ARBITRATION AWARD

BETWEEN:

PUBLIC SERVICE ALLIANCE OF CANADA
(UNDE, LOCAL 90125)
(hereinafter called the "Union")

AND:

SERCO FACILITIES MANAGEMENT INC.
(hereinafter called the "Employer")

GRIEVOR: Sherry Bennett

COUNSEL: For the Union

Douglas Hill

For the Employer

Darren Stratton

ARBITRATOR: James C. Oakley

The arbitration hearing was held at Happy Valley-Goose Bay on October 20, 21 and 22, 2009 and February 11, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.

2. There were no preliminary objections going to jurisdiction to hear the grievances.

3. The grievance procedure was properly followed or any requirements waived.

4. The Arbitrator would remain seized of the matter for sixty (60) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The Employer raised a preliminary issue with respect to the order of presentation of evidence on the merits of the grievances at the arbitration hearing. The Arbitrator heard evidence and submissions on the preliminary issue of the order of proceeding. The Arbitrator issued an oral decision at the hearing directing that the Employer proceed first. The decision is summarized later in the Award. The parties agreed that the exhibits and testimony presented on the hearing of the preliminary issue could be considered by the Arbitrator with respect to the merits of the grievances.

The following exhibits were entered at the hearing:

Consent 1 - Collective Agreement between Serco Facilities Management Inc. at 5 Wing Goose Bay and Public Service Alliance of Canada, UNDE Local 90125, expires March 31, 2008

Consent 2 - Letter dated December 13, 2007 from Natasha McLean, Human Resources Director, Serco, to Sherry Bennett

Consent 3 - Grievance Form, File No. 07-15 dated December 21, 2007

Consent 4 - Grievance Form, File No. 07-16 dated December 21, 2007

Consent 5 - Memorandum dated January 23, 2008 from Bern Crawford, Serco, to Sherry Bennett

Consent 6 - Letter dated June 17, 2008 from Randy Ford, Labour Relations Officer, Serco to Sherry Bennett

NM - 1	Letter dated December 7, 2007 from Goronwy Price, General Manager, GBAC, to Dusty Miller, Site Manager, Serco
NM - 2	Letter dated December 4, 2007 from Goronwy Price, General Manager, GBAC to Dale Campbell, Air Operations Manager, Serco
NM - 3	Notes of meeting December 7, 2007, by Natasha McLean
NM - 4	Notes prepared prior to meeting of December 10, 2007, by Natasha McLean
NM - 5	Notes prepared for meeting of December 10, 2007, by Natasha McLean
NM - 6	Notes prepared for meeting of December 12, 2007, by Natasha McLean
NM - 7	Letter dated January 10, 2008 from Dusty Miller, Site Manager, Serco to Sherry Bennett
SB - 1	Letter dated January 23, 2008 from Sandra Turner, HR Supervisor, Serco to Sherry Bennett
SB - 2	Position description for Lead Building Custodian, effective date 03 July, 2007
SB - 3	Position description for Building Custodian, effective date 01 June, 2009
SB - 5	Letter dated December 15, 2007 from Sherry Bennett to Todd Russell, MP for Labrador
SB - 6	Letter dated January 10, 2008 from Sherry Bennett to Board of Directors, GBAC
SB - 7	Performance appraisal of Sherry Bennett dated May 22, 2007
SB - 8	Letter dated February 12, 2008 from Natasha McLean, Human Resources Director to Sherry Bennett
SB - 9	Certificate of Continuing Education in Interpersonal Communication Skills in the Workplace, issued by College of North Atlantic to Sherry Bennett, June 21, 2007
SB - 10	Photograph of passenger terminal dated December 4, 2007
SB - 11	Photograph of passenger terminal and snow blower operation dated February 25, 2009
SB - 12	Photograph of log book entry on November 25, 2007

SB - 13 Copy of email communications

SB - 14 Email dated November 28, 2007 from Frank Wallace, Janitorial/Custodial Manager, Serco, to all personnel re snow clearing at terminal

Nature of the Grievance

The Union grieves that the Grievor was wrongfully dismissed from her position of Lead Building Custodian at the Happy Valley-Goose Bay Airport Terminal (Grievance 07-15) and that she was unjustly suspended with pay (Grievance 07-16). The Employer submits that the Grievor was not dismissed from her employment, but was laid off when her position of Lead Building Custodian was eliminated and there was no other position available. The Employer also submits that the Grievor's suspension with pay was not a disciplinary suspension and did not violate the Collective Agreement.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 33 Suspension and Discipline

33.01 When an employee is required to attend a meeting, the purpose of which is to render a disciplinary decision concerning him or her, the employee is entitled to have, at his or her request, a representative of the Alliance attend the meeting. Where the disciplinary decision involves suspension or dismissal only, the employee shall receive a minimum of two day's notice of such a meeting.

33.02 When an employee is suspended from duty, the Employer undertakes to notify the employee in writing of the reason for such suspension. The Employer shall endeavour to give such notification at the time of suspension.

. . .

33.06 Grievances relating to dismissal shall proceed directly to Step Two of the grievance procedure.

. . .

Article 37 Layoff/Recall and Severance

. . .

37.02 Employees shall be laid off on the basis of their seniority, applied on a Job Title basis based upon the principle of last on first off and such employees shall be recalled in reverse order of lay off into the Job Title.

. . .

37.06 In the event there is no equivalent or higher rated position that is vacant, an employee may agree to be assigned to a lower rated job title providing he/she meets the qualifications for the position as would be applicable under the Staffing Article and he/she shall not be considered to be on permanent or temporary lay off but shall be entitled to be reassigned to his/her old position should work become available to which his/her seniority would entitle him/her.

If an employee refuses an assignment to a lower rated job title in the bargaining unit, he/she shall be laid off with recall rights as provided for in this Article.

. . .

37.08 Employees subject to lay-off for an indefinite period shall have the option of:

a) accepting layoff, retaining the right of recall for up to one (1) year;

or

b) accepting termination from the Employer with full pay for the remainder of the notice period, waiving the right to recall by accepting severance pay outlined below.

. . .

37.14 Upon termination, eligible full time and part time employees, including seasonal employees, shall be entitled to two weeks pay for the first complete year, plus one week's pay for each additional year of service with Serco. Part years are to be prorated.

Preliminary Issue

The preliminary issue was whether the Union or the Employer should proceed first to call evidence on the merits of the grievances. There were two grievances heard by the Arbitrator. Grievance number 07-15 alleges wrongful dismissal of the Grievor by the letter dated December 13, 2007. Grievance number 07-16 grieves the Employer's action to suspend the Grievor with pay.

The Union's submission was that the Employer should proceed first. The Union submitted that the Employer's actions were disciplinary and the Employer has the burden of proof. The Employer has knowledge of the facts on which it relies to justify its actions. The suspension with pay was disciplinary. The Union submitted that the letter of December 13th was disciplinary and was, in effect, a termination of employment because the Grievor was declared ineligible for jobs for which she would normally be qualified. It was not a proper layoff under the Collective Agreement.

The Employer's submission was that the Union should proceed first. A paid suspension was not a disciplinary action. The position of Lead Custodian was eliminated from the contract with the customer. The Grievor's position became redundant and as a result she was laid off. The layoff was not a disciplinary action. The Grievor was eligible for recall and severance pay and she exercised those rights. The Employer submitted that eligibility for recall to the Custodian position at the airport terminal is the subject of another grievance that is not before the Arbitrator.

I considered the arbitral principles on the order of presentation of evidence and argument. In Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 3:2651, the authors state "Although it is within the discretion of the arbitrator to determine the order of presenting evidence, normally the party with the overall burden of proof will lead evidence first." The authors also state at paragraph 3:2652 - "A different order of proceeding occurs in discharge and discipline cases. As noted above, in such cases, the burden rests upon the employer to persuade the arbitrator of the facts which the employer alleges justified the action. Accordingly, the practice in those cases is for employers to lead off and call their evidence first. . . . This procedure, however, is not normally applied to a nondisciplinary termination or to an instance of a deemed quit. In those instances the general rule usually applies with the union proceeding first."

Although the burden of proof and order of proceeding are usually the same, it is not necessary to decide who has the burden of proof at the beginning of the hearing. However, it is obviously necessary to decide the order of proceeding.

The Brown & Beatty text makes reference to the discretion of the arbitrator. When exercising discretion on the order of proceeding, besides considering the burden of proof, it is appropriate for an arbitrator to consider the best way to conduct a hearing so that it is fair, practical and expeditious. One consideration in this case is that there are two grievances that are being heard at the same time. As a practical matter, the same order of proceeding would usually apply to both grievances.

I considered how other arbitrators have addressed the issue of fairness in the order of proceeding. In *City of Regina and CUPE, Local 21* (1981) 2 L.A.C. (3d) 257 (Norman), the employer knew the reasons for the action it took and was asked to present its case first. It was unnecessary for the arbitrator in that case to decide whether the action was disciplinary. In *Canada Packers Inc. and U.F.C.W., Local 114P* (1991) 14 L.A.C. (4th) 442 (Solomatenko), the reason for a non-disciplinary termination was absence due to sickness and the issue was the interpretation of the collective

agreement. The employer did not possess more information than the union, and the union was required to proceed first to present evidence.

In the circumstances of this case, the Arbitrator exercised discretion and directed the order of proceeding on the basis of fairness. The general principle of fairness, in the order of proceeding, is that the party in possession of the information ought to present it first. It was my opinion that the Employer had knowledge of the facts on which it made the decision to take the action it did, and for that reason the Employer should proceed first. In making the decision on the order of proceeding. I considered the arbitral authorities that found that a suspension with pay is disciplinary and therefore there was potential for a finding that the Employer's actions were disciplinary. However, I did not make any final decision as to whether or not the Employer's actions were disciplinary. Also, I did not make any finding as to which party had the burden of proof. Those issues could be decided after hearing evidence and submissions on the merits of the grievances. For these reasons, the Employer was directed to proceed first to present evidence on the merits of the case.

Evidence

The witness called by the Employer was Natasha McLean, Human Resources Manager. The witness called by the Union was Sherry Bennett, the Grievor.

Sherry Bennett was employed in the position of Lead Building Custodian at the Airport Terminal Building pursuant to a contract for security and janitorial services between Serco Facilities Management Inc. ("Serco") and Goose Bay Airport Corporation ("GBAC"). GBAC is one of the customers of Serco in the Happy Valley-Goose Bay area.

At the Airport Terminal Building, Serco provides the service of Building Custodians, scheduled to work on morning or afternoon shifts on a seven day per week schedule. Prior to December, 2007, Serco also employed one Lead Building Custodian, with hours of work from 8:00 a.m. to 4:00 p.m., Monday to Friday. The position description for Building Custodian states that the position reports to the Lead Building Custodian. The primary duties are related to security and custodial functions. The duties include snow clearing. The position description for Lead Building Custodian states that the duties include the duties of the Building Custodian, plus additional duties. The Lead Building Custodian reports to the Janitorial/Custodial Manager. One of the qualifications listed for both positions is "effective interpersonal skills".

The Grievor's date of hire was October 18, 2004. As the Lead Building Custodian, she reported to Frank Wallace, Janitorial/Custodial Manager. Frank Wallace reported to Sylvia Dawe, Logistics Support Manager.

The Grievor's most recent performance appraisal, dated May 22, 2007, applied to the one year period ending December 31, 2006. The appraisal stated that the Grievor's performance met or exceeded standards in every category. The appraisal included favourable comments about the Grievor's work. The appraisal was signed by Sylvia Dawe and Sherry Bennett. The Employer submitted that, although the 2006 appraisal report was satisfactory, there were issues with the Grievor's performance in 2007.

By letter dated December 4, 2007, the General Manager of GBAC expressed concerns to Serco about the Lead Custodian and her understanding of her role at the Airport Terminal Building. The letter stated that it was not the role of Serco's employees to continually question the decisions or actions of GBAC. The letter referred to four separate incidents occurring within the previous week. These were: (1) gate 12 centre locking pegs - the Lead Custodian said it was not good enough for GBAC to repair the peg holes in the normal way, (2) snow was not cleared around the building and the Lead Custodian instructed staff not to clear snow due to ice buildup under the eaves, (3) electrical problems in screening area - an electrician checked wiring and found a short, but the Lead Custodian purportedly told the electrician to leave the area, and (4) caution taping - a request by the Lead Custodian for taping in area of ice buildup was denied, because there was already cautionary signage, but the Lead Custodian did not seem to accept the decision. The letter also listed other examples from the last number of months, mostly related to repeated raising of minor issues as safety concerns. The letter asked that the concerns about the Lead Custodian be rectified.

Natasha McLean, Human Resources Manager, testified that she was asked to investigate the concerns raised in the letter. She asked another Manager, Colin O'Brien, to assist her with the investigation. She decided not to ask Sylvia Dawe to assist with the investigation, because there had been a prior harassment complaint by the Grievor against Ms. Dawe and she did not want the investigation to appear to be biased. The Employer had earlier determined that the Grievor's harassment complaint against Ms. Dawe was unfounded.

Ms. McLean testified that she asked the Grievor to attend a meeting on December 5, 2007. The meeting was also attended by Kirk Bartlett, a shop steward for the Union, whose attendance was

arranged by the Employer. Ms. McLean told the Grievor about the letter of complaint from GBAC. She told the Grievor there would be an investigation. She said she asked the Grievor not to contact the customer or any coworkers and the Grievor agreed. The Grievor was asked to leave the site immediately. She was suspended with pay. Ms. McLean testified that it was a standard practice to suspend an employee with pay pending such an investigation, in order to avoid any risk of interference with the investigation process. Ms. McLean said that the suspension with pay was not a disciplinary measure. The Grievor testified that she considered her removal from the site and the direction not to talk to the customer or her coworkers to be a form of discipline.

Ms. McLean testified that she commenced the investigation by reviewing emails and other documents and arranging interviews. She met with Frank Wallace and Sylvia Dawe on December 7, 2007. At that meeting, they reviewed the issues raised in the letter from GBAC, and also reviewed additional issues about the Grievor. One of the additional issues concerned complaints from tenants at the Airport Terminal Building about the use of a camera by Sherry Bennett. The camera had been issued to Ms. Bennett for her job, but was taken back by Mr. Wallace after the tenant complaints. Other issues discussed at the meeting of December 7, included incidents of the Grievor discussing matters with inspectors and not the appropriate contact person with GBAC, the Grievor asking for directions in writing from supervisors about numerous minor issues, and the Grievor filing frequent incident reports about minor concerns alleging there were health and safety issues. Ms. McLean also referred to emails that she reviewed in which the Grievor had demanded that supervisors respond to her concerns "ASAP". Ms. McLean observed that the Grievor had received coaching from her supervisors in 2007, but had not received any reprimand or other discipline.

Ms. McLean presented the concerns to the Grievor at a meeting on December 10. The meeting was also attended by Mr. O'Brien and Mr. Bartlett. Ms. Bennett was allowed to read the letter from GBAC and take notes. She was told that she would have an opportunity to respond to the concerns at a meeting on December 12, 2007, and she would be given a decision on December 14. Ms. Bennett gave the Employer names of persons to interview during the investigation.

The Grievor presented her response on December 12, 2007. The Grievor testified that she was told on December 12 that the options under consideration by the Employer included returning to her position, exploring another position with Serco, or layoff.

Ms. Bennett testified about her response to the concerns. She said that when there was ice hanging from the eaves on the roof, the standard practice was to have the ice removed. She would contact the Director of Operations for GBAC, he would issue a work order to the roads and grounds crew, and the crew would use the necessary equipment to clear the ice from the eaves on the building. The Building Custodians would then use the snow blower to clear the walkways. The Grievor denied that she instructed an Electrician to leave the building. She indicated that the reference in the letter to placing caution tape could not be referring to her actions, because she was not working on the weekend when this issue arose. Ms. Bennett testified that in 2007 it became more difficult for her to resolve issues with the management at GBAC.

The Grievor was asked at the arbitration hearing why she wanted confirmation in writing of instructions from her supervisors. She replied that she was protecting her own best interests and she wanted to make sure she was doing what the supervisors had requested. When asked about requests she made for a response "ASAP", she acknowledged that an email response to her from Sylvia Dawe indicated that Ms. Dawe had a problem with the Grievor requesting a response "ASAP".

Ms. McLean testified that her initial investigation indicated that there were conflicting accounts of the facts related to various incidents. She noted that the customer expressed concern about the Grievor's performance and that Serco managers also stated that there were issues with her performance. Ms. McLean did not complete the investigation. On December 13, she was advised by Dusty Miller, Serco Site Manager, that the position of Lead Custodian was eliminated from the GBAC contract. At that time, she was informed about a letter from GBAC to Serco, dated December 7, 2007, which amended the contract as follows:

> Re: Amendment to Serco security contract with the Goose Bay Airport Corporation
>
> Dear Mr. Miller:
>
> Please be advised that the Goose Bay Airport Corporation (GBAC) has dropped the contractual requirement noted in Clause # 13 section D to have a Working Supervisor remaining at site. The Corporation is suggesting the following amended wording for Clause # 13 section D.
>
> - "The Working Supervisor or a GBAC approved designate will be available during all working hours of Contract performance."

> Should this amended Clause # 13 section D be acceptable to your organization, please acknowledge it by signature in the space provide below.

Ms. McLean advised Ms. Bennett that she was removed from the position of Lead Custodian, by the following letter, dated December 13:

> This letter is to inform you that, effective immediately, you have been removed from your position of Lead Custodian. The company has made the decision that this removal will be permanent, and that you will not be eligible to continue working in any capacity within the GBAC contract.
>
> The Company has reviewed alternate positions open within our organization and at this time we do not have any openings for which you meet the qualifications.
>
> Therefore, this letter serves as your 30 days notice of layoff, as per Article 37. You will be laid off from Serco Facilities Management Inc., and benefits will cease as of January 12, 2008. You will not be required to work during this time frame.
>
> During the 30 days notice period, Serco will notify you of any posted vacancies in an effort to avoid a layoff situation.
>
> Should you not accept a position as offered under Article 37.05 or Article 37.06, Article 37.08 allows two options. You may select indefinite layoff, retaining the right of recall for a period of one year. Your other option is to select permanent layoff (termination of employment) and receive severance as per the Collective Agreement. Details of the Layoff/Recall and Severance provisions can be found in Article 37 of the Collective Agreement.
>
> Sherry, should you have any questions, please contact me.
>
> Yours truly,
>
> Natasha McLean
> Human Resources Director

Ms. McLean testified that the statement in the letter about not working in any capacity under the GBAC contract was based on issues raised by the customer and Serco managers. Ms. McLean testified that upon removal of the Lead Custodian position from the contract, Ms. Bennett was laid off. The Collective Agreement does not provide for any bumping rights. Upon layoff, the Grievor

had recall rights under the Collective Agreement, and could be placed in a vacant position. The Employer decided that the Grievor was not eligible for recall to a position within the GBAC contract. Ms. McLean said the reason for this decision was because the Grievor had issues dealing with the current management of the customer, the Grievor did not accept that health and safety issues were being addressed, there was a problem with the Grievor's communication with the customer, and the Grievor did not maintain good customer relations. The Employer determined that the Grievor did not demonstrate good interpersonal skills, which was a qualification for the Custodian and Lead Custodian positions. The Employer indicated that it did not, at any time, take issue with the reasonableness of the Grievor's decision to refuse work, such as snow clearing, on the grounds of health and safety.

Ms. McLean testified that the Employer concluded that there was a communication problem between the Grievor and the customer. The fact that there was a letter of complaint from the customer indicated there was a problem that had to be addressed. Both the Grievor and the customer had observed that there were problems with communication. The Employer was willing to continue the Grievor's employment in another position where she would not have to deal with that customer. Ms. McLean said that, following the meeting on December 10, 2007, she had a high level of concern regarding the Grievor's performance, judgment and attitude.

Ms. McLean testified that the Grievor was not terminated from her employment on December 13, 2007. The intent of the Employer was to find another position for the Grievor for which she was qualified. The Employer subsequently offered the Grievor a position as Cleaner, with a start date of January 15, 2008. It was a permanent full time position with a higher rate of pay. The Grievor declined the offer of the Cleaner position. Ms. McLean testified that, had the Grievor accepted the Cleaner position, she would have continued to be employed as of the date of the arbitration hearing, as there had been no involuntary layoff of anyone in the Cleaner position.

After the Grievor's layoff from the Lead Building Custodian position, there was a vacancy in the position of Building Custodian at the Airport Terminal Building. The Grievor applied for the position. By letter dated January 23, 2008, Sandra Turner, HR Supervisor, informed the Grievor that Serco would not be considering her application for the Building Custodian position, as a result of the decision, as stated in the letter dated December 13, 2007, that she would not be eligible to continue working in any capacity within the GBAC contract.

Following the Employer's letter to the Grievor on December 13, 2007, the Grievor sent letters to Todd Russell, Member of Parliament for Labrador, and to the members of the Board of Directors of GBAC. The letters were critical of GBAC management and complained about the way the Grievor was treated. In her testimony at the hearing, the Grievor denied that the letters used inappropriate language.

The Grievor took photographs showing ice and snow on the roof, which she presented at the arbitration hearing. The Grievor entered as an exhibit a photograph dated February 25, 2009 showing the Airport Terminal Building and Frank Wallace operating a snow blower. Ms. Bennett said the photograph showed ice hanging from the eave and demonstrated a potential health and safety concern. She used her cell phone camera to take the photos. She said she did not know why the camera issued to her by Serco was taken away. She was told that she did not need it. She did not give the Employer any photographs when she met with Ms. McLean on December 12, 2007. She said she did not know if there would be a full investigation at that time.

The Grievor was recalled to work for Serco in the position of Central Registry Clerk from September 16 to November 28, 2008. She was then laid off. She has not been recalled to any other position. Her recall rights under the Collective Agreement expired in January, 2009. She was paid severance pay at that time.

Employer Submission

The Employer submitted, with respect to grievance 07-16, alleging wrongful suspension with pay, that it had acted on a letter of complaint from its customer. The Grievor was notified that the Employer intended to investigate the complaint. The Grievor was suspended with pay and asked not to contact the customer. The Grievor did not object to the process. It was standard practice for the Employer to hold an employee out of service when there was a customer complaint or harassment allegation. The Employer did not consider the action to be disciplinary. The purpose of removing the Grievor from the site was to ensure that the investigation was not tainted. The action was not disciplinary because there was no intent to punish or teach, or to have the action form part of the disciplinary record. The Employer distinguished the arbitration awards relied upon by the Union. For example, in *Riverdale Hospital and C.U.P.E., Local 79* (2000) 93 L.A.C. (4th) 195 (Surdykowski) ("the *Riverdale Hospital*"case), the issue was whether the right to union representation applied, and the suspension with pay was considered part of the events leading up to

the disciplinary penalty. The Employer referred to *Canadian Imperial Bank of Commerce and Union of Bank Employees* (1987) 5 C.L.A.S. 49 (Burkett) and *Hydro One and SEP (Gauci)* (2006) 158 L.A.C. (4th) 86 (Kaplan) where a suspension with pay pending an investigation was found not to be disciplinary. There was no obligation to give written notice of a suspension under Article 33, because that article only applied to disciplinary suspensions. With respect to grievance 07-15, there was no termination of employment. The Grievor was laid off when the Lead Custodian position was eliminated. There were no bumping rights under the Collective Agreement. The Grievor had a right of recall. The Employer offered the Grievor a job as Cleaner within the first 30 days after layoff. If she had accepted that job she would have had no loss of income. The fact that the Grievor continued to be paid for 30 days after layoff indicated that there was a continuing employment relationship. There was no evidence presented by the Union to challenge the fact there was a redundancy. There was a shortage of work. The customer was not prepared to pay for the Lead Custodian position. There was no discharge disguised as a layoff. The Employer distinguished the authority relied upon by the Union in *Fuller Austin Insulation Limited and CJA, Local 2103* (2002) 107 L.A.C. (4th) 421 (Casey) (the "*Fuller Austin*" case). In that case, a dismissal was found to be disguised as a layoff in circumstances where it was found there was no shortage of work. The Employer's actions were appropriate based on evidence of the Grievor's attitude. The Employer determined that the Grievor had not demonstrated good interpersonal skills and there was a breakdown in her relationship with the customer. The Employer's assessment was based on credible evidence. The requirement of "interpersonal skills" was one of the qualifications for a Building Custodian position with the same customer. The Employer referred to arbitral authorities, including *York University and YUSA* (1992) 27 L.A.C. (4th) 403 (Dissanayake) and *Canadian Broadcasting Corporation and Association of Professionals and Supervisors* (2006) 150 L.A.C. (4th) 258 (M.G. Picher) where interpersonal skills were found to be an appropriate job qualification. There was no health and safety issue on the facts of the case. The Grievor's approach to health and safety in the workplace created problems for her relationship with the customer. The Employer requested that the grievances be denied.

Union Submission

The Union submitted that the suspension with pay was disciplinary. The Employer acted on a letter of complaint, called the Grievor to a meeting, advised her not to talk to the customer or other employees, and escorted her from the work site. The Grievor was not given notice in writing of the reason for the suspension as required by Article 33.02. The Employer arranged to have a Union

representative in attendance at the meeting, which indicated that the purpose of the meeting was disciplinary. The letter to the Grievor, dated December 13, 2007, was a termination of employment and violated Article 37.06. There was no mention in the letter of a reason for layoff, such as a reduction of work. The Grievor was not laid off in accordance with the requirements of the Collective Agreement. There was no lack of work. The position was eliminated because the customer had a problem with the Grievor. The Employer decided not to allow the Grievor to work for the customer. The Employer would not agree to assign the Grievor to the lower rated job of Building Custodian. A layoff was found to be a disguised dismissal in the *Fuller Austin* case, and the same result should apply in this case. Although the Employer alleged that the customer had an issue with the Grievor's performance, the Employer never completed an investigation. The Employer did not make an assessment of the Grievor's interpersonal skills. The Grievor's last performance appraisal, dated May 27, 2007 showed that she met the standards for the job. If there was some inappropriate email communication by the Grievor, then the Employer should have documented it in a performance appraisal at the time. The Union relied on the case of *Ottawa City and CUPE, Local 503 (Johnson)* (2007) 164 L.A.C. (4th) 263 (Jamieson), where an employer imposed a one day suspension based on an email complaint from a client. In that case, the arbitrator found that the process was flawed because the employer did not interview the complainant. The Grievor testified that she refused to clear snow around the building when it was unsafe. In those circumstances, Serco had an obligation to ask the customer to correct the problem. The Union requested that the Arbitrator issue a declaration that the suspension was disciplinary and that it be removed from the Grievor's record. The Union requested that the Grievor be paid compensation in lieu of reinstatement, with the Arbitrator to remain seized of the matter and to settle the amount of compensation if the parties could not agree.

Considerations

There are two grievances. The issue in the grievance 07-15 is whether or not there was a wrongful dismissal of the Grievor by the Employer on December 13, 2007. The issue in grievance 07-16 is whether or not the action by the Employer to suspend the Grievor with pay was disciplinary, and without cause, in violation of the Collective Agreement.

The Grievor was employed as Lead Building Custodian at the Airport Terminal building. She was suspended with pay on December 5, 2007, following the receipt by the Employer of a letter of complaint from its customer, Goose Bay Airport Corporation (GBAC). The Employer commenced

an investigation and met with the Grievor to advise her of the letter of complaint. The Employer did not complete the investigation before its letter to the Grievor on December 13, 2007. By letter dated December 7, 2007, the customer, GBAC, dropped its requirement to have a working supervisor on site. The working supervisor was the Lead Building Custodian. The contract with GBAC was amended to eliminate the position. The Grievor was the only person employed in the Lead Building Custodian position. Other persons were employed at the Airport Terminal building in Building Custodian positions. The Grievor was advised by letter dated December 13, 2007 that she was removed from her position, the position of Lead Building Custodian was eliminated, and there were no alternate positions available at that time. She was advised "this letter serves as your 30 days notice of layoff, as per Article 37". The letter also stated that, during the 30 day notice period, the Employer would notify the Grievor of any posted vacancies in order to avoid a layoff situation. The letter stated that if she did not accept any position offered, she could select indefinite layoff with the right of recall for up to one year, or select permanent layoff and receive severance pay. The letter also stated that the Grievor "will not be eligible to continue working in any capacity within the GBAC contract". The Employer's witness, Natasha McLean, Human Resources Director, testified that the Employer determined that the Grievor was lacking in effective interpersonal skills, one of the qualifications for the Building Custodian position at the Airport Terminal building.

With respect to whether or not the Grievor's employment was terminated by the letter of December 13, 2007, it is relevant to consider the subsequent events. The Grievor continued to be paid during the 30 day notice period, as stated in the letter. There are no bumping rights under the Collective Agreement and the Grievor did not have the option to bump into another position. The Grievor was offered the position of Cleaner, but the Grievor did not accept the position. The position would have started on January 15, 2008 and continued in effect until, at least, the date of the arbitration hearing. The Grievor was later offered the position of Central Registry Clerk, which she accepted. She commenced that position on September 16, 2008, and continued in that position until November 28, 2008 when she was laid off. She was permanently laid off and paid severance pay in January, 2009 when her eligibility for recall expired. The recall of the Grievor and the permanent layoff of the Grievor with severance pay, were in compliance with Article 37 of the Collective Agreement. The layoff on December 13, 2007 complied with Article 37.02. The Grievor was given her options on layoff under Article 37.08. She was paid severance pay under Article 37.14. The Grievor's employment relationship continued after the letter to the Grievor dated December 13, 2007. The

employment relationship was not terminated at that time, but continued until the Grievor's permanent layoff in January, 2009.

There was a vacancy in the Building Custodian position at the Airport Terminal in January, 2008. The Grievor applied for the position, but her application was denied on the basis of the Employer's decision that she was not eligible for the position. In the letter of December 13, 2007, the Employer informed the Grievor that she was not eligible to continue working in any capacity within the GBAC contract. The Employer decided that the Grievor was lacking in effective interpersonal skills, one of the qualifications for the position. However, the decision not to recall the Grievor to the Building Custodian position in January, 2008, is not the subject of the grievance before the Arbitrator.

The Union relies on the decision in *Fuller Austin Insulation Limited and CJA, Local 2103* (2002) 107 L.A.C. (4th) 421 (Casey). In that case a dismissal was found to be disguised as a layoff. The arbitrator found that there was no shortage of work. The grievor was dismissed for poor interaction with company management. The company suggested that it laid off the grievor, but did not rehire him, because they were concerned about potential sabotage if he was rehired. In that case, the employment relationship was severed. In this case, the employment relationship was not severed. The Grievor remained eligible for recall, was paid 30 days notice, was offered a position that she declined, was recalled to another position, and over one year later was permanently laid off and paid severance pay. Therefore, the facts of this case may be distinguished from the *Fuller Austin* case. I do not find that this is a case of a dismissal disguised as a layoff.

I find that the Grievor was laid off under the Collective Agreement and was not dismissed from employment on December 13, 2007. Therefore, the Grievor was not wrongfully dismissed as alleged in grievance number 07-15.

Grievance 07-16 alleges wrongful suspension. The Grievor was suspended with pay on December 5, 2007. The suspension continued in effect until December 13, 2007, when the Grievor was given notice of layoff. The Grievor was not given any written notice of the suspension with pay. She was informed about the suspension at the meeting on December 5. There are no significant disputes of fact about these events. The Grievor was told about the letter of complaint from the customer and told she would be removed from the site. She was told not to communicate with the customer or her

coworkers during the investigation. The Employer wanted the investigation to be unbiased and wanted to remove any possibility of interference with the investigation by the Grievor. The Employer submitted that it was standard practice to remove an employee from the workplace pending an investigation of this nature. The Grievor testified that she felt she was being disciplined by her removal from the workplace. The Employer did not complete the investigation before the Grievor's notice of layoff on December 13, 2007.

The issue in grievance 07-16 is whether or not the suspension with pay was disciplinary. The grievance alleges breach of Article 33. Article 33 is headed "Suspension and Discipline". Article 33.01 refers to attendance at a meeting "the purpose of which is to render a disciplinary decision". The Article also refers to notice of a meeting "where the disciplinary decision involves suspension or dismissal only". I find that Article 33 applies to a disciplinary suspension and does not apply to a nondisciplinary suspension.

The arbitral authorities on this issue find that a suspension with pay may be disciplinary or nondisciplinary, depending on the circumstances and the language of the Collective Agreement. A suspension with pay was found to be nondisciplinary in *Canadian Imperial Bank of Commerce and Union of Bank Employees* (1987) 5 C.L.A.S. 49 (Burkett). The arbitrator stated the following at paragraph 8:

> . . . A suspension with pay pending investigation is to be contrasted to a suspension with pay that is part of the corrective disciplinary system used by the employer, as in re *Goodyear Canada* [(1981) 30 L.A.C. (2d) 100 (Kennedy)], which clearly exhibits the hallmarks of corrective discipline. The suspension with pay in this matter is clearly of a different type than the suspension with pay in re *Goodyear*. It is not unusual for an employer to suspend an employee with pay pending the investigation of a serious charge. It is, however, in our view, unusual for a union to grieve prior to the employer deciding whether or not to discipline. Furthermore, whereas arbitrators have found that the failure of an employer to recognize, during the investigation stage, the disciplinary representation rights negotiated on an employee's behalf constitute a breach of the collective agreement, as in re *Hickeson Langs* [(1985) 19 L.A.C. (3d) 379 (Burkett)], it does not follow that a suspension with pay pending the outcome of an investigation constitutes an act of formal discipline against which an employee can seek relief. As we have found, the two events are separate and distinct in both timing and purpose. . . .

The Union referred to arbitral authorities where a suspension with pay was found to be disciplinary. I have considered these authorities, in particular, the *Riverdale Hospital* case and the *Toronto Humane Society* case. Both of these cases concerned a suspension with pay followed by a discharge. The issue in both cases was whether or not union representation rights applied at the time the grievor was suspended pending further investigation. Although there was a finding that discipline was imposed when the grievors in those cases were sent home pending investigation, it was also found that the employer's actions were part of the sequence of events leading to discharge. In this case, the Employer's actions were not part of a sequence of events leading to discharge. The *Riverdale Hospital* and *Toronto Human Society* cases may be distinguished from this case.

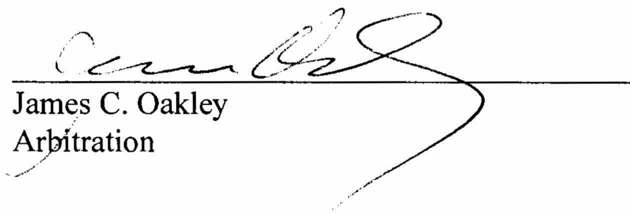
I agree with the observation made in the *Canadian Imperial Bank of Commerce* case, that it is not unusual for an employer to suspend an employee with pay pending investigation of a serious charge. Such an employer action is not intended to be corrective or punitive of the employee and does not have the characteristics of disciplinary action. In this case, the suspension with pay was for a brief period of time pending investigation of a customer complaint. The suspension with pay ended when the Employer laid off the Grievor. While the Grievor may have subjectively felt the suspension with pay was disciplinary, by an objective standard, the suspension was not disciplinary. The suspension was not corrective or punitive in nature, was not intended to form part of a disciplinary record, and was part of an investigation process. The action was not disciplinary, and did not violate Article 33 of the Collective Agreement.

In summary, with respect to grievance 07-15, the Employer laid off the Grievor, with recall rights, pursuant to the Collective Agreement, and did not terminate the Grievor's employment by the letter dated December 13, 2007. There was no wrongful dismissal of the Grievor. There was no violation of the Collective Agreement. With respect to grievance 07-16, the Grievor was suspended with pay as part of the Employer's investigation process. The Employer's actions were not disciplinary in nature. The suspension with pay did not violate the Collective Agreement.

Decision

For the reasons stated in the Award, the grievances are denied.

DATED this 26st day of April, 2010.



James C. Oakley
Arbitration