

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

**West Grey Police Services Board**

(Hereinafter called the "Board")

and

**West Grey Police Association**

(Hereinafter called the "Association")

**IN THE MATTER OF THE GRIEVANCE OF LYDIA BLACK**

**Board of Arbitration:**

Belinda A. Kirkwood, Sole Arbitrator

**Appearances for the Employer**

Rick Baldwin, Counsel  
Jessica Dowling, Student-at-law

**Appearances for the Association**

John D. Middlebro', Counsel  
Lydia Black, Grievor

**Hearing Dates:**

October 27, 2004 and January 17 and 18, 2005, February 16 & 17, 2005, March 1, 2005, and March 29 & 30, 2005, June 16 & 17, 23 & 24, 2005 and August 25 & 26, 2005 in Durham, Ontario

## **AWARD**

### **The Claim**

The Board claimed that it had just cause to dismiss the Grievor on November 28, 2003 for her unacceptable and deceitful behaviour related to an incident that occurred on November 18, 2003, when she made inappropriate and derogatory comments about Robert Walker, a bidder to a tendering process for a firewall for the Board, and for also feigning illness on that day. On December 29, 2003, the Board also advised the Grievor and the Association that in further support of its claim, that the Grievor misled the Board when she prepared a report for the Board on the bids received for the tender, that she had disclosed a preliminary schematic drawing prepared by Robert Walker to a competing bidder during the bidding process, and had disclosed a further schematic drawing from Robert Walker with that competing bidder after the bidding process had been completed. The Board claimed that the Grievor had irrevocably broken its trust and that it had just cause to terminate the Grievor's employment.

### **Overview of the Facts**

Some background information is required to place the incident of November 18, 2003 and the Board's allegations in context.

The West Grey Police Service ("Service") was established as of January 1, 2002, when West Grey came into being as a municipality. The Service has two locations, the primary location in the police station on George Street, and another location at the Criminal Investigation Division in the basement offices of the Municipality of West Grey ("the Municipality"). At its inception there were twelve uniform members, the Chief, three ranks of Sergeants, and Constables. The Grievor was hired into the Service as the first civilian member, in the position of Administrative Assistant and Records Manager. Subsequently, Mary Lovric was hired into the Service as a temporary office worker, and then became a civilian member of the Service. In 2003, the rank of Inspector was added and Sergeant Berger was promoted to Inspector.

As Administrative Assistant and Records Manager, the Grievor acted as a secretary and administrative assistant to the Chief, Allan Metcalfe, and provided general office duties, and records management. Although the Grievor did not have a background in computer technology, she developed computer skills on the job in order for her to perform records management functions, and to resolve any problems that arose from the Service's office computers. She reported to Sergeant Smart, a member of the uniform service, on technological matters, but for all other matters reported to Chief Metcalfe.

The Grievor's job duties in records management required the Grievor to implement "Niche", a record management system used by policing communities in Ontario. Subsequently she became involved in identifying the technology needs of the Service, with the result that the Service decided to implement another records management system, which was in the process of being implemented in policing communities throughout the province. This records management system was being managed and governed by the "O.P.T.I.C. Committee". As the RCMP was a participant in this record management system and was using the O.P.T.I.C. Committee to amalgamate its data base with those of local police departments, and to access the Community Police Information Centre, "CPIC", in order to secure the information in the system, and to protect the entire system from viruses, the O.P.T.I.C. Committee required all participants in this record management system to have a firewall system with a high security level rating of at least "EAL3". The Grievor was involved in obtaining the information required for implementation of this system and in ensuring that the Service met the O.P.T.I.C. Committee's standard of compliance.

By August 2003, the Grievor was urging the Board to purchase a firewall system, irrespective of what the O.P.T.I.C. Committee was requiring, as the Service's computers had been subject to viruses. The Grievor had spent many hours with the assistance of Sergeant Smart, and Bill Nixon, an outside information technology contractor, attempting to rid the computers of the viruses.

The Grievor testified that in August 2003, she became stressed due to the pressures at work to such a degree that she had to leave work. She felt that her work experience did not equip her sufficiently to handle the problems with the computers, and Chief Metcalfe,

who had little computer knowledge, did not provide sufficient support to her on the technological difficulties she was encountering. The Grievor also had difficulties with the parameters of her job duties and with her relationship with Chief Metcalfe. The Grievor originally intended to resign, but after speaking to Sergeant Neil Campbell, her Association Representative, she took stress leave and was off work from August 28, 2003 to October 6, 2003. Prior to her departure, however, the Grievor prepared a memorandum for Chief Metcalfe providing him with a technological update of the virus problems related to the Service's computers, and with her recommendations for protecting the Service's computers from viruses.

Chief Metcalfe on reading the memorandum from the Grievor, sought a second opinion on the issues raised by the Grievor in the memorandum. To assist Chief Metcalfe, Heather Webb, an employee of the Municipality, introduced Chief Metcalfe to Robert Walker who owned Convergent Technologies, and advised the Municipality on its technology issues. Robert Walker discussed the technological issues with Chief Metcalfe, Sergeant Smart and Heather Webb and assisted them with some of their immediate problems. He viewed the solutions to the computer problems differently from the Grievor and Bill Nixon, and set out his analysis and recommendations for anti-virus protection and for a firewall for the police station in a report to Chief Metcalfe on September 9, 2003. In turn, Chief Metcalfe presented Robert Walker's report to the Board.

Robert Walker was asked to prepare a proposal for a firewall. On October 4, 2003, Robert Walker forwarded a proposal and a preliminary schematic drawing using a Netscreen 5XP appliance for the firewall to Chief Metcalfe with a copy to Heather Webb. This schematic only covered the computer system at the police station in accordance with his understanding of the scope of the computer system. Robert Walker also emailed a copy of his proposal to Barbara Hawse, the Chair of the O.P.T.I.C. committee, to inform her of his proposal, and to a colleague, Dave Timbury, the Information Technology Manager at the Owen Sound Police Service, and member of the O.P.T.I.C. committee. Robert Walker's proposal was put to the Board for its consideration at the meeting on October 14, 2003. The Board did not accept his proposal, but decided to put the firewall installation for the Service's two locations out to tender.

In the meantime, the Grievor returned to work on October 6, 2003. She learned that Robert Walker had been working with Heather Webb to overcome various computer problems that had arisen with the Service, and that as a result of Robert Walker's involvement in assisting the Service during her absence, the recommendations she had made to Chief Metcalfe were not followed, and the programs that she had ordered for the protection of the viruses had been returned. As a contract for a firewall had not yet been given, Chief Metcalfe assigned the Grievor and Sergeant Smart the responsibility for placing the firewall system out to tender.

On October 15, 2003, the Grievor sent out letters inviting Robert Walker of Convergent Technologies, Nathan Bowman of Midwestern Communications and Bill Nixon to place bids for the firewall system. As the firewall had to be installed by December 1, 2003, the deadline now required by the O.P.T.I.C. committee, the Grievor set the deadline for the bids for October 31, 2003. The criteria for the bid was to install a firewall system which met the standards set out by CPIC, provided protection for the Land Area Network "LAN" and Wide Area Network "WAN" from internet and "Go Net" gateways. The proposal was to include the price of the firewall and its installation, and maintenance for one year. All correspondence was to be directed to Sergeant Smart and the Grievor.

The Grievor advised Robert Walker on October 15, 2003, that she assumed that the proposal which he forwarded to Barbara Hawse, would stand as his bid. As Robert Walker's proposal did not take into account any WAN or public internet access, Robert Walker contacted the Grievor to discuss the parameters of the tender and learned that the Service had computers in two locations. Accordingly, his earlier proposal was not applicable and on October 27, 2003, he submitted another proposal and schematic drawing for a firewall which covered the computers in both buildings using three Netscreen 5XP Appliances for the firewall. Under this schematic drawing, the two sites, the police station and the Criminal Investigation Division operated independently. Again Robert Walker forwarded a copy of his proposal to Barbara Hawse and Dave Timbury for their information. Robert Walker obtained the consent from the Grievor to submit a further proposal after the October 31, 2003 deadline as he was then able to refine his proposal by adding another Netscreen appliance, linking the two sites through the internet. Robert Walker forwarded his final proposal and schematic drawing on November 4, 2003. The cost of his final bid was \$9,919 exclusive of tax.

Bill Nixon declined the invitation to submit a tender.

Nathan Bowman took a tour of the premises and Midwestern Communications submitted a bid dated October 27, 2003 by fax on October 31, 2003, for the installation of a Cisco Pix firewall appliance. Midwestern Communications subsequently added a leasing component to its bid on November 3, 2003. The cost of this proposal was \$17,800 including taxes. Nathan Bowman then left Midwestern Communications and became self-employed. In his new capacity, he provided advice to High Speed Effects, who, on November 6, 2003, submitted a comparable bid, using the same Cisco Pix firewall appliance for the cost of \$13,800 exclusive of taxes.

On receiving the bids, the Grievor researched the two types of appliances that were being proposed in the bids. She contacted comparable police services to determine what kinds of appliances they were using, and contacted the manufacturers of the Netscreen 5XP and Cisco Pix appliances to obtain their costs in order that she could analyze the costs proposed by the bidders.

The Grievor then prepared a report for Chief Metcalfe comparing the products and the bids in order that he could make a presentation to the Board. She reviewed a draft of the Report with Sergeant Smart, who made one change to the report. He endorsed and signed the final report, which included the leasing component that had been proposed in the Midwestern Communications and the High Speed Effects bids. The Grievor gave the report to Chief Metcalfe. She expected that he would review the report with her, but he did not do so. Chief Metcalfe presented the report to the Board in its meeting on November 17, 2003. Although the Grievor had been invited to other Board meetings on prior occasions to explain technical matters being discussed, on this occasion, she was not asked to attend.

The Board reviewed the report on the three competing bids and consistent with its policy to accept the lowest bid, determined that the bid by Convergent Technologies, would be awarded the contract, subject to a meeting with Robert Walker to clarify certain points raised in the report. Chief Metcalfe in the presence of Inspector Berger, so advised Robert Walker the following day.

The events that gave rise to the Grievor's dismissal arose the next day on November 18, 2003. The Grievor testified that she arrived tired at work, anxious and ill. She met Chief Metcalfe who told her that there had to be another meeting with Sergeant Smart and Robert Walker. He then left with Inspector Berger to a meeting at a local school. Nathan Bowman called to find out about the outcome of the Board's meeting and when learning of the meeting with Robert Walker, concluded that the Convergent Technologies bid had won the contract.

The Grievor was extremely upset that Convergent Technologies had probably won the tender. She was talking with Mary Lovric about the outcome, when John Dickson came to repair the photocopier. The Grievor knew that John Dickson was present, but testified that she paid no attention to him and assumed that anything he overheard would not be repeated.

John Dickson testified that initially he did not listen to the conversation between the Grievor and Mary Lovric, until he heard the words "Rob Walker", a person he knew, and who he knew had submitted a bid for a firewall to the Board. As he later recounted to Moe Hodgson, the investigator hired by the Board, he said that he overheard the Grievor say "I don't have time for this" "They're setting up a meeting with Rob Walker that means he got the firewall contract." "I don't have time for that idiot. This whole thing is crazy. I did a report, he doesn't know what he's doing. They're not inviting me to the meeting because I would fix him. If he does get the contract I won't work with him. Anyway his crap doesn't meet standards. I don't have time for this bullshit. I'm going home. Call him."

John Dickson told Moe Hodgson that the Grievor did not appear sick, but he heard a conversation about being sick. He heard Mary Lovric say "you go to the bathroom and be sick and I'll call him." The Grievor went to the bathroom, Mary Lovric called Chief Metcalfe who then arrived at the station. John Dickson told Moe Hodgson that he concluded that the Grievor and Mary Lovric were conspiring to sabotage a legitimate tendering process and dupe the Chief by feigning illness in order to prevent Robert Walker from getting the contract.

John Dickson was concerned and discussed what he had heard with the co-worker that usually services the equipment at the Board, Steve Rudolph. Steve Rudolf was shocked and then recounted his own anecdote casting doubt over the Grievor's credibility. In his statement to Moe Hodgson, he claimed to have met the Grievor at the former Grey County Mall in a line for the cashier midweek during the summer. He asked her whether she was on vacation, and she said "No I'm on sick leave" then correcting herself, "I'm really off on stress leave, but I'm not stressed now." "I thought that they couldn't get by without me, but they did." Then I brought them to their knees, they got the message, I'll go back after a while".

John Dickson then conveyed the conversation he had overheard to Robert Walker. Robert Walker weighed the information, and decided to withdraw his bid, as he needed the cooperation of the Grievor to install the firewall properly, and he did not want to work in a hostile environment. He called Heather Webb to advise her of his decision on November 19, 2003. Greta Kennedy, the Chair of the Board, was in the office when Robert Walker telephoned. She was concerned, and then contacted Chief Metcalfe.

Chief Metcalfe first attempted to have the Owen Sound Police Service conduct an investigation into the incident, but they were not able to do so. Chief Metcalfe then contacted Moe Hodgson, a well respected investigator, who had a lengthy career in policing, and who had advised the Board in its formation and who acted as its representative in collective bargaining. The Board retained Moe Hodgson to investigate the matter in its meeting on November 24, 2003.

Moe Hodgson immediately met with John Dickson and Steve Rudolf the following day to take their statements as referred to above. Moe Hodgson reported to Chief Metcalfe and Inspector Berger, and arranged with Chief Metcalfe to interview the Grievor and Mary Lovric on November 28, 2003.

On November 28, 2003, Moe Hodgson first attempted to interview Mary Lovric in the presence of her Association Representative, Neil Campbell, but was prevented from obtaining any answers as a result of positions taken by Neil Campbell. Neil Campbell challenged Moe Hodgson's authority to conduct an investigation. Moe Hodgson urged him to obtain legal counsel and delayed the interview and excused Mary Lovric. As Neil

Campbell had no experience in dealing with grievance matters, he sought the advice of Jeff Besealaere, the President of the Association, who was also inexperienced in such matters, and then tried unsuccessfully to contact Rick Houston of the Ontario Police Association, who was the Association's advisor and representative in collective bargaining. During this process Moe Hodgson met with Neil Campbell privately and provided him with an outline of the nature of the allegations and read the questions that he wished to put to Mary Lovric. Neil Campbell was not content with this information and sought full disclosure of the investigation, including copies of all statements that had been made to Moe Hodgson. While these discussions were going on and the Association was attempting to obtain advice, the Grievor, and then Mary, went home sick.

Moe Hodgson reported to the Board, who, with a quorum, decided that if Mary Lovric, or the Grievor in her interview, maintained the position that they would not provide any information or any explanation for the events, they would be terminated for breaching the Board's trust by interfering with the tendering process by commenting negatively about Robert Walker in front of a member of the public. The Board wanted to reduce its liability in the event Robert Walker withdrew his bid. The Board was also concerned that the Grievor had feigned illness on November 18, 2003 after hearing the statements of John Dickson and Steve Rudolf.

Chief Metcalfe called Mary Lovric and the Grievor and directed them to return to the office at 4:00 p.m. Moe Hodgson again met first with Mary Lovric, but this time in the presence of Chief Metcalfe, Jeff Beselaere and Neil Campbell. The Association took the position that Mary Lovric would answer the questions if they were given to her in writing. Moe Hodgson refused to do so, and began to question Mary Lovric again. When Mary Lovric appeared to start to respond, both Neil Campbell and Jeff Besselaere prevented her from doing so. When Moe Hodgson confirmed again that she would not be answering the questions, Chief Metcalfe proceeded to read the letter of termination to her and requested that she turn over all her documents, passwords and keys. Mary Lovric and her representatives left. Moe Hodgson subsequently advised Neil Campbell that written notice would follow.

Similarly, Moe Hodgson in the presence of Chief Metcalfe, Jeff Beselaere and Neil Campbell, attempted to interview the Grievor. When the Grievor was asked the first question surrounding the events of November 18, 2003, she remained mute. When Jeff Besselaere advised Moe Hodgson that the Grievor would not be answering any questions, Chief Metcalfe advised her that she was being terminated for unacceptable, and deceitful conduct, and that the Board would provide further details in its termination notice. The Grievor was then told to leave and did so with her Association representatives.

Chief Metcalfe placed a notice on the bulletin board at the police station advising the members that Mary Lovric and the Grievor had been terminated, and directed the members of the Service not to discuss the termination of these members with the public.

Moe Hodgson made a final report of his findings of his investigation on December 1, 2003 and the letters of termination were forwarded to Mary Lovric and to the Grievor on December 2, 2003.

Robert Walker did obtain the contract to install the firewall at the Service. On December 8, 2003 Chief Metcalfe was discussing the installation of the firewall with Dave Timbury, who was helping Robert Walker with the installation, when Dave Timbury told Chief Metcalfe that he believed that a schematic drawing belonging to Convergent Technologies had been disclosed to Nathan Bowman during the bidding process. As a result of these allegations, the Board retained Moe Hodgson to investigate this matter.

Moe Hodgson interviewed Dave Timbury and Nathan Bowman and Robert Walker and forwarded questions about these allegations to the Grievor, who did not respond. The Board concluded that the Grievor, without any authority to do so, showed schematic drawings presented to the Board by Robert Walker to Nathan Bowman on two occasions, the preliminary schematic drawing dated October 4, 2003 during the tender process and before the closing date, and a later schematic drawing, after the contract had been awarded. Accordingly, the Board notified the Association that it was relying on the wrongful disclosure of the schematic drawings in further support of its termination of the Grievor, and, in addition, for misleading the Board in her preparation of the report dated November 5, 2003.

Mary Lovric provided a written apology to Chief Metcalfe for her behaviour on May 5, 2004 and was reinstated to her employment effective May 6, 2004. Sergeant Smart, who had advised Moe Hodgson that he had authorized the disclosure of one schematic drawing on or about November 19, 2003, believing that no harm could occur as the tender was closed, received an oral reprimand from Chief Metcalfe.

In her defence, the Grievor testified that on November 18, 2003, she had coffee with Chief Metcalfe as usual, and asked about the Board meeting. The Chief was evasive, but told her that there was to be a meeting with herself, himself, Sergeant Smart, and Robert Walker. Chief Metcalfe and Mary Lovric then had a contentious discussion about workload behind closed doors, after which Chief Metcalfe and Inspector Berger left for a meeting at one of the schools. The Grievor was discussing the workload with Mary Lovric when Nathan Bowman called about the outcome of the Board's meeting. She told him that there was to be a meeting with Robert Walker. During her telephone conversation John Dickson arrived to fix the photocopier. The Grievor testified that she was aware of John Dickson's presence as she engaged in her conversation over the outcome of the Board's meeting. She said that she felt "suspicious", and that she had been left out of the process. Although she did not remember calling Robert Walker "incompetent", as John Dickson and Mary Lovric had testified to, she admitted that she called Robert Walker "an idiot", and queried whether he knew what he was doing. She agreed with John Dickson's recollection of her conversation, although she did not remember referring to Robert Walker's full name, and she did not use "bullshit". She denied ever saying that she would sabotage Robert Walker's work and that she would not work with him, as she knew she had to work with him. She said was not concerned about Robert Walker, but about herself.

The Grievor testified that when she had arrived to work that day, she was tired, anxious and ill, and became increasingly anxious, nervous and panicky and out of control, to the degree that she felt that she was going to be sick and would vomit. She went to the washroom as Mary Lovric suggested. Her mouth was dry, she was shaking, she was trying to catch her breath, she kept swallowing, wretched and had some dry heaves. She said her body was going into panic mode. She called out to Mary Lovric and asked

her to call Chief Metcalfe and to tell him that she was going home. She ran water over her wrists and the back of her neck and began to take control over herself.

Chief Metcalfe arrived about ten to thirteen minutes after Mary Lovric called. He knocked on the door of the washroom, and she let him in. He was crouching down, as she was on the floor. He was very concerned and tender, and asked her how she was doing, whether it was because she was dieting. She said “no, I cannot not leave it behind, I cared about this place”, and he said “you have to let it go”. Chief Metcalfe gave her a glass of water and a candy and she looked at herself to see if she had water on her shirt. She said that she was a mess. He helped her up as she was feeling shaky and unsteady and lead her to the police cruiser and took her home. She slept until about 3:30 p.m., at which time she called Mary Lovric and told her that she felt at peace, that whatever happened that it would be all right, and that she should tell Chief Metcalfe that she would be in to work the next morning.

At the hearing the Grievor testified that she only remembered disclosing the first schematic drawing to Nathan Bowman, when he met Sergeant Smart and herself and went on a tour of the premises. She testified that although she valued Nathan Bowman’s advice, she was not eager to show Nathan Bowman the schematic drawing, but was guarded in her actions. She was concerned that she act ethically and professionally and so sought the authorization of Sergeant Smart before disclosing the preliminary schematic drawing to Nathan Bowman. She did so to see if he thought the proposed system would work.

The Grievor did not deny disclosing the second schematic but could not remember doing so. She stated that as she had authorization to disclose the first schematic drawing she would not have found any problem in disclosing the second schematic drawing on November 19, 2003.

The Grievor was aware on November 28, 2003 that there was a problem when Mary Lovric was told to go to the boardroom to see Moe Hodgson and Neil Campbell told her that she was not to carry on any discussions with Mary Lovric. In the course of the day, Neil Campbell met her to discuss the allegations the Board was making. She thought that she was going to be fired, but she attributed her expectations not to her comments,

but to her belief that the Board was concerned with money and the contract negotiations for the civilian members, which were at an impasse. She agreed with Neil Campbell's advice to respond only after receiving the questions in writing.

The Grievor trusted Neil Campbell implicitly, even though she knew that he had no experience in grievance matters. She did not trust either of Chief Metcalfe or Moe Hodgson to deal with the matters rationally, as she felt that the emotions between she and Chief Metcalfe in the preceding ten days were high and that there were tensions between the two of them. She testified that it was like "swimming the witch", "if they threw me into the lake, and then threw me something, she would drown anyway".

The Grievor met Chief Metcalfe and Moe Hodgson, with Neil Campbell and Jeff Beselaere after Mary Lovric was fired. The Grievor would not answer any questions posed by Moe Hodgson, as she told them that she concurred with the Association's advice to respond only after receiving the questions in writing, and accordingly she was terminated.

## **The Issues**

The issues are as follows:

- 1) does the Board have the jurisdiction to have the Grievor dismissed in the circumstances of this case; and
- 2) was there just cause to dismiss the Grievor for her conduct on November 18, 2003, for her participation in the preparation of the Report to the Board on the bids tendered, for feigning illness, and for disclosing schematic drawings belonging to Robert Walker to Nathan Bowman.

In order to determine the second question, it is necessary to determine whether there was misconduct, in each circumstance, and whether such conduct constituted a breach of trust or fidelity to the Board. If so, was there just cause for the Board to dismiss the Grievor, or whether an alternative penalty ought to be substituted.

Association Counsel also raised two other issues, whether the conduct of the Association Representatives in the exit interview on November 28, 2003 affects the termination, and whether the bargaining over the civilian wages and working conditions, which were occurring contemporaneously with the termination of the employees, influenced the Board's decision to terminate the Grievor.

## **Decision**

The first issue is whether the Board had the jurisdiction to discharge the Grievor.

Association Counsel submitted that this matter was a disciplinary matter conducted by the Board and as such was outside its lawful authority. Association Counsel submitted that the day to day operation of the Service is the sole domain of the chief of police and is protected from interference by the Board in section 31(4) of the **Police Services Act, RSO 1990 cP15** (the "Act"). Maintaining discipline flows from this activity and is further referred to as a duty of the chief of police in section 41(1)(b) of the Act. The Act does not distinguish between a uniform member and a civilian member. Therefore, Association Counsel submitted that if any disciplinary matter arises, it should be handled exclusively by the chief of police.

Association Counsel submitted that the scheme of the Act dividing the duties and responsibilities between the general powers of the board to handle matters such as writing policy in section 31 of the Act and the administrative powers of the chief of police as set out in section 41 of the Act ought to be respected. This division of powers has been recognized by the Supreme Court of Canada in **Odhavji Estate v. Woodhouse** [2003] 3 S.C.R. 263, [2003] S.C.J. No. 74.

Association Counsel submitted that Chief Metcalfe initiated the investigation process appropriately by attempting to obtain the services of the Owen Sound Police Service to conduct the investigation, but the Board took the matter out of his hands. Association Counsel submitted that the Board has no authority to impose discipline, and therefore what is the effect then, of the Board's action on the Grievor's termination.

Board's Counsel submitted that the Board has the jurisdiction to dismiss the Grievor, as the Board has been given the authority to appoint members, in section 31(1)(a) of the Act, and which by the application of section 28 of the **Interpretation Act RSO 1990**, includes the power to remove such appointment. Board Counsel submitted that the Board was not interfering with the day to day operations of the Service, which the Board agrees is the responsibility of the chief of police, but was acting to protect the tendering process which was a responsibility within the Board's authority under section 31 of the Act. As the tender was within the Board's jurisdiction, the Board's investigation through Moe Hodgson and its direction to Chief Metcalfe were in compliance with its authority and with the law.

The collective agreement between the Board and the Association covers both uniform and civil employees of the Board. A "member" under Article 1 4) is defined as "members of the West Grey Police Association; subject to Article 2", and Article 2 a) states, "It is agreed that any employee of the West Grey Police Service, exclusive of the Chief of Police, shall be a member of the West Grey Police Association". The Grievor as a member of the West Grey Police Association is therefore subject to the collective agreement.

In Article 3 of the collective agreement, the Association recognizes that it is the exclusive right of the Board to discipline, suspend, or discharge any member, subject to the provisions of the Act and its Regulations, when it states:

The Association recognizes that, subject to the provisions of the Police Services Act and Regulations made there by the Lieutenant Governor in Council, it is the exclusive function of the Board to:

- (i) Maintain order, discipline and efficiency;
- (ii) Hire, discharge, direct, classify, transfer, promote, demote, suspend, or otherwise discipline any member.

The issue then is whether the Act prevents the Board from exercising the power granted to it by the parties in the collective agreement.

Sections 31 and 41 of the Act state:

#### Responsibilities of boards

**31. (1)** A board is responsible for the provision of adequate and effective police services in the municipality and shall,

- (a) appoint the members of the municipal police force;
- (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
- (c) establish policies for the effective management of the police force;
- (d) recruit the chief of police and monitor his or her performance;
- (f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;
- (g) receive regular Reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);
- (h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;
- (i) establish guidelines for dealing with complaints made under Part V;
- (j) review the chief of police's administration of the complaints system under Part V and receive regular Reports from the chief of police on his or her administration of the complaints system. R.S.O. 1990, c. P.15, s. 31 (1); 1995, c. 4, s. 4 (7); 1997, c. 8, s. 21 (1-3); 1997, c. 17, s. 8.

#### Members of police force under board's jurisdiction

**(2)** The members of the police force, whether they were appointed by the board or not, are under the board's jurisdiction.

#### Restriction

**(3)** The board may give orders and directions to the chief of police, but not to other members of the police force, and no individual member of the board shall give orders or directions to any member of the police force.

#### Idem

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

Duties of chief of police

41. (1) The duties of a chief of police include,

(a) in the case of a municipal police force, administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the board under subsection 31 (1);

(b) ensuring that members of the police force carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;...and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;

The Act recognizes in section 31(1)(a), that it is the responsibility of the Board to appoint members and in section 31(2) it recognizes that all members, whether appointed by the Board or not, are under the jurisdiction of the Board. In section 2 of the Act, a “member of a police force” means a police officer, and in the case of a municipal police force includes an employee who is not a police officer”. Therefore the Grievor as a civilian member of the Association was subject to the Act.

As pointed out by Board Counsel, although the Board has the power to appoint members under the Act, there is no corollary provision providing the power to discharge members. However, **The Interpretation Act RSO** in section 28 (b) and (l) is of assistance when it states:

28. In every Act, unless the contrary intention appears,

as to jurisdiction

(b)...where power is given to a person, officer or functionary to do or to enforce the doing of an act or thing, all such powers shall be understood to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing

and words authorizing appointment include power to remove:

(l) words authorizing the appointment of a public officer or functionary, or a deputy, include the power of removing or reappointing the person or appointing another in or to act in his or her stead, from time to time in the discretion of the authority in whom the power of appointment is vested;

Therefore, by the application of section 28(b)(l) of the **Interpretation Act** the Board, having the power to appoint a civilian member, has the power to remove a civilian member's appointment.

The powers of a board are, however, not without restriction, as seen by statute and in the Supreme Court's interpretation in the **Odhavji** (supra) decision, which refers to the division of powers between the chief of police and the board. The Act distinguishes between the general duties and responsibilities of a board in section 31 and the duties of a chief of police in section 41 of the Act. Section 31(1) of the Act lists areas of a board's responsibility. These duties are general in nature, and include such duties as working with the chief of police to set priorities and objectives with respect to effective police services in the municipality, and to establish policies for the effective management of the police force. On the other hand, the duties for a chief of police, as set out in section 41 which function in conjunction with section 31, lie in the administration of the police force in accordance with the priorities of the board, and ensuring that discipline is maintained in the force. Subsections 31(3) and (4) restricts the board's powers such that the board cannot interfere with the normal day to day operations of the service which are strictly within the responsibilities of the chief of police pursuant to section 31(3) of the Act.

The **Odhavji** (supra) decision reiterates the division of powers, but the facts upon which the Odhavji decision are based are different from the facts in this case. In the **Odhavji** (supra) case, the Supreme Court was assessing the nexus between the Board and the members of the public who alleged that they had incurred damages as a result of an inadequate police investigation created by the Chief of Police's alleged failure to ensure that his orders and those of the Special Investigation Unit were followed. However in this case, the facts relate to circumstances which were allegedly preventing the Board from exercising its statutory powers to establish policies and priorities, a situation not dealt with by the Supreme Court, in establishing a credible tendering process, one which both parties acknowledged was within the Board's jurisdiction.

Although the matters of discipline and discharge would usually fall within the ambit of the management of the Service in its day to day operations, in the particular facts of this case, the events that gave rise to the discharge, did not arise out of the day to day operation of the Service, but flowed from the tender process and its application, matters

within the Board's jurisdiction under the Act. This was a new police service of fourteen members, which had only been in existence for little over a year and a half. The Board was in the process of addressing policies to ensure effective policing in the community. In so doing, it was authorizing the establishment of a tender for the firewall for the Service, and assuming responsibility for it. Chief Metcalfe was not comfortable with technology and did not have a background in this area, but pursuant to the Board's direction, was assisting in carrying out this priority and policy in compliance with the Act.

The Board, being responsible for the tender, had a duty to ensure the integrity of the tendering process. When the Board learned that its integrity may have been jeopardized by a disruption to the tendering process, it acted lawfully when it retained Moe Hodgson to conduct the investigation. When it received information from Moe Hodgson that caused the Board to conclude that the Grievor had acted in an unacceptable manner, the Grievor's actions were directly linked to the integrity of the tendering process. As such, the direction to Chief Metcalfe, to terminate the Grievor was within the Board's jurisdiction. Furthermore, this was not a situation in which Chief Metcalfe disagreed with the Board. Although Chief Metcalfe had a great deal of respect for the Grievor, and testified that he saw her as his daughter and was shocked by the Grievor's behaviour, he concurred with the decision to terminate her employment.

### **The Misconduct**

Although the comments allegedly made by the Grievor on November 18<sup>th</sup>, 2003 were the actions which initially triggered the discharge, it is best to consider first the Grievor's actions in setting up the tender and preparing the report (the "Report") for Chief Metcalfe and the Board.

Although Association Counsel submitted that there was an onus on the Board to prove its case on clear and cogent evidence and not on the balance of probabilities, this is not a case which involves criminal offences and accordingly I accept the submission of Board Counsel that the appropriate onus is on the balance of probabilities.

## **The Report**

The sole responsibility for selecting a firewall system was that of the Board. The Board relied upon the Report presented to the Board by Chief Metcalfe. This Report had been prepared by the Grievor, reviewed and signed by Sergeant Smart and given to Chief Metcalfe. The Report was composed of a general descriptive report and a table summarizing the Grievor's findings, and the quotes.

Association Counsel submitted that although the Grievor had been careless and had made some errors in the Report, she was unfairly being held to an unreasonable standard of perfection by the Board. She had done research into the firewall appliances in order to assess the bids and then created a balanced report. She was not pre-disposed against Robert Walker. Board Counsel submitted that the Grievor was not being held to an unreasonable standard of perfection and was not merely careless, but rather, the errors in the Report, particularly when viewed in the context of her remarks on November 18, 2003 established that the Grievor created a report which deliberately mislead the Board to ensure that Robert Walker would not receive the contract.

While it is appropriate that such a report can contain recommendations, and some subjective commentary, the Report must nevertheless be accurate, and it must fairly and honestly appraise the various bids in order to allow the Board to make its decision. The Grievor described the Convergent Technologies quote in such a manner that the inaccuracies and her description of the bid were prejudicial to that bid. The Grievor also acted inappropriately towards Robert Walker by not offering him the same opportunity to respond to questions and concerns she had with his bid, as she did with Nathan Bowman, when she had concerns with the Midwestern Communications bid.

An area of concern is the Grievor's treatment of Robert Walker's experience. Although the Grievor recognized Robert Walker's experience in the body of the Report, and was complimentary of his experience, she did not reflect his experience in the accompanying table. In the Report she stated:

He used to work for Running Tide, a very well respected technology company in the area. We understand that the Municipality is very happy with the work he has done for them, and Mr. Walker was called in to do work for our Service in September. He seemed to do an efficient job for the tasks he was required to do.

However she contradicted her description of Robert Walker's experience when she stated in the table to the Report, under the category of "Experience of technician", that he is "unfamiliar with police environment/expectations".

Another area of concern lies in the Grievor's comments in the body of the Report and accompanying table in reference to the Convergent Technologies bid, when she stated:

the appliances do not come with any kind of official recommendation; the Netscreen firewall has only had its EAL4 rating for a matter of a few weeks which isn't really long enough to know for sure whether these are adequate firewalls or not.

In the table to the Report, the Grievor noted that all of the appliances had EAL4 rating. However, under the category "Appears on RCMP Recommendation/Approval List" the Grievor noted that the Cisco PIX appliances were on the list and the Netscreen 5XP appliance was not. Under the category of "reliability of hardware" she said that the Cisco PIX appliances were reliable, but the reliability of the Netscreen appliance was "unknown." The treatment of the Netscreen 5XP appliance was prejudicial and inaccurate.

The "Appears on RCMP Recommendation/Approval List" category set out in the table, was a poorly described category, as there was no such list, but the use of this terminology in the table is understandable. The O.P.T.I.C. Committee set its standard for firewalls as a result of the participation of the RCMP in the records management system. The O.P.T.I.C. Committee did not dictate what appliance was to be used, but referred participants to the "Common Criteria" website which provided a list of various appliances which had been evaluated, and listed their level of security. The Grievor was using this category to demonstrate if the particular appliance had been evaluated by the Common Criteria website.

However, the Grievor did not check the Common Criteria website when she drafted the Report and she ignored the information that had been provided by Robert Walker to Heather Webb and to herself. On October 1, 2003, Robert Walker had notified Heather Webb that the Netscreen 5XP Appliance had EAL4 rating and that it had been evaluated and listed on the Common Criteria website as of June 2002. He again provided this information to the Grievor in his bid of October 27, 2003 and again in his final bid of November 4, 2003.

The Grievor was irresponsible when she noted in the table that the reliability of the Netscreen appliance was “unknown”. She claimed at the hearing that her conclusion was based upon what she considered a “rule of thumb” which she learned from Bill Nixon, that the reliability of hardware is not known for at least a year of operation, but she did not determine how long the hardware had been in existence. The Grievor knowingly erred when describing the length of time that the Netscreen 5XP had had its rating. She admitted at the hearing that she knew that this appliance had its rating for at least a few months, not a few weeks as she had described. If she had contacted Robert Walker, or had asked the manufacturer when she was doing her research as to when the appliance was placed on the market, she would have learned that her assumptions were also incorrect as the appliance had been on the market for longer than a year.

A further area of concern arises from the Grievor’s comment on the maintenance of Netscreen 5XP appliance. Without acknowledging what Robert Walker was prepared to offer, her comments would raise concerns to an objective reader. In the body of the Report, the Grievor stated:

Another noteworthy aspect is that this quote does not include a 1 year service agreement. In discussions with Mr. Walker about this very issue he told us that he could not provide a figure for a 1 year service agreement because he could not anticipate how much time he required to maintain the firewalls and did not want to get locked into an agreement of such a nature.

She continued in her Summary of Findings that:

The other issue with this quote is that having 4 firewalls could mean double the amount of maintenance work, and with Rob Walker unwilling to enter into a service agreement, the unknowns of this proposal make it somewhat of a risky investment.

Consistent with this description, the Grievor noted on the table under the category of “Includes 1 year service agreement” “no” for Convergent Technologies’ quote.

The Grievor’s description was technically accurate if this category was to mean one year on-site maintenance, the criteria that the Grievor was seeking, but she failed to reflect what Robert Walker had offered. As early as Robert Walker’s October 27, 2003 bid, he offered a one year technical support contact on a twenty-four hour continuous basis from Netscreen and also anti-virus protection through Symantec Corporate Edition anti-virus contacts. Although the nature of the service arrangement was not what the Grievor thought was the best system, the failure to include the proposal related to maintenance made by Convergent Technologies, made the Report incomplete, and therefore did not provide the Board with full information in order to properly assess the bids. The description of the potential maintenance problems, being such that it could make it a “risky investment” also flavours the Report against the Convergent Technologies bid, without any research having been done in this area.

Finally, although the cost of the Convergent Technologies’ bid was \$9,919 versus \$17,800 for Midwestern Communications bid, and \$13,800 for the High Speed Effects bid, the Grievor description placed Walker’s costing and his experience in question without any justifiable basis for doing so when she stated:

Our figures are really only ballpark figures so we can’t say for sure that he is charging almost \$5000 for installation but we suspect that his installation figures are at least double what the others are – this may be because he is unsure about the product and/or he lacks experience in installing firewalls.

The Grievor’s comments on the cost were unfairly prejudicial, since she had learned from Nathan Bowman that the Midwestern Communications bid had inflated its quote far beyond what Nathan Bowman considered as the industry’s common range of profitable margins. In addition, the Grievor’s comments on Robert Walker’s experience or view of the Netscreen appliance, were prejudicial to Robert Walker as she did not speak to him about his choice of firewall appliance or his firewall experience to learn that he had installed over twenty-five firewall systems.

The effect of the compilation of all these inaccuracies, and the Grievor's descriptive prose, was that the Report was misleading and did not fairly reflect the Convergent Technologies bid.

The issue then arises as to why the Report was so inaccurate in describing the Convergent Technologies' bid. Was the Grievor incompetent or incapable of writing an accurate Report, or was she being held to an unrealistic standard as suggested by Association Counsel, or was there another motivation.

I do not find that the Grievor was incompetent or incapable of writing an accurate Report. The Grievor was intelligent and had learned a great deal about computers since being employed by the Board. Although the Grievor went on stress leave in part as she did not feel that she had sufficient foundation in computers, she did not voice any concern on her return to work that she was not capable of preparing such a Report. On the contrary, it was her view that she had developed technical skills and it was her decision to prepare a Report to assist Chief Metcalfe as he had little knowledge of computers. Further, she researched the appliances and contacted other police services to determine what firewall systems they were using. However, on obtaining the information she did not apply such information objectively.

Board's Counsel developed the theory that the Grievor had slanted the Report and subsequently made derogatory comments about Robert Walker because she was upset with her relationships with Chief Metcalfe, Heather Webb and Mary Lovric, as reflected in the meeting with Chief Metcalfe prior to her return to work in October and in the agenda which she had prepared for herself in preparation for that meeting. While the Grievor did have difficulties with Chief Metcalfe's delegation of work and with the line of command and his directions to her, I do not find that the evidence supports a finding that her difficulties with her colleagues and with Chief Metcalfe predisposed her against Robert Walker.

The Grievor testified that she did not believe that Chief Metcalfe felt any tension towards her. If the Grievor felt that there were areas in the Report that needed to be discussed with Chief Metcalfe, it was incumbent upon her to ensure that she spoke to him. She cannot now hide behind her view of her relationship with Chief Metcalfe to excuse her

failure to speak to him. If she felt awkward speaking to Chief Metcalfe, and wanted to discuss any weakness in the Report or any area that concerned her she could have spoken to Sergeant Smart, when she discussed the Report with him. Her failure to do so suggests that she was satisfied with the Report.

After reviewing all the evidence, I find, on the balance of probabilities, that the Grievor portrayed the Convergent Technologies bid inaccurately and misled the Board when she prepared the Report.

The Grievor, as the drafter of the Report must bear most of the responsibility for the Report, as she was doing the research, drafting the Report and was providing information to Sergeant Smart in order that he could sign the Report. However, not all the fault for drafting the Report must fall on the Grievor. Sergeant Smart was the Grievor's superior in technological matters and he had also been given the task of following through with the tender. There was a responsibility on him to ensure that the contents were accurate, whether it was through discussions with the Grievor or through any other resource he wished to use. However, Sergeant Smart agreed with the inaccuracies in the disputed areas of the Report, and signed the Report, believing it to be true. He shared some of the same misconceptions as the Grievor. He was of the view that Netscreen 5XP was not on the list of firewalls listed on the Common Criteria website. He was concerned with the maintenance of Netscreen as it required more units than the Cisco Pix appliance, and therefore might require more maintenance. He also was of the view that the reliability of Netscreen was unknown, even though he had known that it had been on the market for some time.

Although Sergeant Smart was given the responsibility for the Report, and he accepted that responsibility in signing the Report, he was never accused of failing to supervise the Grievor, nor was he ever accused of misleading the Board, and he was never disciplined for his role in the preparation of the Report.

### **The Misconduct on November 18, 2003**

### **Comments Made About Robert Walker**

After a fair investigation, the Board concluded that the Grievor made derogatory and unprofessional remarks about Robert Walker.

Although there are some differences in the statements and the testimony of John Dickson, Mary Lovric and the Grievor, I find that most of the comments that John Dickson told to Moe Hodgson were said by the Grievor. John Dickson did not usually service the Service's photocopiers, and was not involved with the Board. He was an outsider and his only knowledge of the tendering process at the Board, was that he knew that Robert Walker had presented a bid to the Board for a firewall. He overheard the Grievor's words without any preconceived views.

The Grievor knew that the Report was being presented to the Board on November 17, 2003 and she was upset that Chief Metcalfe had not spoken to her about the Report and that she had not been asked to speak to the matter or to be available for questions at the Board's meeting, as she had been in the past when questions on technological issues were being raised. As she testified, she felt "suspicious" that she was being left out of the process. The Grievor had an interest in the outcome of the tender, and she was waiting to hear of the successful bid. She testified that she thought the best bid was that of High Speed Effects. She learned from Chief Metcalfe the following morning that Robert Walker was to be asked several more questions, and she came to the conclusion after speaking with Nathan Bowman that it was likely that Robert Walker won the tender. Although the Grievor was aware that there was a member of the public present in the office at the time, she did not control her speech. It was clear from her behaviour that she did not approve of the Convergent Technologies bid, and she was so emotionally agitated that she openly expressed her disapproval in front of a member of the public, John Dickson, who had been called in to repair the copiers.

The Grievor may not have admitted to all of the statements that John Dickson testified that she said, but she did admit that she made her comments with conviction and that her comments were derogatory towards Robert Walker. What the Grievor said, was not

only as she testified to, not “very unwise and very unprofessional” but were reckless and constitutes serious misconduct.

### **Feigning Illness**

The Board received two statements that attacked the Grievor’s credibility and suggested that the Grievor may have been feigning illness on November 18, 2005. John Dickson, in his statement, concluded that Mary Lovric and the Grievor were conspiring to sabotage a legitimate tendering process. Part of his claim was based upon his assessment that the Grievor did not appear sick, and was feigning illness. John Dickson in further support of his view, provided an additional statement which he prepared a year after the event, and testified, that it was his impression that the Grievor had developed a strong animosity against Robert Walker and that she felt if she remained at work, she would not be able to prevent Robert Walker from getting the contract. He believed that she was going to invent a reason to be out of the office, and for that purpose she would feign illness.

Steve Rudolph’s statement to Moe Hodgson in which he recounted meeting the Grievor in the summer was also very prejudicial to the Grievor. He claimed that she said that she was on stress leave but was not stressed at the moment, and in particular he stated, “I thought that they couldn’t get by without me, but they did Then I brought them to their knees, they got the message, I’ll go back after a while“. The last statement he recanted at the hearing.

I do not put much stead on Steve Rudolph’s statement and testimony. Steve Rudolf was testifying to statements that were allegedly made, attributing nuances to the statements and was commenting on their delivery. Considering that these statements were allegedly made two years prior to his testimony, that it was a cursory encounter of about a minute’s length and of no particular importance at the time, between two people who had a friendly relationship in which they would carry on jokes between themselves, and

in the context of the nuances that occur in a joking relationship, I do not find that this story is sufficiently reliable to assess the Grievor's credibility.

Arguments were made by Counsel as to whether the Grievor had vomited or was suffering from dry heaves. Chief Metcalfe testified that the Grievor had told him that she had been vomiting and was embarrassed that some vomit may have appeared on her shirt. Chief Metcalfe testified, he thought that the Grievor was ill and should go to the hospital. She was shaking when he took her home, and he did not think that she would be coming to work the next day. The Grievor testified that she was having dry heaves, that her body was going into "panic mode", and she ran water over her wrists in an attempt to gain control over herself.

I accept the Grievor's testimony that she was having dry heaves and was ill and that she was not feigning illness. It is more consistent with the evidence that the Grievor was so stressed and angry, that she was ill. She was extremely upset and emotionally agitated as she believed that the Board had not chosen the appliance or the person that she wished to work with. She was upset that Chief Metcalfe had not consulted her on the Report in any substantive way, that she had not been asked to attend the Board's meeting, and she had deduced that Robert Walker had won, or would be winning the contract, despite her Report.

I do not find that she feigned an illness. There is also nothing in her work history that would lead me to believe that she was feigning her illness. She had had severe headaches, but did not take any extraordinary days off for sickness. She had worked hard, and excelled under stress, as testified to by Chief Metcalfe. In terms of her state of mind and her emotional agitation, and her prior good working habits, in this case, there may have been some exaggeration of her state at the time, but I do not think it is of consequence.

I also have to discount John Dickson's statements and testimony as to his perception that the Grievor and Mary Lovric were conspiring for the Grievor to go home ill in order that the Grievor could sabotage the tendering process by ensuring that Robert Walker did not get the contract. The Grievor went home for the afternoon and did nothing to alter the possibility that Robert Walker would ultimately obtain the contract. She

returned to work, and as she told Mary Lovric was ready to continue in the normal course.

### **Disclosure of the Schematics**

The evidence on the disclosure of the schematics was not consistent. There were several different versions of the events given by the witnesses.

The information which the Board acted upon arose from the investigation by Moe Hodgson after he had interviewed Dave Timbury and Nathan Bowman. Dave Timbury had advised Moe Hodgson that he believed that Nathan Bowman had seen another company's schematic drawing early in October. This statement lead to Moe Hodgson interviewing Nathan Bowman. Nathan Bowman advised Moe Hodgson that the Grievor had shown him two different schematic drawings on two different occasions. He identified Robert Walker's preliminary schematic drawing, and advised Moe Hodgson that he had commented that this schematic drawing would not work since it did not refer to the Criminal Investigation Office. He then identified Robert Walker's final schematic drawing as the one which the Grievor showed him on November 19, 2003. At the hearing, he confirmed the disclosure of schematic drawings, but he could not identify which of the two revised schematic drawings he had been shown on the later occasion. Nathan Bowman testified that the first schematic drawing was shown to him after his Midwestern Communications quote was provided to the Board on October 31, 2003 and the second schematic drawing was shown to him on November 19, 2003.

The Grievor acknowledged that she had shown Nathan Bowman one schematic drawing, but testified that she had shown the preliminary schematic drawing before the tendering process had begun and with the authorization from Sergeant Smart to do so. The Grievor testified that Nathan Bowman had come to the premises to take a tour and he met Sergeant Smart and herself in the boardroom. They discussed the Netscreen appliance, the subject of Robert Walker's schematic drawing. Nathan Bowman said that he was not familiar with the Netscreen appliance and did not know if it would meet the Service's requirements. After she asked permission from Sergeant Smart to show

Nathan Bowman, Robert Walker's schematic drawing, she did so. The Grievor did not deny showing a second schematic, but did not recall doing so. She testified however, that as she had had the authorization from Sergeant Smart to show Nathan Bowman the schematic drawing, she would not have had any difficulty showing him a further schematic drawing on November 19, 2003.

Sergeant Smart although called by the Association as a witness, gave evidence which did not support the Grievor's evidence. He testified that the Grievor had come to him showing him the schematic drawing which he identified as Robert Walker's second bid of October 27, 2003 after the bids had been given to the Board and the Report had been prepared. He had no knowledge as to when the Board made its decision, but he placed the date of the disclosure at November 19, 2003 and not in early October 2003.

I find the evidence of the Grievor on the disclosure of the schematics most disturbing. I do not find that she was honest and straight forward and I find it difficult to accept that she could not remember how many times that she showed the schematic drawings to Nathan Bowman and when she did so, as it related to the timing of the tendering process, as the protection of the computer service and the bidding process was important to her.

While I accept Nathan Bowman's evidence that he was shown two different schematic drawings on two different occasions, I discount his evidence as it relates to the timing of the disclosure of the first schematic drawing as there would have been no reason for the Grievor to show him the first schematic drawing after Robert Walker had submitted his second schematic drawing.

I find that on the balance of probabilities that the first schematic drawing was shown to Nathan Bowman early in the tendering process and most likely at the meeting with Nathan Bowman on the Monday following the invitation to tender. The basis upon which I make this finding, is that the preliminary schematic drawing was prepared for presentation to the Board for its meeting on October 14, 2003. The invitation to tender was issued on October 15, 2003 and as the Grievor was prepared to accept the preliminary schematic drawing as Robert Walker's bid, she was therefore not aware as of October 15, 2003 that it would not fulfill the Service's needs. She had however set up

a meeting with Nathan Bowman in his invitation to tender for the following Monday. When Nathan Bowman had taken the tour as suggested by the Grievor, he then would have been in the position to comment on the preliminary schematic drawing and advise the Grievor that schematic drawing would not work, because it did not include coverage for the Criminal Investigation office. There would be no reason to show Nathan Bowman the first schematic drawing at any date after October 27, 2003 as Robert Walker had then addressed the need for the Service to have a firewall at two premises.

I find that on the balance of probabilities that the Grievor showed Nathan Bowman a second schematic drawing after all the bids were in. Although Nathan Bowman could not identify which of the latter two schematic drawings he was shown, he did state that the drawing he saw would work. Therefore it was most likely that Nathan Bowman saw Robert Walker's final schematic drawing, as Robert Walker had added an additional appliance to integrate the firewalls at the two locations. Irrespective of which of the two schematic drawings were shown, for the purposes of this decision, it is the disclosure of the schematic drawing that is relevant as opposed to the identification of which of the two schematic drawings was shown by the Grievor to Nathan Bowman. The second disclosure most likely occurred on November 19, 2003 as Nathan Bowman's statement was consistent with Sergeant Smart's testimony who testified that he had authorized the disclosure of a schematic drawing after the bids were in.

I therefore find that the Grievor showed Robert Walker's first schematic drawing during the tender process without authorization, and a further schematic drawing after the tender process had closed, but with the authorization of Sergeant Smart. In so doing, the Grievor put the tender process at risk and violated the oath of confidentiality which she took on joining the Service, in which she swore not to disclose any information that she may have had in the course of her work without obtaining authorization.

In summary, I find that the Board established misconduct on the part of the Grievor. It established that she misled the Board in the Report of November 5, 2003 which she prepared for its consideration, that she acted unprofessionally and recklessly when making the derogatory comments about Robert Walker in the presence of a member of the public on November 18, 2003, and she disclosed schematic drawings prepared by

Robert Walker on two occasions to a competing bidder and to a person outside the Service, of which one time was without the authorization of Sergeant Smart.

### **November 28, 2003**

Association Counsel raised the question as to, what if any effect, did the conduct of the Association support members and the Grievor have, on the Board's decision to discharge the Grievor? The Grievor chose, in agreement with her Association's advice, not to respond to any questions raised by Moe Hodgson in his investigatory interview, and she refused to answer any questions put to her in the meeting later in the day, which resulted in her dismissal.

In the cases put forward by Board's Counsel of **Quinette Operating Corporation and USWA, Local 9113** [1998] B.C.A.A.A. No. 143 (Chertkow); **Canada Post and A.P.O.C. (1996)** 56, L.A.C. (4<sup>th</sup>) 353 (Chertkow); **Toronto East General Hospital Inc. and Service Employees International Union (1977)** 9, L.A.C. 92d) 311 (Beatty); **District of Coquitlam and CUPE Local 386** (1975)14, L.A.C. 92d) 263 (Larson), the grievors were discharged for theft or intention to steal, and in the case of **Chatham and District Assn. for Community Living and OPSEU Local 148** [1998] O.L.A.A. No. 298 (Brandt), the grievor was discharged for sexual abuse. The grievors did not explain their conduct or respond to questions raised by their employers, and arbitrators dealt with obligation of the employee to respond to employers' questions concerning the allegations of their misconduct. The arbitrators contrasted an individual's right to remain silent in a criminal trial or investigation, with an obligation to respond to answers raised in an employment context. Where a prima facie case of employment misconduct has been made out, the **Quintette (supra)** decision held that there is an obligation to provide an explanation for the conduct. In the **District of Coquitlam (supra)** decision, the obligation to respond to prima facie evidence of wrong-doing was expressed as a duty to respond. In **Toronto East General Hospital (supra)** Arbitrator Beatty held that the failure to respond to a prima facie case of misconduct could even trigger independent discipline, as did Arbitrator Nordlinger, Q.C. in **Re City of Vancouver and Vancouver Firefighters Union, Local 18** (2004) 126, L.A.C. 94<sup>th</sup>) 83 (Nordlinger). In **Chatham**

**and District Assn. for Community Living** at paragraphs 100 to 101, Arbitrator Brandt took a slightly different approach. He recognized that there was an obligation to give a credible explanation for such misconduct, and that it is not sufficient for the employee to rely upon his explanation that his silence was as a result of legal advice. However, Arbitrator Brandt was of the view that an employee could take the risk to provide his explanation before an arbitrator, but to do so might come at a price, that compensation may not be paid for losses suffered by the employee, given that the silence caused the employer to act. Further, the employee takes a risk that his refusal to answer, albeit on legal advice, will result in an adverse inference being drawn as to his credibility particularly where there appears to be no good reason for not cooperating with the employer on issues which pose no potential risk to his criminal liability. Similarly in **Re GDX Automotive and United Steelworkers of America, Local 455** (2003) 116, L.A.C. (4<sup>th</sup>) 265 (Surdykowski) held that the grievor has a right to remain silent in an investigation, but there may be consequences to such silence.

Association Counsel referred to the decision of **SGEU and Saskatchewan** (Wolfe Grievance) [2003] S.L.A.A. No. 2 (Pelton) in which the grievor was terminated for inappropriate use and disclosure of confidential information for her own use. The grievor failed to remember the incidents. At paragraphs 174 to 176, Arbitrator Pelton referred to the decision of the Ontario Court of Appeal in **College of Physicians and Surgeons of Ontario v. Gillen** (1993), 13 O.R. (3d) 385 in which the Court found that the discipline committee had erred in attaching weight to the doctor's denial of professional misconduct at page 386:

...Any doctor is entitled to deny allegations made against him or her and to require the college to establish such allegations. If he or she chooses to admit the allegations, that may be taken into account in appropriate circumstances in setting the penalty, but in no circumstances should denial serve to increase what would otherwise be an appropriate penalty.

Arbitrator Pelton then held that “unless it could be established that a grievor had a positive obligation to provide an explanation or to cooperate in an investigation (and there may be cases in which such an obligation arises), it would be equally inappropriate to point to the lack of cooperation or lack of an explanation in supporting the discipline imposed.”

In my view, an investigation of alleged misconduct occurring in the context of an employment relationship, or a meeting between an employer, an employee, and their representative to discuss such allegations and to determine or set the appropriate course of action that is required to remedy the situation is different from a criminal investigation and a criminal trial, at which the accused does not have to testify. In an employment relationship the purpose of an investigation is to allow the employer to determine what has occurred and to determine whether in its view the alleged breaches are so significant that the employment relationship cannot continue, or preferably, whether there are other lesser penalties that may be applied which would allow the employee to learn from the mistakes and continue in his or her employment. Meetings between employers and unions or associations provide an opportunity for the employee to respond to allegations, to explain events, to put forward the employee's perception of events, and to allow the employee's representatives to advocate the employee's position. It is an opportunity to persuade the employer. Frequently, such explanations cause an employer, in light of new information, to change its conclusions, to lessen the penalty that the employer first thought was appropriate. Even if the employer does not accept the employee's position, a frank acknowledgement of alleged misconduct, or apologies made at such meetings are often taken into account as mitigating circumstances to a penalty, should the matter proceed to arbitration. If an employee does not respond, the failure to respond does not attract discipline, but there may be consequences to the silence of the employee, as the employer will act without the benefit of input from the employee or the association.

As such, the Board is entitled to investigate and should investigate any allegations of wrongdoing that may affect it, and the Grievor ought to have the opportunity, as she was given, to respond to the questions and tell her side of the story with representation. She did not need to be ordered by Chief Metcalfe to answer questions, as submitted by Association Counsel.

The Association representatives were also given the nature of the complaints and the particulars of the allegations and were given sufficient information to canvass the allegations with the Grievor and represent the Grievor. The Association representatives did not have a right to insist that the questions that Moe Hodgson wanted to pose to the

Grievor be in writing, as a condition of their co-operation. As Moe Hodgson stated, to do so would not allow for probative answers and would impinge upon a proper investigation. Moe Hodgson was fair in his dealing with the Association, and also provided time to the Association representatives to call on outside sources to advise them as they did not have experience in these matters.

As the Grievor refused to answer questions at the time when there were allegations against her of misconduct, she bears the consequences of her silence. The Grievor by her silence in the investigation and subsequently in the termination interview placed the Board in a difficult position as it had no information from the Grievor or her Association representatives as to her version of the facts.

Association Counsel raised the issue that the bargaining over the civilian members terms of work which was occurring contemporaneously with the investigation, influenced the Board's motivation to terminate the Grievor. It was the Grievor's view on November 28, 2003 and at the hearing, that she was terminated not as a result of her own actions, but that the Board was influenced in its decision, because the Board and the Association were engaged in collective bargaining for the civilian positions, and had come to an impasse over the wages for her position in these negotiations. The Association representatives also shared the Grievor's view.

The Association, as it conceded, has the onus to show that the Board was influenced by an anti-union animus. Although the Association established that bargaining for the civilian members had reached an impasse, there was no evidence that the Board exhibited any anti-union animus or that the negotiations of the civilian contract impacted upon their decision in any way.

In early summer, Rick Houston, the Association's Representative in the negotiations recommended separating the negotiations for the civilian members from those of the uniform members. This approach was successful for the uniform members as their agreement was ratified in July 2003. A meeting was set for November 24, 2003 for the civilian negotiations between Rick Houston and Moe Hodgson, who was representing the Board in these negotiations, before any of the incidents of November 18, 2003 were known. Moe Hodgson acted in a manner that separated the matters of the collective

bargaining from the complaints raised against the Grievor and Mary Lovric. As Moe Hodgson testified, he did not discuss the matter with Rick Houston on November 24, 2003, as his investigation was not complete and he wished to keep the two matters separate.

The parties did not reach a settlement at that meeting. The primary cause of impasse was the parties' different approach to wages as it related to the two civilian positions. The Board wanted to link the salaries of the civilian positions to comparable positions in the Municipality, and the Association wished to link the civilian positions' salaries to those in other police services. This is not an uncommon area of disagreement in contract negotiations in the policing community. There was no evidence that this impasse created any negative feelings or attitude by the Board towards the Grievor in any way. At no time did the Board ever refuse to negotiate a contract for the civilian positions, and the parties ultimately came to an agreement on the wages for the civilian member positions, even though both civilian members had been terminated.

There was no evidence of any discussion taking place within the Board or between the Board and Moe Hodgson that connected the collective bargaining process to the complaints against the Grievor at any time. The Grievor's premise that the Board was influenced by the impasse in collective bargaining was unfounded.

## **Remedy**

The issue then is whether the Board had just cause to discharge the Grievor for these incidents.

Board counsel referred me to the following authorities: the Ontario Court of Appeal decision of **Rex v. McMorrان** [1948] O.R. 384-397; **Ministry of Attorney-General and BCGEU (1981)** 3, L.A.C. (3d) 140 (Weiler); **Coinamatic (Pacific) Ltd. and Teamsters Local 213** [2003] B.C.A.A.A. No. 169; **United Automobile Workers and De Havilland** (1972) 24, L.A.C. 9 (Johnston); **Consumer's Gas Co. and International Chemical Workers Local 513** (1972) 1, L.A.C. (2d) 304 (Brown); **Re United Brewery Workers**

**Local 304 and Pepsi-Cola** (1967) 18 L.A.C. 1105 (Hanrahan); **Re Regional Municipality of Wentworth and CUPE, Local 167** (1978) 18, L.A.C. (2d) 46 (Kennedy); **McKinley and BC Tel** [2001] 2 S.C.R. 161; **Canada Safeway Ltd. and U.F.C.W., Local 401** (1992) 26, L.A.C. (4<sup>TH</sup>) 409 (Wakeling); **Re Health Sciences Centre**, [1992] M.G.A.D. No. 111 (Teskey); **Re Cape Breton (Regional Municipality) and C.U.P.E., Local 933** (2001) 105, (4<sup>th</sup>) L.A.C. 169 (Lederman); **Visa Centre-Canadian Imperial Bank of Commerce and U.S.W.A., Local 2104(B)** (2002)102, LAC (4<sup>th</sup>) 193 (Brandt); **Faryna v. Chorny** [1952] 2 D.L.R. 354, **British Columbia Nurses Union and Vancouver Hospital** [1997] B.C.C.A.A.A. No.97 (Corsey); **Insurance Corporation of British Columbia and O.P.E.I.U.** (1977) 68 L.A.C. 94<sup>th</sup> 308 (Brent); **Mississauga (City) v. Amalgamated Transit Union, Local 1572 (Harte Grievance)** [2002] O.L.A.A. No.9 (Tacon); **Re Corporation of Township of Langley and Canadian Union of Public Employees, Local 403** (1991) 20, L.A.C.94<sup>th</sup> 256 (McPhillips).

Association counsel referred me to the following authorities: **Cape Breton (Regional Municipality and C.U.P.E., Local 933** (supra); **Re Hospital Employees Union and Communications, Energy and Paperworkers Union, Local 468** (2004) 132, (4<sup>th</sup>) L.A.C. 66 (Burke); **Peel Regional Police Association and Regional Municipality of Peel Police Services Board**, Ontario Police Arbitration Commission (“OPAC”) Award Number 95-007 (1995)(Brent); **Brockville Police Association and Brockville Police Services Board** OPAC Award Number 01-020 (2001) (Starkman); **Re Partek Insulations Ltd. and Canadian Automobile Workers, Local 456** 3 L.A.C. (4<sup>th</sup>) 193 (Verity), **Re Tahsis Co. Ltd. and International Woodworkers of America, Local 1-85** (1984) 14, L.A.C. (3d) 138 (Bird); **Re Tenant Hotline and Peters and Gittens** (1983) 10, L.A.C. (3d) 310 (MacDowell); **Chaumiere Retirement Residence and Service Employees Union, Local 210** (1993) 37, L.A.C.(4<sup>th</sup>) 86 (Roberts).

Board's counsel submitted that when the misconduct is viewed as a whole that there was a basis for finding on a balance of probabilities that the Grievor deliberately slanted the Report against Robert Walker. I do not find that there is sufficient evidence to find that she slanted the Report against Robert Walker with malfeasance. The Grievor had only been at work for one month, by the time she completed the report. Within that month there were no incidents that would demonstrate that the Grievor was not content with her job, with those around her, that she had any difficulties with the computers, let

alone any difficulties that arose from the changes that Robert Walker made to suggest malfeasance.

The Grievor prepared an inaccurate report and misleading Report. It was not fair to Robert Walker who was entitled by entering the bidding process to have his bid fairly reflected. It did not do a service to the Board, as the Board was placed in a disadvantageous position as it did not have all of the facts accurately presented to it. It was not up to the Grievor to make the decision for the Board.

The comments of the Grievor in front of John Dickson were derogatory towards Robert Walker, but, as she testified, were a reflection of herself, her self interest, and the turmoil she felt. They exhibited anger and frustration with the Board's selection of Robert Walker's bid. The comments made by the Grievor were unprofessional and reckless. They had very negative ramifications for the Board. Durham is a small community, and as the facts illustrated, within a short period of time, a version of the facts had been discussed with another member of the public, Steve Rudolf, the person who usually services the Service's photocopiers and had reached Robert Walker, the subject of the Grievor's complaints, and had led him to reconsider his submission to the Board. Although the Board was not sued, the actions of the Grievor could have exposed the Board to criticism.

Showing the schematic drawing to Nathan Bowman, also demonstrated a serious lack of judgment, and jeopardized the tendering process. As held in the **De Havilland case** (supra) the legitimacy and the desirability of the goal does not legitimize or make any means acceptable. If an employee chooses an improper means to pursue a legitimate end, it cannot exculpate the employee from the consequences the employee might suffer for employing improper means.

Therefore disclosing a schematic drawing to a competing bidder, without authorization, may have been well intentioned, but her conduct was nevertheless wrong and inappropriate and resulted in breaching the Board's trust in her ability to perform her job. There is no evidence that the Grievor intended to harm the Board or the Board's credibility in either preparing the Report or disclosing the schematic, but she should have known that harm could be caused.

I have reviewed all the jurisprudence presented to me. While the jurisprudence is relevant to the issues in general terms, most cases are distinguishable on the facts. The remedies ascribed to the cases are a reflection of the facts surrounding the misconduct, whether the acts were deliberate or not, whether there have been any previous warnings, the employee's discipline record, and other mitigating factors. The cases are however of assistance in that they reaffirm that there is a basic premise in an employment relationship that an employee owes a duty of fidelity and loyalty to his or her employer. Loyalty and fidelity may be breached by critical deliberate outspoken comments made by employees against the employer, even if the comments are well-intentioned such as in **Re Ministry of the Attorney-General** (supra). In that case, Arbitrator Weiler recognized that the grievors had previously made critical and unsubstantiated comments about the employer and had been warned not to repeat their conduct. As the grievors deliberately chose to do so again they were found to have breached their loyalty to their employer and were terminated, notwithstanding that their goal was laudable. Fidelity to the employer can also be breached by the disclosure of confidential documents, such as in **Re Hospital Employees Union and Communications, Energy and Paperworkers Union, Local 468** (supra), and particularly when the disclosure is for personal interest or gain such as in **Consumer's Gas Co. and International Chemical Workers Local 513** (supra) and in **Pepsi-Cola** (supra). In the cases which specifically dealt with disclosure of information from CPIC, such as in **Regional Peel Police Services Board** the disclosure of information from CPIC was serious, and in **Cape Breton** (supra) was considered as going to the heart of the employment relationship, and yet in none of those cases did the disclosure of that information lead to the termination of the employee.

The three incidents of misconduct, the inaccurate report, the comments of the Grievor about Robert Walker in the presence of a member of the public, and the disclosure of the schematic drawings to a member of the public and a competing bidder, without authorization to do so all flow from the same goal, to obtain the best firewall for the Board, but the Grievor lost perspective in attempting to reach that goal. I do not find that there was evidence of any malfeasance on her part, but each incident demonstrated a serious lack of judgment by the Grievor and each incident affected the Board by placing the integrity of the Board in jeopardy. Irrespective of the Grievor's good intentions, her

improper conduct justifies discipline. The Grievor's conduct was embarrassing for the Board and it placed the Board's handling of the tender process in jeopardy. The integrity of a police services board is critical to its efficacy and therefore it was entitled to treat the comments as serious misconduct. Although the Grievor may have viewed herself as being loyal to the Board, she breached that loyalty and their trust in her. As such the conduct constitutes serious misconduct for which there was just cause to discipline the Grievor.

The process that has evolved in determining remedies in discipline matters is articulately set out in **Re Tenant Hotline** (supra) by Arbitrator MacDowell when he states:

On one level, setting aside a discharge and substituting some lesser penalty is merely a common sense response to the equities of the situation where the penalty appears disproportionate to the employee's misconduct. It would be "unjust" to uphold a discharge (sometimes metaphorically called "industrial capital punishment") when a more moderate response was called for. Discharge is to be reserved for the most serious forms of employee misconduct and imposed only in the last resort. On another level, however, arbitrators have focused on the purpose which industrial discipline can serve in inducing compliance with work place norms, while, at the same time, preserving the employer-employee relationship. This view posits that where the employee's misconduct is not so obviously serious as to warrant summary dismissal, the application of "progressive" or "corrective" discipline should be sufficient to induce him to mend his ways. Borrowing from criminal law notions of "special deterrence", "general deterrence" and "rehabilitation", punishment is viewed as a means to bring home to an employee that he must correct his behaviour and comply with his employer's requirements, or he will face escalating penalties culminating in discharge. In *Re SKF Manufacturing of Canada Ltd. and Int'l Assoc. of Machinists, Local 901* (1975), 9 L.A.C. (2d) 139 at 140, arbitrator Owen B. Shime, Q.C., put it this way: "Where an employee is disciplined in a formal way, the parties know where they stand in relation to each other. An employee, subject to corrective discipline, knows that after receiving a warning, he may receive a suspension and after a suspension he may be discharged." Indeed some arbitrators have endorsed this concept even in the case of quite serious employee offences which would ordinarily automatically provide legal cause for discharge. (That attitude may be seen in such recent cases as *Re Phillips Cables Ltd. and Int'l Union of Electrical, Radio & Machine Workers, Local 510* (1974), 6 L.A.C. (2d) 35 (Adams)(falsifying production records), or *Re Galco Food Products Ltd. and Amalgamated Meat Cutters & Butchers Workmen of North America, Local P-1105* (1974), 7 L.A.C. (2d) 350 (Beatty)(assault on a supervisor). Arbitrator K.M. Burkett referred to it in rejecting the approach taken in *Wardair*

Canada Ltd. and Canadian Airline Flight Attendants' Assoc., October 20, 1980, unreported (Arthurs), and (Re Lily Cups Ltd. and Printing specialities & Paper Products Union, Local 466 (1981), 3 L.A.C. (3d) 6 (Brown); see Re Kingsway Transports Ltd, and Teamsters' Union Local 466 (1982), 4 L.A.C. (3d) 232. Mr. Burkett argued that where an employee's misconduct does not in itself, unequivocally support his discharge, he should not be denied the reinstatement which would otherwise follow that conclusion unless it can be clearly known that he will not respond to corrective discipline. In that case, the arbitrator set aside a discharge and substituted a long suspension, which, in his view, was sufficient to bring home to the employee the gravity of his misconduct (fighting in the workplace) and to deter any repetition.

The use of progressive discipline is now widely endorsed by arbitrators and the industrial community. The fact is, that it works – at least in a sufficient number of cases to justify its continued application. It might have been thought that employment relationships are too fragile or too personal to be resumed in the face of dissatisfaction by the employer no matter how unjustified the employee's discharge. Alternatively, it might be suggested that, at the very least, the reinstated grievor would be a "marked man" whose reintroduction into the work place would never be accepted by his employer, so that it would only be a matter of time before he either provides the company with an opportunity to terminate him again, or quits in response to unfair treatment. However, in at least one recent study of the careers of individuals unjustly fired and subsequently reinstated, this did not seem to be the case.

As it is pointed out in **Re Health Sciences** (supra) at paragraph 55, that even in cases where unauthorized disclosure of confidential medical records has occurred, and prima facie raises the potential for the most serious consequences in terms of disciplinary penalty, the concept of progressive discipline is always applicable and the appropriate penalty is always determined by the particular configuration of facts and factors present in the individual case.

When all these incidents are viewed together in isolation, they are serious enough that they provide just cause for the Board to discharge the Grievor. However the determination of the penalty does not rely solely on the misconduct unless that misconduct is so egregious that it strikes at the heart of the employment relationship such that the employment relationship is irrevocably broken, and there is no possibility for the employer to regain its trust in the employee and that it is not possible for the employee to learn from the mistakes made.

In this case, the Grievor's conduct was egregious, and demonstrated a breach of trust, however, she has never been disciplined. With the exception of her handling of the tender process she has handled her duties well. When the Grievor's comments and conduct on November 18, 2003 are viewed in the context of her employment history it is apparent that it was an unusual circumstance. Although she had previously worked for the Municipality, she was a relatively short service employee with the Service. However, she came into the Service with high recommendations from those who had worked with her, both in her previous and current employment. She also performed her job well as testified to by not only members of the Association, but also by Chief Metcalfe and Moe Hodgson who had been very satisfied with her previous work and were shocked when they learned of the incident of November 18, 2003. The incident of November 18, 2003 was not consistent with her prior work history.

The Grievor's attitude has concerned me as she has not fully accepted responsibility for her actions. At the hearing she maintained that the Board was influenced by the impasse in collective bargaining, for which I have found that there is no basis. She maintained that November 28, 2003 was "like swimming the witch". She also tried to deflect her responsibility for the consequences of her actions by suggesting that John Dickson was not professional as he passed on to others her comments and his views of what had occurred. However, the Grievor testified that she feels deeply about the Service, the Board and the community, which was substantiated by her commitment to her work prior to going on stress leave. She testified that she had played a minor role in its establishment and has learned from her situation. She feels that she has more to offer the Board as she returned to university when she was unable to find any job and will be graduating this semester. She testified that by finishing school she now has a level of confidence and awareness that she otherwise would not have had and would like to bring to the Board her new level of confidence and awareness. Therefore notwithstanding her failure to accept full responsibility for her actions, these tools should give her the maturity to be able to handle the position again and to develop the trust of the Board.

There must also be a consideration as to whether there are any mitigating circumstances which provide a basis for lessening the penalty. There are several other mitigating factors which have been referred to earlier in the award that must be

considered, and that is the involvement of Sergeant Smart in the preparation of the Report and in the disclosure of the schematic drawing. Sergeant Smart reviewed the Report, he agreed with the Report, and was satisfied that the Report was accurate. As the supervising officer for this Report, he also bears responsibility for the Report and its failings. At no time was he disciplined for the contents of the Report nor for providing insufficient supervision of the Grievor.

Significantly, Sergeant Smart provided authorization for the disclosure of the schematic drawing to a competing bidder. Even though all bids were entered, Sergeant Smart was not aware that a contract had been given, and yet he authorized disclosure of the schematic drawing to Nathan Bowman. Although the Grievor's conduct is more serious than that of Sergeant Smart, as she disclosed the schematic drawing during the tender process, Sergeant Smart should never have authorized the disclosure of the schematic drawing to Nathan Bowman at any time. Nathan Bowman was not an advisor to the Board and he did not attend the Board meeting where the bids were discussed. Sergeant Smart only received a ten minute oral reprimand for his misconduct. Weight has to be given to the light penalty that Sergeant Smart received. As emphasized in **Re Partek** (supra) that as an effect of fairness and justice, there must be some form of equality of treatment between employees who engage in the same or similar conduct for which discipline was imposed.

An apology is frequently considered a mitigating factor. The Grievor testified that she has not apologized to Robert Walker as she understood that she was not to communicate with anyone until after the proceedings had been completed, but she wished to meet with Robert Walker and the Board to do so at the conclusion of this matter. Her testimony on the nature of this meeting was ambiguous, and it gave rise to an interpretation as to whether she wished to reconcile her differences with Robert Walker and the Board, or whether she wanted to reconcile with Robert Walker and the Board and meet to apologize to them. I am prepared to accept Association Counsel's submission that the Grievor wishes to apologize to Robert Walker and the Board.

In this case there is a fine line as to whether there was just cause to discharge the Grievor or whether in the circumstances a lesser penalty should be substituted. I find however, that in all the circumstances that this is not a situation in which the Grievor

cannot be trusted again. The Grievor ought to be given another opportunity to work with the Board. I therefore find that there was just cause to discipline the Grievor in light of the mitigating circumstances and the need to apply progressive discipline, and as a result, that the penalty of discharge should be replaced with a lesser penalty, that of reinstatement. Due to the seriousness of the Grievor's conduct, I do not feel however, that the Board should bear the financial consequences for the suspension. The reinstatement therefore, is with loss of pay, and shall take effect upon the Grievor providing a written apology to Robert Walker with a copy to the Board, and forwarding a written apology to the Board, unless with the Board's consent, she arranges to a meeting between the Grievor and the

Board for that purpose.

Dated at Toronto this 19th of December, 2005

*"Belinda Kirkwood"*

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Belinda Kirkwood