IN THE MATTER OF A RIGHTS ARBITRATION AWARD pursuant to ss. 124(3) of the POLICE SERVICES ACT, R.S.O. 1990, c.P.15,

BETWEEN:

City of Hamilton Police Services Board
(The "Employer")

AND

Hamilton Police Association
(The "Association")

AND in the matter of the individual grievance of Ms. Deborah Crozier

ARBITRATOR: William A. Marcotte

APPEARANCES:

FOR THE EMPLOYER:	B. Duxbury, counsel T.R. Marlor, Deputy Chief D. Ienitle, Comms. Supervisor T. Wide, Supt. J. Anderson, Staff/Sergeant
FOR THE ASSOCIATION:	B. Boyce, Exec. Officer D. Allan, Administrator D. Crozier, grievor C. Elliott-Norrie, comms. opr. and others

Hearings held in Hamilton on January 27, March 17 and 19, 2003.

AWARD

In its grievance of December 16, 2002, the Association claims Ms. Deborah Crozier (the "grievor") was, "discharged based on work performance issues . . . Discipline too harsh especially in light of seniority." The Employer position is that it had just cause to discharge the grievor.

The provisions of the collective agreement to which the parties referred are as follows:

> 1.1 The Provisions of this Agreement apply to all members employed in the job classifications set forth in Schedule "A" attached hereto and forming part of this Agreement and for the purpose of clarity, the rates of pay and the hourly rates set forth in the said Schedule "A" in respect of the job classifications described therein apply, during the term of this Agreement to all members employed in the said classifications.
>
> 2.1 (a) The Association and its Members recognize and acknowledge that it is the exclusive function of the [Employer]:
>
> . . .
>
> (ii) to hire, classify, promote, demote, dismiss, discipline, suspend, or lay-off members. . .
>
> (h) Management acknowledges that, when exercising its rights regarding matters relating to discipline, the exercise of such right is to be measured against a standard of just cause.
>
> 14.2 When full-time vacancies occur the senior applicant is to be awarded the promotion provided the applicant has the qualifications to perform the work required, to the Board's standards, but in the following sensitive areas, namely, Administration, Special Services, Personnel, the promotion shall be subject to the approval of the Chief of Police. Such standards are not to be established in a discriminatory manner and approval of the Chief shall not be exercised in a discriminatory manner.
>
> 14.3 (a) If a member is promoted or awarded a position, whether included or excluded from the scope of this Agreement, and within thirty (30) days or less, can show cause that the position is unsuitable for him/her, the member shall revert to their previous position, and wage

rate, without loss of seniority. Any other member promoted or transferred because of the rearrangement of positions, is to be returned to their former position and wage rate without loss of seniority.

(b) If, however, the foregoing 14.3 (a) does not occur, then within six (6) months, the member proves unsatisfactory, the following options are open to the member:

1. The member may revert to their previous position if that positions is still open. In such circumstances, the member's rights under this Article are then exhausted.

2. If the previous position is not still open, then the member will have the option of being laid off, or accepting an interim position to be assigned by the Chief of Police and receiving the wage rate applicable to such a position. However, it is acknowledged and accepted that the member in either circumstances has two additional options which are as follows:

(i) the member has the right to be placed in a comparable job class for which the member has qualifications as to the performance of the job when the next suitable vacancy occurs. In such circumstances, the Association acknowledges that the posting provisions as set out in Article 14 shall not apply, or

(ii) the member may successfully bid for a job vacancy as it is posted. Upon the member exercising either of these latter two options, the member's rights under this clause of the Collective Agreement are then exhausted.

14.15 (a) In the event that a member is to be laid off for any reason, the Chief of Police will have the option of offering that member a vacant position with an equivalent or lower band rate, if a vacant position exists. In the event that the Chief does not exercise this option, or in the event that no appropriate vacancy exists, the provisions of Article 14.5 with respect to lay-offs shall take effect.

(b) Where the Chief exercises the option in Article 14.15(a), the posting provisions of the Collective Agreement do not apply.

(c) Article 14.15 may be used prior to 14.5 taking effect.

(d) If the member accepts the position offered by the Chief, the member will be accepting the position at the new position's wage rate.

15.1 For the purpose of seniority rating, a civilian member's length of service is to commence and accumulate from the date on which the member entered the service of the Board, including any time spent as a police officer under the Active Police Agreement.

Schedule "A" of the collective agreement was also referred to, part of which forms Appendix A of this award.

The Employer's services include communications functions conducted in the "radio" or "call" room. The call room is staffed, for the most part, by civilian "call-takers" and "dispatchers" who are in the "Communications Operator" job classification pursuant to Schedule "A" of the collective agreement. (At relevant times the grievor was a call-taker.) In addition to regular telephone calls, emergency, "911", calls are handled by the communications operators for police, fire and ambulance services. Police services calls are dealt with directly, while calls for fire or ambulance are passed on to those services by the operator, who then monitors the discussion between the caller and the service in order to be of assistance. Call-takers and dispatchers may also directly contact fire and ambulance services if the 911 call so warrants.

There is in place a technology-driven system for handling 911 calls, the "Priority Response System" or "PRS". (The PRS is a refinement of the "Differential Police Response" system first used in 1993; both systems are fundamentally the same for our purposes.) Briefly, the Priority Response System intends the efficient and cost-effective use of police resources (as well as fire department and ambulance services) by way of priority-ordering of emergency calls. Hence, when a 911 call is received by a call-taker, a template [i.e., "Computer Aided Dispatch", or "CAD"] appears on the operator's computer monitor and, based on the information received, a priority level is assigned by the PRS to that call (or by the call-taker who may override the PRS-assigned priority in some cases) according to the following order contained in Section 2 of the PRS document before me:

- A **Priority 1** call will still be serviced immediately by any available unit, with preference given to the beat officer.

- A **Priority 2** call will still be serviced immediately by the beat officer whenever possible, or within 15 minutes by any other available unit.

- A **Priority 3** call will be serviced immediately by the beat officer whenever possible, or within 30 minutes by another appropriate unit.

- A **Priority 4** call will be serviced immediately by the beat officer whenever possible, or within 3 hours of the dispatcher receiving the call by another appropriate officer.

- A **Priority 5** is the default priority assigned to an officer generated event and as such, is not a priority setting available to the complaint taker.

- A **Priority 6** is the default priority for administrative details.

The significance of proper assignment of the priority level to a 911 call and the role of the call-taker in making that assignment are addressed in Section 3 of the PRS document, as follows:

> The Complaint taker is the first link in the Priority Response process, and as such, figures prominently in our ability to respond appropriately to calls for service. It is imperative that calls be prioritized appropriately. When the priority for a call is set too low, we endanger the lives of those who have entrusted us to protect them. Similarly, if a priority is set too high without justification, we tie up precious police resources making it more difficult to service high priority calls.
>
> It is expected that all complaint takers will utilize the following procedures to ensure that priorities are set as accurately as possible and that an appropriate response can be initiated.
>
> 1. Ask appropriate questions of the caller to determine the call type and priority. (Specifically, WHO WHERE WHAT WHEN WHY WEAPONS).
>
> 3. When the event is of a high priority (Priority 1 or Priority 2), the complaint taker must first obtain initial information to formulate a CAD event, then accept it. The complaint taker will then continue to ask pertinent questions and update the call with the information as it comes in.(this [sic] allows the dispatcher faster access to the CAD event resulting in a quicker response to high priority events)
>
> 4. The onus is on the complaint taker to adjust the priority of the call (higher or lower) should any information received warrant making such a change.
>
> 5. Complaint takers will not assume information, nor will they discount information provided by the caller. Whether or not you, as a complaint taker believe the

information is irrelevant or untrue, we must accept it as valid information until proven otherwise.

6. If you require advice or guidance, seek it first from your Supervisor. That having been stated, we do work in a team environment and often solicit advice from our peers. While we do not wish to entirely discourage this, regardless of the advice received, you as the complaint taker are solely responsible for your actions regarding the call. If you choose to act upon advice supplied by a peer, you assume full responsibility for acting upon that advice as if it were your own.

Once a call has been accepted by the call-taker, it is sent by computer to a dispatcher who then directs police officers to deal with the matter based on the priority level assigned to the 911 call by the PRS or by the call-taker. Also, there is an electronic "reader board" in the communications room which lists 911 calls that are queued and awaiting response. It displays and flashes the time the call was made. It also, "beeps", to draw call-takers' attention to the elapsed time the caller has been waiting. All calls are voice-recorded on tape.

There is little dispute in regard to the relevant, voluminous evidence concerning the circumstances surrounding the Employer's decision to suspend the grievor effective August 27, 2002 and to terminate her employment effective September 16, 2002. Indeed, the *viva voce* evidence of witnesses called by the Employer and the Association to testify about those circumstances so closely reflects the documentary evidence before me, the salients of their evidence for our purposes can be presented, for the most part, in the form of the content of those documents. Where appropriate, recourse will had to testimony from certain witnesses.

Ms. Diana Ientile has been a communications supervisor for five years after having been a communications operator for some fifteen years. In late June or early July, 2002, Ms. Ientile was instructed by her supervisor, S/Sgt. Anderson, to investigate two complaints in regard to 911 calls the grievor had dealt with on June 21, 2002 and on June 28, 2002, respectively. On the basis of her investigation into the June 21st complaint, including a review of the recording of the exchange between the grievor and caller and of a requested explanation from the grievor, Ms. Ientile's July 12, 2002 report to S/Sgt. Anderson states as follows:

> [The grievor] did not ask the complaint her name. She did not confirm the return number. [The grievor] did not get a description of the suspect. [She] did not ask if there were any weapons. [The grievor] did not enter important information on the CAD; "he threatened to kill her and stuff." [The grievor] created this call as a priority 2 and it should have been a priority 1 because the suspect was still at the scene or in the immediate area and may elude apprehension.
>
> . . . . .
>
> When [the dispatcher who received the call from the grievor] gave this call out to the officers she specifically asked them to see the complaintant . . . . The officers were not supplied with important information in the call. They were not advised that the complainants [sic] neighbour was threatened death by this male.

In regard to the June 28, 2002 complaint about the grievor's handling of a 911 call on that day, Ms. Ientile's July 7, 2002 report, based on the same type of investigation as concerns the June 21st call, states as follows:

> [The grievor] created this call as an MVC-PD [i.e., a motor vehicle accident-property damage] priority 4 call. Based on the information [the grievor] received she should have created this call as an MVC-P1 [i.e., motor vehicle accident-personal injury] priority 1. The caller said that there were people hurt and screaming. The caller was not put through to the ambulance and should have been. The caller information was not obtained and confirmed with the caller information that came up on the ANI/ALI [i.e., she did not obtain the name of the caller or confirm the telephone number of the caller].

Ms. Ientile said the grievor's errors in dealing with the June 21st and 28th calls were in regard to "basic call-taking responsibilities", in particular her failure to follow procedures concerning gathering information about the "6 Ws", i.e., who, where, when, why, what, weapons. In cross-examination, Ms. Ientile agreed that in the last five years there has been an increase in the number of 911 calls, along with a corresponding shortage of call-takers and dispatchers, especially from May through to September. She agreed that during that time, "On many nights, we can't keep up with the need and priority levels of all the calls." It was also her evidence that there is much more extensive training of communications operators, some seventeen weeks, than she or the grievor had received, noting that the PRS and its predecessor system had been in place beginning in the early 1990's or so. She also agreed that, as concerns the June 28, 2002 incident, the other two call-takers who dealt with the same motor vehicle accident had also not asked the "6 Ws", and had made mistakes similar to those made by the grievor. She agreed, "It happens", that call-takers do not always ask the 6 Ws. She has no knowledge of these other two having being disciplined. In re-

examination, Ms. Ientile said there were no staff shortages on either June 21st or 28th, and that there were "not too many" 911 calls on those days. She also said that the other two call-takers did not make as many mistakes as the grievor on June 28th.

S/Sgt. Anderson, Ms. Ientile's supervisor and manager of the communications section, reviewed Ms. Ientile's investigation report of the June 21 and 28, 2002 complaints and reported the results of his review thereof to his supervisor, Supt. Wide. S/Sgt. Anderson's August 21, 2002 report contains the following as concerns the June 21, 2002 complaint:

> I have reviewed the taped telephone conversation between [the grievor] and [the complainant], the dispatch radio transmissions, the available CAD information, the response of [the grievor] and the findings of Diana Ientile.
>
> The grievor has stated in her response that in hindsight she should have obtained more information from the complainant. [She] also stated that she did not notate the callers [sic] statement that the suspect threatened to kill the neighbour because it was not directed at the complainant. [The grievor] stated that she did not ask the caller about weapons because she thought the suspect was being detained. [She] says that she prioritized the call as a 2 instead of a 1 because the suspect was not in the apartment.
>
> It is clear that [the grievor] did not ask most of all of the questions outlined as required in her training, her experience, and her training manual about the actions of and the description of the suspect in this matter. She also used poor judgement in her selection of what information she made available to the dispatcher and responding officers in her CAD entry. [The grievor] assigned the incorrect priority to the call by labeling it a Priority 2 rather than a 1. Her explanation, if accepted, demonstrates an inability to synthesize information and apply it correctly to a clearly defined set of criteria to determine priority.
>
> Through neglect and poor judgment, I feel that [the grievor] put the public at risk, put responding officers at risk, and began what I believe to be the resulting poor quality service received by the complainant.

In regard to the June 28, 2002 complaint, S/Sgt. Anderson's report states as follows:

> I have reviewed all of the taped telephone conversations, the dispatch radio transmissions, the available CAD information, the response of [the grievor] and the findings of Diana Ientile.
>
> In her response to this matter, [the grievor] does not make excuse for what is in Diana Ientile's and my opinion, her incorrect assignment of the proper priority to this

> call. This leads me to believe that in her mind [the grievor] believes that she properly assessed the facts before her at that time.
>
> Once again, [the grievor's] neglect in this matter put others at risk. Response by the Fire Department was delayed by seven (7) minutes because she did not follow clearly defined procedures. Ambulance response was delayed to a lesser degree but for the same reason. Police response could have been delayed due to improper prioritization of the call. Fortunately, multiple people called in and we had officers available to attend at that time.
>
> The consequences of [the grievor's] failure to follow procedure could have been greater had other people not call in to 9-1-1 or if the car and ignited and there were other passengers who were trapped in the vehicle. As it turned out, the sole occupant was VSA upon the arrival of the ambulance.

Also in his report to Supt. Wide, S/Sgt. Anderson reviewed the grievor's employment record and noted a series of performance problems beginning, for the most part, in 1999, the steps taken by the Employer, and, his conclusions concerning the grievor, as follows:

> **Previous Performance**
>
> The facts of these matters currently under review and the behaviours demonstrated by [the grievor] are not unlike those demonstrated by this employee in several other matters in the past.
>
> - December 1997 - February 25, 1999 - 3 negative profiles
> - July 27, 1999 from February 26, 1999 - disturbance / stabbing - admonished for poor quality service
> - December 20, 2000 - received counseling [sic] for not sending a car to Breach of Peace Bond
> - December 22, 2000 - from February 22, 2000 - booking units off on her own - written admonishment; suspended as Actor
> - December 22, 2000 - from February 22, 2000 - unprofessional behaviour when speaking to uniformed Staff Sergeant - written admonishment
> - December 22, 2000 - from April 27, 2000 - assault call cancelled without authority - written admonishment
> - April 5, 2001 - from September 16, 2000 - failure to identify self or offer assistance - one day suspension, suspended as actor for one year and warned of increased penalties for further breaches
> - July 30, 2001 - from November 11, 2000 - improper entry of data into CAD - one day suspension
> - July 30, 2001 - from November 11, 2000 incident - failure to respond to email request for response from Supervisor - one day suspension

- February 11, 2002 - from September 21, 2001 - disregard for the Service's Mission and Values, our internal Quality Service standards, the Priority Response System and disregard for an officer's safety. - fourteen day suspension

Conclusion

It is my opinion that [the grievor] has not responded as should be expected to the progressive discipline and intervention measures taken to date. [She] is a twenty-year member of this service. If the problem with this employee is attitudinal, then I do not believe that there is anything further than we can do to get this person to consistently comply with the policies and procedures of this Police Service and those required to perform adequately as a Communications Operator / Dispatcher. If the performance problems are related to knowledge, skills and abilities, then here too, I do not believe that there is anything further that we can reasonably do to get this person to consistently follow the policies and procedures of this Police Service and those required to perform adequately as a Communications Operator / Dispatcher.

Depending upon which root cause is accepted, I recommend either discipline up to termination or the locating of a job within this Police Service for which [the grievor] has the knowledge, skills and abilities to adequately perform and where the consequence of error is significantly less than that of a Communications Operator / Dispatcher.

S/Sgt. Anderson agreed with Ms. Ientile's analysis and report of the grievor's conduct on June 21 and 28, 2002. In formulating his conclusions, he determined that further training would be of no use, and, that the grievor had not responded to prior discipline by way of correcting unacceptable job performance. He suggested that her transfer be considered because he was "trying to make an option available" for her.

Supt. Wide reviewed S/Sgt. Anderson's report and, as had S/Sgt. Anderson in his August 27, 2002 memorandum to the grievor, indicates that:

Further, you were the subject of two other incidents where similar poor performance behaviours were demonstrated. One incident was from October 2001 during an OPP pursuit into our area. You did not provide timely and accurate information to the Sergeant and officers involved and you were not monitoring the Province Common Channel as required. The other matter was from January 2002 when you failed to consider officer safety during a call at a lodging house . . . . You were verbally reprimanded in March 2002 for these matters. You had just returned from a 14-shift suspension on another matter (01-562725). It was felt that given the time lapse since the incidents had occurred and our desire to allow you to return with a clean slate, that a verbal reprimand would suffice.

Based on the information before him, Supt. Wide suspended the grievor and recommended termination of employment in a memo to the grievor dated August 27, 2002:

> In accordance with Policy and Procedure 3.09 - Discipline, Chief Kenneth Robertson authorized the imposition of the following disciplinary penalty for your failure to comply with values and ethics as contained in the Priority Response Policy and Quality Service mandate:
>
> That you be suspended forthwith without pay. A report will be prepared for the Police Services Board, which will recommend termination of your employment with the Hamilton Police Service.

Supt. Wide said that, in deciding upon the discipline imposed on the grievor, he took into account her prior discipline and viewed his 14-day suspension of her on February 5, 2002 as a "substantial imposition of a penalty." In cross-examination, Supt. Wide testified he did not compare the grievor's job performance with other employees' performance. He viewed her record as indicating she was "having difficulty multi-tasking." He is not aware of other employees involved in the June 28th call having been disciplined. He said the grievor was "distraught" in the August 27, 2002 meeting.

Also on August 27, 2002, Deputy Chief Marlor met with the grievor and Mr. Boyce, the executive director of the Association, and informed the grievor of her immediate suspension and his recommendation to the Police Services Board that her employment be terminated. In a letter to him dated the next day, August 28, 2002, Mr. Boyce, on a "without prejudice or precedent" basis, provided the Association response to D/Chief Marlor's recommendation as follows, relevant for our purposes:

> . . . . One of the questions you asked of me, and I wasn't privy to all the information at the time, was whether or not there were any mitigating factors with respect to [the grievor] and her performance issues these last couple of years. [She] has now informed me that she has had some family problems that developed about 3 years ago and that they will soon resolve themselves in the not too distant future.
>
> For the record [the grievor] accepts responsibility for her actions however she wants me to make it clear that her decision-making had nothing to do with not caring. She recognizes in hindsight that she should have handled the calls differently however when it gets busy in the radio room things just get by her and she doesn't know why

> other than it's busy. [She] is not making excuses for her actions other than to explain that it's not because she is not willfully [sic] doing anything wrong; she is not lazy or inconsiderate of the public.
>
> As I'm sure comes as no surprise to you but we don't think that termination from the organization is an appropriate disciplinary sanction for a person with 22 years service and in circumstances where the actions disciplined for were not consciously done. Don't get me wrong we (the grievor and this Association) accept that [she] is responsible for her actions and deserving of some form of discipline, but discharge is far too harsh. Given that position, **our suggestion is to modify the discipline** from discharge to a permanent demotion to another job within the organization at the pay rate of that other job. This disciplinary demotion would be for a fixed period of time which would mean that she would be able to apply for future vacancies in the radio room once that period of time had elapsed & should be qualified and prepared to go back into that environment once again.

In his September 5, 2002 response to the above, D/Chief Marlor states:

> I have reviewed your correspondence of August 28th, 2002 and your request for me to consider moving [the grievor] to a new position within the organization, rather than termination. It is my belief that we have followed a clear, progressive discipline process in regards to this matter and that [the grievor] failed to respond to all proactive steps taken. Therefore, I cannot agree to your request and suggest that you may wish to notify the Hamilton Police Services Board that you wish to make representation to them on behalf of [the grievor].

D/Chief Marlor testified he had been involved in the grievor's prior discipline and is familiar with her entire employment record. Prior to deciding on his recommendation, he did not have a discussion with her but did so with Mr. Boyce. The purpose of their discussion was to find out if there were "personal matters, things that would account for her poor performance that I should be aware of that impact my decision, including health issues. [At the August 27th meeting], some mention was made of a death in the family, but she did not elaborate. She also said working for the service was an important focal point in her life." The grievor did not provide the Employer with any documentation concerning health issues she may have had.

D/Chief Marlor said the grievor's termination of employment was necessary in that, "The communications operator is an important job, people are crying out for help, are at risk, and if they don't receive proper care it can compound and be disastrous. [The grievor] had been struggling for a

number of years and was not doing her job. We tried to work through a stepped process of corrective measures . . . . Discipline and training seemed to have no effect. No matter how many times we told her, she did not take her situation seriously. And, on one occasion in the past, she refused to provide a statement [regarding an incident in September, 2001 that was investigated in similar fashion to those of June 21 and 28, 2002], and in my opinion lied to her supervisor. We tried to work with a problem employee. We expended energy and resources to make [her] useful. I saw no success. The frequency of problems increased . . . . If I felt [the grievor] could be re-habilitated, I wouldn't have recommended termination. Also, [the grievor's] amount of sick days are an indication of a person with problems. She was often sick after a disciplinary proceeding and, in some cases, it affected the process of dealing with her in a timely manner."

It was D/Chief Marlor's evidence that he did consider the Association's August 28, 2002 suggestion of a transfer or demotion of the grievor to another position, but had rejected it. "[Police services] positions have a detailed requirement to work within prescribed procedures, very much a requirement to follow detailed procedures like in the communications centre. With [the grievor], I have someone who doesn't follow guidelines and procedures and policies. So, it did not seem logical to me, knowing of such difficulties . . . . Here the risk was too great in regard to due diligence and risk management and the opportunity for success [of a transfer or demotion] was too small.... In my opinion, her behaviour demonstrated resistance to learning from her mistakes. Basically, there was difficulty for the people involved in the process to obtain timely information, I believe, because she was acting as an obstructionist and she didn't appear to take the situation seriously."

In cross-examination, D/Chief Marlor agreed that a disciplinary transfer or demotion of the grievor was an option available to him, as is a non-disciplinary demotion or transfer under the provisions of the collective agreement. He did recall a circumstance where a long-term employee in the graphics department had posted into the communications operator position. When it was determined, however, that this employee was not suitable for the position i.e., had "multi-tasking difficulties", he was transferred to a lower-rated job in a different classification, as was the agreement between the Association and the Employer. D/Chief Marlor disagreed that employee's circumstances and those of the grievor are similar. D/Chief Marlor further testified that he did take into consideration the grievor's sick time in regard to the September 5, 2001 incident; "Some of my mind did, but it was

not significant. This isn't about sick time", regarding his decision to recommend the grievor's discharge. He agreed that while he had "suspicions", there is no evidence of the grievor not having used sick time legitimately; "I certainly did look at it, it was in my mind, but it was not significant."

D/Chief Marlor agreed there have been significant changes, "huge ones", in the radio-room technology over the course of the grievor's some twenty years as a communications operator, particularly in the last ten years. He is aware that the civilian personnel suffer from stress and physical problems, such as carpal tunnel syndrome. "It's a very busy place at particular times. It's a difficult job, it's the first point of contact for people crying out for help." He thinks the training for the position is the most extensive of the civilian jobs, and agreed that it is one of the higher-rated positions in terms of "exercise of judgment" and "consequences of error" job factors. He agreed many of the jobs into which the grievor could have been transferred are lower-rated on both those factors but said, "All the jobs require attention to detail or prescribed procedures. I saw [the grievor] as lacking concern for attention to detail and a lack of caring and her attitude is not one that is serious and, on one occasion, she was not truthful." He agreed he formed his opinion of the grievor's attitude from the written reports and not from discussions with her. As concerns the events surrounding the occasion of the September 5, 2001 incident, he agreed that employees who face potential discipline do first submit a draft of their statement to the Association prior to submitting it to the Employer. He agreed the grievor was upset in the August 27, 2002 meeting. He agreed the grievor has a history of good performance appraisals, save for recently, and has a number of commendations which she had accumulated over the years.

On October 3, 2002, the Police Services Board convened a meeting to decide on D/Chief Marlor's recommendation and to hear submissions on behalf of the grievor. The Board approved D/Chief Marlor's recommendation. Its October 21, 2002 decision is stated as follows:

> Upon reviewing all relevant information, having considered [the grievor's] length of service, record of progressive discipline, history of performance, extensive efforts by the Police Service to provide assistance to [her], and the serious nature of [her] actions in regard to public safety and the safety of emergency personnel, the Board approves the recommendation that [the grievor] be dismissed effective September 16, 2002.

> The Board has considered the submissions of Mr. Boyce as to demotion or re-assignment of [the grievor], however, the Board is strongly of the opinion that the actions of [the grievor] are inconsistent with the values of the Hamilton Police Service and that she has not demonstrated any real effort to improve her performance, notwithstanding ongoing efforts by the Police Service to provide corrective assistance.

The grievor's evidence is that for the first ten of her some twenty years of work as a communications operator, she had no problems in fulfilling her duties and responsibilities. She testified, however, that with the advent of computerized call-response systems in the early 1990's, communications operators exercise less discretion in assigning priority to a 911 call. She also said that the volume of calls has increased by some fourfold. "When it's busy, it can be hell, going from call to call. As soon as you release one, another comes up on the screen." It was her evidence there are frequent staff shortages and, "You end up working overtime". She feels stress by way of the reader board that was introduced some two or three years ago; "After a period of time, the [queued] calls start to flash and then buzz quite a bit lately." Her last training session, in March 2002, which she underwent at her own request, "brought to light things I could change or do differently."

As concerns the investigated calls of June 21 and 28, 2002, the grievor said, "When I went back through the calls, there are areas I could have improved on . . . . I probably got lazy in some instances and took the information on the screen as being correct", i.e., she did not make the 6 Ws inquiries. She agreed she could have done "a better job" on both occasions. She did not grieve any of her prior discipline regarding unacceptable job performance, although she said, "Some I should have asked questions about or put in information, but I didn't."

In regard to the events surrounding the September 5, 2001 incident, the grievor said, "I'd received a memo to put in information concerning the 911 call. At that time, I was going through a lot of personal stress. That request just happened to trigger it." She said she did not lie about having not listened to the tape of the call, yet having prepared a report about it; "I had my preliminary response drafted; some calls stick in your mind", and which draft she first submitted to the Association for review prior to submitting it to the Employer. Between September 5, 2001 and the date she submitted her report, the grievor went off work for an extended period of time.

In cross-examination, the grievor said that, "Sometimes I feel I can't keep up . . . . The job has gotten beyond me, with what's going on with me. To be honest, I don't know if I could go back." She said that she is not seeking re-instatement to the communications operator position, "at this time." The grievor, however, did not rule out a return to it, which would be possible under the provisions of the collective agreement; "It's an option I want to keep. I can't say I wouldn't two years down the road." She agreed her evidence is that she lays fault on the volume of incoming calls and complexity of the PRS procedures and equipment for her mistakes on June 21 and 28, 2002, especially those of June 28th. She said, "In hindsight, I couldn't verify" some of the information she was required to obtain, but agreed the 6 Ws would have captured it. She said, "in looking back", she had made a serious mistake in judgment on both occasions. She agreed she had done well in her 2-day March, 2002 refresher training session; "I did well one-on-one and the room was quiet. But where I fall down is when it's really busy on the shift. My multi-tasking skills have gone down the drain."

In regard to her personal circumstances, the grievor said she has been on anti-depressant medication starting some three or four years ago, and that she sought EAP assistance in July 2002, after a period of consultation with her doctor and counselling from another individual. She did not inform the Employer of these matters; "I'm not the sort of person who brings her problems to work. I don't broadcast my personal life . . . . I wasn't keeping up to standard. My judgment was off. The medication I was on maybe, but not always, was affecting my judgment." She has no medical documentation because, "I was never asked to obtain it."

Ms. Carolann Elliott-Norrie has been a communications operator for some twenty years. Her evidence is that prior to the computerized systems, the call room was, "pretty relaxed, you had a lot more discretion in how to handle calls . . . . We're now restricted by the PRS." This change is "a bonus . . . because everything is in front of you for the whole region. Everybody knows what's going on right up to the minute. No yelling [between call-takers and dispatchers which frequently occurred prior to the PRS and its predecessor]." She also said that with the reader board, "It flashes and tells you how many calls are in the queue waiting to be answered . . . You scramble to get through to the important calls . . . because you can't distinguish in the queue if it's an emergency or just a backed-up call." She agreed there is more "pressure" as a result of these systems. She also

said that, "Staffing is a problem, people book off sick. I get called almost every day to come in [on overtime]." Ms. Elliott-Norrie said there are many policies and procedures for the call room staff to follow and, that while "We used to get a lot of updates, I haven't seen one in a year." She was not sure if there are more policies and procedures now as compared with twenty years ago.

In regard to the June 28, 2002 incident, she did not ask the 6 Ws of the callers, "because the call was already on the board and already had the service. We were trying to figure out [the exact location]. I'm going through three or four calls to get that information . . . . I'm not going to waste time asking for what I already know." Ms. Elliott-Norrie was the third call-taker to deal with this incident, while the grievor was the first. Ms. Elliott-Norrie was not disciplined for failing to follow procedures.

It was also Ms. Elliott-Norrie's evidence that, while a call-taker is able to override the priority assigned to a 911 call based on the information entered into the PRS, no one does so, "because you might get reprimanded. For example, a domestic, people arguing, and the female calls back and says he's gone and I don't want to see you anymore. We go, just in case." She also said that on some nights, "It gets frustrating because of the number of calls."

In cross-examination, Ms. Elliott-Norrie agreed there is more structure and discipline in handling 911 calls now due to the PRS system. She agreed that system is helpful and useful. She agreed the reader board is an aid and not a hindrance to performing her job duties. She agreed the PRS assigned priority level can be over-ridden when information updates warrant. She is not complaining about her job, which she enjoys doing; "I love it." She has a clean discipline record. The Employer submitted it had just cause to discharge the grievor in circumstances surrounding its decision that do not warrant arbitral disturbance of its decision. The Employer argued that while the grievor was able to properly perform her work tasks for many years in having the ability and training to do so, as acknowledged in her performance appraisals and by way of commendations, beginning in 1999 work performance problems emerged. These work performance problems continued and culminated on June 21 and 28, 2002, despite properly applied progressive discipline and, indeed, despite further training which the grievor herself had suggested. This training indicated the grievor was well-capable of performing her duties as a communications officer in the Employer's call room, notwithstanding the technological and procedural changes that had occurred over the long course of

her employment. In these circumstances, the grievor's failure to appreciate the consequences of continued unacceptable performance of her duties and the lack of any explanation of her deficiencies prior to her discharge reveal, both, a culpable lack of responsiveness on her part and an element of insubordination, such that the Employer reasonably concluded she did not anymore care about doing her job properly. This attitude on her part also renders meaningless any consideration of alternate employment, given that virtually all the positions in the civilian structure require attention to detail and procedures.

The Employer submitted it is worrisome that, as demonstrated by the grievor in her testimony regarding the June 21 and 28, 2002 culminating disciplinary events, the grievor's approach to her job performance mistakes manifests a habit of attempting to rationalize and make excuses for them which approach, however, runs counter to the professionalism and responsibility required of her, as a public servant, for complete honesty and integrity. Instead, the grievor's record reveals a profile of not paying attention to her duties, not identifying priorities and risks, a lack of responsiveness to progressively more severe discipline manifesting insubordination, attempts to deflect fault, and a refusal to acknowledge her errors. The Employer argued that in these circumstances, of having exhausted its corrective measures, there is no meaningful point in or purpose for continuing the employment relationship. Rather, for the sake and protection of the public and its employees, the grievor's discharge is a properly warranted response to her continuing mis-conduct in the performance of her call-room duties.

The Employer argued that a demotion or transfer to another job is not appropriate for reason that the grievor's difficulties are attitudinal in nature and evince an element of insubordination. Secondly, modern police functions by their nature require attention to detail and constant focus, as did her communications operator job functions. Thirdly, police work, in all of its components, involves exposure to the public and, thus, is under constant scrutiny and review. Therefore, given the grievor's attitude and inability to respond to corrective discipline in order to properly perform police-work duties to the higher standard required of public service employees, neither demotion nor transfer is a viable alternative to discharge in the instant case.

In support of its position on the merits of the grievance, the Employer submitted *Re Canada Post Corp. and C.U.P.W. (Chaplin)* (1990), 11 L.A.C. (4th) 16 (Frankel), *Re Greyhound Lines of Canada Ltd. and A.T.U., Loc. 1374* (1991), 22 L.A.C. (4th) 291 (McFetridge), *Re Burlington (City) and C.U.P.E., Loc. 2723* (1994), 45 L.A.C. (4th) 17 (Brent), *Re Cominco Ltd. and U.S.W.A., Loc. 480 (Gerard),* 60 L.A.C. (4th) 246 (Bird), *Re Industrial Family (Hamilton) Credit Union Ltd. and O.P.S.E.U., Loc. 343* (1995), 51 L.A.C. (4th) 443 (Hebdon), and, *Re Toronto Police Services Board and Toronto Police Association* (June 19, 2002) unreported (Starkman).

The Union argued that the circumstance of the grievor's discharge are those of a non-disciplinary situation. As well, and contrary to the Employer's assertion, this is not a case of an attitudinal problem such that discharge is the only option available to the Employer. Rather, it was submitted, the relevant circumstance is that the grievor has not changed or grown with her job and, consequently, lacks the ability to perform the communications operator job up to Employer standards due to the significant changes in the call-room since she started working in it twenty years ago, and due to her personal problems in the past few years. Alternatively, if it is concluded that the incidents in question are disciplinary in nature, discharge is an excessive response and a suspension or demotion is more appropriate in all the circumstances.

The Union argued that the grievor has become over-burdened by the expectations and busy-ness of call-room duties and simply could not keep up with her job requirements, for example as concerns the incidents of June 21 and 28, 2002. In that respect, the grievor has not attempted to rationalize her conduct in order to justify her actions, but clearly accepted that she could have handled the calls differently and had made errors in judgment, as was also her testimony. As to the assertion that the grievor was unresponsive and insubordinate, the Association argued that as concerns the September 5, 2001 incident in question, she properly took the opportunity to speak with Association representatives prior to submitting the report requested of her, which accounts for the delay in submitting her report. Also, while the Employer claims that "nothing seemed to get through" to the grievor and has provided no explanation for her behaviour prior to this arbitration hearing, the Union submitted that for each and every instance where her actions were called into question, the grievor did respond with a formal report when asked for one, with no exceptions. Further, the evidence is

that when her fourteen-day suspension was imposed on her, the grievor was shaken and upset, which are not the reactions of someone for whom discipline is "not getting through."

The Union submitted that the grievor's performance appraisals and commendations indicate she is a good and valued employee. Her problems of the past three years are not evidence of an attitudinal problem but, rather, are more demonstrative of someone who has become overwhelmed by her duties and functions as a communications operator. That she did own up and take responsibilities for her errors in judgment is not behaviour reflective of someone who has an attitudinal problem. In that respect, the Employer, by way of mis-characterizing the grievor's problem, did not properly put its mind to consideration of other jobs the grievor could perform, and the evidence does not support the conclusion that she is beyond rehabilitation. This conclusion is supported by way of her having given the Association the authority to find her another job. This consent on her part is not reflective of someone who has an attitudinal problem, particularly in that virtually any other job would entail a considerable reduction in salary for the grievor.

As to the grievor's voluntary re-training in March 2002, that exercise did not occur in the real-life circumstances of the call room, with its pressure of call after call and the queuing warnings of the reader board, which circumstances are those that caused or contributed to the grievor's problems. In any event, it was submitted, some of the errors the grievor made have been traditionally over-looked, as was Ms. Ientile's evidence, and in the particular circumstances of June 21 and 28, 2002, those same errors were made by other communications operators who were not investigated or disciplined. Also, the Association submitted that D/Chief Marlor's evidence is that in his decision-making regarding his recommendation that the grievor be discharged, he took into account the grievor's absences in the prior three years, but which absences were never investigated as to their validity, and the Employer, despite its rather stringent attendance policy, never raised an issue concerning any of those absences on the part of the grievor. That is, the Association argued, D/Chief Marlor took into account an irrelevant factor in deciding to discharge the grievor. Also, he wrongly assumed the grievor had lied concerning the incident of September 5, 2001.

As to the assertion that the grievor is unable to perform the duties and functions of other positions because of the possibility of errors in judgment on her part, it is abundantly clear from the evidence

regarding other available positions, that none involves the type of exercise of judgement required of the grievor as a communications operator, and none involves the types of consequences as a result of an error in judgment. In that respect, S/Sgt. Anderson's August 21, 2002 report "hits the nail on the head", when he recommends, in recognition of the grievor's difficulties associated with the multi-tasking requirements of the communications operator position, "locating" the grievor in a position "where the consequence of error is significantly less than that of a Communications Operator/Dispatcher." The Association argued that given these circumstances and the non-attitudinal, non-disciplinary nature of the grievor's performance problems, discharge is simply too harsh a penalty.

In support of its merits on the grievance, the Association submitted Brown and Beatty, *Canadian Labour Arbitration* 3d (Aurora, Ont.: Canada Law Book Inc.) paras. 7:3544, 3546; paras. 7:3510, 3520, 3530, 3540, 3544, 3546; paras. 7:4000, 4100, 4210, 4310, 4312; *Re British Columbia Railway Co. and C.U.T.E., Loc. 6* (1988), 1 L.A.C. (4th) 72 (Hope); *Re Wm. Scott & Co,* [1976] BCLRB No. 46/76; *Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910* (1983), 13 L.A.C. (3d) 261 (Hope); *Re Calgary Handi-Bus. Assn. and A.T.U., Loc. 583 (Shoenberg)* (2000), 90 L.A.C. (4th) 240 (Jolliffe); *Re Pirelli Cables and Systems Ltd. and U.S.W.A., Loc. 2952 (Richardson)* (2001), 101 L.A.C. (4th) 270 (Somjen); *Re Edith Cavell Private Hospital and Hospital Employees' Union, Local 180* (1982), 6 L.A.C. (3d) 229 (Hope); *Re Purolator Courier Ltd. and Teamsters Union, Local 938* (1992), 24 L.A.C. (4th) 300 (Brent); *Re Maritime Telegraph & Telephone Co. Ltd. and Int'l Brotherhood Of Electrical Workers, Local 1030* (1984), 16 L.A.C. (3d) 318 (Colter); *Re Penticton & District Retirement Service and Hospital Employees' Union, Local 180* (1978), 18 L.A.C. (2d) 107 (MacIntyre); *Re British Columbia Hydro and Office And Technical Employees' Union, Local 378* (1984), 14 L.A.C. (3d) 69 (MacIntyre); *Re Steel Co. Of Canada Ltd. and United Steelworkers, Local 1005* (1976), 7 L.A.C. (2d) 132 (Beatty); *Re Cominco Ltd. and United Steelworkers, Local 480* (1975), 9 L.A.C. (2d) 233 (P.C. Weiler); *Re Liquid Carbonic Canada Ltd. and United Steelworkers, Local 12998* (1974), 5 L.A.C. (2d) 139 (O'Shea); *Re International Chemical Workers, Local 721 and Brockville Chemical Industries Ltd.* (1971), 23 L.A.C. 336 (Shime); *Re Int'l Ass'n Of Machinists and Gabriel Of Canada Ltd.* (1968), 19 L.A.C. 22 (Christie), and, *Re Riverdale Hospital and Canadian Union Of Public Employees, Local 79* (1973), 2 L.A.C. (2d) 178 (Rayner).

In reply, the Employer submitted that the issue before me is not one of job performance difficulties on the part of the grievor, rather, the issue is that of culpable wrongdoing on her part. As to the issue of culpability *vis-a-vis* the grievor's medical and personal problems, these issues did not arise anywhere except perhaps in Association correspondence of August 28, 2002 but in any event, arose only in cross-examination and not in the grievor's examination-in-chief. However, there is no evidence to back up her assertions. Thus, little weight, if any, ought to be given to the grievor's evidence. While the Association refers to transfers under the collective agreement provisions, should she prove unsatisfactory in another position, the irony is that pursuant to those same provisions the grievor has the ability to transfer back to her position of communications operator in the call room, and which ability she is not prepared to relinquish. The Employer acknowledged that Ms. Elliott-Norrie, the third call-taker on June 28, 2002 was not disciplined for her procedural errors, however, she has no discipline record. As to the matter of the grievor's sick days, D/Chief Marlor's evidence is that the Employer did not rely on any issue associated with the grievor's sick time in deciding to recommend the grievor's discharge. As concerns S/Sgt. Anderson's suggestion of a transfer, that recommendation must be viewed in the context of his entire report and, in any event, his authority does not include decision-making as to appropriate discipline. Moreover, while the Employer did transfer another employee out of the call-room for reason of inability to perform a communications operator's functions, that person's circumstances are in no way similar to those of the grievor.

The issue to be determined in this award is whether or not the Employer has just cause to terminate the grievor's employment effective September 16, 2002. In determining a matter of discharge, fundamental arbitral considerations are stated in *Re Wm. Scott & Co. supra* at para. 13 as follows:

> First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

In applying the above approach with which I concur for purposes at hand, it must first be considered

whether or not the grievor's admitted mis-conduct on June 21 and 28, 2002 is culpable or non-culpable in nature. A relevant distinction between these two types of behaviour, which also acknowledges the uniqueness of the circumstances of each case of discharge or discipline, is provided for in *Brown and Beatty supra* at para. 7:3510 as follows:

> Boards of arbitration have consistently affirmed management's right, in the proper circumstances, to discipline employees who fail to meet reasonable production standards, who are careless or negligent in the performance of their work, who disregard announced safety procedures, or who generally exhibit poor work habits. However, in other contexts, if such behaviour can be attributed to factors beyond the employee's control (involuntary malfeasance), for example his physical or mental capabilities, rather than some factor within his control (voluntary malfeasance), for example inattentiveness, carelessness, disregard for safety procedures, etc., then discipline of any form will not usually be regarded as a valid response. Thus, where it is established that an employee is simply incapable of meeting a particular production standard or of attaining the quality of work which the employer expected of him, arbitrators have generally taken the view that the imposition of disciplinary penalties is not appropriate. In the words of one arbitrator, to substantiate any disciplinary sanction the employer must establish "not only failure to meet reasonable standards, but also some degree of culpable behaviour on the part of the employee which gives rise to this failure."

(Footnotes include reference to *Re Purolator supra, Re Pirelli Cables supra, Re Calgary Handi-Bus supra* and *Re Cominco Ltd. (Bird) supra.)*

The above explication reveals it is the Employer party in the instant case which bears the onus of establishing on the evidence, on a balance of probabilities, that the grievor's conduct on June 21 and 28, 2002 is culpable in nature. In that regard, improper performance of her duties on those occasions, in and of itself, is not reason to find culpability on her part *Re Brown and Beatty supra*.

As concerns the conduct in question, it is not in dispute, as was Ms. Ientile's uncontradicted evidence, that the grievor's mistakes on both occasions were in the nature of a failure to follow the basic duties of a call-taker, i.e., to gather information by way of the 6 Ws - where, who, what, when, why, and weapons. Moreover, the grievor agreed in her testimony that the required information could or would have been obtained had she followed proper procedures. This sort of information is required by the PRS-CAD template on the communications operators' computer monitors, and which technology has been in place for some ten years in the call room. Further, the obligation on

the grievor to obtain this information does not entail an exercise of judgment on her part, but is a basic responsibility in responding to a 911 call, especially since on both occasions the grievor was the first call-taker. (In contrast, Ms. Elliott-Norrie was the third call-taker regarding the June 28, 2002 incident and, as was her undisputed testimony, she did not ask the 6 Ws because that information, save for the exact location, had already been obtained. Accordingly, she did not make redundant inquiries of the callers, i.e., an exercise of judgment on her part.) There is no issue that the grievor had the necessary training and experience to perform this basic call-taker function. The evidence is there was no shortage of personnel on June 21 and 28, 2002, and as was also Ms. Ientile's uncontradicted evidence, there was no an unusual number of 911 calls i.e., "not too many", on those two dates. Thus, it would appear the Employer did have just cause to discipline the grievor on the basis that her behaviour was culpable.

The grievor's explanation for her mistakes on June 21 and 28, 2002 is in effect, that she was overwhelmed by her job duties; "My multi-tasking skills have gone down the drain." The grievor also made reference to her circumstances at those times, namely, personal problems and taking anti-depressant medication. I have considerable difficulty in ascribing credibility to her explanation.

Firstly, at no time prior to testifying at this arbitration hearing did the grievor provide to the Employer the above explanation for her mistakes on the days in question. Her explanation for the absence of any documentation concerning either of her personal problems, i.e., "I was never asked to obtain it", is not convincing, especially since it is her testimony that she did not voluntarily inform the Employer of these circumstances. In any event, the grievor testified only that the medication "may" have affected her judgment on June 21 and 28, 2002. Further, while the grievor testified she is not one to broadcast her personal life at work, a concern for privacy that I can appreciate, it was incumbent on her to explain her apparent culpable behaviour in a timely manner if she wished to avoid discipline. However, she chose not to and, thus, ought to be held accountable for the lack of explanation. Thirdly, and more significantly, if the grievor was truly overwhelmed by her job duties on June 21 and 28, 2002 as a result of technology and the volume of calls, those factors are work-related in nature and need not necessarily be directly related to personal issues, albeit personal problems may be factors contributing to the work-related problems. That is, technologically-driven work demands coupled with increased volumes of 911 calls stand as not

unreasonable explanations, in and of themselves, for a failure to follow proper procedures. Yet at no time did the grievor provide the Employer with this explanation. The lack of this explanation is also puzzling for reason that the grievor claims her work-performance problems over the past some three years also resulted from being overwhelmed by her job duties. However, it is not in dispute that prior to imposing discipline, the Employer's investigation of an incident includes an opportunity for the employee to provide an explanation for his or her mis-conduct, as is Mr. Ientile's evidence. Given the grievor's extensive discipline events in those three years for repeated mistakes that are of the same nature as those she made on June 21 and 28, 2002, it seems quite improbable it never occurred to the grievor, until after she was discharged, that she was no longer able to adequately carry out her call-taker responsibilities after having adequately performed those duties for some seven years. That is, I do not find that the grievor's explanation is credible. Rather, it is more probable that her mistakes in performing her duties on June 21 and 28, 2002 resulted from culpable behaviour on her part. Moreover, and in that respect, the mistakes she made on those two occasions did not occur by way of an exercise of poor judgment. Rather, her mistakes are associated with the basic call-taker duty to obtain information by way of inquiry as to the 6 Ws, and which task does not require an exercise of judgment on her part as the first call-taker.

Based on the foregoing consideration of the evidence before me, I find on the evidence, on a balance of probabilities, that the grievor's mistakes in dealing with the 911 calls in question on June 21 and 28, 2002, were culpable in nature. Therefore, I find the Employer had just cause to discipline the grievor. Accordingly, I find the grievor's culpable mis-conduct on the dates in question are culminating disciplinary incidents and find the Employer properly took into account her discipline record in deciding upon its disciplinary response to her mis-conduct *Re Brown and Beatty supra* at para. 7:4310:

> The doctrine of the culminating incident delineates those circumstances in which it is proper for the employer to consider an employee's past employment record in matters pertaining to discipline . . . . Specifically, the doctrine . . . posits that where an employee has engaged in some final, culminating act of misconduct or course of conduct for which some disciplinary sanction may be imposed, it is entirely proper for the employer to consider a checkered or blameworthy employment record in determining the sanction that is appropriate for that final incident.

As can be seen from the above, while the culminating disciplinary incidents may not in themselves justify the level of discipline chosen by an employer, it is their occurrence *per se* which justifies an employer's consideration of the employee's employment record, including the discipline record. Thus, although the level of discipline imposed might perhaps be disproportionate to the nature of the misconduct associated with the culminating incident, the employer's decision may be deemed appropriate in consideration of the employee's entire employment record.

As to whether or not the Employer's decision to terminate the grievor's employment is warranted or appropriate in all the circumstances, D/Chief Marlor's evidence is that he reviewed the grievor's discipline record in deciding to recommend her discharge. That record reveals discipline associated with her work performance duties as a call-taker (February 26, 1999; February 22, 2000; April 27, 2000; July 7, 2000; September 16, 2000; November 11, 2000; December 20, 2000; March 26, 2001; September 21, 2000). It also reveals discipline for unprofessional behaviour (February 22, 2000 incident); for failing to respond to an e-mail request from a supervisor (November 11, 2000 incident), and, for failure to follow proper service procedures (September 21, 2000 incident). Disciplinary measures include: three negative profiles (December 1997 - February 26, 1999); an admonishment (February 26, 1999 incident); counselling (December 20, 2000 incident); two written admonishments and suspension as Acting supervisor (February 22, 2000 incident); written admonishment (April 27, 2000); written admonishment (July 7, 2000 incident); one-day suspension, along with suspension from acting position for one year, and, "warned of increased penalties for further breaches" (September 16, 2000 incident); two, one-day suspensions (November 11, 2000 incident), and a 14-day suspension accompanied by notification that, "Any subsequent incidents of misconduct will result in further corrective discipline, up to and including dismissal" (September 5, 2001 incident). As well, the grievor was given a verbal reprimand sometime in March, 2002 by S/Sgt. Anderson for incidents in October, 2001 and January, 2002 which appear to be related to her job duties as a call-taker. Further, on March 12 and 13, 2002, the grievor undertook refresher training, apparently at her suggestion, as part of the Employer's efforts to correct her unacceptable work performance.

In my view, the grievor's prior discipline record was reasonably viewed by S/Sgt. Anderson as follows in his August 21, 2002 report:

> Available information shows that [the grievor] has received disciplinary action at least once a year for the past four years. The pattern is consistent. [The grievor] is disciplined, performs satisfactorily for awhile and then a complaint is received about her performance. Discipline is applied, performance improves, and then the cycle continues.

In respect of the above characterization, the grievor's misconduct on June 21 and 28, 2002 is consistent with S/Sgt. Anderson's cyclical view of the grievor's job performance as a call-taker. The grievor's discipline record reveals a lack of consistency in her ability to perform her job in an acceptable manner despite re-training in March, 2002 and despite increasingly more severe disciplinary consequences, particularly in the last three years of her employment following some seventeen years of generally acceptable, and at times commendable job performance, as indicated in her performance appraisals and record of commendations before me. Moreover, the grievor acknowledges she has been counselled and had imposed on her increasingly progressive discipline as a result of poor performance of her job duties. She also agreed she has not grieved the discipline, albeit she said she questioned some occasions but without elaboration of her remark.

On the basis of the above review of the grievor's employment record before me, I find that the Employer's decision to discharge the grievor is not inappropriate in all the circumstances. Her discipline record reveals a lack of response to progressive discipline on fairly numerous occasions in the last three years of her employment, and in the knowledge on her part that continued poor performance could lead to termination of her employment. Having so found, it must be determined whether or not it is appropriate to substitute a lesser penalty for the discharge imposed on her effective September 16, 2002 *Re Wm. Scott supra*.

In *Brown and Beatty supra* at para. 7:4400, many of the mitigating factors often considered by arbitrators for purposes of determining whether or not to ameliorate the discipline which an employer has imposed are listed as follows, citing pp.356-8 in *Re United Steelworkers of America, Local 3257 and Steel Equipment Co. Ltd.* (1964), 14 L.A.C. 356 (Reville, C.C.J.) (cited in *Re Canada Post Corp. supra* at p.27):

1. The previous good record of the grievor
2. The long service of the grievor

3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration due to strong emotional impulses or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negativing intent, e.g. likelihood that the grievor misunderstood the nature or intent of an order . . .
9. The seriousness of the offence in terms of company policy and company obligations.
10. Any other circumstance which the board should properly take into consideration.

In regard to item 10 above, in *Re Wm. Scott supra* arbitrator Weiler indicates an additional circumstance that ought to be considered: "Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem . . ." Further, where there is in place an Employer progressive discipline policy, arbitrators have considered the employee's ". . . rehabilitative potential . . . in those circumstances when the arbitrator is satisfied that the employer's interest in protecting the integrity of its service can be satisfied by some sanction other than the dismissal . . ." *Re Brown and Beatty supra,* para. 7:4422.

In applying those above factors that are relevant to the issue at hand, I find that the grievor does have long service with the Employer, but which service includes a rather extensive discipline record over the last three or so years. The majority of her offences are not isolated, but arise from the sole issue of improper performance of her call-taker duties. The cyclical pattern of offence/discipline/offence militates against any notion of momentariness associated with the grievor's misconduct, or of a misunderstanding of the duties required of her. There is no evidence before me of special economic hardship beyond that which occurs to employees who are dismissed from their employment. While the Association pointed out that Ms. Elliott-Norrie was not disciplined for her failure to follow PRS procedures on June 28, 2002, the relevant circumstances are that Ms. Elliott-Norrie was not the initial call-taker, she properly considered what information was necessary to be acquired by her as the third call-taker, and, Ms. Elliott-Norrie has a clear discipline record. That is, there is no evidence before me to establish that the discipline imposed on the grievor constitutes a form of discrimination. Tangentially, and on the broader view of improper application of a discipline policy,

the Association argued that D/Chief Marlor considered an irrelevant factor in deciding to recommend the grievor's discharge and, secondly, that he was mis-led by the report concerning the grievor's actions following the September 5, 2001 incident, in concluding she had lied to her supervisor regarding her statement associated with the Employer's investigation of that disciplinary incident.

As concerns the issue of an irrelevant factor, i.e., the grievor's sick-day absences, in deciding to recommend an employee's discharge where there is established a culminating disciplinary incident, an employer is entitled to review an employee's entire employment record and not just the record of discipline. That said, where that review leads an employer to take into account matters that are remote from, or not related to, the issues and circumstances surrounding the expressed reasons for its disciplinary decision, at the very least some justification for such reliance ought to be presented. In the instant case, however, D/Chief Marlor, in cross-examination, stated that while the grievor's sick days were "in his mind" as a result of reviewing her record, and reasonably so on the basis that this information is in her record, those absences were not "significant" for decision-making purposes. In that respect, the rather large amount of evidence presented in this award regarding the Employer's investigation into the events of June 21 and 28, 2002, in the form of content from the reports of Ms. Ientile, S/Sgt. Anderson and Supt. Wide, makes clear that, as D/Chief Marlor testified, "This isn't about sick time", i.e., the decision-making process clearly centres on the grievor's job performance offences and the Employer's responses to them over the past three years. I find that whatever consideration D/Chief Marlor gave to the grievor's attendance record, which I accept was not significant on the basis of his testimony, that consideration is overwhelmed by the evidence of job-performance problems by the grievor. Thus, I do not find that D/Chief Marlor's consideration of the grievor's sick days constitutes an irrelevant factor in the instant case.

As concerns the Association position that D/Chief Marlor was mis-led in concluding that the grievor had lied about not having prepared her statement concerning the incident of September 5, 2001, in Supt. Wide's February 5, 2002 report of that matter, he indicates as follows:

> On October 17, at the start of your shift, you told Lori Wheeler, on being handed the demand from S/Sgt. Anderson, *"I haven't even listened to the tape yet."* S/Sgt. Anderson's memorandum directed you to respond in writing before the end of your shift tonight (Oct. 17], failure to do so could result in disciplinary actions. At 6.44

> a.m. October 18, 2001, you forwarded an e-mail to S/Sgt. Anderson stating, *"I received your memo at the start of my shift. My written response was left in error at home, I will bring same into tonight and have same placed in your office. Thanks in advance."]*

The emphasis in the above statement is in the original. That being so, and on the not unreasonable assumption that the grievor would likely have listened to the tape of the impugned call prior to submitting her report, it was not unreasonable for D/Chief Marlor, on the basis of Supt. Wide's method of reporting this matter, to assume the grievor was, perhaps, untruthful about the timing of the preparation of her report. In my view, if there is fault here, it lies with Supt. Wide's method of reporting the matter and with D/Chief Marlor's failure to clarify his intent for doing so with Supt. Wide. In any event, again, the evidence clearly establishes that the grievor was not dismissed for being untruthful about an event in the Fall of 2001, but for reason of issues associated with her job performance.

In regard to the seriousness of the grievance June 21 and 28 offences and those similar in nature in the three years prior to her discharge, it is not in dispute that the duties of a call-taker are significant, especially in regard to 911 emergency calls. Nor is it in dispute that the responsibilities of call-takers and dispatchers are significant for Employer purposes, not only as evidenced by way of the nature of 911 calls, but as recognized by the parties, themselves, given the relatively high salary-rating of the communications operator classification in Schedule "A" and, as revealed in the evidence before me, the relatively high rating for "exercise of judgment" and "consequence of error" associated with the communication operator position. Thus, I find that a failure on the part of a call-taker to follow proper procedures when dealing with a 911 emergency call is a serious offence in terms of the Employer's obligations to the community it services and to the police officers who provide that service in responding to 911 calls.

As concerns the matter of "any other consideration" which ought properly be considered *Re Steel Equipment supra,* the evidence is that the Employer has "attempted earlier and more moderate forms of corrective discipline . . . which did not prove successful in solving the problem" of the grievor's unacceptable performance of her call-taker duties *Re Wm. Scott supra.* In that regard, I have concurred with S/Sgt. Anderson's view of the cyclical nature of the grievor's misconduct/discipline/misconduct pattern of discipline over the past three years.

In regard to the "rehabilitative potential" of the grievor *Re Brown and Beatty supra,* the Association submits that a disciplinary demotion or transfer is warranted in the circumstances. The evidence is that there are civilian positions available, at a lower-rated salary level, with lower-rated "exercise of judgment" and "consequence of errors" factors. In my view, the Employer's decision not to follow that course of action, while perhaps not the decision others might make given the grievor's long service, is not unreasonable. Firstly, under the provisions of Article 14 of the collective agreement, there does arise the possibility the grievor could properly be returned to her communications operator classification, a right she indicated in her testimony she was not prepared to waive. Thus, given the circumstances surrounding the Employer's decision to discharge the grievor, notably the failure of the grievor to achieve a consistent level of acceptable job performance despite the imposition of progressive discipline, the Employer's reluctance is properly founded on the evidence before me. That is, I find it reasonable for the Employer to conclude that there is little potential to rehabilitate the grievor in these circumstances.

Secondly, the dominant nature of the grievor's misconduct over the past three years concerns her inability to follow proper procedures in the performance of her job duties. In that regard, D/Chief Marlor's uncontradicted evidence is that virtually all the civilian jobs in the organization require attention to detail and for proper procedures to be followed. Thus, given these similarities between the grievor's call-taker responsibilities and the responsibilities of other available positions, again in light of the grievor's failure to maintain acceptable levels of job performance despite progressive discipline, I am led to find that the Employer's decision not to place the grievor in another position is not unreasonable.

As concerns the circumstances of a long-standing employee in the graphics department having been transferred to another position following a determination that he was not suitable for the communications operator classification, there is nothing in the evidence to establish those circumstances as being at all similar to those of the grievor. Significantly, while it would appear that individual was transferred for non-culpable improper job performance, in the instant case I have found that the grievor's improper job performance is culpable behaviour.

Based on the above consideration of relevant mitigating factors, I find that it is not appropriate in all the circumstances to substitute a lesser penalty for the grievor's discharge. I find that the Employer's decision to discharge the grievor is appropriate.

In the result and based on all the foregoing, I find the Employer had just cause to discipline the grievor for her culpable behaviour on June 21 and 28, 2002. I find these offences are properly culminating incidents and, accordingly, the Employer properly reviewed the grievor's employment record, including her discipline record, for purposes of deciding upon its disciplinary response to the grievor's misconduct. I find the Employer's decision to discharge the grievor effective September 16, 2002, is appropriate in all the circumstances. I find that consideration of relevant mitigating factors leads me to conclude it is not appropriate to substitute a lesser penalty for the grievor's discharge in all those same circumstances.

The grievance, therefore, is dismissed.

Dated at Toronto, this _____ day of _____, 2003.

William A. Marcotte
Arbitrator