

IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

GOVERNMENT OF ALBERTA
(REFERRED TO AS THE "EMPLOYER")

AND:

ALBERTA UNION OF PROVINCIAL EMPLOYEES
(REFERRED TO AS THE "UNION")

Grievance of "R"
Discharge for Contents of a Personal Blog

ARBITRATION BOARD: Allen Ponak (Chair)
Vern Barteo, Nominee of Union
Paul Workman, Nominee of Employer

AWARD OF THE ARBITRATION BOARD

For the Union: Ray Domeij

For the Employer: Walter Pavlic

Hearing at Edmonton
July 3, 4, 5, & 6 and December 5, 7, 10, 11, 12, 13 & 17, 2007

Board Caucus: March 3, 2008

ISSUE

The Grievor¹, an administrative employee in the Alberta Public Service, was dismissed after the Employer became aware of the contents of her personal blog site. The Grievor's blog contained unflattering comments about a number of her co-workers (who were identified by pseudonyms) and management. After an investigation, the Grievor was interviewed about her blog. Perceiving the Grievor as largely unrepentant, she was terminated, the Employer alleging that the contents of the Grievor's blog had irreparably undermined the employment relationship. The Union, in challenging the dismissal, argued that the Employer had over-reacted, that the Grievor's attempts at an apology had been derailed by management, and that the employment relationship could be restored. As well, the Union took the position that the dismissal had been carried out by a person who lacked the authority to terminate and that the Grievor's representational rights had been violated during the investigative interview at which she had appeared unapologetic. These procedural defects had the effect of voiding the discharge, according to the Union. As a remedy, the Union sought reinstatement with appropriate compensation. The parties agreed that the evidence on the merits and the alleged procedural defects would be entered at the same time and that all issues would be addressed in closing arguments².

¹Because of the nature of some of the material in the Grievor's blog, parts of which have been reproduced in the award, the Board has disguised the names of the people involved and the Grievor's work location within the Alberta public service.

²In its opening statement, the Union gave notice of its intention to argue that the Grievor's rights under the *Charter of Rights and Freedoms* had been violated. This argument was not pursued in its closing submissions.

EVIDENCE

The Employer called 9 witnesses. Members of the Department who testified were: Mr. P, senior department manager; Ms. H, department counsel; Ms. M1, the Grievor's immediate supervisor; Ms. M2, a department manager; Ms. D1, a department coordinator; Ms. B, a department officer; and Ms. F, a department officer. Ms. T and Ms. L, who provided human resource support, also testified on behalf of the Employer. The Union called five witnesses: Ms. M3, a department administrator and Union steward; Ms. D2, Union full time staff representative; Ms. Y, a department administrator; Mr. S, a former senior manager in another department; and the Grievor.

A total of 29 exhibits were entered at the outset and during the course of the hearing:

0. Master collective agreement between the Union and Employer, June 30, 2005.
1. Grievance of R, July 17, 2006.
2. Reference to arbitration, October 30, 2006.
3. Department Website excerpts.
4. Internet usage agreement signed by R, October 29, 2001.
5. R job description.
6. Government of Alberta internet and email usage policies.
7. Code of Conduct and Ethics of Public Service of Alberta.
8. R blog, June 29, 2006.
9. R blog, June 21, 2006.
10. R blog, April 13, 2006.
11. R blog, April 11, 2006.

12. R blog, March 31, 2006.
13. Excerpt from blog entitled "Gossiping".
14. Notes T, July 17, 2006.
15. Notes of M1, July 17, 2006.
16. Notes of H, July 17, 2006.
17. Letter of termination, July 17, 2006.
18. Exhibit excluded.
19. Record of Employment, R, July 25, 2006.
20. Letter from Ray Domeij to Attorney General Department, June 6, 2007.
21. Grievance reply, August 21, 2006.
22. R blog, March 30, 2006 - July 11, 2006.
23. R blog, July 15, 16, 17, & 19, 2006.
24. Summary notes of T, August 2006.
25. Checklist of T.
26. Notes of T, July 17, 2006.
27. Card from R to first floor Department employees.
28. Card from R to second floor Department employees.
29. Notes of D2, July 17 & 18, 2006. [Entered over Union objection on a without prejudice or precedent basis.]

The evidence showed that the Grievor works in a department of the Alberta government, as an administrative capacity. The department in which she works (the "Department") handles sensitive files which require confidentiality, discretion, and judgement on the part of Department employees. The Department mission statement is emphasizes its commitment fair procedures

and natural justice (Exhibit 3). It's values, which were well publicized internally, included respect, cooperation, and teamwork (Exhibit 3). At the time of the arbitration hearing, the Department employed 85 people, in Edmonton and Calgary. The Edmonton offices, which house senior management, are located on the two floors of an office building. The Grievor's offices are on the higher floor, close to the coffee and lunch room.

The Grievor is originally from eastern Canada and had been an employee of the Department since 2000, assuming her current position in 2002. In her job, she was responsible for liaising with member of the public and assisting them in securing necessary documentation for matters within the Department's purview. Interpersonal skills listed in the job description are "superior teamwork, discretion, sound judgement, and abundant common sense" (Exhibit 4). In her role, the Grievor worked closely with the Department officers and other staff. Because of a certain amount of specialization, she worked more closely with some officers than with others. The Grievor believed she had a good working relationship with her co-workers, taking part in Department social activities, and "participating fully in the workplace". In 2001, she had served as a Union steward. Before joining the Department, the Grievor had worked for the Alberta government public service in several capacities, although not continuously, including seven years as a similar department where she had equivalent responsibilities. She had never been disciplined prior to her dismissal. The former senior of her previous department, who had worked closely with her until 1995, described the Grievor as a professional with high standards who was liked and respected by staff and clients.

The Grievor's Blog

The Grievor started a blog in March 2006 during a difficult time in her life. Her father, who still lived in eastern Canada, had become seriously ill the year before and the Grievor

began seeing a therapist in summer 2005 through the Employee Assistance Program. The therapy lasted until the end of 2005, at which time the Grievor decided to try to deal with the issues on her own. In March 2006, she returned home to spend time with her father, whose health had deteriorated significantly. He passed away three months later. After returning to Edmonton in March 2006, the Grievor testified that she decided to implement one of the recommendations of her therapist, which was to write things down as a “way to vent anger and helplessness”. She agreed that her therapist had told her just to write things down, but had not told her to start a blog.

At that time, the Grievor had recently learned about blogs. She said that she viewed blogs as “a safe place for me to put my thoughts” and “as a way to talk about the good things in life”. The Grievor had also taken up running, so she started a blog called “Running Girl”.³ She described the blog as “a great help to me.... that kept me pretty close to sane” during a tough time in her life. In cross-examination, the Grievor elaborated that the blog was meant to be a journal of thoughts and feelings at the time she was making the blog, a kind of “on-line diary”. Running Girl identifies the Grievor by name, indicates she lives in Edmonton, and one of her postings revealed that she works for a provincial government department in the public sector of Alberta (Exhibit 8). While the focus of the blog was intended to be running, the Grievor conceded that she sometimes wrote about matters unrelated to running. As well, the Grievor had two other blogs during this period, “Big Freddy” and “Gossiping”. The Grievor acknowledged that she understood that blogs can be accessed and read by anyone who has access to the internet and indeed people wrote her from all over the world. She agreed that she

³The name of the Grievor's blogs have been changed from the original to protect confidentiality.

was naive to think that her blog was a “safe platform” for expressing her views. Because her blog did not maintain a count, she had no way of knowing the number of times her blog had been visited or by whom.

Entered into evidence were excerpts from the Grievor’s postings on Running Girl and Gossiping between March 28 and July 19, 2006 (Exhibits 22 and 13)⁴. Looking first at the Running Girl blog, much of its contents refers to running or other personal matters, such as recipes, unrelated to work. For example, the Grievor’s posting on March 30, 2006 has a story about her cat (Exhibit 22, pages 59 & 60); on April 12th she wrote about qualifying for the Boston Marathon (Exhibit 22, pages 49 -51); on April 19th, she commented on “the perfect breakfast” (Exhibit 22, page 48); her May 16th blog was about her thoughts during running (e.g. “a time to count my blessings”) (Exhibit 22, pages 41 & 42); and on June 20th she wrote a tribute to her recently deceased father (Exhibit 22, page 13). It was common ground that these blog postings were of a personal nature and no concern to the Employer.

Interspersed with personal, non-work postings, were blog postings about the Grievor’s workplace, her supervisors, and her co-workers. These postings were the focus of the Employer’s concerns and, in order to appreciate the nature of these concerns, excerpts are set out below in chronological order. Some postings which address work issues, but were not identified as specific concerns of the Employer, are also included to provide a full flavour of the blog.

On March 31st, the Grievor posted a blog titled “Aliens Around the Coffee Table”. In this posting, comments are made “about work. More specifically, the people at work. Naturally I’ll

⁴ While the complete contents of these blogs could no longer be reproduced for the arbitration, the available material was sufficient for the Board to examine its contents in light of the Employer’s concerns.

give them each an alias to protect their privacy....” (Exhibit 12 and Exhibit 22, page 54). A paragraph each was devoted to six of the Grievor’s co-workers who regularly met for coffee on the second floor lounge in the Department offices. While aliases were used, all Department witnesses were able to accurately identify the employee upon whom each paragraph was based. A flavour of this posting is given in the following excerpts (pages 54 -57):

..... Roberta likes to talk -- unfortunately she’s menopausal – she might have short term memory problems – always forgets the people’s names she’s talking about, or the point of her story, or the ending – most of the time we just listen for a few minutes until we figure out who made eye contact with her, then we ditch the person from the conversation for the rest of the break. If I had to choose a planet that she came from, I’d say it was some dark planet, with very little oxygen...

Next to her sits Brys. He’s a pleasant fellow.... always polite and very well dressed. He’s somewhere in his 40’s, never married and will house sit for any of the people in the office who have a great address, a three car garage, and lots of fine free food in the fridge. He also spins records at ... an alternative lifestyle bar downtown. I’m gonna go out on a limb here and say he’s from a planet in our solar system – Uranus.

Next to her sits one of the new girls.... She’s worked here for less than three months and has ... already used up all her sick time, her family sick time, personal leave and bereavement leave – and leaves 20 minutes early each day. But she’s never missed a coffee break..... Also and this cannot be stressed enough, she’s a perfect wife. Hubby and her do the deed at least once every night (sometimes more titter, titter) even after 10 years of marriage. She’s clearly from the planet – Liar, liar pants on fire.

Next to her sits Bill, as in “Dollar” Bill. Probably the most perfectly named person in the office. He is so cheap it’s scary. Way past frugal, or careful with his money. ... he brings his lunch to work. It is always a stale peanut butter sandwich.... and a spotty banana. Can you imagine being his spouse, or child.

Next to him sits Miss Gloria in all her majesty. I’ll give her this, she may have started late, but she did well..... She is also well known for her friends in high places. She is quick to voice her disapproval should anyone unthinkingly mock her high fallutin friends.

Last, but certainly not least , let me introduce you to Summer. I could gab about her unique perspective on the world for days. Suffice it to say, she’s really young, really smart and clearly figured all of us out about 30 minutes into her first day on the job. I like her because she has the ability to laugh out loud about herself. She’s our Yoga Guru. ... She holds Yoga classes twice per week at \$5 a pop which means she makes about \$60 per week off her co-workers. Summer is the one I owe this blog to. She suggested that her current lover thinks she’s an alien, one of many all around us. She believes aliens from every known and unknown universe populate Earth. Then she says, “Everyone at this table likely an alien except me. I’m the only earthling here”. Which got me thinking.. which as you can see is a very bad thing.

To any of my co-workers, who didn't appear in this accounting, be warned your turn may be coming.

On April 11th, the Grievor posted a blog in which she expressed her views about an administrative change that required a new numbering system for documents submitted to the Department by outside clients. The blog was titled "SNAFU – Situation Normal, All F.... Up"⁵ and contained the following comments (Exhibit 11 and Exhibit 22, page 51):

I work in a lunatic asylum. Nurse Ratched⁶ (aka, the supervisor) just sent the following e-mail to her staff.

[Email message reproduced]

So, WTF does this mean. Because we already number the documents, it looks like the LIC (lunatic in charge) now wants us to go ahead and renumber all the pages within a document as well. I can just imagine how this is projected to speed up the process for the people waiting to hear from us with a decision.

However, someone obviously suggested it to Nurse Ratched and she (without ever stopping to think how stupid this particular idea is) ran with it. My job is so screwed up. I thank God every day that there is a pension involved at the end of this. Otherwise I would be so gone....

Does anyone else out there live in a world like mine with imbeciles and idiot savants (no offense to them) running the ship.... and is anyone else's ship being sailed down the highway to hell?

On April 13th, the Grievor's blog set out her feelings about a file she had handled that was apparently under review by the provincial ombudsman's office. She wrote (Exhibit 10 and Exhibit 22, pages 48 & 49):

My heart has been going pitty pat, pitty pat all morning over a file that has been closed for over a year, which the Office of O is doing an investigation on. It makes my heart hurt. I tried so hard to help that woman and at the end of it all, she rats me out. I am confident that I did everything I could, but omigod my memory of who I spoke to on the telephone on December 8, 2004 is pretty crappy. I challenge anyone to remember who they spoke to and what they said to them that long long ago. Anyway I was about to hyper-ventilate, so I went shopping....

⁵In the blog, the heading appeared as "All F..... Up" and did not include the word that "F...." stands for.

⁶Nurse Ratched is an unflattering character in the novel (and movie) "One Flew Over the Cuckoo's Nest".

The Grievor's June 28th posting, titled "It's all up to me and you", provided her views on a training and development session for Department employees (Exhibit 22, page 21):

Last Thursday at our annual spring conference the lunch time speaker was Carolyn *****. She is one of our commissioners and in her spare time she runs ultra marathons. She simply talked about her lifestyle, what caused her to decide to get fit, etc. She was very droll and had us all rolling on the floor laughing..... but her message was clear you are responsible for you ... it's up to you to decide who or what you want to be ... and then find a way to do it, or be it.

The next day, June 29th, the Grievor posted emails about her unsuccessful efforts to use discretionary funds from the Employer's Learning and Wellness Account to purchase a portable computerized personal trainer. The blog was titled "Cat Fight Coming – Me and the Power Hungry Wench in Charge" and included emails she had written and emails she had received from the person who administered the account, as well as the Grievor's own commentary (Exhibit 8 and Exhibit 22, pages 15 - 18):

I want one [computerized personal trainer]. And, I am going to get one... come hell or high water...

I work in the public sector in Alberta, Canada. Our provincial government departments jumped on the fitness and wellness bandwagon a while back. So to support in the only way they know how, a group of Ministries created a program and threw bags of money at it. Employees in participating departments – mine is participating, by the way – are allotted \$500 each annually to help increase their learning or personal wellness.

[Excerpt from program description]

There is mucho money available, **but** an employee must make a purchase first and then submit the receipt for reimbursement. Naturally, before I make a \$300-400 purchase I want to make sure the program covers it.

So, I send the wench in charge (WIC) an email asking if this wrist mounted personal computer is covered. I thought it was just a formality, because the plan will reimburse for a treadmill, if I want one, it will pay my gym fees

And, it will pay for a lap top computer, or printer, or keyboard, CD burner etc. So imagine my surprise when I got this email back from WIC.

[Email from program administrator indicating "wrist mounted pc" not eligible for reimbursement]

Naturally, I asked to appeal the decision. Guess what they said.

[Email from administrator indicating no formal appeal mechanism, but offer to raise with review committee]

I immediately wrote back...

[Grievor email asking why item not covered]

They answered right away....

[Administrator email elaborating on why item refused]

So I write back again.

[Grievor email reiterating her disagreement with decision not to fund the item]

Here is the total response I received.

[Administrator email indicating matter would be reviewed, but could take a few months. Signed by⁷]

What is it about bureaucracies and power hungry women??? How do they find each other?

On July 13th, the Grievor compiled a “Top 10 things that Piss me Off List” and posted it on her blog. Half of the items were unrelated to work, such as “Sandals that fit in the store, but take chunks out of my feet when I wear them really”, but the other half comment about the workplace (Exhibit 22, pages 63 & 64):

People who think when my office door is open, that means they get to come into my space and whine to me about how miserable their life is. Would you stop that please.

The people who stole all the cutlery out of the drawer in the kitchen on the second floor are making me really cranky.

The person who thinks the microwave magically cleans itself every time his tomato soup explodes is a person who really pisses me off.

People, especially co-workers, who constantly brag about themselves and their accomplishments make me really owly.

⁷The first name of the administrator is listed in the blog.

It really yanks my chain when people bring their pets into the office and let them pee on the floor. Well, no I have not caught the pet in the act, but there are pee spots on the carpet.

In addition to the above postings, there was two postings on June 30, 2006 by the Grievor on a blog titled "Gossiping". The Grievor used the pseudonym "First Bitch". In her first posting she wrote (Exhibit 13, page 7):

So, I've started it. What have you got to say? Say it however you want. You can name names (I hope you do, or put silly aliases on the people you want to slam).

Fell free to contact the head bitch at any time to add your friends, co-workers, or even those you hate (if you dare) to the people who know where to find this.

A word of caution... I take no responsibility for the consequences.

An hour later, a second posting by the Grievor appeared on this blog, titled "Channelling Eva Gabor", with the initials of the person being parodied appearing below the title and used in the blog. The Grievor wrote (Exhibit 13, pages 6 & 7):

Did you ever stop to think how much this woman is like Eva Gabor .. ridiculous dyed blonde hair, dripping with diamonds haughty and arrogant. Looking down her nose at everyone she thinks is a class or 10 below her. Just like Eva, I think she's forgotten her roots. Eva came from nothing and married money, so did AA⁸.

What on earth would make her think its okay to go into a hearing to determine the livelihood of an unfortunate, probably almost penniless person, wearing enough gold, silver, and diamond bling bling to choke a mule? Answer: she doesn't think... It's all about status with her.

Recently I heard her say to a member of the administrative staff, who asked her where she got the lovely suit she was wearing. This is what she said, no shit.

O, I don't think you want to know, it was really expensive.

Enough already AA, I know you've got more money than me but do you have anything else?

⁸The Board has changed the initials from the original blog.

Employer Discovery of the Blog

Department management first became aware of the existence of the blog and its contents in early July 2006. Ms. F, a Department officer, was shown the Nurse Ratched blog (Exhibit 11) by another officer. After reading it, Ms. F went to see Ms. H, Department counsel, to seek advice. In Ms. H's office, they accessed the Google search engine and typed in the Grievor's name plus "blog", which brought them to "Running Girl". Together, they scanned the blog which included "Cat Fight" (Exhibit 8), the "Office of O" posting (Exhibit 10), "SNAFU" (Exhibit 11), and "Aliens Around the Coffee Table" (Exhibit 12). Later, Ms. H reviewed the blog more carefully and was also able to link to the "Gossiping" blog, discovering the "Eva Gabor" posting (Exhibit 13). After showing the blog to Ms. M2, a Department manager, and reviewing it with her, the blog was brought to the attention of the senior Department Manager, Mr. P, on July 6th. Ms. M2 also notified Ms. M1, the Grievor's direct supervisor and shared the blog with her; Ms. M1 had not previously been aware of it.

Department managers testified about their concern with the contents of the blog. The Information Technology department was contacted to verify that the blog actually originated from the Grievor and human resource advice was sought from Ms. T, the public service HR liaison to the Department. An investigation ensued which eventually led to an interview with the Grievor on July 17th. Prior to the interview, the Grievor was not contacted about management's concerns or made aware that they knew about her blogs, nor was she asked to remove them.

It is unclear from the evidence how many employees were aware of the blog or had read it at the time it was discovered by management. Ms. F, the person who first brought the blog to the attention of management, learned about the blog from another employee (who did not testify), who, according to Ms. F, said Ms. Y had told her about the blog. Ms. Y testified that she

knew about and had read the Grievor's blog from its inception, but did not know of anyone else in the Department who was following the blog. Ms. F did not read the blog until Ms. H was able to show her how it could be accessed. Mr. P testified that he met individually with each of the employees who had been referred to in the blogs to warn them about the contents of the blog and to advise them not to read it. He said none of these employees told him that they had personally seen the blog. He did not provide these employees with hard copies of the blog nor did he tell them how the blog could be accessed. Ms. D1 and Ms. B confirmed that the blog was first brought to their attention by Mr. P in early July. Ms. M3 said she had been aware for a while that the Grievor was writing a blog, but had never visited it. There was no other direct evidence of employees, other than Ms. Y, who had read the blog prior to early July. Neither Ms. H, Ms. M2, nor Mr. P had received any complaints about the blog from any employee prior to July. Ms. M1 testified that she received complaints from three Department employees who worked in Calgary and said that they had read the blog, but she could not recall when these complaints had been made. None of these Calgary employees were called as witnesses.

Management and Staff Perceptions of the Grievor's Blog

At the arbitration hearing, employees and managers provided their views about the contents of the blog. Mr. P testified that the posting referring to the "Office of the O" (Exhibit 10) was "absolutely inappropriate" because it dealt with a confidential file and that the Grievor's comment about being "ratted out" was an offensive reference to a legitimate complaint process. He believed that the personal comments about co-workers would be "devastating to some individuals" and "poisonous to the workplace". He thought that the reference to Lunatic in Charge (Exhibit 11) might be a reference to himself. He said that "the kind of personal attack by [the Grievor] does not fit anywhere in my sense of values or the values of the Department".

Ms. H testified that, given the information about the Grievor contained in the blog, it would be pretty easy for someone to “connect the dots” and determine where the Grievor worked. She felt that the “Office of O” reference jeopardized confidentiality. The comments about individuals, in Ms. H’s view, were hurtful, disrespectful, and “offensive to all our values”. Ms. M2 characterized the “Aliens” blog (Exhibit 12) as “totally disgusting” and “couldn’t believe someone would write these things about colleagues who were nice people”. She labelled the comments as mean spirited, disrespectful and rude and felt “embarrassed that I was associated with such a person”. She said that for more than six months after the Grievor’s termination employees avoided the coffee room because “the trust factor was gone”. Ms. T expressed similar sentiments, indicating that she was most upset by the “derogatory” Aliens blog.

Ms. M1 read a hard copy of Exhibits 22 and 13 in early July. She testified that she found the blogs demeaning and disrespectful to the people with whom the Grievor worked and that reading the blogs made her physically ill. She said that the “Aliens” and “Eva Gabor” blogs were extremely nasty and insulting, betrayed confidences, and were a “cowardly personal attack” on people in a public forum. Ms. M1 was very upset with the “SNAFU” posting (Exhibit 11), with its references to Nurse Ratched, Lunatic in Charge, imbeciles, and idiot savants, which she interpreted as a personal attack on her and the senior Department manager. She said she felt “very embarrassed that a person like that works for my organization” and was emotional and distraught in delivering her evidence. Ms. M1 stated that the Grievor had betrayed her trust and that she would “absolutely not” be willing to work with the Grievor.

Ms. L was the subject of the “Cat Fight” posting (Exhibit 8), which contained much of her email exchange with the Grievor over reimbursement for a personal running computer. She was shown the blog by Ms. T. Ms. L testified that “she couldn’t believe” what the Grievor had written

about the government wellness program, describing the criticisms as very unfair. She was shocked by the personal comments directed at her, by name, and did not like to be referred to as a “power hungry wench in charge”. Ms. L was especially upset that there was no way for her to have responded to the Grievor’s criticisms, although she agreed that no one had contacted her as a result of the blog.

Ms. D1, a regular coffee room participant, was one of the employees described in the “Aliens” posting. She first learned about the blog from Mr. P and was upset to learn that something had been written about her, considering it was “open to the whole world”. She did not recall being warned not to read the blog and decided to read it “to see what it said about me”. Ms. D1 testified that she read the paragraph about herself and a few sentences of the next paragraph about another colleague. She said she became “so angry I just stopped reading” and was too upset to continue, finding the description of her very insulting. Reading the blog left her so completely rattled that she called her family for support. Ms. D1 said that after the blog became known, the coffee group fell apart for many months. The group members were uncomfortable with each other and she felt personally embarrassed. She said that if the Grievor was reinstated, there would be mistrust, suspicion, and fear. When asked if an apology from the Grievor would have made a difference, Ms. D1 stated that it depended on when it was made and what was said. She indicated that she was upset at the time she first learned of the blog and was upset more than a year later at the arbitration hearing.

Ms. B was another co-worker who regularly attended the coffee room and was referred to in the “Aliens” blog. She was first told about the existence of the Grievor’s blog by Mr. P who advised her not to look at it. Ultimately, she decided to ignore this advice because she “wanted to know what exactly was being said about me”. Ms. B said that after learning how to find the

blog through Ms. H, she had no trouble identifying herself in the “Aliens” posting. She characterized the depiction as “silly, not accurate, nonsensical” and, in her view, it showed a lack of judgement on the part of the Grievor. After reviewing her own description, Ms. B testified that she looked at the rest of the descriptions because her co-workers talked about the posting. She said she was “absolutely shocked” at what she called “character assassination” – “I couldn’t believe that [the Grievor] had that mean spirited notions” and that she “could be so demeaning and unkind to some of the nicest people we work with”. In her opinion, the blog was contrary to Department’s values. Ms. B stated that she could not work again with the Grievor, “someone with so little respect for me and her colleagues”. After the blog became public, the coffee room became “apprehensive and guarded ... if anyone showed up”, although the situation had returned to normal by the arbitration hearing. With respect to the impact of an apology, Mr. B indicated that had the Grievor made an immediate apology, “I would have sat down with the Grievor and tried to understand what the heck she had in her mind”. She felt it was up to the Grievor to call her and apologize; when shown a card that the Grievor had attempted to leave for staff (Exhibit 28), she said she did not consider it “a personal apology to me”.

Ms. F heard about the Grievor’s blog through a co-worker and first read the “SNAFU” posting in Ms. H’s office. She viewed it as unprofessional, disrespectful to supervision, and generally “mean and nasty”. A few days later, Ms. F read the “Aliens” blog because she had been told that she had been mentioned in one of the postings. She said she was horrified by what she read, characterizing the descriptions of her colleagues as mean spirited, venomous, and lacking respect. By this time, another posting that had referred more specifically to Ms. F had been removed and she never saw it. Ms. F stated that based on what she had seen she

would not want to work with the Grievor again, even if she had apologized. Ms. F felt that she could not trust the Grievor to respect individuals, a necessity given the sensitivity of the Department's work. In cross-examination, Ms. F agreed that there had never been complaints about the Grievor's work or her interactions with clients and co-workers.

Ms. Y works on the second floor of the Department and would go for coffee with co-workers. She had been reading the Grievor's blog from the outset and was aware of "Aliens" soon after it was posted, telling the Grievor that "she loved it". Ms. Y testified that she recognized herself and was not at all offended, nor was she offended by the depiction of others. She described the posting as "satire and exaggeration". She did not agree that the coffee group had dissolved after the Grievor's termination, stating that there was the same comradery and teasing as before. She said she would have no trouble working with the Grievor if she was reinstated. With respect to the "Gossiping" blog (Exhibit 13), Ms. Y said that she shared the site with the Grievor. The "Eva Gabor" posting was made on June 30th and Ms. Y posted something further on July 7th. On July 10 or 11, 2006, she and the Grievor mutually agreed to take down the "Gossiping" blog site because they were uncomfortable with the tone of the site. She was unaware of any linkages between the "Gossiping" and "Running Girl" blogs.

The Grievor's Perceptions of Her Blogs

The Grievor gave evidence about her intentions at the time she wrote the blogs and how she viewed them in hindsight. She testified that she never expected the blogs to be read by the general public or her co-workers, who she liked and respected. She believed that Ms. Y was the only person at the Department who followed her blog because she received no comments about the blogs from other colleagues. In cross-examination, she conceded that by creating her blog, everything she wrote was available to anyone with access to the internet. In response to

questions from the arbitration board, the Grievor replied that she did not know, when she established her blog, that it was possible to restrict access through password protection. She did not see when she wrote her blog that might cause harm to the employment relationship and once she had posted something she rarely went back and re-read it. In hindsight, after her termination and subsequent testimony about the blog in the arbitration hearing, the Grievor now realized that “what I write and say can be misconstrued”. She admitted that she made mistakes in judgement because of the pressures of her father’s illness and death and family dynamics.

The Grievor was questioned about individual postings. With respect to the “Aliens” posting, the Grievor described it as an attempt at caricature, after a chance comment from Ms. Y about aliens. She said it was “me playing with words” and a deliberate exaggeration. The various descriptions, according to the Grievor, were not meant to be of real people even if they used certain obvious traits associated with specific individuals. Rather, the Grievor viewed them as “prototypes” and amalgamations of various people in the workplace. The Grievor stated that she did not believe what she wrote was hurtful, although she accepted how it might be viewed that way. She said “I’m sorry I hurt these people’s feelings. I never meant to do that”. In cross-examination, the Grievor testified that she had not intended the Aliens blog to be offensive but agreed that when she took a good look at the posting at the arbitration hearing she “definitely thought people could have their feelings hurt” by what she had written. By way of explanation, she indicated that the posting reflected her feelings on the day she written it. She had not realized its potential consequences for her ability to work with the people she had caricatured.

The Grievor addressed the SNAFU posting in which she referred to her supervisor as Nurse Ratched and made reference to a lunatic-in-charge. She stated that her purpose in writing this blog was to criticize a new process for numbering documents that she felt would

lead to confusion for the clients. According to the Grievor, the process was introduced without input from the officers who worked with the documents. She said that the posting was aimed at the process and was not meant to be a criticism of any particular individual. The “Nurse Ratched” was intended to show that her manager was just following instructions. In cross-examination, the Grievor said that Nurse Ratched and lunatic-in-charge were both references to Ms. M1, whom she regretted offending. The Grievor noted that she apologized to Ms. M1 during the investigation interview, but had also stated “those were my feelings at the time”. The Grievor explained that she was frustrated because, in her view, the new numbering system interfered with her ability to get the job done. She said that she was “lashing out” at a difficult time in her life and was not thinking clearly at the time. She did not understand that referring to her managers as imbeciles and idiot savants might do irreparable harm to the employment relationship.

The Grievor commented on the “Office of O” posting. She testified that she had worked with the individual to whom the blog referred and in fact had suggested the ombudsman to her as an appeal mechanism. The Grievor acknowledged that she was upset when she wrote the blog because it was the first time one of her files had been referred to the ombudsman. She believed that there was insufficient information in the posting to breach the confidentiality of the individual involved. In cross-examination, the Grievor said that there was nothing offensive in the posting.

With respect to “Cat Fight”, the Grievor acknowledged that the posting was sarcastic and that, in hindsight, reproducing the emails between her and the wellness program administrator “was a silly and foolish thing for me to do”. In cross-examination, the Grievor admitted that referring to the administrator as the “wench in charge” was a “catty” thing to say

and that there was enough information in the posting to identify the Department and possibly Ms. L. She said that inclusion of Ms. L's first name was unintentional and careless. She agreed that the posting as a whole was "not well thought out".

The Grievor was asked about the "Eva Gabor" posting during cross-examination. She testified that even though the actual initials of the real person were provided in the blog, "no one but me would have been able to put the name to the initials". She said those were her personal thoughts and feelings about that particular individual, and others like her, when she wrote the blog. The Grievor acknowledged that she did not realize that the posting could be hurtful when she had written it, but understood in hindsight how hurtful it might be. She expressed relief that the posting had not been read by the person being parodied and noted that the blog site itself had been taken down voluntarily before she had been asked about it.

Employer Interview of the Grievor

The Employer interviewed the Grievor about her blog at 9 AM on Monday morning, July 17, 2006. In attendance were Ms. T, Ms. M1, Ms. H, Ms. D2 (a Union representative), and the Grievor. The evidence established that the Grievor was not advised of the interview until her arrival at work on July 17th. Ms. M1 testified she called the Grievor in her office and told her "we're meeting in [Mr. P's] office" and asked her to come over. She was not told the purpose of the meeting. When the Grievor arrived at Mr. P's office, the others, including Ms. D2, were either already present or arrived at the same time as the Grievor.

Ms. T was responsible for planning the meeting and made most of the arrangements on Friday, July 14th. She contacted Ms. D2, who was the Union liaison for the Department and asked her to attend a meeting about the Grievor, telling her that there was a concern over internet misuse, that the matter was serious, and asking Ms. D2 not to advise the Grievor about

the meeting. Ms. T explained that the decision to not advise the Grievor in advance was partly to ensure that no manipulation of the blog would occur once the Grievor received notice of the meeting and partly because it was standard practice to not provide advance notice to employees in serious matters.

Ms. D2 confirmed that she was advised of the meeting on Friday and asked not to inform the Grievor. She testified that she felt uncomfortable with this arrangement, because employees usually were notified in advance, but that she nevertheless complied with Ms. T's request. Ms. D2 said that it was unusual for management to choose the Union representative; the normal practice is to advise an employee that a meeting might lead to discipline and tell the employee to get a Union representative. Ms. M3, the Department union steward, was not advised of the meeting nor was she asked to attend. The Grievor was not formally advised, either at the start of the meeting or while it was in progress, that she had a right to Union representation, although she was aware that Ms. D2 was from the Union. Ms. D2 did not have an opportunity to meet with the Grievor prior to the start of the meeting. At no time during the meeting did Ms. D2 or the Grievor ask for a recess or adjournment so that they could consult. The Grievor did not ask for a different Union representative, testifying that she was unaware that she had this right.

The evidence showed that the meeting lasted about an hour. According to Ms. H, its purpose was investigation -- to review the blog with the Grievor and get her explanation for its contents. A set of questions, developed and asked by Ms. T, had been prepared prior to the meeting and given to the three management attendees, but not to Ms. D2. Notes were taken by all participants, the Grievor excepted, and entered into evidence (Exhibits 14, 15, 16, & 29). While there are some differences among the notes and testimony of the various management

participants, there are common elements regarding what occurred from management's perspective.

First, the Grievor was advised that the meeting was about her blog and she was provided with 67 pages of hard copy from "Running Girl" blog and an additional 7 pages from "Gossiping" (entered in this arbitration as Exhibits 22 and 13, respectively). Second, when she was asked if "Running Girl" was her blog, the Grievor responded in the affirmative. She also acknowledged two other blogs, "Gossiping" and "Big Freddy", and indicated that the former had been shut down. Third, the Grievor agreed that she was aware of the Department's internet usage agreement and stated that she had used lunch and coffee breaks for her blog. She characterized the blog as "my personal thoughts – training, hopes, running" and contained "humorous thoughts about the people who work here" (Exhibits 14 & 16). Ms. T described the Grievor as nervous and agitated during this stage of the meeting.

Fourth, when asked to explain the contents of her blog, the Grievor asked if there was a problem, requested that management "tell me what's wrong with this" and inquired several times whether the meeting was disciplinary, to which she received no response (Exhibits 14, 15, 16). According to Ms. T, the Grievor was not initially told what parts of her blogs were of concern to the Employer. The idea was to let the Grievor go through the material and explain what she had written. At this point in the meeting, the Grievor made a number of remarks such as "it's none of your business", "I have freedom of speech", and "is there a law". Ms. T characterized the comments and the Grievor's tone as aggressive. Ms. H described the Grievor as strongly defending the contents of her blogs and her right to create them.

Fifth, as various postings were pointed out, such as "Aliens", "Cat Fight", "Eva Gabor", and "SNAFU" the Grievor insisted that she had attempted to be humorous, most people found

it funny, and that there was nothing offensive about what she had written, partly because she had removed people's names. She called the "Aliens" blog a "clever and humourous" joke about the people with whom she worked. The Grievor said that she was sorry if she offended anyone, "but those were my feelings" with respect to the "SNAFU" posting. In neither Ms. T nor Ms. H's views, did the Grievor come across as genuinely sorry at any point in the interview, even when apparently apologizing if she had offended anyone. Ms. H testified that she showed no remorse and Ms. M1 said the Grievor seemed quite proud of what she had written.

Sixth, there was some question as to whether the Grievor was asked to remove her blog during this meeting. Ms. D2 was unsure on this point and none of the management notes made reference to this particular question or a response on the Grievor's part. The Grievor was certain that she was not asked to remove her blog during the questioning; she agreed that she did not volunteer to take down her blog on her own accord.

Ms. D2 testified about the meeting. She confirmed that the Grievor was provided with a copy of her blogs and asked to explain them. Despite several requests by the Grievor to know if the meeting was disciplinary, Ms. D2 stated that the Grievor was never told during the meeting that she might be subject to discipline. Indeed, Ms. D2 thought the purpose of the meeting was simply to investigate the Grievor's various blog postings. She said she spent most of the meeting trying to understand what was the issue, although she agreed that she was aware that management was concerned about the contents of the blog. At the end of the meeting, Ms. D2 told the Grievor that she did not believe she would be fired.

In her evidence in direct examination, the Grievor confirmed that the meeting began with Ms. T, who she had not previously met, telling her that management was investigating her blog. The Grievor told the meeting that she had three blogs and then was handed a large amount of

paper, which proved to be her Running Girl blog (Exhibit 22), as well as a much smaller package containing the Gossiping blog (Exhibit 13). She stated that the Running Girl package was not in chronological order, there was some duplication, and that some of the pages were sideways⁹.

According to the Grievor, she was then asked to “tell us about these”, something with which she had difficulty complying because she did not know what information was wanted. She said she became very worried and repeatedly asked if the meeting was disciplinary, but received no answer, heightening her anxiety. The Grievor testified that she began shuffling through the paper, trying to figure out what management wanted and what might be offensive. She recalled saying that the blog was about her running and her personal thoughts, pulling out several postings and asking if these were the problem. Eventually she was pointed to the “Aliens” posting. The Grievor testified that she could see that the contents might be offensive and told the meeting that she was sorry if she had offended anyone. The meeting ended with Ms. T asking if the Grievor had anything else to add and when she said no, Ms. T advised her that management would caucus and make a decision.

In cross-examination, the Grievor agreed saying, at some point, “is there is some law I have broken here” and acknowledged that she may have also said “it’s none of your business” and “I have freedom of expression”, but could not recall specifically. The Grievor admitted thinking during the interview that “I must have done something wrong, otherwise I wouldn’t be here” but stated that she had no idea what it was she had done wrong. The Grievor recalled being asked about specific postings, including “Office of the O”, “Cat Fight”, “SNAFU”, “Aliens”,

⁹The Board notes that the Grievor’s description of Exhibit 22 is accurate.

and “Eva Gabor”. She said that most of the meeting was spent discussing these postings, but could remember few of the specific comments she may have made about them. She testified that she apologized to Ms. M1 at the meeting, since the Nurse Ratched and Lunatic in Charge comments had been directed at her, and could see why Ms. M1 could have been offended. The Grievor conceded that she had added “those were my feelings” to the apology.

The Grievor said that she was confused at the end of the meeting, felt as if she was being trapped, and recognized that she was in trouble. According to the Grievor, she had tried to act professionally and just wanted the meeting to end, although she may have come across as assertive as a result of her anxiety. She agreed that at no time during the meeting did she volunteer to remove the material about her employer or colleagues from her blog. In hindsight, she admitted that she had been wrong in insisting that the blog had nothing to do with work and was not the Department’s business.

Termination Decision

After the meeting concluded, Ms. H, Ms. T, and Ms. M1 left to confer with Mr. P. The Grievor and Ms. D2 remained in the meeting room. By all accounts, the management meeting lasted slightly more than 15 minutes. All agreed in their testimony that, after being briefed about the interview and some discussion, Mr. P made the final decision that the Grievor’s employment should be terminated.

Mr. P testified that he made the termination decision after being told him that the Grievor had admitted writing the blogs and that she had refused to remove them. He stated that he considered the Grievor’s behaviour totally contrary to the Department’s values of respect and cooperation, prominently displayed in the Department’s offices (Exhibit 3). He said he could no longer trust her. As well, Mr. P believed that her actions violated the government’s Code of

Conduct and Ethics, drawing attention to Section 16 which concerned confidentiality (Exhibit 7). He pointed in particular to the Grievor's posting about the "Office of the O" and her disclosing of internal emails in "Cat Fight". At the time Mr. P made the decision, he was aware that another employee, Ms. Y, also had a blog, but it was his opinion that her blog was not as "personal or vitriolic" as the Grievor's. (Ms. Y's blog is discussed later in the award.)

A letter of termination was prepared and signed by Ms. M1, the Grievor's direct supervisor. The evidence showed that several letters had been drafted in advance, one of which was a termination letter. The other letters provided lesser amounts of discipline. Ms. M1 agreed that she had seen the letters prior to the meeting on Ms. M2's computer, although she did not read them at the time. The material parts of the Grievor's letter of termination state (Exhibit 17):

We have concluded the review pertaining to your use of a blog. We find that your actions in this regard fundamentally undermine the employment relationship and contravene the Code of Conduct and Ethics of the Alberta Public Service.

Your actions have caused irreparable damage to the employment relationship. In addition, there is potential to damage the employer's reputation.

The others involved in the decision expressed their opinions as to why they believed termination was justified. Ms. T testified that the Grievor's misconduct was serious, she had responded aggressively in the interview, she had expressed no regret for her actions, and had made no offer to delete the offensive postings. In her view, the Grievor's actions had made it impossible for the Grievor to work with the others in a very small office setting. Ms. H was especially concerned about the impact of the Grievor's blog on her co-workers. She said that it was not right to require "people who had been written about in so disrespectful a manner to work with their abuser", calling the Grievor's presence in the workplace as "toxic", especially

given the small size of the work group. As well, Ms. H suggested that the fact that the Grievor did not think there was anything offensive in her blog raised questions about her judgement. Ms. M1 stated that given the deep resentment towards the Department and its staff exhibited by the blog postings, they simply “could not allow [the Grievor] to continue working in our office”.

Management witnesses were questioned about who had the delegated authority to terminate an employee in the Alberta public service. Mr. P stated that he possessed the delegated authority to dismiss employees, but was uncertain whether Ms. M1 possessed similar authority. Ms. M1 understood that Mr. P had the authority to terminate. She said he had given her the authority to discipline her staff and she had in fact issued a letter of reprimand in the past. She had never dismissed an employee prior to signing the Grievor’s letter of termination. Ms. T believed that Mr. P had written a letter on July 11, 2007 delegating authority to the Department’s senior management team, including Ms. M1, to sign letters of termination. She said it was normal for discipline to be delegated down from the deputy minister level to members of the executive team. She stated that Mr. P’s July 11th letter was on file¹⁰. Ms. H stated that it was appropriate for Ms. M1, as the Grievor’s immediate supervisor, to sign the letter of termination. She could not say if any senior officials, such as the Minister or deputy minister in the department, had delegated the authority to terminate to anyone in the Department. Finally, Ms. M2 testified that it was her understanding that Ms. M1, as a supervisor, always had the authority to discharge staff under her supervision.

After the letter of dismissal had been signed by Ms. M1, the management group, without Mr. P, returned to the meeting room. The notes (see, especially Exhibits 14 & 16) and testimony

¹⁰No letter was produced in the hearing.

show that the Grievor was given the letter of dismissal and then asked if she would remove her blog. It is common ground that she adamantly refused to do so, saying “Absolutely Not” and “You ain’t seen nothing yet”, or very similar words. The Grievor explained that at the time she uttered these words she was shocked and angry and was simply reacting. Until the termination she had not thought that she had done anything wrong. The Grievor was then escorted from the building. On her way home, the Grievor telephoned Ms. Y to tell her what had just happened and to alert Ms. Y that she might be in trouble over what she had written on the “Gossiping” blog site.

The next day Ms. D2 spoke to Ms. T to complain she had been “sideswiped” by the termination. According to her testimony and notes (Exhibit 29), Ms. T told her that they had not intended to terminate the Grievor, but the Grievor’s reactions during the interview, and her absolute refusal to remove the blog, had resulted in the decision to dismiss. Ms. T, in her testimony, agreed that the Grievor’s attitude in the interview contributed to her dismissal which was why, prior to the interview, several letters had been prepared, only one of which was a letter of termination.

Grievor’s Actions Following Termination¹¹

After returning home on July 17th following her dismissal, the Grievor posted the following in her “Running Girl” blog under the title “So... bad things happen to good people” (Exhibit 23):

¹¹This post-discharge evidence is admitted for several reasons. First, it is part of a continuous sequence of events that took place in the immediate aftermath of the termination. Second, one of the issues raised in the arbitration was whether the Grievor was apologetic; this evidence addresses that issue. Third, this evidence may be relevant for the purposes of remedy, should that arise. In accepting this evidence, the Board has reviewed the authorities provided by the Employer: *Cie miniere Quebec Cartier v. United Steelworkers of America* (1995) 125 DLR (4th) 577 (SCC); *Canada Safeway v. United Food and Commercial Workers Union, Local 401* (1997) AJ No. 52 (Alta QB); and *United Nurses of Alberta v. Red Deer Regional Hospital* (1998) AJ No. 135 (Alta QB).

This has definitely been a banner day. One day some time in the future, I'll write it down. For now, suffice it to say that there are folks in the world who do not like my blog.

O woe is me again...
I was definitely born under an unlucky star.
What goes around me, always come back around and smacks me upside the head.

Two days later, on July 19th at 10:49 AM, the Grievor posted the following on her blog, titled "I'm so sorry" (Exhibit 23):

This post is meant to be an apology to all those who have read, or were directed to my blog to read its contents. I did not mean to hurt you, or your family, or friends by writing this blog post. I also wish to apologize to my employer if inadvertently I caused any harm to its reputation.

The purpose of this blog was to share my running progress with friends and family and also to communicate with others in the world with similar running interests.

On July 18th or 19th, the Grievor returned to the Department to clean out her office, spending about an hour there. She was accompanied by Ms. H and Ms. M2.¹² Both described the Grievor as angry and unapologetic. Both testified that the Grievor attempted to say hello to two of her co-workers who had been described in "Aliens", but neither would acknowledge her in any way or respond to her hellos. Another staff member (who had not been mentioned in the blogs) approached the Grievor on her own volition, but was encouraged to leave by Ms. H. Both recalled that the Grievor accused them of instructing Department staff not to talk to the Grievor, an accusation they denied.

When the Grievor first arrived at the Department offices, she gave two cards to the receptionist, asking her to place them in common areas on the first and second floors so that staff could see them. The receptionist brought the cards to Ms. M2's attention. After conferring with Ms. T, the cards were sent to Ms. T's office without being read by anyone at the

¹²The Grievor thought it was on July 19th while Ms. H believed that the office clean out was on July 18. Ms. M2 was not queried on this point. Nothing turns on the issue of whether the Grievor cleaned out her office on July 18th or 19th.

Department or being left out for staff. The arbitration hearing was the first time that the Grievor learned that the cards had not been left for staff as she had intended, a discovery that visibly upset her. The cards were entered into evidence as Exhibits 27 & 28.

Exhibit 27 was addressed to the “first floor staff”. It is a “Shoebox Greeting” card with a bath tub on the front with the caption “When life gets too hectic, I’ve always found that a nice, hot bath can solve most problems”. On the inside, the card says “I’ve been here since last Thursday”. In her own handwriting, the Grievor had written “It’s good to have friends like you! Sorry to have to say goodbye this way. I shall miss you all. Please know that I’ve never had a mean thought about any of you”. It was signed “Love [Grievor’s first name]”.

The envelope for Exhibit 28 was addressed to the “second floor staff”. It was another Shoebox card. The front caption said “The next time you feel a smile coming on for no particular reason at all” with the inside of the card completing the sentence with “....maybe that’s me, thinking of you”. The Grievor wrote the following on the inside of the card: “I never meant to hurt anyone! I’m so sorry. This got so blown out of proportion. Sorry I never got a chance to say goodbye to all my great friends. Please feel free to call me at anytime.” She signed the card and left her phone number. The Grievor testified that she wrote the apology in her blog and left the two cards on her own volition – she had not been told to do so by the union or anyone else. She said the apologies reflected her genuine distress at having hurt people.

In cross-examination, the Grievor conceded that she made no attempt to apologize to Ms. M2 or Ms. H while cleaning out her office. She agreed that she made no attempt to apologize personally to her colleagues either by telephone or email. She explained that she did not want to violate Department rules against personal use of emails, she had been told not to communicate with anyone at the Department following her termination, and she did not believe

an apology would be received well by those mentioned in her blog. The Grievor also stated that, after she had fired, she felt she would be humiliated if she attempted personal apologies. She agreed that she made an exception by contacting Ms. Y to apologize and give her a heads-up about her interview.

In the next days after her dismissal, the Grievor removed those parts of her Running Girl blog that had related to work or to any of her co-workers (e.g. “Aliens”, “SNAFU”), a fact confirmed by Ms. H in her evidence. The “Gossiping” blog had been shut down prior to the termination. Eventually, Running Girl was shut down entirely as well. At the time of the arbitration, the Grievor had started three other blogs which she stated had nothing to do with the Department, any former co-workers, or the ongoing arbitration. These new blogs were not in evidence.

Discipline of Ms. Y

Ms. Y also had a personal blog and shared the “Gossiping” blog with the Grievor. The Gossiping blog was entered into evidence.¹³ Writing under the pseudonym of “Epic Bitch”, Ms. Y posted the following on July 7, 2006 (Exhibit 13, page 2):

“you should be wearing pearls with that”

Every morning, X¹⁴ comes into my office to say good morning. Really, it's not just to say good morning. It's to check out what I'm wearing and exhibit some overt judgmental reaction to it. It's already been established that I wear costumes to work..... I think she's pissed that I consistently walk the fine razor's edge without ever actually crossing the line. Around here, it's more likely I'd get fired for what I wear to work than by really screwing up some file.

Furthermore, about X, what's with the little hot flash lapel habit she's got when she's

¹³The Union asked the Employer for a copy of Ms. Y's personal blog but the Employer was unable to locate a copy. Ms. Y's personal blog was not entered into evidence.

¹⁴In the actual posting, the first name of the employee is used.

telling stories? During an especially rivetting re-telling, she can be observed numerously to grab the open seams of her blazer or sweater (she always wears these to work; she's of the generation of shoulder padded power suited women) and open them about 2 inches like she's going to take it off and then let them go..

You only have to be careful of what you wear to work when you are a 60+ chubby female.

The Gossiping blog site, which Ms. Y shared with the Grievor, was taken down voluntarily in early July. She said the blog made her uncomfortable because it was such a public document. Aside from the Grievor, Ms. Y could not say if anyone at the Department saw the "wearing pearls" posting prior to the discovery of the site by management. She testified that her personal blog contained one or two postings related to her work which she removed at the request of management. Ms. Y continued to maintain a personal blog at the time of the arbitration hearing.

Ms. Y was interviewed about her blogs on the afternoon of July 17th by Ms. H, Ms. M1, and Ms. T. Ms. D2 was also in attendance. Ms. Y was aware of the purpose of the meeting having been phoned by the Grievor earlier in the day and had given some thought to how she would respond. She answered the questions, expressed what she described as sincere remorse, and offered to remove any portions considered offensive. Ms. Y was concerned that she too might be fired, stating that she was tearful and distraught during the interview. After the interview, Ms. Y was given a two day suspension. When she returned to work following her suspension, Ms. Y met with colleagues individually to explain her blog and attempt to allay their fears.

Ms. M1 testified about the differing amount of discipline imposed on Ms. Y compared to the Grievor. She stated that Ms. Y's blog only infrequently commented about the Department and its staff and she did not identify herself by name. When interviewed, she readily acknowledged that her postings about employee X and the workplace had been inappropriate,

volunteered to apologize to employee X, apologized to Ms. M1, and agreed to remove the offensive postings. Ms. D2 confirmed that, when interviewed, Ms. Y had been contrite, embarrassed and willing to remove postings about work; in contrast, the Grievor was unwilling to apologize, refused to remove any part of her blog, and was defensive rather than embarrassed.

COLLECTIVE AGREEMENT

ARTICLE 28 DISCIPLINARY ACTION

- 28.01 When an Employee has been give a written reprimand, suspension, disciplinary demotion or is dismissed from employment, the Employee shall be informed in writing as to the reason(s) for such action.
- 28.02 An Employee who is to be interviewed with respect to disciplinary action as referred to in Clause 28.01 shall be notified of the time and place of the interview and if desired by the Employee he may arrange to be accompanied by a Union Representative or Union Steward.
- 28.07 Subject to Article 29, an Employee may be dismissed, suspended, demoted or given a written reprimand for just cause.

ARTICLE 29 GRIEVANCE PROCEDURE

29.05 Power of Boards of Arbitration

- (c) Arbitration Boards..... shall confine their decisions solely to the precise issue submitted to them and shall have no authority to make a decision on any other issue not so submitted.

EMPLOYER ARGUMENT

The Employer took the position that the contents of the Grievor's blog postings, her lack of remorse, and her lack of understanding as to why her blog had been so offensive had undermined the employment relationship irreparably, justifying her termination. This was especially so, in the Employer's view, in a Department which handled sensitive cases and whose well publicized values emphasized respect, fairness, and cooperation. The reach of her blog, available to anyone with internet access, compounded the damage of her actions (*Barrick*

Gold Corporation v. Lopehandia and Chile Minerals (2004) 71 OR (3d) 416), especially since the Grievor had revealed her name and other information that made it easy to determine where she worked (*Municipality of Chatham-Kent and CAW - Canada, Local 127* (2007) OLAA No. 135 (Williamson)).

In terms of the contents of the blog, the Employer argued that the “SNAFU” posting had referred to management as imbeciles and idiot savants and her supervisor as Nurse Ratched and lunatic-in-charge. These comments were insubordinate, insolent, and contemptuous of management, justifying severe discipline: *Highland Valley Copper and United Steel and Autoworkers of America, Local 7619* (1999) 82 LAC (4th) 310 (Greyell) and *Chatham Kent*. The Grievor had also violated confidentiality expectations in the “Office of O” posting and had showed lack of respect for a client who she accused of “ratting me out” (*Chatham Kent*). Her blog postings about her co-workers, according to the Employer, had been universally condemned as hurtful, mean spirited, derogatory, vicious, sarcastic, and insulting. It would be very unfair to these co-workers, most of whom continued to work at the Department and had made it clear they no longer wanted to work with her, to reinstate the Grievor.

The Employer submitted that the Grievor had failed to provide a sincere apology for her actions, further harming the prospects of restoring the employment relationship. In the Employer’s view, the Grievor had shown she was not apologetic. She had been defiant and unapologetic during the July 17th interview; had qualified her apparent apology to Ms. M1 by saying “those were my feelings at the time”; had not volunteered to remove the offensive blogs, insisting on her freedom of expression; had threatened management with “you ain’t seen nothing yet” after her termination; and had not apologized to either Ms. H or Ms. M2 when she had returned to clean out her office, but had been described as unapologetic and belligerent.

The Employer pointed out that the Grievor had made no attempt to personally contact the people she had offended, instead relying on a blog posting and two cards that she had hoped to leave for staff. The Employer characterized these efforts as inadequate in the circumstances and noted that the language used (“if inadvertently I caused any harm”) was hardly that of contrition. There was a complete lack of a heartfelt, unqualified “I am sorry”.

The lack of a real apology, the Employer suggested, was consistent with the fact that the Grievor had never been able to recognize how offensive and hurtful her postings about her co-workers had been and how contemptuous she had been about management. It was argued that there were numerous examples throughout the evidence that showed a lack of insight on the Grievor’s part: her assumption that her blog would not be seen by others; her persistence in claiming that her blog was only about running and other personal things, when it manifestly was not; her belief that her Aliens posting was somehow clever and humorous; her inability to understand during the interview what she had done wrong; her repeated caveats about “these were my feelings” as if that somehow excused her conduct; her inability to see, after spending close to an hour being quizzed about her various postings, why she had been fired; her surprise when two co-workers would not even acknowledge her greeting when she was cleaning out her office; her comment on an apology card that “this got so blown out of proportion” (Exhibit 28); and her testimony that she could see how people might have “misconstrued” what she had written. The Employer asserted that the Grievor’s failure to understand why she had been disciplined and the absence of any acceptable explanation for her conduct resulted in no reassurance that, if reinstated, this kind of behaviour would not be repeated. It was further evidence that the employment relationship could not be restored.

For these reasons, the Employer urged the Board to uphold the discharge, or, in the alternative, to award compensation in lieu of reinstatement. The Grievor should not be allowed to return to the Department. Additional authorities provided included: *Wm. Scott & Co. and Canadian Food and Allied Workers, Local P-162* (1976) BCLRBD, No. 98 (Weiler); *Weyerhaeuser Company and United Steelworkers Local 1-207* (2007) AGAA No. 14 (Power); *Shell Canada and Communication, Energy, and Paperworkers Union, Local 835* (2003) AGAA No. 65 (Sims).

UNION ARGUMENT

The Union argued that the Grievor should be reinstated both for procedural and substantive reasons. Turning first to the procedural issues, it was the Union's position that: 1) the Grievor's representational rights under Article 28.02 had been violated; and 2) the termination had been carried out by a person, Ms. M1, who lacked the authority to dismiss employees.

With respect to Article 28.02, the Union submitted that the Employer was required to notify the Grievor of the time and place of a disciplinary interview and to allow the Grievor to arrange for Union representation if she so chose. The evidence showed, according to the Union, that the Grievor was not notified of the July 17th interview, even though the Employer had set up the meeting on the previous Friday (July 14th), was not told before or during the interview whether it was disciplinary, and was not given the opportunity to choose her own representative. A Union representative was selected for her by the Employer. In these circumstances, the Union argued that the Grievor's substantive rights had been violated, rendering the discipline null and void. In support of this position, the Union provided the following authorities: *Brown & Beatty, Canadian Labour Arbitration (3d)*, paras. 7:2100, 7:2130,

& 7:2140; *Medis Health and Pharmaceutical Services and Teamsters, Chemical, and Allied Workers, Local 424* (2001) 100 LAC (4th) 178 (Kirkwood); *Axis Logistics and United Food and Commercial Workers Union, Local 175* (2000) 87 LAC (4th) 100 (Faubert); *Toronto Humane Society and Teamsters, Local 419* (2004) 128 LAC (4th) 296 (E. Newman); *Dupont Canada and Communications, Energy, and Paperworkers Union, Local 28-0* (2003) 123 LAC (4th) 158 (Leighton); *University of Calgary and Alberta Union of Provincial Employees* (2004) AGAA No. 28 (Smith); *Government of Alberta and Alberta Union of Provincial Employees [Cordingley-Wagner]* (2006) AGAA No. 86 (Hornung); *Government of Alberta and Alberta Union of Provincial Employees [DB]* (2007) AGAA No. 49 (Jolliffe); and *Irving Industries and Glass, Moulders, Pottery, Plastics, and Allied Workers International Union, Local 360* (2001) 101 LAC (4th) 70 (Tettensor).

With respect to the authority to dismiss, the Union argued that there was no evidence that Ms. M1, who had signed the letter of termination, had been delegated the authority to discharge employees under section 25 of the *Public Service Act*. In the Union's submission, section 25(1) required dismissal to be carried out by the "employee's department head", in this case Mr. P. Indeed, Ms. M1 herself seemed unaware that she had been delegated the authority to dismiss employees. As a result, it was argued, the dismissal should be declared void.

Even if the procedural defects could be overcome, the Union argued that there were insufficient grounds to support discharge. First, the Union contended that the Employer had relied on grounds, namely insubordination, that had not been set out in the letter of dismissal. According to the Union, if insubordination was one of the reasons for the termination, it had to be expressly mentioned in the dismissal letter under Article 28.01. Because insubordination

had not been specified, it was beyond the power of the arbitration board to consider it as a basis for the disciplinary action (Article 29.05(c)).

Second, the Union argued that the Employer's process deprived the Grievor of procedural justice, a key Department value, hindering her ability to counter the allegations against her. In this regard, the Union took the position that the Grievor had been ambushed at the July 17th interview. She had not been given advance notice of the purpose of the meeting and had not been told the meeting was disciplinary. A large pile of documents was dumped on her and she was told to explain herself. In these circumstances, the Union suggested, it was hardly surprising that the Grievor was confused and her responses less than ideal.

Third, the Union strongly disagreed that the Grievor had been unapologetic. Her reaction at the July 17th reflected her surprise and confusion not a lack of contrition. According to the Union, she had apologized directly to Ms. M1 at the meeting, had written an apology on her blog that was titled "I'm so sorry", and had written apology cards to her co-workers. The second floor card, to her most immediate colleagues, had said "I never meant to hurt anyone! I'm so sorry". The fact that these cards were never delivered was not the Grievor's fault, but lay entirely at the feet of management who decided not to allow their distribution. The Grievor had also apologized at the arbitration hearing for any hurt that she caused to her colleagues. The Union asked rhetorically "what more could she have done"?

Fourth, the Union submitted that the Grievor had shown genuine remorse for her conduct. Aside from her apologies, she had voluntarily removed the Gossiping blog before becoming aware of management's concerns. After her termination, she had removed those parts of her Running Girls blog that management had flagged as problematic. She had acknowledged at the arbitration hearing that the blogs may have been hurtful to others and had

expressed her regrets. These actions indicated that the Grievor had recognized the implications of her blog and was genuinely remorseful.

Fifth, the Union claimed that the Employer had exaggerated the harm caused by the blogs. There was no evidence that confidentiality had been breached, that the Department's reputation had been damaged, or that its ability to carry out its mandate had suffered. In the Union's view, the evidence showed that very few of the Grievor's colleagues even knew about the blog until management brought it their attention. There was little evidence that most staff had even read the blog. The testimony of Ms. Y showed that she had been invited to rejoin the coffee room group almost immediately, belying the proposition of lasting harm or animosity. The Union suggested that had management not interfered by removing the cards of apology written by the Grievor, her colleagues anger might well have been assuaged, helping to restore the employment relationship.

Sixth, the Union argued that the Grievor had been treated far more harshly than Ms. Y, who had also written blog postings that arguably upset colleagues. It was noted that Ms. Y received advance information about her interview from the Grievor, something that made a huge difference in how she responded. Had the Grievor received similar notification she too would have reacted in a way more likely to have resulted in less harsh treatment. In the Union's opinion, there was simply no way to justify the gap between the two day suspension imposed on Ms. Y and the termination of the Grievor.

Seventh, the Union pointed to a number of mitigating factors that counted in the Grievor's favour including a long record of unblemished service and lack of an intention to hurt people. Even if the Board concluded that the Grievor engaged in serious misconduct, the Union

contended that the gravity of her actions, which amounted at most to some nasty verbal comments, did not reach a level of seriousness normally associated with discharge.

The Union asked for reinstatement with appropriate compensation, either within the Department or to another government office.

In support of its submissions on the merits, the Union provided numerous authorities including: *Wm. Scott; Brown & Beatty* (3d), paras: 7:3010, 7:3330, 7:3430, 7:4414, & 7:4428; *Owens-Corning and Communications, Energy, and Paperworkers Union, Local 728* (2002) 113 LAC (4th) 97 (Price); *Lancaster Labour Arbitration News*, Vol 39, No. 11/12, 2003; *Ontario Ministry of Natural Resources and Ontario Public Service Employees Union* (2003) 115 LAC (4th) 120 (Petryshen); *Steel Equipment Co. and United Steelworkers, Local 3257* (1964) 14 LAC 356 (Reville); *Westcoast Energy Inc. and Communications, Energy, and Paperworkers Union, Local 449* (2001) 97 LAC (4th) 327; *Canadian Broadcasting Corporation and Canadian Media Guild* (2002) 105 LAC (4th) 1 (Ponak); *Government of Alberta and Alberta Union of Provincial Employees [Rennich]* 2005 AGAA No. 122 (Ponak); *Government of Alberta and Alberta Union of Provincial Employees [Reville]* 1991 Unreported (McFetridge); *Government of Alberta and Alberta Union of Provincial Employees [Erl]* 2006 AGAA No. 2 (Jolliffe); *City of Calgary and Calgary Fire Fighters Association* (2006) Unreported (Hornung); *Hickeson-Langs Supply Company and Teamsters Local 419* (1985) Unreported (Burkett); and *Cabinet Dixon Wilson v. Catherine Sanderson* (2007) Unreported (Vallee) [in French, case from France].

EMPLOYER REPLY

With respect to the merits, the Employer replied that the Grievor was discharged for actions related to her blog that fundamentally undermined the employment relationship – insubordination was one of those actions and did not need to specifically identified in the letter

of termination. On the suggestion that it was the Employer who spread the blog, thus increasing the alleged harm, the Employer argued that it was clear by the time Mr. P notified employees about the blog that its existence had already become known within the Department. This was not a situation in which no one knew about the blog; management was faced with the dilemma of either letting the matter percolate or drawing it the attention of employee. The Employer accused the Union of blaming the victims for the ensuing damage. In terms of the differences in the way Ms. Y and the Grievor were treated, the Employer argued that different facts resulted in different treatment. In particular, the Grievor's posting were more vitriolic and any apologies were grudging at best. Finally, the Employer strongly urged against attempting to reinstate the Grievor in another part of the public service, submitting that transferring problems to a different department was not a good solution.

Turning to the procedural arguments, the Employer argued that Article 28.02 had two requirements: 1) the employee be notified of the time and place of the meeting; and 2) the employee be given Union representation. Both requirements had been fulfilled in the Employer's view. The Grievor had been told when and where the meeting was to be held and she was provided with an experienced Union representative. There was no requirement under Article 28.02 to disclose the purpose of the meeting. Advance notice ran the risk of tampering with the blog and full disclosure of the purpose of the meeting might have reduced the honesty of answers provided. In support of its position on Article 28.02, the Employer provided the following authorities: *Government of Alberta and Alberta Union of Provincial Employees [Howie] 1995 Unreported (Moreau); Alberta [DB]; and, Alberta [Cordingley-Wagner]*.

The Employer then addressed the delegation of authority issue. First, the Employer submitted that neither the grievance nor the referral to arbitration specified this matter as a

basis for overturning the dismissal. Having failed to challenge the delegation of authority in a timely manner, the Union was precluded from raising it at the arbitration, according to the Employer. Cited in support of this position was *Government of Alberta and Alberta Union of Provincial Employees [Gingras]* 1994 Unreported (McFetridge).

Alternatively, even if this question was properly before the Board, the Employer submitted that the evidence was absolutely clear that Mr. P made the decision to terminate and there was no dispute that he had the authority to terminate. The facts established that he had instructed Ms. M1 to sign the letter of termination, something he was entitled to do. While it was unclear whether Ms. M1 herself had the delegated authority to terminate, it did not matter since Mr. P, not Ms. M1, made the decision to discharge the Grievor. Ms. M1 merely communicated the decision in the Employer's submission. In support of its position, the Employer cited: *Government of Alberta and Alberta Union of Provincial Employees [Drummond]* 1988 Unreported (McFetridge); *Government of Alberta and Alberta Union of Provincial Employees [Stretch]* 1984 Unreported (Jones); and *Government of Alberta and Alberta Union of Provincial Employees [Jacob]* 1978 Unreported (Williams).

UNION REPLY ON PROCEDURAL OBJECTIONS

With respect to Article 28.02 and union representation, it was argued that employees must be told the time, the place, and the reason for the meeting, otherwise the notice and representation requirements have no meaning. The manner in which notice was provided to the Union representative, Ms. D2, and the withholding of information about the real purpose of the interview, compromised her ability to provide effective counsel to the Grievor. This defeated the whole purpose of Article 28.02.

With respect to the delegation of authority, it was Ms. M1's name and signature on the letter of termination and there was no evidence to support her authority to terminate the Grievor or any other employee of the public service. The Union noted that the grievance was broadly worded, and in its view, encompassed the question of whether the termination was carried out in accordance with the law.

DECISION ON UNION OBJECTIONS

The Board will first address the Union's argument that the discharge should be struck down because the termination was carried out by a person, Ms. M1, without the delegated authority to discharge. There was uncontradicted evidence that, although Ms. M1 signed the letter of termination, the decision to terminate was made by Mr. P, the senior Department manager. It is not disputed that Mr. P has the authority to dismiss employees. In *Government of Alberta [Drummond]*, Arbitrator McFetridge concluded that the key question is not who communicated the decision to terminate, but who actually made the termination decision. As long as a person with the authority to terminate makes the decision, the termination cannot be overturned on the ground of an improper delegation of authority. The *Drummond* award was issued in 1988 and has not been contradicted since. The Board adopts *Drummond*. We are satisfied that Ms. M1 merely communicated the decision to terminate that was made by Mr. P. Therefore, the Union's objection that the termination was made by someone who lacked the authority to terminate, must fail.¹⁵

The second objection of the Union is that Article 28.02 was violated when management interviewed the Grievor on July 17th. Under Article 28.02, an employee who is to be interviewed

¹⁵We make no ruling on the Employer's position that the delegation of authority question was not raised in the reference to arbitration and is therefore outside the Board's jurisdiction.

with respect to discipline must be notified of the time and place of the interview and “if desired may arrange to be accompanied by a union representative or union steward”. This provision has been the subject of a number of arbitration decisions between these parties. In *Howie*, Arbitrator Moreau explored the question of what constituted a disciplinary interview and concluded that, for the purposes of Article 28.02, “an interview is a formal meeting set up to gain information” (page 17). The Board is satisfied that the interview of July 17th, during which the Grievor was questioned about her blog and asked to explain herself, constituted “an interview with respect to disciplinary action” under Article 28.02. Indeed, the Employer’s intentions were manifestly clear by its preparation of three possible letters of discipline, ranging from a letter of warning to a dismissal letter, prior to the interview.

Two recent decisions, *Cordingley-Wagner* and *DB*, consider the interplay between Article 28.02 disciplinary interview notice requirements and union representation rights. In *Cordingley-Wagner*, Arbitrator Hornung, after an extensive review of the authorities, came to the following conclusions (para. 38 - 57):

Although the Grievor’s breach was serious and severe, the failure to provide Union Representation, as is required by the terms of the Collective Agreement, would [result] in the decision to terminate being null and void. As pointed out in *University of Calgary v. AUPE* by Arbitrator Smith

“the right to Union Representation is a substantive right and one that is neither to be taken lightly or disregarded. A breach of the same, results in the determination to terminate, being null and void. (p. 94)”

Article 28.02 requires that an employee who is “to be interviewed with respect to disciplinary action” as referred to in clause 28.01 shall:

“be notified of the time and place of the interview and if desired by the employee may arrange to be accompanied by a Union Representative ...”

The Employer does not satisfy that section by simply advising the employee that a meeting will be held. Where the purpose of the meeting is to obtain admissions of culpability or exculpatory information that will be taken into account in making a determination of whether or not disciplinary action should be taken, the Employer owes a duty, in order to comply with the meaning and intent

of Article 28.02, of advising the employee that the purpose of the meeting is for investigation of a possible disciplinary matter. If it were to be otherwise there would be no reason to have the continued the sentence which follows in Article 28.02. That portion of the Article requires:

"When a Union Steward requires time off from work to accompany an employee to an interview pursuant to this clause, the Union must obtain prior approval from his employing department to be absent from work ..."

Here the grievor was given no indication that discipline was to be contemplated or that she was to be interviewed with respect to conduct which might be subject to disciplinary action. In order to comply with Article 28.02 as the article intends, the Employer must advise the employee, at a minimum, of the purposes of the interview so that the balance of Article 28.02 can be complied with.

In *University of Calgary v. AUPE*, the board refers to a quote from Arbitrator McFetridge in *Greyhound Lines* wherein he states:

"The Employer's obligation to provide notice has a dual purpose; it lets the employee know that it will be an important meeting and allows time to arrange for representation if desired. The employee is denied that right when the fact that discipline may be contemplated is not revealed until the meeting is in full flow ..."

and at p. 85:

"The Employer's obligation is to give the employee sufficient notice of the meeting. This means that the employee must be advised in advance that company officials wish to meet with her and that the meeting will concern a matter where discipline may be contemplated. Only after employees have this information can an informed choice be made as to whether the presence of a Union Representative is desirable."

To simply ask an employee to attend for an investigative meeting that could result in disciplinary action, without advising of the purposes of that meeting, makes it impossible for the employee, and the Union, to comply with the provisions of Article 28.02 and provide the necessary assistance to an employee which was bargained for in the Agreement.

Medis does a thorough and detailed analysis of the issue with respect to employee's rights to Union Representation at disciplinary meetings. At p. 190, the board in *Medis* quotes the decision of Arbitrator Ish who states:

"Another very important, if not the most important, reason for having a representative at a disciplinary meeting is to caution an employee about making inculpatory statements. There is no obligation on an employee to make admissions or other inculpatory statements in response to inquires by an Employer. If statements are made to Employers of an inculpatory nature it may be that such statements could be used later in a criminal proceeding. Thus representational rights such as are given in Article 23.05 are very important ones both for the purposes of workplace discipline and for the purposes of the broader criminal law."

Medis goes on to point out that:

"The approach taken by Arbitrator Ish is similar to that of Arbitrator Abbott in the *Williams* decision which has been followed and adopted in many subsequent decisions, as Arbitrators look to the interest of the affected employee and the role of the Union to represent them where they can affect the outcome. In the *Williams*, decision, Arbitrator Abbott held that a "disciplinary interview" was not limited to the giving of discipline. He stated at p. 99:

"Thus, in my opinion the term "disciplinary interview" cannot have been intended to apply only to an occasion on which a penalty is imposed. It must include an occasion in which the affected employee has an opportunity to make his or her contribution to the disciplinary process, to have a possible effect on the outcome, that is to say, on the decision whether to impose discipline or not ... I am quite satisfied, on the evidence before me, that the postal inspectors intended their meeting with Mr. Williams to be an opportunity to further their investigation, by obtaining from him admissions of culpability or exculpatory information, and that they would take into account whatever they obtained from Mr. Williams in deciding whether disciplinary action should be taken against him. This is exactly the sort of interview of which an employee should have advance notice and should have the opportunity to be accompanied by a union representative."

As the *Williams* and *Safeway*, decisions illustrate, one of the key aspects of union representation is to represent the employee at the time where the employee's interests are likely to be affected to his or her detriment.

We agree with the observations of Arbitrator Smith that each of these cases must be assessed on its own merits.

Arbitrator Hornung declared the discipline void because the failure to tell the grievor that her interview would likely lead to discipline resulted in the interview being conducted without the benefit of union representation, a violation of a substantive contractual right. In *DB*, Arbitrator Jolliffe adopted the *Cordingley-Wagner* reasoning. In *DB*, the grievor was not informed that an interview was disciplinary and he was not accompanied by a union representative. The arbitrator declared the resulting discharge null and void, notwithstanding the seriousness of the allegations against the grievor.

In *Cordingley-Wagner*, *DB*, and all the other cases cited by the parties (or referred to in *Cordingley-Wagner* and *DB*), the crucial element in overturning discipline has been the lack of attendance of a union representative at a meeting or interview that directly resulted in discipline.

In these cases, management's failure to advise employees of the potential for discipline deprived them of the opportunity to exercise a contractual right to union representation.

The current case is not the same. It is true that the Grievor was not told in advance about the interview or its purpose and was not told during the interview that discipline, despite her queries, was the likely outcome. In the Board's view this lack of disclosure was contrary to the notice requirements of Article 28.02, which, the authorities make clear, obligate management to tell an employee the purpose of the meeting. However, the primary reason for such disclosure, also as set out in the authorities, is to allow for union representation. Here, while the Grievor was not told the interview's purpose, union representation was provided and a union representative was present throughout the July 17th interview. This distinguishes the current case from *Cordingley-Wagner* and *DB* and indeed all the other cases cited.

Can it be said that failing to provide notice of the purpose of the meeting, but ensuring the presence of a union representative, nevertheless violated Article 28.02 such that any subsequent discipline should be annulled? In considering this question, the Board accepts that there were irregularities with the way in which management conducted itself and the way in which union representation was provided. As the Union correctly argued, it is the employee who should choose the union representative, not management. In this case, the Employer contacted Ms. D2 and asked her to come to the July 17th interview. The Grievor should have been told about the meeting and its purpose and given the opportunity to select a representative of her choosing, which may or may not have been Ms. D2. Second, the Grievor never had a chance to confer with her union representative prior to the start of the interview. This arose because the Grievor was not told the reason for the meeting, did not have a chance to select a union representative, and Ms. D2, who knew about the interview well in advance, heeded

management's admonition to not advise the Grievor of the meeting. Had the Grievor been given proper advance notice of the meeting and chosen her own representative, more than likely she would have been able to confer in advance which may have influenced her approach to the interview. Third, the Grievor was not advised during the meeting, despite repeated attempts on her part to elicit a response, that the meeting was likely to result in discipline. Clearly, the Employer contemplated discipline having prepared letters of discipline in advance of the meeting. The only possibility under which discipline would not have been imposed, by management's own admissions, was if the blog proved not to be the Grievor's, an extremely remote outcome given the information about the blog already in the Employer's possession. Furthermore, very early in the meeting the Grievor admitted that the impugned blogs were hers. Under these circumstances, the Board cannot understand the reluctance to answer the Grievor's questions about the disciplinary implications of the interview. The Board is satisfied that the repeated failures of management to indicate the true nature of the interview was unfair in the circumstances and may have had a negative impact on the Grievor's responses and demeanour during the interview.

Do these irregularities result in a substantive breach of the Grievor's rights under Article 28.02 such that the discipline subsequently imposed should be voided? After much consideration, the Board answers this question in the negative. The problem for the Union in attempting to persuade the Board that Article 28.02 was violated, is that a full time representative of the Union knew of the meeting in advance, had been advised that the matter involved internet misuse and was serious, and was in attendance for the entire interview. It was well within the power of Ms. D2, as the Grievor's representative, to act to negate the irregularities that may have placed the Grievor at an unfair disadvantage. Even if Ms. D2 was

prepared to accept the Employer's request to not notify the Grievor in advance of the meeting, she could have conferred with the Grievor prior to the beginning of the meeting, advised her of the subject matter, and alerted her to its potential seriousness. Ms. D2 could have ensured that the Grievor was satisfied with her as the union representative, rather than someone else (such as the Department's union steward, who was a friend of the Grievor). Ms. D2 could have called a halt to the interview at the point where management refused to disclose whether or not the meeting involved discipline. She did none of these things.

While this Board is critical of the interview procedures, we are unprepared to find the Employer violated the Grievor's substantive right to union representation under Article 28.02 in a situation in which a Union representative participated in the disciplinary interview and was in a position to intervene, but failed to do so. The Union cannot have one of its representatives sit idly by and then claim foul. The Board, however, will take account of the fact that the Grievor's conduct during the interview may have been affected by the manner in which the interview was arranged and conducted.

For the above reasons, the Union's submissions that the dismissal should be voided because a person without the proper delegated authority terminated the Grievor and because of a violation of Article 28.02 are rejected.

DECISION ON THE MERITS

It is the Board's decision to deny the grievance. While the Grievor has a right to create personal blogs and is entitled to her opinions about the people with whom she works, publicly displaying those opinions may have consequences within an employment relationship. The Board is satisfied that the Grievor, in expressing contempt for her managers, ridiculing her co-

workers, and denigrating administrative processes, engaged in serious misconduct that irreparably severed the employment relationship, justifying discharge.

That a blog is a form of public expression is, or ought to be, self-evident. Unless steps are taken to prevent access, a blog is readable by anyone in the world with access to the internet. The Grievor took no steps to prevent access. On the contrary, the tone of her blogs placed them very much in the public arena and suggested that the Grievor relished addressing a wider audience. In one posting (Exhibit 13), she specifically invited others to write in and insult people they did not like. In another posting (Exhibit 12), after venomously caricaturing her colleagues, the Grievor warned that those not mentioned in this posting could be next. She used her own name in one of her blogs and disclosed that she worked for the provincial government in Edmonton. The Board rejects any professed ignorance on the Grievor's part of the public dimension of her blog.

The Union argued that few people in the workplace had discovered the Grievor's blogs at the time they came to management's attention, minimizing any damage. In the Board's view that is not the issue; the issue is their content and public access to that content. The fact remains that some Department employees and managers had already read the blogs and were highly offended. Had management not intervened, there would have been nothing to prevent other Department members from reading them once word of the blog spread. Furthermore, one has no way of knowing how many other people, within the provincial government, in Alberta as a whole, or beyond, had read the blogs. The point is, once the blogs were posted, they were in the public domain and the Grievor lost control over who would read them.

There are four specific postings at issue. The contents of the Grievor's one-page SNAFU posting (Exhibit 11) are insulting and contemptuous of her supervisors and those

managing the Department. She referred to the Department as a lunatic asylum. She called her supervisor “Nurse Ratched” and the “lunatic in charge”. She wrote that “imbeciles and idiot savants (no offense to them) were running the ship”. These comments can only be characterized as insolent and insubordinate, even though they were not accompanied by a refusal to carry out an order or perform her assigned duties. We accept the analysis of Arbitrator McPhillips in *Squamish Terminals* (as cited in *Chatham-Kent*, para. 24) in which he concluded that “insubordination in the workplace can involve behaviour other than simply a refusal to follow a direct order. Insolent, disrespectful, insulting or defiant words may, in a particular context, constitute a type insubordination and be an employment offence”. In this case, the Grievor’s SNAFU posting was all of these things, justifying discipline.

In coming to this conclusion, the Board rejects the Union’s argument that insubordination is a new ground raised by the Employer for the first time at the arbitration. The letter of termination cites the Grievor’s blogs as the source of the Employer’s concern and alleges that the Grievor’s actions relating to the blog undermined and irreparably damaged the employment relationship. This placed the contents of the blogs squarely in front of the Board and it is certainly within the Board’s purview to draw its own conclusions about how the contents of the blogs are best characterized. In the case of the SNAFU posting, the Board concludes that it is insolent and insubordinate.

More damaging to the viability of the employment relationship are the Grievor’s blog postings about her co-workers. “Aliens” was posted on March 31, 2006, soon after the Grievor started her blog. It is three pages long and presents sketches of six of the Grievor’s co-workers. Though aliases are used, the people being described are easily identifiable to Department employees (and perhaps others). “Eva Gabor”, aimed at one co-worker, appeared on June 30th

and contains the initials of the colleague being parodied. The descriptions in both blogs, with the possible exception of the one of Ms. Y, are universally unflattering. Witnesses variously characterized these postings as malicious, insulting, nasty, disrespectful, and mean spirited, characterizations with which the Board agrees. Two of the employees caricatured in Aliens expressed anger and “absolute shock” upon reading it. Others who knew the individuals targeted in the postings expressed similar sentiments. Several employees testified they could never again trust the Grievor. Several witnesses were visibly distressed during their testimony, more than a year after the events.

The Aliens and Eva Gabor postings amount to public attacks on seven identifiable colleagues, people with whom the Grievor interacted on a daily basis. There was no evidence of provocation. The postings took place several months apart and cannot be seen as a momentary aberration. Both postings concluded with a warning of more of the same to come and the Eva Gabor posting invited others to contribute to the bashing of colleagues. The material contained in the blogs are inherently destructive to workplace relationships and inimical to the normal expectations of respect and dignity to which people are entitled when they come to work. The Board shares the feelings of betrayal and invasion expressed by those targeted by the Grievor’s blogs. Her public ridicule of colleagues was abhorrent and has no place in a work setting. Placing the Grievor back into this relatively small workplace would be a further offense to the victims of the Grievor’s blogs.

The “Office of the O” blog was posted on April 11th. It is one page long and only a small portion raises any concern. In that part of the blog, the Grievor comments on an old file she had handled that had given rise to a complaint to the provincial ombudsman. While the Grievor provides a date for a conversation about the file, the Board agrees with the Union that there is

insufficient information in this posting to identify the appellant. This posting cannot be seen as a breach of confidentiality by the Grievor. However, the Board accepts that the comment that the “woman .. rats me out”, which is a reference to the appellant going to the ombudsman, is unprofessional and reflects poorly on the Department and the Grievor. The attitude exhibited by these words is antithetical to the Department’s values and activities with respect to the resolution of disputes. Publicly referring to a client who accessed an appeal mechanism as someone who “rats me out” is highly inappropriate for someone in the Grievor’s position.

The final posting of concern, “Cat Fight”, was released on June 29th. In this posting the Grievor relates the story of her attempt to use a wellness fund to pay for a personal running device. In so doing, the Grievor posts an email exchange with a wellness fund administrator. She reveals that she works in the public sector of Alberta and mentions the provincial government. The first name of the administrator is contained in one of the emails and she is referred to as the “wench in charge” and later as a power hungry woman. In the Board’s view, the Grievor violated an implicit trust by publicly posting emails sent to her by the fund administrator that were intended as private communication between the administrator and the Grievor. It was also inappropriate to refer publicly to the administrator in insulting terms.

Collectively the four postings about the Grievor’s co-workers and work environment provide grounds for discharge. In coming to this conclusion the Board has reviewed the authorities provided by the parties. The Union cited numerous cases in which an array of employee misconduct, some of which the Union suggested was far more serious than any committed by the Grievor, did not result in termination. Misconduct included misuse of an office computer (*Owens-Corning*), sharing of pornography at work (*Ontario Ministry of Natural Resources*), fighting among workers (*Westcoast*), public criticism of management by a union

official (*Alberta Department of Justice [Rennich]*), breach of policy (*City of Calgary*), insubordination by displaying a poster at work critical of management (*Government of Alberta [Reville]*), misappropriation of employer property (*Hickeson-Langs*), and jeopardizing the safety of clients (*Alberta Solicitor General [Erl]*). None of these cases is comparable and each turned on its own particular set of facts. The same can be said for the Employer's authorities, such as *Highland Valley Copper* (displaying a poster insulting management) and *Shell Canada* (theft of company product).

Because blogs are a relatively new phenomenon that have not attracted a great deal of arbitral attention to date, the parties could only point to one previous award on this subject, *Chatham-Kent*, a decision issued in 2007. In *Chatham-Kent*, an employee of a health care facility for seniors was fired for the contents of her blog. Like in the current case, there were no restrictions on public access – it was open to anyone with internet access. Based on the employee's comments in the blog, the arbitrator concluded that the blog was intended for the public at large as well as present and future employees of the facility. As in the current case, much of the blog site, which was in existence for three months, was devoted to personal matters unrelated to work. The employee posted other material, however, that the arbitrator concluded was insubordinate to management, derogatory and abusive towards co-workers, demeaning and disrespectful of patients, and disclosed confidential information about patients, including a photograph. Notwithstanding an immediate apology by the grievor when first interviewed, eight years of service, and some family related difficulties, Arbitrator Williamson upheld the discharge. He concluded that "given the nature and the extent of her misconduct it must be found that the decision of the employer should not be disturbed" (para. 33). The arbitrator considered the fact that two other employees with blogs had received lesser amounts

of penalty, but concluded that the grievor's blog postings were much more serious, justifying harsher discipline.

There are a number of similarities between *Chatham-Kent* and the current case. In both cases an employee initiated blog was found to be insubordinate and insulted colleagues. In both cases the blogger invited comments from others and issued warnings about what may be coming next, evidence that the blogger was aware of the public nature of the blog. Unlike *Chatham-Kent*, the Grievor in the current case did not disclose confidential information about clients, although she certainly disparaged a former client for appealing to the ombudsman. The Grievor's comments about co-workers are significantly more damaging than those made by the blogger in *Chatham-Kent*. Consistent with the outcome in *Chatham-Kent*, the Board agrees that the impugned conduct in the current case was serious enough to undermine the employment relationship beyond repair, justifying discharge.

In reaching this decision, the Board has considered the role played by the July 17th interview in the dismissal. The Board has already commented on the deficiencies of the July 17th interview. The Grievor was not told the purpose of the meeting, had 75 pages of untabulated material from her blog thrust on her with little explanation, her queries about discipline went unanswered, and she received no help or guidance from the union representative in attendance. The evidence showed that the Grievor was unapologetic and defiant about her blog and demonstrated little awareness of the hurt she had caused. She defended her freedom of expression, refused to remove the blogs, and threatened more postings after she was told that she had been terminated. Her conduct at the interview was influential in the Employer's decision to terminate her employment.

If the Grievor's reaction on July 17th was at odds with other evidence, the Board might have entirely disregarded the interview given the unfair circumstances under which it was conducted. If other evidence had demonstrated that, contrary to her responses during the interview, the Grievor fully recognized the impact of her conduct and truly regretted her blog postings for reasons other than the fact it may have cost her her job, this might have signalled to the Board that the conclusions management drew from the interview were unwarranted. The problem for the Grievor is that the attitude she displayed at the interview, in which she could not really understand what she had done wrong, continued up to and including her testimony at the arbitration hearing. It was also consistent with the aggressive tone found in several of her blogs. It is unclear to the Board, that even if the July 17th interview had been conducted properly, the Grievor's responses would have been different.

On the same day as the Grievor was dismissed, her next blog posting stated "there are some folks in the world who do not like my blog" and expressed sorrow for herself (Exhibit 23). She did not express any regret for her actions. Two days later the Grievor did issue an apology on her blog titled "I'm so sorry" (Exhibit 23). She wrote "this post is meant to be an apology" and "I did not mean to hurt you or your family". She apologized to her employer if she "inadvertently" damaged its reputation. While the Grievor clearly apologized in this posting, there is little, if any, indication that the Grievor appreciated why her blog was so offensive and that she had in fact hurt a number of people, regardless of what she "meant to do". It is unclear how many of her colleagues would have seen this posting. Certainly the Grievor displayed no remorse or contrition when she cleaned out her office a day or two after her dismissal.

The Grievor's next attempt to apologize was in the form of two Shoebox greeting cards that she intended to be left in common areas for Department staff. These cards were never set

out for staff, a result that was not the Grievor's fault. The contents of the cards are instructive because they reveal the Grievor's feelings at the time. In one card, she wrote that "it's good to have friends like you" and "please know that I've never had a mean thought about you". In the other card she wrote that she "never meant to hurt anyone", "I'm so sorry", and "this got so blown out of proportion". She left her phone number on the second card.

These cards and her July 19th blog posting are tepid apologies, at best. There is no acknowledgement by her that she actually had hurt anyone, only a *mea culpa* about her intentions. They are qualified with words such as "inadvertently", "blown out of proportion", and "meant to be an apology", indications that the Grievor had difficulty accepting responsibility for her conduct and did not understand why her blogs were so offensive to her colleagues and managers. The cards were intended for a group of people, not individuals. Clearly missing from her apologies are any personal initiatives toward the individuals she had insulted. The Grievor did not email any of her former colleagues or attempt to contact them by phone. Her explanations, that she did not want to violate Department rules against personal emails and she had been told not to communicate with Department employees, ring hollow, especially since she immediately called Ms. Y after she was dismissed. The Grievor could have attempted personal apologies had she wanted to personally apologize. The conclusion of the Board is that the Grievor did not apologize directly to those she had offended because she did not appreciate how much her blog postings had hurt them and still did not quite understand what all the fuss was about. The Grievor's conduct is in contrast to Ms. Y, who personally apologized to the people she had offended. The Grievor's sole genuine sign of remorse at the time was the removal of any material about her work or her colleagues from her blog. By then the damage had been done.

The Grievor continued to display only limited appreciation at the arbitration hearing for the impact of her blogs. She defended the blogs as attempts at satire or caricature and was disingenuous in suggesting that she was not describing real people. The Grievor suggested that, since aliases were used, no one could really identify the person she was caricaturing, which was clearly not the case. She acknowledged that the blogs could have been hurtful to those targeted and expressed relief that some of the people had not read what she written about them. But her explanations were frequently couched in qualifiers, such as her belated realization that the postings could be “misconstrued” or that they reflected her feelings on the day they had been written, as if that somehow made it acceptable. Missing from her testimony was an unqualified recognition that she had written some truly awful things about her colleagues and managers, she accepted full responsibility, and that she apologized without reservation.

In short, the Board is not satisfied that the Grievor has accepted just how offensive were the contents of her blog and why the things she said in them were capable of destroying the employment relationship. At the time of the arbitration she had three new blog sites. Even discounting the Grievor’s responses at the July 17th interview, the Board does not find a basis in the Grievor’s subsequent actions and testimony to relieve against dismissal.

In its arguments the Union suggested that if the Grievor could not be returned to work at the Department, a place be found for her elsewhere in the Alberta public service. The Board is not certain that it has the jurisdiction to reinstate an employee to a position different from the one held at the time of discharge. However, even if we had the authority to do so, this is not a situation in which we would exercise our authority. We agree with the general proposition, advanced by the Employer, that it is not a good idea to transfer problems from one department to another. There may be special circumstances in which such transfers are made by mutual

agreement or for idiosyncratic reasons. We might consider such a solution if the Board believed strongly that the Grievor ought to be reinstated and the only impediment was her inability to work with her previous colleagues. This is not the case. The Board has concluded that the decision to dismiss was justified on several grounds, not solely because some of her colleagues no longer want to work with her. In these circumstances, transferring the Grievor to another part of the public service is not an option.

Nor do any mitigating factors provide a compelling enough reason for the Board to exercise its discretion to relieve against dismissal. The Board is cognizant that the Grievor had worked for the Department since 2000 and had no previous disciplinary record. Her judgement may have been affected by her grief over the illness and subsequent death of her father. All these factors count in her favour. While there was some suggestion that the Grievor did not intentionally set out to insult her co-workers, that argument cuts both ways. On the one hand, it may show the Grievor 's rehabilitative potential, a factor in her favour. On the other hand, it may show that the Grievor never understood that the things she had written were anything but clever and humorous, suggesting that good intentions aside, the Grievor never fully appreciated the hurt caused by her blog. Lack of intent, without a clear recognition of the nature of the misconduct, is not enough to mitigate the penalty.

Finally, it was argued that the Grievor was treated differently from Ms. Y, a colleague who also wrote about the workplace and her colleagues in a blog. The Board was not given a copy of Ms. Y's personal blog and only saw her posting on the "Gossiping" site that she shared with the Grievor. The Board is satisfied, based on the evidence of witnesses who attended her July 17th interview and who saw her personal blog, that Ms. Y's blog differed materially from that of the Grievor's, containing few and far less offensive postings about the workplace. Not only

did Ms. Y apologize when first confronted and volunteer to remove her blog, she met with colleagues individually to apologize, evidence of remorse notably absent in the Grievor's case. Even recognizing that the warning received by Ms. Y prior to the July 17th meeting from the Grievor assisted her response, there are still sufficient differences in her situation and that of the Grievor to justify the significantly different discipline imposed.

Accordingly, the Board concludes that the Employer had just cause to dismiss the Grievor and this is not a case in which the Board should exercise its discretion to reduce the penalty.

AWARD

For all the above reasons, the grievance is denied.

Mr. Bartee, nominee of the Union disagrees with this award and his written dissent is attached. Mr. Workman, nominee of the Employer concurs with this award.

Dated April 11, 2008 in Calgary.

Allen Ponak

IN THE MATTER OF A GRIEVANCE ARBITRATION

BETWEEN:

GOVERNMENT OF ALBERTA
(REFERRED TO AS THE "EMPLOYER")

AND:

ALBERTA UNION OF PROVINCIAL EMPLOYEES
(REFERRED TO AS THE "UNION")

Grievance of "R"
Dismissal

ARBITRATION BOARD: Allen Ponak (Chair)
Vern Bartee (Nominee of the Union)
Paul Workman (Nominee of the
Employer)

DISSENT OF THE UNION NOMINEE

Date: April 10, 2008

I have reviewed the award of the majority in this case and am unable to agree with the conclusions reached with regard to all of the main issues therein. In this dissent I will deal separately with each of those issues as follows:

Article 28.02

I refer to the Award – page 48 – last para. – Mr. Ponak states:

... "The grievor should have been told about meeting and its purpose and given the opportunity to select a representative of her choosing which may or may not have been Ms. D2."

The evidence from the grievor during the hearing was that she would not have chosen Ms. D2 as her representative, but would have chosen her regular Union Steward, who knew the department and had been Union Steward for many years.

Further, Mr. Ponak continues:

.... "Second, the Grievor never had chance to confer with her union representative prior to the start of the interview. This arose because the Grievor was not told the reason for the meeting, did not have a chance to select a union representative, and Ms. D2, who knew about the interview well in advance, heeded management's admonition to not advise the Grievor of the meeting. Had the Grievor been given proper advance notice of the meeting and chosen her own representative, more than likely she would have been able to confer in advance which may have influenced her approach to the interview. Third, the Grievor was not advised during the meeting, despite repeated attempts on her part to elicit a response, that the meeting was likely to result in discipline. Clearly the Employer contemplated discipline having prepared letters of discipline in advance of the meeting. The only possibility under which discipline would not have been imposed, by management's own admissions, was if the blog proved not to be the Grievor's, an extremely remote outcome given the information about the blog already in the Employer's possession. Furthermore, very early in the meeting the Grievor admitted that the impugned blogs were hers. Under these circumstances, the Board cannot understand the reluctance to answer the Grievor's questions about the disciplinary implications of the interview. The Board is satisfied that the repeated failures of management to indicate the true nature of the interview was unfair in the circumstances

and may have had a negative impact on the Grievor's responses and demeanour during the interview.

Do these irregularities result in a substantive breach of the Grievor's rights under Article 28.02 such that the discipline subsequently imposed should be voided?"

On page 47, the Arbitrator states:

"Arbitrator Hornung declared the discipline void because the failure to tell the grievor that her interview would likely lead to discipline resulted in the interview being conducted without the benefit of union representation, a violation of a substantive contractual right. In DB, Arbitrator Jolliffe adopted the Cordingley–Wagner reasoning. In DB, the grievor was not informed that an interview was disciplinary and he was not accompanied by a union representative. The arbitrator declared the resulting discharge null and void, notwithstanding the seriousness of the allegations against the grievor.

In Cordingley–Wagner, DB, and all the other cases cited by the parties (or referred to in Cordingley–Wagner and DB), the crucial element in overturning discipline has been the lack of attendance of a union representative at a meeting or interview that directly resulted in discipline. In these cases, management's failure to advise employees of the potential for discipline deprived them of the opportunity to exercise a contractual right to union representation."

On page 45 of the award Mr. Ponak refers to the *Cordingley–Wagner* matter, and within that award Arbitrator Smith (*University of Calgary v. AUPE*) states:

"... The Employer does not satisfy that section by simply advising the employee that a meeting will be held. Where the purpose of the meeting is to obtain admissions of culpability or exculpatory information that will be taken into account in making a determination of whether or not disciplinary action should be taken, the Employer owes a duty, in order to comply with the meaning and intent of Article 28.02, of advising the employee that the purpose of the meeting is for investigation of a possible disciplinary matter. If it were to be otherwise there would be no reason to have the continued the sentence which follows in Article 28.02. That portion of the Article requires:

"When a Union Steward requires time off from work to accompany an employee to an interview pursuant to this clause, the Union must obtain prior approval from his employing department to be absent from work ..."

Here the grievor was given no indication that discipline was to be contemplated or that she was to be interviewed with respect to conduct which might be subject to disciplinary action. IN order to comply with Article 28.02 as the article intends, the Employer must advise the employee, at a minimum, of the purposes of the interview so that that balance of Article 28.02 can be complied with.

In University of Calgary v. AUPE, the board refers to a quote from Arbitrator McFetridge in Greyhound Lines wherein he states:

“The Employer’s obligation to provide notice has a dual purpose; it lets the employee know that it will be an important meeting and allows time to arrange for representation if desired. The employee is denied that right when the fact that discipline may be contemplated is not revealed until the meeting is in full flow....”

and at pg. 85:

“The Employer’s obligation is to give the employee sufficient notice of the meeting. This means that the employee must be advised in advance that company officials wish to meet with her and that the meeting will concern a matter where discipline may be contemplated. Only after employees have this information can an informed choice be made as to whether the presence of a Union Representative is desirable.”

To simply ask an employee to attend for an investigative meeting that could result in disciplinary action, without advising of the purposes of that meeting, makes it impossible for the employee, and the Union, to comply with the provisions of Article 28.02 and provide the necessary assistance to an employee which was bargained for in the Agreement.” ...

It is important to consider that the instant case as well as the *Cordingley-Wagner (Hornung)* and *DB (Jolliffe)* cases share a common employer, common union and common collective agreement. Further, the *Cordingley-Wagner*, *DB*, and *University of Calgary* cases were not challenged by the employer, therefore these represent the arbitral standards Mr. Ponak ought to apply.

In *Cordingley-Wagner, DB and the University of Calgary* cases the arbitrators concluded that the employees' right to notice had been violated, therefore the terminations were declared null and void. In my opinion, once Mr. Ponak made the statements regarding the disciplinary meeting, wherein he concludes that Article 28.02 had been violated by the employer because the employee was not warned the meeting she was called to would result in disciplinary action, he has a duty to declare the discipline null and void. It constitutes an error of law for Mr. Ponak to go beyond that, and thereby fail to declare the discipline null and void. There is an obvious disconnection between the Arbitrator's fact-finding and his ultimate conclusion.

Arbitrator Ponak concludes that Article 28.02 is a substantive right; he sites from the cases that state why it is a substantive right; however he then allows the deficiency to be corrected. He accomplishes this by only considering ONE of the purposes of the article as set out by McFetridge, and that is there was a union representative in attendance at the meeting. There is another purpose of the article; that is the Grievor's right to know what the meeting is concerning. This allows the Grievor to prepare (as did the second employee in this case). The initial interview is very important and can affect how an employer feels and can influence the next steps taken. When the employer "blindsides" as they did in this case, that throws the "train off the track", not only by the Grievor's reactions, but by how the employer perceived those actions.

Once that substantive breach has occurred and the damage is done, Arbitrator Ponak then goes on to make assumptions regarding how things were or would have played out. He then discounts the first meeting, but by then the damage is done - damage that may not have been done had there been compliance with the substantive right.

On page 48, Mr. Ponak states:

"The current case is not the same. It is true that the Grievor was not told in advance about the interview or its purpose and was not told during the interview that discipline, despite her queries, was the likely outcome. In the Board's view this lack of disclosure was contrary to the notice requirements of Article 28.02, which, the authorities make clear, obligate management to tell an employee the purpose of the meeting. However, the primary reason for such disclosure, also as set out in the authorities, is to allow for union representation. Here, while the Grievor was not told the interview's purpose, union representation was provided and a union representative was present throughout the July 17th interview. This distinguishes the current case from Cordingley-Wagner and DB and indeed all the other cases cited."

Arbitrator Ponak misses the other primary reason set out by McFetridge, and that is in order to make the employee aware the meeting could lead to discipline. There are reasons why it is important for the employee to be aware beyond securing representation (i.e. composure, reflection, thinking about things in order to put the situation into context, etc.).

In my view, Mr. Ponak is incorrect in his conclusion that the discipline should not be declared null and void due to the fact the employer invited a Union Member Service Officer to attend the meeting. Further, the *Cordingley-Wagner, DB and University of Calgary* and *Greyhound* cases all clearly state the employer must inform the employee the meeting could result in discipline, and at that time the employee has the right to decide whether or not to have union representation, and also to decide specifically who he/she wishes to have as a representative. The cases cited (*Cordingley-Wagner, DB and University of Calgary*) set a clear precedent that the violation of Article 28.02 is the failure to inform the employee prior to the meeting that discipline could result. That alone triggers the "null and void" declaration. This case clearly demonstrates the duty incumbent upon the employer to inform the employee of the reason for the meeting and that discipline could result. This is particularly true here due to the fact that this employee was dismissed as a result of her actions and reactions during the disciplinary meeting. Further, the employee who received a two-day suspension was informed

(by the Grievor) that the meeting was a disciplinary meeting and it was regarding the “blog” she had written. This is clearly an injustice that the Arbitrator substantively ignored, and therefore resulted in an unreasonable conclusion.

Further, in this case the employer by-passed the Union Steward and instead contacted the AUPE MSO to inform her there was a meeting scheduled. The evidence at the hearing was the employer instructed the MSO not to disclose to the employees involved that a meeting was planned. Also, the employer did not reveal to the MSO that the meeting could result in discipline. The employer’s direction to the MSO (Ms. D2), which she followed, and the employer’s failure to disclose that the meeting could result in discipline established a clear interference with the grievor’s representational rights by not directly providing the notice required to the employee as the employer is required to do. Even if it is acceptable for the employer to select union representation (which it is not), where was the compliance with the other purpose of the Article, and that is notice that there is an important meeting? The AUPE MSO (Ms. D2) was not told what the meeting was about and in fact she testified that she was “blind-sided” by the meeting. The employer’s obligation to provide notice has a dual purpose; it lets the employee know that it is an important meeting and allows time to arrange for representation if desired.

It is alarming that not only was there a substantive breach, the employer admitted that this lack of adherence to this substantive right in the collective agreement is their common practice:

Page 22: “ Ms. T explained that the decision to not advise the Grievor in advance was partly to ensure that no manipulation of the blog would occur once the Grievor received notice of the meeting and partly because it was standard practice to not provide advance notice to employees in serious matters.”

Furthermore, the explanation given by the employer for not complying with the collective agreement lacks credibility. The

employer already had the evidence in hard copy. It would be impossible for the Grievor to manipulate the blog. Indeed, had the Grievor made attempts to manipulate the blog after she was advised of the employer's concern, THIS would have been grounds for discipline, as it would have been dishonest.

In the *Cordingley-Wagner, DB and University of Calgary* cases the arbitrators have found that it is a substantive right of the employee to be informed that a meeting they are called into may result in discipline. If the employer violates this right of the employee, the discipline must be declared null and void. This was the result in all three of the precedent matters. In keeping with this well-established precedent, Mr. Ponak has no alternative but to find the same result.

Arbitrator Ponak in his award at pages 49 and 50, criticizes the AUPE MSO (Ms. D2) for not informing the employee about the subject matter of the meeting and for not ensuring that the Grievor was satisfied with her as a representative. Mr. Ponak fails to consider that even the MSO was not told this was a disciplinary meeting, was asked not to meet with the Grievor prior to the meeting, and was admonished by the employer not to disclose to the Grievor that there was a meeting scheduled. Even though Arbitrator Ponak states in the award that the MSO could have met with the Grievor prior to the meeting, or stopped the meeting, the fact remains this was not done, and the Grievor suffered the injustice. Further Ms. D2 was not informed that the matter concerned a "blog" and the employer felt the "blog" was offensive and expressed contempt for her managers, ridiculed her co-workers and denigrated administrative processes and constituted engagement in serious misconduct that irreparably severed the employment relationship, justifying discharge. If the AUPE MSO (Ms. D2) had been informed of the employer's position and attitude about the blogs, and not simply told it was a matter of "internet misuse" as stated in the award at page 49, she could have taken advantage of the opportunity to negate the irregularities that placed the Grievor at an unfair disadvantage.

Mr. Ponak has allowed the employer a “slight of hand” move. This was achieved by the employer contacting the MSO (Ms. D2) directly and instructing her to attend a scheduled meeting, not informing her it was a disciplinary matter, and instructing her not to inform the employee. Mr. Ponak exceeded his jurisdiction by not applying the clear and unambiguous terms of the collective agreement by accepting that the employer can choose the representative and that notice that must be given to the employee can be given to the union representative of the *employer’s* choice instead. In this case Mr. Ponak has attempted to shift the onus to the AUPE MSO (Ms. D2) to inform the employee that there was a meeting scheduled. Informing the employee was the obligation of the employer, as is clearly related in the three precedent matters (*Cordingley–Wagner, DB and University of Calgary*). Only the employer was aware the meeting was of a disciplinary nature, and Mr. Ponak acknowledges that fact on page 49 of the award:

“...Third the Grievor was not advised during the meeting despite repeated attempts on her part to elicit a responses, that the meeting was likely to result in discipline. Clearly the Employer contemplated discipline having prepared letters of discipline in advance of the meeting.” ...

The employer clearly, knowingly and purposely interfered with the grievor’s substantive representational rights. Any such interference is a violation of the law as well as the collective agreement and must be found to render said discipline “null and void”.

Adverse Inference & Blogs

The law is clear that an employer must not discriminate against an employee. In the event two employees of the same employer are disciplined for the same alleged infraction, the discipline must be equal, and thereby non-discriminatory.

There were two employees involved in “blogging” in this case. One employee was disciplined with a two-day suspension, and the other

employee (the grievor) was dismissed. In the award Arbitrator Ponak quotes many statements contained in the grievor's blog, however does not quote from the blog of the employee who was suspended for two days. Throughout the course of the hearing, the Union requested a copy of the blog of the employee who received the two-day suspension, however this blog was not provided to the Union or to the Board, therefore the Arbitrator was unable to examine the contents of such blog. ***The second employee was suspended as direct result of the blog that was not provided as evidence.*** It is unreasonable to uphold the dismissal in the absence of relevant evidence.

When discipline is meted, it is incumbent upon the employer to demonstrate a clear rationale why two employees who are accused of the same, or similar, infraction are not dealt the same, or similar, disciplinary sanction. If such evidence is not provided by the employer (who has the burden of proof) the Arbitrator is obligated to draw an "adverse inference" against the employer. The fact that through evidence it has been disclosed that the employer caused the blog to be removed and destroyed compounds this inference. It seems peculiar the evidence was that when the employer met with the Grievor, they reduced the blog to written form. Surely the same process would have been followed with the other employee who was accused of the same offence. An adverse inference was not drawn in this case, and therefore Arbitrator Ponak, in drawing upon general principles of law and in particular the principle of discrimination, misapplies that law.

Arbitrator Ponak states at page 60 of the award:

... "The Board is satisfied, based on the evidence of witnesses who attended her July 17th interview and who saw her personal blog, that Ms. Y's blog differed materially from that of the Grievor's, containing few and far less offensive postings about the workplace." ...

The Arbitrator accepts evidence from employer witnesses that is clearly self-serving in order to justify why one employee was suspended for two days and the other was dismissed. Arbitrator Ponak was unable to

outline any evidence with respect to the specifics contained in the main blog of the employee who received a lesser discipline. This is due to the fact that the employer did not provide, nor was compelled to provide, the wording of the main blog. What little was provided of the other employee's second blog shows that the content and quality did not differ to such an extent to reasonably justify such disparate results. I respectfully submit that it is the Board's duty to review all relevant material, and in this case that review would include a comparison between the wording of the blogs of both employees. If it was not available for review, the employer has not met their onus and the benefit therefore goes to the Grievor. At most, the Board should have found that the discipline will be the same as the other blogger. In my opinion Arbitrator Ponak's assignation of any weight to the self-serving evidence of the employer witnesses was wrong. In this case, Arbitrator Ponak arrived at a conclusion for which there was no evidentiary basis.

Right to Terminate

On page 29 of the award, the Arbitrator states:

"The next day Ms. D2 spoke to Ms. T to complain she had been "sideswiped" by the termination. According to her testimony and notes (Exhibit 29), Ms. T told her that they had not intended to terminate the Grievor, but the Grievor's reactions during the interview, and her absolute refusal to remove the blog, had resulted in the decision to dismiss. Ms. T, in her testimony, agreed that the Grievor's attitude in the interview contributed to her dismissal, which was why, prior to the interview, several letters had been prepared, only one of which was a letter of termination."

The evidence does not support that the Grievor's refusal to remove the blog resulted in the dismissal. The notes of the meeting clearly show that the grievor was dismissed prior to being asked to remove the blog.

At page 27, the Arbitrator states:

"A letter of termination was prepared and signed by Ms. M2, the Grievor's direct supervisor. The evidence showed that several letters had been drafted in advance, one of which was a termination letter. The other letters provided lesser amounts of discipline. Ms. M1 agreed that she had seen the letters prior to the meeting on Ms. M2's computer, although she did not read them at the time." ...

Further, on page 28, the Arbitrator states:

"Management witnesses were questioned about who had the delegated authority to terminate an employee in the Alberta public service. Mr. P stated that he possessed the delegated authority to dismiss employees, but was uncertain whether Ms. M1 possessed similar authority. Ms. M1 understood that Mr. P had the authority to terminate. She said he had given her the authority to discipline her staff and she had in fact issued a letter of reprimand in the past. She had never dismissed an employee prior to signing the Grievor's letter of termination. Ms. T believed that Mr. P had written a letter on July 11, 2007 delegating authority to the Department's senior management team, including Ms. M1, to sign letters of termination. She said it was normal for discipline to be delegated down from the deputy minister level to members of the executive team. She stated that Mr. P's July 11th letter was on file. Ms. H stated that it was appropriate for Ms. M1, as the Grievor's immediate supervisor, to sign the letter of termination. She could not say if any senior officials, such as the Minister or deputy minister in the department, had delegated the authority to terminate to anyone in the Department. Finally, Ms. M2 testified that it was her understanding that Ms. M1, as a supervisor, always had the authority to discharge staff under her supervision.

After the letter of dismissal had been signed by Ms. M1, the management, group, without Mr. P, returned to the meeting room." ...

The letter *believed* to have been written by Mr. P on July 11, 2007 delegating authority to sign termination letters referenced in the above quote was never provided to the Board. No witness under oath would confirm that Ms. M1 had this authority. It seems there is no other confirming evidence in the excerpt noted above that would show that Ms. M1 has the right to terminate.

In the award at page 44, Mr. Ponak states:

The Board will first address the Union's argument that the discharge should be struck down because the termination was carried out by a person, Ms. M1, without the delegated authority to discharge. There was uncontradicted evidence that, although Ms. M1 signed the letter of termination, the decision to terminate was made by Mr. P, the senior Department manager. It is not disputed that Mr. P has the authority to dismiss employees. In Government of Alberta [Drummond], Arbitrator McFetridge concluded that the key question is not who communicated the decision to terminate, but who actually made the termination decision. As long as a person with the authority to terminate makes the decision, the termination cannot be overturned on the ground of an improper delegation of authority. The Drummond award was issued in 1988 and has not been contradicted since. The Board adopts Drummond. We are satisfied that Ms. M1 merely communicated the decision to terminate that was made by Mr. P. Therefore, the Union's objection that the termination was made by someone who lacked the authority to terminate, must fail."

As stated above, there is no confirming evidence that Ms. M1 had the authority to terminate – the Board only has a statement that she “believed” she had such authority. It was Mr. P’s testimony that he terminated the employee, however he did not state he had given Ms. M1 the authority to terminate. There is no dispute that Mr. P had the authority to terminate, however the evidence was clear there were several letters prepared by Ms. T prior to the meeting. The evidence shows these letters were not approved or ordered by Mr. P. The letters contained varying degrees of discipline, and the decision to issue the termination letter was supposedly based upon the grievor’s reaction during the interview. Mr. P did not attend this interview and therefore could not have made the decision to terminate. This decision clearly was made by Ms. M1 who attended the interview and had signed the termination letter. In the absence of evidence showing Ms. M1 had the authority to dismiss employees and in light of the fact that Mr. P was not in attendance when the decision to terminate was made (nor is there any evidence that Mr. P was consulted prior to the decision to terminate), it is reasonable to conclude the termination was indeed carried out by someone who lacked the authority to terminate. Further, the *Public Service Employee Relations Act* is clear with respect to who has the right

to terminate and who has the authority to delegate this right. In the instant case there is no proof that Mr. P delegated the authority to terminate to Ms. M1.

In this case the employer did not prove any delegation of authority to terminate, therefore the Union's objection that the termination was made by someone who lacked the authority to terminate, must succeed.

Conclusion

The decision to dismiss should be set aside from the outset because of the breach of the substantive rights under Article 28. However, even if you get beyond that, which this Arbitration Board cannot without adding to or detracting from the collective agreement, the grievance ought to be upheld for all of the reasons set out above.

For all of the foregoing reasons, I dissent from the majority award.

Respectfully Submitted:

Vern Bartee,
Nominee of the Union