approved this new method, and no one in authority to the grievor. Furthermore, staffing officers would often retrieve résumés from the inventory without making a record of such and the central registry was as a result often incomplete.

[27] The old method of processing résumés therefore continued and staffing officers kept some résumés in their offices and some in the central filing cabinet. Bonnie Hutchinson was the human resource assistant to the grievor for a short period of time. Hutchinson informed the grievor of this new method of operation; however, she testified that it was not unusual for staffing officers to keep résumés in their individual offices.

[28] Hutchinson also had her own method of hire procedure, i.e., she would vet the applicable résumés, conduct the interviews and recommend the hire of a person. Because she did not have the authority to sign the recommendation form, she would put it to the staffing officer. When she was assigned to Gannon, he told her he preferred to review each recommendation before signing, because, she admits, he probably had ultimate responsibility on the hire.

[29] While Hutchinson was an advocate for the central inventory as a preferred method of hire for all staffing officers, she did recognize that there continued to be instances where family members of senior personnel were hired by staffing officers. According to Hutchinson, those instances were proper as long as the personnel was not directly involved in the hiring of the family member, i.e., no influence and no signing of any hire forms. To her knowledge, however, the grievor had not made any inappropriate referrals of hire, and she in fact asked him to consider her daughter-in-law once.

[30] Hutchinson just returned from leave during the same time the grievor was suspended. She was asked on two occasions to search the office of the grievor to locate any files which needed action, such as in his "in basket". Hutchinson conducted these searches. On the second search, while accompanied by Hardigan, she searched the grievor's desk drawers. This is where she found a curriculum vitae of the grievor, with an attached fax cover page addressed to Health Canada (Exhibit E-12). Hutchinson reviewed the curriculum vitae of Gannon and disclosed to Hardigan to her horror that Gannon had indicated he had a Bachelor's Degree when he did not. She maintained that was fraudulent, that the grievor was a liar, and made worse because as a human resource officer, he would ask everyone else to adhere to the rules but placed himself above those rules. By the same token, Hutchinson described Gannon as a very good worker, supportive of staff who reported to him, and one who never refused a request for assistance.

[31] Hutchinson telephoned the contact person at Health Canada about the grievor's job application. Then, at the request of Stringer, Hutchinson made a search of the grievor's e-mails and printed them all. Hutchinson did admit to having herself sent personal e-mails from the office, and she was unaware that she could be fired for

sending a certain amount of personal e-mails. Policies on e-mails and internet use (Exhibits E-15, E-16 and E-17) were placed before her but Hutchinson testified to not having seen these before nor to having been explained their purpose by the employer. Altogether, the employer retrieved some 300 e-mails sent or received by the grievor at this workplace in regards to personal matters (for a sampling, see Exhibit E-13).

[32] Notwithstanding the good working relationship Hutchinson enjoyed with Gannon, she said she could no longer work with him because she could not trust him.

[33] The grievor reported to Paul Hartigan, Senior Human Resource Officer, who reports to James Stewart. Stewart in turn reports to Ginette Laflamme, the Director General and she reports to the Assistant Deputy Minister.

[34] Stewart testified that he has known the grievor since 1995, and more directly, as one of the human resources officers reporting to him through senior officer Hardigan. In November of 1999, Stewart was informed of an alledged misconduct involving Gannon. Their department had received an inquiry from a lawyer in Family Court who was questioning the confirmation of Gannon's salary due to prior inconsistent information on same. In fact, a letter on DND letterhead was retrieved which showed the forged signature of an official with DND citing a lower salary level for Gannon. Gannon admitted to the misrepresentation and explained that he was involved in a child dispute matter and was under a lot of stress. Stewart found such actions to be fundamentally wrong, especially a human resource officer with signing authority for appointments to employment positions. It was the first incident involving Gannon who had 22 years of good service, was an experienced staffing officer for 12 years, fully trained and qualified, was organized through the difficult down-sizing periods, was reliable, and was considered one of the best to work with clients in workforce adjustment cases. Stewart took a long time before deciding on the appropriate action. This was an extremely serious misconduct, but after careful consideration, Stewart imposed the lowest sanction, a five-day suspension.

[35] At a meeting on November 26, 1999, Stewart warned the grievor that any further incident of the kind would not be tolerated and committed this warning to writing:

> *Following a review of all of the evidence available to me in this case, I cannot accept the explanations that you have provided minimize the seriousness of the fraud you committed, in the Department's name.*
>
> . . .
>
> *Your explanation that the issue of salary has been rectified with Dalhousie Legal Aid maybe somewhat understated. Following our meeting Ms. MacNeil's office was contacted and has confirmed that the forged letter was filed with the courts. Human Resources Advisors are employed in positions of trust and must be above reproach in their behaviours and actions. You committed fraud when you presented the forged letter to legal authorities. This unethical behaviour is a serious breach of the trust that compromises employer/employee relationship that I cannot in anyway condone.*
>
> *I accept the remorse you offered at the meeting and the fact that you were experiencing stress because of a variety of personal circumstances. Coupled with your 22 years of service and the fact that you state this was an isolated incident I am prepared to mitigate a disciplinary penalty and award a five days suspension. Your manager, Mr. Paul Hartigan, will discuss the dates of this suspension with you.*
>
> *Further misconduct of any nature will result in a more severe disciplinary penalty up to and including termination of employment.*

[36] The five-day suspension was not grieved. Stewart believed the matter was resolved and everyone could move on.

[37] In early July of 2000, Stewart was apprised of a supposed hiring by Gannon of a person with whom he had had a prior relationship. Stewart had the authority to conduct an investigation into the alledged misconduct and to impose sanctions if proven. He explained that he investigated alledged misconduct and not harassment as there had not been a complaint of harassment filed at that time. That is why the harassment policy procedure was not followed for this investigation. When challenged, Stewart did admit to having made a distinction between harassing behaviour and an actual complaint of harassment when he reviewed the statements of

Robinson and Bent, and concluded that Gannon was being accused of harassing Robinson. According to Stewart and the information given to him by Stringer, it was alledged that Gannon had led Robinson to believe that he controlled her employment such that if she spoke of their prior relationship, she would lose her job. Robinson was convinced he controlled her employment at DND. The focus by Stewart was intimidation and harassing behaviour and not a harassment complaint per se calling into play the policy on harassment complaint investigation procedure.

[38] Stewart interviewed a number of people and obtained statements. In those, he immediately recognized the name of Paula Robinson from the Family Court matter in November and was particularly concerned. The main issue as relayed by Robinson to Bent, to Commander Siew to Donna Stringer was that Gannon had been involved in the hire of Robinson and that he could be involved in her termination. After the investigation, Stewart met with Gannon on July 13 without prior notice and he explained the allegations and perception of improper conduct towards Paula Robinson. He advised the grievor that he would have an opportunity to give his side of the story. Stewart expected the grievor to be shocked by all of this but instead Gannon stated that Robinson was capable of vendetta, connivance and harassment.

[39] Stewart exercised another power to suspend without pay because he felt that it was best the grievor not be at work during the continuation of the investigation to avoid the perception of interference. He told the grievor that this was a serious matter and that the matter would be dealt with immediately. He asked for Gannon's e-mail password to verify his accounts and to ensure that day-to-day operations were carried on. Gannon gave those passwords and did not object.

[40] Stewart handed the letter of suspension to Gannon on July 13, 2000:

> *This is to inform you that you are hereby suspended without pay pending the outcome of the investigation of allegations that you abused your authority preceding and during the employment of Ms. Pamela Robinson. Your alleged conduct during her employment tenure is considered intimidating and harassing. If as a result of this investigation the allegations are deemed to be unfounded, you will immediately returned [sic] to duty and your pay will be reinstated retroactive to the date of your removal from duty. If the allegations against you are substantiated, a*

> *recommendation will be made that you be terminated for cause for disciplinary reasons.*
>
> *You are to have no contact with Ms. Robinson concerning this matter. If you do contact Ms. Robinson concerning this matter it will be considered harassment and intimidation. The Department will take whatever administrative or civil action required to ensure you cease and desist.*

[41] Stewart referred to several policies and/or guidelines regarding proper usages of e-mail and internet for staff at DND. The grievor was not accused of any criminal nor unlawful use of the e-mails or internet, only its unacceptable, inappropriate use. The employer pointed out that on every computer screen, including that of the grievor's, when an employee first commences his or her day at work, a warning appears indicating that e-mails at the office are monitored.

[42] A lot of time was spent by counsel for the grievor to determine the extent of the employer's breach of the grievor's privacy, i.e., the search of his office, the telephone calls to determine use of his résumé in job applications, the review and printout of his personal e-mails and internet uses, and so on. Stewart stated that he obtained this information as per his authorization to do so pursuant to the *Financial Administration Act* and the delegated authority as per the CPAO 1.02 (see Exhibit E-27). Moreover, the employer provided a copy of a letter dated July 17, 2001 by the Office of the Privacy Commissioner of Canada (see Exhibit E-37). This letter disposed of the complaint made by Gannon against the DND officials from the Civilian Human Resource Centre (Atlantic) in respect of searches of his office, computer accounts without his consent and then used in an administrative investigation. The Commissioner's office made the following finding:

> *The complainant was employed as a Human Resources Officer in DND's Civilian Human Resources Service Centre (Atlantic). We determined that an informal harassment complaint was lodged against him as a result of comments he made to a female employee at DND. While DND was conducting its inquiries other issues came to light concerning the complainant's hiring practices and a possible abuse of authority.*

We were told that the abuse of authority issue stemmed from an allegation that the complainant hired individuals with whom he was closely acquainted. DND investigators wanted to review the resumes of those individuals the complainant recommended for employment with DND but could not locate all of them in the official departmental file. After he told the investigators that he kept some resumes in his office for his own reference, the complainant's office was searched and the missing resumes were located.

DND officials also explained that it discovered during the course of its investigation that the complainant was using its electronic networks for unauthorized purposes. DND was required to pursue the matter based on this new evidence. DND investigators asked the complainant to provide his passwords, and they subsequently accessed his Internet "Visu Mail" account and DND Intranet "Outlook" account in an effort to determine whether there was any merit to this allegation.

DND is governed by Treasury Board's policies with respect to both harassment in the workplace and the use of electronic networks. As such, it is duty-bound to investigate allegations of harassment or abuse of authority to ensure a harassment-free workplace. It is also obligated to ensure compliance with policies on the proper use of electronic networks and to investigate any allegation that the policy has been contravened. Deputy heads have an obligation to promote both a harassment-free workplace and the use of electronic networks in a working environment where unacceptable or unlawful activity on either issue is not permitted. They also have an obligation to deal quickly, fairly and decisively with any violations of policy or law.

In this case, DND had cause to search the complainant's office to gather evidence for its administrative investigation of the allegations of harassment and abuse of authority. During this investigation, other information gave rise to additional allegations about the abuse of its electronic networks. The information taken from the complainant's office and his Internet and Intranet accounts was used as part of its investigation of these issues. This, in the Privacy Commissioner's view, meets the requirements of section 1(a) of the ***Privacy Act****. The complainant's personal information was properly collected for a legitimate program activity and was used in accordance with section 7(a) for that same purpose - to conduct an administrative investigation.*

The Privacy Commissioner has therefore concluded that DND did not violate the complainant's privacy rights in that regard. This complaint is ***not well founded.***

[43] Due to personal circumstances, Stewart was unable to continue the investigation and the matter was remitted to his superior, Ginette Laflamme in Ottawa. Laflamme is the Director General, Regional Civilian Human Resource Services for DND. Stewart was only partly involved later on to obtain information on Gannon's job applications with the federal public service. He received the curriculum vitae used by Gannon showing the university degree and passed this information on to Laflamme.

[44] An independent investigator, Cindy Reid, Senior Human Resource Officer from the Prairies, was brought in to investigate the matter and the results of her investigation were compiled in a report dated August 4, 2000 (see Exhibit G-6). In such, the investigator included an affidavit of the grievor wherein he answered to the allegations (see Exhibit G-1).

[45] The employer broadened the scope of their initial investigation when they uncovered the false résumés of the grievor, great amounts of personal e-mails, and missing résumés of individuals recommended by the grievor to be hired for casual term positions.

[46] Laflamme has been in the civil service for 27 years, 24 of which have been in human resources. Her experience includes attaining the PE III level as an accredited staffing officer. She has provided training on all aspects of staffing, including the application of the legislation, the legal versus illegal of such work and so on. Today, she is responsible for those who operate in staffing, i.e. accountable for staffing services and how such services are delivered. Altogether, there are some 400 employees under her direction. The grievor falls under her chain of command.

[47] Laflamme took the time to gather all relevant information and to ensure the procedures and methods of investigations were proper as it was the first time she investigated a human resource manager involved in such allegations. All the material of the full investigation was made available to the grievor's counsel, and a letter by Laflamme disclosed all of the allegations made against Gannon at that time (see letter dated August 23, 2000, Exhibit E-30). Later, counsel and the grievor met with Laflamme and Hardigan on August 30 at a formal meeting to afford Gannon the opportunity to respond to the allegations. It was made clear by Laflamme that the

investigation was not a harassment complaint investigation but rather an investigation into misconduct.

[48] Together they explored the issues of staffing practices, nepotism in the hiring of Robinson, inappropriate and extensive use of e-mails for personal matters, and misrepresentations on his curriculum vitae. To these, Laflamme testified the grievor explained away and did not see the gravity of his actions nor the inappropriateness. The e-mails contained sexual material and inappropriate personal content according to Laflamme but not according to the grievor. This concerned her particularly because the grievor was a manager, a professional with delegated authority from the Deputy Minister, and one holding a position requiring trust and ethical behaviour. Legal counsel made a request for re-integration into the workplace pending the outcome of the investigation and Laflamme took same under advisement.

[49] Later on, information came to the attention of Laflamme that, while he was suspended but before their meeting on August 30, 2000, Gannon had applied for a position in the federal public service using his false résumé and that he had attended for an interview. This he had not disclosed at their meeting.

[50] Laflamme reviewed all of the documents and results of the investigation. She also reviewed the grievor's affidavit, the investigator's findings, and further written representations from the grievor's legal counsel (see Exhibit E-32) on all of the issues. As a result of that information, Laflamme ordered an audit of the practices used in the Halifax Service Centre with respect to use of casual employment and appointment of term employees. That audit report (Exhibit E-33) disclosed that there were no deficiencies in regards to the "legality" of the staffing actions but suggestions were made to make the process more transparent. Legal counsel then wrote to the Minister of DND that the investigative process and suspension of the grievor were inappropriate, and alleging unfair treatment based on race (see Exhibit E-34). The Minister did not get involved according to Laflamme.

[51] The fact that the grievor knew Robinson personally and that he asked for her résumé for the job makes his practices unfair and show preferential treatment, according to Laflamme. She admitted that there was no illegality in the grievor's hiring

of Robinson, except for those facts: that Robinson had not filed a résumé with the Service Centre, that it was the grievor who had called Robinson and asked for her résumé, that he breached the rule on nepotism, fairness, equity of treatment, and transparency by hiring someone he knew he had a relationship with, without distancing himself from this file, and for not having disclosed same, contrary to the policy on the hiring of casual employees.

[52] In the end, Laflamme made a decision keeping in mind such factors as the seriousness of the grievor's actions, his long service of employment, the occupation which he held and the accompanying trust he held, the delegated authority granted to him in his position, his prior discipline in 1999 involving a forged letter and thus a similar kind of misconduct, whether the grievor could be placed in another position, his breach of trust, and the fact that Laflamme never received the satisfaction that Gannon had realized the seriousness of his actions nor his lack of judgment. She recommended that his employment be terminated.

[53] Laflamme testified that one employee named in the e-mail messages of the grievor was investigated and disciplined for inappropriate use of the e-mails. Other employees involved did not come under Laflamme's jurisdiction.

[54] Robert Downey testified in this case as to the practices he held as a staffing officer for 10 years at DND. He worked with the grievor during those years. He explained that with the era of downsizing of DND in 1994-1995, a Service Centre was created at DND to provide civilian personnel support to the military, but there was no formalized inventory for applicants to send in their résumés to apply for various job openings.

[55] Each staffing officer maintained their own informal or "ad hoc" inventory of applications, and this fact was known to all, including managers who would make staffing requests of Downey and the grievor, and other personnel officers. Downey does recall that central office kept a central inventory but such inventory might not include all applications for members of the public who fell in the employment equity groups, i.e., visible minorities, a large group from which Downey and the grievor received applications. Downey is Black, and he and the grievor would receive many

applications from their contacts in the community.

[56] Downey kept many résumés he received in the course of his work right in his office, and staff had access to these, same as other human resources did. He did not solicit résumés from people he knew.

[57] Downey also spoke of hiring practices in DND involving family members of existing employees. While the policy did not discourage such hirings, Downey explained that he would be required to ensure the appropriateness of the hiring by informing the manager seeking to hire a daughter for instance to have another manager consider her application and look after the hiring process.

[58] Downey said that in the case of casual employment, where the employment is conducted quickly and without competition, there is more occasion for the rules to be bent. The staffing officer is directly involved in the hiring with the manager, and Downey testified that it would be inappropriate for him to do the hiring of a family member. Instead, Downey stated he would have circulated the family member's résumé to other human resource officers and to the various inventories so as to not prevent the family member from applying but by the same token removing himself from directly hiring that relative. His rule of thumb is to keep the hiring at arm's length and not to interfere. When Downey was presented a hypothetical case of facts similar to that of the grievor and Paula Robinson, he stated that he would not have been involved in the hiring process, he would not have sent in the woman's résumé, and at the very least, he would have disclosed the relationship to the manager who was making the request for hire.

[59] As for use of the e-mail and internet accounts, Downey testified that he stays away from jokes messages and no sexual content at all. He says that employees will use their computer at the office for some personal messages, but only a minuscule amount. He is aware that there are conditions for using these accounts and that the government monitors their use.

[60] Barry Boehmer is an Information Officer with Formation Logistics, and he testified that he is involved in staffing and as such has often worked with the grievor

for staffing requests. He said that the hiring of Paula Robinson posed no problem with her work or her qualifications to do the work. Boehmer, however, was not aware of the relationship between the grievor and Robinson and he stated he would have liked to have been so informed because of the policy of not hiring family members.

[61] Kelley Dunfee is the past President of the Union Local, PSAC, USDE with DND. She testified that she used the government's computer networks often to issue notices to members of the union via the e-mail. Sometimes, those e-mail communications were in the hundreds and Dunfee reported that she was not disciplined for such use but was told by her employer not to use the employer's equipment for union business. A grievance on the matter did resolve the issue and Dunfee was able to issue notices to the membership in this fashion.

[62] The grievor, Carl Gannon, has been with DND since November of 1977 when he was first hired as a mail clerk. He worked through the ranks over the ensuing years to finally become a Personnel Officer III in 1991.

[63] The grievor spoke firstly on the matter of Paula Robinson. The grievor received a staffing request from Barry Boehmer at Formation Logistics for a clerical casual employment. He obtained from a filing cabinet in the general office area three résumés, including that of Robinson. He did not use his personal inventory. Those résumés were from the employment equity groups.

[64] The grievor spoke of a system of maintaining personal and general inventories in a like manner to that presented by his colleague Downey. For the hiring of casual employees, the grievor has the authority without the referral to the recruitment agencies, such as the HRDC or the Public Service Commission.

[65] The grievor made phone calls to determine the availability of the three persons selected, and only Paula Robinson was available to work. He then informed Boehmer of this and Boehmer told the grievor to go ahead and hire Robinson. The grievor stated he did not exert any influence on Boehmer to hire Robinson.

[66] The grievor testified that he then telephoned Robinson and offered her the position. The two met later when Robinson's position was extended, and the grievor signed for these extensions.

[67] The grievor denied ever receiving the CPAO 4.44 on the hire of casual employment as a tool for his trade as staffing officer. He says in any event such a policy is outdated. He did admit that he would be required to follow such an administrative order, and when challenged on its contents, the grievor could not state what was meant by "demonstrably free of favouritism" in the process of casual hire. Instead, the grievor testified that in the case of Robinson, he went out of his way to be fair to her and to not be influenced by their background. He did admit to considering the issue of nepotism and favouritism in the case of Robinson but in his opinion, he and Robinson were not related therefore this did not apply. He says so because their relationship was no more than a one-night affair and Robinson turned up in his life five years later with his child. He fought the matter of paternity and support in court. The court battle was very nasty.

[68] The grievor did admit to telling Robinson not to speak about their relationship to anyone for the reason that his private life is private and it has nothing to do with the office. According to the grievor, he asked her not to say anything and he did not place any condition on this request. He denies any harassment of intimidation towards Robinson, and he stated that it was she who initiated telephone calls to him.

[69] Then on July 13, 2000, Stewart presented him with the statement of Donna Stringer and the letter of suspension disclosing that an investigation on his alleged intimidation and harassment of Robinson was underway. He was to leave his office immediately. The grievor was asked for his e-mail and internet account passwords and he gave those. The grievor was quite upset by all of this and he says it was not expected. That is all the information he received until the report of the investigator.

[70] That report disclosing the evidence on the intimidation and/or harassment of Robinson was inconclusive and there was no proof of misconduct. According to the grievor, he had made no threats to Robinson and he had not intimidated her either. He could not speak to what Robinson may have "assumed" from their conversations,

but he states he did nothing of the sort.

[71] The scope of the investigation was broadened at this time but the grievor was not made aware of same. He disagreed with allegations of inappropriate and preferential treatment in the hiring of casual employees found in the letter of September 29, 2000 (Exhibit E-35). He says he has followed the rules at all times and his performance at work was good. He denies that he did anything wrong in the hiring of Robinson, and he maintains he followed the procedures. In cross-examination, the grievor did admit that he asked Robinson to send in a more up-to-date résumé as the one he had retrieved was an old one.

[72] As for the matter of the false résumé, the grievor testified that he indicated that he had obtained a Bachelor's Degree from Dalhousie which he did not obtain. The reason for this was "cosmetic window dressing" because he had the equivalent in training. The grievor testified that maybe he made an error in judgment and he would remove this if the employer felt it necessary. He does not believe what he did was "illegal", and in any event, he says his application would be screened and he would inform officials of his equivalent training. Therefore, the grievor added, he derived no advantage from indicating he had a university degree. When pushed as to why do so in that case, and that it could be misrepresentation, the grievor could not answer. He later admitted through legal counsel that he could derive a "slight benefit". In the end, the grievor maintained he did nothing wrong and there was no harm in "padding" his résumé.

[73] The grievor went on to state that the employer has never given him training in ethics nor has anyone told him that these actions were inappropriate.

[74] The same view he held for use of e-mails and internet accounts. The employer never gave the grievor any directive regarding inappropriate material on the message exchanges, and no clear cut directive on use of e-mails. The grievor did admit that he sent personal e-mails from the office and he added this was common practice with other employees and managers. He reviewed the sample of e-mails retrieved by the employer from his accounts and he did admit they were personal but contained no actual sexual conversation, rather everyday talk. In one message, the word "orgasm" is

used, and the grievor stated it referred to a drink from a local bar. He referred to a bar menu dated May 29, 2001 in which sexual terms are used for cocktail drinks. This was not brought up to Laflamme when they met on the allegations. Again the grievor added that the employer never told him what was appropriate or inappropriate.

[75] When asked whether he had ever reviewed the employer's directives on the acceptable use of e-mails and internet, the grievor said he had never received same. He questioned whether some of the directives from the military side of DND even applied to him.

[76] The grievor admits he made a mistake and he is prepared to do anything to preserve his employment.

Summation – Employer's Position

[77] It is the employer's position that the grievor was terminated for cause pursuant to sub-section 112(f) of the *Financial Administration Act.* The employer believes it has established that the grievor's conduct was such that discipline was warranted, and that discipline in the form of a termination was appropriate and justified in the circumstances.

[78] In Exhibit E-36, there were incidents of conduct which taken individually are sufficient to establish cause for termination. For instance, the incident of submitting a false résumé to four separate governmental departments certifying that Gannon had obtained a Bachelor's Degree when in fact he had not, and by writing "part-time" in brackets next to Bachelor's Degree, the grievor intends to cover up the fact that he has not obtained a Bachelor's Degree. When faced with this incident by his superior, Ms. Laflamme, Gannon simply failed to realize the seriousness of his actions by offering three different explanations as a defence and by justifying his actions.

[79] Gannon stated that he was just "testing the waters" so as not to be denied a job upon first applying but if asked, he would not have gone to an interview. The employer does not accept this explanation given that Gannon knew that his years of experience in the field would accord him a "grandfathering" provision, i.e., the benefit

of equivalent training upon application to certain job, thereby negating the need for falsifying the résumé. Furthermore, Gannon told Laflamme that the false résumé did not matter as he had not applied for positions at DND, though the evidence later showed that another false résumé, which had not been brought to Laflamme's attention at the time she met with Gannon, had been acted upon by Gannon and that he in fact had attended at an interview.

[80] At a minimum, the employer is of the view that Gannon had an opportunity to come clean with this incident but he chose to continue to cover up his actions. Applying for a PE II would mean a promotion for Gannon, in a position which commands a high degree of trust, and for Gannon to apply for such a position with a falsified résumé breaches the core element of the work and demonstrates a serious offense on the part of the grievor.

[81] The employer reminds us that the false résumé incident is made worse for the reason that it took place on the heels of another prior incident for which the grievor was disciplined a five- day suspension. The seriousness of this conduct ought to be intuitive to the work performed by Gannon, and yet, the misconduct simply continues.

[82] An important element to the position held by Gannon was his delegated authority of the Deputy Minister in respect of the application of the *Public Service Employment Act*, that is to ensure proper adherence to legal requirements in the hiring of public servants. Ensuring that a false résumé not be used to unfairly apply for a public service position is exactly the type of conduct a Staff officer such as Gannon must watch for let alone condone.

[83] The second incident which points to cause for termination is the issue of Gannon's approach to the hiring of casual employees, and further, the hiring of Paula Robinson. First on the hiring practices of casual employees, the evidence disclosed that Gannon was using his own inventory of applicants as opposed to the central registry which ought to have been used, especially to avoid any perception of favouritism. The employer does concede, however, that this element alone is grounds for discipline but not "stand alone cause for termination".

[84] Secondly, the whole series of facts leading to the hiring of Paula Robinson shows tremendous lack of judgment and serious breach of the nepotism policy which an experienced staffing officer such as Gannon knew too well not to violate. Gannon concealed the prior relationship with Robinson from Boehmer, did not give the file to another staffing officer even after he had considered the question of nepotism in this case and contrary to what would be customarily done as testified by Robert Downey. Moreover, the actions of Gannon in relation to Robinson demonstrated that Robinson was intimidated by the grievor, and clearly the work situation at this point was serious.

[85] A third element of misconduct in the case of Gannon is in regard to his use of electronic mail for personal use while at work. The employer concedes that this element alone is insufficient to warrant termination, but taken together with the other incidents of misconduct, it demonstrates cause for dismissal. Personal use of the e-mails is one thing, states the employer, but extended personal use of the e-mails is a question of judgment and appropriateness. Additionally, the content of the e-mails in this case with sexual undertones and overt sexual language were clearly improper in a workplace. The grievor did not accept any responsibility for his use of the e-mails by attempting to lay blame on the employer's failure to advise him of what use ought to be acceptable or unacceptable.

[86] What matters most to the employer is the grievor's unwillingness to admit to a single misconduct but rather to blame the employer for all of his shortcomings. According to the employer, the trust which once secured a good working relationship with the grievor no longer exists as it had been damaged beyond repair by the grievor continued inappropriate actions and defiance towards guilt or remorse for such misconduct.

[87] In the alternative, should the employer not have established a case for dismissal for cause, the employer contends that the grievor can no longer be entrusted with the work he once did at DND, and compensation ought to be ordered instead, referencing the following decisions: *Champagne v. Canada (Public Service Staff Relations Board), [1987] F.C.J. No. 906 (Fed. C. A.), Deigan and Treasury Board (Industry Canada) (Board Files Nos. 166-2-25992 and 166-2-25993), Tipple v. Treasury Board (Sept.26, 1985, Fed. C.A., File No. A-66-85), Belval and Treasury Board (Regional*

Industrial Expansion) (Board File No. 166-2-15179), and Re AGT Ltd. and I.B.E.W., Loc. 348 (1995), 52 L.A.C.(4th) 415.

Summation - Grievor's Position

[88] According to the grievor's counsel, the crux of this case is to determine what it is the grievor is alleged to having done. In order to do so, reference is made to the three elements of alledged misconduct in the termination letter. The grievor is of the view that the employer has not met its burden of proof on any of the three elements.

[89] This burden, it is suggested, must be borne out of the employer's policies regarding discipline. The CPAO produced at the hearing provides that discipline is utilized to correct the conduct and is not intended to be punitive. Steps to be followed in a discipline case include a careful investigation and an objective assessment to obtain the facts, a short delay between investigation and action toward the employee, and thirdly that the employee be given an opportunity to reply to the discipline and the sanctions imposed. In the case of his discipline, Gannon states that the employer did not conduct a thorough investigation but rather relied on hearsay evidence, that the employer suspended him without pay based on hearsay evidence and an absence of direct evidence of harassment, and that he was not given an opportunity to be heard before he was suspended.

[90] The severity of the discipline must also be weighed and the interests of the employer and the employee's potential for rehabilitation. The grievor does contend that he had a previous disciplinary action but that he nevertheless had the potential for rehabilitation. The suspension without pay without the benefit of hearing the grievor is unheard of in labour relations.

[91] Discharge is the ultimate disciplinary action, and it is contemplated only if it is determined that the employer-employee relationship is no longer tenable. While Stewart testified candidly that there was nothing in the statement of Robinson that the grievor had harassed Robinson, Stewart did say that he was led to believe that such was the case. Even if the charge of harassment had been substantiated, it was

inappropriate to suspend the grievor without pay as per the policy on discipline.

[92] Counsel for the grievor argues that the policy on discipline would dictate that during an investigation, the employee can remain in the workplace but can be re-assigned to another sector unless arrangements cannot be made for this, then suspension without pay is implemented only if there is danger to the employer's workplace and that the employee could seriously impede investigation and that the employee's actions have caused the employer to doubt the employee's honesty and integrity. None of these elements were present in the grievor's case.

[93] In regards to the employer's first point of conduct warranting discharge, the grievor is of the view that this point is insufficient. Firstly, there was no preferential treatment in the hiring of Paula Robinson. The fact that the grievor and Robinson may or may not have had a relationship is not the question; rather, it is the events surrounding the hire which determine preferential treatment. And the facts show that a request came forward and the normal procedure for hiring were followed, as fully stated in the affidavit of Gannon which was made before Gannon met with Laflamme.

[94] Further, the central registry of which much was made is simply a filing cabinet and not a whole system of filing of résumés that the employer would lead us to believe. The fact remains that Human Resource Officers had a practice of keeping some résumés in their own offices but not to the exclusion of the filing cabinet central registry. And in the Robinson case, Gannon testified, and it was not rebutted, that he found three résumés of persons who would qualify for the intended position, and that he did so keeping in mind the restricted pool of applicants from which he could select: that they be from the employment equity group and that they be qualified to the clerking duties.

[95] It is a given that Gannon hired Robinson, and in hindsight, he could have protected himself better, but his counsel states that Gannon wanted to be fair to her and he wanted to eliminate the appearance of conflict. Notwithstanding all of these facts, there was no evidence of preferential treatment of Robinson in this.

[96] Moreover, on the matter of Robinson, there was no evidence to suggest intimidation by Gannon towards her. It was Robinson who called Gannon after the hiring and not vice versa. He had cautioned her before she came to work at DND.

[97] On the point of unauthorized use of e-mails, the grievor concedes that he had used e-mails for personal use, all 394 of them; however, only one was suggestive of sexual content, the rest simply of a personal nature. Even Laflamme said she reviewed all of the e-mails and could only find one with sexual content.

[98] The policies on use of e-mails speak of unacceptable versus illegal use of e-mails, such as "abusive, sexist or racist", and while they were for personal use, the grievor's e-mails were not used as such unacceptable means. Dunfee's use of the e-mails could be said to be "personal" use and yet she was not disciplined on the issue. This is differential treatment according to the grievor.

[99] On the third element of the employer's case, the grievor admits that he has acknowledged that he has misrepresented his academic qualifications on his résumé. The grievor adds that it was made clear to him by Laflamme that it was unethical to hold out as having a Degree this way, and that he understood. While the grievor would clearly have derived an advantage with this false résumé, his counsel asks how could this be deceitful? Clearly the grievor knew he did not have a Degree but he had the equivalent training and he knew he would be screened out without the Degree, so he decided to put it in his résumé. Gannon did not use the false résumé to obtain his current employment.

[100] Therefore, the grievor asks how does the employer find power to discipline on this issue when the conduct is outside the duties of the employee? The grievor references the *Millhaven* case which states that an employer can discipline for conduct "away from place of work" but the onus is high. Gannon's résumés were not sent from work, and they did not impinge on this work, therefore cannot discipline for that. There is no rule or regulation in the law which states that one cannot submit a false résumé.

[101] The employer states that the grievor was given the opportunity to explain his actions and he did not, but the fact remains that Gannon did explain his conduct but his explanations were not given any credence and were disregarded. Furthermore, Gannon was never challenged on this affidavit by the employer.

[102] There was no evidence of nepotism, nor conflict of interest in this case. In fact, Paula Robinson was quite supportive of the grievor in this case. Overall, the evidence is little on point in this case and any doubt ought to go to the benefit of the grievor.

[103] In support of its case, the grievor referred to the *Satwinder Samra c. Treasury Board (Indian and Northern Affairs Canada) (Board File No. 166-2-26543)* decision where it is said that when the employee's reputation is at stake, the employer must demonstrate misconduct by clear, consistent and cogent evidence, i.e., more than a preponderance of proof. See also *Isaac Jalal v. Treasury Board (Solicitor General - Correctional Service Canada)(Board File No. 166-2-27992).*

[104] The employer in this case had not met its burden and the grievor wishes to be reinstated with costs. If reinstatement is not appropriate, however, then a reasonable notice period based on the grievor's length of service would be required, and legal counsel provided a listing of a number of decision on the length of reasonable notice periods depending on length of service and nature of employment.

Employer's Reply

[105] In reply, the employer refers to the *Wells v. Treasury Board (Solicitor General - Correctional Service Canada)(Board File No. 166-2-27802)* case to support its position that the suspension during investigation was replaced by the termination is made retroactive to the date of the suspension.

[106] The policy regarding the use of e-mails at work is the policy of DND, the employer, and not the TBS policy on the internet. As for the issue of the grievor's résumés, those were brought to the attention of the grievor in a detailed letter of Laflamme one week before their meeting at the end of August 2000.

Decision

[107] Given the amount of evidence before me in this matter, I will deal with each issue separately in the first instance, and deal with the question as to the discipline of suspension and discharge in the final analysis of this decision.

Allegations of Invasion of Privacy by Employer

[108] One of the issues raised by the grievor was the matter of the invasion of his privacy during the employer's investigation into his alleged misconduct.

[109] As I referred to this issue above in the facts, and given the decision of the Privacy Commissioner regarding the issue of searches of the grievor's office and use of his personal information, I need not deal with this any further. I am satisfied that the employer conducted the investigative process in a proper manner, though I questioned the search of the grievor's desk drawers in his office without his specific knowledge and presence. As stated earlier, however, the Privacy Commissioner's office has dealt with that question.

[110] The retrieval of the grievor's e-mail and internet accounts at work were proper. Such accounts are not personal assets and the grievor was told that those accounts would be reviewed. He gave his account passwords.

Broadening of Scope of Investigation

[111] The grievor was afforded an opportunity to be heard and he was also represented by legal counsel during the investigative process. Both he and his counsel were given full opportunity to speak and make representations. The scope of the initial investigation was broadened upon the employer's retrieval of certain information and I believe the employer is correct in its authority to do so.

[112] I am satisfied that the administrative process in the discipline of the grievor respected the rules of natural justice and that the employer carefully approached its investigation into the grievor's conduct. In the instance there may have been some irregularities toward the grievor, however, I am satisfied that the present adjudication

afforded the grievor an even greater and full opportunity to rebuke the employer's case against him. The procedure set out in CPAO 7.06 on Discipline (Exhibit G-5) was followed in this case. See also *Tipple*, supra.

Allegation of Improper Hiring Practices of Casual Employees

[113] Over the years, the grievor had developed a practice in regards to the hiring of casual employees in that he often received résumés and applications from various people in the community at large or from the black community through his many personal or work-related contacts. As the grievor so stated, he became known in the community as a staffing officer so it made sense that many people would approach him and ask whether they could send in their résumés for future consideration.

[114] Those personnel applications were kept by the grievor in his office, and were not necessarily included in the central inventory of applicants, an inventory which the employer was trying to implement. Sometimes, the grievor freely admitted, he did not even consult the central inventory and made his selection from the group of applications he had in his office, knowing full well that he was able to fill the position quickly and just as fairly. To this, the employer objected and alleged that the grievor was performing unfair hiring practices.

[115] The evidence led at this hearing, however, demonstrated that such practices were not dissimilar to that performed by other personnel officers. Furthermore, an audit of such hiring practices conducted by the employer revealed that the process followed by the grievor and by other staffing officers was not unlawful nor improper, though some improvements in the system were recommended. If the employer did not find such practices to be acceptable, the employer ought to have given the grievor and other staffing officers clear notice that the practices of the past would be no longer and a new process set out clearly for everyone to follow would be the only process to be used. Only then, if the grievor had continued in his previous practices, would the employer have had cause to discipline.

[116] Given the evidence before this tribunal, I do not find that the employer demonstrated that the grievor had used improper hiring practices for casual term

employees, and the employer was therefore not able to discipline the grievor for his casual term employment hiring practices.

Hiring of casual Employee Paula Robinson

[117] As for the matter of the grievor's hiring of Paula Robinson, however, I do find that such was made clearly in breach of the employer's policy on casual employment. I do wish to point out that nepotism only refers to the hiring of a blood relative such as a parent, a brother or sister or a child. In this case, the employee Robinson was not a blood relative of the grievor but the two did have a relationship, and by hiring a person with whom the grievor had and was continuing to have some form of personal relationship however defined, the grievor demonstrated preferential treatment, and as a result, a lack of fairness and transparency in this hiring process.

[118] The grievor argued that he was not aware of the policy on the hiring of casual employees, an argument which I dismiss for the following reasons: firstly, such a policy was clearly part of the grievor's mandate and responsibilities as a staffing officer; secondly, the grievor told Robinson not to disclose their relationship to anyone demonstrating that the grievor knew such a hiring by him was wrong; and finally, and perhaps the most disconcerting, the grievor's attempts to cover up the hiring of Robinson in and of itself is an acknowledgement of the grievor's recognition that his actions were improper and in breach of the policy in the first place. The grievor may have testified he wanted "to keep his affairs private and not bring them to the office", i.e., not to disclose same at the office, but the facts show the contrary by reason of his sending and receiving many private e-mails while at the office.

[119] The grievor further argued that notwithstanding the possible breach of the so-called policy, there was nothing wrong with the hiring of Paula Robinson for the reason that Robinson had the requisite qualifications for the position and that her work was satisfactory. Those factors have no bearing on the process for hiring in the first instance, a process for which the grievor received specialized training and certification and a process which he was required to respect, to apply and to uphold in the name of his employer who had entrusted him with this task.

[120] I find that the employer was justified in disciplining the grievor for the hiring of Paula Robinson.

Personal E-mails and Internet Use

[121] The evidence introduced at this hearing pointed to the grievor's use of his computer while at work for sending and receiving e-mail messages or other internet correspondence for personal use totally outside of the mandate of his work.

[122] The employer alleged that the grievor did not adhere to the normally accepted practices of e-mails and internet accounts while at the office, evidenced by the great amount of personal messages of intimate and romantic discussions with other women during working hours. When challenged on those e-mail messages, the grievor failed to acknowledge that his conduct was improper, instead placing the blame upon the employer for not having informing him of what was proper or what was improper.

[123] Evidence was led that most employees do conduct some personal e-mail exchanges during office working hours, and the employer did not introduce the level at which such use of the e-mail or the internet for non work-related activity becomes unacceptable so as to attract discipline. It is therefore difficult for this adjudicator to judge whether the amount of messages sent and received by the grievor in the course of his daily work at the office would be substantially different from that of other employees. What is certain is that the employer pointed to an important amount of e-mails sent and received by the grievor, some 300 in the course of several weeks, but still, no particular standard was adduced to show me how this weighs against uses by other employees and this factor alone would not support cause for discipline.

[124] The Treasury Board policy on use of electronic networks (Exhibit G-4) does mention that there will be access of the government's electronic networks for personal use, and Appendix D entitled *Responsibilities of authorized individuals* does not indicate how much personal use is too much. This Appendix adds that authorized individuals shall be responsible for writing communications in a professional way so as not to reflect badly on their institution, and this includes refraining from using objectionable language, or when in doubt, asking an official on whether the intended

use is unlawful or unacceptable.

[125] What requires no explanation, however, is the non acceptable use of sexual language, reference to sexual connotations or explicit sexual messages in e-mails or any other type of written correspondence at work. It is simply inappropriate for employees to send from work messages which include references to sexual conduct to other persons at work or to others over the internet. The employer is not required to inform its employees of this common sense rule of good conduct. There is a personal code of conduct commensurate with any position one holds and the level of responsibility which is required of such position. This personal code of conduct falls within what would be considered acceptable conduct by a reasonable person in like circumstances.

[126] The employer produced samples of messages sent by the grievor and received by him which include private exchanges which connote sexual conduct. And while the grievor may have dismissed those messages as being acceptable practice, it does not make it so. Furthermore, his insistence that there is nothing inappropriate about such conduct raises questions as to his judgment and his credibility. The grievor produced a bar menu which lists sexual terms to describes cocktail drinks, such as the term "orgasm". The term is irrelevant to the issue at hand. It is the context within which the sexual term was used – in an e-mail written exchange between the grievor and a woman while the grievor was at work and such term was not explicitly referencing a cocktail drink – which calls for the charge of improper conduct.

[127] Common sense dictates that sending and receiving most private and intimate messages at work is improper, and the employer is not obligated to present a policy on common sense nor to educate its employees on common sense.

[128] I am asked to accept the grievor's view that the rules of good conduct do not apply to him unless the employer has specifically instructed him on same, i.e., that unless the employer told him not to do this or that, he could do this or that. This is evidenced by the grievor's position that policies and administrative orders of the employer did not apply directly to him as the employer could not prove that those policies and administrative orders had been specifically explained to him. For

example, the grievor testified that his employer never explained to him what would be appropriate or inappropriate content of e-mails and internet communications, and consequently, the employer could not discipline him after having failed to do so.

[129] I respectfully disagree. The employer is not charged with the instruction of its employees on the fundamentals of good conduct or common sense. Those inherent qualities one brings to the job. The test for which conduct will be considered proper or improper I believe is an objective test, one based on the belief held by a reasonable person in like circumstances.

[130] Sometimes people make mistakes and sometimes they misconduct themselves during the course of their employment. The general rule is that the employer is entitled to discipline for misconduct, not for a mistake. If the employee's misconduct can be characterized as a mistake, an error in judgment not made in bad faith nor harbouring any ill or malicious intent, then discipline makes way to leniency and a warning to stop the conduct in the future will normally suffice, of course depending on the circumstances of the incident. On the other hand, if the employee's misconduct is not a mistake but rather evidence of the employee's intentional improper conduct, even if the employee may view it as acceptable, then by applying the objective test – whether same conduct would be considered improper by a reasonable person in like circumstances – the employer is able to judge the misconduct and to discipline accordingly.

[131] Not all incidents or misconduct or improprieties are written in rules, guidelines or policy. The test is what would be viewed as proper according to a reasonable person in like circumstances. In this case, the application of the objective reasonable person test in like circumstances would not view the use of sexual content on e-mails or over the internet while at work as proper. I find that the employer was justified in imposing a discipline for such conduct.

<u>The Grievor's False Résumé</u>

[132] I will now deal with the issue of the grievor's conduct on willfully preparing and submitting a false résumé certifying that he had a university degree when he did

union to adduce evidence of pertinent mitigating factors, particularly if it relates to a mitigating factor about which the employer was unaware at the time it made its decision to terminate the employee. Although opinion is divided on this issue, several arbitrators have held that such an assessment may include an evaluation of an employee's behaviour during the period between the date of the discharge and the arbitration hearing. Thus, many arbitrators have explicitly examined and ultimately relied upon the rehabilitative potential of persons who, for example, had seriously threatened, or actually physically abused members of management, or engaged in an act of theft, or even sabotage, or were addicted to gambling, as a basis for substituting a period of suspension for the discharge initially imposed. As well, a positive prognostication as to the rehabilitative potential of an employee who immediately admits his wrongdoing and/or tenders an apology following his misconduct thereby recognizes the impropriety of his behaviour and thus would more likely be capable of conforming to the expected norms, have relied on that fact as a basis on which to ameliorate the discipline imposed. This emphasis on the rehabilitative potential of the grievor seems particularly compelling in those instances when the arbitrator is satisfied that the employer's interest in protecting the integrity of its service can be satisfied by some sanction other than the dismissal of the employee in question.

Conversely, where arbitrators can imply, from the grievor's refusal to admit to a true statement of what must have been the facts, or from refusal to acknowledge the wrongfulness of his conduct, or from his failure to take some positive and substantial step to remedy the cause of his unsatisfactory performance, or refused to comply with company rules by terminating competing employment, or refused to identify an accomplice, or where the resolution of marital problems causing culpable and non-culpable absenteeism appeared unlikely, or where the risk of recidivism appears high, or where the grievor's conduct had poisoned the work environment, what they conceive to be a lack of rehabilitative potential, they have relied upon that as a factor in determining not to exercise their discretionary powers to modify the discipline imposed.

[Emphasis added]

*[See **Ryerson Polytechnical Institute (1976), 12 L.A.C. (2d) 58**, and **District of Burnaby (1983), 11 L.A.C.(3d) 418**, and other cases cited in reference.]*

[137] I agree in principle that there is a duty upon the employer to make an employee aware that a persistence in misconduct may result in discharge. The evidence demonstrates that such a warning was communicated clearly to the grievor. The grievor was warned yet he continued in his misconduct. The grievor himself minimized the seriousness of his actions, even in the face of accusation by the employer that such actions were improper and some which even constituted misrepresentation. Moreover, the employer's policy on Discipline (Exhibit G-15) in paragraph 4.(e) states that "*disciplinary penalty will be determined with regard to the seriousness of the misconduct as it relates to the employer's legitimate interests, and the disciplinary record and rehabilitative potential of the employee*".

[138] The grievor is a courteous and professional person. He is known as a good employee of some 22 years of service and liked by his peers. The grievor does not believe in the wrongfulness of his actions and he maintained this belief during this hearing notwithstanding the evidence against him on his wrongful conduct. Therein lies the problem. Throughout these events and even during the hearing of his grievances, the grievor failed to see the error of his ways in that he believed his conduct to be above reproach. Moreover, the grievor still held this view after being told by his employer that his conduct was improper, and even after having been warned that further actions of misrepresentation would not be tolerated.

[139] This brought me to reflect on the employer's concerns regarding the grievor's continued employment with DND and the employer's concerns in the grievor's future actions at the office. Will the employer be able to place its trust in this employee once again? Can this employee be rehabilitated? Can we assess on the part of the grievor an ability and a willingness to reform or rehabilitate himself so that a satisfactory employment relationship can be re-established? Is the grievor "redeemable"?

[140] The employer is of the view that the grievor's actions have permanently broken the trust the employer held in this once valued employee, and this view is founded upon the grievor's unwillingness to change or reform his actions. I unfortunately share the employer's concerns. I say this particularly in light of his earlier warning in November of 1999 that any future transgressions would be considered as very serious misconduct and met with possible termination. In

addition, concern for the grievor's continued misconduct is exacerbated by the fact that the grievor sought to hire, only a few short months after the employer's warning of November of 1999, the same woman with whom he was embroiled in an unpleasant family maintenance court battle, and against whom he had submitted forged and false information regarding his salary for the court's assessment.

[141] Then the grievor's misdeeds continued. He warned this same employee, Paula Robinson, of the dangers of disclosing their relationship to the employer, and the grievor even took steps to cover up the relationship, and even to deny any wrongdoing when confronted with the situation by his superiors.

[142] The grievor's insistence that his conduct is normal and acceptable is evidenced by his refusal to accept any blame for participating in the exchange of improper personal e-mails and internet messages while at work and for drafting a false résumé, an act which is clearly viewed as wrong as it is misrepresentation. I find it astonishing that anyone would falsify a curriculum vitae but in particular, one whose profession is human resources at the managerial level.

[143] I am left with the impression that if the grievor had not been caught, he would have continued as he had done in the past, for the facts show that the grievor did not chose to correct his behaviour after receiving the written warning of November 1999.

[144] The grievor enjoyed a positive working relationship with his employer for many years, but only until November of 1999 when evidence of the impropriety became known. Even at that point, however, the employer sought to keep the grievor employed and warned him to correct his ways. For all intents and purposes, the grievor would have continued to be employed had he chosen to conduct himself properly. Unfortunately, the grievor chose not to do so.

[145] The grievor was a manager, a position which attracts a high level of trust. He was also a most senior Personnel Officer manager, with delegated authority to provide employment, and charged with being an example to subordinates. He worked without supervision and with much autonomy. Unfortunately, this autonomy allowed the grievor to transgress into types of misconduct not known to his employer. The grievor

was not forthright and in fact misled his employer.

[146] The clear warning by this employer failed to wake in the grievor a sense of rehabilitation. Furthermore, notwithstanding all of which had happened to him, at his testimony before this adjudicator, the grievor could not see the impropriety in his conduct. The Personnel Officer position is one which is performed without supervision, and by virtue of that fact, entails a high degree of trust by the employer, especially in the matter of delegated authority to employ in the public service. While the grievor performed his job well, which was never disputed, his conduct at work placed his employer at risk. I agree with the employer's assessment that trust in this once valued employee was damaged, and that the risk of recidivism is high.

[147] For me to exercise my discretion and impose a lesser penalty in this case would entail reinstating the grievor with a suspension. I am not prepared to so do. The employment relationship with the grievor has been fundamentally breached by his own misconduct, and the employer's perceived breakdown of the trust in this employee is not unreasonable given the facts of this case.

[148] Having said this, however, I cannot overlook important mitigating factors in this case: the grievor's long employment service with DND, his good work record, and the potential difficulties he may face in re-establishing himself in the workplace. I believe that the penalty of discharge is simply too severe a penalty under the circumstances. While I maintain that I cannot return the grievor to his former position, I believe it appropriate to award him six months' compensation in lieu of reinstatement at the rate that the grievor was receiving at the date of his discharge.

[149] On the basis of the foregoing, I uphold the employer's decision to suspend the grievor in the first instance, but I allow the grievance on the termination as indicated above.

Anne E. Bertrand
Board Member

FREDERICTON, March 18, 2002.