Date: 20040909

File: 166-34-32591

Citation: 2004 PSSRB 133

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

LILLIAN SHNEIDMAN

Grievor

and

CANADA CUSTOMS AND REVENUE AGENGY

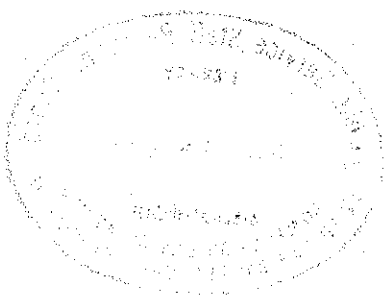
Employer

Before: Evelyne Henry, Board Member

For the Grievor: Glen Chochla, Public Service Alliance of Canada

For the Employer: Lesa Brown, Canada Customs and Revenue Agency

Heard at Toronto, Ontario,
May 25 to 28, 2004 and June 22 and 23, 2004



[1] Lillian Shneidman was employed as a Non-Filer/Registrant Field Officer in the Enforcement and Verification Division of the Toronto North, Tax Services Office (TNTSO) of Canada Customs and Revenue Agency (CCRA). On May 24, 2001, she grieved the termination of her employment, effective May 18, 2001, by letter from the Director of TNTSO, G.A. Troy (Exhibit E-2). The letter reads:

> *On April 10, 2001, you were advised that the investigation into the allegations received against you for making unauthorized accesses and disclosing confidential taxpayer's information to a third party was completed. The investigation conducted by Internal Affairs Division and a review of the Audit Trail Search confirmed that you without authorization, accessed three accounts for a total of 97 times during the period of April 1999 to January 2001.*
>
> *There was (sic) an additional four taxpayer accounts accessed 90 times without authorization and confidential information was disclosed to a third party.*
>
> *During that meeting you demonstrated no remorse and denied these allegations.*
>
> *You were informed at that meeting that a vetted copy of the report would be made available to you and in the interim access to all client information would be suspended and less sensitive duties would be assigned to you. You were also advised that based on the findings, disciplinary action would be taken up to and including termination of employment.*
>
> *On April 23, 2001 you received a vetted copy of the Internal Affairs Division report. You were asked to submit a written statement to management by April 27, 2001 providing facts that management might want to consider prior to issuing disciplinary action.*
>
> *A meeting was held on May 1, 2001 with the Assistant Director, Revenue Collection, once again you did not show any sign of remorse and indicated that the accounts in questions (sic) were part of your workload. Management is of a different opinion. You advised management that no written statement would be provided without access to a full report.*
>
> *On May 3, 2001 a "Protected to View" copy was offered to you, solely for your viewing. You refused this offer and indicated that your requirement was to have access to a full copy of the report for you and your Union Representative prior to submitting anything to management.*

On May 7, 2001 your Union Representative informed management that you made an official request to Access to Information and Privacy Division requesting all documentation related to this situation.

On May 11, 2001, you were given a letter dated May 9, 2001 asking you to provide information by May 15, 2001 so that management could consider (sic) prior to issuing disciplinary action. Your Union Representative stated that the accounts in question were part of your workload and you were strictly doing your job.

On May 15, 2001 you stated in writing to the Assistant Director "until such time as I am given an un-vetted copy of the report and I am allowed to have a union representative present with me during this process, I must respectfully decline to submit my response, in writing".

It is management's position that the only relevant missing information in the report provided to you are the names of the unauthorized accesses in question. Based on the number of accesses and your discussion with the Investigator, it is apparent that you have a full knowledge of this information and your refusal to cooperate with management's request is unacceptable. The Internal Affairs Investigation Report indicates that you did not admit to these accesses until the investigator confronted you with the evidence.

It is my conclusion that you have abused your position as a Non-Filer/Registrant Filed (sic) *Officer by making unauthorized accesses to taxpayer's information without a work related reason. You also misrepresented yourself at a place of business during working hours as an employee on official business. It was further revealed during the Internal Affairs Investigation that you have received monetary compensation for consulting services you provided. You did not disclose your involvement in outside activity as a Consultant. This is a violation of the Conflict of Interests guidelines.*

I find your actions are in violation of Section 241 of the Income Tax Act *and contrary to the Code of Ethics and Conduct established for the employees of the Canada Customs and Revenue Agency. Additionally, your actions constitute a serious breach of trust. You have demonstrated no remorse, continued to deny any wrongdoing and refused to provide (sic) management explanation of your actions.*

Therefore, I am of the opinion that the employee/employer relationship has been irrevocably damaged and as a consequence of your actions, you cannot continue to be employed by the Canada Customs and Revenue Agency. Accordingly, I am terminating your employment effective

> *close of business May 18, 2001. This is in accordance with the authority delegated to me under Section 51(1)(f) of the* Canada Customs and Revenue Agency Act.
>
> *You have the right to grieve this decision within 25 days.*
>
> *Your Compensation Advisor will advise you of any benefits you may be entitled. (sic)*

[2] The employer replied to Ms. Shneidman's grievance on June 26, 2003, and her grievance was referred to adjudication on July 10, 2003. The grievance was scheduled for a hearing on November 24 to 28, 2003; these dates became mediation dates. The matter was rescheduled March 1 to 5, 2004, but postponed to May 25 to 28, 2004.

[3] On May 18, 2004, the bargaining agent raised a preliminary objection claiming that the discharge of the grievor was void *ab initio* and also asking for an order for the production of documents (Exhibit G-2). The letter of May 18, 2004, reads:

> *I write to advise the Board that we will be raising a preliminary objection at the outset of this hearing that the discharge of the grievor was void ab initio because of the employer's failure to comply with Article 17.02 of the collective agreement.*
>
> *Article 17.02 entitles an employee required to attend a disciplinary hearing or meeting to the presence of a union representative if she so requests.*
>
> *In early 2001, at the outset of meetings between the employer and the grievor which led to her discharge, the grievor asked the employer if a union representative could be present. The employer told her that this was not necessary and that a representative would not be entitled to say anything in any event.*
>
> *Following these meetings, the employer produced a vetted "investigation report" in which an enormously large number of sections had been removed. At a disciplinary meeting in or about the month of May 2001, the grievor requested that a copy of the complete report be provided to her and her union representative. This request was refused. The employer did offer the grievor an opportunity to view the complete report, but only if her union representative was not present and only if the grievor agreed not to take any notes during the viewing. At that point, the grievor and her union representative advised the employer that she would be making an Access to Information request, and that any decision regarding discipline await the production of that*

> *information. The employer refused, and proceeded to fire the grievor.*
>
> *We are requesting that the Board hear evidence and argument regarding this objection at the outset of the hearing on May 25, 2004 and rule upon it prior to hearing evidence on the merits of the grievance. Clearly, if the Board allows the objection, the discharge will be void and it will not be necessary any evidence on the merits. (sic)*
>
> *We are also requesting that the Board make an immediate order that the employer provide to the union forthwith the documents which we requested of the employer's representative Lesa Brown via e-mail and fax on May 14, 2004, copies of which are enclosed. We have received no response to this request, despite having left a number of telephone messages for Ms. Brown.*

[4] On the same day, the employer wrote the following letter to the Board:

> ***Re: Lillian Shneidman (166-34-591)*** (sic)
>
> *We are in receipt of the correspondence from the grievor's representative, Mr. Glen Chocla* (sic), *dated May 18, 2004, in which he indicates that he will be making a preliminary objection at the outset of the hearing scheduled May 25 to May 28, 2004.*
>
> *In said correspondence, the Union alleges that there has been a violation of Article 17.02 of the Collective Agreement between PSAC and CCRA. In light of the PSSRB's decisions in Naidu 166-34-30505 and Buchanan 161-2-1199, the Employer will argue that there has been no violation of the above-noted provision.*
>
> *With respect to the Union's allegation that we have neglected to provide them with certain documents which they had requested on May 14, 2004, please be advised that at the outset of the hearing, commencing May 25, 2004, the Employer intends to make representations to the Board in order to protect confidential taxpayer information contained in some of the documents requested. The Employer is reluctant to provide these documents to the Union until such time as the Board has addressed this issue.*

[5] On May 20, 2004, the bargaining agent reiterated its request for an order of production of 19 documents, as listed in its letter.

[6] At the outset of the hearing, on May 25, 2004, the grievor's representative reiterated his request for an order of production of documents. The employer did not

oppose the order as long as steps were taken to protect taxpayers' confidential information. The following steps were agreed to by the grievor's representative in order to protect the unvetted copies of documents that the employer would provide;

- The adjudicator would keep under seal, unvetted copies of documents when produced, accessible only by the parties' representatives, the adjudicator and higher tribunals, should the need arise;

- Vetted copies of documents where taxpayers' names and/or confidential information are protected would be produced along with the unvetted copies as part of the open record;

- At the conclusion of the proceedings, the grievor's representative would return to the employer the unvetted copies of documents containing taxpayers' information

[7] Following the above, I ordered that the employer provide the grievor's representative the documents requested in his letter of May 20, 2004, and those on the list provided at the hearing (Exhibit G-4).

[8] The grievor also requested that I rule on the preliminary motion prior to hearing the case on its merits.

[9] The grievor's position is that the employer violated her substantive rights to union representation when its management representatives, Normand Rodrigue and Sheila Merrick, met with her on March 7, 2001, in the absence of her union representative and when she was denied the opportunity to see and discuss with her union representative, an unvetted copy of Mr. Rodrigue's report which formed the basis for the termination of her employment.

[10] The employer's position is that any procedural unfairness in the disciplinary process can be cured at adjudication. The employer is also of the opinion that it is not within the Board's jurisdiction "to determine the existence of discipline" or if it can be considered void *ab initio.*

[11] For the preliminary motion, the grievor called herself as a witness, as well as her union representatives, Jerry Dee and Gordon Edward Hawkins.

[12] The collective agreement between CCRA and PSAC was entered as Exhibit G-1.

[13] Ms. Shneidman testified that she was told in the morning of March 7, 2001, that she would be meeting with Internal Affairs Investigator, Mr. Normand Rodrigue. At the meeting, Mr. Rodrigue and Ms. Sheila Merrick, her manager, were in attendance. Ms. Shneidman did not ask Ms. Merrick to be in attendance, she had asked Mr. Rodrigue if she should have a union representative present. She was told there was no point since the union representative would not be able to make representations. Since she was uncertain whether she would be able to locate a union representative on such short notice, she attended the meeting.

[14] Ms. Shneidman introduced as Exhibit G-5, a vetted copy of the report by Mr. Rodrigue. She introduced, as Exhibit G-6, incomplete notes taken by Mr. Rodrigue at the meeting and Exhibit G-7, those taken by Ms. Merrick. These documents were obtained following her request on May 3, 2001, for Access to Personal Information pursuant to the *Privacy Act* (ATIP). The documents were introduced solely for the purpose of showing what information was made available to the grievor, and not as proof of their content.

[15] Ms. Shneidman was told that there were serious allegations against her of unauthorized access to taxpayers' information and disclosure of such information. Ms. Shneidman was asked to sign Exhibit E-4 before Mr. Rodrigue started asking any questions. This document is entitled "Rights, Privileges and Cautions". She had asked about union representation prior to signing that document. Ms. Shneidman also obtained other notes, through ATIP, dated March 7, 2001. (Exhibit G-10) Ms. Shneidman stated numerous items were inaccurate about what she said at the meeting. There were items presented to her, which she later found out were false.

[16] Ms. Shneidman stated that she was intimidated by Mr. Rodrigue during the interview, his demeanour changed. She did not have all the information she needed to respond. It was only long after the meeting, when she got documents through ATIP, that she discovered how many errors there were in those reports. For example, Ms. Shneidman referred to page 2 of Exhibit G-7, in reference to question 7; "viewed patient files on stand-alone p.c." It is not accurate. Ms. Shneidman had advised Mr. Rodrigue that there was no information of that kind on the computer, she did not access or view any patient files.

[17] Ms. Shneidman gave several examples of inaccuracies or errors in her statements to Mr. Rodrigue. She was relying on information that was being provided to her, inaccurate information to which she could not respond and for which she was not allowed to prepare adequately.

[18] On March 8, 2001, Ms. Shneidman had another meeting with Mr. Rodrigue between 2:00 pm and 3:15 pm. Exhibit G-11 is one page of notes by Mr. Rodrigue that wasn't shown to her at the time. She obtained this document through ATIP.

[19] Ms. Shneidman also obtained notes by Staff Relations Officer Al McCaie through ATIP (Exhibit G-12). These notes, according to the grievor, confirm that Ms. Shneidman did attempt to amend the notes taken by Mr. Rodrigue and to clarify her statement as she felt she was entitled to do, in accordance with the document she had signed (Exhibit E-4).

[20] Ms. Shneidman denied that she had made certain statements and indicated that when she met with Mr. Rodrigue on March 8, 2001, she retracted some previous statements and clarified some. She told him that she had verified or confirmed some information. Mr. Rodrigue did not make notes of those statements or clarifications.

[21] Ms. Shneidman introduced as Exhibit G-13, a statement provided to her by Stewart M. She provided this statement to CCRA.

[22] Ms. Shneidman obtained through ATIP, a copy of notes by Mr. McCaie, dated April 10, 2001 (Exhibit G-14). These notes were made pursuant to a meeting she had with management on that day. She was told she would receive a vetted copy of the report. She had had no meeting with management between March 8, 2001, and April 10, 2001. Esther Burt was her union representative at the April 10, 2001, meeting. Mr. Dee was not available; the meeting was called on short notice.

[23] Ms. Shneidman obtained through ATIP (Exhibit G-15), a copy of email correspondence between Mr. McCaie and Todd Burke, Senior Staff Relations Advisor in CCRA's national office. This exchange occurred before Ms. Shneidman received a copy of Mr. Rodrigue's report.

[24] Between April 10 and her dismissal on May 18, 2001, Ms. Shneidman's access to the databases, required for her work, was suspended. From thereon her duties consisted of reading manuals. After a while, she was allowed to do the reading from

home. Ms. Shneidman returned to the office only for disciplinary meetings. She met with her union representatives at their office.

[25] Ms. Shneidman introduced other documents she obtained through ATIP. Exhibit G-16 is an exchange of e-mails between Mr. McCaie and Marlene Underwood; a note of April 10, 2001, entitled "Ed Meecham", Exhibit G-17 and an exchange between Mr. Meecham and George Nushis, Exhibit G-18.

[26] Ms. Shneidman introduced notes taken by Mr. McCaie (Exhibit G-19), dated April 23 and May 3, 2001. These notes confirm that Ms. Shneidman was requesting to see the full report by Mr. Rodrigue and that her request was denied. Ms. Shneidman received a vetted copy of the report on April 23, 2001. She could not make sense of the report because of the many blanks in it. She told the employer she could not respond to something she could not read.

[27] The employer offered to give Ms. Shneidman a "Protected to view" opportunity to see the report, meaning that while she could read the report, she could not make notes and her union representative could be present but could not see the report. After discussing this with her union representative, Ms. Shneidman informed the employer this was not satisfactory, she was unwilling to provide comments in writing unless she received full disclosure. She sent a letter to Mr. Collins (Exhibit G-21), on May 15, 2001.

[28] Ms. Shneidman introduced as Exhibit G-22 an exchange of correspondence from Ms. Underwood, that she obtained through ATIP. Exhibits G-23 and G-24 were obtained the same way; they were notes she believes were written by Mr. McCaie.

[29] Ms. Shneidman obtained a copy of a message, from Mr. McCaie to Senior Staff Relations Advisor, Ms. Lesa Brown (Exhibit G-25), and of briefing notes by Ms. Brown, dated June 1, 2001 (Exhibit G-26). Also obtained through ATIP, is a document entitled "Précis" (Exhibit G-27).

[30] Ms. Shneidman introduced, as Exhibit G-28, a letter she received from Don Collins, on May 9, 2001. Her letter of May 15, 2001 (Exhibit G-21) was in response to that letter.

[31] Ms. Shneidman introduced a copy of a letter (Exhibit G-29) from Ms. Underwood to Connie Dick, the ATIP Consultant. Exhibit G-30 are documents Ms. Shneidman

obtained after making a specific request for documents shown to Mr. Rodrigue in preparation of his report.

[32] Exhibit G-31 is a copy of a letter signed by Stewart M. that Ms. Shneidman provided to Mr. Collins during one of the disciplinary meetings.

[33] In cross-examination, Ms. Shneidman agreed there was no mention in her grievance (Exhibit E-1) of her concern that she was not allowed to have union representation. Ms. Shneidman stated that she relied on Mr. Dee for the drafting of the grievance and that she did grieve the report.

[34] Ms. Shneidman stated she never had union representation in the past and did not know her rights.

[35] Ms. Shneidman was assisted by Mr. Dee in composing her letter of May 15, 2001 (Exhibit G-21).

[36] Ms. Shneidman acknowledged her signature on Exhibit E-4, and acknowledged that she had read the document and was aware of the paragraph that read "any information provided by them may be used in a disciplinary process".

[37] Ms. Shneidman stated that Mr. Rodrigue had told her there was no point in bringing a union representative; she was not experienced and assumed he was correct.

[38] Ms. Shneidman reiterated that she had two meetings with Mr. Rodrigue: one on March 7, 2001, and one the next afternoon. She stated it was possible that the meeting of March 8, 2001, was at her request given that she was aware because of Exhibit E-4, that she was entitled to clarify or rectify notes he had taken.

[39] The grievor knew that between her two meetings with Mr. Rodrigue, he had met with Stewart M. Ms. Shneidman could not recall if she did go for lunch or met with Stewart M. on March 8, 2001. Ms. Shneidman stated that she spoke with Stewart M. on the telephone on the evening of March 7, 2001.

[40] Ms. Shneidman attended three or four meetings with management during the period April 9 to May 18, 2001. She had union representation at all those meetings. Mr. Collins and Mr. McCaie were present but Mr. Rodrigue was not at any of those meetings.

[41] Ms. Shneidman made her request of ATIP on May 4, 2001, and received a response approximately two months later.

[42] Mr. Shneidman wrote a letter to Commissioner Rob Wright, on May 29, 2001 (Exhibit E-5). She wrote this letter before she received a response to her ATIP request.

[43] Ms. Shneidman was aware that M. M. was one of the complainants. She felt she had the right to know who all her accusers were. In the vetted copy of the report, there appears to be more than one complainant.

[44] Ms. Shneidman denied that M. M. had called her but agreed that she phoned Yvonne Booth to ask if M. M. had filed a complaint. Ms. Shneidman was apprised of a complaint against her by Stewart M., who played a message from his answering machine in which M. M. boasted about calling CCRA and making a complaint.

[45] The grievor called as a witness, Mr. Dee, President of the Union of Taxation Employees (UTE), local 048. Mr. Dee received a call from Ms. Shneidman in late March 2001, with respect to a meeting called by management. Mr. Dee was assigned the case and became aware it involved Internal Affairs Division (IAD). Ms. Shneidman had come to see Mr. Dee after she received the IAD report (Exhibit G-5) in late April 2001. Mr. Dee had a great deal of problems with the report, mostly with what was excluded from the report.

[46] Mr. Dee believes he met with Ms. Shneidman before his notes of May 1, 2001 (Exhibit G-32). At the May 1, 2001, meeting, Mr. Dee asked about the 200 accesses mentioned in the report, Mr. Collins refused to explain, stating Ms. Shneidman would know what she had said to the investigators. The case presented to Mr. Dee by Ms. Shneidman indicated that she had raised a file in the field.

[47] Mr. Dee advised management that he needed full disclosure of unauthorized accesses and of everything in the report in order for Ms. Shneidman to prepare a competent defence or rebuttal, as they were asking. Mr. Collins refused to provide them with any further information.

[48] After consultation with Gordon Hawkins, Regional Vice-President for UTE, an employee of CCRA, but working full-time for UTE. Mr. Dee advised the employer they were going through an ATIP request and asked that the disciplinary process be stopped until the union got full disclosure.

[49] There were communications between Mr. Dee and Mr. McCaie; Mr. Dee kept asking for a rebuttal. Management's response to Ms. Shneidman's request for disclosure was the termination of her employment.

[50] Mr. Dee did receive a copy of Exhibit G-28, the letter of Mr. Collins to Ms. Shneidman, requesting a written response to the IAD report, prior to May 15, 2001. In this letter, there was an offer to view the report in a "Protected to view" fashion as described in paragraph 27. Mr. Dee considered this unsatisfactory because this was without the right to photocopy or make notes. Mr. Dee was not allowed to view the report with Ms. Shneidman.

[51] Mr. Dee wanted full disclosure because details were required in order for him to know what this was about. Mr. Dee was aware of Exhibits G-13 and G-31, letters from Stewart M. correcting information in the IAD report.

[52] The IAD report indicated that Ms. Shneidman, by her own admission, had disclosed taxpayers' information. This conclusion or allegation was being disputed by the grievor. It was therefore important to know what was in the report.

[53] In his capacity as union representative, Mr. Dee has seen vetted investigation reports before. In many cases, grievors could simply fill in the missing information or the employer simply ascribed a letter or number to it so that it was possible to follow throughout the report. In this report, it was impossible to put the pieces together.

[54] In cross-examination, Mr. Dee stated that Exhibit G-32 were his notes, typed by him, after a meeting with management.

[55] Mr. Dee did not recall a conversation with a Bernice Gorner. Mr. Dee could attend the "Protected to view" meeting but was told he could not review or see the "Protected to view" information.

[56] Mr. Dee disagreed with management's belief that there was little to be gained in waiting for an official response to the ATIP request because there was an opportunity to make a complaint to the Privacy Commissioner and obtain more adequate information.

[57] Gordon Edward Hawkins was Regional Vice-President for the Greater Toronto Region of UTE, a component of Public Service Alliance of Canada (PSAC). As part of his

duties, he chaired the regional Grievance Committee, which comprised representatives from the four locals in his region and himself.

[58] In April and May 2001, he was asked by Mr. Dee to assist him in Ms. Shneidman's case. He first met with Mr. Dee and the grievor after her interview with Mr. Rodrigue but before the issuance of the report. His advice, after discussing the case, was to wait for the report since management had not taken any direct action.

[59] The matter was brought to the Grievance Committee, various options were discussed and it was agreed they would wait for Mr. Rodrigue's report.

[60] Mr. Hawkins was given a copy of Exhibit G-5 almost immediately after he met with Ms. Shneidman and Mr. Dee. His recommendation was that because all was protected, she could not comment until she got a clean copy, one without the "Protected" stamp throughout.

[61] Mr. Hawkins explained how the Grievance Committee worked to avoid frivolous grievances. The grievors are not present at Grievance Committee meetings.

[62] Mr. Hawkins explained that the grievance (Exhibit E-1), was prepared by May 24, 2001, and accepted by the employer on May 31, 2001. The wording of the grievance was likely prepared by the Grievance Committee and signed by Ms. Shneidman on May 24, 2001.

[63] Mr. Hawkins understood that the employer had offered to have Ms. Shneidman look at the report but had advised her that she could not take notes and would have no union representation during her review. This was unacceptable to the union representatives because the matter was a serious one and the employer wanted responses in writing.

[64] A concern of the union was that according to Ms. Shneidman, she had apparently attempted to clarify inaccurate information but that Mr. Rodrigue was not interested in the clarification.

[65] Another concern of the union was that no notes could be taken and no union representative could be present to see the document. Mr. Hawkins felt the union had a right to be there, that it was part of the process of representing. He was interested in the truth and accuracy of statements.

[66] The Grievance Committee discussed the issue and recommended that Ms. Shneidman not attend the "Protected to view" meeting unless she could take notes and have a union representative present. This recommendation was given to Mr. Dee to take back to Ms. Shneidman.

[67] Mr. Hawkins retired in February 2003, he no longer is Regional Vice-President and does not know what happened from there in that case.

[68] In cross-examination, Mr. Hawkins was asked whether he was aware that the union could attend the "Protected to view" meeting but was not entitled to view the document. He replied that he was not.

[69] Mr. Hawkins indicated that approval of the regional Grievance Committee was required to approve the filing of grievances pertaining to the collective agreement.

[70] The regional Grievance Committee had been aware that Ms. Shneidman had some concern about union representation at the meeting with Mr. Rodrigue. For Mr. Hawkins, the union representation started when Ms. Shneidman came to speak to them.

[71] The employer called four witnesses: Donald Collins, Yvonne Booth, Alan McCaie and Normand Rodrigue.

[72] Mr. Collins is Assistant Director of Revenue Collections. He is responsible for 450 people and manages a variety of programs through subordinate section managers. He has been with CCRA for 28 years and in his current position since approximately 1994.

[73] He became involved in Ms. Shneidman's case when he was contacted by Gerry Troy, Director of TNTSO, around April 8 or 9, 2001. Mr. Troy advised that he was in receipt of the report of the Internal Affairs investigation on Ms. Shneidman.

[74] Mr. Collins received an unvetted copy of the report, which he reviewed and clearly understood that the report concluded that Ms. Shneidman had committed serious misconduct. Mr. Collins discussed the report with Staff Relations Officers and referred to the disciplinary policy of CCRA (Exhibit E-6).

[75] Mr. Collins consulted Exhibit E-6 because major misconduct of this nature does not occur often. He reviewed the disciplinary grid established in the policy. Mr. Collins referred on page 3 of the policy to the definitions of "Disciplinary Investigations", "Investigation" and "Misconduct". Mr. Collins pointed to the section entitled "Discipline Administration Process" under "Roles and Responsibilities", part b) "Managers", to the paragraph that reads:

> *Managers will start the **discipline administration process** as soon as possible after there is alleged employee misconduct by:*
>
> - *initiating an **investigation** of any incident, or series of incidents, that could constitute misconduct (the Internal Affairs Division must conduct the investigation in some cases, as noted in the policy on Internal Investigations into Alleged or Suspected Employee Misconduct);*

[76] Mr. Collins also referred to part c) "Investigation Process" and the part entitled "Employee Rights and Obligations".

[77] Mr. Collins looked at Exhibit E-6 after he saw Mr. Rodrigue's report around April 9, 2001. He ensured that a copy of the report was sent for vetting through a Staff Relations Officer, Mr. McCaie. He also took steps to start the process to cancel Ms. Shneidman's access to the computer system.

[78] Mr. Collins asked Staff Relations to arrange a meeting to advise Ms. Shneidman that a report had been received from Internal Affairs and that she should have union representation.

[79] Mr. Collins has also asked Ms. Merrick to contact security to arrange system access denial for Ms. Shneidman.

[80] The meeting with Ms. Shneidman was arranged for April 10, 2001, at 2 p.m.

[81] The above steps were discussed with and approved by the Director of TNTSO. Mr. Troy.

[82] At the April 10, 2001, meeting, Ms. Shneidman was represented by Ms. Burt. He and Mr. McCaie also attended. Mr. Collins advised Ms. Shneidman that he was in receipt of the IAD report and its conclusions indicated serious misconduct. He advised

her that the report had been sent for vetting and once received, a vetted copy of the report would be given to her. Once she received the vetted copy, she would be given time and opportunity to respond to the report in writing. Mr. Collins told Ms. Shneidman that management would be considering disciplinary action up to and including termination. In the meantime, she would be placed on less sensitive duties and all system access would be denied because of the nature of the misconduct.

[83] On April 23, 2001, Ms. Shneidman was provided a vetted copy of the report and was asked to prepare a written response to the report, the conclusions raised, and any factors that should be considered in determining appropriate discipline. She was given until April 27, 2001, to respond. On or just before April 27, 2001, Mr. Dee contacted Staff Relations to ask for an extension.

[84] To the best of Mr. Collins' recollection, there were no witnesses when Ms. Shneidman was given a copy of the vetted report. Mr. Collins gave approval to extend the deadline to May 1, 2001.

[85] On May 1, 2001, there was a meeting with Ms. Shneidman, Mr. Dee, Mr. McCaie and Mr. Collins. Mr. Collins expected to receive a written response to the IAD report but was advised that no written response would be given unless they received an unvetted copy.

[86] There was a lengthy discussion. In summary, Mr. Collins' response was that based on his analysis of the unvetted report, the vetted copy was clear enough for Ms. Shneidman to respond to the four conclusions of the report.

[87] Mr. Collins testified that there were four major conclusions, the first being that there were numerous unauthorized accesses to the complainant's, her husband's and their company or corporation's accounts. Mr. Collins' position was that Ms. Shneidman clearly knew who these individuals were and which company was being referred to.

[88] From the report, it was clear she had a connection with the three entities and their names were discussed with her by IAD. In the report, the names were vetted out.

[89] The second conclusion was based on her own admissions of sharing this information with the complainant's son. This was based on her own testimony to the IAD investigator.

[90] The third conclusion referred to her field visit to the company as a favour to the complainant's son. This was also based on her own testimony.

[91] The fourth major conclusion referred to her doing work on contract and receiving payment for this work from the company of the complainant. This was also based on her own interview.

[92] Through the UTE representative, Ms. Shneidman indicated they would not provide a response without an unvetted copy of the report. Mr. Collins indicated he would investigate what could be done.

[93] Mr. Collins contacted Mr. McCaie and was advised on May 3, 2001, that Ms. Shneidman could be provided an unvetted copy of the report under certain conditions. Only she could see or read the report but no notes were to be taken. Mr. Collins felt it was extremely important that Ms. Shneidman provide a response and anything he should consider before determining what was an appropriate discipline.

[94] Mr. Collins was advised by Mr. McCaie that Ms. Shneidman had refused this offer and would not respond unless she received a copy of the report and her union representative also had access or received a copy. Mr. Collins told Mr. McCaie to advise Ms. Shneidman it was not possible and that the offer stood as given.

[95] Mr. Collins was acting on instructions received from ATIP to Mr. McCaie and to himself.

[96] On May 3, 2001, Mr. Collins was advised by Mr. Dee that an ATIP request for the report had been submitted and he was asking that the disciplinary procedure be delayed until the report was received.

[97] Following a discussion with Mr. McCaie and Director, Mr. Troy, with the information that the ATIP request would result in them receiving a vetted report identical to the one already received, Mr. Collins arranged for a meeting with Mr. Dee and Ms. Shneidman on May 10, 2001.

[98] On May 10, 2001, Mr. Collins provided a letter signed by himself (Exhibit G-28) advising of the steps management had taken and its intention to proceed with appropriate disciplinary action on May 18, 2001. In that letter was a final opportunity

to provide in writing by May 15, any additional information Ms. Shneidman felt should be considered in making the decision.

[99] On May 15, 2001, Mr. Collins received a letter (Exhibit G-21), in which she repeated her refusal to prepare any additional information unless she and her union representative received an unvetted copy of the report.

[100] On May 18, 2001, there was a meeting with Ms. Shneidman and the decision to terminate her employment based on serious misconduct was made.

[101] In cross-examination, Mr. Collins indicated that Ms. Shneidman's response to his offer to view the report in the "Protected to View" fashion, was not communicated to him directly by Ms. Shneidman.

[102] Mr. Collins reiterated that the rules for the "Protected to view" opportunity was subject to the rules that management could live with. She alone could view the report, her union representative could not view it and she could not take notes. Mr. Collins did not want the union representative to see the report.

[103] Mr. Collins had information that the ATIP group that vetted the original copy of the report would be the same group that would respond to the request made by Ms. Shneidman.

[104] Mr. Collins knew what ATIP was going to do, based on his discussions with Mr. McCaie. The ATIP group is located in Ottawa, Mr. Collins believes it is part of the Human Resources Division. Mr. Collins stated that constant requests are received from clients for Access to Information and all documents are sent to the ATIP group. Mr. Collins does not know how the exercise is conducted.

[105] Mr. Collins is not familiar with Todd Burke's name. He did not recall seeing Exhibit G-15 before, the copy of e-mail correspondence between Senior Staff Relations Advisor, Todd Burke and Mr. McCaie.

[106] Mr. Collins spoke with Marlene Underwood on a number of occasions. He discussed possibilities of termination with her because the conclusions of the report warranted termination.

[107] Mr. Collins was at the meeting of April 10, 2001, but did not take the notes in Exhibit G-14.

[108] Mr. Collins did not get a response from the grievor that she had, with respect to the conclusions in the report, a connection with the entities named in it. Mr. Collins did not get, from the grievor personally, any of the admissions mentioned in the report.

[109] Mr. Collins agreed that in looking at Exhibit G-5, there were more than just names lifted from the original document.

[110] When Mr. Collins made the decision to cut off Ms. Shneidman's access to the system, he discussed with her manager, Sheila Merrick, the possibility of having the grievor perform less sensitive duties. Mr. Collins does not recall what those were. He was aware she was at home for parts of the disciplinary period.

[111] Mr. Collins saw letters from Stewart M. (Exhibits G-13 and G-31) prior to Ms. Shneidman's termination of employment.

[112] Mr. Collins saw Exhibit G-5 at the time. Mr. Collins knew that Terri Shultz, ATIP Coordinator, Human Resources, Southern Ontario Regional Office, came under the umbrella of the Regional Headquarter in Ontario. In that office, is the Assistant Commissioner for Ontario. Also in that office is the Director of Human Resources, responsible for all Human Resources activities, including Staff Relations, staffing, ATIP and Pay and Benefits. The Director is Deborah Denis.

[113] Mr. Collins testified that he knows Jerry Dee; he is one of the 450 employees that report to him and he is a full-time union representative. Mr. Collins believes that Mr. Dee works as a technical officer in collections. Mr. Dee has also taken an oath of office.

[114] Mr. Collins would not allow Mr. Dee to see the report because of advice he received from ATIP in April 2001.

[115] In re-examination, Mr. Collins indicated that the Director of TNTSO, Gerry Troy, was the only person in TNTSO who had the delegated authority to terminate employment.

[116] Allan McCaie is a Staff Relations Officer in TNTSO. His duties are to provide advice to management on the interpretation of collective agreements, on discipline and different human resources issues, including training and assisting at grievance hearings. Mr. McCaie has been with CCRA and its predecessor since 1978.

[117] Mr. McCaie contacted Bernice Gorner, the ATIP co-ordinator, concerning Ms. Shneidman's request to view an unvetted copy of Mr. Rodrigue's report. She is assigned to his region and deals with requests from TNTSO for access to information. It was Bernice Gorner who advised Mr. McCaie that only Ms. Shneidman was allowed to see an unvetted copy of the report, that no copies were to be made, and that no notes were to be taken. Ms. Gorner had explained that any taxpayer's information is confidential and not to be disclosed. Mr. McCaie followed her instructions.

[118] In cross-examination, Mr. McCaie admitted that he saw Ms. Shneidman's letter of May 15, 2001 (Exhibit G-21). Mr. McCaie indicated he probably prepared exhibit E-2 but did not sign it. Mr. McCaie would have been the main advisor and would have consulted at the regional and national levels. At the regional level, he consulted with Ms. Underwood and Laurie Wallace. Every time an employee is terminated, support is needed from the national level because grievances are filed at the third level, which is the national level. They make sure they have the support at the national level. Todd Burke works at the national level.

[119] Mr. McCaie knows Jerry Dee. As far as he knows, Mr. Dee is paid by CCRA. He never discussed with Mr. Dee how he is paid when he is on union leave without pay. Mr. McCaie sees a lot of Mr. Dee, almost every day or every second day.

[120] Mr. McCaie has no reason to believe Mr. Dee would be a threat to taxpayers' confidentiality; he was following instructions from Bernice Gorner. Mr. McCaie did ask Ms. Gorner to contact Mr. Dee, to explain the process and the reasons, because she knows the process better.

[121] Yvonne Booth is Executive Assistant to the Director of TNTSO. She receives his phone calls, maintains his filing systems and opens his mail. She routes mail and telephone calls from taxpayers to other people who are the most appropriate to answer them. She schedules the Director's appointments and provides the administrative support for his office.

[122] When a complaint comes to the Director of TNTSO, it does not get to the Director directly, it goes to one of the divisions then up the ladder to him if it is not resolved.

[123] Ms. Booth answers calls and takes information from the taxpayers, on the nature of the problem, and makes notes of all conversations. If it can be resolved in another area, she redirects the call to that area, if she feels it is a serious matter that needs the Director's attention, she brings it to his attention. Her functions usually start with trying to calm the situation with the taxpayer. The next step is for the Director to make the decision regarding where the matter will be handled. Generally, one of the five assistant-directors is assigned to do a fact-finding; there is one for each division. Sometimes, depending on the issue, the assistant-director of Investigation may be asked to do an initial fact-finding.

[124] Ms. Booth became involved in Ms. Shneidman's situation when she received a call on January 19, 2001. It is her practice to make notes while she is on the telephone with the taxpayer. Exhibit E-7 is a copy of the notes she took of a call she received on January 19, 2001, from M. M., at 10:50 a.m. She agreed to speak with Ms. Booth on the condition that the matter would be referred to someone in authority.

[125] Ms. Booth received another call from M. M. at 2:30 p.m. in the afternoon of January 19, 2001. This call was recorded in Exhibit E-8.

[126] At 3:30 p.m. on the same afternoon, Ms. Booth received a call from Ms. Shneidman. Ms. Booth knew Ms. Shneidman from when she worked for the Director of the Non-Registrant Division. Ms. Booth made notes of that call (Exhibit E-9).

[127] Ms. Booth received another call from M. M. on February 16, 2001, at 12:55 p.m. She made notes of that call (Exhibit E-10). This was the last contact she had with M. M.

[128] On January 19, 2001, when she provided the information to Mr. Troy, he made the decision to refer the matter to Director of Investigations, Mr. Don Renaud to do a fact-finding.

[129] In cross-examination, Ms. Booth stated she started officially in her position on July 2, 2000. Prior to that, she was assistant to the Director of Investigations, Don Renaud.

[130] Ms. Booth stated she wrote down her notes when the phone calls came in. She gave all four notes to the Director, Mr. Troy. A file was opened and the notes were placed on it.

[131] Normand Rodrigue is Senior Investigator for IAD, in the Security Directorate in Ottawa. He held the same position in 2001. The purpose of his division is to investigate allegations of wrongdoing on the part of employees. Mr. Rodrigue stated that the type of investigations he does are strictly administrative. When a complaint comes forward from management to IAD, discussions take place between the Director of IAD and whoever is requesting the services. There is no input from the investigator in the decision as to whether or not an investigation will take place. After the decision is made that an investigation will take place, the file is assigned to an investigator, based on workload.

[132] Mr. Rodrigue, when assigned a case, does some research on the information provided and does logistical preparation. He makes initial arrangements with regards to the availability of the persons he needs to interview. During the investigation itself, he may need to see more people. Mr. Rodrigue then proceeds to the location where he will conduct the investigation and interview people. Once his investigation is complete, 1Mr. Rodrigue submits a report to the Director of IAD and the Director General of the Security Branch. If they feel it requires some changes, he is asked to look at their concerns; if he concurs, he makes the changes and eventually signs the report.

[133] Mr. Rodrigue worked for 30 years in the Military Police of the Department of National Defence and has worked for 12 years in IAD.

[134] Mr. Rodrigue was assigned the Lillian Shneidman file on February 28, 2001. The process as described in paragraph 131 occurred with the management of TNTSO. Mr. Rodrigue then analysed the file and proceeded to Toronto to conduct an investigation into allegations of unauthorized accesses on the "RAPI" system, which is the system where information is kept; he does not know what "RAPI" stands for. The case was about unauthorized accesses and possible unauthorized disclosure on the part of Ms. Shneidman.

[135] On the file were some e-mails regarding conversations with the Director of TNTSO, documentation from Don Renaud, Manager of Special Investigation Division.

Prior to sending the file to Mr. Rodrigue, a preliminary investigation was conducted by management and it was determined that there was evidence of unauthorized accesses. There were also notes on the file with regards to the complainant, M. M.

[136] Mr. Rodrigue stated he first contacted Ms. Shneidman on March 6, 2001, from the TNTSO. He cannot recall whether he spoke to her in person or on the telephone. During the conversation, Mr. Rodrigue explained to Ms. Shneidman that he needed to interview her regarding allegations of unauthorized access on the "RAPI" system. To the best of his recollection, Ms. Shneidman was aware there had been a complaint on the part of M. M. Ms. Shneidman was told that "we like to meet her" at 1:00 p.m. on March 7, 2001, in an interview room located within the premises of the Special Investigation Division at TNTSO. He also informed Ms. Shneidman it was up to her if she wanted to have an observer present during the interview.

[137] The following day at 1:00 p.m., or thereabout, Ms. Shneidman reported to the interview room assigned to Mr. Rodrigue. She was alone. In the room was Sheila Merrick, the Manager of Ms. Shneidman's division.

[138] In the initial discussion, Mr. Rodrigue usually goes through the caution. He introduced himself and explained the role of IAD, which is to collect information with regards to allegations of employee wrongdoings. Mr. Rodrigue also explained that the file was randomly assigned to him, that he did not know her or anybody involved prior to the file assignment.

[139] Mr. Rodrigue informed Ms. Shneidman that the purpose of the investigation was to give her an opportunity to explain her accesses of taxpayers' information on the "RAPI" system. He explained that a report would be submitted, that the report would contain no recommendation and that once the investigation was completed, IAD was out of the process. Mr. Rodrigue indicated that there is a form, which basically states what he just described, known as "Cautions and Privileges". Mr. Rodrigue was referring to Exhibit E-4; Ms. Shneidman read and signed Exhibit E-4.

[140] At the outset of the interview, Mr. Rodrigue explained to Ms. Shneidman, that he had made an interview plan and would proceed with the plan, consisting of questions based on information he had gathered during his investigation. If she had additional information to bring forward at the end of the questions they would address them. Mr. Rodrigue cannot recall whether she had questions at the end of the interview. Mr.

Rodrigue did not provide Ms. Shneidman with a copy of his notes. He asked Ms. Shneidman to review the notes taken during the interview by Ms. Merrick. Mr. Rodrigue had given Ms. Merrick a copy of the questions prior to the interview, and asked Ms. Shneidman to read the notes and if changes should be made, they could address them. She initialled the notes and to the best of Mr. Rodrigue's recollection, no changes were made to these notes.

[141] During the interview, Mr. Rodrigue also took rough notes. He explained to Ms. Shneidman that he would take time that evening to rewrite his notes and asked her if she would meet him the following morning to review his notes and initial them.

[142] Mr. Rodrigue stated that Ms. Shneidman complied with his request the following morning and that she made one change that he remembers with regards to the date. She visited Dr. M.'s clinic in Barrie, Ontario that morning, then she reviewed carefully his notes and initialled each page around 9:00 a.m. on March 8, 2001.

[143] Mr. Rodrigue interviewed Stewart M. around 11:00 a.m. that morning, at the TNTSO. That interview lasted 45 minutes. Ms. Shneidman helped coordinate the interview, as Mr. Rodrigue did not know where Stewart M. was living. Mr. Rodrigue does not recall whether it was after the interview on March 7, 2001, or subsequent to his second meeting with her on March 8, 2001, when she came to sign his notes, that they discussed the possibility of Mr. Rodrigue interviewing Stewart M.

[144] The interview with Stewart M. was conducted in another interview room accessible from the public side of the Investigation Division. To the best of Mr. Rodrigue's recollection, he saw Stewart M. and Ms. Shneidman waiting at the elevator.

[145] Mr. Rodrigue had another contact with Ms. Shneidman at approximately 13:30 p.m. that same day. She arrived unannounced at the interview room where he first interviewed her in the Special Investigation Division. This second interview lasted approximately one hour or more. She was alone and so was Mr. Rodrigue. Mr. Rodrigue stated that she wanted to discuss some of the reasons why she had accessed the accounts of the complainant, that of her husband and of their business. She also wanted to reiterate that she had accessed M. M.'s account. Mr. Rodrigue believes that she stated that the access took place on January 21, 2001, though he is unsure. To the best of his recollection, she stated that the access was to confirm to

Stewart M., that payments made to M. M.'s account had been received by the Collection Agents.

[146] Mr. Rodrigue does not recall how the meeting ended, he just took three or four lines of notes, the information or reasons why the accesses were made had been dealt with during the interview. Mr. Rodrigue did not ask Ms. Shneidman to sign these notes.

[147] Mr. Rodrigue does not recall if there was any discussion with Ms. Shneidman with regards to observers at the meeting. It does not matter who sits down as an observer: it can be a friend, co-worker or union representative.

[148] Mr. Rodrigue identified Exhibit G-5 as a vetted version of the report he drafted.

[149] Mr. Rodrigue, in cross-examination, stated that he most likely saw Exhibits E-7, E-8, E-9 and E-10, but is not sure exactly when he saw them. On the file Mr. Rodrigue reviewed, there were some e-mails, some requests for audit trail searches (ATS) with four names identified. The requests were aimed at finding out who had accessed those three or four accounts. The requests wanted to know who had accessed the complainant's account and also that of J.M., of Stewart M. and of B. Rest Home. There was a memorandum sent by management to IAD. He did not have the result of the ATS at the time that he drafted his report.

[150] Mr. Rodrigue obtained the printouts of the ATS when he interviewed Peter Mortenson, on March 6, 2001, at TNTSO, the day before he met Ms. Shneidman. The ATS first came on disk then a printout was made.

[151] Mr. Rodrigue does not recall what notes were on the file before he interviewed Ms. Shneidman.

[152] Mr. Rodrigue had on the file he reviewed, the letter from Mr. Troy to his superior, M. André St-Laurent, dated January 22, 2001 (Exhibit G-30), item 000154. Also, on the file were items 000136, 000137 and 000138 of Exhibit G-30.

[153] To the best of his recollection, Mr. Rodrigue was given items 000129, 000130, 000131, 000132, 000133, 000134, 000135 and 000140, of Exhibit G-30 on March 5, 2001, by M. M.

[154] Mr. Rodrigue identified further documents from Exhibit G-30 that he had prior to his interview with Ms. Shneidman. There were notes of interviews with Yvonne Booth, Peter Mortenson and Sheila Merrick. The notes of the interview with Stewart M. are dated March 8, 2001. Mr. Rodrigue was not involved in interviews that occurred prior to March 5, 2001.

[155] The way Mr. Rodrigue proceeds is to put on the file the notes he takes at interviews. Mr. Rodrigue agrees that prior to the interview with Ms. Shneidman, he was in possession of a lot of information. The documents Mr. Rodrigue trusted the most were the result of the ATS and the testimony of Mr. Mortenson. Mr. Mortenson checked Ms. Shneidman's workload and compared it with accesses and concluded they were not related to her workload.

[156] The purpose of the interview with Ms. Shneidman was to give her the opportunity to explain those accesses.

[157] Regarding Exhibit G-6, Mr. Rodrigue is not sure of the time they were initialled. Mr. Rodrigue wrote the time as 13:30 p.m. on March 7, 2001, because it was the time this information was "transpired" to him during the interview. He did not indicate the time they were being initialled. Mr. Rodrigue remembers that it was the arrangement he had made the previous afternoon. Exhibit G-7 is a copy of the notes taken by Sheila Merrick; Mr. Rodrigue initialled them in the box named "Investigator-Enquêteur". He did not review these as well with Ms. Shneidman on March 8, 2001. They were reviewed immediately after the interview, around 4:30 p.m. on March 7, 2001.

[158] Mr. Rodrigue had Exhibit G-7 when he transcribed his rough notes to Exhibit G-6. Mr. Rodrigue stated he does not have his rough notes; he destroyed them. He would have shredded those notes upon returning to Ottawa.

[159] Mr. Rodrigue writes in a notebook but he did not write the notes related to Ms. Shneidman's interview in his notebook. Mr. Rodrigue keeps a notebook to remind himself who he interviewed, or a specific day, not specific information on who he interviewed.

[160] Mr. Rodrigue cannot say it is impossible that Ms. Shneidman reviewed and initialled his notes on March 7, 2001, but he doubts it.

[161] Mr. Rodrigue saw Stewart M. and Ms. Shneidman at the elevator prior to Stewart M.'s interview. To the best of his recollection, he saw her again with him after the interview. Mr. Rodrigue is sure he saw them together once, he is not sure it was twice. Somebody had to escort Stewart M. out of the building. There was no need to go through the restricted area to get access to the interview room. Mr. Rodrigue did not see Ms. Shneidman and Stewart M. having lunch together. Mr. Rodrigue does not recall a conversation with Mr. McCaie, noted in Exhibit G-12. He has no problem agreeing that he may have said what is stated, given that they left together around noon. Mr. Rodrigue does not recall that he said to Mr. McCaie that Ms. Shneidman's story was totally different. Until presented with Exhibit G-12, Mr. Rodrigue had no recollection of a conversation with Mr. McCaie.

[162] When told that Ms. Shneidman's evidence was that she did try to make a correction to what she told him, Mr. Rodrigue stated that he took notes of what he felt was relevant to the purpose of the investigation.

[163] Mr. Rodrigue does not recollect that Ms. Shneidman told him that she did not disclose nor could have disclosed information on M. M.'s account. He disputes Ms. Shneidman's evidence that she did not disclose or could not have disclosed M. M.'s information to Stewart M. Mr. Rodrigue agrees that he definitely said the role of an observer is to not say anything.

[164] In rebuttal, Ms. Shneidman testified that to the best of her recollection, she reviewed and initialled Mr. Rodrigue's notes at the same time as those of Ms. Merrick in the afternoon of March 7, 2001. In the afternoon of March 8, 2001, Mr. Rodrigue did not provide her with the opportunity to review or initial his notes when she made corrections.

[165] Ms. Shneidman did not have the opportunity to review or initial Mr. Rodrigue's notes in Exhibit G-11. When Ms. Shneidman wanted to correct her previous statement, Mr. Rodrigue was not writing anything down. She wanted it to be official. She had to instruct him to write it down but she never did get to see what he wrote down.

[166] Mr. Rodrigue had commented to her that he had a notebook when Ms. Shneidman was interviewed and explained the procedures within her department. Mr. Rodrigue had commented that he felt that the rules were too lax there and had showed her his notebook, which resembles a small police notebook, that investigators

carry with them. He told her at the time that he had to keep a detailed log and submit it to his manager in case there were any questions about the investigation.

[167] Ms. Shneidman stated that Exhibit G-11 does not reflect what she had in fact told Mr. Rodrigue.

[168] Ms. Shneidman does not recall who initiated the meeting on March 8, 2001. She did not bring anyone with her and did not ask to see the record.

Grievor's Submission on Preliminary Motion

Grievor's Argument

[169] The grievor quoted clause 17.02:

> ***17.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.*

and stated that there are two issues in relation to this clause. The first issue is did the grievor request union representation?

[170] There are two events where union representation is in question. The meeting of March 7, 2001, and the subsequent meetings in April and May 2001, when she wanted an unvetted copy of the report so she could respond to it.

[171] There is not much issue about wanting union representation in relation to seeing the report. But on March 7 and 8, 2001, there is arguably an issue as to whether she specifically requested union representation. She asked: "Should I have union representation?" It is uncontradicted by Mr. Rodrigue that he replied: "No point, they would not be able to participate anyway." Mr. Rodrigue's evidence basically confirms that. He was very clear that a union representative could only observe and not say anything.

[172] The grievor argued that Ms. Shneidman's testimony was unchallenged, that she found out about the meeting in the morning of the meeting. Clause 17.02 states:

> *"Where practicable, the employee shall receive a minimum of one day's notice ..."*

[173] Mr. Rodrigue's evidence matches the content of Exhibit E-4, which discusses union representation rights in the "Rights, Privileges and Cautions" document. What exists here is a policy reiterated by Mr. Rodrigue on March 7, 2001. According to the policy, there is no union representation allowed when a meeting of the nature of the March 7, 2001, interview occurs. There is no point in asking for union representation, it will not be allowed. The grievor argued that the answer should have been that it was to the grievor's and management's benefit to have a union representative present.

[174] For the employer to say that union representation was not requested because the grievor was not emphatic, runs counter to a principle that should be sacrosanct. There is a blanket refusal of union representation in this workplace, even if a request had not been made. However, in this case, there was a pretty clear request: "Should I have a union representative?"

[175] The second issue to address is whether the meeting of March 7 and 8, 2001, was a disciplinary hearing within the meaning of clause 17.02.

[176] Mr. Rodrigue, by his own admission, already had a significant amount of information. The situation was serious; several unauthorized accesses from the reports of a Mr. Peter Mortenson. Mr. Rodrigue had interviewed a number of people: including M.M. and Peter Mortenson. He had records of interviews for Yvonne Booth, M. M.'s notes, S. H.'s notes, telephone conversations with Head Nurse M. It is not known if he had spoken to D. E. In the context of all the other information Mr. Rodrigue had received, the allegations were serious, the tone was disciplinary and according to Ms. Shneidman, his demeanour changed once the meeting started, and she then felt intimidated. The evidence showed that when Mr. Rodrigue's investigation was completed, discipline was imposed. In April 2001, what occurred in effect was a suspension with pay. Exhibits G-17 and G-18 show that Ms. Shneidman was cut off from normal work duties, she was suspended from access to the database and from her job of non-filer agent. Don Collins admitted in cross-examination that Ms. Shneidman needed access to the database to do investigations.

[177] Another important point is that, if the meeting of March 7 and 8, 2001, was not disciplinary, the employer would not have suspended nor made the decision to terminate employment on the basis of its report.

[178] Exhibit G-14, which are Mr. McCaie's notes of the April 10, 2001, meeting, where Don Collins and Al McCaie met the grievor state: "Don Collins advised her that the investigation was finalized and the allegations were serious. Disciplinary action will be imposed and could include termination of employment."

[179] The employer had already made up its mind. How can a meeting not be a disciplinary meeting when the central piece of the decision taken was the report of the meeting?

[180] Exhibit G-15 is dated April 18, 2001, and was written prior to the grievor receiving the report. In it, Mr. Burke responds to Mr. McCaie and says: "As you and I discussed earlier, I read the IAD report and the attached document in the e-mail below. I will fully support a termination at the final level based on the results of the IAD report."

[181] Another issue is the employer's initial refusal, on April 23, 2001, to permit the grievor to see the unvetted copy of the report. The employer then changed its mind and allowed the grievor to see an unvetted copy of the report but did not allow the union representative to see it. How could the grievor have advice from her union representatives without their seeing the report?

[182] Evidence from Jerry Dee, Gordon Hawkins and the grievor, is to the effect that it is impossible to respond to the vetted report. Mr. Dee stated he had seen other IAD reports and been able to put pieces together but could not do it with the report in this case.

[183] Mr. Hawkins and Mr. Dee raised the issue with the Grievance Committee and their conclusion was that the grievor should not view the unvetted report unless her union representative had access.

[184] It is important to note that the employer was doing the same thing that Mr. Rodrigue did on March 7, 2001. The evidence of Mr. Collins was that he was "OK" with allowing the union representative to be in the same room but not see the report. He agreed to allowing the union representative to observe but not participate.

[185] This presence without participation puts "a stake in heart of the sacrosanct principle of collective bargaining"; that relationship when employees democratically

decide to have a union represent them and then a collective agreement between the employer and the employees comes to exist.

[186] Arbitrators say that the only remedy is to void the discipline when that principle of the right to union representation is violated.

[187] There is evidence that Jerry Dee did make a request to delay the discipline to permit the grievor and the union to request an unvetted report from ATIP. The hearsay evidence of the employer that somebody in ATIP was saying that Human Resources cannot provide an unvetted copy to the union is a red herring. The employer could have had ATIP provide evidence of applicable legislation and regulations that support this position if it exists. The employer did not.

[188] Mr McCaie's answers were revealing to the questions about confidentiality and whether Mr. Dee could be bound by confidentiality. Mr. McCaie had no reason to believe that Mr. Dee would have disclosed taxpayers' information. He is an employee of CCRA, although a full-time local union president.

[189] With regard to the appropriate remedy, it is not necessary to get into the question of prejudice to the grievor and to labour relations. The collective agreement is the legal basis for the remedy. Clause 9.01 establishes the legal relationship. This clause has a similar effect to subsection 41(1) of the Act.

> ***41.*** *(1) Where an employee organization is certified under this Act as the bargaining agent for a bargaining unit, the employee organization has the exclusive right under this Act*
>
> *(a) to bargain collectively on behalf of employees in the bargaining unit and to bind them by a collective agreement until its certification in respect of the bargaining unit is revoked; and*
>
> *(b) to represent, in accordance with this Act, an employee in the presentation or reference to adjudication of a grievance relating to the interpretation or application of a collective agreement or arbitral award applying to the bargaining unit to which the employee belongs.*

[190] subsection 8(1) of the Act reads:

> ***8.*** *(1) No person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall participate in or interfere with the formation*

> *or administration of an employee organization or the representation of employees by such an organization.*

[191] The grievor refers to the decision in *Wendy Evans*, PSSRB file 166-02-25641 (1994), the only decision on point. The adjudicator talks about the principles and remedy when substantive rights to representation are breached. The grievor cited the facts of that case from page 6. The language of the collective agreement is similar to the present case, although not the same.

[192] The adjudicator, in his reasons for decision, cites on page 9 the principle recognized by Kevin Burkett in the *Hickeson-Langs Supply Co. and Teamsters Union, Local 419 (1985), 19 L.A.C. (3d) 379* and an article by Mervin Chertkow, cited on page 10: the grievor reads from page 10 of *Wendy Evans* (supra) a citation from Lord Denning:

> *"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses..."*

[193] With respect to the issue of prejudice, the grievor was unable to recall adequately the events surrounding the allegations of disclosure of taxpayers' information when meeting with Mr. Rodrigue. After she left, she spoke with Stewart M. and realized the information was not correct. When she went back to Mr. Rodrigue to correct it, he refused to note her corrections. On June 20, 2001, Mr. Rodrigue informed Mr. McCaie that the day following the meeting, the grievor had returned to change her story. Had there been union representation on March 7 and 8, 2001, this kind of confusion might have been avoided.

[194] Union representation is for the integrity of the procedure, as much for the protection of the employer as that of the employee.

[195] The grievor testified that Mr. Rodrigue had given her documents that she could not respond to properly. That is just one example to illustrate that she was not allowed to properly prepare her defence.

[196] It may be that Mr. Rodrigue may never have come to the conclusion he did, if Ms. Shneidman had added anything to her statement. Exhibit G-11, the notes from the March 8, 2001, meeting, were not shown to Ms. Shneidman. If a union representative

had been present, they would have been shown and there would have been copies made.

[197] Exhibit G-10, obtained from ATIP, are notes dated March 7, 2001; the author was not identified. Exhibits G-6 and G-7 are copies, which should have been given to Ms. Shneidman at the time but were not.

[198] The grievor raised the above issues to show concretely what the adjudicator was referring to in *Wendy Evans* (supra).

[199] The grievor also cited the decision Re *Riverdale Hospital and C.U.P.E., loc. 79 (Reyes)* (2000) 93 L.A.C. (4th) 195. An employee was sent home. There should have been union representation at that point as the collective agreement provided that the employer notify an employee of his right to union representation in advance of suspension or discharge. In the present case, the employee asked for union representation on March 7, 2001, when she was asked to meet Mr. Rodrigue. It was the employer's mistake in not notifying the grievor of her right to representation. The union cited from the *Riverdale* (supra), decision, page 6 at the bottom, which reads as follows:

> *Even in hindsight, in the relative calm of a hearing room or in an arbitrator's peaceful contemplation, it can be difficult to discern where an investigatory process ends and a disciplinary process begins. Indeed, I suggest that it is neither possible nor useful to try to draw such a distinction even in hindsight. Investigations are conducted because an employer is concerned that something is amiss. An investigation may satisfy the employer that there is nothing to be concerned about, or it may indicate the contrary. Paranoid employers are the exception, and experience suggests that more often than not, an investigation confirms an employer's suspicion that there is cause for concern, which in the real world generally translates into negative consequences for the employee who is the subject of the sort of investigation under consideration. Who possesses a crystal ball that accurately predicts the result of an investigation (which crystal ball would make the investigation unnecessary)? To ask that question is to answer it. The fact is that an investigatory process is inherently part of a disciplinary continuum.*

[200] In the present case, we have to keep in mind that the employer made its decision to discipline on the basis of Mr. Rodrigue's report. The remedy must also be to void the decision. As stated on page 8:

> *"It is also well established that the alleged violation of a union representation clause need not be specifically "pleaded" in a grievance, or even raised in the grievance procedure."*

It is too fundamental an issue; it has to be done.

[201] The issue in *Riverdale* (supra), was that of notification and, like here, there was a violation of the collective agreement, because the investigatory process was found to be part of the disciplinary process. The interview with Mr. Rodrigue was the disciplinary investigation.

[202] The grievor also referred to *Medis Health and Pharmaceutical Services and Teamsters, Chemicals and Allied Workers, Loc. 424 (Satar) (Re)* (2001) 100 L.A.C. (4th) 178. This case turned on the requirement to have union representation when being disciplined. A violation of the collective agreement was found when the employer met with employees after videotaping them and concluding that theft was occurring. The arbitrator found that the initial meeting to obtain confessions from employees triggered the right to union representation. Even though they were not terminated right away, they were later terminated on the basis of what they said during the interview and on the basis of the videotape surveillance. The grievor cited pages 7 and 9 of the decision, as well as pages 13 and 14. From this case, it can be seen that the right to union representation is so fundamental that the only remedy in the event of a violation is to render the discipline void *ab initio.*

[203] The grievor referred to *Axis Logistics Inc. and U.F.C.W., loc. 175 (Horwood) (Re) (2000)* 87 L.A.C. (4th) 100, where the article referred to on page 2, is not much different from the collective agreement article in question here. The grievor cited pages 10 and 11 of the decision. At page 11 the arbitrator stated:

> *"I am satisfied that the employer considered the grievor's statement in his second interview with Mr. Tidy on September 6, when it reached the conclusion that the grievor had been negligent in operating the forklift, and that the interview formed part of the employer's decision to dismiss the grievor."*

[204] In the case at hand, in the IAD report (Exhibit G-5), at the bottom of page 000011, it is clear that things Ms. Shneidman said were used against her. On the next

page, (00012), in the first paragraph, Mr. Rodrigue goes on to talk about contradictions. In the second and third paragraphs, there is also reference to statements of the grievor. At the bottom of the same page, under "Investigator's Conclusion", the second last paragraph reads: "Based on the same information, Lillian Shneidman disclosed confidential tax information related to the accounts of ..." In the last paragraph, it states: "By her own admission, Lillian Shneidman visited ..."

[205] It is the grievor's position that this interview was not just investigatory but formed part of the decision to terminate. This was like the situation in *Axis Logistics* (supra) and a little different from the *Riverdale* (supra) case.

[206] The grievor finally referred to *Re Toronto (City) and C.U.P.E., loc. 79 (Nzeakor)*,(1995), 47 L.A.C. (4th) 197, and, citing from page 8, referred me to a partial quote from Brown and Beatty, "Canadian Labour Arbitration", para. 7: 2100:

> *"Within this framework, many arbitrators have tended to construe provisions, which call for the attendance of union representatives at disciplinary meetings, where employees are either confronted with allegations of misconduct or notified of the imposition of some disciplinary penalty, as being substantive and mandatory in nature."*

The grievor then referred to pages 9 and 11, where it was found that the employer could not argue that the grievor had waived his right to representation as the waiver had to be very explicit.

[207] The grievor then asked that I remain seized for the implementation of all remedies mentioned in the grievance (Exhibit E-1) or in the event that the employer should argue that the grievor had failed to mitigate.

[208] The grievor reiterated the request for a ruling on the preliminary motion because its case on the violation of union rights was clear and the employer's breach was flagrant. To spend any more time on this case was difficult to justify. It was unclear when the issue of the merits could be heard. A number of documents remained outstanding, as the employer had yet to disclose them to the grievor. Disclosure of documents would have to be worked out before the bargaining agent and the grievor could proceed on the merits.

[209] The present case is not one where a trial *de novo* would be the right way to go. It is substantive rights that were breached not merely procedural rights. This is a case that absolutely cries out for determination of the preliminary motion.

Submissions for the Employer

[210] The employer also urged me to give a ruling on the preliminary motion of the grievor. My decision could potentially impact not only on how CCRA conducts its investigation but also on the entire public service.

[211] To date, the PSSRB has been clear that administrative investigations do not trigger an entitlement to union representation. To rule against this principle, well established in PSSRB jurisprudence, would have a significant impact.

[212] I am urged to rule on the preliminary objection, prior to the commencement of the hearing on the merits, in order to assist the employer to put forward its case.

[213] The Employer submits that on the face of the termination grievance (Exhibit E-1) there is no reference to any violation of the collective agreement. A violation of a collective agreement provision is adjudicable and would be before me if it had been grieved. There were other grievances filed but they are not here, there is only one grievance at adjudication here and it is not concerned with a violation of the collective agreement.

[214] Ms. Shneidman stated in cross-examination that it was Mr. Dee who drafted the grievance presentation form. It was he who prepared its appendix "A". If we look back at Exhibit G-21, which was a letter to management regarding the "Protected to view" issue, Ms. Shneidman addressed the issue of union representation.

[215] Mr. Gordon Hawkins, a very experienced union representative, testified that this grievance was referred, for its stamp of approval, to the regional Grievance Committee, before it was presented to the employer. It did not occur to Mr. Hawkins or the Grievance Committee to refer to the issue of union representation before they gave Ms. Shneidman's grievance the stamp of approval to proceed.

[216] There could have been grounds for grievance or for an amendment to the grievance at adjudication but also for a potential section 23 complaint under the PSSRA. The employer submitted that I am without jurisdiction to consider a section 23

complaint at this point because only the bargaining agent could file such a complaint, not an individual grievor such as Ms. Shneidman.

[217] In this regard, the employer refers to *Buchanan v. Correctional Service of Canada*, 2001 PSSRB 128, at paragraph 12:

> *Mr. Buchanan's complaint raises a serious concern as to the Board's jurisdiction to hear it. Indeed, the alleged omissions forming the complaint relate to the right of an employee to be represented during a disciplinary investigation. In* Reekie v. Thomson, *supra, the Board found that subsection 8(1) of the Act protects the right of an employee organization, not that of an employee, against the employer's interference and that only an employee organization or an official representative of an employee organization, can complain of the employer's failure to observe that right. That decision was followed in* Czmola v. Garwood-Filbert *(Board files 161-2-938, 939, 942 and 953),* Feldsted v. Treasury Board and Correctional Service of Canada (supra) and Feldsted v. Public Service Alliance of Canada and Union of Solicitor General Employees *(sic) (Board files 161-2-945, 946 and 955), where the Board found that:*
>
> ...
>
> *... it is clear upon reading subsections 23(1) and 8(1) of the PSSRA that only an employee organization or a person acting on its behalf has the statutory authority to bring a complaint alleging employer interference in the affairs of the employee organization. I fully agree with the findings of Board member Turner in the* Reekie *case (supra).*
>
> ...

[218] The employer submits that if the bargaining agent was remiss in not filing the appropriate grievance or section 23 complaint, Ms. Shneidman has a recourse against her bargaining agent. It is a matter between the grievor and her bargaining agent and is not the issue here.

[219] With respect to the issue of changing the grievance at adjudication, the Federal Court was very clear in *James Francis Burchill v. Attorney General of Canada,* [1981] I F.C. 109 (F.C.A.), at paragraph 5:

> *In our view, it was not open to the applicant, after losing at the final level of the grievance procedure the only grievance presented, either to refer a new or different grievance to adjudication or to turn the grievance so presented into a grievance complaining of disciplinary action leading to discharge within the meaning of subsection 91(1). Under that provision it is only a grievance that has been presented and dealt with under section 90 and that falls within the limits of paragraph 91(1)(a) or (b) that may be referred to adjudication. In our view the applicant having failed to set out in his grievance the complaint upon which he sought to rely before the Adjudicator, namely, that his being laid off was really a camouflaged disciplinary action, the foundation for clothing the Adjudicator with jurisdiction under subsection 91(1) was not laid. Consequently, he had no such jurisdiction.*

[220] In the recent case of *Schofield v. Canada (Attorney General)*, 2004 FC 622, the principles in *Burchill* (supra) were restated at paragraph 10:

> *Pursuant to section 92 of the PSSRA, an Adjudicator's authority is limited to considering a grievance which formed part of the internal grievance procedures.*

[221] The employer then referred to the decision in *Todd Boyce*, 2004 PSSRB 39 at page 12, paragraph 65:

> *[65] Mr. Rochon also raised, at the hearing, the fact that Mr. Boyce was not given an opportunity to have union representation. There was no grievance filed alleging a breach of the union representation article of the collective agreement. Therefore, I am without jurisdiction to rule on this allegation. I note, however, that since there was no evidence that the meeting related to disciplinary matters, the article would not have been applicable in any event.*

[222] Similarly in the present case, no grievance was filed alleging a breach of clause 17.02. The issue of union representation was in the minds of the grievor and the union representatives prior to the filing of this grievance yet no reference was made to the issue in the grievance presentation form. Additionally, no section 23 complaint was filed by the bargaining agent, and the employer therefore submits I am without jurisdiction to rule on this allegation.

[223] The employer submits that should I decide to take jurisdiction on this issue, that I take a good look at clause 17.02. There are a couple of criteria in clause 17.02. The first is that the employee be required to attend a meeting of which purpose is to

conduct a disciplinary hearing or render a disciplinary decision. The second criteria is that the employee request union representation.

[224] It is the employer's position that the interview with Ms. Shneidman was not a disciplinary hearing and secondly, there was no request for union representation.

[225] Mr. Rodrigue stated he had no role in the discipline imposed on Ms. Shneidman. The fact is as stated by Mr. Collins; the only person with the delegated authority to terminate employees at TNTSO is the Director.

[226] The employer is entitled to perform fact-finding. The purpose of the meeting with the grievor was to gather the facts. The employer had received a taxpayer's complaint about unauthorized access. Mr. Rodrigue met with other witnesses to obtain information from them in the same vein that he met with Ms. Shneidman. Mr. Rodrigue testified he contacted Ms. Shneidman on March 6, 2001, and advised her she could bring an observer. On March 7, 2001, Ms. Shneidman testified she reviewed and signed the caution which advised her she had a right to an observer. In cross-examination, Ms. Shneidman said that Mr. Rodrigue did not tell her she was prohibited from bringing a union representative. The grievor had an opportunity between her conversation with Mr. Rodrigue on March 6, 2001, and the meeting on March 7, 2001, to choose, obtain and bring an observer, if she wished.

[227] In fact, Sheila Merrick, the grievor's line manager, was at the meeting. The employer submits that we heard undisputed evidence from Mr. Collins that it was he and Mr. Troy who were the decision-makers on the issue of discipline.

[228] It was partly on the basis of information gathered at the March 7 meeting, but also partly on the basis of the IAD report as a whole that discipline was imposed. There has been no allegation of denial of representation of other witnesses or that their statements were tainted. There was, additionally, the ATS report.

[229] Ms. Shneidman testified she attended three or four meetings with management, specifically with Mr. Collins in April and May 2001. She had her union representative at each of those meetings.

[230] The union has alleged there was a suspension with pay regarding the fact that the grievor's system access had been removed. There was no grievance filed on this issue so the issue is not before me. Mr. Collins stated it was normal procedure to

suspend access to the system, in a case of allegations of unauthorized accesses, which CCRA views as serious. In addition, such allegations are allegations of the commission of a criminal offence, under section 241 of the *Income Tax Act*. The grievor was not charged, as far as the employer was aware.

[231] With respect to the second meeting with Mr. Rodrigue, the afternoon of March 8, 2001, it was Mr. Rodrigue's evidence that it was held at the grievor's request. The grievor, in cross-examination, stated it was possible she initiated the meeting. Ms. Shneidman could have brought an observer with her to this meeting but she stated she came alone.

[232] Mr. Hawkins's evidence was that, subsequent to the grievor's interview with Mr. Rodrigue, they were not in a position to take any action as management had not taken any direct action against Ms. Shneidman. The employer submitted that in the public service, there is a clear distinction between the administrative investigation process and subsequent disciplinary decisions.

[233] The employer acknowledged that the investigation was material to the discipline eventually imposed on the grievor but the investigator did not make a decision on the discipline to be imposed. The employer submitted there was no specific language in either the collective agreement or the PSSRA, which grants employees the right to representation when management calls employees to a meeting to answer questions regarding an employee's conduct in the course of employment.

[234] The bargaining agent has argued that the employer promulgated a policy regarding union representation during investigations, a policy reiterated by Mr. Rodrigue. In fact, the bargaining agent made the same argument in *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124. The employer cited page 3, paragraphs 2, 3 and 4, and then referred to page 16. The first paragraph of the "Reasons for Decision", reads as follows:

> 1. *Does an employee have a right to representation during the investigation of wrongdoing by the employer..."*

[235] For the answer to this issue, the employer then referred to paragraphs 78 to 80 on page 17, to paragraphs 82, 83 and 86, on pages 19 and 20.

[236] The position of the employer is that the wording of the collective agreement article in question in *Naidu* (supra) is very similar to the wording in clause 17.02. In *Buchanan* (supra), at paragraph 15, the adjudicator states:

> *In any event, with regards to the merits of Mr. Buchanan's complaint, I would like to stress that, under the Act, the P.S.S.R.B. Regulations and Rules of Procedure, 1993 and standard clauses of collective agreements, an employee does not have a right to representation during a disciplinary investigation: Naidu, 2001 PSSRB 124 (166-34-30505) paras. 71-86.*

[237] The grievor will refer to clause 17.02 as being different from the language in *Naidu* (supra) but paragraph 15 in *Buchanan* (supra) deals with this argument. Mr. Tarte, in *Buchanan* (supra), states the PSSRB's position with respect to the right to representation during an investigation.

[238] Moving to the "Protected to view" issue, again the employer suggests the meeting with Mr. Rodrigue was not for the purpose of discipline. Rather, it was management's attempt to address concerns raised by the grievor with respect to the readability of the report, there was no discipline to be imposed at the meeting, and there was no discussion. The meeting was meant to give Ms. Shneidman an opportunity to view the unvetted document.

[239] Mr. Dee testified he was not prevented from attending the "Protected to view" meeting, but he could not see the protected information. Practically speaking, this is somewhat of a moot issue since the evidence is that no such meeting was held.

[240] With regards to *Wendy Evans* (supra), the employer submits this is the only PSSRB decision where termination was declared void a*b initio* for lack of union representation. The *Wendy Evans* (supra) case is clearly distinguishable on 5 key points. In *Wendy Evans* (supra), the grievor alleged contravention of the collective agreement in the grievance presentation form. The meeting at issue, called by management, was a disciplinary meeting with the individual possessing the delegated authority to terminate employment. Thirdly, Ms. Evans specifically expressed the request that a representative participate in the meeting. Fourth, at this meeting, management told the grievor she would be terminated if she did not resign. Finally, in *Wendy Evans* (supra), it is clear that management, at the meeting, had already taken the decision to terminate.

[241] The employer then referred to *Tipple and Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File 166-2-14758 (1985) (QL) and referred to the third paragraph on page 12 and to pages 14, 15 and 16. This PSSRB case made its way to the Federal Court of Appeal in *Tipple and Treasury Board (Revenue Canada, Customs and Excise)*, [1985] F.C.J. No 818 (F.C.A.) where judge Urie stated:

> *Assuming that there was procedural unfairness in obtaining the statements taken from the Applicant by his superiors (an assumption upon which we have considerable doubt) that unfairness was wholly cured by the hearing de* de novo *before the Adjudicator at which the Applicant had full notice of the allegations against him and full opportunity to respond to them. In particular, it was no error of law for the Adjudicator to give such weight as he thought right to those statements which were, in our view, properly admitted in evidence by him. The section 28 application will be dismissed.*

[242] The employer submits that in the event I find there was procedural unfairness in the way in which Ms. Shneidman's interview was conducted or with respect to the "Protected to view" session, such procedural unfairness is wholly cured by a trial *de novo*, as stated by the Federal Court of Appeal in the *Tipple* (supra) decision.

[243] Going back to the L.A.C. cases cited by the grievor, they can be distinguished on the basis that they are a group of cases that came from another jurisdiction. They are not cases decided by the PSSRB. It is clear they are not applicable as is evidenced by the fact that there is only one decision in the PSSRB jurisdiction where termination was declared void *ab initio* on the issue of union representation. In the past, the PSSRB has put little, if any, weight on L.A.C. jurisprudence on this issue. There is no reason to depart from this position here.

[244] In the *Corporation of the City of Toronto* (supra), the interviewing was conducted between the grievor, management consultants and the Director, the same individuals who imposed discipline on the grievor.

[245] In *Medis* (supra) at page 7, is reproduced clause 10.01 of the collective agreement in that case. The language of that provision is different and stronger than the provision here. It says "will be accompanied by the employee's shop steward"...

[246] In summary, the employer argues that to rule on the issue of denial of union representation when it was not grieved would be to exceed my jurisdiction.

[247] If there was jurisdiction, the employer submits that the meetings of March 7 and 8, 2001, were not disciplinary.

[248] In the public service, in departments under PSSRA and *Financial Administration Act* jurisdiction, the specific authority for management to discipline is found in legislation. This authority is delegated to specific managers and that is what distinguishes this case from the L.A.C. case law submitted by the grievor dealing with different legislations and different legal frameworks.

[249] Mr. Rodrigue is not in the business of managing or disciplining, his business is fact-finding. As stated earlier, at no time was the grievor prohibited from bringing an observer to the March 7 and 8, 2001, meetings.

[250] In the event that the meetings were found to be disciplinary and therefore, covered by clause 17.02, the employer submits that any procedural unfairness can be remedied by a trial *de novo*, any remedy that may be granted should be proportional and directly linked to the breach alleged.

[251] The employer submits that to exclude the entire report and statements of witnesses would be disproportionate since if there was any procedural unfairness, it relates only to the meeting between Mr. Rodrigue and the grievor.

[252] At the end of the day, there is no basis for the grievor's claim that the termination be declared void *ab initio*.

Reply Submissions of the Grievor

[253] The grievor disagrees with the employer's position. The rights of employees in the public service are the same as those in the public sector. The *PSSRA* provides the same language as other legislations with regard to the exclusivity of the relationship between unions and employers. When the language in collective agreements is the same in and out of the public service, the rights are the same.

[254] In *Wendy Evans* (supra), which is the only case where the PSSRB dealt with the issue of the same fundamental principle, the result was the same as the union's position in this case.

[255] The issue here is not about procedural fairness, as it was in *Tipple* (supra), it is about the fundamental right to representation. It is not about whether an interview was conducted properly but about the violation of a fundamental right.

[256] The grievor may have misread *Wendy Evans* (supra) but there is nothing in that decision that says she filed a grievance on the issue of representation. The employer is mixing up the issue when it states that the grievor had to file a grievance when her due process rights were violated.

[257] With all due respect to the decision in *Boyce* (supra), bad facts make bad law. At paragraph 65, it is recognized that there is no evidence that the meeting was about disciplinary matters. The facts in *Boyce* (supra) are different from those in this case.

[258] The grievor referred to page 8 of *Riverdale* (supra) and to a case called *Valdi Food* (1991), 16 L.A.C. (4th) 318. In that case, the first time the issue was raised was the morning of the hearing. It was found that substantive due process rights are not a question of procedure that can be waived. Their violation can be corrected at any time.

[259] In the present case, the grievor and the bargaining agent raised the issue. Mr. Dee and Ms. Shneidman raised the issue in the context of the "Protected to view" report. They raised it prior to termination, prior to the grievance being filed. There is no surprise here, the issue was raised "from the word go".

[260] The employer made some arguments about a section 23 complaint in *Buchanan* (supra). In that context, an employee has no standing, an employee has to grieve and this is what we have here.

[261] The employer argued that there is no specific collective agreement or statutory language in the public service that provides a right to union representation when the employer calls an employee to a meeting. This is incorrect if the meeting is a disciplinary hearing or one called for the purpose of receiving a disciplinary decision. The facts are important; this is where *Riverdale* (supra) comes in.

[262] The facts in *Naidu* (supra) are different. The language in clause 33.03 at issue in *Naidu* (supra) is very different.

[263] With regards to the arguments relating to the "Protected to view" meeting, there never was a meeting with the employer that protected the rights of the grievor. Three meetings took place: May 1, May 10 and May 18. These were clearly disciplinary meetings, the last one was where discipline was rendered. However, on May 1 and May 10, 2001, the focus of the meetings was the report of Mr. Rodrigue, the employer disingenuously seeking a response from the grievor. If the employer was sincere in asking for a response on a report that could not be shared with the union, the rights of the employee were violated.

[264] The grievor disagrees with the 5 distinctions the employer made with respect to *Wendy Evans* (supra). The meeting with Mr. Rodrigue was called by a manager under the authority of a person who had the authority to terminate employment. Regardless of how the employer decided to conduct its investigation, when a meeting by a front-line manager and an individual, such as Mr. Rodrigue with an employee takes place, it is quite obviously disciplinary, particularly when the report is acted upon immediately by management. The employer might have had an argument if it had not acted upon the report and if the facts were different.

[265] With respect to the employer's argument that in the *Wendy Evans* (supra) there was a specific request for representation, the grievor in this case raised the issue and was told there was no point.

[266] The employer claimed that the meeting was not for the purpose of rendering a disciplinary decision, as in *Wendy Evans* (supra). That argument might be more justified if the language of clause 34.03 in *Wendy Evans* (supra) was the same as clause 17.02. In this case, the language refers to disciplinary hearings.

[267] In distinguishing the Wendy Evans (supra) case, the employer pointed out that in that case, management had already made the decision to terminate when they met. In the present case, it is known that the employer had made the decision to terminate Ms. Shneidman on April 10, 2001, before the May meetings. Exhibit G-14 shows that if they had not made a decision to terminate, they had made the decision to discipline.

[268] On April 18, 2001, the exchange of memos between Mr. McCaie and Mr. Burke show they had the termination letter drafted five days before the grievor got her hands on the vetted report.

[269] In the *Buchanan* (supra) decision, the sweeping comments on the issue of representation are obiter; they are not founded on the facts of the case. The PSSRB, in *Buchanan* (supra), refers to *Naidu* (supra), where the collective agreement did not provide a right to representation except when discipline was being rendered. What is being said is that in most collective agreements such as in *Naidu* (supra), there is no right to representation during a disciplinary investigation; it is not the case here.

[270] With regards to the *Schofield* (supra) decision, which deals with the application of *Burchill* (supra), the grievor submits that the employer is missing the point; a substantive right does not have to be grieved.

Reasons for Decision

[271] On the basis that both parties were in agreement that I render a decision on the preliminary motion and were not prepared to proceed just then on the merits, I agreed to adjourn to render a written decision and advised the parties that, should further hearings be required, they might have to take place before another adjudicator as my term was coming to an end.

[272] The first issue I have to determine is whether I have jurisdiction to deal with the preliminary motion.

[273] On July 23, 2003, the PSAC referred to adjudication pursuant to paragraph 92(1)(c) of the Act, Ms. Shneidman's grievance, which reads:

> ***B DETAILS OF GRIEVANCE***
>
> *I grieve the letter of dismissal given to me on May 18, 2001 by Don Collins and signed by Gerry Troy. I maintain that this decision to terminate my employment is unwarranted, unreasonable, excessive and without just, reasonable and sufficient cause.*
>
> ***C CORRECTIVE ACTION REQUESTED***
>
> ***See Appendix "A"***
>
> *APPENDIX "A"*
>
> *I WANT TO BE REINSTATED TO MY POSITION AS A PM-2 NON FILER INVESTIGATOR EFFECTIVE MAY 18, 2001.*
>
> *I WANT ALL REFERENCES TO THE TERMINATION AND ALL MATTERS ANCILLARY TO IT BE REMOVED FROM ANY AND*

> *ALL FILES IN WHICH THEY ARE CONTAINED AND DESTROYED IN MY PRESENCE. (sic)*
>
> *THAT I SUFFER NO LOSS OF PAY AND BENEFITS AND THAT I BE GRANTED ANY OTHER REMEDY TO MAKE ME WHOLE AGAIN.*

[274] Paragraph 92(1)(c) clearly includes "termination of employment" as a matter that is adjudicable. There is no doubt that Ms. Shneidman's grievance against her termination of employment is properly before me, but does the language of her grievance permit a determination that the termination of employment was void *ab initio*? I believe so. The text of her grievance is clear and broad enough to include a challenge to the validity of the disciplinary action because of a denial of contractual due process. Ms. Shneidman clearly challenges the "decision to terminate my employment ..." and in the corrective action requested, she included the statement: " ... that I be granted any other remedy to make me whole again."

[275] The grievance language is such that it encompasses any argument that challenges the validity of the termination of employment, including the claim that the termination was void *ab initio* because of a violation of contractual due process.

[276] The next issue I must decide is if in fact, Ms. Shneidman's substantive rights to representation were violated. Clause 17.02 reads as follows:

> ***17.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her or to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where practicable, the employee shall receive a minimum of one day's notice of such a meeting.*

[277] The article clearly covers two types of meetings: one "the purpose of which is to conduct a disciplinary hearing concerning him or her" and the second the purpose of which is "to render a disciplinary decision concerning him or her."

[278] What is at issue in this case is the meaning of "disciplinary hearing". It is not defined in the collective agreement. In the dictionary, hearing is defined, amongst others, as "an opportunity to state one's case." It also includes, as a third meaning, an act of listening to evidence, especially a trial before a judge without a jury."

[279] Did the meeting Ms. Shneidman attended with Mr. Rodrigue constitute a "disciplinary hearing"? The employer refers to that meeting as an investigation. Mr. Rodrigue gave evidence about his role as an investigator and he stated that the purpose of his division is to investigate allegations of wrongdoing on the part of employees. He also indicated that a complaint comes from management to IAD and that discussions take place between the manager and the Director of IAD and then he is assigned the case at random.

[280] Mr. Collins gave evidence on the disciplinary policy of CCRA and stated that only the Director of TNTSO, possessed the authority to terminate employment.

[281] The disciplinary policy of CCRA does not define what is a disciplinary hearing. The only time the expression is used is in the chapter entitled "Discipline Administration Process". In section "A" under the subtitle "Roles and Responsibilities" we find a sub-section entitled "d) Unions". This is the paragraph where a reference to rights under a collective agreement is found. It states " ... an employee who belongs to a bargaining unit is entitled to have the local representative present when the employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning the employee ..."

[282] Nowhere in the policy does it states how, when and under what conditions are disciplinary hearings conducted but there is an entire section on the "Investigation Process" followed by one entitled "Preliminary Fact Finding Inquiry". The first item under "The Investigation" deals with what Mr. Rodrigue described, it states:

> *If a preliminary fact finding inquiry determines that the alleged misconduct requires an investigation, the local director, in conjunction with the Internal Affairs Division, will determine who will conduct the investigation.*

Further on, it states that the person conducting an investigation must, among other actions, "interview the employee(s) involved in the alleged misconduct" and "prepare a factual report ... for review and action by the delegated manager".

[283] Under the section entitled "c) Employee Rights and Obligations", there are two interesting paragraphs that give us an indication that interviews conducted as part of the investigation may in fact be disciplinary hearings. They read as follow:

c) Employee Rights and Obligations

> *The employee being investigated has the right to be presumed innocent until misconduct has been established. Consequently, the employee has the right to know the details of the case, to respond to and rebut any allegations and to be made aware of the consequences of a finding of misconduct. The employee being investigated, and other employees, are obliged to fully cooperate with the appointed investigator during the investigation. When the investigation report is completed, the employee must be made aware of the contents of the report and be given one last opportunity to respond to the findings, at a meeting with the manager who will be recommending or determining the quantum of discipline.*
>
> *The discussions with the employee must take place in private. Any written communications are confidential. The requirement of privacy does not exclude, at the employee's request, the attendance of a union representative or other individual to act as an observer (provided this individual is not to be interviewed as a witness or is a concerned party in any way during the investigation). The employee may consult with the individual, but the individual may not speak on behalf of the employee being interviewed.*

[284] Another important fact is found in Exhibit E-4, which states at the sixth and seventh bullets:

> - *the object of the interview is not criminal prosecution but an administrative investigation and that the facts are being gathered to establish whether a misconduct has occurred or not occurred;*
> - *any information provided by them may be used in a disciplinary process.*

[285] These facts convince me that Mr. Rodrigue's investigation was a disciplinary investigation and that his interview of Ms. Shneidman was to give her an opportunity to state her case with regards to allegations of misconduct on her part. I therefore find that a disciplinary investigation, that includes meeting with an employee to hear what he/she has to say about an allegation of misconduct on his/her part, qualifies as a "meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her."

[286] The facts of the present case further convince me that it was a disciplinary hearing because it was on the basis of the investigation report that the person with the authority to so do terminated Ms. Shneidman's employment.

[287] The employer is empowered by legislation to organize its workplace as it sees fit. The management team of CCRA has chosen to delegate certain functions to certain parts of its organization according to certain specializations. The employer is entitled to do this but it cannot use this prerogative to circumvent its contractual obligations. It does not matter who conducts the disciplinary hearing, it is subject to the rights provided for in the collective agreement. Mr. Rodrigue and manager Sheila Merrick were interviewing Ms. Shneidman on behalf of Mr. Troy, Director of TNTSO. Mr. Troy based his decision on the report of the investigation.

[288] Ms. Shneidman's collective agreement provides that she was "entitled to have, at his or her request, a representative of the Alliance attend the meeting." The evidence is uncontradicted that Ms. Shneidman asked: "Should I have a union representative?" and that she was told: "There is no point", since the union representative would have no right to say anything.

[289] This approach was contrary to the discipline policy and the collective agreement. A union representative cannot answer questions in the place of an employee but a represented employee may consult with a representative when she is being interviewed. A representative can also ensure that questions are clear and unambiguous, and that an employee understands what is being asked. A union representative's role is to ensure that interviews are conducted with due process.

[290] Was Ms. Shneidman's question a request for union representation? The answer must be in the affirmative. The investigator's response to her inquiry was clearly designed to discourage any attempt on her part to secure proper union representation.

[291] This attitude of discouraging proper union representation was pursued by Mr. Collins when he prevented Ms. Shneidman from viewing the investigation report in the company of her union representative. The evidence is quite clear that the employer has denied access to the unvetted copy of the investigation report to the union representative. The excuses given by the employer are baffling. A large number of employees on the management's staff relations side had access to the report, yet management did not consider this to be a breach of the confidentiality of taxpayers'

information. However, having an employee of CCRA working on the union's staff relations side would constitute a breach according to management. This makes no sense. Ms. Shneidman had the right to have an observer and/or a union representative listen or view all the confidential taxpayers' information during the interview but could not view it in the investigation report. I do not understand the logic of the employer in this case.

[292] In April and May 2001, the employer wanted the grievor's response to the investigation report, it clearly recognized that this request was part of a disciplinary hearing yet it refused to give the union representative access to the report. The report was the key element of the meeting and to prevent its viewing by the union representative was the same as denying attendance to part of the meeting. That too was a violation of clause 17.02 of the collective agreement.

[293] The next issue is whether a breach of clause 17.02 constitutes a breach of procedural fairness or of substantive rights.

[294] The facts of the present case are different from those in *Tipple* (supra). In *Tipple* (supra), no substantive rights were breached, the adjudicator also found that the investigation "was fair to the grievor and did not violate any relevant procedure" (page 14, fourth paragraph of the "Reasons for Decision"). The Federal Court was not dealing with a question of breach of substantive rights but one of procedural fairness, which could be cured by a hearing *de novo.*

[295] The issue of breach of substantive rights was considered by this Board in *Wendy Evans* (supra), a case subsequent to *Tipple* (supra). The adjudicator, at page 10, stated:

> *"The right to representation in such circumstances is a substantive one whose breach cannot be cured at some later date by a hearing* de novo. *Unlike Tipple (Federal Court of Appeal A—66-85), this case is involved with more than simple procedural fairness."*

[296] I fully concur with this view.

[297] It is interesting that the member of the Board who decided *Wendy Evans* (supra) is the same individual who heard *Buchanan* (supra). In that decision, he makes an *obiter* comment that refers to the principles in *Naidu* (supra). The language in the

collective agreement in *Naidu* (supra), which appeared to be the standard clause in the public service, is different from that in the collective agreement in the present case.

[298] The employer in *Naidu* (supra) is the same as in the present case but the bargaining agent is different. We can only assume that the substantive rights in the present collective agreement are more extensive than those in *Naidu* (supra) since the language is different and more extensive.

[299] In *Naidu* (supra), the adjudicator recognizes, in paragraph 79, the limitation of clause 33.03 when she states:

> *Investigatory meetings, and meetings requesting explanations for the conduct of employees are common occurrences in the work place. Had the parties intended the language of the collective agreement to include the right to representation at these meetings or at all meetings between the employer and its employees, collectively or individually, it would have been a simple matter to include that right in the agreement. In arriving at the conclusion not to accept the interpretation the grievor's representative would have me uphold, I have had regard to the general scheme of grievance resolution contained in the collective bargaining agreement and the legislation, and to general principles of interpretation. I have also had reference to and taken into account the traditional prerogatives of employers and determined that neither the language of the collective bargaining agreement or the applicable legislation alters those prerogatives in this case. Lastly, I have considered the cases relied upon by the grievor's representative.*

[300] In clause 17.02, meetings or interviews where a manager or his representative is requesting explanations for the conduct of employees are covered by the phrase: "When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or her."

[301] The *Boyce* (supra) case does not deal with an issue of discipline but one of rejection on probation. The adjudicator made a finding that "there was no evidence that the meeting related to disciplinary matters." That decision has no application here since the meetings with Ms. Shneidman related to allegations of misconduct on her part.

[302] The last issue I have to deal with is the remedy available when substantive rights of an employee have been violated in the course of a disciplinary process. In the circumstances of the present case, the termination of employment was based in great part on the investigation report, which in turn relied on the interview of the grievor for its analysis and conclusions. A hearing *de novo* cannot cure the prejudice suffered by the grievor even if the report was excluded from the evidence. I agree with Adjudicator Tarte in *Wendy Evans* (supra): "The weight of arbitral authority in situations such as this is to declare the discipline imposed "void *ab initio*." Ms. Shneidman's grievance is therefore allowed.

[303] Ms. Shneidman is to be reinstated as of May 18, 2001, the date of her termination of employment.

[304] I was asked to remain seized for the implementation of all remedies mentioned in the grievance. I will not do so as my term will have ended by the time this decision is published. I order that the parties meet and decide how to effect the corrective actions and what sums of money are owed to the grievor in compensation for loss of wages and benefits. They may avail themselves of the Board's mediation services but I do not retain jurisdiction. Ms. Shneidman is to be paid for loss of pay and benefits as if she had not been terminated. From these sums owed are to be deducted all wages and income earned since her termination. To be deducted as well, if they exist, are the periods during which Ms. Shneidman deliberately made herself unavailable for employment. Ms Shneidman's files should be purged of all references to this disciplinary action and all ancillary matters.

[305] I am conscious that more than three years have elapsed since the termination of employment of Ms. Shneidman and I am appalled that it took CCRA two years to answer the grievance, apparently with the blessing of the bargaining agent. It is the taxpayers who will ultimately pay for this nonchalance but I have no jurisdiction to enquire into this question. I can only hope that the parties will review clauses 18.13 and 18.23 of their collective agreement as well as section 76 of the PSSRB regulations.

[306] In summary, the termination of Ms. Shneidman's employment is void *ab initio* by reason that her substantive rights to union representation were violated and her grievance is hereby allowed.

Evelyne Henry
Board Member

OTTAWA, September 9, 2004