

IN THE MATTER OF A RIGHTS ARBITRATION under s. 124 (4) of the POLICE SERVICES ACT

BETWEEN:

Ottawa-Carleton Regional Police Services Board
(The “Employer”)

AND

Ottawa-Carleton Regional Police Association
(The “Association”)

AND in the matter of the individual grievance of Mr. Malcolm Orwin

ARBITRATOR: William A. Marcotte

APPEARANCES:

FOR THE EMPLOYER:

C. V. Hofley, counsel
L. N. Fisher, counsel
C. Roy, Director of H. R.
and others

FOR THE ASSOCIATION:

S. Welchner, counsel
G. Broadfoot, Assn. admin.
M. Orwin, grievor
and others

Hearings held in Ottawa on February 9, 10 and 11, July 5, 6, 7, 11 and 12, November 15, 17 and 21, 2005.

AWARD

In its July 21, 2004 grievance, the Association claims that Mr. Malcolm Orwin (the “grievor”) has been “unjustly dismissed and has been dealt with unfairly and inequitably.” Remedy sought is “full redress, all lost wages (and interest), as well as compensation for the damage to his reputation arising from his dismissal on an accusation of sexual assault.” The February 27, 2004 letter of discharge under the signature of Police Chief Vince Bevan states, relevant for our purposes, as follows:

This is to advise you that, as a result of the investigation conducted by the Professional Standards Section into your involvement in a sexual assault in the workplace and the further findings of a pattern of harassing conduct, your employment . . . is terminated effective immediately, for cause.

The relevant provisions of the collective agreement under which the grievance arises are as follows:

ARTICLE 3 - MANAGEMENT RIGHTS

- (a) The Association recognizes that . . . its is the exclusive function of the Board to:

 (iii) discharge or otherwise discipline any employee.
- (b) The Board agrees that employees will be dealt with fairly and equitably and in a manner consistent with the provisions of this Agreement, the Police Services Act and any Regulations made thereunder by the Lieutenant Governor in Council.
- (c) If a [sic] employee claims that the Board has exercised any of the functions outlined in paragraph (a) in violation of this Agreement, the employee is entitled to exercise his/her rights commensurate with the provisions of the Grievance Procedures as outlined in this Agreement.

Ms. Chantal Mathieu began term employment working full-time hours with the Employer in August, 2001 as a call-centre agent on rotating day, afternoon, and night shifts. The call centre is located in the Greenbank station, on the bottom floor of that three-floor structure and is staffed mainly, if not exclusively, by female personnel. The grievor’s office is also on the bottom floor near a back entrance where smokers, including Ms. Mathieu, would exit for a smoke break. On the far side of

the bottom floor is a dis-used firing range which has a gated area. Inside that area the grievor, who is responsible for, among other things, the procurement, storage and dissemination of pamphlets, displays and other information used by the police service for presentations in the community and for dissemination to the public, stores these materials (hereinafter the “storeroom”). The grievor controlled access to the storeroom and would accompany police officers and others into it when they needed materials for presentations. He worked from 8:00 a.m. to 4:00 p.m., Monday to Friday.

Ms. Mathieu, who is now 26 years old, met the grievor shortly after she began working in the call centre when she and other call-centre agents would go outside for a smoke break, somewhere around 4 or 5 times during an average shift. The grievor, a non-smoker, would frequently join the smokers, either on his own initiative or on invitation from them. She had no contact with the grievor outside of work and considered him to be a friend.

Ms. Mathieu said when she and the grievor were alone on a smoke break they would talk about, “Just things, things in general, just about life like you do with friends.” When asked by the grievor about how things were going with her boyfriend, she would mention problems she was having with their relationship, that he was out of work at one time. The grievor’s responses were “usually very normal. One time he asked if [problems] were sex related and I said, no problem in that area.” After the first couple of months, she found the grievor to be “someone I could trust.” However, over time, the grievor would seem to turn whatever topic they were discussing towards sexual overtones or sexual matters. “One time he asked if [her boyfriend] had a problem with going down on me [and] said older men [the grievor is 52 years old] have experience and, ‘If you want me to, I can go down on you’. I turned beet red and said, No, okay . . . I’d try to change topics [and] try to turn [the conversation] to something else.” She said that particular remark by the grievor, and others he would make generally of a sexual nature, made her feel “embarrassed, uncomfortable. I felt they were inappropriate, but [I thought] maybe he’s like that. I’d try to ignore him.” On some of those occasions, the grievor would notice her to blush and say, “ ‘Oh, you’re turning red’ .”

Ms. Mathieu recalled one occasion when the grievor commented on a new shirt or blouse she wore, which her mother had picked out, that was “a little more cut than usual. I had a leather jacket [over the blouse]. I came to [the grievor’s] office, said hello, and he said, ‘Oh, you look good’, and he rolled his chair to the door where I was standing. He opened my coat and looked me up and down. I blushed, turned red. I closed my jacket and left.” While she could not remember the grievor to have

said anything else on that occasion, she recalled that, “When he’d say something like that, he’d turn red, put his hands on his crotch and say, ‘Please leave’ ”, at which Ms. Mathieu would become embarrassed. She recalled “at least three times” when the grievor had acted in this manner. She mentioned this behaviour “to a few people” but did not file a complaint against him.

Ms. Mathieu said that as time continued the grievor’s comments in their conversations went “from tolerable, to inappropriate, to worse and worse. It was like a gradual thing . . . more sexual, he wanted to find out more things, now checking out my clothing, comments about my clothing.” She did not tell him to stop “because I felt that by my expressions, by changing the subject, he’d know that I didn’t [like] that. After the jacket [incident] I didn’t talk to him for a month . . . I’d turn beet red, change the subject then leave. If he’s talking about sex and I’m not [responding in kind], he should have known.” While she described “a few incidents” to the other call-centre agents, she did not really discuss the grievor’s behaviour with them; “I felt he didn’t speak to the other girls like [he did] with me when it was just him and me.”

In April 2003, Ms. Mathieu was in the process of formulating her Professional Development Program (“PDP”) for work-related purposes and one of her goals involved developing a community-policing program. Ms. Mathieu said she was not faced with a deadline to complete her PDP, “No, I still had half of the year.” She also said she was not under stress to complete it. On April 24, 2003, she went to the grievor’s office to see what pamphlets or information he might have that she could include in her community policing program. At that time, a police officer was with the grievor who also needed some materials and, eventually, the three of them went to the storeroom. The police officer collected what he needed and left. Ms. Mathieu collected a few pamphlets and a newsletter and started out of the storage area, walking ahead of the grievor. “I felt something on the back of my neck . . . I felt like it was fingers tapping. Then he leaned forward and kissed my neck. I knew that he did because he had a scab on his lip. Then he pulled, with force [at the waist of] the back of my pants. I was scared. He again put his fingers on, and kissed, my neck. I moved again a couple of feet forward and he pulled me back. He was saying it sounded like ‘I want to do this’. At that point I was shocked and did not like what was going on; he used force, the door was locked, a third time this kiss on the right side [of my neck]. I took a couple of more quicker steps to the door and went out. He followed. I did not look at him. I was red in the face, embarrassed, in shock — did this really happen? I said to him, Malcolm you’re crazy.” Ms. Mathieu said that when it occurred, the

incident “felt like a long time”, but estimated it took about ninety seconds to two minutes. She said that the grievor kissed her three times and pulled her back three times.

Ms. Mathieu said she went “right to Sue O’Connor’s desk”, a call-centre agent, within “four minutes” after the incident, and said, “Sue, I’m not quite sure what happened. I didn’t want to see anyone else because she’s great at giving advice . . . She said maybe I should talk to him. I said, no. She said ‘Do you want me to?’, and I said I didn’t know, I was still in shock. I wanted to think about it . . . I was overwhelmed. I saw her within four minutes [of the incident].”

Ms. Mathieu said that about two hours later, the grievor walked by the call centre door and, “Smiled and [did] a neck motion with a smirk. I said, Sue, we need to go outside for a smoke right now.” When they got to the smoking area, the grievor joined them about two minutes later. “I thought that I could not talk about this now. The grievor and Sue were talking. I said to him, How long until you retire and he said ten years and something like, ‘I’ll put in a good word for you’. I said I want your job because you don’t do anything. It was my way of finding out how long I had to deal with this. We returned to the office. That’s it.” She believed the grievor had joined her and Ms. O’Connor “to make sure I kept my mouth shut.”

The next day, April 25, 2003, Ms. Mathieu went to work and mentioned the incident to a Ms. Bourdon, a co-worker and good friend. “By that time, it had sunk in. I needed advice about what to do. She said it was not right and that I should talk to S/Sgt. Colotelo [the supervisor].” After Ms. Mathieu described the incident to him, S/Sgt. Colotelo informed her it constituted an assault and that a report would have to be made. S/Sgt. Colotelo contacted a SACA [i.e., sexual assault and child abuse] officer, and the Employer’s Professional Standards Section (“PSS”). He told Ms. Mathieu to write a statement about the incident, which she did. While drafting it, Officer Campbell arrived and they then went to headquarters offices where Ms. Mathieu met with SACA investigators. The relevant portions of Ms. Mathieu’s statement are as follows:

We both then proceeded to walk through the chain fence. Malcolm was behind me walking.

Malcolm then said something to the effect of: “I’ve wanted to do this” and proceeded to touch my neck with his fingers. Malcolm then put his mouth against the back of my neck. I didn’t say anything & took a few steps ahead. Malcolm then grabbed my right side (on the pants waistline) & pulled me towards him. My back touched his chest & that

NOTE: When he was grabbing the side of my pants to bring me closer to him, I noticed that he put muscular force into it. Also, I know that he kissed me because he had a scab on his bottom lip which I felt on my skin.

he continued to give my [sic] a kiss on the back of the neck. I was trying to walk ahead again and again he pulled me back towards him and put his mouth on the back of my neck. My back was again touching his chest. I then took a few more steps ahead & that [sic] he let go & proceeded to walk behind me.

I kept my eyes in front, looking at the shut door & avoided looking at him. I then opened the door and felt my face turn beet red & that he proceeded to walk on the left side of me. I said: "Malcolm you're crazy." We proceeded to walk down the hall & I returned to my office & Malcolm returned to his.

Approx. 1 hour later, Malcolm walked pass [sic] the office, looked at me (I was sitting at my desk which has a view of the door) & he did a motion with his hand towards his neck. It was similar to what he previously did to me. As he did this he smiled & proceeded to walk pass [sic] the door.

Before he had walked by the call center office door (a/m) paragraph) I spoke with Sue O'Connor another call center clerk about the incident that took place in the supply room. Sue told me that it was the first step to sexual harassment in the workplace. I did not know what to do about this incident & asked her for suggestions. Sue advised me that I should maybe speak with Malcolm & tell him that it made me feel uncomfortable. Sue said that if I didn't want to, She could talk to him on my behalf. I told Sue that I would think about it & maybe talk to him on my next shift, being today April 25th 2003.

As to the incident itself, Ms. Mathieu said, "It did a number on me. I trusted him and felt he was a friend. Yes, some of his comments were inappropriate but I never thought he'd touch me I didn't want him to do this to anyone else He invaded my space This whole experience really bothered me He knew I had no interest to be with him He should know better and know not to do that."

In cross-examination, Ms. Mathieu agreed it was hard to understand what the grievor had said on April 24, 2003 while he was walking behind her on their way out of the storeroom. She said it was a "tapping-type motion" on the back of her neck. She disagreed she was under stress regarding her PDP; "No, it was something I enjoyed doing and I did it mostly for myself." When asked if she told the grievor she was stressed about it, she said, "The topic didn't come up." She disagreed that the way the grievor fluttered his fingers was his attempt to gently massage and calm her; "It was not a massage and kissing is not a massage." It felt sexual to her. She said that in pulling her back it was not in the shoulder area. As to having touched or kissed her neck three times, "he did it so quickly I

didn't actually get out of his arms' reach". She did feel a scab on his lip "and stubble because he was unshaven." She said the grievor's scab had been there "for awhile, it was a big purple dot. The week before it really got bad." She agreed the grievor has a permanent blemish on his lip which does not protrude; "Most of the time you don't notice the blemish on his lip, but the week before it was very obvious." Ms. Mathieu agreed she was absolutely positive about having been kissed and pulled back by the grievor; there is no doubt, "none, whatsoever" in her mind concerning these actions by the grievor. The worst part was having been pulled back by the grievor because, "I didn't know what was going to happen." She did not tell him to stop or say anything because, "I was in shock". Ms. Mathieu said that in her conversation with Ms. O'Connor, within minutes of the incident, she told her about the contact with her neck, being kissed three times, and, having been pulled back. She then agreed it was possible she had only mentioned about her neck and not being certain, at that time, if the grievor had kissed her; "It could have been possible. I was in shock. It was out of the norm To tell the truth, I don't know for sure what I told her." She would not have lied to Ms. O'Connor. She then said she was "pretty sure" she told Ms. O'Connor about having been pulled back by the grievor and that Ms. O'Connor would be mistaken if she had not done so. She was certain the grievor had kissed the back of her neck. She disagreed she had informed Ms. O'Connor that the grievor had "tried" to kiss her neck, as indicated in the transcript of her interview with the SACA investigators, to wit: ". . . that he put his fingers there and tried kissing . . . well, not tried, sorry, did kiss my neck a few times . . ."

Ms. Mathieu said she had not testified in examination-in-chief that the scab on the grievor's lip was bigger the week before, "No, I was it was very evident and I felt his stubble on my neck . . . it was not bigger, it was obvious the whole week before [the incident]." She agreed it was fair to say she did not see the grievor from April 18 to April 22, 2003. She did not know if she saw him on April 23rd. She then said, "I may have seen him around without talking to him", and "I remember it [i.e., the scab] was there for a period of time before the incident."

As to the grievor's words to her during the incident, Ms. Mathieu did not remember if she had clearly heard any words other than, "wanted", and, "this", having been spoken by the grievor. She did not remember to have told S/Sgt. Colotelo the grievor having said, "I'm not done yet" and said, "I don't remember hearing that at all," and that, "I'm pretty clear [the grievor] didn't."

She did not know how much time it took her to walk to the storeroom exit after the grievor let her go, but estimated, “maybe five to ten seconds.” As to her evidence-in-chief, that the whole incident lasted for about ninety seconds to two two minutes, Ms. Mathieu said, “I wasn’t timing it, it happened very quickly, one to two minutes.” When asked about the variety of estimations she had provided, she said, “I wasn’t timing everything. I was thinking about my safety [and] getting to the door.”

There is no indication in her initial, April 25, 2003 SACA interview transcript of having asked Ms. O’Connor to go outside for a smoke break. She said her second interview transcript, handwritten by Sgt. Davies, is not correct where she is reported to have said that she did, “go outside with [the grievor] and Sue on the afternoon of the day that this incident happened.” She said, “I did not go out with [the grievor] and Sue. I went out with Sue and [the grievor] followed us outside.”

She disagreed she had asked the grievor for a reference in writing about his job when he retired. When asked if she had acted during the smoke break as if nothing had happened earlier, she said, “I kept it to myself. I avoided the topic and was avoiding [the grievor].” She did not leave; “I didn’t want to make it obvious. He did not know [Sue] knew what had happened.”

Sgt. James Davies has worked in the SACA unit for twelve years and is its most senior officer. He has been a detective for quite some time. He investigates sexual assault/child abuse cases in the vicinity of 120 per year. In addition to his general investigation/interviewing training, he has undergone specialized training for his current duties.

Sgt. Davies was appointed lead SACA investigator in regard to Ms. Mathieu’s complaint against the grievor. He said the purpose of the investigation was to determine “whether, in fact, a criminal offence had occurred, and, if so, who was responsible and what should be done criminally if a criminal offence had been committed.” The Employer’s Professional Standards Section was also involved in the investigation of Ms. Mathieu’s complaint against the grievor. The PSS investigation was led by Sgt. Paul Ingram. According to Sgt. Davies, “The criminal side takes precedence and Professional Standards takes over once my findings are known. We were together, but I was the lead interviewer.”

Sgt. Davies was made aware of Ms. Mathieu's complaint to Sgt. Colotelo the day it was filed, April 25, 2003 and also began his investigation that day. He interviewed Ms. Mathieu at the main police station in the afternoon of April 25th, the videotape and transcript of which is in evidence before me. He also interviewed Ms. Danielle Guertin, Ms. Linda Lacroix and Ms. O'Connor in the following seven or eight days at Greenbank station and, then, interviewed the grievor on May 6, 2003 at the main police station. The videotape of that interview is in evidence before me. He conducted follow-up interviews with Ms. Mathieu, Ms. Guertin and Ms. Lacroix. Sgt. Davies, in discharging his responsibilities, determined that the grievor had committed a criminal offence in his encounter with Ms. Mathieu on April 25, 2003. He also determined that the grievor had engaged in mis-conduct over a period of time which breached the Employer's harassment policy. (Which determinations are addressed in the Association and Employer submissions.)

Sgt. Paul Ingram said the PSS was involved in the investigation of Ms. Mathieu's complaint against the grievor because both are employees. He monitored Sgt. Davies' interviews with the grievor and Ms. Mathieu from a room adjacent to the interview room. The purpose of his involvement was "to determine the truth [concerning Ms. Mathieu's complaint]. The investigation went further. We believed we had a responsibility, as an organization, to find out about the alleged sexual assault harassment." He participated in Sgt. Davies' interviews of Ms. Guertin, Ms. Lacroix and Ms. O'Connor. In addition, Sgt Ingram interviewed Ms. Melva Cruikshank, Const. Kelly Cooper and A/Sgt. Maureen Hunt. Sgt. Ingram, on the basis of his involvement in the investigation, concurred with Sgt. Davies' determinations.

In cross-examination, Sgt. Ingram said he interviewed ten women in total who worked at Greenbank station and who would have had repeated contacts, over time, with the grievor. He said half the women interviewed described "consistent" behaviour on the part of the grievor towards them; "He commented on their clothes, their looks, they didn't think it appropriate." The other five female interviewees essentially had no negative complaints about the grievor nor had experienced inappropriate conduct or behaviour on his part.

Ms. O'Connor said she and the grievor are "pretty good friends" and that, "We'd have conversations whenever we had breaks or happened to meet up together." He often, "most of the time", joins her when she is on break in the smoking area. She and Ms. Mathieu "always went out together" for a smoke break when working the same hours and they are "very close friends."

Ms. O'Connor recalled Ms. Mathieu to have spoken to her about an alleged incident with the grievor on April 24, 2003, at her desk in the call centre. Ms. O'Connor agreed that her statement to investigators, given on May 1, 2003, is accurate save for the part where it says, " 'They were alone in the photocopy room'. That was my assumption When I asked Ms. Mathieu if it happened in [the grievor's office], she said 'No, around the corner.' The photocopy room is around the corner." She had noticed nothing out-of-the-ordinary about the grievor's lip on April 24, 2003 or in the preceding weeks. Ms. O'Connor's statement is as follows:

On the afternoon of April 24th/03, Chantal Mathieu approached me and asked if she could speak with me in confidence to which I replied, "yes."

She began to say that while she was alone in the photocopy room, Malcolm Orwin entered the room. Chantal stated Malcolm approached her and began to rub the back of her neck and said in a whisper in her ear that he "had been waiting a long time for this."

While Chantal was telling me this, her eyes began to get watery and she stated she cannot be sure if Malcolm kissed her on the neck or just whispered. She also stated the whole situation made her very uncomfortable.

I asked Chantal if she felt comfortable enough to approach Malcolm and advise him that he made her feel very uncomfortable and did not want a repeat of the incident. Chantal told me she did not feel comfortable talking to him now but would think about it. I also advised her she could speak to her supervisor and if satisfaction not received then next step would be to go to higher authority. She thanked me for talking to her and asked me to keep it confidential.

In cross-examination, Ms. O'Connor agreed that Ms. Mathieu was visibly upset when she first approached her on April 24, 2003 and it was the first time she had seen Ms. Mathieu in that state. Ms. O'Connor did not doubt that something had happened and was concerned for Ms. Mathieu. Ms. O'Connor was not sure what Ms. Mathieu had told her, but said it was about "touching" her neck area. She agreed there was definitely a change in the grievor's and Ms. Mathieu's relationship after that incident on April 24, 2003. She agreed that prior to April 24, 2003, Ms. Mathieu had not indicated, in any way, that she was going "to get" the grievor or do something to get his job. She agreed Ms. Mathieu is not the type of person who would do that. Ms. O'Connor does not recall a smoke break on April 24, 2003, involving herself, the grievor and Ms. Mathieu.

Ms. Danielle Guertin has been a call-centre agent at Greenbank Station since December, 2000. She recalled the grievor, usually on his own initiative, to join her and other call-centre agents on their smoke breaks, she estimated, two or three times a shift. He would also occasionally go into the call-centre area “to chat” if one of the agents was not busy. She said the grievor did not appear to have a busy job and, “I’d often tease him, saying that I’d love to have your job, not just me but other girls in the call-centre, as well.”

Ms. Guertin said that in conversations with the grievor on smoke breaks, “Often he’d make comments we thought were inappropriate. He turned a topic around to a sexual comment or to a sexual nature. We expected this [from him] but I’d feel uncomfortable.” Her reaction to his comments were “in a way not to encourage him. We, the girls, never talked that way, but he’d turn it around to a sexual nature We’d let on we didn’t like it with gestures, rolling our eyes or saying, Come on [in an exasperated manner as demonstrated by Ms. Guertin at the hearing].” She also recalled that, on one occasion, the grievor came into the call-centre; “We didn’t think it was funny but he did. He used a hand to cover his private parts making it look like he was getting an erection. He’d treat it as a joke.” The call-centre agents’ reaction was “to make him know we didn’t appreciate it.” Again, Ms. Guertin demonstrated gestures of exasperation and saying, “Come on”, to the grievor.

Ms. Guertin got along well with the grievor. “He’d come and talk not about personal things, at first. One day [in or about October, 2002] it changed. [The grievor] said he was interested in watching my son’s [who was nine years old at that time] hockey games. I say maybe, if my son ever plays in the area”, and that she would check his game schedule. Either that day or the next, the grievor asked her to check the schedule and she noted his next game was out of town, some distance away. “I said you’re not going to drive all the way there to watch a hockey game. It doesn’t make sense, wait until a game in Ottawa, He said he didn’t mind, ‘I’ll drive by your place and we can all have dinner’. I was surprised, the focus had changed [away] from a hockey game. He had other intentions. I felt uncomfortable.... I said if your intentions are to get closer to me and my son, I told him I had no interest [in him], I didn’t want anyone in my life and no one from work.”

Ms. Guertin’s evidence is that at other times, the grievor “would suggest different things, like go to a museum. [The grievor] knows I live for my son and I think he was trying to make a point. Another time, he suggested an IMAX film I told him I had no interest in seeing anyone from work and

didn't want anyone in my life. I knew inside I had to tell him . . . I did not want to encourage him....He was told from the beginning I had no interest.” The grievor, however, did not stop; “No, he continued. He'd often mention that it would be a good thing in my life for my son to have a man around. [The grievor] was pursuing me. Whenever he'd see me he said, ‘What can I do to change your mind’, to reconsider. He'd try different methods.” Ms. Guertin attempted to discourage him; “I'd say no . . . I'd always discourage [his suggested outings] and not give in. He'd try to change my mind but when he'd see I was insistent, he'd leave it like that. Then, he'd have a new idea.”

Ms. Guertin also said the grievor called her at work on a Saturday, from his home, after the conversation about attending her son's hockey game. “My two girlfriends [i.e., co-workers] knew what was going on with [the grievor]. They knew I was talking with him and that I felt uncomfortable. They were gesturing [to the effect for Ms. Guertin to] once and for all tell him, and I actually told him again, sorry, I'm not for you. I don't want anyone in my life, I want to be left alone. To my surprise, he said nothing for what seemed a long time. I said are you okay and [he] said, ‘I'm just so hurt. I can't believe you don't want to try it. Give me a chance, I'm a good guy, good for you and your son’. I think I eventually said that I had to go back to work, I hope I did not hurt your feelings, but there's nothing between us.” Nonetheless, the grievor continued to pursue Ms. Guertin. “On Monday, he looked uncomfortable, was red in the face and said, “Is there anything I can do to change your mind?” I said, No. This went on for a week or a week and-a-half, whenever I met [him].”

Ms. Guertin talked about her circumstance with the grievor to a female sergeant. Ms. Guertin said that instead of following the suggestion to file or formalize a complaint against the grievor, she said she would wait a week; “I didn't want the hassle of a formal complaint.” The grievor then stopped pursuing her, “As suddenly as he had started.” At around this time, Ms. Guertin's co-workers, apparently, told the grievor that Ms. Guertin was seeing someone and “to my surprise, it worked.” After that event, “I'd see [the grievor] in the hallways occasionally. He'd appear hurt. I made a point of not talking, just hi and bye. He was making it very obvious that he was sad. I didn't want to be supportive. I felt the more distant I was, the better.”

Ms. Guertin said there were two aspects of the grievor's behaviour towards her that bothered her. “First, he'd turn everything into a sexual nature [in the smoke break discussions] and, second, the

way [he pursued her]. It was very uncomfortable for me to say I had no interest [and would] hint it, again and again.”

Ms. Guertin prepared a statement, dated April 30, 2003, in response to a request from the officers investigating Ms. Mathieu’s complaint. Her statement is in evidence before me. She was then asked to make a second statement, which she did “some days” later. That statement only indicates a date of 2003. In this latter statement, Ms. Guertin refers to a dictionary which she had received from a family member and which she gave to the grievor. “I didn’t think it was a gift. It was just so he could make use of it rather than coming into the call-centre”, to make use of the one there. On another occasion, Ms. Guertin left her home number on the grievor’s answering machine in regard to a videotape from work which she had signed out but was unable to return on the date she had told the grievor she would.

In cross-examination, Ms. Guertin estimated she would have conversations with the grievor three to five times a day, on average, prior to October/November 2002, including two or three times on a smoke break. Some of her conversations occurred while she was standing in the doorway of his office. She did not know about inviting the grievor to join her and her co-workers on smoke break, but “he was always happy to see us, an occasion to get out of his office. There were no problems at first, later there were problems with me. There was nothing wrong except he enjoyed picking at some of the things we talked about and turning them sexual. It made me uncomfortable and [the grievor] knew that — his jokes, his comments.” He was welcome to take part in their smoke breaks.

As to his comments, “No matter what we talked about, he’d turn it around, constantly turning every conversation into a sexual nature.” She estimated he did so ninety-five percent of the time. When asked for an example of the grievor’s behaviour, Ms. Guertin said, “I’ve been trying to think. It’s something you just block out. We’d be talking about a call we just had and he’d say, ‘Oh, she got lucky last night’ . . . Sex was always on his mind . . . He’d make me blush, be uncomfortable and he enjoyed that. He’d say, ‘Oh, Danielle, you don’t have to be uncomfortable about that’, and it would make it worse. I’d tell him it made me uncomfortable.” When asked if she ever told the grievor straight to his face that she did not appreciate his comments and to stop, Ms. Guertin said, “We were often a group of girls. We’d roll our eyes or say here he goes again, or, come on, or, get that off your mind, to show him it’s not proper behaviour . . . There were times we were one-on-one, but I gave hints and gestures that it was inappropriate . . . He acknowledged I was

uncomfortable. He'd think it was cute, he knew I didn't." In any event, Ms. Guertin said she got along with the grievor up to April, 2003. She agreed that in dealing with the grievor's inappropriate behaviour, she typically ignored it or looked away. She never told him directly that his gestures were inappropriate nor recalled any of her female co-workers to have done so. She said, "We demonstrated it was not appropriate. He was aware we knew, but he continued doing it." Ms. Guertin's evidence is that, perhaps, at some point the grievor could have perceived she was interested in him; "I was never anything but myself and he may have mis-interpreted that."

Ms. Linda Lacroix has been a call-centre agent for approximately five years. She said every time she went out for a smoke break when on day shift, some 4 or 5 times, the grievor would join her, either on his own initiative or by way of invitation from her. During those breaks they would talk about religion and family values, among other topics. When he asked her if she read the Bible, "He talked about sex in the Bible but I didn't want to go there." When he said he did not believe Mary was a virgin, "I stopped the conversation [by way of stating] that we each had our own beliefs." The grievor usually referred to sex in their discussions about the Bible, "A lot of times when he led to sex, I'd stop it. I'd say ninety percent of our conversations were always towards sexual and I'd stop it."

When Ms. Lacroix married in 2001, she told the grievor about her new husband, "how good he was to me and how thoughtful he was. [The grievor] asked if he was good in bed. I didn't respond to that...I was very taken aback and stunned." Ms. Lacroix never raised topics of a sexual nature in their discussions. The grievor's references to sexual matters made her feel uncomfortable; "We could never stay on what the conversation was about."

At one time, the grievor sought advice from Ms. Lacroix or how to handle a relationship with a lady he had met. "He asked me about a romantic atmosphere to propose. I said soft lights, candles, dinner and to bring his best smile. [The grievor] said, 'Oh god, Linda, you're turning me on', and put his hands over his genitals, like having an erection. I told him to stop. It was a humiliating and embarrassing moment." On another occasion, "I was outside with a co-worker, discussing our favourite sexiest movie stars" and remembered discussing Mel Gibson. "At one point [the grievor] said, 'You guys are giving me a hard on', or, 'turning me on'. Again, he had his hands on his genitals and squatted. She and the co-worker did not say anything; "We looked at each other and stopped talking. We went inside. We were stunned and embarrassed."

Ms. Lacroix recalled receiving two e-mails on April 10, 2003 from the grievor “that had strange comments” in them. These e-mails shortly followed a conversation she had with the grievor that day, in the smoking area, about music. He had informed her he would send her an e-mail concerning jazz and blues recordings. In the first e-mail, shortly after that discussion, Ms. Lacroix found it strange for the grievor to include, “I miss you”, and did not know why he said that; “I guessed it was just nothing, harmless, so I let it go.” Approximately one hour later, she received a second e-mail which stated: “Hi Linda . . . boy this separation thing is a killer . . . O.K. . . Dutch Mason album... “Blues Ain’t Bad” is the title and its great, just exactly what you’re looking for.” Ms. Lacroix said, “I was very upset because there was no reason for the remark [about “separation”] and the earlier remark, “I miss you.” She sent an e-mail to the grievor in response, “Don’t get sloppy . . . keep it simple . . . a lot easier.” A few days later, she went to his office. “I asked why [he made] his remarks. He said they meant nothing. I said they were inappropriate. . . If I bring these [e-mails] home, my husband will think there’s something between us He said he was really sorry and wouldn’t do it again.”

Ms. Lacroix said her experiences with the grievor made her feel, “very stressful and embarrassing. It left you very tired because, always, our conversations always took that detour into sexual areas. I felt I had to work hard to keep him away from that.” She did not speak to her supervisors about the grievor’s behaviour, “because I’d say, don’t go there, and stop the conversation.” When asked by the investigators into Ms. Mathieu’s complaint for a statement, Ms. Lacroix provided one which is in evidence before me.

In cross-examination, Ms. Lacroix said that prior to the April 10, 2003 e-mails, she and the grievor were “getting along”. She agreed the grievor is a joker and while, “maybe for him”, turning to sexual comments was joking, it was “not [so] for me.” She never told the grievor that his focus on sexual matters, generally, bothered her; “No, I didn’t go into it.” She said the grievor was an emotional person, always friendly and respected her religious views. She did not recall to have told the grievor that she was “good intimately” with her husband, and denied she would have made such a remark to the grievor. Ms. Lacroix agreed the grievor was like a kid brother to her and he often relied on her advice. She recalled having told him that an attempt to establish a relationship with Ms. Guertin was not a good idea. As to his persistence in pursuing Ms. Guertin she said, “I thought it was pretty strong to pursue a person and not take no for an answer.”

She said the grievor had not actually grabbed his genitals but had simply covered them with his hands on the occasions she referred to in examination-in-chief. When she told him to stop it, “he laughed and went onto another topic.” She recalled having told the grievor at one time that they were musical soulmates. She agreed that when first contacted by the investigators, she had told them she did not want to lay a complaint against the grievor.

Ms. Melva Cruikshank has worked as a clerk at the Greenbank station for eight years. She does not work with the grievor but encountered him in hallways or in the station gym. She does not know him well. She said that, “a few times”, the grievor had made inappropriate remarks to her. “One time in the gym, [he] commented on how the work-outs were affecting my body . . . I dismissed it”, and did not recall saying anything to the grievor. On another occasion, while she was walking in a hallway, the grievor “made a turn around gesture [to me]. I did because I thought someone was behind me. [There was no one there] and he said ‘I like it from that angle’.” She ignored his remark and felt it was inappropriate. While she could recall no other specific incidents, she said, “Over the course of years, his conversation was not becoming nice. A couple of times I told him to fuck off [when] a comment was made that I didn’t like or if the conversation was going on a path I didn’t want it to.” At one time, or times, the grievor’s reaction was that, “He told the peers in my office, ‘Watch this, she’s going to tell me to fuck off’.” Ms. Cruikshank prepared a statement for investigators when asked to do so and which statement is in evidence before me. At no time did she convey, or encourage, or indicate to the grievor that his conduct was appropriate, acceptable or invited.

In cross-examination, Ms. Cruikshank said she would occasionally have brief conversations with the grievor when he came into her office looking for empty boxes. She agreed most of their conversations were light-hearted chit-chat, and numbered those as numerous over the some four years she knew the grievor. Both of them initiated their conversations. They did share a laugh frequently in their conversations. She recalled agreeing to listen to a musical recording with the grievor in the station chapel. She recalled conversations about religion with the grievor. She recalled telling the grievor in the gym that she was working out to get back in shape after her pregnancy. She has told others at work to fuck off and has done so in a joking manner.

In re-examination, Ms. Cruikshank said she never laughed during those conversations where the grievor had made inappropriate remarks. She agreed there was a qualitative difference between telling others to fuck off and telling the grievor to do so.

Const. Kelly Cooper knew the grievor from her previous position as a school resources officer when she worked out of Greenbank station, starting in March, 2002. She would obtain pamphlets, brochures and other materials for her presentations from the grievor. She does not know him well, “we had a hello-how-are-you relationship.” On average, she would get supplies and materials from the grievor about once a week.

Const. Cooper recalled an occasion when the grievor had made inappropriate remarks to her. At a Christmas party at a restaurant, “He made a comment about how beautiful or pretty I looked. However, the following day, he said I was stunning, that he was speechless from the first time that he saw me in plain clothes [i.e., out of uniform].” She said the latter remark was inappropriate, it having been made “in the workplace, in my office between him and me; just the way it was said and with him staring. I felt uncomfortable about it, being alone [with him] in my office.” On another occasion, “Again, I was alone in the office. He [mentioned] how nice my pink blouse looked on me and the way he was staring made me uncomfortable.” She mentioned this incident to a fellow officer, A/Sgt. Maureen Hunt, and “We agreed neither of us would go into the storeroom alone with [the grievor],” whereas prior to these incidents, she had gone into the storeroom for supplies alone with him. Const. Cooper prepared a statement when asked to do so by investigators which is in evidence before me.

In cross-examination, Const. Cooper said that prior to the grievor’s above referred-to remarks, they had a professional relationship. She agreed he would sometimes joke around with her. She recalled having mentioned to the grievor on one occasion to the effect that all men let her down, but was not sure if that conversation preceded the occasion of the grievor’s remarks about her pink blouse. She is aware of the Employer’s sexual harassment policy and agreed she had not filed a complaint against the grievor under it, nor did she specifically tell the grievor she found his remarks to be inappropriate; “I felt they were but not to the point of taking action and filing a complaint.” She agreed that in her statement to the investigators she had not said the grievor’s remarks were “inappropriate”, but that they had made her “uncomfortable”. She recalls saying to the investigators that she may have thanked the grievor for his comment about her pink blouse and said, “I just

wanted the moment to pass.” In re-examination, Const. Cooper agreed that in joking around with the grievor, references were not made to sex, or her body or about how she looked.

A/Sgt. Maureen Hunt was in a community services position at Greenbank prior to her current assignment. She had a professional working relationship with the grievor, who she dealt with when she needed supplies or materials for her presentations in the community, roughly once every two weeks. She said that after she had been a community services officer for approximately one year, the grievor made “a couple of comments in the [storeroom]. Normally, I’m in a working uniform. That one morning I was dressed for court, long black skirt, black top and red blazer. He said I look nice and I took it as a compliment He then suggested, however, if I was wearing white, a particular type of material would flow against my body. I felt that was inappropriate and said to the effect that it was. It ceased. The phrase ‘flow against my body’ was very inappropriate.” Following that incident, A/Sgt. Hunt still went to the storeroom alone with the grievor, “but I’d tend to go not as often. I didn’t want to go with him. It was in and out, no banter, I didn’t want to speak, not on that level.” A/Sgt. Hunt said that Const. Cooper asked her to accompany her and the grievor to the storeroom and “maybe I asked her once.” She said Const. Cooper told her that, “She felt [the grievor] was giving her creeps, that she was uncomfortable with how he’d spoken to her in the past and didn’t want to be alone with him.” A/Sgt. Hunt provided the investigators with a statement that is in evidence before me.

In cross-examination, A/Sgt. Hunt said she did not recall joking or kidding around with the grievor. She denied ever having a conversation with the grievor about her clothes, save for the above referred-to occasion. She did not file a complaint against the grievor. She explained why; “because I dealt with it, I told him [his remark] was inappropriate. He’d crossed the line. It stopped. I was very direct. It’s not something women should tolerate.”

Supt. Peter Crosby is in charge of the Criminal Investigation Division and worked out of Greenbank station during the grievor’s tenure. He and the grievor would meet “regularly but infrequently” to deal with matters connected with the grievor’s duties and responsibilities. S/Sgt. Colotelo advised Supt. Crosby of Ms. Mathieu’s complaint on the day it was made. A case conference was held “to get an idea of the scope of the issue, to determine what organizational issues need to be addressed in the near term and then to action those and for go-forward decisions.” In addition to himself and S/Sgt. Colotello, legal and human resources personnel, and others, attended that case conference.

The decision was made to conduct an investigation into the complaint. After that initial involvement, Supt. Crosby was next involved three days later, on April 28, 2003, when he handed the grievor his suspension letter, which states as follows:

A review is being conducted by the Sexual Assault Unit, in light of the recent allegations against you arising from your conduct in the workplace. A parallel Professional Standards Section investigation is also being conducted. As a result, effective April 28, 2003 you are hereby suspended from duty with pay. Your suspension will continue until revoked in writing, and while under suspension you must abide by all of the conditions as outlined below:

- You will be required to return all of your Ottawa Police Service property including any access and identification cards.
- You are not to enter onto or into any property, building or vehicle owned and/or operated by the Ottawa Police Service unless directed by a Senior Officer or a member of the Professional Standards Section.
- You will be required to contact Ms. Sue McLaren, Health/Safety & Lifestyles Unit on a weekly basis. She can be reached at 236-1222, ext. 2081.

At the conclusion of the internal investigation your status will be reviewed and appropriate action will be taken, action which may include the termination of your employment with the Ottawa Police Service.

I recognize that this is a difficult time for you. Should you require personal counseling, I would like to remind you that you may contact the following support resources:

- EAPlus at (613) 722-1035 to reach an Employee Assistance Program contact on a 24 hour/7 day basis
- Dr. William Westwick, Ottawa Police Medical Advisor, at (613) 725-1465.

These support resources are totally confidential and may be accessed at no cost to you.

Sincerely,

Superintendent Peter Crosby
West Division

Supt. Crosby's next significant involvement was his attendance at a meeting on February 10, 2004, which included Ms. Christine Roy, the director of human resources, and the grievor. He said the meeting was called, "to advise [the grievor] of the results of the investigation, that we were looking at those seriously and that a legal opinion had been received to fire him. Also, to give him a chance to tell us his story because he was a long-serving employee We wanted to find if there was anything salvageable and to cover the bases and, at the same time, to give [the grievor] the benefit of

the doubt.” The grievor was unaccompanied and Sgt. Crosby said that, in notifying him of the meeting, “he was encouraged to meet with the Association representatives and to take advantage of that.”

In providing the grievor with an opportunity to address his side of the story, Supt. Crosby expected him “to be remorseful, to recognize that what he did was wrong and that, perhaps, he needed guidance in overcoming his behaviour. Or, he might say [his behaviour] was due to some condition or something internal or external to the job.” In that regard, Supt. Crosby said, “I certainly had an open mind as to what we would hear. This is a necessary step before a recommendation is made [to the Chief of Police]. If I heard something to make me believe there was something salvageable, I was prepared to take a strong disciplinary stance, short of firing him.” What the grievor said, however, was, “completely contrary and opposite to what I had expected. He said it was not his fault he was attracted to women, not verbatim, but hard not to be. He indicated it was almost their fault because of the way they dressed and bounced around . . . This would cause him to be in an awkward way In my experience, it was quite disturbing, what he was saying, and completely contrary to what I thought he’d say He knew his job was in jeopardy. He said if he came back he’d need help — where he would be, and who with, and that he’d need cameras all the time around him. There was no indication that he felt remorseful or that his behaviour was wrong; it was more the women’s fault Towards the end, he said that, ‘If others find this [behaviour] offensive, I’m sorry’, but it was not sincere.”

Supt. Crosby’s reaction was, “Wow. This guy knows his job is on the line and he missed the opportunity to perhaps bring us on side, to give us the opportunity to recommend something short of firing. I had no problem supporting the firing I didn’t think anything could be salvaged. It would not be fair to other employees, especially female ones, to put someone back who’d need some sort of controlling device. I felt comfortable [with the recommendation], notwithstanding that he was a long-service employee.”

In cross-examination, Supt. Crosby said his recollection is that the grievor was given an opportunity to have an Association representative present at the April 28, 2003 suspension meeting. “I believe when I called him, [I said] he might want to have his representative there, to that effect.” Supt. Crosby did not tell the grievor to, “Shut up”, when the grievor asked what the meeting was about; “That’s not my style . . . I didn’t do that.” Supt. Crosby said, “I couldn’t counter that”, when it was

put to him that no one offered for him to have an Association representative present. He agreed the grievor, at the February 10, 2004, had denied the allegation of assault. “It was clear from what he was saying he didn’t feel he’d done anything wrong, that it was the women’s fault This [meeting] was about making a recommendation to fire him or not. We weren’t there to talk about the specifics of the assault. We were there to hear mitigating things.” Supt. Crosby was not aware of what the investigators had told the grievor when it was put to him that no one had informed the grievor of any specifics of the allegations against him, save for the April 24, 2003 incident involving Ms. Mathieu. Supt. Crosby said it was correct to say the grievor told him at the February 10, 2004 meeting that he did not know what the other allegations were and that it is “an assumption on my part that he must have known the main thrust of the inquiry. [The grievor] indicated things had happened that he didn’t think appropriate but he didn’t think it was criminal.” Supt. Crosby agreed, “it could be”, the grievor was only referring to Ms. Mathieu’s allegation, “but he left me with the impression he knew what we were talking about, he knew the nature of the substance.” Supt. Crosby agreed the grievor’s reference to having cameras around the workplace could possibly have been suggested by him in order to disprove false allegations against the grievor; “Yes, a camera would assist in the future, he was scared of women, that they might say something that isn’t true.” Supt. Crosby also said the grievor, “Did say he’d change his behaviour, would not be as friendly as he was, that he would not allow himself to be attracted to women any more. It would be just business, no small talk, that he’d modify his behaviour, that he wouldn’t allow that to happen any more.”

In re-examination, Supt. Crosby said that in the suspension meeting of April 28, 2003, he read the suspension letter to the grievor but that, “In terms of specific allegations, I don’t believe I put it to him To be fair, there wasn’t a lot of discussion on way or the other.”

Ms. Christine Roy is the director of human resources. Her role in the investigation began with the case conference on April 25, 2003. The purpose was to “discuss [Ms. Mathieu’s] allegation of assault against [the grievor] and the strategies and steps to follow. The decision was made at that time to suspend the grievor, with pay.” Ms. Roy made the recommendation to the Employer’s Executive Council that the grievor’s employment be terminated. She made her recommendation “on the basis of the results from the SACA unit and Professional Standards investigations. I relied [also] upon a legal opinion that supported dismissal and the results of the meeting Supt. Crosby and I had with [the grievor] on February 10, 2004.”

From Ms. Roy's perspective, the purpose of the February 10th meeting was, "to advise [the grievor] that the investigation had been completed, that it was determined he had committed a sexual assault, that there was an opinion to support [his dismissal] and, that it was specifically an opportunity for him to speak, to show understanding of his behaviour, remorse, and assurance [as to his future behaviour.]" This opportunity was provided to the grievor because he was a long-term employee with no discipline on his record and had no performance issues, and as part of "due diligence" on the Employer's part. Ms. Roy said they had not decided whether or not to recommend discharge prior to the meeting. When provided with the opportunity to have Association representative, the grievor indicated he had spoken with the Association and was following its advice. She and Supt. Crosby prepared an agenda for the meeting and, at its end, their conclusion, "without a doubt was that his employment not continue. We were completely shocked by what he had to say." She said the grievor showed no remorse for his behaviour, did not demonstrate any understanding of his misconduct, and that "he blamed the women for his behaviour and indicated he was afraid of women." The grievor did not explain why was afraid of women.

Ms. Roy said when queried about what he had done, on his own, about his behaviour in light of the allegations, "Nothing he'd done [indicated] he could be re-integrated [into the workplace]." She also said that at one point, when asked about his understanding of harassment in the workplace, the grievor "launched into a number of telling remarks that were very disconcerting and I was shocked; all women had to do is say something and you're trouble, women dress inappropriately, they bounce, rub, shake their booty, use their sexuality to advance their jobs. At one point he said, 'No offence Ma'am'. I took offence. He looked at me. I was very offended. I was glad I was with Supt. Crosby." Ms. Roy said "the closest we got to an apology was when [the grievor] said, 'So sorry if there are things that I have done — never tried to create a monster'." After the grievor left the meeting, "Supt. Crosby and I looked at each other and immediately said there's no way he can return to work here." She believed there was no alternative to recommending the grievor's dismissal.

In cross-examination, Ms. Roy said all new employees are given a copy of the Employer's harassment policy, which policy is accessible to all employees through the Employer's website. She said an objective test of what harassment means or entails is contained in the *Ontario Human Rights Code* and which test the Employer uses in determining whether or not harassment has occurred. Ms. Roy said whether or not commenting on another employee's clothes is harassment, "depends on how an individual takes that comment and its nature You have to look at each case on its merits, the

facts and the situation.” Ms. Roy said it would not constitute harassment if an employee felt harassed or offended when told by another that he or she “looks great”, nor would, “of itself”, a comment about a woman’s perfume. “Usually [in cases of harassment], there’s a look or a stare. Also, why and where it is said, how it is said, how often, all this could make it inappropriate.” She would not consider the employees’ ages to be a factor. She said whether or not a joke in the workplace is a form of harassment depends, “Again, on the circumstances If someone takes offence, I’ll deal with it”, in which case, that would be a violation of the harassment policy. A mitigating factor would be if the teller of the joke did not expect it would offend. Sensitivity training is available for employees should they need it.

Ms. Roy recalled a 2001 investigation into a complaint of sexual harassment by an employee against a supervisor, Mr. Black. Some of the allegations were confirmed. The officer was not dismissed but received a lesser form of discipline. I have in evidence before me the PSS report into the investigation of the complaint, the discipline imposed, correspondence to Mr. Black, and, correspondence between the Employer and Association related to the discipline imposed.

Ms. Roy said that in the February 10, 2004 meeting, the grievor “appeared to be angry”, and had said he was. At that point, he had been suspended for some nine months. She said “it was possible” the grievor had said he would not admit to something he did not do, “but we weren’t there to talk about the investigation, but about moving forward and what those next steps would be.” When asked if the grievor had been told in that meeting he had offended others besides Ms. Mathieu, Ms. Roy said, “We told him the investigation was completed, it was found he had committed these offences and serious discipline would be imposed I understood [the grievor] knew what he was being investigated about . . . from the investigation reports, the witnesses and their statements, and the sexual assault itself. He responded to all of these.” She did not recall the grievor to have said he did not know about these other allegations, i.e., besides that of Ms. Mathieu. She did not know if the grievor had been provided with copies of the investigation reports prior to February 10, 2004; “I don’t know. My understanding is that would not be a normal practice.”

In re-examination, Ms. Roy said that as a result of the grievor’s comments in the February 10, 2004 meeting, she did not believe sensitivity training was appropriate for the grievor. She also said that prior to the February meeting, neither she nor Supt. Crosby supported the legal opinion that the

grievor be dismissed, “Yes, discipline, but to what extent and how far we’d go” She did not believe Mr. Black’s case was comparable to the grievor’s situation.

The grievor described himself as “a caring person, a joker, I wear my heart on my sleeve, straightforward, speak my mind, sensitive, if [other people] are happy it picks me up.” He said it was “common” for workplace conversations to contain sexual overtones, “not the whole conversation, but sprinklings.” The grievor engaged in those sorts of conversations; “chitty-chatty, jokes made, I’d join in, I wouldn’t run away. Sometimes during the conversation, I was the first one to come out with a joke that way, sometimes I wasn’t.” As to the evidence that he would always add sexual overtones to a conversation, he said, “I certainly didn’t see it that way. There were sprinklings, but it was not continual.” He never engaged in sexual banter when he knew it was not welcome. If someone told him that the nature of his conversations made them uncomfortable, “I’d stop, it would upset me, and probably apologize.” As concerns occasions where he made motions towards his crotch area, he recalled doing so; “If someone told a racy joke, I’d do a Marilyn-Monroe thing and say, Oops, enough of that.” No one ever told him or conducted themselves so as to indicate what he did was inappropriate; “On the contrary, [sometimes] someone would ask me to do it again because they thought it was funny.”

The grievor said he “frequently” complimented female employees on their appearance, “just to be pleasant, to brighten the day, to be honest . . . in almost all cases, they would thank me. Some even said, ‘I appreciate it when you do that’.” Apart from A/Sgt. Hunt, no other female employee told him she thought his remarks to be inappropriate. He has complimented male co-workers on their clothing. He has hugged other employees at work. “I can remember hugging Ms. Mathieu twice, one time I remember clearly. It was the completion of her first term and she wanted to become full-time. The process turned against her and she was angry and upset. I told her to calm down, that was no way to behave and said, You could use a hug. She said ‘yes’, and I gave her one. Another time, she was at my office door. I think it was relationship problems, boyfriend or family. I said you could use a hug she said, ‘Yes’, and I gave her one. There was another lady in the call-centre, I think Diane. She had a brain aneurysm When she [returned to work] she right as rain. I was elated. I said Right on, great to see you and gave her a hug.” He recalled a supervisor with whom he had a work-related disagreement. “He asked to speak to me alone . . . He admitted he had treated me poorly I said I understand and gave him a hug [to show] no hard feelings.” He also recalled

having been given a hug by a Deputy Chief who sympathized with the grievor, when in the process of his divorce.

The grievor said he had a “work relationship” with Ms. Mathieu and that he acted as her sounding board, “kind of a father figure because I’m obviously older. We were also friends, equals if you will, because she helped me with a few things. She put some games on my computer. Another time we were shoulder to-shoulder at my desk [working on] my song book . . . that kind of thing.” He said he saw Ms. Mathieu “sporadically often, like with other folks. Frequently, because we were [on the same floor]. I might see her ten times a day and then not at all because of her shift changes. It ebbed and flowed that way.” On those days when their work hours overlapped, it was “hi/bye”, and also, “maybe three times”, they would have a conversation. They mutually initiated their conversations. As to where they typically occurred, “with Ms. Mathieu, I think most were at the door of my office. I was in my chair area and she’d wander in at times to the filing cabinets [i.e., part way into his office] and we’d chit-chat there . . . Typically, we were alone, although not exclusively since you’d not want to broadcast everywhere.” As to other locations, “a little bit outside, a little bit in the office. More the smoke area, but I don’t think she smoked.” As to their topics of conversations, “Oh, everything, relationships — hers and mine — a lot because she was having troubles, religion, work, music.” He recalled commenting on her clothing; “I recall a time when I did it more than others. She hadn’t been there long, then she was getting a regular pay cheque. She asked what I [thought] of this. For a short period of time, she would show me. Or, I’d say is that new. It lasted a few weeks then petered off, occasionally if it was noteworthy.” As to the incident where she said he opened her jacket in his office, the grievor said, “It didn’t happen. I’m as sure as I can be.”

The grievor knew Ms. Mathieu had a boyfriend. “She told me and I think I met him once”, and she would tell him personal details of their relationship. ‘She told me [he] was a problem . . . The parents didn’t like him. She was really upset because he wasn’t working, wasn’t trying to find work... She felt used, but she was crazy about him. I heard all that . . . Then in winter, things got better and he took her to Montreal. I asked how it was and she told me. It got a little graphic. She told me about x-rated movies, that the sex was great with [the boyfriend]. I had enough at that point and just said, Great.”

As to Ms. Mathieu having testified that at one time he had asked her if her boyfriend “went down” on her, and he told her, to the effect, that because he was older he could do it better, the grievor said, “I don’t ever recall saying that.” When asked if it was possible that he had, he said, “It’s possible, but it would certainly have to be in context. The one time I can think of is the Montreal trip. It would have been done in humour and I certainly wouldn’t mean it.” At no time did Ms. Mathieu tell him that she thought any of his conversations with her were inappropriate. He thought he could recall her blushing in some of their conversations. “I’m a blusher, too, and may have made a comment because of that.” As to how often he made her blush, “I don’t know, it was not really an issue at all.” He said, “It’s nothing I perceived”, in regard to Ms. Mathieu’s testimony that she would ignore him for a period of time after he had made an inappropriate comment to her; “I can’t really see this happening, being ostracized.” He “never got the impression” from her that she found his remarks to be inappropriate.

The grievor said that his comment to Ms. Mathieu in his April 22, 2003 e-mail reply to her April 17, 2003 e-mail about PDP information, i.e., “if I can keep focused”, was in reference to his being busy or pre-occupied with preparations for police week in mid-May, concerning all the types of information used to promote that week; “I was busy and my mind was everywhere. What she had to deal with wasn’t much a priority in my life.”

As concerns the events of April 24, 2003, the grievor said that early that morning, Ms. Mathieu and Const. Niblet (?) came to his office at about the same time. Because both needed some material from the storeroom, all three went there together. When there, “I remember trying to serve Ms. Mathieu first because I thought she’d be much quicker She insisted on being served last, I guess to discuss what she wanted to get.” After the police officer left, they discussed some of the material and Ms. Mathieu gathered a few documents. “So, we’re leaving, it’s a reasonably narrow area. I was a half-step behind Ms. Mathieu. She was mumbling or saying about her PDP and having to get it right.... I’m participating, saying Yes, Yes, and about halfway [out], I gave her four, six boxer-type shoulder [rubs] and a little squeeze. I said something like, You’re fine, everything’s going to be okay, and that was it.”

The grievor said he did not kiss Ms. Mathieu. As to having had a scab on his lip, “I’ve never had one. This scab [Ms. Mathieu described] is where my freckle is located but you can’t feel a freckle and it certainly hasn’t changed, ever.” He did not pull Ms. Mathieu back towards himself. He did

not hear her to say, “Malcolm, you’re crazy.” He has no recollection of making motions towards Ms. Mathieu some one or two hours after they left the storeroom, “but I was walking back and forth and it’s quite possible, especially if you make eye-contact with someone, that you are going to give them a ‘hi’ sign.”

The grievor recalled being in his office later that day; “Ms. O’Connor was going outside, flashed her cigarette. I’m pretty sure, maybe, Ms. Mathieu was already outside. The three of us grouped, we started chit-chatting The nature of my job came up. Ms. O’Connor seemed to think Ms. Mathieu was well informed. I told Ms. O’Connor not to be so hard on Ms. Mathieu Ms. Mathieu said, ‘When you retire, I want your job.’ I said sure, I’ll put in a word for you. Ms. Mathieu said for a third time, ‘Would you actually put that on paper and sign it for me.’ I said sure, I will. That’s all I really remember from that conversation.” He said Ms. Mathieu was acting “totally normal” towards him, was not upset, and that it was “quite a regular conversation.”

In regard to his interactions with Ms. Guertin, he recalled he had assisted her with some research related to police work that she was doing for her son. She named the song book he had compiled for his work with senior citizens. By this time, “We’re chatting a lot . . . an easy rapport.” He was “kind of touched” when she gave him the dictionary, “I bet it costs sixty, eighty dollars. Quite frankly, I was coming to admire this lady. I liked how she spoke, dressed and carried herself. I thought to myself . . . maybe it’d be nice to get to know her more.” He recalled asking if she and her son would like to go to a movie but Ms. Guertin declined; “It [the IMAX theatre] was so steep, she got nauseous from it, which I accepted. It didn’t seem like a ‘no’. Somehow the conversation was about hockey, she might have said, ‘Besides, I’m busy with hockey with my kid’. So, having had children . . . I knew how much fun that was, watching the little ones. So I said, Great, how about that? I recall her saying [she would] have to check the schedule which is when she gave me her extension at work and told me to call her on Saturday, that she’d know by then I called her as arranged [and] she gave me a flat no to the whole idea. That took me back. I was speechless, probably a little crestfallen, there was certainly a pregnant pause on my part.” He recalled the conversation to have lasted only some five minutes.

The grievor said Ms. Guertin never told him that his conversations with her were inappropriate nor had indicated by way of her behaviour or body language that he was acting inappropriately. He

would not have referred to it being good for her son to have a man around as a “tactic” to get a date with her.

The grievor said it was “easy to develop a rapport” with Ms. Lacroix, that they were “good buds at work, only at work We had some things in common; we’d both been divorced, she was on a second husband, I was engaged [in or round 2001]. We talked about religion, cooking and music.” He talked with Ms. Lacroix more than anyone else in the call-centre group, typically, “at my door, in my office, or in the smoke area.” He estimated he was alone with her, in those frequent conversations, eighty to ninety percent of the time. Sometimes he would join her in the smoke area on his own initiative or she would invite his company. He recalled their conversations about the Virgin Mary. As to whether he talked about sex and prostitution in the Bible and she would not want to discuss such matters, he said, “With all due respect, I didn’t see it that way. Ms. Lacroix is wrong, Mary Magdellan was not a prostitute.” The only way he could see her making the Biblical connections, “is because I’m such a confessing Christian. I don’t hide it, it colours everything for me. So, maybe, that coloured our conversations, but to put the two together, it’s just not happening.”

The grievor said he and Ms. Lacroix did engage in conversations with sexual overtones, “by both of us.” One example he recalled was when Ms. Lacroix “was saying it [i.e., marriage] is always better the second time. Her philosophy was you made your mistakes [the first time] and the second time your got it right. To that end, she bragged a little about how her current husband treated her well because she knew how to look after a man and [she] made a gesture with her tongue and hand. I thought it was funny.” Ms. Lacroix never told him his conversations with sexual overtones were inappropriate. As to Ms. Lacroix’s evidence regarding their conversation about how the grievor could create a romantic evening with his fiancée, he said he did not recall making either the crotch gesture or the remark she said he did, but said, “That’s not to say I didn’t do it, I suppose, but I don’t recall it.”

As to having made a gesture to his crotch during a conversation when Ms. Lacroix and others were talking about movie stars, the grievor said, “Actually, I recall a similar gesture. I recall interjecting and explaining why I’m much better looking. There’s a good chance they disagreed with me. When they did, they probably did so with comments and put-downs, and I can remember being kicked in the groin and saying, Oh, that hurts.” No one told him his behaviour was inappropriate, nor did their behaviour lead him to believe they thought it was; “I can only imagine they laughed.”

As to his e-mails to Ms. Lacroix about musical selections, he said in writing to her, "I miss you", that "It was a joke. I was playing on the fact she'd just called me her music soulmate [and] because I'd just seen her five minutes ago." He replied with a question mark to her, "don't get sloppy", remark, "As if to say, are you taking me seriously?" After that e-mail exchange, Ms. Lacroix went to the grievor's office and "started telling me they were a bit of problem. I'm not sure why. She apologized to me because they could not be taken as a joke and would be a problem in taking them home. I realized they could [and] apologized. End of story."

As concerns Ms. Cruikshank, the grievor said their relationship at work was, "light-hearted [and] different. [Ms. Cruikshank] has a wit and a sharp tongue. I like that, it's fun to have jokes with someone like that. Quite often, she came out on top of those . . . There wasn't any other person that I can recall [who] had such a wit that she could tell you to fuck off and it was okay because that's how good she was. We also had a bit of a friendship because I asked her to help out [with some music] in the chapel. Also, we spent numerous times in the gym at lunch hour, talking about whatever. [On a daily basis] I'd pop into [her office] because she had envelope boxes I could use . . . they'd like me to get rid of them. [He and she] maybe had a conversation once or twice a week and [there were] nods and little jokes at each other in the hallway."

Ms. Cruikshank told him she was working out in the gym because "she just had a child and was trying to get her figure back." He recalled telling her in the gym that her work-outs were working well for her body because, "It was true. We were friends. I was encouraging her. I think she [replied] with a thank you, but I can't really recall." While he did not recall doing so, "but certainly I might have said she looked great during one of her work-outs in the gym." As to the occasion when he told her in a hallway to turn around because he liked that angle, the grievor said, "We were face-to-face in a hallway. I do believe I gave a little hand signal to encourage her to turn around, and I think I said that I prefer it from this angle. This is all part of our little [interactions]. It's my way to tell her to fuck off. I was being witty. Obviously, I was misunderstood." He agreed Ms. Cruikshank would, on occasion, tell him to fuck off or to get lost. He took her remarks as "good natured, as I said, light-hearted." He agreed about having mentioned to others to watch, that Ms. Cruikshank would tell him to fuck off, but thought it was in the context of telling Ms. Cruikshank he thought she would be the replacement or successor of a long-time employee who also told others to fuck off, and that he meant it in a light-hearted way.

In regard to Const. Cooper, he viewed them as having a working relationship “casual, a little chit-chat, but hardly any.” He might speak with her two or three times a week, in person or on the telephone, concerning materials she required. He recalled attending the Christmas party Const. Cooper referred to in her testimony, could not recall telling her she looked beautiful, “but I’m sure I would have”, because she was “dressed up” and out of uniform. He does not recall telling her soon after the party how stunning she had looked, but agreed it was possible he had done so. He recalled, on another occasion, to have complimented her about a pink blouse. He made the comment, “for a specific reason. Not long before, there was a small group of all females in the [S.R.O.] office. Const. Cooper was sort of the attention. It struck me she was quite upset about something. [At that point] she said to the effect, ‘All men will let you down’ . . . I felt there were some big hurts there. I decided that, at the next chance I got, I’d cheer her up.” When that occasion arose, after he made the remark about the blouse, “She gave a look that made me feel she thought I was joking . . . I said no, that I meant it . . . She gave me another look. I thought, I’m not getting through here . . . So, in an effort of sincerity, I said, No, I really mean it, you look great . . . She gave me the same quizzical look.” He did not know or suspect that Const. Cooper decided, after this encounter, not to go to the storeroom alone with him.

The grievor had a working relationship with A/Sgt. Hunt, “We kidded a little, a little more relaxed [than with Const Cooper].” He would speak with A/Sgt. Hunt two to four times a week, sometimes alone and sometimes with others present. He recalled commenting on A/Sgt. Hunt’s clothing while they were in the storeroom. “She had [previously] called me looking for a display for a weekend event. She wasn’t familiar with the stock I had. She didn’t want what I would call one of the good ones, she wanted an old one. [There were] different colours, she was keen on blue because it was a police event. I explained the posters didn’t show up well on blue. She still had an affinity for it. So I asked if she was going to be in uniform because maybe that would help. She said she didn’t think so. [I asked about] the colours she’d be wearing. She said ‘On top or underneath?’ I’m used to that kind of joke . . . She said black for both. I said, Oh, wow.” On the later occasion when he commented about white material flowing on her body, “She told me that was not on and didn’t appreciate that, words to that effect . . . I was a little taken aback because of our previous conversation. But, I respected her thoughts, said I was sorry, and left it at that.” Aside from A/Sgt. Hunt’s above remark, no one in his entire history of employment had ever told him that his sexual

banter or comments about women's clothing were inappropriate. If he returned to his employment he "would insist upon" sensitivity training for himself.

As to his suspension on April 28, 2003, the grievor said that a police sergeant was waiting in his office that morning and informed him Supt. Crosby wanted to see him in his office. When he arrived there, Supt. Crosby "started to say something, I started to reply, he said, 'Shut up, just listen'. He read something out. I was escorted out . . . and put in my car." As to the nature of the allegations against him, the grievor said, "I was really in a kind of a fog. He just read out what was in the suspension letter."

The grievor recalled that his interview with Sgt. Davies on May 6, 2003 lasted approximately two hours. The tape of that interview was adduced in evidence and played at the hearing.

In the February 10, 2004 meeting, the grievor said that it was not until "halfway" through the meeting when he was informed of the nature of the allegations, beside those of Ms. Mathieu, against him; "[When] asked by Supt. Crosby 'What about all the other people who complained about you?', I just slumped in my chair and in my mind I just went mental. It was the first I'd heard of any of these. No details as to who. I already had false allegations [against me]. I tried to think over the past twenty years, all the fooling around I had with some people that seemed to be two ways. You get laughing, joking if they have any wit. We get into it. When it's all over, you say it's a good think nobody heard any of this . . . I was like a wounded animal at that point. [Emotionally] I was a basket case. I . . . was angry, confused, scared." As to Ms. Mathieu's allegation in particular, "I didn't understand from the first allegation my suspension. I'd been asking but getting no feedback. I was confused." In his weekly telephone calls to Ms. McLaren, as per the instruction in his suspension letter, "I'd ask what's going on, why are they doing this? Are they investigating me? Technically in retrospect I'd done nothing wrong. It was appropriate. Week after week, she would not tell me. Nine months later, there's a meeting." As to his reference to "technically", and in regard to his interview with Sgt Davies, he said, "I didn't grasp [that] technically what I'd done was an assault, I didn't know", in regard to his having given Ms. Mathieu a shoulder rub on April 24, 2003.

The grievor recalled being "boggled" in his mind during the February 10, 2004 meeting. As to the statements he made in that meeting, as referred to by Ms. Roy and Supt. Crosby in their testimony,

he said, “These came from those fresh allegations. My mind was racing. It was just landing on the most outrageous clowning around episodes I could recall. There’s a moral inequity here. I’m joking around, it’s terrible, it’s criminal and the women I was with could do anything and I’m trying to explain that. Obviously, I went overboard . . . I was grasping at straws. . . . I started to think to myself, Am I missing [something] I failed to pick up? Maybe I need help I was so upset, I was just lashing out I thought it [i.e., his conduct or behaviour] was encouraged. Now with these allegations, I started to doubt myself [But] I didn’t know what the allegations were.” When asked about his statement to Ms. Roy while making his remarks, i.e., “No offence, Ma’am”, the grievor said, “When I was spouting off quite inappropriately about women’s clothing and flirting, I wanted her to know that I didn’t associate her with those thought patterns, so I didn’t want her to think I was including her.”

In cross-examination, the grievor indicated that the female Employer witnesses who had testified as to specific remarks or behaviours on his part had not indicated his conduct was “extremely inappropriate” as were Employer counsel’s words: “Not quite. I felt some [of his behaviour or words] were described as uncomfortable, at best. But, some said inappropriate.” When asked if these witnesses had been lying in describing his conduct, the grievor said they were “wrong, you can be wrong and be telling the truth.” Some were exaggerating and some were taking his conduct out of context, but “there was also a lot of truth” in their testimony. He said, “I don’t know”, when asked if any of the female witnesses had been lying about him. “For example, it’s wrong that I said Mary Magdelan was a prostitute [as concerns Ms. Lacroix’s evidence]. I don’t know if she’s lying, but she’s certainly wrong.” He agreed Sgt. Davies told him that his conduct towards Ms. Mathieu on April 24, 2003 was inappropriate and a sexual assault and agreed Sgt. Davies had no reason to lie to him. As to his comment to A/Sgt. Hunt about certain clothing flowing against her skin, the grievor said that remark was in relation to the discussion between them on the earlier occasion when they had discussed what colour clothing she would be wearing when using a display for a presentation she was making. His remark about clothing flowing was “not a perfect segue, but it did [follow].”

The grievor recalled his remark to Ms. Cruikshank about liking “it from that angle”. He said this was his way of telling her to fuck off; “I felt I had a right to respond in kind”, in that Ms. Cruikshank had the ability to get away with telling people to fuck off. When asked how his remark could be interpreted as telling her to fuck off he said, “That’s the reason.” In telling Const. Cooper she

looked stunning he said, “I thought I was being gracious”. He said he was, “Upset because no one told me” that Const. Cooper, after that incident, would not go alone to the storeroom with him.

He does not see placing his hands over his crotch as something inappropriate when done in Marilyn Monroe fashion. He repeated that he did not recall the incident Ms. Mathieu described, that is, opening her jacket, looking up and down at her and, perhaps, asking her to leave and placing his hands over his crotch. He said Ms. Mathieu “was mistaken about this.” He did say that such a gesture in the presence of a female would be not inappropriate, “in the right circumstances, a humorous situation.”

In regard to his having related Ms. Mathieu’s complaint against him to her inquiries about his retirement and her wanting his job later on April 24, 2003, he denied that he had presented that as a theory behind her complaint; “I think I said it was Machiavellian and she’s full-time now.” He also said, “It crossed my mind”, that she made up the complaint because she was looking to get his job. He did not think she would get it in any event and, “That’s why I didn’t think my recommendation would help [her].” When specifically asked if that had been Ms. Mathieu’s motive for filing her complaint against him, the grievor said, “I do have trouble believing it, it is so off the wall. I’m trying to make sense [of Ms. Mathieu’s complaint].” He also said it, “crossed my mind”, that Ms. Mathieu had made up her complaint because the Employer wanted him gone from employment, and said, “I hope not”, when asked if that was a reasonable explanation for Ms. Mathieu’s complaint; “Now [Ms. Mathieu] is full-time and it makes me wonder.” When asked what is presently in his mind as to why Ms. Mathieu would fabricate a complaint, the grievor said, “What I’ve come to accept is that Ms. Mathieu mis-understood totally what I did [on April 24, 2003] and she’s come to believe what she mis-interpreted.”

The grievor said that when he first told Sgt. Davies in his interview that he had never put his hands over his crotch, “My statement was wrong at that time. I didn’t lie, the reason being he was driving to a sexual assault motive.” He agreed he had then said he had done it as a joke; “As time went on, I remembered that”, i.e., an incident when he had put his hands over his crotch. On that and other occasions when he had performed that gesture, it was in a different context; “One context is aggressive and mean, and one is for show. He was not asking me if I did it in an aggressive sexual manner, but I knew I was there for a sexual assault. I volunteered that error.”

He denied every saying to Ms. Mathieu that he was willing to “go down” on her and, “I have no recollection [of that remark], so my conscience is clear.” He agreed such a remark would be inappropriate; “It’s base humour, I can’t see myself [saying] it.” He then said, “In the right, giggly conversation . . . if the context is watching sexual movies”, it might not be inappropriate. He agreed that in his role as a father-figure to Ms. Mathieu, such remark would be inappropriate.

The grievor said that his statement to Sgt. Davies, that he did not pressure Ms. Guertin, “was wrong. [When] I heard her testify, I never had a chance to explain [the circumstances to Sgt. Davies]. When she testified [as to those circumstances] I was mortified”. He agreed he had told Sgt. Davies he does not agree with the way women dress today and that he turns away from them. When it was put to him that he had also said he would initiate conversations with them of a sexual nature and that in doing so it seemed to be a contradiction, the grievor said, “Yes, all Christians are hypocrites. Scripture tells me I believe you have to be in the world . . . We can’t exist in a bubble.” He agreed he had told Sgt Davies it was not his nature to force himself on people, and, in regard to his pursuit of Ms. Guertin said, “There’s a difference between being persistent and not taking ‘no’ for an answer.” His evidence is that he perceived Ms. Guertin as not having said no to him; “She seemed like she was great about it.”

As to his testimony that he did not talk about sex more than anyone else in the workplace *viz-a-viz* the testimony of Ms. Mathieu, Ms. Guertin and Ms. Lacroix that he did, the grievor said, “Why didn’t someone tell me . . . They’ve got to say something.” As to why these three witnesses would say he did talk about sex more often than anyone else, the grievor said, “They all sit together” i.e., their jobs in the call centre, and that “It crosses my mind” that there is a conspiracy among them towards him. When asked if they were not telling the truth, he said, “I’m saying they are wrong”, and, “didn’t know” if they were actively trying to work against him. He agreed he would see Ms. Mathieu blush at some of his remarks but denied he would deliberately or intentionally try to make her or anyone else blush.

As to the incident with Ms. Mathieu on April 24, 2003, the grievor denied putting his fingers on her neck, “To me, she’s making it up”, that she is making up that he touched her neck with his lips, and, is making up that he pulled her towards him. When asked if it was Ms. Mathieu’s imagination that his chest had touched her back, he said, “I could have touched her back with my chest when I massaged her neck”, but did not recall that occurring. He did not recall her to be blushing, or to

have said, “Malcolm, you’re crazy.” He agreed that according to his version of events he had touched her without asking. As to his version of the incident, the grievor said that his description and demonstration of it given to Sgt. Davies was complete, “There was nothing else.” That demonstration and description consists of placing his hands on her shoulders while walking behind her, giving them a few, short rubs and ending with a short slight squeeze to her shoulder/upper arm area, which actions he said were prompted by her being “stressed” about her PDP. He agreed she had not given consent for his actions as Ms. Mathieu had on previous occasions. The grievor said that Ms. Mathieu “mis-interpreted what I did” in her description of the incident to S/Sgt. Colotelo on April 25, 2003. He agreed that he is angry about Ms. Mathieu’s complaint because he is the victim.

The grievor agreed that in his meeting on February 10, 2004 with Ms. Roy and Supt. Crosby he felt then that he was a “target”, in Employer counsel’s word, and said, “I don’t know”, if he thought the same presently; “I was cast off for nine months [i.e., from the time of his suspension until the February, 2004 meeting]. I was freaked out. There were false allegations. I was scared”, in regard to the statements he had made in the February 10, 2004 meeting. He added, “You’re taking my comments out of context. I didn’t know [at that meeting] what other things” he had been accused of in regard to the evidence of Ms. Guertin, Ms. Lacroix, A/Sgt. Hunt, Const. Cooper and Ms. Cruikshank. “I had no idea what I was accused of, I had no idea of the details and, as it turned out, none of these people were on my mind. I never knew what things they [i.e., Ms. Roy and Supt. Crosby] were talking about The only thing I thought was being dealt with was Ms. Mathieu’s complaint.” As to his remarks about women he made in that meeting, the grievor said, “I was thinking about things, it was a light-hearted workplace. [I was thinking] I’m going to be dismissed or punished. So I’m thinking maybe I’m missing the [point], maybe I’m not getting this I had a little problem with women when they do that [i.e., clothing some women wear]. I’m a decent man, but think of what others might do, take advantage of them.” He viewed his remarks towards Ms. Cruikshank and Const. Cooper, and Ms. Guertin, as they had testified to, as “natural things that happened giving someone the compliment of asking them out.” The grievor again agreed he was angry when first accused by Ms. Mathieu in April, 2003 because he effectively viewed himself as the victim. When asked again if that view had not changed by the time of the meeting on February 10, 2004, the grievor agreed it had not and said, “Although I recognize now that touching her [i.e., Ms. Mathieu] on the neck is wrong, strictly speaking.”

In re-examination, the grievor said that had he known Const. Cooper was uncomfortable with his remarks about her blouse, he would have, “begged her apology and told her it was not intended to be offensive and if she was offended, I would apologize.” As to the Employer witnesses’ evidence concerning his turning conversations to sexual innuendos, had he known his conduct was not appropriate, “I would probably have tried to eliminate it totally, at least with the people who complained, or bring it to a more acceptable level by talking [to them] about it. After so many years of the way I am, I’m curious if there is something I am saying or doing, that is, why is someone upset with something I’ve been doing before.” As to what he had meant by describing himself as a hypocrite, the grievor said, “Sometimes a woman is so well turned out, I look. Also, there is the issue of not looking at body parts but still admiring their clothes.”

Ms. Norma Couturier is a firearms officer at Greenbank station. She first met the grievor in his previous position of special constable. She and some eight others, including the grievor, shared a office. She is friendly towards him, as she is with her co-workers, “I’m an extrovert” and has, perhaps, a couple of conversations with him in a week. “We’d banter back and forth. He’s very religious and I’m not.” She described the grievor as “a joker, friendly and an extrovert as well. I find it easy to get along with those types.” While she could not say how often, “but some of [the grievor’s] jokes would have sex overtones if I chose to take it that way.” She said “none” of these conversations with the grievor was inappropriate. She has been involved in workplace conversations which she felt were inappropriate and on those occasions, “I would shut them down vocally and walk away.” No one at work ever told her the grievor acted inappropriately concerning comments about clothing or sexual innuendos. She could not recall the grievor to have made a gesture with his hands over his crotch but would not be surprised if he did, in the context of a conversation with sexual overtones; “He’s outgoing, a joker.” In the weeks leading up to the grievor’s suspension in April 2003, Ms. Couturier did not notice anything unusual about the appearance of the grievor’s lip.

In cross-examination, Ms. Couturier said that while sharing the office with the grievor and others there were always others present and it was rare for no one to be in it. She is not a smoker but does go out on breaks with people who do. She does not interact with the call-centre agents. She and the grievor are work friends. She is not easily offended by remarks with a sexual overtone and said it was possible such jokes would not be well-received by some people. If someone did a “Michael Jackson” [i.e., hands to crotch] in her presence, “I’d tell them where to go.” In re-examination, Ms. Couturier said that she “often” had conversations with the grievor when no one else was around,

sometimes in his office, and that they often went to the storeroom, by themselves, to get information material.

Mr. Stephen Marshall retired from his position with the Employer as a police officer in March 2004. He first met the grievor some fifteen or twenty years at Greenbank station. After being off work from 1996 until 2000, Mr. Marshall continued his friendship with the grievor until his retirement some four years later. He said they would have conversations, “at least a couple of times a week,” usually in the morning when Mr. Marshall entered the building by the door near the grievor’s office, but “nothing heavy, no politics, no religion, just chit chat and banter.” Mr. Marshall observed the grievor to be “light-hearted, there was a lot of joking, we had a shared sense of humour.” He was “not really aware of [the grievor’s] interactions with others. I can’t really comment on how he was reacting with others.” The grievor never said anything inappropriate to him nor did he overhear the grievor with others to make inappropriate statements. Neither did Mr. Marshall hear others complain about the grievor’s behaviour. While he could not recall a specific occasion when the grievor would have put his hands over his crotch, “but it’s something either of us could have done in our bantering, depending on what we were talking about.” In the weeks leading up to the grievor’s April 2003 suspension, Mr. Marshall said, “I don’t recall noticing anything about [the grievor] physically”, when asked if he noticed anything out of the ordinary regarding the grievor’s lip.

As concerns the cultural at Greenbank station, Mr. Marshall said that, “It seemed to be quite acceptable” for there to be banter and jokes of a sexual nature, “whether between male or female, civilian and sworn” personnel. Also, “The use use of profanities was tolerated [and] sometimes there were inappropriate comments made.” Mr. Marhsall recalled a summer when “a couple” of female student replacements were “inappropriately dressed, bare midriffs. That [led to] the expected comments from staff members, [for example] an e-mail about a certain young lady wearing a thong, things like that.”

In cross-examination, Mr. Marshall agreed he does not know whether or not the grievor made inappropriate statements when he was with other employees. He agreed he does not know if others thought the grievor’s behaviour, in particular putting his hands over his crotch, was inappropriate. He has no knowledge of the grievor’s relationship with the call-centre employees. He agreed that he would not expect himself to remember, some two and a-half years later, whether or not a colleague had a cold sore on his lip or had cut himself shaving. Mr. Marshall “absolutely” agreed he is in no

way suggesting that the wearing of inappropriate clothing justified harassment or inappropriate comments or behaviour, or assault.

S/Sgt. Brad Spriggs first met the grievor in the early 1990's at Greenbank station and for one year, beginning sometime in 1995, S/Sgt. Spriggs was his immediate supervisor, i.e., when the grievor began his current job. During that period, he had daily contact with the grievor about whom there were no complaints. He described the grievor's personality as "jovial, bubbly, always up, very friendly, and laughed a lot. He seemed to really enjoy his job." S/Sgt. Spriggs and his subordinates, some thirteen in all, shared an open concept office. In that year, he did not hear the grievor to ever make an inappropriate remark. He did not notice the grievor to engage in banter or make jokes of a sexual nature; "He was a very religious man [who made] Bible-related jokes."

S/Sgt. Spriggs departed Greenbank station and returned there in 2002. At that time, he was not the grievor's direct supervisor but encountered him, "a bit more", than once a month, usually to get material for S/Sgt. Spriggs' monthly community presentation. Their contacts slowly diminished over time when S/Sgt. Spriggs stopped making his monthly presentations. On occasion, they would commiserate about their divorces. From 2002 onwards, S/Sgt. Spriggs never heard the grievor to say to himself or others an inappropriate remark.

S/Sgt. Spriggs said that the workplace culture is "changing, not like it was thirty years ago" in regard to sexual banter and jokes. "I jump on off-colour or inappropriate [remarks], there is still some innuendo. Sometimes, I tell [a female] she's not wearing her name tag and she'll say, 'You're just looking at my breasts', jokingly." Innuendo, however, occurs "fairly frequently with both male and female. It seems to be in the workplace as a way to deal with stress. Sometimes, it's not the nicest of humour." S/Sgt. Spriggs' evidence, also, is that it is "common" in the workplace for employees to compliment on others appearance or clothing and the response "typically is positive; 'Nice of you to notice, thanks'. I've never heard anyone to take offence." He said the workplace culture at Greenbank stations was "Almost like a family, more relaxed [than at other police stations]. People seemed to take the time to talk. In other divisions they say how nice it is to go to Hollywood West [i.e., Greenbank]."

S/Sgt. Spriggs has not seen the grievor to make a Marilyn Munroe-type gesture involving placing his hands over his crotch area. However, he would not be surprised if the grievor had done so; "I can

see him doing it with a little chuckle, with a little-boyish attitude, like ‘Oh, you’re embarrassing me’.” While he could not say if such a gesture was inappropriate or not without knowing its context, “but I’d see it from him as a jovial defensive move.”

In cross-examination, S/Sgt. Spriggs, a non-smoker, indicated he had only a workplace relationship with the grievor. S/Sgt. Spriggs’ office is on the second floor of Greenbank station and very seldom does he go down to the grievor’s floor. As to having “jumped on” an inappropriate remark, “In the past two years, I have said something three times” in reaction to an inappropriate remark that “crossed the line.” He agreed that it would be inappropriate for someone to tell a co-worker to, “Turn around because I like that angle.” It would also be inappropriate, he said, for someone to say to a co-worker “Cover up, you’re getting me excited.” He added, “I’d also deal with [that person’s] clothing. We have a dress code”, about which there are no problems at Greenback station, in his experience. He agreed, in effect, that covering one’s crotch in the context of a remark about a woman “being hot” would be inappropriate. He agreed it would be fair to say there were fewer stresses associated with the grievor’s job as compared to those associated with the work of a police officer.

The Employer argued that it had just cause to discharge the grievor on the grounds that he sexually assaulted Ms. Mathieu on April 24, 2003. It was submitted that Ms. Mathieu’s version of the events of April 24, 2003 is credible and the grievor’s version is not.

Ms. Mathieu, it was argued, in her testimony was clear, straightforward and consistent in that her version never changed in a significant or substantive way when given to S/Sgt. Colotelo, to Sgt. Davies and in her description given at the arbitration hearing. In particular, her version is vivid, detailed and graphic in describing and demonstrating the grievor’s fingers on her neck, feeling his whiskers and lip scab on her neck, and, feeling the grievor’s chest against her back. She described how she was scared when the grievor, with muscular force, pulled her back three times and related, vividly, her feelings of fear, flushing at the time and being beet red in the face coming out of the storeroom. She also described how, sometime later, the grievor had taunted her by making a finger-fluttering gesture while passing by the communication centre. In cross-examination, Ms. Mathieu was unshaken and did not over-reach in her testimony, nor attempt to be self-serving. She was consistent in stating that she could not be sure of the words spoken by the grievor yet, if she was fabricating her version, it would have been more black and white. As to the discrepancy between

what she testified to as having told Ms. O'Connor and Ms. O'Connor's version of Ms. Mathieu's remarks, Ms. Mathieu did not say Ms. O'Connor was mistaken or wrong, rather, simply said she did not know why Ms. O'Connor reported what she had said in her statement. That is, where Ms. Mathieu was unsure about details of the incident, she admitted as such.

In contrast, the grievor's testimony is inconsistent, self-serving, vague where it was properly expected to be detailed, and, contains incredulous explanations of events and, thus, not credible. In describing the events of April 24, 2003, the grievor provided an un-balanced account of what occurred that morning. He gave a very detailed account of events prior to entering the storeroom and a very detailed account of what occurred in the storeroom prior to the incident. However, as to the incident itself, he describes but a brief massage of Ms. Mathieu's shoulders, but no description of whether a conversation was going on between them and no statement as to Ms. Mathieu's reaction to the alleged massage. Moreover, aside from his simple denial of Ms. Mathieu's version, the grievor offered self-serving statements whenever the opportunity to arose. He said he massaged Ms. Mathieu's neck because she was stressed over her PDP and, yet, tells Sgt. Davies that she is a pest. Further, he relied on an off-hand remark by Ms. Mathieu later that day about wanting his job as motive for Ms. Mathieu to lie and make up the story of an assault. In cross-examination, he intimated that because Ms. Mathieu is now a full-time or permanent employee, there was a conspiracy against him, supported by Ms. Guertin and Ms. Lacroix, in his noting that they and Ms. Mathieu sat together in the call-centre. The grievor's credibility is further found wanting given his incredulous explanations of his comments to A/Sgt. Hunt, Ms. Cruikshank and Const. Cooper. All these explanations simply and clearly demonstrate the grievor's propensity to fabricate and to explain away his actions with creative alternative explanations, just like he did concerning the incident with Ms. Mathieu in the storeroom.

The Employer submitted that the pertinent surrounding circumstances of the April 24, 2003 lend further credibility to Ms. Mathieu's version and work against the grievor's credibility. There is no evidence to suggest that Ms. Mathieu had an axe to grind against the grievor but, rather, considered him to be a friend. Also, through Ms. Mathieu, the grievor knew she liked it when her boyfriend rubbed her neck. Directly after the assault, Ms. Mathieu, within minutes, tells what happened to Ms. O'Connor and Ms. O'Connor described Ms. Mathieu as appearing shaken and upset. In that respect, her appearance begs the question as to why she was upset and shaken if the grievor had simply massaged her neck. Also, the next day, April 25, 2003, Ms. Mathieu told S/Sgt. Colotelo a version

of the incident consistent with her statements to Ms. O'Connor, to Sgt. Davies, and, in testifying at the hearing. For his part, S/Sgt. Colotelo reported Ms. Mathieu's eyes to be bloodshot and teary. It is clear from the evidence that Ms. Mathieu had nothing to gain in filing her complaint against the grievor, just as the female witnesses who testified had nothing to gain in describing the grievor's inappropriate conduct towards them. Further, both Sgt. Davies and Insp. Ingram, who are experienced investigators, had absolutely no doubt that Ms. Mathieu was telling the truth. On the other hand, the grievor has every motive to lie about the incident in the storeroom and he was unable to come up with any credible or plausible reason why Ms. Mathieu, and other female witnesses for that matter, would say what they did other than his view that they are fabricating stories and conspiring against him.

The Employer submitted that discharge is the only appropriate discipline in all the circumstances. Sexual assault is the most serious type of workplace offence, is an affront to dignity, and has lasting effects on the victim. For its part, the Association has not demonstrated good reason to mitigate the discipline imposed and, in cases such as this, long service and a clean discipline record are not viewed as mitigating factors or factors of such sufficiency so as to lessen the Employer's disciplinary penalty.

The Employer argued that I should not accept the grievor's evidence to the effect that he has no appreciation of his inappropriate conduct towards females in the workplace; he knew better but engaged in it nonetheless, for example, causing Ms. Guertin to blush when he made inappropriate comments. Moreover, from his remarks made in the February 10, 2004 meeting, it is clear he does not understand he has done wrong but, rather, sees himself as the victim. In short, his failure to understand or to appreciate his actions is an aggravating factor in the instant case.

In terms of his conduct during the investigation of Ms. Mathieu's complaint, Sgt. Davies testified the grievor was being a obstructionist in his interview and during that interview the grievor misled the investigator, as he also did in the arbitration hearing, as to the circumstances of having obtained Ms. Guertin's personal telephone number. As well, the grievor continues to assert he has done nothing wrong in regard to the events of April 24, 2003, and in regard to his inappropriate conduct towards his female colleagues, including indicating they are wrong in respect to the frequency of times he turned his conversations with them to matters of a sexual nature. The grievor has shown no remorse for his conduct, has not apologized for it and continues, as he did on February 10, 2004, to blame

women for his behaviour, and believes that they have conspired against him. On April 24, 2003, he chose the youngest and most vulnerable female colleague, Ms. Mathieu, upon whom to commit his sexual assault, thus, there was a certain degree of premeditation to his actions that day. There was no provocation for his behaviour. The grievor has taken no steps in regard to his issues with women. As to the circumstances surrounding the Employer's disciplinary response to another employee, Mr. Black, there are numerous differences in that case so as to distinguish it for purposes of assessing the manner in which the Employer has responded towards inappropriate conduct by a male towards female co-workers.

In support of its position on the merits of the case, the Employer submitted *Re Niagara Health System and S.E.I.U. Local 204* (July 11, 2005) unreported (Marcotte); *Re Trillium Health Centre and C.U.P.E., Loc. 4191 (Borgona)* (2001), 102 L.A.C. (4th) 48 (Surdykowski); *Re Canadian Airlines International Ltd. and I.A.M., Dist. 140* (2000), 92 L.A.C. (4th) 153 (62 C.L.A.S. 123) (Keras); *Re Canadian National Railway Co. and C.B.R.T. & G.W.* (1988), 1 L.A.C. (4th) 183 (M. G. Picher); *Re McMaster University and S.E.I.U., Loc. 532* (1993), 33 L.A.C. (4th) 33 (Brunner); *Re Royal Towers Hotel Inc. and Hotel, Restaurant and Culinary Employees and Bartenders Union, Loc. 40* (1992), 32 L.A.C. (4th) 264 (Blasina), and, *Re Canadian Broadcasting Corp. and Canadian Media Guild (Christopher)* (1998), 70 L.A.C. (4th) 44 (Hope).

The Association argued that the Employer has not proven a sexual assault occurred on April 24, 2003, on the basis of clear and cogent evidence and on all the probabilities. It agrees with the Employer that the matter of credibility is significant for purposes of determining the issue. The Association submitted that the grievor has provided a credible version of the incident on April 24, 2003. Thus, while walking behind Ms. Mathieu when leaving the storeroom, he placed his hands on her upper shoulder area, massaged that area a few times, finishing with a little squeeze. Moreover, when two people are walking in the same direction and the one in back gives a massage while continuing to walk, that can feel like a pull back. While the Employer submitted that the grievor's version is not credible for want of detail, what the grievor has provided is more than sufficient detail to describe the conduct or actions and, in any event, there is no greater level of detail to provide. In that regard, Ms. Mathieu could not see what was happening behind her and, so, relied on her other sensory perception. That is not to say Ms. Mathieu is necessarily lying about the incident, rather, it

appears she has convinced herself something occurred that did not. While her perception may be honestly held, that does not mean her version is true.

The Association argued that, contrary to the Employer's assertion, Ms. Mathieu's version of the incident has not been absolutely consistent throughout the re-tellings she has made, and there are notable inconsistencies in those versions. Prior to the hearing, Ms. Mathieu's position in her statement to S/Sgt. Colotelo, was that the grievor had said, "I've wanted to do this", yet in cross-examination she said the grievor was mumbling and she heard only the two words, "wanted", and "this". So, by the next day, April 25, 2003 she has made a part up of the incident. Ms. Mathieu's evidence is that the grievor kissed her on the neck three times and she could feel the scab on his lip. The grievor said he never had a scab where his lip freckle is and which freckle is where Ms. Mathieu locates his scab. In any event, Ms. Mathieu said that the grievor's lip got worse in the week prior to the incident, yet the evidence is their shifts last overlapped, prior to April 24th, on April 17, 2003 and before that, on April 10, 2003. Further, there is a tremendous unfairness in the investigation of Ms. Mathieu's complaint on this matter. In particular, the grievor was not interviewed by Sgt. Davies until May 6, 2003, and so lost the opportunity in the intervening twelve days between then and the incident to demonstrate there was no scab on his lip. While Mr. Marshall and Ms. Couturier said they did not notice his lip at the time of the incident, it is fair to say they were not looking for anything in that regard some two and a-half years before giving their testimony.

In regard to Ms. O'Connor's evidence, both Sgt. Davies and Sgt. Ingram said that, due to its closeness in time to the April 24, 2003 incident, it is the best evidence as to what Ms. O'Connor perceived and which evidence is not consistent with Ms. Mathieu's version. In that respect, Ms. O'Connor said the only statement she made that is inaccurate is when she located the incident in the photocopy room. Otherwise, she said it was accurate that Ms. Mathieu said the grievor began to rub the back of her neck, said in a whisper he "had been waiting a long time for this", that she could not be sure the grievor had kissed her on the neck, and, that Ms. Mathieu's eyes were beginning to water. Not only is Ms. O'Connor's statement critical for what it says in comparison with Ms. Mathieu's recollection, it is also critical for what it does not say. There is no mention of a pull back or pull backs and, yet, Ms. Mathieu said this was the action that she was really concerned about.

In Ms. Mathieu's statement to S/Sgt. Colotelo on April 25, 2003, it is reported she said the grievor stated, "I've wanted to do this for a long time" and, "I'm not done yet", which latter statement she

denied the grievor had said in her testimony, but which version is different from Ms. O'Connor's evidence and S/Sgt. Colotelo's report. She is also reported by S/Sgt. Colotelo to have said she "believed" the grievor kissed her on the neck, and to have reported the grievor grabbed her side, pulled her back three times and, that on two of those occasions, their bodies made contact.

Ms. Mathieu's testimony is also inconsistent when she states it was darker in the storeroom area of the shooting range in that the evidence is the whole area is lit by halogen lights that are either on or off. She was also inconsistent in her evidence as to the duration of the incident. In examination-in-chief, she said it lasted some 1½ to 2 minutes and in cross-examination said it was between 1 and 1½ minutes. Also, in testifying she denied asking the grievor for a reference in their smoke-break conversation later on April 24, 2003, yet, in her follow-up interview shortly after April 25, 2003, she said that she did ask him to recommend her for his job.

The Union submitted that the multiple inconsistencies in Ms. Mathieu's stated versions of the April 24, 2003 incident lead to the conclusion she has convinced herself that more occurred than what actually did in the storeroom with the grievor. Rather, what occurred is the grievor's version, particularly in light of Ms. O'Connor's evidence. In that regard, there are no inconsistencies in the grievor's version in examination-in-chief and in cross-examination. Further, he provided a rationale for the massage, that is, that Ms. Mathieu was upset over and stressed about her PDP, which is also his explanation for his conduct given to Sgt. Davies. Also during which interview, he said Ms. Mathieu's version was based on a misunderstanding of what had occurred, and that she had come to believe events that did not occur. Further, as the grievor himself admitted, while he did express his theories about Ms. Mathieu fabricating events to get his job, and that complaints from other female co-workers reflect a conspiracy against him, he, himself, could give no credence to these matters, which, in any event, he said simply crossed his mind.

In regard to Sgt. Davies' conclusion that the grievor did sexually assault Ms. Mathieu on April 24, 2003, the Association argued that Sgt. Davies made a serious error in determining that Ms. O'Connor's statement was not substantially different from Ms. Mathieu's statement. As for his conclusion that Ms. Mathieu's version was more credible than that of the grievor, it is important to understand that at the start of the grievor's interview, Sgt. Davies said that Ms. Mathieu "alleged the sexual assault. That's the allegation." Thus, where the grievor talked about Ms. Guertin and Ms. Lacroix he was, in effect, acutely aware that Sgt. Davies' perspective was from that of "aggressive

sexual behaviour”, as was the grievor’s testimony, and the grievor testified he would never engage in that sort of conduct. Thus, when Sgt. Davies mentioned the hands-over-crotch gesture, the grievor, albeit ultimately, volunteered that he had done so on more than the one occasion Sgt. Davies referred to, but in the context of humorous circumstances.

Further, Sgt. Davies’ testimony, that he did not find the grievor to be credible because he tried to control the interview by asking questions back and deflecting answers, suffers from a review of the videotape of the interview in that those events rarely happened and when they did, the grievor’s conduct was appropriate. Where Sgt. Davies determined it was inconsistent for the grievor to consider himself as a father-confessor to Ms. Mathieu but also to have conversations with her involving sexual overtones, the grievor said his role towards Ms. Mathieu changed in their conversations. As to Sgt. Davies’ view that there was no reason for the grievor and Ms. Mathieu to discuss her sex life *vis-a-vis* her father’s status with the Employer, that conclusion simply does not make sense. Sgt. Davies did not believe the grievor when he said Ms. Mathieu asked him to comment on her clothing, yet Ms. Mathieu said she did. As to the difficulty to “keep focus” in his April 22, 2003 e-mail to Ms. Mathieu, the grievor explained there was no sexual overtones to it in that, at the time, he was involved in supplying information material for the upcoming police week and, hence, was experiencing difficulty in focusing on Ms. Mathieu’s requests. For Sgt. Davies to have concluded it was inconsistent for the grievor to say he would not force himself on other people but to have done so with Ms. Guertin and Ms. Lacroix is not accurate; Ms. Guertin’s evidence is that the grievor’s pursuit of her stopped as quickly as it started after she had turned him down twice. The Association submitted that it was not inconsistent for the grievor to have told Sgt. Davies he tried not to put himself in the way of temptation around women but would also flirt with them; the grievor explained that while he tried not to focus on women’s apparel he did not always succeed. Further, it is important to note that Sgt. Davies, in the interview, never mentioned anything about the grievor’s interactions with Ms. Cruikshank, Const. Cooper, or A/Sgt. Hunt.

The Association argued that the unfairness of the Employer’s investigation of Ms. Mathieu’s complaint and the investigation concerning a pattern of inappropriate conduct on the grievor’s part is made manifest beginning with his suspension meeting on April 28, 2003. The grievor had no opportunity to have an Association representative present when he met with Supt. Crosby, and for nine months was given no information about any other allegation besides Ms. Mathieu’s. The unfairness is further made manifest in the February 10, 2004 meeting with Ms. Roy and Supt.

Crosby, in that they assumed the grievor had been informed of the complaints from Ms. Guertin, Ms. Lacroix, Ms. Cruikshank, Const. Cooper and A/Sgt. Hunt when he had not. They also incorrectly assumed the grievor knew the purpose of the meeting was not to respond to all the allegations but, rather, was an opportunity for the grievor to influence their disciplinary decision. Thus, it is not surprising there was no acknowledgment from the grievor of his having upset other employees, or that his behaviour was a problem for them, or that he would change his behaviour in the future, given no knowledge of which of his specific behaviours were problematic. Moreover, the grievor was never given an opportunity to respond to these other allegations against him. However, the Employer's own harassment policy provides for the grievor to have been given that opportunity. Given this context of the February 10, 2004 meeting, the grievor's statements regarding his perceptions of women and his interactions are at least understandable, given no knowledge on his part other than vague references to other complaints.

As concerns the bases for the Employer's decision to discharge the grievor, the February 27, 2004 letter of dismissal indicates involvement in a sexual assault, and, a pattern of harassing conduct. However, that letter is not accurate where it states that "a complete investigation was conducted and all relevant facts were available for consideration." The grievor was never given a chance to respond to the allegations against him other than the complaint of Ms. Mathieu. Thus, it is also not true that the grievor was "provided with several opportunities to respond to the accusations against you." As to the grievor's alleged "utter lack of remorse", he has consistently denied that he sexually assaulted Ms. Mathieu, so it is unreasonable to base the discharge decision on his lack of remorse. Moreover, the grievor never once "blame[d] the females involved", given he had no knowledge of allegations against him. The Association noted, however, that in its submissions the Employer does not rely on the ground of a "pattern of harassing conduct" as a basis for discharge. Nonetheless, the Employer's inaccurate view of the investigation has the effect such that the decision to dismiss the grievor was tainted from the start of the unfair investigation.

Further, the Association argued that the Employer's decision to discharge the grievor is not in line with the level of discipline imposed in a similar circumstance involving another employee, Mr. Black, a supervisor, in 2001. In that case, the concluding report of an investigation of a harassment complaint against Mr. Black indicates as follows:

It is being made clear to you that the behaviour you have exhibited towards women in the Communications Centre is unacceptable and must cease immediately.

You are being counseled in relation to the touching of female employees, regardless of your intentions. The touching of female employees should not occur under any circumstance.

You are also being counseled in relation to humour using sexual overtones in the workplace. This will not be tolerated and you must refrain from using that sort of humour.

If there is any sustained recurrence of this type of conduct (inappropriate touching, inappropriate humour or harassment), more serious disciplinary action will be taken, up to and including potential dismissal.

In that case, the discipline imposed on Mr. Black was very minor in nature, namely, a prohibition against competing for “any managerial/supervisor promotional opportunities for a 1 year period.” In comparison, the decision to discharge the grievor is overly severe discipline.

In support of its position on the merits of the grievance, the Association submitted *Re Manitoba Lotteries Corp. and M.G.E.U. (MacAuley)* (2002), 114 L.A.C. (4th) 193 (Peltz); *Re Baptist Housing Society of British Columbia and International Union Of Operating Engineers* [1999] B.C.A.A.A. No. 321 (Dorsey); *Re Canadian Union of Postal Workers and Canada Post Corp. (Walsh)* [1995] C.L.A.D. No. 60 (Thistle); *Re Toronto (Municipality) and C.U.P.E., Loc. 79 (Kline)* (1997), 62 L.A.C. (4th) 185 (Tims); *Re Government Of the Province Of Alberta (Dept. of Social Services and Community Health) and Alberta Union Of Provincial Employees* (1983), 10 L.A.C. (3d) 179 (Larson); *Re Western Grocers and U.F.C.W., Loc. 1400* (1993), 32 L.A.C. (4th) 63 (Priel); *Re Ottawa Board of Education and Ottawa Board of Education Employees’ Union* (1989), 5 L.A.C. (4th) 171 (Bendel); *Re Eurocan Pulp & Paper Co. and C.E.P., Loc. 298 (Klie)* (2000), 93 L.A.C. (4th) 95 (Hope); *Re North York (City) and C.U.P.E., Loc. 94* (1990), 16 L.A.C. (4th) 287 (Burkett); *Re Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.); *Re British Columbia and B.C.G.E.U.* (1995), 49 L.A.C. (4th) 193 (Laing); *Re School District No. 33 (Chilliwack) and Chilliwack Teachers’ Assn.* (1990), 16 L.A.C. (4th) 94 (Hope), and, Brown and Beatty, *Canadian Labour Arbitration*, (3d) loose-leaf ed. (Aurora, Ont.: Canada Law Book, Inc.) paras. 3:2500 and 3:5110.

In reply, the Employer submitted that whatever the inconsistencies in Ms. Mathieu’s version of events, they do not detract from the main facts of a sexual assault. The circumstances of Mr. Black’s inappropriate conduct, in particular that there was no sexual assault, that his actions were done in

front of others and that he was found to be just trying to be one of the group even though he was a supervisor, are distinct and distinguishable from the grievor's behaviour on April 24, 2003. The Employer's harassment policy procedures do not apply in the instant case because a complaint of sexual assault does not come under that policy. There is no grievance from the Association concerning a denial of Association representation in the suspension meeting of April, 2003, and no grievance that the grievor was denied being properly informed of the allegations against him. In any event, the grievor was immediately aware of Ms. Mathieu's complaint against him. Also, in the interview with Sgt. Davies, the grievor was made aware of the allegations of Ms. Guertin and Ms. Lacroix. The grievor's lack of awareness of the allegations of Ms. Cruikshank, Const. Cooper and A/Sgt. Hunt in the February 10, 2004 meeting does not justify his statements in that meeting, including portraying himself as the victim. The flaws in the investigation are not necessarily germane to the decision to discharge the grievor for sexually assaulting Ms. Mathieu.

The issue to be determined in this award is whether or not the Employer had just cause to discharge the grievor effective the date of the dismissal letter, February 27, 2004. The Employer, based on its submissions, does not rely on the stated ground in that letter of "a pattern of harassing conduct" on the part of the grievor. The Employer does rely on the stated ground of the grievor's "involvement in a sexual assault in the workplace" in justification of its decision.

There is no issue as to the proper arbitral approach to a grievance that complains of improper or unjust cause for discipline. Thus, two independent decisions must be made. First it must be determined whether or not the employee has actually done anything that justifies the imposition of discipline by the employer. If the employee has so justified the imposition of discipline, it must be determined whether or not the level of discipline imposed by the employer is warranted in all the circumstances. Further, if it is found that the specific disciplinary penalty is not appropriate, it must then be determined what would be appropriate discipline in all those same circumstances *Re Royal Towers, supra*, p.273.

In applying this arbitral approach in the instant case, I find the merits of the grievance, on the evidence and submissions before me, require determination of whether or not the grievor sexually assaulted Ms. Mathieu on April 24, 2003 in the storeroom at their place of work, Greenbank station. If I find the grievor did not, the grievance will be upheld. If I find he did, it must then be

determined whether or not discharge is an appropriate Employer disciplinary response in all the circumstances. If I find that discharge is not warranted, it must then be determined what would constitute appropriate discipline in all those same circumstances.

The arbitration awards before me indicate that sexual harassment or sexual assault in the workplace justifies the disciplinary response of discharge. As stated in *Re Trillium Health Care, supra*, at p.57:

Sexual harassment or assault is intolerable. It is one of the most frightening and damaging things that one person can do to another. The effects of sexual harassment or sexual assault on the victim can be extreme and long-lasting, and incidents of this misconduct can disrupt the workplace. I am satisfied that sexual harassment falls within the same category of serious misconduct as theft, and that discharge is *prima facie* the appropriate penalty even in the case of first offence. This does not mean that discharge will necessarily be appropriate in every case, but the onus is on the Union and the grievor to demonstrate that it is appropriate to mitigate the penalty in a particular case.

In the instant case, the Employer takes the position that Ms. Mathieu was sexually assaulted by the grievor and does not claim he sexually harassed her. In that regard, arbitrator Brunner in the *McMaster University* case adopted a definition articulated by the Supreme Court of Canada of a sexual assault, at pp. 44 and 45:

The leading decision as to the constituent elements of the offence of sexual assault is that of the Supreme Court of Canada in *R. v. Chase* (1987), 45 D.L.R. (4th) 98, 37 C.C.C. (3d) 97, [1987] 2 S.C.R. 293 In delivering the unanimous judgment of the court, Mr. Justice McIntyre said the following at pp. 204-5:

“Sexual assault is an assault . . . which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: ‘Viewed in the light of all the circumstances, in the sexual or carnal context of the assault visible to a reasonable observer’ (*Taylor, supra, per Laycraft C.J.A.*, at p.162 C.C.C., p.269 C.R.). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the contact, including threats which may or may not be accompanied by force, will be relevant: . . . The intent or purpose of the person committing the act, to the extent it may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is

simply one of many factors to be considered, the importance of which will vary depending on the circumstances.”

I adopt, as did arbitrator Brunner, the above definition of sexual assault for purposes of this award. Therefore, the essential question which must be answered is whether or not the grievor’s actions in the storeroom on April 24, 2003 were “of a sexual nature, such that the sexual integrity of the victim [i.e., Ms. Mathieu] is violated.” *Re R. v. Chase, supra*.

The above definition of sexual assault fits within the meaning of that term under the *Criminal Code*, and in a criminal trial the standard of proof to be met on the evidence is that of beyond reasonable doubt. However, an arbitration hearing is not a criminal trial and in that regard the standard of proof is the civil standard, *viz.*, balance of probabilities. The application of this standard in the labour arbitration context is addressed in *Re School District No. 33 (Chilliwack), supra*, at p.118 by arbitrator Hope, citing *Re Bates v. Bates*, [1951] P. 35, [1950] 2 All E.R. 458, 114 J.P. 416 (C.A.) p.404:

“... In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard . . . in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a balance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject-matter.”

The allegation against the grievor in the instant case is serious in its nature and there are serious consequences to the grievor should the allegation be proven. Thus, as in the *Chilliwack* case where the grievor was discharged for sexual harassment, the arbitrator states, at p.119:

Allegations amounting to criminal or sexual misconduct which impact on the issue of employability generally . . . have been viewed by arbitrators as constituting consequences that require proof of disputed facts to a high degree of probability.

Therefore, in the instant case I find that due to the serious nature of the allegation against the grievor, the Employer bears the onus of proving that the grievor did sexually assault Ms. Mathieu on a balance of probabilities to a high degree of probability. In that regard at p.198 in *Re Canadian National Railway, supra*, the arbitrator accepted “the argument of counsel for the union that the seriousness of the charge against [the grievor, i.e., sexual harassment] requires a commensurate standard of clear and cogent evidence.” (See also *Re Niagara Health System, supra*, where I

adopted the standard of “clear, cogent and convincing evidence” at p.42 in regard to an allegation of physical harassment of another employee by the grievor.)

Based on the foregoing, I find in the instant case that in bearing the onus on it, the Employer must prove, on a balance of probabilities by way of clear and cogent evidence, that the grievor did sexually assault Ms. Mathieu on April 24, 2003.

The only witnesses to the incident in question are Ms. Mathieu and the grievor. There is an overwhelming credibility gap between their respective versions of the events in the storeroom on April 24, 2003. Not only does each party argue that its witness’s version is credible, each argues that the other’s version is not credible. Thus, it is within this context that the gravamen of the dispute remains to be resolved. In *Re Faryna v. Chorny, supra*, at pp. 356-7, the matter of credibility is addressed, relevant for our purposes, as follows:

If a trial Judge’s finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

Further, in *Trillium Health Centre*, arbitrator Surdykowski provides, at p.54, an elaboration on the notion of the “appearance” of a witness to include, “the demeanour of the witnesses, the firmness, clarity, consistency, and overall clarity of testimony (particularly under cross-examination), [and] their apparent ability to resist the influence of self-interest.”

As can be seen from the above explications in *Faryna v. Chorny* and *Trillium Health Centre* of the notion of credibility, determination thereof is a complex involving assessment of the witness and assessment of his or her version of events such that “the real test of the truth of the story of a witness . . . must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.” *Re Faryna v. Chorny, supra*.

Prior to dealing with Ms. Mathieu’s and the grievor’s versions of their encounter in issue, I note that in their submissions Employer and Association counsel both referred to the matter of the Employer investigators’ conclusions as to the truth of the matter, in particular and in detail by Association counsel Sgt. Davies’ conclusions that Ms. Mathieu was telling the truth and the grievor was not. The investigator’s conclusions are relevant only to the extent that they inform the Employer’s decision to discharge the grievor (as was Supt. Crosby’s and Ms. Roy’s evidence) and, thus, tend to explain to a degree why the Employer made that decision. However, as arbitrator I am required to make my own independent decision regarding whether or not the Employer had just cause to discipline the grievor, which necessarily in the circumstances of the instant case entails independent determinations concerning the credibility of Ms. Mathieu’s and the grievor’s versions of events.

As to their respective versions of events, both Ms. Mathieu and the grievor describe them as having taken place when they were leaving the storeroom. While Association counsel submitted that Ms. Mathieu was incorrect in stating it was darker in the storeroom area, in his interview with Sgt. Davies the grievor described cages and a partition separating the area where he kept his materials from the rest of the space. That is, Ms. Mathieu is not necessarily incorrect in stating it was darker in the storeroom area. Further, both describe that in walking out of the storeroom the grievor was behind Ms. Mathieu. Both, also, indicated that the entrance door to the storeroom was closed and which door, apparently, is locked when it is closed. I now turn to the evidence regarding Ms. Mathieu’s version of the incident.

Ms. Mathieu provided lengthy testimony for some one and a-half days, the majority of that time under cross-examination. As to her demeanour, her tone and level of voice throughout examination-in-chief and cross-examination were appropriate. She was self-assured while testifying, in particular, about the incident in issue. When she could not remember or recall incidents or events, she did so with the same degree of firmness as when speaking of those she did recall. Rarely was she not directly responsive to the questions put to her.

As to the words spoken by the grievor during the incident, in examination-in-chief Ms. Mathieu made no mention of the grievor having said “I’m not done yet”, while S/Sgt. Colotelo’s report states she told that to him. In cross-examination she said, “I don’t remember telling that [to the S/Sgt.], I don’t remember that all.” In examination-in-chief, she said the grievor “was saying . . . sounded like ‘I wanted to do this’.” S/Sgt. Colotelo’s document indicates her to have reported, “ ‘I’ve wanted to do this for a long time’.” Her own report of April 25th states the grievor “said something to the effect of ‘I’ve wanted to do this’.” In her initial interview on April 25th with Sgt. Davies, she said the grievor’s words “sounded like ‘I’ve wanted to this for awhile’, but I’m not positive about ‘the while’. But I know he said, ‘I’ve wanted to do this’.” In cross-examination she said, “I heard ‘wanted’, and, ‘this’ ” and agreed she assumed he had said “I’ve wanted to do this.”

As concerns the grievor’s actions during the incident, in examination-in-chief she said, “I felt something on the back of my neck . . . like fingers tapping the back of my neck. Then he leaned forward and kissed my neck. I knew because he had a scab on his lip. Then he pulled the back of my pants Then again his fingers and a kiss on the neck. I moved again . . . and he pulled me back,” and described a same third sequence. In S/Sgt. Colotelo’s report, he indicates Ms. Mathieu said she “believes [the grievor was] kissing her on the back of the neck. [The grievor] then pulled [her] towards him three times and on two occasions their bodies made contact.”

In her April 25th statement she writes that the grievor, “proceeded to touch my neck with his fingers... then put his mouth against my neck . . . [I] took a few steps ahead [he] then grabbed my right side (on the pants waistline) & pulled me towards him. My back touched his chest and he continued to give me a kiss on the back of the neck. I was trying to walk ahead . . . and again he pulled me back towards him and put his mouth on the back of my neck. My back was again touching his chest.” She also includes a “Note: when he was grabbing the side of my pants to bring me closer to him. I noted that he put muscular force into it. Also, I know that he kissed me because

he had a scab on his bottom lip which I felt on my skin.” She estimated the events took place over 1½ to 2 minutes. In her interview with Sgt. Davies she said “. . . and he proceeded to touch my neck . . . like kind of like a wave kind of . . . just like tingling . . . wiggling the fingers . . . the tips of his fingers.” She then agrees with what she had described as the grievor putting his mouth on the left-side of her neck, “to give me a kiss What I would do is I would take a couple of steps forward and that’s when he . . . grabbed by my . . . pants, by the waistline . . . and then he pulled me back.” She said it was “three different times” the grievor kissed her. She also said that in pulling her back with muscular force, “that’s what scared me more because I was not expecting that . . . I was expecting to just walk away and that was the end of it. But when he grabbed me that scared me.” She also said that the grievor’s scab was on the “bottom right-hand side of his lip . . . it was just harder and then he had stubble around, cause he was . . . unshaven So I felt . . . the hairs and that.” She then said he pulled her back again, could not remember if he ever let go of her pants and described a third pull back and kiss, this third kiss on the right-hand side of her neck.

In cross-examination, Ms. Mathieu said the grievor’s actions were “not a massage, kissing is not a massage.” She said the grievor had not touched her shoulders at any time. She agreed she believed his actions were sexual in nature. She repeated there were three instances of kissing and three instances of having been pulled back by the grievor. She said the scab on the grievor’s bottom lip had been there “for awhile”, was larger than usual and “purplish”, and which had gotten worse “the week before”. The evidence, however, is that her shifts and the grievor’s work hours overlapped only on April 17 and, prior to that day, April 10, 2003. While she had testified in examination-in-chief that the incident lasted for 1½ to 2 minutes, she estimated 1 to 1½ minutes. Further, she said each individual instance of kissing and pulling back took about five seconds, “but at the time it seemed longer.”

In addition, Ms. Mathieu provided an account of the incident to Ms. O’Connor, which discussion Ms. Mathieu said in examination-in-chief occurred immediately, “four minutes”, after leaving the storeroom; “I went right to Sue O’Connor’s desk. I told her I’m not quite sure what happened.” In examination-in-chief, Ms. Mathieu was not asked to describe the specificities she had related to Ms. O’Connor. In her April 25th report, Ms. Mathieu states, “Before [the grievor] had walked by the call centre office... I spoke with Sue O’Connor . . . about the incident that took place in the supply room.” Ms. Mathieu’s report does not contain any of the specific details she told Ms. O’Connor. In her interview with Sgt. Davies, Ms. Mathieu states: “Actually when I spoke to [Ms. O’Connor] was

right after the incident . . . I was beet red so I went directly to her . . . I said . . . I need your advice . . . It was an incident that happened . . . in the supply room. I explained to her what had happened, that he put his fingers there and tried kissing . . . well, not tried, sorry, did kiss my neck a few times and then each time when I tried to release myself he would pull me back in.” In cross-examination, Ms. Mathieu said she told Ms. O’Connor about the fluttering-type motion of the grievor’s fingers on her neck, that he had kissed her three times, and had pulled her back towards him. As to his last action, Ms. Mathieu then said, “I don’t remember what I told” Ms. O’Connor, and she was “pretty sure” she had mentioned this action to Ms. O’Connor. She also said it was “possible” she had told Ms. O’Connor she was not sure if the grievor had kissed her. Under further questioning as to what she had told Ms. O’Connor concerning the specifics of the incident in question, Ms. Mathieu said, “To tell you the truth, I don’t know for sure what I told her.” She agreed she would not have lied to Ms. O’Connor.

For her part, Ms. O’Connor testified in examination-in-chief that other than her reference to the incident having been described by Ms. Mathieu as occurring in the photocopy room, her May 1, 2003 statement is accurate. Relevant to purposes at hand, Ms. O’Connor writes: “On the afternoon of April 24, 2003 Ms. Mathieu approached me She began to say [that the grievor] approached her and began to rub the back of her neck and said in a whisper in her ear that he ‘had been waiting a long time for this’. While Ms. Mathieu was telling me this, her eyes began to get watery and she stated she cannot be sure if [the grievor] kissed her on the neck or just whispered. She also stated the whole situation made her very uncomfortable.” In cross-examination, Ms. O’Connor said Ms. Mathieu told her she was “not sure” what the grievor had done.

The above review of the evidence before me in regard to Ms. Mathieu’s version of the incident in the storeroom on April 24, 2003 reveals she has consistently indicated that the grievor said something to her at or near the start of the incident, and his statement contained two distinct words, “wanted”, and “this”. Her evidence, consistently, is that the grievor touched her neck and not her shoulders. Save for Ms. O’Connor’s May 1, 2003 report, i.e., a statement made seven days after April 24, 2003, the evidence is that Ms. Mathieu consistently includes having been pulled back by the grievor on three occasions. While Ms. Mathieu was certain in her testimony, some two years after the event in issue, that the grievor had kissed her on the neck, that evidence is not consistent with Ms. O’Connor’s evidence, i.e., Ms Mathieu was “not sure” the grievor kissed her. Nor is it consistent with S/Sgt. Colotelo’s report, where he indicates Ms. Mathieu said, “what she believes was [the grievor] kissing

her.” In her interview with Sgt. Davies, she said she explained to Ms. O’Connor that the grievor “tried kissing . . . well, not tried, sorry, did kiss my neck a few times” while having previously told Sgt. Davies that the grievor did kiss her neck.

To the extent that consistency in multiple versions of events supports credibility, I find Ms. Mathieu’s version to be credible in regard to the grievor having said something to her at or near the first instance of touching which included the words “wanted” and “this”; that the grievor touched her neck and not her shoulders, and, that the grievor pulled her back three times. Her evidence, however, is not consistent as to whether or not the grievor did actually kiss her or only attempted to kiss her, but in any event, her evidence is consistent in having felt his beard stubble and a scab against her neck on three occasions. As to the scab, while Ms. Mathieu testified it got worse over the week preceding the incident, her hours of work did overlap those of the grievor on April 17th, i.e., eight days prior to the day of the incident.

As did Ms. Mathieu, the grievor testified for a lengthy period of time. Throughout his testimony the grievor’s tone and level of voice were appropriate. The grievor was also self-assured, however, he did have a tendency to be expansive rather than directly responsive to questions put to him in examination-in-chief and cross-examination, and, occasionally, chose to “fence” with Employer counsel rather than directly answering questions put to him.

In regard to his words spoken during the incident, the grievor’s evidence before me is that associated with his shoulder massage, he said “It’s going to be okay, everything’s fine” or similar words. In his interview with Sgt. Davies, the grievor used the same expressions and associated them with his shoulder massage.

As concerns the grievor’s version of his actions during the incident, in examination-in-chief he said he gave Ms. Mathieu “four, six boxer-type shoulder [massage-type gestures as demonstrated at the hearing]” and specifically denied having touched her neck. In his interview with Sgt. Davies, he demonstrated on Sgt. Davies placing his hands on the shoulders, quick, short rubs or massages and, then, a slight squeeze of the shoulder/top-of-arm area, while keeping his face away from Sgt. Davies’ neck area. In cross-examination, however, when asked if his chest was against Ms. Mathieu’s back, the grievor said, “I could have touched her back with my chest when I massaged her neck.” Later, when asked if he was angry in his interview with Ms. Roy and Supt. Crosby on

February 10, 2004, because he believed he was effectively the victim, and that his view had not changed one year later when testifying at the hearing, the grievor said, “Although I realize now [that] touching her on the neck was wrong, strictly speaking.” Thus, while neither question concerned where he had placed his hands on Ms. Mathieu, on both occasions the grievor specifically indicated he touched Ms. Mathieu’s neck, and not her shoulders as was his evidence in examination-in-chief and in his interview with Sgt. Davies.

The above review of the grievor’s version of the April 24, 2003 incident indicates that he has consistently maintained he gave Ms. Mathieu a massage on her shoulders, that he did not pull her back and did not kiss her. His evidence is consistent as to what he said, i.e., “It will be okay, everything’s fine”, or similar words, and has consistently denied having said “wanted” or “this”, or “I have wanted to do this.” However, the grievor’s evidence is not consistent as to where he placed his hands on Ms. Mathieu. In examination-in-chief and in his interview with Sgt Davies he said, and demonstrated, that he placed his hands on her shoulders and shoulder/upper arm area. However, in cross-examination on two occasions he specifically referred to having placed his hands on Ms. Mathieu’s neck in response to questions that did not concern the location of his hands. Also, his evidence is inconsistent to the extent that in his testimony before me he said that nothing was said between himself and Ms. Mathieu after the massage, and in his interview with Sgt. Davies said that they continued talking until they exited the storeroom.

Also, there is evidence before me regarding the circumstances surrounding the incident which lends support to Ms. Mathieu’s version, and, evidence which does not support the credibility of the grievor’s versions.

The evidence which lends credibility to Ms. Mathieu’s version is that of Ms. O’Connor. Ms. O’Connor’s evidence is that when Ms. Mathieu came to her she appeared visibly upset. And while Ms. O’Connor’s May 1, 2003 report indicates that Ms. Mathieu approached her “in the afternoon”, I prefer Ms. Mathieu’s account of the time, i.e., directly after the incident. In that regard, both she and the grievor place the visit in the storeroom as having occurred in the morning. More significantly, on the basis of what Ms. Mathieu told her, Ms. O’Connor concluded that Ms. Mathieu ought to speak to her superiors about the grievor’s conduct and, “if satisfaction not received then the next step would be to go to higher authority”, after advising Ms. Mathieu that she herself, would speak to the grievor on Ms. Mathieu’s behalf. That is, at the very least, Ms. O’Connor concluded that Ms.

Mathieu was not fabricating an incident and that the grievor had physically acted in an improper manner towards Ms. Mathieu.

The evidence which lessens or detracts from the credibility of the grievor's version concerns Ms. Mathieu's PDP. As to his reason for massaging Ms. Mathieu's shoulders, in his testimony before me the grievor's evidence is that he massaged her shoulders because she was upset over and stressed about her PDP. In his interview with Sgt. Davies, the grievor was even more emphatic about Ms. Mathieu's concerns, in saying she was "so stressed", "extremely stressed", "extremely upset, quite frankly being a pest" about her PDP. However, Ms. Mathieu's undisputed evidence is that in April she still had six months to complete her PDP, and her uncontradicted evidence is that she liked the work it involved and was not stressed about it. Where Ms. Mathieu agreed with Union counsel about work-related stress was in regard to not having her term appointment renewed, and not in regard to her PDP.

As to other evidence regarding the grievor's credibility, as previously indicated, the Employer does not rely on the evidence of Ms. Guertin, Ms. Lacroix, Ms. Cruikshank, Const. Cooper and A/Sgt. Hunt for purposes of establishing "a pattern of harassing conduct" toward female employees. Rather, it relies on this evidence for the purpose of dis-crediting the grievor's denial of having sexually assaulted Ms. Mathieu on April 24, 2003.

I accept that the grievor is an extrovert and a friendly sort of person in the workplace who has a sense of humour and likes to joke around with his colleagues, both male and female, as was the evidence, for example, of Ms. Couturier, Mr. Marshall, and S/Sgt. Spriggs. I also accept that in engaging in humorous banter and innuendo of a sexual nature, the grievor was not alone among those at Greenbank which by all accounts had a friendlier and more relaxed work environment than other police stations. Rather, the evidence establishes there were some occasions when the grievor "crossed the line" and his remarks and actions were not appropriate and unwelcome. At the same time, I accept the grievor's testimony that he was unaware that his behaviour was inappropriate, notwithstanding his assertion that he is a "feeling" person towards others, on certain of the occasions in evidence before me.

I accept that the grievor intended his comments to Ms. Cruikshank about her body while they were in the gym to be complimentary and encouraging. However, I do not accept his testimony as

credible that on the occasion when he indicated in the hallway that Ms. Cruikshank turn around and then said, “I like it from that angle”, he was telling her fuck off. I also find it difficult to accept the grievor’s evidence that on the occasions where she told him to fuck off, he believed she was joking; there is nothing funny about being told to do that in the manner and circumstances Ms. Cruikshank testified to before me. In regard to the incidents spoken to by A/Sgt. Hunt, I do not accept the grievor’s testimony that his remark to her about how certain-coloured clothing flowed against her skin continued an earlier discussion between them as to the complementarity of display and clothing colours. What I do note, however, is that when A/Sgt. Hunt chastised him for that remark, he immediately ceased such comments.

I accept the evidence of Ms. Guertin, Ms. Lacroix and Ms. Mathieu that on their smoke breaks when the grievor joined them, he would turn the conversation topic towards a sexual nature. While the grievor disputes the percentages of time they indicated he did this, I accept he did it frequently, at least. However, the grievor was insensitive to their discomfort, as exemplified by Ms. Guertin’s testimony that when he did so, she would say “Oh, come on”, in a clearly-demonstrated (at the hearing) exasperated manner. In my view, any reasonable person ought to have realized his or her remarks were unappreciated when they elicit that type of reaction. Moreover, in her testimony, Ms. Guertin said that when the grievor said something inappropriate, “I’d tell him it made me uncomfortable.” For her part, Ms. Lacroix said that when he did so, “I’d tell him to stop it.” I do not view this evidence as going to the grievor’s credibility. Rather, it speaks to his insensitivity or inability to appreciate that others did not always find his behaviour to be appropriate.

In regard to the incident where the grievor spoke to Const. Cooper about her blouse, it is clear from Const. Cooper’s evidence that his demeanour and remarks were inappropriate. (In that respect, the grievor fenced with Employer counsel. When it was put to him that did he not think his behaviour was “extremely inappropriate”, the grievor challenged the use of the term “extremely”. When then asked if his specific behaviour was inappropriate, the grievor correctly pointed out that Const. Cooper had used the word “uncomfortable”. Nonetheless, people are not normally made uncomfortable by appropriate behaviour.) Moreover, Const. Cooper’s evidence that she would no longer go alone with the grievor to the storeroom after that incident was corroborated by A/Sgt. Hunt in her evidence. However, since the grievor was never specifically informed about Const. Cooper’s reactions, this matter does not speak to his credibility.

In regard to the evidence concerning the grievor's pursuit of Ms. Guertin, he was described as more ardent a suitor in her evidence than his own and I do not comment further on this "affair of the heart." In any event, I do not accept the grievor's evidence that she gave him her phone number for other than work-related purposes. In regard to his e-mail correspondence with Ms. Lacroix, the circumstances surrounding their timing do support the grievor's claim that he was attempting to be humorous. However, I do not accept that Ms. Lacroix apologized to him. I can discern no reason for such an apology in the evidence before me.

As to his above interactions with Ms. Guertin, Ms. Lacroix, Ms. Cruikshank, Const. Cooper and A/Sgt. Hunt, while I have found that his explanations of the incident in the hallway with Ms. Cruikshank, his assertion concerning Ms. Lacroix's apology, and how he obtained Ms. Guertin's personal telephone number not to be credible, these are, in my view, relatively minor events. Rather, what I do note from the grievor's evidence about all the above encounters is an apparent inability to appreciate that some of his behaviours were not appreciated by his colleagues notwithstanding reactions from them, e.g., Ms. Guertin's evidence, "Come on", that a reasonable person would readily recognize as not being supportive or appreciative of his conduct.

Further, it is Ms. Mathieu's evidence that the grievor's behaviour was inappropriate on two specific occasions. One occasion is when she arrived at work wearing a jacket with a new blouse which, apparently, was cut lower in front than her usual attire. Her evidence is that while standing in the grievor's office to show him her new clothing, he rolled towards in his chair, opened her jacket, and looked her up and down in a suggestive fashion. While she did not specifically remember or associate the grievor's crotch gesture to that incident, she said before that incident, when the grievor "says things like that, he'd turn red, put his hand on his crotch and say, 'please leave'." In his testimony before me, the grievor denied the incident occurred at all, but conceded that he has made hand-on-crotch gestures, as he also informed Sgt. Davies in his interview. His evidence does not connect an occasion for such a gesture as having occurred at the time of the above incident Ms. Mathieu described in her evidence. However, in his interview with Sgt Davies, when describing his view of the relationship he had with Ms. Mathieu and in regard to her asking him about her attire, the grievor indicated that on one occasion he told her to close her jacket and demonstrated using his hands as through closing someone's open jacket or clothing. The second incident referred to by Ms. Mathieu occurred, she said, while only she and the grievor were in the smoking area. The grievor turned the discussion to a sexual nature and made a remark to the effect that if she wanted, he would

“go down” on her and related that to his being older and more experienced than Ms. Mathieu’s boyfriend. The grievor denied the remark in examination-in-chief before me and in his interview with Sgt. Davies. However, when pressed in cross-examination on whether he could make such a remark, the grievor conceded that in the right kind of “giggly” conversation, he might make it.

As concerns the jacket incident, even Ms. Mathieu did not directly associate the grievor’s crotch gesture to that occasion. Thus, I do not find his denial of having done so on that occasion to lessen or detract from his credibility. In regard to the “go down” remark, the uncertainty on Ms. Mathieu’s part as to when it was made and in what circumstance does not negate the grievor’s evidence that it may have been intended as a humorous remark in the context of Ms. Mathieu’s telling him about her trip to Montreal with her boyfriend.

After careful review of all the foregoing evidence concerning the credibility of Ms. Mathieu and the grievor’s versions of the event in issue, I find Ms. Mathieu has provided a credible version of the April 24, 2003 incident. Her version is consistent in regard to two words having been clearly said by the grievor, “wanted”, and “this” at or near the first instance of touching, having been touched on the neck by the grievor, and, having been pulled back three times. Her inconsistency as to actually having been kissed is balanced by her consistent testimony that she felt the grievor’s beard stubble and scab on her neck on three separate occasions. Further, she and the grievor were alone in an isolated area of the building behind a closed door.

I find the grievor has not provided a credible version of the incident in issue. In that regard, there are two significant inconsistencies in his evidence. Firstly, in his cross-examination, the grievor twice explicitly referred to having touched Ms. Mathieu’s neck when responding to questions that were directed towards other matters, yet, his version in examination-in-chief and to Sgt. Davies was a firm denial of having touched her neck and he specifically referred to having only touched her shoulders. Secondly, the grievor’s stated reason in his testimony and interview with Sgt. Davies for giving Ms. Mathieu a shoulder massage was because she was quite upset and stressed about her PDP. However, Ms. Mathieu’s undisputed evidence is that she had six months remaining in order to complete her PDP and her uncontradicted evidence is that she enjoyed the task and specifically denied that she was stressed about her PDP.

The significance of the grievor's inconsistencies, one within his own evidence and one in relation to Ms. Mathieu's undisputed and uncontradicted evidence, arises from the crucial nature of their subject-matter. Why the grievor placed his hands on Ms. Mathieu, and, where he placed them are fundamental elements in support of the grievor's version. Yet, both are inconsistent with his own and other undisputed evidence before me. Further, in that respect, if the grievor had simply given Ms. Mathieu a shoulder massage then their continuing to talk after it seems reasonable. The grievor, however, was inconsistent in his evidence in stating to Sgt. Davies that they did so, yet in testifying before me said that nothing further was said between them, and which inconsistency also detracts from his credibility.

The grievor's credibility is also cast in doubt by Ms. O'Connor's evidence, which also lends support to Ms. Mathieu's version. In that regard, Ms. O'Connor's evidence is significant for reason of her description of Ms. Mathieu being visibly upset when relating to her the incident involving the grievor. Moreover, Ms. O'Connor's implicit acceptance of the truth of Ms. Mathieu's claim of improper behaviour on the part of the grievor, by way of offering to speak to him herself and advising Ms. Mathieu to pursue a complaint against the grievor, does not support the grievor's version of a shoulder massage.

Based on my review of all the above evidence, I find the grievor's version of the incident in issue is not in "harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" *Re Faryna v. Chorny, supra*. As against that same standard, I find Ms. Mathieu has provided a credible version of the April 24, 2003 incident. Moreover, I find the evidence in support of Ms. Mathieu's version, on its own, is clear and cogent. I find that the grievor did sexually assault Ms. Mathieu on April 24, 2003 in that he did violate Ms. Mathieu's sexual integrity *Re R. v. Chase, supra*. Therefore, I find the Employer had just cause to discipline the grievor. Having so found, it must be determined whether or not discharge is appropriate in all the circumstances.

As previously indicated, sexual assault in the workplace is a very serious offence and discharge is viewed as an appropriate disciplinary response *Re Trillium Health Centre, supra*. Whether or not it is appropriate in the particular circumstances of its occurrence ought to be considered in light of the extent to which those circumstances and mitigating evidence adduced by the Union support a lesser

penalty *Re McMaster University, supra*, at p.47: “Whether or not discharge is the appropriate response, however, depends on all the circumstances.”

In *McMaster University*, the grievor had 12 years of service and a clean disciplinary record and was discharged on the grounds of, both, sexual assault and sexual harassment. Arbitrator Rayner found, at p. 47, that the grievor’s actions did constitute sexual assault but could not also be proper grounds for sexual harassment; “To do so, in my view, would contravene fundamental principles of justice. Having been found guilty of sexual assaults, the grievor should not also be condemned for sexual harassment based upon the same incidents.” He did, however, find that another incident did constitute sexual harassment, apparently for reason that the grievor did not touch the complainant whereas he had done so in those incidents found to be sexual assaults. In dismissing the grievance, arbitrator Rayner found the grievor’s denial that anything inappropriate occurred was not credible. Further, at p. 48, he states:

It was clear to me during the course of the grievor’s evidence that he had little or no appreciation of the seriousness of the matter There has been in the matter before me no candid or sincere admission or apology in recognition of what were serious acts of misconduct. There has only been a denial and an attempt to paint a picture which was very different from reality. I have formed the view that the grievor was and still is unaware that he has committed certain acts and engaged in conduct which was contrary to law and that these matters are grave.

As well, in consideration of whether or not to lessen the penalty of discharge, the arbitrator rejected the union argument that the grievor’s attitude towards women was an “old school” (p.48) cultural attitude, in finding the grievor’s actions were to judged against current workplace norms. He also considered that if returned to work, the grievor would have continuing contact with young female students and that the grievor “has taken no steps whatever since the termination of his employment to obtain counselling so that he might better understand what motivated his actions . . .” (p.49). Moreover, the arbitrator did not consider that the economic hardship resulting to the grievor by way of discharge served to mitigate that penalty.

As can be seen from the above, in determining whether or not to lessen the penalty of discharge imposed by the employer, arbitrator Rayner considered certain factors, namely, the grievor’s denial of having done anything wrong; the grievor’s length of service; his discipline record; the seriousness of the offence; the grievor’s awareness of the nature and seriousness of his misconduct; current cultural attitudes towards sexual misconduct; the work environment should the grievor be returned

to his employment, and, the existence or absence of an apology. In *Re Manitoba Lotteries, supra*, the same approach to a determination of whether or not to lessen the disciplinary penalty of discharge was largely followed. While the grievor in that case was discharged for sexual harassment and not for sexual assault, his misconduct did include two occasions of inappropriate physical touching of female employees.

In *Manitoba Lotteries*, the grievor, who had five years of service and a “poor” discipline record (p.1 Quick Law), was discharged for “harassment of a co-worker”, in particular, that he “inappropriately touched two female employees . . . was accused of writing a sexually charged poem about one of the women and making persistent verbal comments about her personal appearance” (p.2). The touching included hitting one female on the buttocks with a book or some papers in a public area (which event led to the complaint filed against him) and touching the right side of another female’s hip or buttocks in the employee’s check-in area. The poem, which did have sexual overtones, was said by the grievor not intended to be offensive (p.11), and, the grievor made “rude comments” (p.3) about that same employee’s hair and make-up, which events occurred in the year prior to the complaint. Relevant for our purposes, the grievor’s and union position are set out on p.2 as follows:

The grievor admitted most of the allegations and agreed that there was cause for discipline. However, the Union argued for a lengthy suspension in place of dismissal. In essence, the Union suggested that this was a first occurrence of harassment and that the grievor has shown good rehabilitative potential. An apology was written [during the course of the grievance procedures] to the main complaint and the grievor expressed genuine contrition at the hearing. The Union insisted that the grievor now “gets it” and that therefore he is accepting responsibility for his actions. Given the relatively low level of harassment in this case, the Union urged that the ultimate penalty of dismissal was too harsh.

Also, in the hearing the grievor indicated “he has taken steps to ensure that there will be no repeat of his misconduct [and] has read over the harassment materials and has spoken to Employee Assistance about it. He has learned how people can get hurt . . . and will never harass again” (p.11).

Arbitrator Peltz, in finding that the grievor had acted inappropriately by way of his above referred-to conduct, states at p.15:

However, the mental element is also very important in this case. The grievor testified that his actions were never intended to offend and he was generally just joking around. He denied knowing that his conduct amounted to harassment prohibited by Corporation policy. After much deliberation, I find I am unable to

accept these aspects of the grievor's testimony He took the harassment training...and agreed that he knew the policies concerning harassment and a respectful workplace.

As to the grievor's conduct during the Employer's investigation and his testimony during the hearing, the arbitrator states, at p.16:

Certainly, the grievor was evasive and unhelpful to some extent during the investigation. He minimized his conduct and continued to do so in some aspects of his testimony before me His written apology was narrow in scope, alluding only to [hitting one of the females on the buttocks with a book or papers]. . . . However, I accept the sincerity of the apology delivered at the arbitration hearing, which was unreserved and genuinely intended to show remorse and new insight the grievor's regret is genuine and on balance, I believe that if restored to his job after the experience of a lengthy suspension, he would probably not repeat his misconduct.

Also relevant for our purposes, arbitrator Peltz considered the gravity of the grievor's misconduct, and found that it fell within the category of "sexual annoyance", as opposed to "sexual coercion" (p.16) citing *Re Western Grocers, supra* (p.69), in the circumstances of the case before him; "His harassment was not an isolated or singular act, but neither was it as oppressive and destructive as some of the reported cases cited to me by the parties" (p.16). In regard to mitigating factors, the arbitrator noted the grievor's relatively short service and his poor disciplinary record, but that if the discharge was upheld, he would experience serious personal hardship for himself and his family. It was noted, at p.16, the grievor had admitted to the "bulk" of his offensive conduct, notwithstanding some evasion and denial. Also, at p.16, "He has apologized in a manner which I have found to be genuine. I discern in the grievor a capacity to learn from his mistakes and a willingness to try." The arbitrator concluded that progressive discipline was appropriate in that case and imposed a 10-month suspension as a "one last chance" (p.17). He also took into account that many of the inappropriate behaviours took place in "plain view or hearing of other employees" (p.17).

As can be seen from the above and relevant for our purposes, arbitrator Peltz took into account, in addition to those factors considered by arbitrator Rayner in *McMaster University*, the grievor's intent behind his actions and the locations where the inappropriate touching occurred.

A review of the remaining relevant awards submitted by the parties reveals that the identified factors in the *McMaster University* and *Manitoba Lotteries* cases are typical of those considered by the arbitrators when dealing with sexual misconduct that involves touching of a female employee by a

male employee. And, as can be seen in the above two cases, the evidence which informs those factors is weighed and considered for purposes of determining whether or not to substitute a lesser penalty for the discharge.

In applying the above approach to the matter at hand, the grievor has some twenty years of service and a clean discipline record. Long service and a clean discipline record, however, in themselves are not dispositive as to the matter of mitigation *Re Trillium Health Centre, Re McMaster University*. The assault occurred in an isolated area of the basement and not in a public place. The grievor did intend to sexually assault Ms. Mathieu. The grievor, while aware of the seriousness of his misconduct, i.e., his own version of the incident is that he was “wrong, strictly speaking”, has offered no apology to Ms. Mathieu.

As to whether or not the grievor has shown remorse for his misconduct, and thereby providing the Employer with a degree of confidence that such mis-conduct will not re-occur should he be reinstated *Re Niagara Health System, supra*, p.50, I find the grievor has not provided the Employer with that assurance. In the February 10, 2004 meeting with Ms. Roy and Supt. Crosby, the grievor was informed he was being provided with an opportunity to indicate to them that the recommendation for his dismissal ought not be made. I agree with Association counsel that Ms. Roy and Supt. Crosby were of the mistaken belief that all the complaints against him had been made known to the grievor prior to the meeting. However, the grievor was clearly aware that Sgt. Davies did not believe his version but believed he had sexually assaulted Ms. Mathieu when so informed by Sgt. Davies in the May 6, 2003 interview. Also in that interview, Sgt. Davies made explicit reference to his interactions with Ms. Guertin and Ms. Lacroix that formed the subject-matter of their evidence before me. That is, while the grievor was not aware of the investigative statements made by Ms. Cruikshank, Const. Cooper and A/Sgt. Hunt, he was aware of Ms. Mathieu’s complaints and Ms. Guertin’s and Ms. Lacroix’s concerns about his behaviour.

I have carefully reviewed Ms. Roy’s and Supt. Crosby’s evidence as to the grievor’s comments made in the February 10, 2004 meeting. I note the grievor does not deny having made those comments but his evidence, in effect, is that he was not thinking properly because he had no prior knowledge, at least, that Ms. Cruikshank, Const. Cooper and A/Sgt. Hunt had indicated inappropriate behaviour on his part, and because he thought the purpose of the meeting was an opportunity for him to respond to Ms. Mathieu’s complaint and, thus, made his remarks unthinkly

out of anger and confusion. The grievor does not, however, deny that Ms. Roy indicated that the purpose of the meeting was to provide him with an opportunity to dissuade them for following the legal opinion that he be dismissed because he was a long service employee with a clean record. I accept that the Employer did call the meeting for the purpose of providing him with the opportunity to demonstrate understanding of his misconduct, remorse and assurance that such behaviour would not re-occur in the future. In his testimony before me, the grievor did not retract the statements he made in that meeting, notwithstanding he said he made them at time out of anger and unthinkingly.

In reviewing Ms. Roy's, Supt. Crosby's and the grievor's evidence as to his statements, I note that while he did say his behaviour towards Ms. Mathieu was inappropriate on his version of the April 24, 2003 incident, he offered no apology. It would seem that the closest he came to an apology, i.e., some insight that his behaviour was inappropriate towards female employees, is as indicated in Ms. Roy's notes of the meeting where the grievor stated, "So sorry if there are things that I have done." The inclusion of the word "if" in the above remark indicates to me that the grievor remained unwilling to accept responsibility for his behaviour. Further, it is clear from his statements that in that meeting and in his evidence before me, the grievor faults his female co-workers for his behaviour and believes he is their victim. For example, as indicated in Ms. Roy's notes: "He's a target." Moreover, while the grievor said that his conspiracy theories on the part of Ms. Mathieu, and on her part in conjunction with Ms. Guertin and Ms. Lacroix, had only "crossed his mind", he did not expressly reject or distance himself from them in testifying before me. When asked by Supt. Crosby about his understanding of the notion of harassment in the workplace, the grievor's responses, for example, about it being "Not fair, showing off your booty, sexual innuendos, wearing inappropriate clothing They wear things that make them overly attractive Rubbing and bouncing If I pick the wrong moment it's 'No' ", and that he needs camera surveillance in the workplace to protect him from false accusations against him by women, indicate no remorse for his actions whatsoever. That he feels he needs to be protected from women in the workplace indicates little, if any, acceptance of responsibility for his own behaviour. Given no apology for his inappropriate behaviour towards Ms. Mathieu, no insight concerning his own behaviour towards women, no remorse for his conduct but, rather, he blames female co-workers for it, the Employer's conclusion, that there does not exist assurance that the grievor's mis-conduct will not re-occur in the future is not unreasonable.

As to the Association submission that the discipline imposed on the grievor is too severe when compared with the discipline imposed on Mr. Black, there are three circumstances which distinguish Mr. Black's case. Firstly, Mr. Black was found culpable of sexual harassment and not sexual assault, that is, there was no issue as to whether or not he violated the sexual integrity of the female employees. Secondly, Mr. Black did administer shoulder massages as part of his efforts, as a supervisor, to be "one of the gang". Thirdly, Mr. Black's physical contacts with the females he supervised all occurred in public and not in a separate private area. In my view, and I so find, the distinctions between the grievor's case and Mr. Black's case negate consideration of the Employer's penalty of Mr. Black as a similar disciplinary circumstance.

Based on the foregoing, I find that the level of discipline imposed by the Employer on the grievor is appropriate in all the circumstances. I find on review of all those same circumstances that it is not appropriate or warranted to substitute a lesser penalty for the discharge.

The grievance, therefore, is dismissed.

Dated at Toronto, this 20th day of December, 2005.

"William A. Marcotte"
William A. Marcotte
Arbitrator

