

**ARBITRATION AWARD**

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION  
OF PUBLIC AND PRIVATE EMPLOYEES  
(hereinafter called the "Union")

AND:

GOVERNMENT OF NEWFOUNDLAND AND LABRADOR,  
DEPARTMENT OF GOVERNMENT SERVICES,  
MOTOR REGISTRATION DIVISION  
(hereinafter called the "Employer")

GRIEVOR: Dean Walsh

COUNSEL: For the Union

Hubert Sutton

For the Employer

Don Saturley

ARBITRATOR: James C. Oakley

The arbitration hearing was held at Grand Falls-Windsor on September 10, 2009, and January 26 and 27, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
5. Witnesses were excluded from the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Maintenance and Operational Services (MOS) Collective Agreement between Her Majesty the Queen in Right of Newfoundland and Labrador, represented herein by Treasury Board, et al. and Newfoundland and Labrador Association of Public and Private Employees, signed February 13, 2009, expires March 31, 2012
- Consent 2 - Grievance Form dated March 2, 2009
- Consent 3 - Letter dated February 27, 2009 from Sheree MacDonald, Deputy Minister to Dean Walsh
- BT - 1 Vehicle daily usage log book, vehicle # 4371, January 16 to January 29, 2009
- BT - 2 Vehicle daily usage log book, vehicle # 4371, January 30, 2009
- BT - 3 Vehicle daily usage log book, vehicle # 3687, February 2 to February 11, 2009
- CP - 1 Vehicle daily usage log book, vehicle # 4371, June 16 to June 26, 2007
- CP - 2 Daily patrol sheet, January 29, 2009, Pelley/Snow
- CP - 3 Daily patrol sheet, January 30, 2009, Pelley/Snow
- CP - 4 Vehicle daily usage log book, vehicle # 3687, January 29, 2009

- CP - 5 Daily patrol sheet, February 2, 2009, Snow/Pelley
- CP - 6 Vehicle daily usage log book, vehicle # 4371, February 2 to February 16, 2009
- CP - 7 Daily patrol sheet, February 9, 2009, Pelley/Snow
- CP - 8 Daily patrol sheet, February 9, 2009, Walsh
- GG - 1 Notes of interview with Chris Pelley
- GG - 2 Notes of interview with Derek Snow
- GG - 3 Notes of interview with Dean Walsh
- GG - 4 Email dated February 9, 2009
- GG - 5 Email dated February 27, 2009 from Glenn George to Dean Walsh and list of emails
- DW - 1 Daily patrol sheet, January 19, 2009, vehicle # 4371, Walsh
- DW - 2 Daily patrol sheet, January 20, 2009, vehicle # 4371, Walsh
- DW - 3 Daily patrol sheet, January 21, 2009, vehicle # 4371, Walsh
- DW - 4 Daily patrol sheet, January 22, 2009, vehicle # 4371, Walsh
- DW - 5 Daily patrol sheet, January 23, 2009, vehicle # 4371, Walsh
- DW - 6 Daily patrol sheet, February 9, 2009, vehicle # 4371, Walsh
- DP - 1 Statement dated February 12, 2009 signed by David Pierce, school bus owner

### **Nature of the Grievance**

The Union grieves that a three (3) day suspension issued to the Grievor, Dean Walsh, for insubordination was an unjust suspension. The Employer submitted that there was just cause for the disciplinary penalty and requested that the grievance be denied.

**Collective Agreement**

The relevant Articles of the Collective Agreement are as follows:

Article 8      Grievance Procedure

...

8.03      Subject to Clauses 8.02, 8.04 and 8.08, grievances shall be processed in the following manner:

...

Step 3

If the grievance is still not satisfactorily settled by the foregoing procedure or if it is of the type referred to in Clause 8.04, either part to this Agreement may submit the grievance to arbitration in accordance with Article 9.

...

8.08      Grievances involving suspensions and grievances involving alleged violations of clauses which deal with promotions and transfers, may be submitted in the first instance at Step 3 of Clause 8.03.

...

Article 9      Arbitration

...

9.14      An arbitration board may not alter, modify or amend any provisions of this Agreement, but shall have the power to set aside a decision of the Employer and to modify a disciplinary measure imposed by the Employer.

Article 33      Discipline

33.01      Within five (5) days of an oral notification of suspension or dismissal, an employee shall be given written confirmation of the suspension or dismissal, including the reasons for such action.

33.02      Subject to 8.04 and 8.12, all dismissals, suspensions and other disciplinary action may be subject to formal grievance procedure as outlined in Article 8.

**Evidence**

The witnesses called at the hearing by the Employer were Barbara Thomas, Deputy Registrar, Lisa Newman, Administrative Officer, Chris Pelley, Weigh Scale Inspector, Tom Power, Highway Enforcement Officer, Kenneth Rowsell, Highway Enforcement Officer and Glenn George, Human

Resources Consultant. The witnesses called by the Union were Dean Walsh, Highway Enforcement Officer and David Pierce, school bus owner.

The Grievor, Dean Walsh is a Highway Enforcement Officer (“HEO”) employed at the Grand Falls-Windsor office of the Motor Registration Division. He has been employed for about 6 years in that position, and has 23 years service with the Government. He was issued a disciplinary suspension of three (3) days without pay by the following letter, dated February 27, 2009, from the Deputy Minister, Department of Government Services:

Dear Mr. Walsh:

This letter is to advise you that the department has completed its investigation in reference to the events of Friday, January 30, 2009 in relation to your use of Vehicle # 4371.

Our investigation has revealed that you did receive direction from your supervisor to advise that Vehicle # 3687 was assigned to the Highway Enforcement Officers, and Vehicle # 4371 was assigned to the Weigh Scale Inspectors for the Friday, January 30, 2009. Against direction your utilization of Vehicle # 4371 disabled Weigh Scale Inspection staff to do their duties by having their equipment inaccessible to them.

As a result of the investigation and review of your personal file, you are being suspended for three (3) days without pay for insubordination. Your suspension will commence on March 2, 2009 and you are next scheduled to report to work on March 5, 2009.

You should also be aware that any further acts of behavior of this kind or similar nature will result in further disciplinary action by the Employer up to and including dismissal.

Sheree MacDonald  
Deputy Minister

There are two other Highway Enforcement Officers in the central region, Tom Power and Kenneth Rowsell. The HEOs share an office in the Provincial Building in Grand Falls-Windsor and report to Barbara Thomas, Deputy Registrar. The duties of the HEOs include inspection of ambulances, school buses and garages, and enforcement of the *Highway Traffic Act*. Their duties require them to be on the road about 90% of the time. There are two Ford F150 trucks assigned to the HEOs for

the performance of their duties. One truck, vehicle # 4371, is usually operated by Dean Walsh. The other truck, vehicle # 3687 is usually operated by Tom Power and Kenneth Rowsell.

The Motor Registration Division also employs Weigh Scale Inspectors (“WSI”) in the central region. The WSIs also report to Ms. Thomas. The WSIs weigh and inspect commercial vehicles at the weigh scale station located on the Trans Canada Highway between Grand Falls-Windsor and Bishop’s Falls. They also patrol the highway and weigh commercial vehicles using portable weigh scales. There is a Ford F150 truck, vehicle # 3390 assigned to the WSIs. Each WSI is usually assigned to patrol the highway for 2 weeks out of every 6 weeks. If the WSIs are unable to go on the road with the portable scales, then they have other duties to perform at the weigh scale station.

In mid January, 2009, vehicle # 3390, the truck assigned to the WSIs, went out of service to have the engine replaced. The truck remained out of service until late March. Barbara Thomas testified that, in January, 2009, she assigned vehicle # 4371 to the WSIs to use to patrol the highway with the portable scales, and she assigned vehicle # 3687 to the three HEOs. Ms. Thomas said that in the week prior to the week of January 26 to 30, 2009, she told the three HEOs that vehicle # 4371 was assigned to the Weigh Scale Inspectors. Chris Pelley, Weigh Scale Inspector, testified that Barbara Thomas informed him during the week of January 26 to 30, 2009, that vehicle # 4371 was assigned to the weigh scales. Tom Power, HEO, testified that on Thursday, January 29, 2009, Barbara Thomas said that vehicle # 4371 was assigned to the weigh scales. Kenneth Rowsell, HEO, testified that he believed Ms. Thomas had advised the HEOs some time prior to Friday, January 30<sup>th</sup> that vehicle # 4371 was assigned to the weigh scales.

Dean Walsh, the Grievor, testified that after vehicle # 3390 went out of service, Barbara Thomas informed the HEOs that vehicle # 4371 was assigned to the weigh scales and vehicle # 3687 was assigned to the HEOs. Dean Walsh continued to use vehicle # 4371 after the middle of January. According to the daily patrol sheets completed by Mr. Walsh, he used vehicle # 4371 every day from January 19 to 23, 2009. It was not clear from the evidence that Ms. Thomas knew that Mr. Walsh used vehicle # 4371 during that week. Mr. Walsh was not disciplined for using vehicle #4371 during the week of January 19 to 23, 2009. Mr. Walsh testified that, during the week of January 26 to 30, 2009, he stayed in the office in Grand Falls-Windsor and did not go on the road. He was studying for a course on motor coach inspection that he was planning to attend in Moncton, New Brunswick.

The three HEOs did not usually travel together in one vehicle. The trucks assigned to the HEOs have a small rear seat that is uncomfortable for one person to have to use all the time. Also, Dean Walsh and the other two HEOs did not get along together. Barbara Thomas testified that there had been incidents between Tom Power and Dean Walsh. Ms. Thomas believed that this history of conflict led to the Grievor taking the action on February 2, 2009, for which he was disciplined. Tom Power testified that he gets along with Kenneth Rowsell, but there are problems with his working relationship with Dean Walsh. Dean Walsh testified that he believes that he gets more work done when he works alone. Ms. Thomas said that the Employer had tried mediation and counselling but the issues between the employees were not resolved.

The Grievor was disciplined for insubordination arising from a directive allegedly given to him and the other two HEOs by Barbara Thomas at a meeting held at about 4:00 p.m. on Friday, January 30, 2009. There was conflicting testimony as to what was said at the meeting. Barbara Thomas testified that she told the three HEOs she would be away from the office the following week. She testified that she told the HEOs that vehicle # 4371 was assigned to the weigh scale inspectors, and she ordered the three HEOs to use vehicle # 3687, not vehicle # 4371. She wanted to make sure that all three of them travelled together. She testified that she told them there were two school buses in Harbour Breton to be inspected and if the weather was fine, then all three HEOs would travel together to Harbour Breton. She testified that her statement about inspecting the buses in Harbour Breton was more of a request than an order. In an email sent February 11, 2009 to Glenn George, Ms. Thomas described the events of Friday, January 30, 2009. The email stated that she advised the HEOs they would only have vehicle # 3687, and they would have to work together. The email also stated: "I told them that there were 2 school buses in Hr. Breton that needed to be inspected and that if the weather was good all 3 of them would go to Hr. Breton to do the inspections."

Tom Power testified that, on January 30, 2009, Barbara Thomas instructed the HEOs to work together during the following week using vehicle # 3687. She told them that vehicle # 4371 was assigned to the weigh scales. Kenneth Rowsell testified that, on January 30, 2009, Barbara Thomas told them that vehicle # 4371 was assigned to the weigh scales. Neither Mr. Power nor Mr. Rowsell recalled any direction about going to Harbour Breton to inspect school buses.

The Grievor, Dean Walsh, testified that on January 30, 2009, Barbara Thomas informed him and the other two HEOs that she was going to St. John's the following week. She said that the three of them would have to work together. He testified that Ms. Thomas directed them to go to Harbour Breton

and inspect school buses if the weather was good. The Grievor testified that he had been informed prior to January 30, 2009, that vehicle # 4371 was assigned to the weigh scales. He did not recall Ms. Thomas giving any direction about vehicle # 4371 on January 30, 2009.

The Grievor was disciplined for his actions on February 2, 2009 when he took vehicle # 4371 and drove by himself to Harbour Breton to inspect the school buses. Vehicle # 4371 was the only vehicle available early on the morning of February 2, 2009, as a result of the fact that vehicle # 3687 was at a service station to have an oil change and minor maintenance work. Evidence was presented about the usage of vehicle # 3687 and vehicle # 4371 on Thursday, January 29 and Friday, January 30. The entries in the vehicle daily usage log book for January 29 and 30, 2009, indicate that vehicle # 4371 was used by Tom Power, Highway Enforcement Officer, and was not used by the Weigh Scale Inspectors. The entry in the log book by Tom Power for vehicle # 4371 on January 29<sup>th</sup>, indicated that the vehicle was taken out at 11:00 a.m. and returned at 2:00 p.m. The entry in the log book by Tom Power on January 30, 2009 indicated that vehicle # 4371 was taken out at 9:30 a.m. and returned at 3:00 p.m. There were no entries in the log book by the WSIs for vehicle # 4371 on January 29 or 30, 2009.

Tom Power testified that vehicle # 3687 had an appointment at the service station on January 29. He said that he and Ken Rowsell drove vehicle # 3687 to the service station that afternoon and then drove vehicle # 4371 back to the office. He said there was no entry in the vehicle daily usage log book for vehicle # 3687 on Friday, January 30, because the vehicle was at the service station. Kenneth Rowsell testified that he and Tom Power dropped vehicle # 3687 at the service station on Thursday, January 29. They took vehicle # 4371 from the weigh scales so they would have a ride back to the office. Mr. Rowsell said that on Friday, January 30, he and Tom Power went on patrol together. They were joined by Chris Pelley and Derek Snow, who they picked up from the weigh scale station. Dean Walsh stayed in the office on January 29 and 30, and did not go on patrol. Chris Pelley testified that on January 29 there was a snow storm and he worked at the weigh scales. On January 30, his daily patrol sheet stated "worked local no vehicle". He understood that Tom Power and Kenneth Rowsell took vehicle # 4371 back to the office in Grand Falls-Windsor.

Barbara Thomas testified that there was a snow storm on January 29 and the WSIs did not go on patrol. She understood that on the afternoon of Friday, January 30, Tom Power and Kenneth Rowsell delivered vehicle # 3687 to Goobies Service Station to have service work done. The service station is about 1 kilometre from the weigh scale station. They used vehicle # 4371 to drive back

to the office. As a result, vehicle # 4371 was parked at the Provincial Building in Grand Falls-Windsor and not at the weigh scales, from the afternoon of Friday, January 30, until the morning of Monday, February 2, 2009.

Dean Walsh testified that on the morning of Monday, February 2, 2009, the weather was sunny. He decided that it was a good day to drive to Harbour Breton. It is a 2½ to 3 hour drive from Grand Falls-Windsor to Harbour Breton. Tom Power was off sick that day. After Mr. Walsh arrived at work, a few minutes before 8:00 a.m., Kenneth Rowsell told him he wanted to bring his personal vehicle home for his wife to use. He asked the Grievor to pick him up at home using vehicle # 4371. Mr. Walsh testified that he drove vehicle # 4371 to Mr. Rowsell's home, and picked him up. They returned to the office together. He asked Mr. Rowsell if he wanted to go with him to Harbour Breton. Mr. Rowsell declined, saying he had to do some personal business. Mr. Walsh observed that the keys to vehicle # 4371 were not hung on the board in the office and he obtained the keys from Mr. Rowsell. He wrote on the white board next to his name that he had gone to Harbour Breton in vehicle # 4371. He told Lisa Newman, the Acting Supervisor, that he was going to Harbour Breton to do the bus inspections.

Mr. Walsh testified that before he left the office, he had a telephone call from Chris Pelley, asking about the vehicle. He told Mr. Pelley that vehicle # 3687 was at the service station and that he was getting ready to take vehicle # 4371 to Harbour Breton. Mr. Walsh testified that Mr. Pelley did not say anything at that time about his portable weigh scale equipment or notebooks. Mr. Walsh did not make any inquiries before he left to see when vehicle # 3687 could be picked up from the service station. Mr. Walsh then drove to Harbour Breton. He met David Pierce, the school bus owner, and did the school bus inspections on the school parking lot, starting at about 1:00 p.m. When he was doing the inspections, at about 1:30 p.m., he received a telephone call from Chris Pelley. Mr. Pelley told him that he needed the portable weigh scales out of the truck. Mr. Walsh said he told Mr. Pelley that when he returned to Grand Falls-Windsor he would transfer the equipment or change vehicles. Mr. Walsh testified that he did not notice the portable weigh scale equipment in the back of the truck when he left to go to Harbour Breton. There were equipment bags in the back, but the HEOs and the WSIs have similar equipment bags.

Chris Pelley testified that on February 2, 2009, he arrived at work at the weigh scales at about 5:00 a.m. His equipment bag, with the portable scales and other equipment, was in the back seat of vehicle # 4371. He called Dean Walsh on his cell phone between 9:00 a.m. and 10:00 a.m. and told

him that he had their equipment. Mr. Walsh told him that he was on his way to Harbour Breton and to use vehicle # 3687. Mr. Pelley did not ask Mr. Walsh to return to the weigh scales. Mr. Pelley picked up vehicle # 3687 at the service station at 10:30 a.m. and went on patrol on the highway. He did not have the portable weigh scales and was unable to weigh commercial vehicles when he was on patrol. He said he left work at 1:00 p.m. and would not have called Dean Walsh at about 1:30 p.m.

The vehicle daily usage log book for vehicle # 3687 indicates that the vehicle was used by Chris Pelley from 6:00 a.m. to 2:00 p.m. on February 2, 2009. The entry was hand printed by Tom Power. Mr. Power testified that an entry for February 2 had been made by Chris Pelley on the preceding page of the log book on the next line after the last entry in January. Mr. Power said that the entry for February 2, since it was the first entry for the month of February, should have been entered on the next page in the log book. Mr. Power said he copied the information that had been entered by Chris Pelley onto the next page and crossed out Mr. Pelley's entry. The log book also indicated that vehicle # 3687 was used by Tom Power from February 3 to February 11, 2009. The log book for vehicle # 4371 indicated it was used by Dean Walsh on February 2 from 8:45 a.m. to 6:00 p.m., used by Derek Snow on February 3 and 5, and used by Chris Pelley on February 6.

Kenneth Rowsell testified that on February 2, 2009, Dean Walsh told him he was going to Harbour Breton. Mr. Rowsell told Mr. Walsh that he had paper work to do and he would not be going with him. Mr. Rowsell said that he always has a set of keys for vehicles # 4371 and # 3687. There were also keys on the board in the main office. He said it was unlikely that Dean Walsh obtained the keys to vehicle # 4371 from him. He testified that after he arrived at work that morning he returned home in his own vehicle. Dean Walsh picked him up in vehicle # 4371 and they returned to the office.

Barbara Thomas testified that she had a telephone conversation with Lisa Newman, Acting Supervisor on February 2. Ms. Newman reported to her that Tom Power was sick, that Kenneth Rowsell had stayed in the office to do paper work and that Dean Walsh had gone to Harbour Breton. Ms. Newman did not say what truck Mr. Walsh used. Ms. Thomas did not know that the Grievor used vehicle # 4371 until she returned to the office on February 9. Ms. Thomas also learned on February 9 that during the rest of the week of February 2 to 6, the three HEOs had gone together in the same truck, and Dean Walsh had stayed in the truck when the other two HEOs inspected a garage. She understood that Mr. Walsh's explanation for this action was that he felt it was intimidating for all three inspectors to do the same inspection. She reported the incident of February

2 to her Supervisor, the Registrar of Motor Vehicles. Ms. Thomas was concerned that Chris Pelley was unable to perform the duties of his job on February 2 because Dean Walsh had taken the vehicle with the portable weigh scales to Harbour Breton. She said that Chris Pelley was not laid off for lack of work that day, and that he had other duties he could perform.

David Pierce, school bus owner in Harbour Breton, testified that he was present when Dean Walsh inspected his school buses in Harbour Breton on February 2, 2009. He said Mr. Walsh received a telephone call around 1:00 p.m. He could overhear that the call was about weigh scales being transferred to another truck. After the telephone call Mr. Walsh told Mr. Pierce that “the boys at the weigh scales” wanted to know when he would be back.

Tom Power testified that if there is only one vehicle available, then usually the Highway Enforcement Officers have priority to use the vehicle, because the Weigh Scale Inspectors can perform other duties at the weigh scales. Dean Walsh testified that if only one vehicle is available, then the HEOs have first priority to use the vehicle. He acknowledged that management has authority to allocate vehicles.

Glenn George, Manager of Employee Relations, testified that he conducted an investigation. He interviewed Chris Pelley, Derek Snow and Dean Walsh. He recommended that the Grievor receive a 3 day suspension without pay for insubordination. He prepared the letter of discipline for signature by the Deputy Minister. He said that the disciplinary penalty was based on the fact that, contrary to direction from his supervisor, Dean Walsh took a vehicle not assigned to him, with the weigh scale equipment in the vehicle, and drove to Harbour Breton to do the bus inspections. He said there was no record of discipline relied upon by the Employer when the decision was made to impose a suspension. With respect to whether Mr. Walsh had acted properly to follow a directive to go to Harbour Breton, Mr. George said that Mr. Walsh did not need to leave first thing Monday morning. He could have done the inspections any day that week.

Mr. Walsh said that when he received the letter of suspension he was surprised and shocked. He believed that he was following his supervisor’s directive to go to Harbour Breton and do the bus inspections. He said that if management felt he had done anything wrong, then he apologized.

### **Employer Submission**

The Employer submitted that the Grievor did not follow the order given by his supervisor, Barbara Thomas, and was guilty of insubordination. There were discrepancies between the accounts of the witnesses. Self interest was an important factor, when considering the credibility of the witnesses. Barbara Thomas, Tom Power and Kenneth Rowsell all testified that Ms. Thomas gave direction at the meeting on January 30, 2009 that vehicle # 4371 was assigned to the WSIs and vehicle # 3687 was assigned to the HEOs. The order was clearly communicated to all three HEOs. The Grievor, Dean Walsh, refused to acknowledge the order, and did not comply with the order. There was conflicting testimony with respect to whether any directive was given about inspecting school buses in Harbour Breton. The Grievor said that Barbara Thomas gave such a directive. Ms. Thomas was uncertain whether an order was given to go to Harbour Breton. Neither Tom Power nor Kenneth Rowsell heard such an order. The Grievor could not rely on such an order as a reason to take vehicle # 4371. The Grievor made the decision to use vehicle # 4371 to go to Harbour Breton, contrary to the order from his supervisor. Kenneth Rowsell said it was very unlikely that he gave the Grievor the keys to vehicle # 4371. The Arbitrator was asked to accept the testimony of Chris Pelley, and not the testimony of Dean Walsh, about telephone conversations on February 2, 2009. Chris Pelley testified that at 9:30 a.m. he called Dean Walsh and told him that he had the portable weigh scale equipment in the truck. Chris Pelley also testified that he could not have made any call to the Grievor after 1:00 p.m. that day because he left work at 1:00 p.m. The testimony of David Pierce was not inconsistent with the testimony of Mr. Pelley. Mr. Pierce testified that Mr. Walsh told him he had a call from the “boys”. The Employer referred to arbitral authorities on proof of insubordination. The ingredients of insubordination were proven in this case, namely, (1) a clear order was communicated to the Grievor, (2) the order was given by a person in authority, and (3) the order was disobeyed by the Grievor. Insubordination was a serious offence, because it strikes at the Employer’s right to manage. The Employer referred to arbitral authorities on the penalty for insubordination, including *Newfoundland Association of Public Employees and Her Majesty the Queen in Right of Newfoundland (Burt)* June 7, 1993 (Oakley) (the “*Burt*” case) where a three day suspension for insubordination was upheld by the Arbitrator. The Employer distinguished the arbitral authorities relied upon by the Union as cases where there were several mitigating factors not present in this case. The Employer requested that the penalty of a three day suspension be upheld.

**Union Submission**

The Union submitted that the Employer had not proven insubordination. The inconsistencies in the testimony of the witnesses should be resolved in favour of the Grievor. At the meeting on January 30, 2009, the supervisor, Barbara Thomas, did not address what would happen on Monday, February 2, if vehicle # 3687 was still in the garage, and vehicle # 4371 was the only one available. Ms. Thomas had given a directive on January 15, 2009 that vehicle # 4371 was assigned to the weigh scale inspectors. However, Dean Walsh had operated the vehicle from January 19 to 23. The Employer impliedly accepted the Grievor's use of the vehicle. The other HEOs had also used vehicle # 4371 after the directive had been given on January 15. In her email to Glenn George on February 10, Ms. Thomas did not state that she gave an order on January 30 to the HEOs not to use vehicle # 4371. The email stated that she had given a directive about the vehicle two weeks earlier. There was no evidence of a direct order to the HEOs to use vehicle # 3687 and not vehicle # 4371. Dean Walsh did not remember hearing any directive about vehicle # 4371 at the meeting on January 30. There was a history of conflict between Tom Power, Kenneth Rowsell and Dean Walsh. As a result, Mr. Power and Mr. Rowsell had a personal interest not to give testimony that would help the Grievor. It was consistent with their personal interest not to recall being told to go to Harbour Breton to inspect the school buses. Ms. Thomas testified that she told all three HEOs that they were required to go to Harbour Breton to do the inspections. This directive was confirmed in her email to Glenn George. The Employer's counsel had questioned the testimony of Barbara Thomas by submitting that there was uncertainty about whether a directive was given to go to Harbour Breton. Ms. Thomas likely gave the directive, because on February 9, 2009, she was pleased to hear that someone had gone to Harbour Breton to do the inspections. When there is only one vehicle available, the practice is that the HEOs have priority to use the vehicle. This was confirmed by the testimony of Tom Power and Chris Pelley. With respect to credibility, Kenneth Rowsell did not deny that he gave his keys to the Grievor, he just said it was highly unlikely. Mr. Rowsell did not say to the Grievor at any time on the morning of February 2 that he was not allowed to take vehicle # 4371 to Harbour Breton. Chris Pelley testified that he did not speak to the Grievor after 1:00 p.m. on February 2. However, according to the notes taken by Glenn George, Mr. Pelley told Mr. George that he may have called the Grievor at that time to see when he would be returning. The Employer had treated the Grievor unfairly in the circumstances, because other HEOs were not disciplined for using vehicle # 4371 or for failing to go to Harbour Breton to inspect the school buses. The Union distinguished the *Burt* case, as a case where the grievor had flatly refused an order and had a prior disciplinary record for insubordination. The Union referred to the arbitral authorities of *Her Majesty*

*the Queen in Right of Newfoundland and Newfoundland Association of Public Employees (Hatfield)* June 25, 1995 (Panjabi) (the “*Hatfield*” case) and *Newfoundland (Treasury Board) and NAPE (Ward)* (1992) 25 L.A.C. (4<sup>th</sup>) 364 (Browne) (the “*Ward*” case). In both cases, a disciplinary penalty for insubordination was reduced having regard to mitigating factors. The Union requested that the grievance be upheld, the disciplinary penalty be removed from the Grievor’s record and the Grievor be paid full compensation.

### **Considerations**

The Employer suspended Dean Walsh, the Grievor, for three days without pay for insubordination for his actions on February 2, 2009. The Grievor was disciplined for acting against a directive given by the Grievor’s supervisor, Barbara Thomas, on Friday, January 30, 2009. The Arbitrator will consider whether or not the Employer had just cause to impose discipline, and if it did, whether there was just cause for the penalty of a three day suspension.

The ingredients of the disciplinary offense of insubordination that are required to be proven by an employer, are discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, at paragraph 7:3612 as follows:

In the standard case where an employee is disciplined for refusing to do what he or she has been told to do, arbitrators have required the employer to prove that an order was in fact given, that it was clearly communicated to the employee by someone with the proper authority, and that the employee either refused to acknowledge it or actually refused to comply. However, even if no specific order is given, an employee may be found to have been insubordinate if the arbitrator concluded that he or she must have been aware of the duties expected and refused to discharge them. As well, in order to justify disciplining someone for insubordination, it is typically not necessary for an employer to prove that the employee intended to defy management or had a blameworthy state of mind, or that it suffered any financial loss, although the absence of any of these factors will usually serve to lessen the seriousness of the misconduct.

Arbitral authority has consistently recognized the right of management to manage the employer’s operations without interruption of production. The requirement to obey an order from management is subject to recognized exceptions, but there is no issue in this case about any exception to the usual requirement. Insubordination consists of actions that have the effect of undermining the employer’s

authority. However, it is not necessary for an employer to prove that an employee intends to undermine the employer's authority. The employee's intent may be relevant when considering the appropriate penalty.

The letter of discipline alleges that the Grievor received a directive from his supervisor, Barbara Thomas, Deputy Registrar, that vehicle # 4371 was assigned to the Weigh Scale Inspectors, and that the Grievor used vehicle # 4371 contrary to this directive.

With respect to the three requirements to prove insubordination, it is clear that Barbara Thomas, Deputy Registrar, was the Grievor's supervisor and that she was a person in authority. It is also clear that the Grievor used vehicle # 4371 on Monday, February 2, 2009. The factual issue in dispute, with respect to proof of insubordination, is whether or not Ms. Thomas gave the directive alleged.

The Arbitrator will consider what directive was given by Barbara Thomas to the Grievor on January 30, 2009. There was conflicting testimony and it is necessary to consider the credibility of the witnesses. With respect to the issue of credibility, the Arbitrator has considered the following statement by the British Columbia Court of Appeal in *Faryna v. Chorny* [1952] 2 D.L.R. 354 at 357:

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 be to 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.

With respect to the credibility of witnesses, the Arbitrator has also considered the following statement in the case of *Sheraton Ltd.* (1980) 26 L.A.C. (2d) 122 (Brunner) at 125:

The assessment of the credibility of a witness is very often a most difficult and delicate task. The authorities on this branch of the law of evidence, such as they are, indicate that regard should be had to the demeanour of the witness, that is the manner in which they testify before us, the character of their evidence, i.e., whether they appear to be forthright and open or evasive and uncertain; their respective capacities and opportunities to perceive, recollect and communicate matters with respect to

which they gave evidence; the consistency of their testimony, the inherent probabilities of their respective accounts, the presence or absence of bias, interest or other motive, as well as their individual character.

When considering the issue of credibility of the witnesses, I have considered the likely probabilities of their testimony. The surrounding circumstances are relevant when determining the likely probabilities. With respect to the statements made by Ms. Thomas at the meeting on January 30, the surrounding circumstances include the usage of vehicles in the Regional Office of the Motor Registration Division. Usually there were three vehicles available, two vehicles for the Highway Enforcement Officers and one vehicle for the Weigh Scale Inspectors. The HEOs need a vehicle to travel to locations throughout the region to carry out their duties. The WSIs assigned to patrol the highway with portable weigh scales also need a vehicle. The vehicle usually assigned to the WSIs went out of service on January 15, 2009 to have its engine replaced, and that vehicle remained out of service until March, 2009. The Grievor usually operated vehicle # 4371 and the other HEOs, Tom Power and Kenneth Rowsell, usually operated vehicle # 3687.

Barbara Thomas gave a directive, prior to January 30, 2009, that vehicle # 4371 was assigned to the Weigh Scale Inspectors. No one questioned that such a directive was appropriate, when there were only two vehicles available. The HEOs, including Dean Walsh, were aware of this directive, although they recalled different dates when they knew about the directive. The Grievor, Dean Walsh, continued to use vehicle # 4371 in the week of January 19 to 23, but it was not clear that Ms. Thomas knew that Mr. Walsh used the vehicle at that time. The Grievor was not disciplined for using vehicle # 4371 that week. During the week of January 26 to 30, 2009, vehicle # 4371 was used, in part, by the WSIs and, in part, by the HEOs, Tom Power and Kenneth Rowsell. The log book indicates that Tom Power used vehicle # 4371 on January 29 and 30, 2009. Vehicle # 3687 was taken to the service station for an oil change and minor maintenance. Tom Power and Kenneth Rowsell used vehicle # 4371 to have a ride back to the office in Grand Falls-Windsor. On January 30, 2009, Mr. Power and Mr. Rowsell patrolled together with two WSIs in vehicle # 4371, the only vehicle available that day. Vehicle # 3687 was at the service station on January 30, and was expected to be ready for use some time on Monday, February 2, 2009. A review of the usage of vehicle # 4371 during the two weeks between January 15 and January 30, indicates that there were several days when the HEOs continued to use both vehicle # 4371 and vehicle # 3687, and the WSIs did not have a vehicle. It is reasonable that management would assign one vehicle to the HEOs and one vehicle to the WSIs, rather than leave the WSIs without any vehicle. If a management directive in

that regard was given and not followed, then it is reasonably likely that a further directive would be given.

It is appropriate to consider the surrounding circumstances of the workplace conflict between the Grievor, Dean Walsh and the other two HEOs, Tom Power and Kenneth Rowsell. Mr. Walsh testified that he preferred to work alone, rather than travel in the same vehicle as the other two HEOs. The history of workplace conflict is relevant to the extent that the three HEOs would prefer to have two vehicles rather than one vehicle, because having one vehicle meant that the three HEOs would be required to travel together. It would therefore be reasonably likely that Barbara Thomas would give a directive that the three HEOs travel together in the same vehicle and work together, in order to emphasize the directive that vehicle # 4371 was assigned to the WSIs.

I will now examine the testimony of the witnesses with respect to what Ms. Thomas said at the meeting of January 30, 2009. Ms. Thomas testified that she told the HEOs that they would only have vehicle # 3687, that all three of them would travel together in one vehicle, and they were not to use vehicle # 4371. This statement is confirmed in her email to Glenn George after she learned about the events of February 2. Her statement about using vehicle # 3687, and not vehicle # 4371 would have been reinforced by her statement that the three HEOs would travel together during that week, when she would be out of the office. The testimony of Ms. Thomas on the usage of the vehicles was confirmed by the testimony of Tom Power and Kenneth Rowsell. They testified that they heard a directive that vehicle # 4371 was assigned to the weigh scales. Tom Power heard a directive that the three HEOs were to work together in vehicle # 3687. The Grievor testified that he did not hear any directive about vehicle # 4371 at the meeting on January 30. However, he had previously heard a directive that vehicle # 4371 was assigned to the weigh scales. Therefore the Grievor acknowledged that he received a directive about vehicle # 4371. Having considered the testimony of the witnesses, the surrounding circumstances, the history of usage of the vehicles, the likelihood that Ms. Thomas would want to reinforce the assignment of a vehicle to the Weigh Scale Inspectors during the week when she would be out of the office, and the history of workplace conflict among the HEOs, it is likely that Ms. Thomas gave the directive about vehicle # 4371 as she stated in her testimony. Therefore I find that Ms. Thomas gave a directive to the Grievor and the other HEOs that, during the week of February 2 to 6, 2009, they were to use vehicle # 3687 and not to use vehicle # 4371. When the Grievor used vehicle # 4371 to drive to Harbour Breton and inspect the school buses on February 2, he was acting contrary to this directive.

There was also conflicting testimony with respect to whether or not the HEOs were given a directive to go to Harbour Breton and inspect the school buses. Ms. Thomas testified that she assigned the work, although she did not consider it to be an order. Dean Walsh testified that he was directed to go to Harbour Breton, together with the other two HEOs, if the weather was good. Tom Power and Kenneth Rowsell did not recall Ms. Thomas making such a statement. The fact that Mr. Walsh drove to Harbour Breton and did the school bus inspections on February 2 is consistent with his testimony and the testimony of Ms. Thomas on this point. Also, when Ms. Thomas returned to the office, before she knew which vehicle the Grievor had used, she was pleased that the Grievor had inspected the school buses in Harbour Breton. Having regard to all the circumstances, it is reasonably likely that Ms. Thomas directed the three HEOs to travel together to Harbour Breton and do the school bus inspections, during the week of February 2 to 6, 2009.

The Grievor testified that when there is only one vehicle available, it is standard practice that the HEOs have priority over the WSIs to use the vehicle. There was only one vehicle available on the morning of February 2, as a result of the fact that vehicle # 3687 was in the service station. Could the Grievor justify taking the only vehicle available, based on a standard practice that HEOs have priority? The directive not to use vehicle # 4371 was clear and specific, and did not allow for an exception in the event that vehicle # 3687 was in the service station. Vehicle # 3687 was in the service station at the time the directive was given. The Grievor anticipated that vehicle # 3687 would be available for use some time on Monday, February 2. The vehicle was getting an oil change and minor maintenance. In his telephone conversation with Chris Pelley on the morning of February 2, the Grievor told Mr. Pelley to use the vehicle in the garage, meaning vehicle # 3687. However, even if the Grievor believed he could follow the standard practice that HEOs have priority if there is only one vehicle available, that did not give him authority to act contrary to the directive. If one of the two vehicles was unavailable, the Grievor was still required to follow the directive. It is unnecessary to make any finding as to whether or not there was a standard practice. If the Grievor believed there was a conflict between the standard practice and the directive, it does not follow that the Grievor had authority to follow the standard practice, as he understood it, and not the directive.

The Grievor also believed that he was complying with a directive to go to Harbour Breton and do the bus inspections. However, he could have done the bus inspections any time during the week, provided the weather was good for driving. This did not give Mr. Walsh authority to use vehicle #

4371 contrary to the directive not to use that vehicle. He could have used vehicle # 3687 to go to Harbour Breton when that vehicle was available.

The actions by the Grievor amount to insubordination. The Grievor was given a clear directive to use vehicle # 3687 and not to use vehicle # 4371. The directive was given by the Grievor's supervisor, a person in authority. The Grievor failed to comply with the directive. The Employer had just cause to discipline the Grievor.

The Union alleges it was inconsistent for the Employer to discipline the Grievor and not discipline other employees. There was no discipline imposed on the other HEOs for using vehicle # 4371 on other days prior to February 2, 2009. However, the usage on those days occurred prior to the directive by Ms. Thomas on January 30, 2009. Was it inconsistent for the Employer to impose discipline for failure to follow the January 30 directive, but not impose discipline for failure to follow the earlier directive? In my opinion, there was no inconsistency, because the directive on January 30 reinforced the earlier directive, and was given to ensure that the Weigh Scale Inspectors had the use of a vehicle. However, the fact that no discipline was imposed on other employees for failure to follow the earlier directive, may be taken into account when considering the seriousness of the Grievor's actions. There was no discipline imposed on Kenneth Rowsell for using vehicle # 4371 on the morning of February 2, to get a ride from his house to the office. However, Kenneth Rowsell's use of vehicle # 4371 on February 2 was for only a brief duration early in the morning, and it did not cause any inconvenience to the WSIs. There was no discipline imposed on Tom Power or Kenneth Rowsell for failing to comply with the directive to do the bus inspection in Harbour Breton. Tom Power was sick on February 2 and Kenneth Rowsell had other work to do. Their actions did not interfere with the bus inspections or cause the WSIs to be unable to patrol with the portable weigh scales. The directive that the three HEOs travel together in one vehicle was related to the directive that one vehicle was assigned to the weigh scale inspectors and one vehicle was assigned to the HEOs. The directive reinforced the fact that the HEOs did not have the use of two vehicles. It was not inconsistent treatment to discipline the Grievor. However, these circumstances have the effect of reducing the seriousness of the Grievor's actions.

I have considered the effect of the Grievor's actions on the work of the Weigh Scale Inspectors. As a result of the Grievor taking vehicle # 4371 to Harbour Breton, Chris Pelley was unable to perform the full extent of his regular patrol duties that day. Although the WSIs were able to use vehicle #

3687 they did not have the necessary equipment to weigh vehicles, because the portable weigh scales were in vehicle # 4371. There was a conflict between the testimony of the Grievor and Chris Pelley about their conversations on February 2, 2009. Chris Pelley testified that he told Dean Walsh on the morning of February 2 that Mr. Walsh had the vehicle with the portable weigh scales. It was likely that Chris Pelley knew that vehicle # 4371 was the one that was assigned to the WSIs and that it had their equipment in it. Vehicle # 4371 had been parked at the weigh scales. It was used by Tom Power and Kenneth Rowsell to drive back to the office, after they delivered vehicle # 3687 to the service station. On February 2, Mr. Pelley knew that vehicle # 3687 was in the service station. Vehicle # 3687 was the vehicle assigned to the HEOs and it would not likely have had the portable weigh scales. The purpose of Mr. Pelley's call to Dean Walsh was to ask for the return of vehicle # 4371 and the equipment. It is therefore likely that Mr. Pelley told the Grievor that the weigh scale equipment was in the truck. I accept Mr. Pelley's testimony in that regard. There was conflicting testimony about a second call to the Grievor on the afternoon of February 2, 2009. I find that it is unnecessary to resolve the conflict about the second call in order to find that the Grievor knew Mr. Pelley was looking for the return of vehicle # 4371 in the morning. Therefore, the Grievor did not give due consideration to how the Weigh Scale Inspectors would be able to perform their duties if he took vehicle # 4371 with their equipment to Harbour Breton. The Grievor's actions had an effect on the work of the WSIs on February 2, 2009. The effect did not last more than one day, because the Grievor returned vehicle # 4371 to the WSIs for their use the rest of the week.

There are mitigating factors in favour of the Grievor. Mitigating factors may reduce the penalty that might otherwise be imposed by an employer. The Grievor believed that he was complying with the directive from his supervisor. He understood that he was directed to do bus inspections that week, and he believed that he had priority to use the only vehicle that was available at the time he decided to drive to Harbour Breton. The weather was good that day and he did not know if the driving conditions would remain favourable for the rest of the week. The Grievor has 23 years of service with Government. There was no disciplinary record entered at the hearing. The Grievor apologized for his actions at the arbitration hearing to the Employer if anyone was offended by anything that he did. The Grievor was not intentionally disrespectful of the Employer's authority. These are factors in the Grievor's favour that may be considered on the issue of penalty.

I have considered the prior arbitral authorities submitted at the hearing, dealing with insubordination. In the *Burt* case, the grievor was given a three day suspension for insubordination for a flagrant and defiant refusal to follow a directive. He had a prior record for insubordination for comments directed

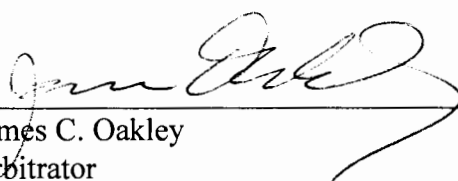
at his supervisors one month earlier. For the prior incident he was given a reprimand. For the incident before the arbitrator, a three day suspension was upheld, having regard to the seriousness of the incident and the prior record. The *Hatfield* case and the *Ward* case concerned more serious acts of insubordination than the present case. In both cases a two day suspension was reduced to a one day suspension by the arbitrator. In the *Hatfield* case, the grievor refused to perform assigned duties, believing the duties were not part of his job, and the refusal could not be justified having regard to the “work now grieve later principle”. In the *Ward* case, the grievor grabbed his supervisor and argued with him in a threatening manner. He did not apologize and showed no remorse for his actions. In both cases there was intentional disrespect of the employer’s authority. I find that the offences in both cases were more serious than the present case, and there were fewer mitigating factors in both cases when compared to the present case.

The primary purpose of discipline is be corrective of behaviour in the workplace, and to send a message to the employee that similar conduct will result in more severe discipline. Having regard to the purpose of discipline, the arbitral authorities, the Grievor’s lack of disrespectful intent, and other relevant circumstances as discussed in the Award, the penalty of a three day suspension was excessive. A just and reasonable penalty would have been a reprimand.

### **Decision**

The grievance is allowed, in part. The Employer had just cause to discipline the Grievor for insubordination. The penalty was excessive, having regard to all the circumstances. The disciplinary penalty of a three day suspension shall be replaced with a reprimand. The Grievor shall receive full compensation.

**DATED** this 20<sup>th</sup> day of April, 2010.

  
James C. Oakley  
Arbitrator