

Ref:

Re: Suspension,
Letter of Reprimand

**FINDINGS AND DECISION
IN A DISPUTE**
between

THE CITY OF CORNER BROOK
("the Employer")
and

THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 706
("the Union")

Grievor: Mr. Todd White

APPEARANCES:

For the Employer:

Presenter: Mr. Harold Smith Q.C.
Advisor: Mr. Michael Dolter, Chief Administrative Officer
Witnesses: Mr. Daniel Clancy, Foreman
Mr. Paul McIsaac, Foreman
Mr. Brandon McDonald

For the Union:

Presenters: Ms. Susan Coen, LLB, CUPE Legal & Legislative Representative
Ms. Donna Ryan, CUPE National Representative
Advisor: Mr. Rick Kean, President, Local 706
Witnesses: Mr. Carl Frost
Mr. John Specker
Mr. Wayne Peddle
Mr. Don Cook
Mr. Larry Osmond
Mr. Todd White, the Grievor

Arbitrator: Dr. John A. Scott

The Statement of Grievance reads: "The City violated the Collective Agreement in the suspension without pay of Mr. Todd White on Friday, March 20, 2009. Specifically Articles 1.01, 4.01, 9.01, 9.05, 16.01, 16.02, 17.01, 17.05 and all other pertinent related articles, the *Occupational Health & Safety Act* and Regulations, and the City's Policy and Procedures 10-05-10."

The Requested Adjustment reads: "Mr. White receive the lost wages, the letter of March 23, 2009 be removed from his personnel file and Mr. White receive a written apology from the City for the treatment and lack of proper procedure displayed toward him."

The Arbitration was heard in Corner Brook on December 2, 3, 6, 7, 2010.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived;
- there are no other points to be raised as to arbitrability or other preliminary objections;
- all witnesses were excluded until all their testimony had been heard;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within thirty (30) calendar days they will be referred to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for period of thirty (30) calendar days after its publication should issues of interpretation of the Award arise;
- witnesses would be excluded from the hearing until their testimony was heard.

ITEMS TAKEN INTO EVIDENCE:

- Consent #1 The Collective Agreement expiring December 31, 2017
- " #2 Letter of Reprimand, March 23, 2009
- " #3 Grievance form #2009-09
- " #4 Operational Services Department organisation chart
- " #5 2 hand drawn maps of Foremen's office & surrounding offices & hallways
- " #6 City of Corner Brook Occupational Health & Safety Program
- " #7a-cOH&S Committee Minutes (3 sets): Aug 31, '06; July 17 & Nov 21 , 2007
- " #8a-hOH&S Committee Minutes (8 sets): from Nov 30,'05 to Sept 1, '09
- " #9 Consolidated Newfoundland Regulations 1165/96 and 70/09 under *Occupational Health & Safety Act*
- DC #1 Sewer Maintenance Checks sheet March 20, 09
- " #2 Mr. Clancey's statement
- " #3 Diagram of Main Street manhole locations
- " #4 Sewer Maintenance Checks sheet undated with "comments"
- MD #1 Mar 21, 2009 letter: Mr. Dolter to Grievor
- " #2 April 3, 2009 letter: the Union to Mr. Dolter, responding to MD #1
- " #3 April 3, 2009 letter: Mr. Dolter to Union
- " #4 April 24, 2009 letter: Union to Mr. Dolter
- " #5 April 28, 2009 letter: Mr. Dolter to Union
- " #6 City of Corner Brook Policy # 10-05-10
- " #7 Safety Reminder (pay cheque insert)
- JS #1 Mr. White's witnessed statement
- " #2 Statement signed by Mr. Specker & Mr. Frost
- BMc #1 March 20 handwritten notes
- LO #1 Witnessed account of March 20, 2009 events
- TW #1 Grievor's WHSCC Occupational Health & Safety training certificate
- " #2 Minutes of Oct 30, 2008 Public Works Snowclearing meeting
- " #3 Series of 8 pictures of scene taken on Dec 1, 2010
- " #4 Series of 11 pictures of scene taken on Dec 6, 2010

- TW #5 Handbook for Construction Traffic Control Persons
- " #6 City of Corner Brook Policy # 10-05-13
- " #7 City of Corner Brook 12 July 06 Notice of verbal warning to Grievor
- " #8 October 19, 1990 letter: Mr. Joyce to Grievor
- " #9 August 7, 2006 letter: Mr. Bourgeois to Grievor
- " #10 Jan. 24, 2007 letter: Mr. Barnable to Grievor
- " #11 March 10, 2009 letter: Grievor to Mr. Dolter
- " #12 Dec. 15, 2008 letter: Mr Dolter to Grievor

Consent #9 Regulation 70/09, filed "August 7, 2009", reads, in part, as follows:

(2) Where the movement of vehicular traffic constitutes a hazard to workers, effective traffic control shall be provided.

(3) Traffic Control procedures shall at minimum meet the requirements of the Department of Transportation and Works "Traffic Control Manual for Roadway Work Operations" or procedures established by a municipality that have been approved by the minister and all relevant specifications.

- Exhibit #1 Copy of press report: "City workers injured after being struck by car"
- " #2 2009 Calendar
- " #3 *Traffic Control Manual for Roadway work Operations* Field Edition
- " #4 *Traffic Control Manual Dept of Transportation & Works* May 2010
- " #5 *Occupational Health & Safety Act*
- " #6 *Act to amend Occupational Health & Safety Act* (May 28, 2009)
- " #7 March 5, 2009 e-mail exchange: Mr. Giles and Mr. Ellsworth
- " #8 Inspection / Officer's Report transmitted by Fax Dec. 6, 2010

The Occupational Health and Safety Act (Exhibit #5) reads, in part, as follows:

Employers' general duty

4. An employer shall ensure, where it is reasonably practicable, the health, safety and welfare of his or her workers. 1978 c23 s4

Specific duties of employers

5. Without limiting the generality of section 4, an employer

(a) shall, where it is reasonably practicable, provide and maintain a workplace and the necessary equipment, systems and tools that are safe and without risk to the health of his or her workers;

(b) shall, where it is reasonably practicable, provide the information, instruction, training and supervision and facilities that are necessary to ensure the health, safety and welfare of his or her workers;

(c) shall ensure that his or her workers, and particularly his or her supervisors, are made familiar with health or safety hazards that may be met by them in the workplace;

(d) shall, where it is reasonably practicable, conduct his or her undertaking so that persons not in his or her employ are not exposed to health or safety hazards as a result of the undertaking;

(e) shall ensure that his or her workers are given operating instruction in the use of devices and equipment provided for their protection;

(f) shall consult and co-operate with the occupational health and safety committee, the worker health and safety representative or the workplace health and safety designate, where the employer is not the workplace health and safety designate, on all matters respecting occupational health and safety at the workplace;

(f.1) shall respond in writing within 30 days to a recommendation of

- (i) the occupational health and safety committee at the workplace,
- (ii) the worker health and safety representative at the workplace, or
- (iii) where the employer is not the workplace health and safety designate, the workplace health and safety designate at the workplace indicating that the recommendation has been accepted or that it has been rejected, with a reason for the rejection;

(f.2) shall provide periodic written updates to

- (i) the occupational health and safety committee at the workplace,
- (ii) the worker health and safety representative at the workplace, or
- (iii) where the employer is not the workplace health and safety designate, the workplace health and safety designate at the workplace on the implementation of a recommendation accepted by the employer until the implementation is complete;

(f.3) shall consult with

- (i) the occupational health and safety committee at the workplace,
- (ii) the worker health and safety representative at the workplace, or
- (iii) where the employer is not the workplace health and safety designate, the workplace health and safety designate at the workplace about the scheduling of workplace inspections that are required by the regulations, and ensure that the committee, the worker health and safety representative or the workplace health and safety designate participates in the inspection; and

(g) shall co-operate with a person exercising a duty imposed by this Act or regulations. 1978 c23 s5; 1999 c28 s2; 2001 c10 s25; 2004 c52 s1

Supervisors' general duty

5.1 A supervisor shall ensure, where it is reasonably practicable, the health, safety and welfare of all workers under his or her supervision. 2009 c19 s2

Specific duties of supervisors

5.2 A supervisor shall

(a) advise workers under his or her supervision of the health or safety hazards that may be met by them in the workplace;

(b) provide proper written or oral instructions regarding precautions to be taken for the protection of all workers under his or her supervision; and

(c) ensure that a worker under his or her supervision uses or wears protective equipment, devices or other apparel that this Act, the regulations or the worker's employer requires to be used or worn. 2009 c19 s2

Workers' general duty

6. A worker, while at work, shall take reasonable care to protect his or her own health and safety and that of workers and other persons at or near the workplace. 1978 c23 s6

Specific duties of workers

7. A worker

(a) shall co-operate with his or her employer and with other workers in the workplace to protect

- (i) his or her own health and safety,
- (ii) the health and safety of other workers engaged in the work of the employer,
- (iii) the health and safety of other workers or persons not engaged in the work of the employer but present at or near the workplace;

(a.1) shall use devices and equipment provided for his or her protection in accordance with the instructions for use and training provided with respect to the devices and equipment;

(b) shall consult and co-operate with the occupational health and safety committee, the worker health and safety representative or the workplace health and safety designate at the workplace; and

(c) shall co-operate with a person exercising a duty imposed by this Act or regulations. 1978 c23 s7; 1999 c28 s3; 2001 c10 s26; 2004 c52 s2

Imminent danger

8. A worker shall not

(a) carry out work where there exists an imminent danger to his or her or another worker's health or safety or the health or safety of another person; or

(b) operate a tool, appliance or equipment that will create an imminent danger to his or her or another worker's health or safety or the health or safety of another person. 1978 c23 s8

39. A committee established under section 37

(a) shall seek to identify aspects of the workplace that may be unhealthy or unsafe;

(a.1) shall participate in a workplace inspection that an employer is required by the regulations to conduct;

(b) may make recommendations to principal contractors, employers, workers, self-employed persons and the assistant deputy minister or an officer for the enforcement of standards to protect the health, safety and welfare of workers at the workplace;

(c) shall receive complaints from workers as to their concerns about the health and safety of the workplace and their welfare;

(d) shall establish and promote health and safety educational programs for workers;

(e) shall maintain records as to the receipt and disposition of complaints received from workers under paragraph (c);

(f) shall co-operate with the assistant deputy minister or an officer who is exercising his or her duties under the Act; and

(g) shall perform those other duties and follow those procedures that may be prescribed by the regulations.

Worker representative

41. (1) Where less than 10 workers are employed at a workplace, the employer shall ensure that a worker not connected with the management of the workplace is designated as the worker health and safety representative to monitor the health, safety and welfare of workers employed at the workplace.

(2) The employer shall provide and pay for training for the worker health and safety representative.

(3) The training provided under subsection (2) shall meet the requirements the Workplace Health Safety and Compensation Commission may set.

(4) The worker health and safety representative shall participate in the training provided under this section.

(5) An employer shall compensate a worker for participating in training under this section as if the training were regular work.

Duties of representative

44. (1) A worker health and safety representative or the workplace health and safety designate has the same duties as those imposed upon a committee under section 39, where that is reasonably practicable.

(2) A worker health and safety representative or the workplace health and safety designate, where the workplace health and safety designate is not the employer, shall consult with his or her employer while performing his or her duties under subsection (1).

(3) Where the workplace health and safety designate is the employer, he or she shall consult with the workers while performing his or her duties under subsection (1).

Discriminatory action prohibited

49. An employer or union shall not take a discriminatory action against a worker by dismissing him or her or by deducting wages, salary or other benefits, or by taking other disciplinary action against him or her

(a) because of the worker's participation in or association with the committee, worker health and safety representative or workplace health and safety designate at the workplace, or because the worker is a worker health and safety representative or workplace health and safety designate;

(b) because the worker has testified or is about to testify in a proceeding or inquiry under this Act or regulations;

(c) because the worker has given information to the Workplace, Health, Safety and Compensation Commission, an officer or another person concerned with the administration of the Act or the regulations concerning the health, safety and welfare of workers at his or her workplace; or

(d) because the worker has reasonably refused to work under his or her right to do so under section 45. 1978 c23 s47; 1998 c19 s20; 2004 c52 s11

ARTICLES FROM THE COLLECTIVE AGREEMENT CONSIDERED

ARTICLE I - GENERAL PURPOSE OF THE AGREEMENT

1.01 Purpose

WHEREAS, it is the desire of both parties to this Agreement to promote the well-being of the community, to maintain, the existing harmonious relations and settle conditions of employment between the City and the Union, to promote co-operation and understanding between the City and its staff, to recognize the mutual value of joint discussions and negotiations in all matters pertaining to working conditions, hours of work and scale of wages, to encourage efficiency in operations, and to promote the morale, well-being, safety and security of all the employees in the Bargaining Unit of the Union.

NOW THEREFORE, the parties hereto agree as follows:

ARTICLE 3 - CITY RIGHTS

3.01 Rights of the Employer

The Union recognizes the right of the Employer to hire, lay-off, promote, demote or transfer any employee and to suspend or otherwise discipline and discharge any employee for just cause. The Union further recognizes such other rights as the Employer might have conferred upon it by any Statute from time to time.

3.02 Employer Rights Subject to Grievance

The exercise of such rights by the Employer shall be subject to the right of the employee or Union to lodge a grievance in the manner and to the extent provided herein.

3.03 Right to Manage and Make Rules

The Union further recognizes the right of the Employer to operate and manage its business in all respects in accordance with its responsibilities. In addition to the location of its plants or places of employment, the methods, processes and means of performing the various works are the right and responsibility of the Employer. The Employer also has the right, and the Union recognizes it, to make and alter from time to time, the rules and regulations to be observed by the employees, which rules and regulations shall not be inconsistent with the provisions of this Agreement.

ARTICLE 4 - DISCRIMINATION

4.01 Discrimination

Subject to the provisions of the Human Rights Code, Newfoundland, the City agrees that there will be no discrimination, interference, restriction or coercion exercised or practised with respect to an employee by reason of age, race, colour, political or religious affiliation, gender nor by reason of his/her membership in a trade union.

ARTICLE 9 - HEALTH & SAFETY

9.01 Co-operation by Parties

The Union and the City shall co-operate in continuing and perfecting the safety measures now in effect and agree that the Occupational Health and Safety Act and Regulations are in effect.

9.05 Employer Responsibility

All employees working in any dangerous capacity, beyond their normal duties, shall be supplied with all the necessary tools, safety equipment and protective clothing when needed. All employees working on quarrying operations shall be supplied with safety boots and helmets which they shall, as a condition of employment, be required to wear at all times.

15.02 Arbitration Board Procedure

The Board may determine its own procedure but shall give full opportunity to all parties to present evidence and make representations to it. The Board shall commence its proceedings within fourteen (14) days after the Chairperson is appointed unless the parties otherwise agree in writing. It shall hear and determine the difference or allegation and render a decision within thirty (30) days from the time the Chairperson is appointed. The decision of a majority shall be the decision of the Board.

15.03 Decision of the Board

The decision of the Board of Arbitration shall be final and binding on all parties but in no event shall the Board of Arbitration have the power to alter, modify, or amend, this Agreement in any respect. Should the parties disagree as to the meaning of the decision, either party may apply to the Chairperson of the Board of Arbitration to reconvene the Board to clarify the decision, which it shall do within five (5) days.

ARTICLE 16 - WARNINGS & ADVERSE REPORTS

16.01 Warnings

Whenever management decides to discipline an employee in a manner indicating that dismissal may follow for repetition of similar activity, or may follow if such employee fails to bring his/her work up to a required standard by a given date, the Employer shall within five (5) days give written particulars of such discipline to the employee involved with a copy to the Union.

16.02 Adverse Report

An employee shall be notified in writing of any expression of dissatisfaction, or complaint ("adverse report") concerning his/her work performance within thirty (30) working days of the event giving rise to the adverse report. This notice shall include particulars of the work performance which led to such report. If this procedure is not followed, the adverse report shall not become a part of his/her record for use against him/her at any time. The employee's reply if filed within forty-five (45) days of receipt of the adverse report shall become part of his/her record.

16.03 Disciplinary Record

The disciplinary record of any employee shall not be used against him/her at any time in the following instances:

- (a) when eighteen (18) months have elapsed since a suspension, provided there has been no recurrence of a similar and/or any other infraction;
- (b) when twelve (12) months have elapsed since the issuance of a letter of reprimand, provided there has been no recurrence of a similar and/or other infraction.

ARTICLE 17 - DISCHARGE CASES

17.01 Dismissal/Suspension

An employee after the completion of the probationary period may be dismissed for just and reasonable cause upon the authority of the Chief Administrative Officer or Acting Chief Administrative Officer. Other persons in authority may suspend an employee but shall immediately report such action to the Chief Administrative Officer. Such employee and the Union shall be advised promptly in writing by the Chief Administrative Officer of the reason for such dismissal.

17.03 Reinstatement and Compensation

Should it be found upon investigation that an employee has been unjustly suspended or discharged, such employee shall be immediately reinstated in his/her former position without loss of seniority and shall be compensated for all time lost in an amount equal to his/her normal earnings excluding overtime during the next pay period immediately following reinstatement, or by any other arrangement which in the opinion of the conferring parties or an Arbitration Board or Arbitrator (if the matter is submitted to such Board) is reasonable.

17.05 Offences

Appropriate disciplinary action may be taken for the following offences:

- (a) Misconduct during employment
- (b) Incompetence and inefficiency
- (c) Failure to perform assigned duties
- (d) Disobedience of a superior
- (e) Insubordination or insolence to a superior
- (f) Summary conviction
- (g) Failure to observe rules and regulations
- (h) Incompatibility with other employees
- (i) Unauthorized absence from duty.

The above list is not to be construed as limiting the rights of management to take disciplinary action for other offences.

OPENING STATEMENTS

FOR THE UNION, Ms. Coen pointed out that the matter is disciplinary. There is no doubt of the fact of the discipline. The events are very straight forward and the Collective Agreement lays out very clearly the Grievor's and Union's rights in respect of such a matter.

In the Union's view the issue is a straight forward one of health and safety. No discipline whatsoever is appropriate in relation to the Grievor's action, *i.e.* using the radio system to contact coworkers who are working on a main street doing sewer maintenance manhole checks without a flag person. The employer has disciplined the Grievor, himself a health and safety representative and a Union officer. It was a wrongful discipline. There are no grounds for disciplining an

employee who, by virtue of his health and safety position, was acting as he was required to do under statutory and regulatory requirements. It is a question of whether he acted appropriately in the execution of his duties.

On the issue of quantum, on the Friday afternoon the City management initially ordered the Grievor to leave City property, and sent him home until the Monday morning when he was called in and given a letter of suspension covering the Friday afternoon suspension without pay. The pay was then reinstated. What remains is the fact of the suspension. The Union seeks to have this expunged from his record.

FOR THE EMPLOYER, Mr. Smith pointed out that an employee's personal file constitutes a permanent record of events which cannot be revised, and that the sunset clause (Article 16.03) makes it clear that, in any case, the matter is already dead by virtue of the time limits.

Ms. Cohen pointed out that the record does not die if there is a subsequent discipline for a similar matter, and further that, in the Union's view, settlement of the financial issue does not cover the Grievor's concern that he was improperly treated on the day. Therefore, the question of whether the Employer should or should not have sent him home is a key issue.

Mr. Smith again noted that the Employer has already reduced the suspension without pay to a letter of reprimand. Therefore, there is no value to the Grievor to proceed to consider the details of the discipline. The grievance procedure, itself, cannot change the grievance procedure.

There is a fundamental problem here. The grievance procedure itself is being violated and abused. The Employer is now being judged on an issue that has already been resolved. It is within the Employer's right to send an employee home. It paid him. It decided that it wanted him at home. That is within management rights, and not circumscribed by the Collective Agreement.

This case is absolutely simple. A lot of effort is going into something that is simply not a matter for an arbitration case. The employee took it on himself to use the radio system – which can easily be heard by the general public – to contact the workers involved, after determining that, in his view, flag persons were required. It was the Grievor that made this determination and made the contact, not the supervisor.

As a Health and Safety Committee member, the Grievor has no status and no right to do what he did. He was told that there were two people working on manholes without a flag person.

He then went to the supervisor's office, approached his own foreman, briefly commenting on the situation as he saw it, and then approached the foreman whose workers were involved. He grabbed the base station in the foremen's office, called the self-directed crew and effectively ordered them to stop the work. The Grievor took on the mantle of the whole health and safety committee, and that of the government office, to direct them to cease work, thus supplanting the supervisor and undermining the appropriate supervision. That is what he was disciplined for.

The facts of the situation on the street are not determinative. It was not the Grievor's role to make that determination, and he was told, in writing, not to do that in future. He arrogated to himself rights and powers that he did not have.

The Grievor will, undoubtedly, attempt to use legislation to defend his actions; but his duty is constrained by the process that was put in place by the Employer in accordance with the legislation. Employees do not take it on themselves to criticise employers or other employees over the public radio waves. The Grievor got a written reprimand. A written reprimand is not unusual in the circumstances. The grievance should be denied, in the Employer's view.

EVIDENCE

THE FIRST EMPLOYER WITNESS was Mr. Daniel Eugene Clancey. He has worked for the City for three years, and is currently the Water and Sewer Foreman. At the time of the incident from which this grievance has arisen Mr. Clancey was Public Works Foreman, the department in which Grievor was, and still is, an employee.

Mr. Clancey described the general responsibilities of the Water and Sewer department, which includes "flushing the system and checking for problems in an ongoing preventative maintenance" program. He also described a routine, regular weekly sewer check, which takes place each Friday at various check points located around the City, each protected by a manhole cover.

We check it weekly to see if maintenance is needed. There may be no problem at all; but if there is, it needs to be done. We do it Friday. We check to see that the cover is intact in the asphalt and then we pop the manhole and ensure that there is a good flow, and that it is free of debris. If anything is found, they will radio back and say, "Clancey we've a problem at such and such a place." I'll run in and have a look: maybe to just scoop it out or bring in a jet pump truck. The workers do not take a jet pump with them. They use a pickup to go from manhole to manhole. Normally this is done by a sewer maintenance person and a labourer.

Mr. Clancey also described the reporting form used to record the checks.

The forms go back to the records room where they are filed, and we can follow what the checks show or record any ongoing problems for upgrade decisions.

Mr. Clancey identified, as DC #1, the March 20, 2009 sewer maintenance check sheets, showing the locations checked each Friday. DC #1 is signed by Mr. Carl Frost and Mr. John Specker.

Mr. Clancey confirmed that Mr. Specker and Mr. Frost had done the checks that particular day.

He confirmed he had seen Mr. White, the Grievor, in the Foremens' office that morning. Asked which manhole check was actually the site of concern, Mr. Clancey answered, "The one at the Credit Union on Main Street." Asked to describe Mr. White's concerns, Mr. Clancey said, "I understood he had an issue about the men being out in traffic without traffic control." Asked if this was the first he was aware of Mr. White's concern, Mr. Clancey answered:

No. I heard him on the radio before he showed up at the office. I was in the office at my desk. There's a radio in the Foremen's office at the back of the room. He called to John and Carl that they should not be out in traffic without a flagger, that they could get knocked down, and that he'd a call that they were out in traffic and should not be out there.

Asked whether Mr. White was a Supervisor of some sort, Mr. Clancey answered, "No, he's not."

Asked what he had thought when he heard what Mr. White said on the radio, Mr. Clancey said:

I knew at the time they were Paul's men... I knew that when they came in we'd probably have a chat about it, right? They came back to the Foremen's office about 10:00 or 10:10... He (referring to the Grievor) came in through the Foremen's office door. I was doing paperwork that Friday morning. (Mr. White) said:
The boys should not be out in traffic. They'll get knocked down.
He went right back to Paul. Paul did not hear him first time... then he went straight to the radio... He did speak to Paul, but I don't know if Paul heard him.

Asked to estimate how long it was between the Grievor's speaking with Mr. MacIssac and his picking up radio, Mr. Clancey said:

Under a minute... He said it, but didn't have his attention... He took up the radio. He told the guys... He pressed the button, and said something like: 'Truck 48, John and Carl, you shouldn't be out in traffic without a flagger. I got a call...'

Mr. Clancey explained that all trucks have a number. Asked whether the Grievor had identified who was speaking on the radio, he said: "No, not to my recollection... He told them to get off the road." Asked if this is what radios are used for, Mr. Clancey answered:

Not normally for a worker to give direction to other workers unless he's a foreman or a lead hand.

Asked if there is any reason why he remembers these events so clearly, Mr. Clancey said: "I have a pretty good memory, and I wrote it down on a statement that day." He identified, as DC #2, the statement he had written at about the time of the events. It reads:

March 20, 2009

This is pertaining to the incident involving Todd white on March 20, 2009 between 9.55am and 10:10 am.

I was sitting in the foreman's office doing time cards when I thought I heard Todd white on the radio about truck 48 being out in the middle of the road without Flagg men.

Then a short time after that Todd was in the office, talking to Paul Mclsaac about truck 48 was out in the road without flagmen.

Todd then walked up to the radio and proceeded to call truck 48 first by the truck # then by the worker's name, once he had their attention he then told them they should not be out in traffic without flaggers or, they were going to get knocked down ,and that he got a call that they were out in traffic without flaggers.

I then asked Todd what is the problem because this all happened very fast, he drew a diagram of what the workers in truck 48 were doing by commerce court on main street.

Larry Osmond walked in and, was already aware of the incident. I said to Todd that Carl frost, and John Specker had not said anything to me, about feeling unsafe, I was not aware and, to my knowledge they had not refused the work they were assigned by the water and sewer foreman. I then replied if they have a problem and don't tell us how we can help them.

Paul and I began talking to Todd and Larry left the office. I am not sure but I believe Todd was looking for Keith or Eric.

Asked what Mr. White had done after speaking on the radio, Mr. Clancey said:

He began talking about the incident. He drew a diagram showing the truck in traffic and them working... Paul and me and Todd were in the office at the time. Todd left and I believe that he went looking for Keith or Eric.

Mr. Clancey confirmed that DC #2 identifies "truck 48" and working "by Commerce Court on Main Street" as the location. Mr. Clancey then said:

No. it was at the Credit Union, not at Commerce Court. I was not in Water and Sewer back then. I was in Public Works, and Paul MacIssac was the Water and Sewer Foreman at the time. Later I went to Water and Sewer foreman ... a couple of months after that... On the day of the incident Mr. White reported to me... Ya, that's what he described it, 'by Commerce Court'. This was at 10:00 AM, when traffic is slower and the workers would judge for themselves.

Mr. Clancey identified, as DC #3, a map of Main Street taken from City records, and identified the manhole showing on that map. Asked what is done on a routine check as in DC #1, he said:

You simply pull up and park the truck in front of a manhole. You have a flashlight and you pop the top and confirm flow. Then you get into the truck and go on. You radio back if there's any problems.

Asked how long this takes, he said, "just long enough to do that job." He also testified:

Now there's a different procedure for flaggers and traffic conditions. There is now a flag person with the crew for the first hour. He puts the signs out. The extra labourer does the flagging... The change took place in 2009. An extra man is sent out with the two person crew and does the flagging. That's not for all manholes: just the ones that need it. The Foreman and the Superintendent and the Occupational and Health and Safety Committee decided which ones. I'm thinking they have the extra person for about one hour.

Asked whether he or Mr. MacIssac took any further action once Mr. White left the office,

Mr. Clancey answered:

We began talking about the incident: Mr. White being on the radio, and the whole incident – they being out in traffic, and telling them to get off the road and coming on the radio ... not a common procedure.

ON CROSS EXAMINATION, Mr. White was asked to describe more fully the conversation between himself and Mr. MacIssac that occurred after Mr. White had left the office. He said:

Shortly after that Keith Costello came in. He heard the incident himself. And shortly after that Brandon MacDonald was involved. Keith Costello is Superintendent of Works and Services... Keith would have been Paul's boss. Keith was aware of the incident. I believe Carl and John came in afterwards. I remember talking to them afterwards. Mr. MacDonald got involved afterward, but before dinner. It was getting close to dinner... Paul and I went to Mr. MacDonald's Office. I was there, and Todd, Larry Osmond and someone else from the Union and Brandon MacDonald... It was Keith Costello who told us to go to Brandon MacDonald's office... Todd had drawn a diagram on a piece of paper on the desk in the Foreman's office. I'm not sure if he gave to Paul or took it himself.

Asked when he was asked to prepare his statement (DC #2), he said:

I can't totally remember. Normally we'll make notes if we have an incident... Someone asked me if I had a record and I said I'd written it. That was after the meeting in Brandon's office. I hadn't prepared handwritten notes before going to Brandon's office.

Referred to DC #2 he confirmed that he ...

thought I heard Todd White on the radio... Yes, it sounded like him; and when he

came into the office he confirmed it and went on the radio again... Once he came into the office, he did have my attention. I was sitting at an angle to Paul and could see; and when he first started talking, Paul had his head down. It happened very fast. I can't tell you word for word, but it was what is in the statement there.

Asked whether he heard what Mr. McIssac had responded, Mr. Clancey said: "I can't remember exactly. He did not respond right away. Then they were talking."

Asked whether Mr. McIsaac had shrugged his shoulders, Mr. Clancey said, "I can't remember Paul shrugging."

Ms. Coen then told the witness that the Grievor will testify that it was only after Mr. McIsaac had shrugged that he spoke on the radio for the first time. Mr. Clancey answered:

I heard Todd's voice the first time, and he pretty well confirmed it when he came in. I heard his voice and I know it was him on the radio.... No I did not see Todd using the radio, not before he came into the office. He said he got a call about the flaggers... When he came into the office, that was the first time I saw him. But I heard his voice the first time. Then he talks to Paul, and then he goes on the radio.

Asked what words the Grievor had used when speaking on the radio in the office, he said:

Just like on my statement (DC #2): 'truck 48.' He said. 'John Specker, Carl Frost.' They probably said, 'Go ahead'... and just as on DC #2...

Ms. Coen pointed out that nothing in DC #2 record Mr. White saying, "Get off the road." Mr. Clancey said: "No, I did not write that down." Ms. Coen then pointed out that the Grievor would testify that he had not said that. Asked if Mr. Clancey might be adding that direction to his statement at this point, he answered: "As the statement says. He gave them direction." Ms. Coen also pointed out that the Grievor will testify he did not know the truck number, and that he was "told" but was not "called". Mr. Clancey responded: "I understood that it was a 'call'." Mr. Clancey also testified that Mr. Osmond is a Health & Safety Committee member.

I think he was, and Todd was, I think. He was in the past. Larry was aware that they were out in traffic without flaggers. Larry came in through the office door. I can't say whether he came from, the left or the right.

Mr. Clancey confirmed he had told the Grievor he had heard nothing about a lack of safety. "I am not sure if Paul was still there, or whether he had already gone to look for Keith."

Mr. Clancey's attention was directed to one of the diagrams of the workplace (Consent #5). He confirmed that he had not seen Mr. White using the radio...

not before he came into the office. He said he got a call about the flaggers...
When he came into the office, that was the first time I saw him. But I heard his voice the first time. Then he talks to Paul and then he goes on the radio.

In his view, the Grievor had come into the Foremen's office "from the yard or the lunch room."
He does not know the direction Ms. Osmond had come from. He also confirmed, as noted in DC #2, that neither Mr. Frost nor Mr. Specker had said anything to him about a safety problem.
Asked to describe what happened in Mr. MacDonald's office, Mr. Clancey said:

Brandon had a conversation with Todd and us all, and he sent Todd home at that time for the rest of that day – not to come back to the yard – for "defamation to a fellow worker." I can't recite the exact policy. I believe he informed Todd of this, and to return Monday morning with a Union rep. He said, 'I haven't got time... don't stop, yes he did tell him 'not to step on City property'.

Asked whether the atmosphere was heated, Mr. Clancey said:

There was no swearing, but he was concerned for the issue... There was reference to two City policies that were infringed, one about a cell phone and the other I don't recall.

Asked whether he recalls Mr. White asking MacDonald, "Did you see me on the cell phone?" He said "Yes, and Brandon had answered, 'No, but you said 'call' on the radio.' Todd then said, 'No Brandon. I said, 'We got a call'." Mr. Clancey also confirmed there was an exchange about the cell phone policy, and recalls..

Mr. MacDonald saying that Todd had 'criticised a fellow worker'... something like that... Todd then left and he might have made a comment about a lawyer.

Asked if he'd been surprised by events at the meeting in Mr. MacDonald's office, he said:

I can't say totally shocked at that time. There were a few issues about the chain of command at work. There were problems that they used to report to Brandon. It was happening quite a bit. I can see why he did what he did.

Asked whether he would agree that the radio is used for a range of issues, and not always just between a foreman and a worker, but includes worker to worker communication as well, Mr. Clancey said, "I agree with that... yes." Asked whether a call had come from John or Carl for a flagger on that particular day, Mr. Clancey answered, "Not to my knowledge." Mr. Clancey does not know whether they actually got a flag person that day.

Mr. Clancey recalls a March 6 lunch room meeting that he had attended concerning two workers who had been hit by a car on March 3rd. It was attended by management people.

Upper management was there as well as Superintendents. I can't recall Brandon. Barry was there, Craig and Keith and Mr. Dolter. Various people spoke about the accident and Health & Safety. We talked about going out in traffic and patching potholes and traffic control and whatnot.

Asked whether it is possible that Mr. Dolter had said that he would "hold the slow, slow sign" himself, Mr. Clancey said, "I'd say yes but I can't recall it." Asked whether management people were talking about employees "having each other's backs" about Health & Safety, Mr. Clancey said, "Yes, they did talk about that." Asked whether the impression was that it was "a big deal," Mr. Clancey said, "Yes, especially after the accident." Asked about Mr. White's participation, Mr. Clancey said, "I don't recall what he said, but I do know that he did speak up: something about visibility and on a curve." Mr. Clancey does not recall Mr. Dolter saying anything like "How can you worry... I've been dodging bullets for twenty years."

Asked whether any further actions were taken as result of the March 3rd accident and the March 6th meeting, Mr. Clancey said:

The trucks were all fitted with lights, and a document done up on flaggers in collaboration with the Occupational Health & Safety... There wasn't a flagger at the March 3rd accident, and there was an Health & Safety investigation ... I know they did put a stop work order, and the City had to do up a pothole patching policy. Wayne Giles was at the office. The City had to develop this procedure. I don't know the exact wording.

ON REDIRECT EXAMINATION, Mr. Clancey testified that before the meeting in Mr. MacDonald's office he had ...

met with Keith and Brandon Keith and Brandon, and it was discussed and they were discussing disciplinary action... this first meeting – with Keith, Brandon, myself, and Paul – happened before the meeting I attended with the Todd there.

Mr. Clancey confirmed that the record of sewer maintenance checks showing various sites where "flag person" is required (DC #4) was put in place "probably before July 2009" and after the incident involving Mr. White and the radio.

Ms. Coen asked Mr. Clancey to clarify his testimony on cross examination about the difficulties that management was experiencing with employees not observing the chain of command. He said:

If someone has a problem, he normally comes to the foreman. And if he is not satisfied, he goes on to the Supervisor. And still, if there is no satisfaction, then it

goes to the OHS committee. There were times that they would tell the Foreman and then go on to Barry or Brandon and skip the in-betweens. That was going on.

Asked the basis for his observation (in DC #2) that Mr. Osmond "was already aware of the incident" when he came into the foremen's office, he said: "Larry already knew about the truck in traffic without a flag." Asked whether Mr. Osmond is a Union official, he said: "I believe he is a Occupational Health & Safety officer. I'm not sure."

THE SECOND UNION WITNESS was Mr. McIsaac, Works & Services Foreman with the City of Corner Brook, the position he held in March 2009. He confirmed he had seen the March 20, 2009 Sewer Maintenance Check form completed by Carl Frost and John Specker (DC #1).

It is a form used every Friday to check the sewer lines for possible problems. It is performed by a sewer maintainer and a labourer. They pull up each manhole and assess it, and do any work as required, or confirm that it is okay and go on.

Mr. McIsaac started as Works & Services Foreman in 2008, and forms like DC #1 had been in use for a number of years before he became Foreman. The forms are stored in the records room at the depot on Charles Street. He confirmed that both John Specker and Carl Frost had done this check before the March 20th, and that neither had asked for a flagger prior to March 20. The checks are done "every Friday", and had been done prior to March 3rd and March 20th. Asked whether anyone had ever asked for a flagger before March 20, Mr. McIsaac answered, "No." He testified that, after Mr. White had called the crew on the radio he did get a request for a flagger on that day, and also that he had been present when Mr. White had made that radio call. Asked for his recollection of what happened in the foreman's office on that morning, Mr. McIsaac said:

Yes, it was Friday morning. I heard him when he came in. He was speaking with Daniel Clancey. I was at my desk doing time cards and machine cards. I heard him talking to Mr. Clancey. I listened a little, but they were talking about flaggers and someone out in the middle of the road without a flagman... Todd was having "a good discussion with Clancey. It was back and forth. I did not really pay attention to it. I heard their chatter. Todd was under Clancey's supervision. It was none of my business. The whole thing maybe lasted one, maybe two minutes, tops. Todd came down and went on the radio. I asked him who was he calling, and there was no answer. I asked again, and there was still no answer; and a third time it was the water & sewer crew, and this was the third time that he was telling them to get off the road. And I should have been the one to tell the crew to get off the road...

Asked if there were employees laid off at this time of year, Mr. McIsaac answered, "Yes." Ms. Coen pointed out that other evidence will show that the Grievor only suggested they ask for a flagger. Mr. McIsaac answered: "No, he was telling them to get off the road because they did not have a flagger." Asked whether he had told the Grievor that it was his job as Foreman to make such a call, Mr. McIsaac answered:

No, it did not occur to me at the time. I was sort of taken aback. I did not realise that he was talking about my crew... He told them to get off the road because it wasn't safe... and then he left the office.

Asked what had happened after Mr. White left the office, Mr. McIsaac said:

After that myself and Clancey spoke about it. I said to Clancey, I should have been the one to tell the crew to get off the road if it wasn't safe.

Asked if he knew himself whether it was safe or unsafe, he said:

No, I did not know there was any problem with safety in their doing the manhole checks anywhere.

Asked how long a check takes, Mr. McIsaac said: "15 seconds. Including the stop and getting out, probably just as long or longer." Asked whether he knew, when Mr. White came into the office, where the crew was working, Mr. McIsaac said:

Yes, because I know what they do... The one on Main Street by the Credit Union building is the one.... When Todd was in the office, he said they were on Main Street at the Credit Union.

Asked whether he is referring to the position by Commerce Court, Mr. McIsaac answered: "No, at the Credit Union on Main Street. That's what Todd said." Asked what he and Clancey had a discussion about when Mr. White left, he said ...

that we should be telling crews when to go, and giving them direction... So Clancey and I went out to see Brandon MacDonald.

Asked if it would be usual for a non-supervisory worker to use the radio base station, he said:

It does happen when they are looking for someone or trying to get a message to someone, but not to order a crew off the road.

Asked whether he recalls having had a conversation with the superintendent, Mr. Keith Costello, before meeting with MacDonald, Mr. McIsaac said "No I don't recall any talk with Keith." Asked why he and Mr. Clancey had gone to see MacDonald, Mr. McIsaac said:

We wanted to speak about what happened. Maybe Keith was not in his office at the time. We passed by Mr. Ellsworth office. He was not there, so we went straight to Brandon.

Asked why they would bother the Director, Mr. McIsaac said:

Myself and Clancey had spoken and agreed that it wasn't right. We should give direction, not another worker giving directions. We told Brandon what just happened: the crew ordered off the road by Todd White for not having a flagger. We talked a bit back and forth and Brandon agreed with us that it was not right. Todd, at the time, was reporting to Clancey. So Clancey went and spoke to Todd before dinner. Clancey told me that he spoke to Todd.

Asked whether there was another meeting with MacDonald about this, Mr. McIsaac said, "No." Pressed as to whether or not he had attended another meeting with Mr. MacDonald, Mr. Clancey, and Mr. White, Mr. McIsaac again said, "No."

Mr. McIsaac confirmed that "John and Carl had requested a flagger", but could not be precise about when that request had been made and whether it was before or after the meeting with MacDonald. He does not recall when a flagger was actually dispatched to the crew.

The crew called me and said that they wanted a flagger for the main roads. It wasn't required for side roads.

Asked whether the crew had told him where they were, Mr. McIsaac said: "I sent them to Main Street by the Credit Union." Mr. McIsaac said he had no further contact or direct involvement in the discipline.

ON CROSS EXAMINATION, Mr. McIsaac confirmed there had been an incident in which two workers had been hit by a car on March 3rd, and that on March 6, 2009 there had been a general meeting in the lunch room involving management. He confirmed that "more than likely, yes" he had attended the meeting, but is not sure who spoke, or about what. He cannot recall Mr. Dolter saying that he would "hold the slow, slow sign" himself. He recalls seeing a directive from senior management that "there would be no more cold patching at night and that, if it is done in daylight, on a main road we'd have a flagger."

He confirmed the radio in the Foremen's office is used if something is needed by workers:

Yes there are five sets in that area and they are on at all times... You have to push to talk... In some trucks if you turn off the ignition the radios will go off and some if you put it on accessories the radios will work. Mr. Keith Ellsworth has a radio in his own office.

Noting his earlier testimony that he had heard a conversation between Mr. White and Mr. Clancey, Mr. McIsaac was asked whether Mr. White had spoken directly to him. He answered: "No, he did not speak to me. It was not until he went on the radio that I talked to him." When it was pointed out that Mr. White will testify that, before his using the radio he did speak with Mr. McIsaac, and that Mr. McIsaac had shrugged his shoulders, Mr. McIsaac said: "No, he talked to Clancey first, and not until he had used the radio..." Pressed on whether it is possible that Todd had spoken with him, Mr. McIsaac answered, "He did not ask me."

Asked if he can recall precisely the words the Grievor used on the radio, and whether it is possible that he had said, "You shouldn't be out there, it's not safe." Mr. McIsaac answered, "He used the words, "Get off the road"." It was pointed out that Mr. White will testify that he had suggested that they should contact the Foreman and ask for a flagger. Mr. McIsaac answered, "He did not 'suggest'. He told them to get off the road." Mr. McIsaac confirmed that he and Mr. Clancey were both still sitting down during this time, but that Mr. Clancey was still within earshot, and that the radio base station is "right behind me on a separate table."

Asked whether he had spoken with Mr Clancey after Mr. White had spoken on the radio and left, and whether he had seen Mr. Larry Osmond at all. Mr. McIsaac said, "No, Ma'am. I saw, or spoke to, Keith Costello later on that day. I don't know when." Asked whether he had spoken with Mr. Costello by the time he met with Mr. Clancey and MacDonald, Mr. McIsaac said: "No. Later in the day I talked to him." Asked whether the crew had come into the depot, Mr. McIsaac answered:

Mr. Frost and Mr. Specker, called me on the radio... I'd say they called me requesting a flagger person... No it was on the radio... I took a labourer from the Works & Services or the Public Works to go with them. I told him to take two paddles: one man to do the end of the truck and one to do the check... after Todd spoke to them on the radio they called me.

Asked again if he remembers them coming into the depot at all, Mr. McIsaac answered: "No. They did not come back to the depot. I dispatched a flagman to go and a truck." Asked what the normal morning break time is, Mr. McIsaac said: "10:00 AM for ten minutes."

There was no redirect examination.

THE THIRD EMPLOYER WITNESS was Mr. Michael Dolter Chief Executive office of the City of Corner Brook. He had been involved with the instant grievance "As a Step 3 grievance..."

As far as I know it came directly to me." Mr. Dolter confirmed he had responded to Mr. White's March 26 grievance (Consent #3) in a letter dated March 27, 2009 (MD #1) directing the Grievor to submit his grievance to Mr. Brandon MacDonald and that, if Mr. MacDonald's decision was unsatisfactory, to proceed to Step 3 as set out in the Collective Agreement at Article 14.03.

Mr. Dolter confirmed that he had not received any supplementary information from Mr. White in writing, but did receive information from Mr. Rex Hillier (MD #2) which sets out the Union's position. Mr. Dolter, himself, responded (MD #3) to Mr. Hillier's MD #2 letter, and subsequently received MD #4 as the Union's letter in reply.

MD #1

The City of Corner Brook

Hand Delivered
March 27, 2009
Mr. Todd White
Labourer, Public Works Depot
c/o City of Corner Brook
P. O. Box 1080
Corner Brook, NL A2H 6E1

Dear Mr. White:

Re: Grievance 2009-09

I am in receipt of your grievance dated March 26, 2009.

It is my understanding that this grievance has not yet been brought to your Department Head in accordance with Step 2 of Article 14.03. As such, I am unable to consider your grievance until Step 2 has been completed. Under Article 14.04 of the CUPE Local 706 Collective Agreement, steps may only be by-passed where a question of general application or interpretation occurs. Therefore, you should bring your grievance to Brandon MacDonald, the Director of Operational Services for his consideration.

I should note as well, that should Mr. MacDonald's decision not be to your satisfaction and you decide to proceed to Step 3, I will require sufficient particulars in writing on which to base my decision. This requirement is set out in Step 3 of Article 14.03. I will require details of the complaint and redress sought for each Article of the Collective Agreement for which a violation has been claimed

Michael W. Dolter, MBA, CMA
Chief Administrative Officer

ccs. B. Basha, Shop Steward
R. Kean, President CUPE Local 706
B. MacDonald, Dir. Operational Services
L. Sharpe, Human Resources Officer

MD #2

Michael Dolter,
Chief Administrative Officer
The City of Corner Brook
P.O. Box 1000
CORNER BROOK, NL
A2H 6E1

VIA FACSIMILE (709) 637-1543

April 3, 2009

Dear Mr. Dolter:

Re: Local 706 - Grievance #2009-09 (Todd White)

I am Writing in response to your letter of March 27, 2009 regarding the above-noted grievance.

In your letter you stated that the grievance did not follow 14.03 (Step 2) procedure.

The grievance specifically states suspension - Clause 17.02 reads: "An employee considered by the Union to be wrongfully discharged or suspended shall be entitled to omit steps 1 and 2 of the Grievance Procedure."

In this case, 14.03 (Steps 1 & 2) does not apply.

As per your request for sufficient particulars, details of the complaint and redress sought for each Article, I will endeavour to clarify.

Article 1.01 - Purpose - In Mr. White's case, the City did not maintain the harmonious relationship to promote cooperation and understanding with its staff. Mr. White, when made aware that workers were in the middle of the road with no flag person, spoke to Mr. Paul McIsaac, Water & Sewer Foreman, and asked him if he knew that the workers had no flag person. The Foreman said he didn't know. That alone violated the well-being, morale, safety and security of all employees.

Article 4.01- Discrimination - Violation of this clause results from Mr. White's membership in a trade union. Statements made by Mr. MacDonald have been heard and witnessed by other staff. Statements like 'Todd White is preventing the City from moving forward'; in Mr. MacDonald's letter to Mr. White on March 23, 2009: "critical remarks", "publicly criticizing staff", "as expected", "criticism of City staff", "a gross act of misconduct", and "ignore proper chain of command". These statements, being made without any proof, investigation or prior consultation with Mr. White, are nothing but discrimination.

Article 9.01 - Co-operation by Parties - Mr. White was acting in his role as a H&S Representative for his membership, as required by the H&S Act, with concern for their well-being and safety when known to be in harms's way. The foreman involved did not act to see if safety procedures were being followed.

Article 9.05 - Employer Responsibility - The employees were working in a dangerous capacity but were not supplied with the proper safety measures.

Article 16.01 - Warnings - Mr. White was notified and called to Mr. MacDonald's office on the morning of Friday, March 20, 2009 and suspended without pay for that afternoon. Mr. White did not receive a warning or any indication that suspension was probable.

Article 16:02 - Adverse Report - Mr. White did not ever receive an expression of dissatisfaction or complaint of his conduct in his 22 years of service for the City.

Article 17.01- Dismissal/Suspension - Mr. White was not made aware or advised in writing by you, CAO, of the reason for the suspension. He received a letter of explanation on March 23, 2009 from Brandon MacDonald, Director of Operational Services. The CAO was not in attendance at the meeting referred to in Mr. MacDonald's, letter and no investigation took place. The burden of proof rests with the Employer.

Article 17.05 - Offences - Mr. White was suspended in regards to Article 17.05 (a) & (g). Mr. White is innocent of both of the allegations.

All other pertinent Articles related to this grievance shall apply.

Occupational Health & Safety Act:

Section 46 - Mr. White did follow procedure and reported it first to Larry Osmond, chair of H&S committee, and then to Paul Mclsaac, Water and Sewer Foreman.

Section 49 (a) - Mr. White acted in his role as a worker H&S representation for his membership.

Section 50 - The actions taken against Mr. White are discriminatory.

All other pertinent sections of the OH&S Act that relate to this grievance shall apply.

City of Corner Brook - Policy Procedure - 10-05-10 - "This policy applies to all employees of the City of Comer Brook; union and **non-union.**" "It is the City of Corner Brook to promote and ensure appropriate conduct among staff and facilitate the fair and consistent treatment of all employees." We are not seeing this displayed by the City.

The redress is fairly self explanatory.

- > Mr. White receive the four (4) hours lost wages from Friday, March 20, 2009;
- > The letter of March 23, 2009 be removed from White's personnel file;
- > Mr. White receive a written apology from the City for the treatment and lack of proper procedure displayed towards him.

We await your response to this grievance.

Sincerely,
Rex Hillier
T/National Representative
C. Rick Kean, Todd White

MD #3

April 13, 2009
Mr. Rex Hillier
T/National Representative
Canadian Union of Public Employees
Corner Brook Office

Dear Mr. Hillier:

Re: Grievance # 706- 2009- 09 (Todd White Suspension)

This will confirm receipt of your letter dated April 3, 2009 regarding the Todd White grievance number 706 - 2009 - 09.

Please be advised that I am prepared to accept this letter as a written statement of the particulars of the grievance as required under step three of the grievance procedure outlined in the CUPE 768 collective agreement and as such I will respond under Step three.

With respect to your reference to clause. 1.01 – Purpose, let me state for the record that the management staff of the City of Corner Brook strives to promote and maintain a harmonious working environment for its employees. While we remain committed to this position, the task could be more readily achieved but for the disruptive actions of a few. A review of your letter suggests that Mr. White is of the opinion that he did nothing wrong in this matter and holds no remorse for his actions. In the meantime, after hearing Mr. White's comments over the radio communication system, three different managers came forward claiming what they heard was unacceptable. It appears that Mr. White either doesn't know where the boundaries of acceptable conduct are, or he has blatant disregard for those boundaries.

With respect to your allegations of discrimination, I can assure you with all certainty that any disciplinary action taken towards Mr. White has absolutely nothing to do with his membership in a bargaining unit or his position on the executive. On the contrary, I would suggest that Mr. White is using his membership in the union, and positions that he holds with that union as a screen to hide behind when challenging the role of management.

While I'm well aware and respectful of the role of the union executive member and/or occupation occupational health and safety committee member, the employee holding that responsibility must also understand that it is unacceptable to coach employees to refuse their assigned work tasks. In Mr. White's case the situation was aggravated by the fact that he used the public works radio system to communicate his view to the employees on how the work should be conducted. The concern of Mr. White with respect to safe work practice was not sufficiently urgent or of an imminent threat to the workers to warrant the course of action that he chose to take. The use of the open radio system to issue instructions to employees who are working under the direction of a supervisor, not only challenges the role of the supervisor by sending conflicting messages to the workforce but serves to subvert the authority of the managers involved. If Mr. White was not satisfied with the actions of the supervisor, there are proper channels to be followed.

While you claim that Mr. White has never received an expression of dissatisfaction or complaint of his conduct in his 22 years of service with city, I should make you aware that; in 1990 Mr. White was given a written warning about his conduct toward a supervisor; in July 2006, Mr. White was issued for warning regarding the violation of the cell phone policy; in January 2007 Mr. White was issued a letter from a Director of Community Services regarding his withdrawal of services in the animal control division; in December 2008, Mr. White was issued a letter advising the improper procedure in writing to City Council regarding the city's hiring procedure.

Clause 17.01 – Dismissal/Suspension does not require the Chief Administrative Officer to provide a suspended employee with written reason for the suspension. While the, clause does address both the issues of termination and suspension, it clearly states that "Such employee and the union shall be advised promptly in writing by the Chief Administrative Officer of the reason for such **dismissal**". Mr. White was suspended on March 21 by the Director and the Director reported the suspension to me as required. The letter dated March 23, 2009 was prepared and signed by the Director and while I was fully aware of the letter, it did not require my authorization or signature. Given the circumstances of March 21st, Mr. McDonald was correct to remove Mr. White from the worksite as is his prerogative under clause 17.01. However, matters of dismissal do, and will continue to require action from my office.

With respect to your reference to the OH&S act, while not conceding that Mr. White complied with OH&S procedure, or that he was acting in his role as OH&S representative, that is not the issue of concern in this case. The OH&S act and regulations DO NOT give Mr. White the right or liberty to take any action he sees fit if/when he is not satisfied with a particular result or situation. It was the actions of Mr. White beyond the scope of his responsibility as an OH&S representative that are unacceptable.

While pleased to see that you are recognizing of the Employee Conduct policy (#10-05-10), I should point out that the policy also states as Specific Objectives to: Encourage proper conduct; ensure that employees are aware of their obligations and

consequences of disregarding those obligations; and ensure that employee misconduct is dealt with in an appropriate manner. The policy further states that a "culminating incident" which in itself would not normally result in dismissal, but in consideration of other documented problems with the employee, justifies dismissal. Such language is consistent with recognized labour practices of progressive discipline.

During my review of the circumstances relating to this grievance, the Director of Operational Services, Mr. Brandon McDonald, has recommended to me that the four hours of lost wages to Mr. White be reinstated. While I am somewhat reluctant to accept this recommendation, I am prepared to recognize that the primary intent of sending Mr. White home on March 21 was to remove him from the work place as a disruptive force and not necessarily subject him to financial loss. Therefore, I will accept the recommendation and order that the four hours regular wages be reinstated to Mr. White. The letter of March 23 to Mr. White will remain on the personnel file as notice of unacceptable behavior. Further, while I concur that an apology is warranted in this matter, I believe that apology should come from Mr. White to the managers for his conduct.

The disciplinary action of removing Mr. White from the work place while the issue of his conduct was reviewed was proper and it (*sic*) the best interest of the organization. With the reinstatement of lost wages, it is my decision that the grievance is partially upheld.

If you have any questions related to this matter please feel free to contact me your convenience.

Sincerely,
Michael Dolter, MBA, CMA
Chief Administrative Officer

Cc B. MacDonald, Director of Operational Services
D. Park, Director of Corporate Services
S. Colbourne, Human Resources Officer
R. Kean, President CUPE 706

MD #4
April 24, 2009

Dear Mr. Dolter:
Re: Local 706 — Grievance #2009-09 (Todd White)

Thank you for your response letter received April 17, 2009 to my letter of April 3, 2009

Mr. Dolter, I wish to inform you that when it comes to the actual interpretation of the Collective Agreement, I have knowledge of its procedure. I know when the grievance requires to be submitted at a particular step. My letter did not ask you to accept it at Step

3. The Local 706 Collective Agreement, you referred to Local 768, signed by both parties gives us that right under Article 17.02.

It is obvious from your letter that you are only willing to listen to one side of the story; the side that speaks for management. I refer you again to your Policy 10-05-10. Listening to one side is not facilitating the "fair and consistent treatment of all employees". Especially when you say "I can assure you with all certainty that any disciplinary action taken against Mr. White has absolutely nothing to do with his membership in the bargaining unit or his position on the executive." Then you make an accusation against Mr. White and accuse him of using those positions as a screen to hide behind.

You also refer to Mr. White as coaching employees to refuse their assigned work tasks, as well as advising them on how the work should be conducted. Further, you say that "The concern of Mr. White with respect to safe work practice was not sufficiently urgent or of an imminent threat to the workers". How can you, as the CAO for the City of Corner Brook, make such a statement when there was no investigation done at that time, no report of an investigation since (to our knowledge), and that shortly after the incident, two (2) flagmen were put in place, This is a great example of a one-sided story.

You also refer to letters that Mr. White was issues (*sic*) over the past years:

> In 1990, a written warning about conduct toward a Supervisor. I would suggest that you would take the time to review he letters involved, which are still on his personnel file;

> In July 2006, issued warning regarding violation of cell phone policy.

- On June 26, 2006, Mr. Stephen Burbridge sent a memo to all O.S. staff advising that the use of personal cell phones will be prohibited as of July 1, 2006;
- On July 10, 2006, the policy was approved by Council. It was not printed until July 26,2006.
- On July 21, 2006 at 11:30 am., Mr. White received a verbal warning about "bringing" his cell phone on the worksite;
- Mr. White's warning was for bringing his cell phone on site, not using it.

> In January 2007, issued a letter regarding withdrawal of services in the Animal Control Division. This letter was concerning his request to resign from working with Animal Control. He was also informed that he did not attend training. He was never informed of the training. His request was denied. Mr. Paul Barnable wished that the letter would clarify any misunderstanding that existed. This, I assume, would be normal procedure.

> In December 2008, issued a letter advising the improper procedure in writing to City Council regarding hiring procedures. This was the case of a father and a taxpayer concerned for his son's opportunities within the workforce and conducted on his own time. No Employer has the right to interfere with that.

Mr. Dolter, none of these letters are (*sic*) of disciplinary action, reprimand, suspension or

dismissal . These letters are still on his file. Letters of this nature, along with the verbal warnings, are normally removed after three (3) months. Why were some of these letters placed on his file in the beginning? Please see that these letters are removed.

It is obvious that the Employer sees no wrong in their actions against Mr. White, only in him.

The Union is not willing to accept this grievance as being partially upheld.

It is the intention of Local 706 to refer this grievance to arbitration.

Sincerely,

...

(for) Rex Hillier

T/National Representative...

c. Rick Kean, Todd White

MD#5

The City of Corner Brook

April 28, 2009

Mr. Rex Hillier

T/National Representative

Canadian Union of Public Employees Commerce Court Building,

Suite 17 50 Main Street

Corner Brook, NL

A2H 1C4

Dear Mr. Hillier:

Re: Grievance # 706-2009-09 (T. White)

Thank you for your correspondence of April 24, 2009.

In your letter you stated the union's intention to refer this grievance to arbitration. With that understood, I will provide further clarification of the City's position.

The actions of Mr. White, on the morning of March 2009, were determined to be unacceptable by the Director of Operational Services and he was removed from the work site while the matter was investigated. The investigation confirmed improper conduct and a letter was provided to Mr. White on March 23, 2009 detailing the discipline, warning against similar incidents in the future, and confirming the four hour suspension without pay.

The union grieved the decision of the City on March 26, 2009. While there was a differ-

ence of opinion as to whether the grievance could be submitted to Step 3 without complying with the terms of Step 3, I did consider the facts you presented in your letter in coming to a decision. Additionally, after reviewing the grievance and the information provided in your letter with senior staff, it was recommended that the four hours of lost wages be reinstated as it was not the intent to subject Mr. White to financial hardship. The letter of warning will remain as part of Mr. White's disciplinary record. This decision was communicated to the grievor in my letter of April 13, 2009.

While your letter of April 24, 2009 does not address the actual issue of Mr. White's conduct on March 21, or provide any information related to his actions of that day, you did raise the issue of Mr. White's personnel file that I must address.

The personnel files of all employees are, and will remain, the property of the City. All documents contained in that file are also the property of the City and will remain so, and no relevant document is ever removed from any employee's file. Why you would suggest that correspondence touching on matters of discipline would "normally be removed after three months" is puzzling and incorrect. Your request to have letters removed is denied. I should point out that the only reason the issue of these letters was even raised was to correct your assertion that "Mr. White did not ever receive an expression of dissatisfaction or complaint of his conduct in his twenty-two years of service with the City".

I trust this clarifies the City's position on this matter.

Yours very truly,
Michael Dolter, MBA, CMA Chief Administrative Officer

ccs. B. MacDonald, Director of Operational Services
B. Ellsworth, Manager of Public Services
S. Colbourne, Human Resources Officer R. Kean, Local President
T. White, Griever

Mr. Dolter explained that, in responding to the Union, he had partially upheld the grievance, in his view, by virtue of the fact that he had the pay restored lost pay for the afternoon of the day of the incident. He insisted, however, that the letter (Consent #2) would remain on the Grievor's personnel file as "notice of unacceptable behaviour".

Mr. Dolter understands that the request to remove this letter is at issue in this arbitration. The letter relates to his having undermined the effectiveness of a supervisor (in this case, Mr. McIsaac) and using the radio to instruct fellow employees in a public way. These actions don't follow Health & Safety procedure, and fail to observe protocol.

He firmed that MD #3 confirms the reinstatement of the Grievor's pay that had been

docked for the afternoon of the incident. He testified that the Union did not accept his decision in this particular as having partially upheld the grievance. The Union insisted the matter proceed to arbitration. Asked what he understands the Union is seeking in the instant arbitration, he said: "I think they want the disciplinary letter be removed: that is to say, the written record." Asked whether, in his view, the letter can be relied on for additional discipline, Mr. Dolter said: "No. The time period has elapsed..." Mr. Dolter confirmed that the primary intention behind Mr. MacDonald's action on the Friday was "to remove the Grievor from the workplace, the distraction and disruption..."

He viewed the situation as a very difficult one in which to gather facts. It would be difficult to determine what actually happened, so it was decided to send him home... The claim made was that he was acting as a Union officer, but I said that was incorrect. His being a Union officer had no bearing on the action taken against the him.

Asked whether there is a history of the Grievor's challenging management, Mr. Dolter said, "Yes, that is correct." Asked if it is not a Union's right to challenge management, he said:

Yes, but there is a procedure to follow and that line was crossed. When the explanation was provided he was not willing to accept that explanation.

Mr. Dolter's attention was directed to his reference (on p 1- 2 of MD #33) to a "work practice" that "was not sufficiently urgent or of an imminent threat to the workers to warrant the course of action... . He responded that:

Flagging is a tool used to avert threats. In this case we assess risk. The actual task was done weekly. If a worker had called to say that the traffic was busy we would manage that risk. Mr. White, however, chose to take actions that related to what in his view was an imminent risk rather than an inherent risk. It really did not call for his more emergency action. There was no imminent threat; nothing had changed. In this case he challenged the chain of authority. If we let people get on the radio we could put people at increased risk, getting conflicts out there. Mr. McIsaac was the Supervisor in charge of the work done by the workers on the site.

By using the radio the Grievor had usurped the authority of the Supervisor. And the workers were also being told that they were doing the wrong thing. A lot of people monitor the radio. Sometimes there is banter between workers, and we got a call complaining from a resident who was monitoring the radio. On a daily basis people are monitoring that radio and listening to this.

Asked if he knew of any other bargaining unit member giving direction to another, he answered:

No, none. It would have been dealt with in the same way. We try to be consistent in our approach.

Asked if he has a radio in his office, Mr. Dolter said: "No. If I am listening to the radio I'm not doing my job."

Asked why, if the letter can no longer be used for disciplinary purposes, he is unwilling to take the letter off the Grievor's file. Mr. Dolter answered, "It's part of his personnel file."

ON CROSS EXAMINATION, Mr. Dolter was asked by Ms. Coen whether he could issue a further letter withdrawing the discipline and apologising and make that part of the Grievor's file, Mr. Dolter said, "I could, yes."

Asked to clarify the discussion about Step 1 and Step 2 carried on in the correspondence in evidence, Mr. Dolter said:

The Grievor was instructed to leave the workplace by a Supervisor. I am denying that it was a suspension, yes.

When it was pointed out that the Grievor was not paid, Mr. Dolter answered: "I'm sure you can interpret it as a suspension, yes."

Asked to name the three managers who had taken note of Mr. White's use of the radio, Mr. Dolter answered:

Mr. Clancey, Mr. McIsaac and Mr. Costello, I believe. He does have a radio. I'd have to verify that. The first two definitely and the third I can't recall.

Mr. Dolter testified he had not been involved in investigating the incident. Asked if anyone from the Human Resources division was part of the investigation, Mr. Dolter again answered "No. The issue was use of the radio. It would require little if any investigation." He confirmed that MD #6 is the policy 10-05-10 which at page 3, para. 2 states that:

PROCEDURE

When a supervisor becomes aware of a misconduct issue, he/she shall consider the severity of the matter and either (1) address the issue with a verbal or written warning if deemed warranted by the supervisor or (2) refer the issue to the Superintendent/Coordinator or Director or his/her designate, if the supervisor suspects that more severe disciplinary action may be warranted. Should an issue be referred to the Superintendent/Coordinator or Director or his/her designate and it is determined that disciplinary action may result in suspension or termination; an investigation into the incident will be required. An investigation team will be implemented consisting of the immediate Supervisor, Human Resources, and the Director, if necessary, or his/her assigns, who will meet with the employee to discuss the conduct. Union representation, if applicable, may be present if requested.

Following the meeting and depending on the nature of the incident, the investigation team may write a report and submit to the Director (if not a member of the investigation team) and/or the Chief Administrative Officer within 10 days of the conclusion of the investigation. The report will recommend the form of discipline that may be appropriate in this particular case.

The Director and/or Chief Administrative Officer will follow up in writing with the parties within 10 days, if possible, outlining the course of action in the case and the discipline issued.

Asked when he had learned of the incident, Mr. Dolter said, "By lunch time that Friday I was aware." He had seen Mr. Clancey's statement (DC #2).

I can't recall when exactly I saw it. It may have been late in March. I dealt with Mr. MacDonald directly.

Asked whether he had spoken with Mr. Clancey, Mr. Dolter said, "No Mr. MacDonald did that."

Asked whether he was aware of Mr. MacDonald's request that Mr. White stay off the Safety committee, Mr. Dolter answered, "No I don't get involved in that level of detail."

Mr. Dolter was asked about questions posed on direct examination concerning the Grievor's alleged history of challenging management. He was asked whether there was any record of discipline involved. Mr. Dolter answered: I don't think that he was disciplined... There was no discipline, but there was a history."

Asked why, in MD #3, Mr. Dolter says that there was not a sufficiently urgent safety issue, Mr. Dolter differentiated between imminent and inherent kinds of risk. Asked how long, in his view, it would take someone to secure a Supervisor while workers were actually at risk, Mr. Dolter answered, "There is no simple answer to that." He reviewed the history of the procedure that was being done on Main Street on March 20.

If someone says that there's an inherent threat, then we have to check the history of the cases and the records that are kept of that procedure.

Asked whether he recalls saying, himself, that he would hold the slow/slow sign, Mr. Dolter said:

I was prepared to do so, to go out with the crew, because I felt that the safety procedures kept them safe. That included calling in if they felt it was needed at any time. I made that point.

Asked whether he had made some reference to "dodging bullets for the last twenty years," Mr. Dolter said, "I did not make that statement." Asked whether he recalls Mr. Todd White speaking at that meeting, Mr. Dolter answered: "To be honest I don't recall Todd speaking up." Asked if changes were developed by himself or other management personnel, he said:

It was developed through others. Mr. Ellsworth said he was working on it. I signed off on some of it.

Asked whether this happened after March 2009, Mr. Dolter answered, "Yes they have been coming since that point." Asked if he recalls a handbook on flagging being passed out at the March 6th meeting, Mr. Dolter answered: "Yes I do recall that. It was when Mr. Ellsworth was talking about the new policy, but the Province's procedures don't always fit our needs." He confirmed he does not participate in the Occupational Health & Safety committee. "No. I read their reports." He is aware, however, that Mr. White has been a member of the Occupational Health & Safety committee "on and off, for years". Mr. Dolter also acknowledged a message that had been sent out on the back of pay stub encouraging safety awareness... "Yes it goes more to managing the inherent risk." With reference to the March 3rd accident, Mr. Dolter said, "We have not seen a final report on that so far as I know..."

Mr. Dolter was asked whether he would agree that each employee must take appropriate steps to address safety, Mr. Dolter answered, "Yes, I'd say that's correct."

ON REDIRECT EXAMINATION, Mr. Dolter was asked whether such appropriate steps include usurping the authority of the Occupational Health & Safety committee. Mr. Dolter answered, "No, it would not."

Asked whether the new policy changes proposed by Mr. Ellsworth deal with general issues of the City's work, Mr. Dolter answered, "No. It was to deal with asphalt." Mr. Dolter also said he does not know whether Mr. White was, in fact, on the Occupational Health & Safety committee on March 20, 2009. "I believe Larry Osmond was on the committee." Asked whether that committee has the power to change procedures, he said:

No it has to go to the Occupational Health committee and that has to be done in conjunction with management. It's done through this dialogue, and may end up applying them, for example, to warning lights on vehicles. That was done at the divisional level. In fact, at that meeting we agreed that they should be put on all vehicles even though many did have them.

THE FINAL EMPLOYER WITNESS was Mr. Brandon MacDonald, who was Director of Operational Services for the City of Corner Brook on March 20, 2009, having begun work there in 2007. He is a Professional Engineer currently employed with the Provincial Department of Transportation & Works. Mr. MacDonald confirmed that Consent #4 properly shows his place on the organisational chart for the City at the time. "I reported directly to Mr. Dolter, the Chief Administrative Officer. Mr. MacDonald described the role of the Division of Operational Services within the City of Corner Brook, including his legislative duties as City Engineer. He also confirmed that Consent #2 is the letter he wrote to the Grievor dated March 23, 3009 (*sic*) concerning "conduct". Mr. MacDonald noted that he had typed the document and that there were a number of "typographical errors, including the date which should read 2009 and the reference to the date of the incident should have been March 20th not March 21st." Consent #2 reads:

Todd White
Vice-President, CUPE Local 706
HAND DELIVERED
March 23, 3009 (*sic*)

RE: Conduct

Dear Mr. White,

On Friday, March 21st, (*sic*) 2009 two separate Foremen and the Superintendent of Water and Sewer heard you on the City of Corner Brook radio system making critical remarks of other workers undertaking work in the water and sewer division. Upon becoming aware of this situation, I immediately requested a meeting with you in which your CUPE representative Mr. Larry Osmond attended, in addition to Mr. Eugene Clancey. At that meeting I expressed that your actions violated City Policy by publically criticizing staff. I also expressed concerned (*sic*) that you were possibly engaged in the use of a private cell phone during work hours. You were summarily told that you were to leave the workplace without pay while I investigated the matter, and that a further meeting would be held 9 am the following Monday morning. As expected you disputed that you used a personal cell phone and further indicated that your actions over the radio system related to your feeling that you had a responsibility to identify unsafe work, as an OH&S representative.

With respect to the allegation of use of a personal cell phone during work hours, there is insufficient information to substantiate this claim and I am not pursuing it further. However, at issue here primarily is your criticism, of City staff over the radio system which in my opinion constitutes a gross act of misconduct and undermines the authority and effectiveness of the foremen who are actually charged with the direction and care of the

workforce. As an executive member of the union and a trained OH&S representative you are well aware of the required reporting structures. It has been my observation over many months that you frequently ignore proper chain of command and established regulations. Your conduct in this incident is a serious affront to the effectiveness and credibility of the organization in a very public way. Future incidents similar in nature will result in your termination.

Thus, in consideration of City Policy 10-05-10 and Article 17.05 (a) and (g) of the Collective Agreement, I am confirming my decision to suspend you, without pay, for the afternoon of March 21st (*sic*). Your reinstatement will be effective 8 am, Monday March, 23rd.

Sincerely,

Brandon MacDonald, P.Eng Director of Operational Services
cc. Kristy Osmond, Recording Secretary CUPE Local 706
Michael Dolter, Chief Administrative Officer
Steve Colbourne, Human Resources Officer
Barry Ellsworth, Manager of Public Services
Keith Costello, Superintendent of Water and Sewer

Mr. MacDonald described what gave rise to Consent #2.

On Friday the 20th Mr. Ellsworth came to see me to discuss an incident that had happened. He said that he was frustrated by Mr. White's actions. Three different people heard Mr. White on the radio system criticising two of our workers who were out working in the roadway without proper flagmen and White comes on the radio; 'You know that you're not supposed to be working without a flagger.' Mr. Ellsworth said it was difficult to manage workers, and Mr. White was not following protocols and asked that I manage the situation.

I had a conversation with Mr. Clancey, Public Works Foreman. He heard the conversation on the radio. I asked if that was what he had heard and I asked him to note it down, and I asked to see Mr. White and a Union representative.

Around 11:30 to 12 o'clock I sat down, as a follow up to the conversation with Mr. Ellsworth, with Mr. White and Larry Osmond. I basically asked if he were on the radio... He said he did, and followed it up by saying, it was his 'duty as an OHS person.' We also talked about cell phone usage, the policy on cell phones. I believe Clancey told me about his using a cell phone. I did not have a clear sense of that and Mr. White said he had not used a cell phone.

I told him that he was suspended without pay and to go home, to leave the work site, to return Monday morning to meet, and I'd follow up with an investigation of the matter... I also told him to avoid further disruption. I thought it was disruptive to have him in the workplace and that's why I asked him to leave.

I had Clancey's and Mr. Ellsworth's statements. Mr. White had not challenged the fact that he was on the radio. There was not much more to do but to follow up with a written letter, because I knew there would be due process for that document.

Asked if he had investigated the cell phone usage and to explain the reference to criticism of City Staff, Mr. MacDonald said:

There was nothing more to determine whether he did or did not use it. This was why I did not follow up on the cell phone use... It was criticising them for working in the road without proper flagmen. They were doing work that he thought they should not be doing. There are procedures for dealing with unsafe work, and there was a proper venue to raise that. In a room with a few people is one thing but on what is almost a public address system where everybody could hear it is another thing. It was a definite incident of undermining authority. Mr. White would know the authority structure. As an officer of the Union he'd have opportunity to interact with the different levels of authority.

Mr. MacDonald was asked about his recommendation to Mr Dolter (MD #3) that the Grievor's wages be reinstated. Mr. MacDonald said:

I guess upon reflection the unpaid suspension was too harsh, too soon. It did not really follow progressive discipline. First there should have been a letter of reprimand.

Asked whether it would not have been more appropriate to issue a verbal reprimand rather than a letter of reprimand, Mr. MacDonald said:

That was the balancing act. The public way in which he had acted, and the undermining of our Foreman. I saw it as being much more serious than a verbal reprimand, but not warranting unpaid suspension... I'm not certain what the record now shows by way of discipline, but I did have a discussion with HR, informally as it unfolded. Mr. Kennedy was brought in on Monday. He is a Supervisor of Public Works. He was aware of the whole incident..."

Asked why Mr. McIsaac appears not to have been involved, Mr. MacDonald said: "Because Mr. Ellsworth was responsible... and he was involved." He recalls the March 6th lunchroom meeting.

If I recall correctly, it was an open forum in the lunchroom to talk about the issue of the accident... I was part of the discussion, but don't recall particularly what I said. Mr. Dolter chaired the meeting.... On the use of flagmen, if I remember correctly, we were under the direction of the Occupational Health & Safety, the government department, but I can't be sure. The discussion was about flagmen in light of the accident and at the time there was some uneasiness... to talk about the issue in an open way.

Asked whether the Occupational Health & Safety committee was without authority, itself, to make changes in the workplace, Mr. MacDonald said, "That's correct."

He testified that BMC #1 were his notes of the meeting that took place between 11:30 and 11:45 AM on March 20th.

ON CROSS EXAMINATION, Mr. MacDonald said that he recalls Mr. Dolter saying something about holding the sign and "the issue about his roots, as I recall; but he does not recall any reference to dodging bullets." He also recalls a discussion between Mr. White and Mr. Ellsworth "about a flagger certification", but does not recall a discussion about positioning of flaggers, or sketches on a board in the lunchroom.

Mr. MacDonald does vaguely recall...

sometime around the middle of March, learning that Mr. White was going to become a member of the Occupational Health & Safety committee rather than an alternate. I have a vague recollection of that. After the accident there was a change ... I don't think that he was on the committee during my time there. Larry Osmond and Laura Whelan were at one meeting for the Union.

Ms. Coen said that Mr. White would testify that sometime around the 13th of March he had been called into Mr. MacDonald's office, and that when he went into the meeting, Mr. MacDonald had said, "I have a favour to ask ... that you not join the committee because you are totally hard nosed on safety." Mr. MacDonald said:

Yes, I don't recall the detail, but the intent was to have a one-on-one without anyone else there to say, 'We need to work together, not against each other on various issues.' .. No, not too "hard nosed" but "too close to the situation." Mr. White had a passion for either labour or safety. Sometimes they tended to get blurred.

Asked if Union officers are allowed to members of the committee, Mr. MacDonald said, "I'd say yes. It was more a preference."

Asked if Mr. Ellsworth had actually named the three persons who had heard Mr. White on the radio on March 20th, Mr. MacDonald said:

Clancey was the first and Paul McIsaac was second. The third I don't recall. I asked Mr. Clancey to come out to the office and I asked him for a written statement, which he gave me, I believe... Yes DC #2 is that statement... I cannot be certain whether I had that statement before I met with Mr. White.

Asked if he had questioned the Grievor on speaking to Mr. McIsaac before the radio call, he said:

I don't remember if I did or not. My approach was, Did you make comments on the radio? I don't think we did discuss his talking with Paul McIsaac, because I was primarily interested about what he said on the radio.

Mr. MacDonald does recall Mr. White asking, Did you see me on the radio, and his objecting to being disciplined for a cell phone policy. "Yes I do remember that." Asked how long the meeting had taken, he estimated:

About fifteen minutes... I think it was before noon on Friday. Most of the information was provided by Barry Ellsworth. He brought it too me, in fact, but we did speak with Mr. Clancey.

Asked if any further investigation had been done during the period between Friday and the Monday morning meeting with Mr. White, Mr. MacDonald said:

I had first hand from Mr. White and Mr. Ellsworth, who reported to me. I had some talk with HR about followup procedure. I spoke with Mr. Colborne in HR. I spoke specifically about the 'without pay' issue with the Director of Public Services.

Asked whether he recalls Mr. Osmond coming to him and saying that Mr. White had not been using his cell phone, Mr. MacDonald said, "Yes, I do remember that. As memory serves it was a call to or from the lunchroom."

Mr. MacDonald had no role in assigning flaggers on March 20, and had no role in the subsequent management decisions on that matter. "I don't believe so." I left in August of 2009."

ON REDIRECT EXAMINATION Mr. MacDonald testified that the notes were used in preparation for the Monday morning meeting. Asked whether he is aware that Mr. White feels that he was treated as a common criminal by him, Mr. MacDonald said, Yes, he made that statement. Mr. MacDonald confirmed that

The notes record everything. If I took the effort to write them down it was pretty close to what was relevant to the discussion.

Mr. MacDonald confirmed that Mr. White had brought a number of Union representatives with him to the meeting on Monday morning. Asked if that was normal, he said:

No, I was a bit taken aback that so many filed in... The Union provided no further evidence to support Mr. White's version of the story.

THE FIRST UNION WITNESS was Mr. Carl Frost, who has been an employee of the City for 21 years. He was with sewer maintenance "for about eight years" in March 2009.

I did a bit of everything, sewer maintenance, bus driver, HEO. In March 2009 I was sewer maintenance. Keith Costello was Supervisor, and under Keith it was Paul McIsaac.

Mr. Frost said he had not received an update from the City about Health & Safety, and that he had never asked for a flag person, and also that it is his handwriting on DC #1.

We'd pickup those sheets on Friday morning. We'd get on the truck and check out each manhole site. We'd go through this list and see if its flowing and for any obstructions. It's for insurance reasons, and to rectify any problems before the weekend. We park as close as possible to the manhole as close as we're allowed.

Asked how long it would have taken in March 2009 to perform a check, Mr. Frost said:

I'd say five to ten, maybe fifteen minutes, with the snow and frost. Sometimes you have to use a pick or a steel bar to lift the cover. In the summer it would take about five minutes... It could be three minutes or five minutes that the manhole is actually open, depending on how well you can see or depending on if there's any debris there or not. If we have to do a flush, we'll call back later and we may have a flagman because the road is blocked off. I usually check off on the list as I go along. That way I don't have to go back. It's my system. I put Johnny Specker there, so I'd know who was there with me. I was responsible for sewers... The form is changed since I finished with water and sewage. They added a few and took a few off. I left water and sewage last spring.

Asked whether either of the two men in the truck direct the traffic, he said "No". Mr. Frost testified that, at the manhole by the Credit Union, they checked the manhole and ...

Johnny Specker got called on the radio. It was Todd, and he asked Johnny if we had a flagman. I was outside. I did the manhole. I came back and got back in the truck. Johnny said that Todd called and wanted me to call him back. I did. He asked if we had a flag person, and Todd asked me to go back to the depot and ask the Supervisor for a flag person because it's too dangerous to be out in the road.

Asked if he heard this comment himself, Mr. Frost said: "Yes, I was talking to Todd then."

Asked if Todd had been critical of any City staff, Mr. Frost said: "No. He was part of Health & Safety. Asked if he had said anything negative about any Foreman, he said, "No." Asked if Mr. White had ordered himself and Mr. Specker to get off the road or to leave the job or anything like that, he again answered, "No." Asked if he was surprised by Mr. White's concern, he said:

No. Like I said he was part of Health & Safety, and I thought it was part of his job. Somebody has to look after each other over this... We went back to the Depot and asked for a flag person. It took a while, and then we got one. We radioed Paul and asked for a flag person and then we went back. He said 'come back to the depot, and we'll work something out.' That wasn't his exact words.

Asked if there was any discussion of what manhole the crew was working on at the time, he said:

No, we were stopped work and we were on the way back to the Depot by ourselves anyway. When we got to the Depot we asked for a flag person and Paul told us, 'We're working at it.' As far as I know, we were back at the Depot when he said, "We're working at it." ...We got the flag person at the depot. I guess I was in lunchroom waiting to find out if they got one. Then we left the depot and finished our checks.

Asked whether they had just one flag person, Mr. Frost said:

Paul was getting us just one, but I think Keith told him to get us two... I'm not sure... Yes, we did get a second flag person. They got on a truck. We told them where we were going and how to set up. They stayed with us until the checks were done. It's been that way ever since. Now when we do this there are two flag persons there, up to sometime in the spring.

Asked if anyone from management asked him about what happened with Todd, he answered:

No. The day before this (arbitration hearing) was the first I heard about the event since it happened. I didn't know anything about it.

Asked what the radio is generally used for, Mr. Frost said:

Calling my foreman, or the Town calling me, or calling another employee where he's to. I may need something out of a truck... I've heard a lot of foolishness on it, not protocol. There's a few things that should not be said, but according to the City it's only for City use.

ON CROSS EXAMINATION, Mr. Frost testified he had never served as a supervisor and has worked on sewer maintenance for approximately eight years.

He confirmed the sewer checks had been done previously without flag persons. Asked if, prior to this incident, he was aware that, if he needed a flagger, he could call one, he said: "Yes and no. When you are told to do the checks we should have had it." Asked again if, prior to March 20th, he had known that he could have asked for a flag person, Mr. Frost said, "No."

Asked if that means that flag persons were not very often used by sewer workers, he said: "All I can say is that by past practise they were not in place, and that's it." He had been aware of his right to refuse unsafe work "for years I guess, but I never exercised that right before March 20th."

Mr. Frost was questioned about his estimate of ten to fifteen minutes per manhole site inspection in March. He maintained that those estimates were accurate, and also testified that, on the morning in question, there was no difference from the normal. He does not recall whether they left the depot at the normal time on that particular day, but recalls that it was not raining.

He described in detail the actual series of stops prior to the stop on Main Street and the procedures used in making the sewer check. Mr. Frost estimated that they had taken

... between five and ten minutes to complete the check. ...That includes getting out of the truck and back in, the flashlight. That one isn't really deep. Johnny was back in the truck first. He heard Todd on the radio. I was putting the shovel back in the truck.

When he actually got back in the truck he had not heard Todd on the radio.

No. Johnny said Todd called and he wants me to call Todd. So I called. He asked if we had a flag person, and then said, "I suggest you get one." We were leaving there anyway. We'd normally go to Station Road. I realised that I should have a flag person.

Asked if they waited in the Depot for a flag person, Mr. Frost said, "I guess so yes. We were waiting for flag people." Asked if he was waiting because Mr. White said, "You're supposed to have a flag person", he said, "Well I'd say yes I was waiting because of Health & Safety. He confirmed Mr. White was neither a Foreman nor a Supervisor. Asked if the only reason he had requested a flag person was because Mr. White had told him to, he answered:

He'd brought it to my attention, yes, that we should have flag people. Todd said that it was too dangerous to be out in the road and suggested that we come back and get flag people.

Asked whether Mr. White had actually come by the job site to inspect, Mr. Frost said, "No, not that I know of." Asked how, in Mr. Frost's view, Mr. White would have come to the conclusion that it was too dangerous. Mr. Frost answered:

I heard that someone had told him we were out in a dangerous situation without a flag person. Something happened a couple of weeks before that pushed it ... that was patching...in the dark.

Asked to explain how this fits with his having done the same job for many years without a flag person, Mr. Frost answered:

It was always dangerous... but it was brought to light. But it should have been a long time before, in my opinion.

Mr. Frost confirmed despite the accident on March 3rd he had done the normal Friday sewer check on Friday, March 10th no flag persons requested on the 10th or 17th of March, 2009. "No. Like always." A Flag person had been requested on the 20th because of the conversation he had with Mr. White.

He also confirmed that it is now normal to have two flag people, and that sites on the current list that require flag persons are done first. The flag persons are then released while the crew continues to complete the listed sites. On March 20th, the two flag persons did stay with the crew until Mr. Costello decided what was needed to manage the inherent risk.

Mr. Frost agreed that there is a good chance, if one were to use the radios inappropriately, someone in Corner Brook would be aware. "The City is sensitive to what is said on the radio."

Mr. Frost was asked whether, in effect, what Mr. White had said over the radio was that You're not doing your job because you're not using flag persons. Mr. Frost answered, "No, it did not sound like that to me. It was someone with Health & Safety watching my back."

THE SECOND UNION WITNESS was Mr. John Specker, who has worked with the City since 1997 and is a pipe fitter in water and sewage.

Sometimes I do the manhole checks, four or five times a year, half a dozen times maybe, in the winter time. I'm second checker mostly with Carl Frost and Tony Drover, the other Maintainer.

Asked whether he had ever requested a flagger, Mr. Specker said:

No. Past practice, right? Normally when you do the checking, you wait in the lunch room for a foreman's order; then you get your gear from the stock-room and get into the trucks and head out to wherever the jobs are. Usually I'm a passenger.

He confirmed his name appears on DC #1, and recalls being assigned the job by Paul McIsaac.

Carl and me, we got out gear and got out to the truck. We might have gassed up and maybe delivered the signs or barricades and then went on with our checks. We went into town first by Tim Horton's, and then headed to Main Street.

We checked the manhole. We were parked by the side of the road, the right hand side. Carl wanted it parked there, but I wanted it in the middle of the road. We discussed it on the ride in. I said in the middle of the road and we need a flagman, and Carl said, no by the side of the road. I asked him to put the truck in the middle of the road to block us in case something came by. He did not want to do that either. It wasn't long before that that the two people got injured.

We checked out the manhole. Everything was alright, so we went back to the truck. I got to the truck first. I heard a call for him on the radio. Carl was putting the pick in the back of the truck. I answered the call and heard Todd on the radio. He asked where we were. I said on Main Street, and he asked if we had a flagman. I said, no. Then Todd suggested that we call the foreman and get a flagman. So I called the Foreman, Paul McIsaac, and asked him could we get a flagman. The foreman said, "Stand by" and we waited for a minute. He called us to come back to pick up the flagmen. One fellow did the work.

So we went back and got flagger. I might have been talking to the Foreman for a few minutes in the depot, in the foremen's office... I remember Paul was there, and Keith Costello was in there standing up by the window. Clancey may have been there, I'm not sure. Yes, Keith was there, back where the coffee machine is, looking out the window...

We picked up one flag from the stockroom, across from the office, there and then proceeded out to the truck. We started to leave over by the gas pumps and we got a call from Paul McIsaac to come back, you have to get two flagmen. We went back and waited there half an hour/forty-five minutes. They had to call men in to go flagging. We waited out in the truck. We were outside and inside for a few minutes. That was around break time.

Asked whether he had seen or spoken with Todd White, Mr. Specker said:

No I didn't see him. Then we went back on the checks with the flagmen and the signs. We had the paddles and signs aboard the truck for them. They went on the regular checks and did the busiest streets first. We did the flagman roads first to get the flagger freed up.

Asked whether Mr. White had said anything critical of the City staff, Mr. Specker said,

"No." Asked about Mr. White's tone of voice, Mr. Specker said:

Regular tone. I was kind or relieved, actually, to get flagmen, and then we wouldn't have to be out in the middle of the road.

Asked what he has heard the radio used for, Mr. Specker said

For foremen to give orders, and calling for parts, and calling co-workers looking for location for jobs you're needed on.

Mr. Specker confirmed that he has done manhole checks since the March 20, 2009 incident.

Only last week we had flagmen actually. That was my first time since last winter. They were with us for four or five stops, on the West Valley Road and two on Main Street on Upper and Lower Main Street.

Mr. Specker confirmed that he had attended the lunchroom meeting on the 6th of March:

It was about safety and watching each others' backs and trying to figure out the best way to park the truck and the best way for flaggers to set up... Two fellows got knocked down just before that... Brandon MacDonald spoke and Craig Kennedy and Mr. Dolter.

Asked whether he had ever requested a flag person, himself, Mr. Specker said:

Yes, certain times: anytime we're out in the middle of the road and it's busy. If we were using a tractor there in the middle of the road, we'd need a flagman.

Asked if that was before or after 2009, Mr. Specker answered, "Both I'd say."

He confirmed that he has a flagger's certificate and has flagged. He signed JS #1 which was written by Mr. Todd White and witnessed by, amongst others, Carl Frost and himself, summarising the events as Mr. White recollects them. "I signed it just after it happened, within a week, say." Mr. Specker also identified as JS #2, a statement dated March 24, 2009 signed by himself and Mr. Carl Frost which reads, in part, as follows;

We the undersigned, John Specker and Carl Frost, were not embarrassed in any way when Todd White called over the radio to confirm if there was a flagman at the work site. Immediately following Todd radioing us, we were told to use one of us as a flagman. Shortly after that, we were told to get off the road and wait for a second flagman, proving that flagmen were required on the job.

ON CROSS EXAMINATION, Mr. Specker confirmed that JS #1 is

...roughly the way it happened. What I told you today is roughly the same thing... I thought he called for Carl and he thought he called for me and I answered.

Mr. Specker confirmed that Todd White had asked him to sign JS #1 but had not told him why. "No he just said that he was covering his own self." He confirmed that Mr. White is a member of the Union – "Yes. Vice President I think" – and thinks Mr. White was on the Health and Safety committee. "I'm not sure if it is alternative or on OHS." Asked if he would agree that something happened to persuade Carl to change his earlier decision, Mr. Specker said, "I didn't convince him."

Asked if Mr. White had told him to get off the road, Mr. Specker said, "No." Asked who did tell them to get off the road, Mr. Specker said, "Paul McIsaac, did but we weren't out to the depot at that point."

He confirmed he has been an employee since 1997 and has never served as Foreman. Mr. Specker confirmed that "Generally the checks are done using a pickup truck." He had worked with Mr. Frost since about 1989.

Asked when he had first learned of Mr. White's grievance, Mr. Specker answered: "A couple of weeks ago. I knew something happened. I knew the incident happened." He had not taken notes about these events, but had "signed a paper about it in the lunchroom". Asked what the paper had said, Mr. Specker said: "I can't recall: just something about the incident, but I didn't keep a copy. I just signed my name." Asked whether it was routine for Mr. White to behave as he had, Mr. Specker answered, "I don't know. We'd had a couple of people run over a couple of

days before. " Mr. Specker confirmed that he knew that he had the right to refuse dangerous work but he had not done so. "No, I'd talked to Carl Frost. He's the senior man. We'd been doing it for years." Asked whether he's aware that Mr. Frost had a different version of the radio conversation between the truck and Mr. White, Mr. Specker answered, "No." Asked to describe his coming to be aware of the call from Mr. White, and whether he understood that Mr. Frost had heard him talking with Todd before he got in the truck Mr. Specker said:

He just called and asked for me on the radio. I believe "Carl Frost" and then I heard my name so I answered him... I'd say so, yes. I remember it because I talked about it to Carl. The boys were just run over. I know it was wrong but he was the senior man.

Asked if he had ever asked for a flag person when doing the manhole checks, he said: "I didn't think that they would give us one... past practice."

Mr. Specker confirmed that on the morning of the 20th they were given not one flagger but two, and that both were called in from layoff. He also believes that were a lot on layoff at the moment, and that the flaggers are unionised. Asked whether they were required to call in people from layoff, Mr. Specker said:

No, not necessarily. They could have used a few fellows there. Flaggers were used on both ends of the work site. I believe it was two signs used each way that day. They stopped traffic both ways, yes.

Asked how long it took to get the manhole off and look down into it, Mr. Specker estimated "between five and ten, maybe fifteen minutes."

THE THIRD UNION WITNESS was Mr. Wayne Walter Peddle, an employee with the City for 25 years and an Animal Control Officer for approximately 17 years. Mr. Peddle testified that,

I was at the City pound and I remember Todd calling John Specker on the radio. He came back, "Go ahead." Todd got back on the radio, "Are you working out in the middle of the road." Then John Specker said, "Yes." Then Todd replied, you shouldn't be out in the middle of the road without a flagman." And that is what I can remember.

Asked if Mr. White had been critical of any City staff on the radio, Mr. Peddle said, "No."

Asked what Mr. White's tone had been, Mr. Peddle said, "Same as men on the radio." Asked if he had had any reaction to hearing the call on the radio. Mr. Peddle said:

I wasn't happy about it because just before that there was an accident where two guys almost got killed, and after that we had a safety meeting in the lunchroom

where we're supposed to watch out for each other. Then they put two men out on the road. It should not have happened.

Mr. Peddle recalled that Mr...

Craig Kennedy did most of the talking in the lunchroom meeting. I don't remember anyone else. I may have had to go on a call. He was the only one who spoke while I was there.

He testified that he, himself, had been involved in a workplace accident that had resulted in a dislocated shoulder and being off work for a few months. He had been "part of a paint crew doing a cross walk. I went back on the paint crew." He had not requested a flag person "because I might get the reputation. Every time we ask for a flag person we don't get one." Asked if he had ever actually asked for a flag person and been denied, Mr. Peddle said, "No." Asked whether he is aware of his right to refuse unsafe work, Mr. Peddle said,

No. I did not know what would happen if I asked. I don't like to cause trouble. I left it alone and done my work.

ON CROSS EXAMINATION, Mr. Peddle testified that his own workplace injury had occurred "around 20 years ago." He signed JS #1 at Mr. White's request. "Because he might have to deal with management down the road. I signed it a few days after the incident."

There was no redirect examination.

THE FOURTH UNION WITNESS was Mr. Don Cook, a labourer with the City of Corner Brook. Mr. Cook testified that on March 20th

We were in the lunchroom for the ten o'clock break. I was there and Todd was there and about a dozen others.... One of the boys came in; Phil Whelan, for his break. He asked was Water & Sewer exempt from flagmen. Todd asked him why, and he said, "Specker and Frost are out in the road with a manhole cover up in the middle of traffic, not safe." Todd got up to find Larry. He is over in the mechanic's lunchroom. He's on the safety committee. I was sitting next to Todd. Larry's a welder. He has his lunch out in the mechanic's lunchroom.

So by that time the break was pretty well over. I was there working in the stockroom opposite the Foremen's office. When I got there Todd was coming down the hall from the Foremen's office. I was down there stood up at the wicket. There were two fellows in there, Paul and Clancey. I heard Todd say, "Boys we got a call. You've got men out in the road with no flags." I could hear Todd speak. Then I heard Todd calling John and Carl and he said: "Boys, we've got a call that you were out on the road with a manhole cover up and no flagger. I suggest you get in touch with your Foreman or Supervisor and get him to get a flagger for you." That's not word for word, but pretty close to along these lines.

Mr. Cook confirmed that Mr. Osmond is on the Health & Safety committee and Mr. White is Vice President of the Union. Mr. Cook confirmed that he had, himself, served on the OHS committee. "I stepped down and Todd filled in for me. I think Todd was an alternative.

Asked about which direction the Grievor was coming from when he saw him in the hallway near the Foremen's office, he said:

Down from either lunchroom: from that hallway or from the mechanic's lunchroom. I just looked and saw him going to the Foremen's office. When I came back from break I saw the two, Clancey and Paul, in there. I could hear only hear Todd talking... I don't have a radio in the stockroom... Sometime after, John came in to get a flag paddle. I can remember passing them a flag paddle... Some days, you might pass out 25 flag paddles.

Mr. Cook's attention was directed to the Occupational Health & Safety committee minutes for the meeting of 31 08 2006 (Consent #7(c)), and to minutes report for 24/11/2007. Mr. Cook said he had attended "perhaps four or five meetings, not a lot." He confirmed that flagging was raised in the committee. Mr. Cook was not serving on the committee when the March 3rd accident occurred. "I don't think so. I wasn't at any meeting about that."

ON CROSS EXAMINATION, Mr. Cook was asked whether there is any suggestion in the minutes that the Committee can make binding decisions, Mr. Cook answered, "No." Asked if it says that a Labourer such as Mr. Whelan, is authorised to make such decisions, Mr. Cook said:

No... I don't think Phil Whelan made a decision. I think that he merely reported... Phil Whelan raised that concern when he stopped on Main Street. It's not a safe place on a Friday morning. I would not do it. He just reported the fact. He reported what he thought ... and perhaps he should have told the Foreman... Yes, Todd said, "I'll go look for Larry Osmond." The next time I saw him he was heading down the hallway...towards the Foremen's office. He was coming from the other end. He could have been coming from either lunchroom that way. (When he went into the office) he said: "Boys we've got men out working in the road with no flagmen." A couple of minutes after I heard him talking to John and Carl... "We got a call, you are out on the road." – I think he didn't want to say one of the boys reported – "I suggest you call a Supervisor to get a flagperson for you. ... I couldn't hear what the others in the office said but I could hear Todd's voice clearly because he has a voice that can be easily heard. That is not word for word, but that's what he said.... The reason it sticks out is because when I went into lunch time Todd told me they sent him home that day for using the cell phone. But the "call" was Phil coming into the lunchroom.

Mr. Cook confirmed he had signed JS #1 and remembers doing so. "The date says that it was March 20th. I guess it was that day." He had not been shown the document since he signed it and thinks that "Todd asked me to sign it. I guess he wanted proof of what he said."

ON REDIRECT EXAMINATION, Mr. Cook was again questioned on the direction of Mr. White's approach to the Foremen's office, but was unable to add any information.

THE FIFTH UNION WITNESS was Mr. Larry Osmond, who has worked with the City of Corner Brook for the past seven or eight years. He was a welder, but is now a labourer. He is a member of the Union and serves on the Occupational Health & Safety and the Safe and Early Return to Work committees. He has been with the Occupational Health & Safety Committee for four or five years, and carries the safety certificate. "I had it with another Local long before I was on the Committee. Mr. Osmond serves as Co-chair of the Committee."

Mr. Osmond described the procedure for dealing with recommendations such as those set out on page 0094 of Consent #7(a).

What is supposed to happen with the recommendations is they are supposed to go to the Government officer. In my experience it stays within the four walls of the committee. They are signed, and go to Mr. Ellsworth and Brandon, and on to the Wayne Giles, The Government officer. Where the minutes say "ongoing" it means no decision taken. It is ongoing.

Asked if anything came to the Committee after the two employees were hit in March 2009, Mr. Osmond said:

I don't know. I remember Wayne Giles and Craig Kenny putting something on the chalkboard, but nothing was accepted. I did not sign anything on that.

Mr. Osmond was asked about a meeting he had attended with Mr. Costello and others in Mr. Craig Kennedy's office a few days after the accident. He said:

They called a meeting in Craig Kennedy's office. It was on short notice. That was the first one for me. It was a few days after the accident. Most times it was just me from the Local dealing with OHS. We were hoping Todd would come on to it. He was an alternate for a time.

Asked if Mr. Dolter or Mr. MacDonald attended that meeting, Mr. Osmond said, "Not to my knowledge." Asked whether there had been any discussion of the Health & Safety committee and its work between that meeting and March 20th, Mr. Osmond said, "No." Asked to recall events from March 20th, he said:

I was working the eight to four or eight to five shift. Todd abruptly came into the lunchroom and said that there were two guys on the road who were in the Water & Sewer group with no flagger. I immediately went with Todd. I was surprised and taken aback. I thought that Keith Costello would know where the Foreman was. So I escorted Todd to the Foremen's office. I saw that Keith was not there and that Paul and Clancey were there.

I went to Keith Costello to find out who was their Foreman. I could not find Keith, so my fear would be We have to get this decision now. I was really concerned about another incident and the City being liable. I went down the hall to find Brandon MacDonald and notify him. I met Brandon in the hall. He was in a hurry. He said abruptly that Keith Costello was telling him that Todd was making a call and using a radio and continued on down the hallway. It was all over with... whatever needed to be done was done.

Sometime later I was called again to meet with Todd in Brandon's office. To my surprise Brandon was very upset. Brandon told Todd to "get off the premises. Don't show up till Monday morning." Todd asked Why, and he answered, because he was "using a cell phone and misuse of the radio". Todd was upset, and made some statement about a lawyer and got up abruptly and left.

I was surprised by Brandon's statement. I half thought that he was going to fire him. I went to talk to one of the boys to see if anyone saw Todd using a cell phone. I went back to Brandon, and told him that he had been misinformed and Todd was not on the cell phone. So I tried to have a discussion with Brandon, and ask if he did not know that Todd was an Alternative on Health & Safety. He said he was trying to get Todd settled down and use procedure. I said to Brandon that "if it wasn't for Todd, this would be a shit place to work." And that's when I had my say, and it wasn't going to go any further, and left his office.

Asked why he had been looking for Mr. MacDonald in the hallway, Mr. Osmond said: "He needed to tell me who the Foreman was to deal with the situation. I did know it was a manhole check. Todd told me that." Asked whether the Occupational Health & Safety Committee had asked for flagmen with the manhole checkers, he said: "Not to my knowledge" and confirmed that, as a member of the Committee, he would know if anything had been done.

Asked whether he was aware of the practice of doing the manhole checks without a flagger for a number of years, Mr. Osmond answered:

In the machine shop, I would not know. Flagging was a ongoing issue that I do not understand... I knew that the policy concerning cold patching was being discussed ... There was some consideration, but nothing written down, so far as I know. You can't change the flagger rules and regulations without OHS being involved, and negotiation with Government.

Asked why he was surprised at Mr MacDonald's reaction, he said:

We had two guys about killed, and here we are again risking the City getting sued; and I still cannot believe it.

Mr. Osmond again described the Friday afternoon meeting in Mr. MacDonald's office.

Todd came to get me. He told me Brandon wanted a meeting with him, and he wanted me as a witness. I thought that he was going to fire him. I thought he was very crass, very demeaning. A lot of times when you are mad you say things... I returned on the same day to speak with Mr. MacDonald. I wanted to know why he was upset. I wanted to smooth things over. I felt I knew him enough to have a decent, sensible conversation with him.

Asked if he had told Mr. MacDonald about what had happen, Mr. Osmond said:

I never had time to. It moved so fast: like a whirlwind and it wasn't necessary. I believe it was ax grinding myself, personally...Todd is with the Union, and trying to help. Todd was not trying to be problem but to solve problems. But, for whatever reason, nobody wanted to listen.

Asked whether he had any discussion with anyone from management other than Mr.

MacDonald, Mr. Osmond said: "No. I left it alone, and hoped it would resolve itself." Asked if the Grievor had initiated discussions between him and a supervisor, Mr. Osmond said:

Yes. On Monday or Tuesday of the following week, after that Friday incident, I was in the welding shop. Todd came over with Clancey. Todd said: "Larry, Clancey's got something to say to you." And I said, "What would that be?" And what he said to me was: "Todd did talk to Paul McIsaac, and Todd did not tell the men to get off the road or stop the work." I was surprised again. I thanked Clancey for his honesty, and then they both left. I concentrated on work. I was impressed.

Asked whether he had taken that information to Brandon MacDonald or anyone else in senior management, Mr. Osmond said:

No... The reason why? I just felt some of the boys did not want to listen to anything anyway.

Asked why that information was important for Mr. Clancey to share, Mr. Osmond answered, "He was a witness to what Todd said he did." Mr. Osmond then described the March 23rd meeting in Mr. MacDonald's office.

We had a meeting, Todd, myself, Todd's girl friend, and a chap from the Union. Larry Ellsworth and Brandon MacDonald were there. I stood in to listen to what was going on. Mr. MacDonald gave Mr. Hillier the letter to read. He slid the letter across the table. All I got was that the Union rep could not believe the misuse of Todd White as representative of Occupational Health & Safety and in dealing with Union business. He could not believe he could treat Todd so poorly.

There was some conversation. I don't remember a lot, and then the meeting was dismissed. It was not very long. Brandon said something to the affect, "I don't want to discuss it any further."

Mr. Osmond responded to questions dealing Health & Safety Committee documents and procedure. He also answered questions about filing forms relating to near misses, and said that:

Some men are afraid to fill in forms despite the fact that jail time and a fine is imposed if they do not. But workers are not sure about management being aware of that policy. Not following safety can be a very serious issue. Working with the committee I have always tried to find a middle ground but it seems to me that the Employer does not always want to see both sides. I'm just speculating here. Mr. Ellsworth said that the committee was not going to be part of drafting any new cold patch policy. Craig Kennedy and Brandon MacDonald were to develop the new policy.

He also described disagreements during a meeting with management about this decision, held...

sometime after the March 6th lunchroom meeting. I had to be present. I was angry with Mr. MacDonald that we had to be present and part of the process even though we couldn't make policy. The Occupational Health & Safety Committee were being pushed aside on that one.

Mr. Osmond also testified that an entry in Consent #8(g) for June 2, 2009 was, in fact

a discussion relating specifically to Todd White, though his name does not actually appear in the text. The recommendation reads:

"Employees have no right to stop another from working. A poster outlining OH & S duties and powers and right to refuse work are posted in lunchroom. Information on proper steps to report unsafe work practises should be distributed to all staff.

That did not happen. The information was not given to all staff. If it was, I am not aware of it... People are still afraid of reporting unsafe work practises. They don't want to get in trouble. Can you blame them? Beating up on Todd was not a very good thing to do for the morale of the men in the City. They are saying, "I'm not going to rat somebody." People now are using cell phones to report incidents or whatever. It happened to me a couple of weeks ago.

Asked how this relates to the City Policy relating to cell phone use, Mr. Osmond said:

Well you get Foremen using cell phones. People sending pictures of unsafe practices. This can't go on. It'll turn it into a bloody fiasco. People will be killed.

Asked if he can name names and dates, Mr. Osmond said, "I'd prefer not to name names..." and acknowledged that "some of these problems have now been resolved." He testified that the March 6th lunchroom meeting had been organised by the Employer and he had attended.

There was a lot of temper. We were crying out to get help. We were looking to Management to help us and show some leadership. Management said that they would try to see about getting some flag people. We were crying out for help and they mumbled something about flag people. I don't know what the issue is!

Mr. Osmond confirmed he had signed LO #1 "a few days or weeks after the incident.

Todd brought it to me. I had no problem signing it, not a problem."

ON CROSS EXAMINATION, Mr. Osmond confirmed he had taken safety training, probably in 2005. He had also taken a safety training course prior to the 2005, when he was with the Pipe Fitters Union. Asked whether, as part of that training, he was told that, as a member of the Occupational Health & Safety committee he does have a recommendation role but not a management or administrative role. Mr. Osmond answered: "I'm not a manager... But it stayed in these four walls. We were pawns in a game." Mr. Osmond agreed that a key part of the Committee's work is to do detailed reviews of whether a near miss or an accident has occurred. He also agreed that both sides should air their views and make recommendations. "It should be that way." Asked if he understands why it is important to investigate what actually occurred, he said: "Yes. So we can prevent it happening again. You try to change the situation so it can't happen.

Mr. Osmond reviewed, for Mr. Smith, the order of events on March 20th when Mr. White came to him in the mechanic's lunchroom. He described, in particular, the path he had taken within the building to seek Mr. Ellsworth and then Mr. MacDonald. "When I saw Paul and Eugene I immediately left to look for Keith.

Asked what knowledge he had of the incident at that time, Mr. Osmond said: "That Todd said we had two men – not identified – out on the road, in the middle of the road... hauling off manhole covers." Mr. Osmond confirmed he had earlier testified accurately that he was upset by this fact. Asked what the two workers were doing, he said, "hauling off manhole covers, without flag people." Asked if he knows why they were doing that, Mr. Osmond answered, "No idea." Asked if he knows whether this was routine, he answered, "I guess it's an everyday thing." Asked whether he knew that at the time, Mr. Osmond answered, "I knew they were hauling up manhole covers; yes, it's ongoing all the time." Asked whether he was aware that the work had been done without flaggers for years, Mr. Osmond answered: "I have to say no. I'm in the machine shop." Asked why, then, he was "taken aback", Mr. Osmond answered:

Because we previously had two fellows run down. They were supposed to have flaggers out there. I was learning it was not the case.

Mr. Osmond confirmed that the only information he had was what Mr. White provided. Asked whether Mr. White had told him the source of his information, Mr. Osmond said: "He was called, or someone came into the lunchroom, and told him." Asked if he had any reason to think that Mr. White had held back information from him, Mr. Osmond answered, "No, he wouldn't do that, not to my knowledge."

Mr. Osmond answered a number of questions relating to various legislatively mandated governmental and municipal bodies involved in regulations, particularly those concerning the use of flag persons in various construction and road work other situations. He acknowledged he had read the regulations for the use of flag persons, "a long time ago - more than 20 years ago." Asked if a prudent member of the committee would be well advised to check before assuming that flag people were required, Mr. Osmond answered:

I understand what you are saying. But we lean heavily on the Foreman to take that responsibility. That's their job, and workers lean heavily on those Foremen.

Mr. Osmond testified that, before becoming a welder, he had some experience, as a labourer, with inspecting sewers. Asked whether he was aware of what the workers were doing at the time of the incident, he said:

Todd told me that in the hall, but I did not know who the workers were or where they were... We rely on foremen to assess whether flaggers are needed or not.

Asked if he knew that, when the radio call was made, the workers had finished the task, he said:

I had no idea. I was running around looking for Keith Costello. I couldn't find him so I went to Brandon... Mr. Costello is head of Water & Sewage. He would know who was in charge of the men, and so would have the real information.

Mr. Osmond agreed that the City can only be charged for a violation of regulations, and was asked, how therefore, he could assume there would be a liability for the City, he answered:

I have current knowledge and training in the context of Occupational Health & Safety and I've refreshed in Occupational Health & Safety regulations and policies ... My belief is that, if it happened again they could be charged. Somebody would be sued.

Mr. Osmond again agreed that he had no particular knowledge of the regulation in effect on the March 20th incident and that he had not reviewed the flagging regulations and rules for

many years. He further acknowledged he was not aware that the workers had already completed the work, or that the work was of a routine nature, done for many years without flaggers. He agreed the Occupational Health & Safety committee's responsibility is to investigate issues.

Yes, but we very rarely get the opportunity. It should be. Most times it is the City, and they do not transfer the information. We don't get involved.

Asked whether the Committee had received a report on the investigation, Mr. Osmond answered, not always. "Did we get a report on the cold patch? Yes. But it's mainly managers who work at it; only rare that we get some involvement." Mr. Osmond also confirmed the rights of a worker to refuse unsafe work, and sketched the procedures involved in exercising this right.

He is allowed to refuse work. That's when they go and get one of us OHS members or a representative of the committee. If there is no agreement, then – and if the worker still feels it's unsafe – he can refuse, and go back to the foreman and the foreman will generally find someone else, if someone else is qualified... The documentation will go to the Committee, and he can also go to the Government. It can result in a regulation.

Asked to explain his comment that he felt that there was "axe grinding" in Mr. MacDonald's treatment of Mr. White, Mr. Osmond said:

I had never seen him like that before. I felt I knew Brandon enough to go talk to him. What I'd been observing and told was that people were after Todd, and did not want him on the Committee because he "was interfering with the procedure." They were trying to get PRIME. When Brandon was on the Committee ... it was narrowed to a skeleton crew. They were trying to get on Todd's case because he was standing up for human rights. They didn't want him on the committee.

Asked if there was some blurring between advocacy and the Committee's role, he said:

Todd is fair: not that difficult, but he does speak up. He is not a problem, but he is a man willing to speak for everybody... They are giving him a hard time. There were a lot of people at the (March 23rd) meeting. I didn't think it was normal. I expected Rex and another member of the Committee. But there was a level of mistrust between members and management; and that is as sick as you can get.

Mr. Osmond described the events of the meeting, and said that:

Brandon appeared a little perturbed and on the defensive. He slipped the letter over the table and wanted the men to leave. He was a little nervous.

Asked if, in his view, there was some attempt to intimidate Mr. MacDonald, Mr. Osmond said:

"There might have been. People were mad." Asked what he understood were the words Mr.

White had used on the radio, Mr. Osmond said:

I understood he told the boys to get off the road and get a couple of flag people. My understanding, after the fact, was that he did not say those things. At the time, I did not know what was said or not said. All I heard from Brandon was that he was on the radio and the cell phone.

ON REDIRECT EXAMINATION, Mr. Osmond said he had learned from Mr. MacDonald, himself, during the later conversation he had held him on Friday the 20th, that Mr. MacDonald had not wanted Todd on the committee.

THE FINAL UNION WITNESS was the Grievor, Mr. Todd White. Mr. White testified he had been employed by the City for approximately 23 years, and is a labourer. "I do a lot of jobs." He confirmed that he has done manhole checks but never for a Water & Sewer. His department is Public Works and, "at the time of the incident, Eugene Clancey was my Foreman." He has held Union office with CUPE Local 706, "including President for several years. In March 2009 I was Vice President." He had been ...

Chairperson of the Occupational Health & Safety committee for a while, and then stood off the committee for a while. They called me to go back on it. I accepted. They needed someone on it.

Asked whether, as of March 1, 2009 he was on the committee or not, Mr. White answered:

Yes, I was on the committee. It was not clear, but I was on it. I was alternate all the way along. Within the time frame of March 6th lunchroom meeting, I was on the Committee replacing Don Cook.

Asked to describe the conversation with Mr. MacDonald about his Committee role, he said:

He came out and got me in the lunchroom and asked me if I had a few minutes in his office to discuss something. So we went out into the office. He said, "I'm going to be honest and quite frankly ask a favour. We don't want you on the Safety Committee." I said, "Can you tell me why?" He said, "Because you're too hard nosed about safety." I said, "There's nothing 'hard nosed' about safety. Safety comes first for me, and I've been voted in by my peers." Basically that was it. Then I spoke up and told him if he would "only go out and sit down with the men and listen to their concerns about safety and tell them they wouldn't have to worry about repercussions of what they say, you would understand what is going on and you would understand that they are scared." I told him they don't trust management. He asked me, "Well do you trust me?" And I said, "I trust you more than some of the management here." The conversation went on to about 12:30, into lunch hour. It ended, and he asked me to think about what he had asked.

Mr. White could not accurately date the conversation: "It was not quite a week before March 20th.

I did not make note of it because I did not think that it was really important at the time."

Asked if he could explain his absence, noted in Consent # 8(f) for the meeting of March 9, 2009 of the Health & Safety Committee, he said:

I wasn't privy to this. I did not know of any meeting. No one called me. I don't know if I was off at the time: no knowledge of it.

He said he had no further contact with Mr. MacDonald about his request. Asked whether he had any role in matters to do with the March 3rd accident, Mr. White said:

I was called by some of my co-workers. One of my co-workers went and picked me up and I went up. I also sat in with co-workers so I was partly involved and as an OHS Committee member... The OHS officer met them at the hospital. They wanted a representative. He did not want to do it. His name is Wayne Giles. He refused to accept me in any meeting. He wanted to get together with them in a rush while it was fresh in their minds. He told me, more or less, that I wasn't allowed to go in. I told him he had no right to refuse a Representative. He said he'd check into it, and called me back and said he'd spoken to his Supervisor and "You are right, they are allowed to have representation." That meeting took place with the two victims after the March 20th incident.

Mr. White said there were no Occupational Health & Safety Committee meetings after the accident, and he had not had any part in organising the March 6th meeting in the lunchroom.

That was organised by management. The meeting on March 6th opened up with questions about what had happened. Basically most of the Supervisors got up – Brandon, Casey, Mike – they all said the same thing. "We are all responsible for each other, and need to watch out for each other out there." They said they got the okay from Wayne Giles to put the truck back on the road with a flagger behind to slow the traffic down and send the traffic into oncoming traffic. I spoke up then and said that he is an Occupational Health & Safety Officer, and does not have the right to change the legislation... Rick Kean said that he would not get out with a slow/slow sign, so you can write him down as the first to refuse. Mike was saying, "I don't understand it. It's the first time I heard of it about a flagger."

Then Mr. McCarthy said, pointing at me, "This man doesn't stop talking about it." With that, Mike was saying he'd do it himself with a slow/slow sign. He said, "I don't know what the big problem would be about a few cars. How would you like to live like I have for the past twenty years, dodging bullets."

So I asked if any management person had a flagger certificate, and Barry Ellsworth said, "Yes, I do." So I told him he did not take the same course I took, and told him that the rules state that if the traffic is to veer over the centre line you must have two flagmen. If the traffic is going around a turn you must use three flaggers with the centre one visible to the other two. Mike said he was not aware of any regulation like that, and I said that I would get a book and show him, and I did: all of it highlighted. We were sitting around having a general chat, Mike and Brandon and Barry and Keith and I went over it. I showed Mike the paper and

Mike read it and he looked at it and said, "Todd you're right." Mr. Ellsworth said, "No, Mike, let me go and look at my book" ... in there with the four management people and myself. I asked, "Why did you send me to go for a course, if it's no good, and you don't want me to use it?"

Mr. White testified that he had completed the course for the Occupational Health & Safety position. He had been sent by City, and had also taken the flagman's course. He identified TW #1 as the certificate for his course. "I think it was up in the Charles Building on O'Connell Drive." Mr. White also listed other courses that he had completed in related issues. All of these were through the City. He had taken the flagman course "only once, fifteen years or so ago." Asked if anything had changed concerning the flaggers after the lunchroom meeting, Mr. White answered: "No, not that I was aware of in any way shape or form. Stuff is still ongoing."

With reference to the policy relating to cold patch recorded in Consent #8(f), Mr. White said, "To my knowledge the only thing was that management policy was closed down. That's all I know of... I think permanently, at least when the investigation was on." Asked whether the accident investigation was completed, Mr. White answered:

Not so far as I know of. I asked the two injured workers if they had heard back from the officer, and the answer was, no. I suggested that they should be in touch to get an update of what was the result. That was a nice while ago. I can't pinpoint when. It's nice to have your bricks in a row.

Asked to describe events on March 20th, Mr. White said:

I turned up for work. I was doing maintenance work. I was in a pickup doing little odd jobs... Yes, I had a radio in the truck. I started to work at 8 o'clock. My break is at 10 o'clock for ten minutes. You take it on the road if that's where you are, or go in the yard and take it there. On that day I must have had something that took me back to the yard.

Asked what he was wearing, Mr. White said:

All my PPE. I usually never take it off, even on break. I hardly ever take it off. There's reasons behind that. I had it on that day, yes. I take it off going home for dinner or brunch.... So Phil Whelan came in the door and called out to me by name, and ran over to where I was and asked if Water & Sewer were under the same OHS rules as Public Works. He wasn't that calm. He was very excited. He said, "You better get somebody... Johnny Specker and Carl Frost are out in the middle of the road with a manhole cover off, and there is traffic going all the way around on both sides and they have no flagman. They are going to get killed."

With that I jumped up and ran out through the hallway, through the two doors, the little stairs, in through the two green doors, through to the mechanics'

lunchroom. I told the boys first "I'll go get Larry." There were fifteen or sixteen fellows there, probably. I explained to Larry right away what was going on and we'd better go find somebody to deal with the situation. I was talking to Larry in the mechanics lunchroom: half a dozen there with him. We proceeded out through, down the hallway. I was giving him particulars. I knew who was in the road, cars all around and concerned that they would be killed.

We ran to Keith's office first and did not see anybody, and came back to the Foremen's office. At first I didn't see anyone. Then I only saw Gene Clancey in there, sitting down. I told Larry that I would stay here and he went on. I did not know then where he went. I went into the Foremen's office. I was about to speak to Clancey first, but I saw Paul McIsaac. There was a big desk unit. That's why I did not see him first. I asked whose control Carl Frost and John Specker were under, and he said, "Mine." I said, "Do you realise that they are out in the middle of the road without flaggers?" He said, "No." I said "We just received a call. They are out in the middle of the road, and they were going to get run over." With that he shrugged his shoulders. I took it as, "What do you want me to do about it?" That's the way I took it. With that I picked up the radio and called for "John Specker". There was no answer, so I called for "Carl Frost". With that Johnny picked up. I asked if they had a flagman with them. He said, "No." I said, "We just received a call that you are out in the middle of the road and you are going to get run over. I would suggest to you, call your Foreman and ask for a flagman." With that I left the office... I went back to work.

Mr. White was reminded that Mr. Clancey had testified he had heard him talking on the radio earlier. He answered:

No way I could have been on the radio. I know there is a radio in the lunchroom usually, but I did not pick it up and I did not use it. I can't tell you if there was one that day, but there usually is one in the lunchroom. My purpose was to get some help before there was an injury or a death. That was my foremost thought.

Asked why he had gone first to Mr. Osmond, he answered:

Because of all the past practices in dealing with management. They ask you afterwards, did you have proof of what you did. You always have to have someone else to confirm your action.

Asked to describe the conversation he had in the Foremen's office, and reminded that Mr. McIsaac had testified that he was talking with Mr. Clancey, Mr. White said:

No, I was never talking with Gene, but I was looking for the Water & Sewage Foreman. Clancey would not know who was working or where. Paul said, in his testimony, that he knew when and what day, but he did not know that they were out in the middle of the road with no flagman. No foreman asked me what I was doing on the radio or told me to get off. I just spoke on the radio and got out.

It was pointed out that the Employer feels he had no right to tell the employees to leave the job. Mr. White answered:

I've got the right to tell them of the danger. I've got the right, and the obligation under Occupational Health & Safety and under the Union, and as a fellow worker to make sure, as much as I can. I can't tell them to stop; just to tell them that there was something wrong here. What they do is up to them. I've been asked and I've always answered, Look at what is written down. They have the right to refuse, but every action is different. I did not yell. I don't. I took the position to make it a better place, but in meetings superiors tell you that people are stupid and dismiss the issues. I told Keith Costello I did not like his choice of words. Another Supervisor told me that I'm "not telling him where to send flaggers. " I said, "I'm not. The law is." I've got nothing to fear, so I speak up. It's an opinion. It's supposed to come to a vote. There is supposed to be three plus three with someone doing the minutes. A lot of the time there's more management. On an ongoing basis, my co-workers were put down.

Asked if the "investigation team" required by "Procedure" (Policy # 10-05-10, MD #6) was put in place to deal with the incident, he said: "Not to my knowledge. No. If it was, I wasn't included."

Mr. White said that he had not been critical of City staff on the radio. "A lot of them are scared, so you sometimes explain without hurting their feelings." Asked if he had violated any policy that day, he said:

There were none in place that I know of. The only thing that should be is that the City should co-operate with the Committee and its members. It's not co-operating to fail to listen to someone telling you about people who are in harms way. While on the Committee, as a Representative you have some responsibility. That's in legislation. You're responsible if you have knowledge, and don't act on it. There is no expiry date, once you've done the course. Once an Occupational Health & Safety Representative, always a Occupational Health & Safety Representative.

Asked when he had found out that they actually got the flagmen they requested, Mr. White said, I think it was Monday. Asked if he had used the truck number as Mr. Clancey had described (DC #2) Mr. White said, "No, I didn't know their truck number and I did not say it."

Asked what happened on Friday after he had left the Foremen's office, Mr. White said:

I went back to work and, Gene Clancey called first on the radio system to say Brandon wanted to see me. Someone told me I was wanted. My cell phone rang to come in as soon as possible with a Union rep. Brandon wanted to see me right away. I bumped into Rick. I went and got Larry, and we got Clancey and we went on out to Brandon's office.

Asked whether there was any discussion between himself and Larry and Clancey on the

way to Mr. MacDonald's office, Mr. White said:

Not a lot.... You know... Brandon looked at me. He was very angry. He said "I don't have time to deal with you today. Take up all your gear, get out through the door, do not stop to go to the City truck, get on up over the hill and get off the City property, and don't step on City property for any reason for this weekend." So I asked him what he was kicking me off the job for, and he said, "I don't have to tell you." I said, "You do, and I'm not leaving the office until you do." And he said, "There are two City Policy infractions, one being the cell phone." I said, "Did you see me on the cell phone?" He said, "No. But over the radio you said that you had just received a call on your cell phone." I said, "Brandon, I did not say that. I said, we had just received 'a call'; and everyone and his dog is on the cell phone... and you're kicking me off for a cell phone infraction! Anyway, okay, what's the second one?" He said, "Criticising fellow workers over the airwaves." I said, "'Criticising fellow workers over the airwaves?' I don't know what part of the Occupational Health & Safety you don't understand." He said, "I don't care. Get out my office." So I left and picked up my gear and I left and I went home. At that point I felt that he had already fired me and like a common criminal to be kicked off the job. I felt I'd done nothing wrong except help save somebody's life. Needless to say, I didn't feel very good about it.

Asked what had happened on Monday, Mr. White said:

On Monday I showed up in Brandon's office. Rex Hillier was our rep. Rick came, and Larry came, and my partner Kim came. Brandon was there, Craig was there and Barry was there. As soon as we got in the door and sat down ... a little introduction ... Brandon passed a letter over to Rex. Rex said, "This is not really for me. It is for Todd", but he read it anyway. So they passed it to me and I began to read it. I said, "Go on, talk; I can read and listen." But they stopped and gave me a chance to read. I said, "If there's a loader over there heading for a live wire, what's my best option? Head over to try to warn him or pick up a radio and call him to tell him he is about to hit the wire?" Brandon said, "No hypothetical questions."

Before that Brandon had stopped the meeting and asked in what capacity everybody was there. My partner, Kim Patten, said "I'm only here as moral support", and she said, "I'm happy to leave." But he said, "No, you can stay." Rex Hillier starting asking questions. Brandon said, "This isn't open for discussion." So Rex said, "Well what are we doing, trying to find out what happened?" And Brandon said, "This meeting is over." Rex said, "My advice is, retain a lawyer and keep him by your side at all times." Rex said, in all his years he's never dealt with anything like the City of Corner Brook.

To me that morning I was being fired. It maybe hearsay, but a fellow told me that Mike Dolter was coming up that morning to fire me.

Asked whether he had used his cell phone, Mr. White said, "No. The only cell phone call I got was from Clancey." Asked If he had undermined the Foremen and their effectiveness, again

Mr. White answered, "No." Asked what he had understood by Mr. McIsaac's shrug of his shoulders, Mr. White said:

I didn't know. I took it as unwillingness to do anything, but I'm obligated to let the gentlemen know of the danger... I felt the need to document things right away. I went in and spoke to Clancey, and took him over to Larry. Clancey said the same thing to Larry. That was two or three days after the Monday meeting. I went over to the #3 building and told Larry that Gene has something to say. Larry said, okay and Mr. Clancey said I was talking to Paul about security. I did not tell anyone to quit work. The conversation was short. I thanked Eugene for his honesty and went on. I did have another conversation with Clancey. He could not believe what had happened. He felt that Brandon would say "don't do it again", but not the way he treated me. He told me that on the way over to see Larry. He said, "The last thing I expected was you to get kicked off the job."

Asked about his alleged failure to observe proper reporting structures, Mr. White said:

No. I did everything I could to get someone to act. Under Occupational Health & Safety rules you must co-operate with the committee.

Asked whether any management person had ever told him what he should have done, and why he had not requested a meeting instead of picking up the radio, he said:

No. No one would talk to me. There was no discussion... You can only go to the next one up. That's the way we've always done it. There was only a Foreman around, and he was not showing willingness to do anything.

The Grievor was asked if Mr. MacDonald had ever told him what was meant by the comment, in Consent #2, that "It has been my observation over many months that you frequently ignore proper chain of command and established regulations." Mr. White said:

I don't know why he said it. The statement has no place there. It is my Union job to look at the book and represent people. It is a representation. It's not Todd White.

Asked if Mr. MacDonald had explained his use of the term "established regulations" (Consent #2 para. 2), and if he was ever told that he was not abiding by "established regulations", Mr. White answered: "No. It is never my approach. I respect others." Asked if he had caused an "affront ... to the organization" or to its "credibility", he said, "No."

Mr. White identified as TW #2, the minutes of a Public Works snow clearing meeting held in the lunchroom on October 30, 2008 at 1:00 PM. Asked if he had attended the meeting, he said, "I'm saying that I did, but I'm not a 100% sure." Item #14 reads:

Radio usage (radio checks) Residents have scanners so employees should monitor what they are saying. Also the fall (*sic*) on the CRTC rulings, so staff have to watch their language.

Asked if he remembers being at a meeting where this issue was discussed, he said:

We've always been told about this, but people do swear. I don't use that kind of language on the radio.

Asked if he had ever spoken to a co-worker about asking for a flagman, he said:

I have myself. Sometimes they said no and sometimes I refused 'til I got one. I don't step out on a road without a flagman. I do explain things. I have four beautiful children and a granddaughter. I want someone behind me if my butt is out in the road. Glen McCarthy got struck out there eight years ago, and he was off work for a period; but he's still doing it. I don't understand. I do tell him about it, but I can't hold his hand everyday and he's not the only one.

Mr. White identified as TW #3 and TW #4 two sets of pictures of the area of the manhole at issue in the March 20th incident. He also identified as TW #5 the handbook for construction traffic control persons published by the Government of Newfoundland & Labrador, and a copy of the City's policy statement dealing with "employee conduct on cell phones" (TW #6).

Mr. White also identified, as Exhibit #3, the Field Edition of Traffic Control Manual for Roadway Work Operations published by the Government of Newfoundland & Labrador and the Traffic Control Manual itself (Exhibit #4). Mr. White linked these two documents to TW #5, the course handbook he had received on completing his own course with the City.

Asked whether the City of Corner Brook has ever issued anything of its own creation concerning flagging, Mr. White answered:

Nothing that I know of. Wayne Giles only told us we could do it into oncoming traffic. I did call him that day too. I called him and asked what happened to give the City permission to send traffic into oncoming traffic. Mr. Giles said he didn't know it had happened, and that that applied only to the case of a four lane highway. Perhaps we were given wrong information.

Mr. White also testified about statements relating to the March 20th incident (LO #1, JS #1 and JS #2,) that he prepared for people to sign. He confirmed he had done so to provide

... proof of what I had done because of how I was being treated. I could not just walk away. These were done within that week, the week of March 23rd.

Asked about his use of the word "call" as it appears in documents and testimony, Mr. White said:

To me it was just a figure of speech, I guess. It came off the top of the tongue,

and I said it. Once said, it's hard to take back... Someone came into the lunch-room and told me what was going on.

Mr. White's attention was directed to references in the correspondence (MD #2, 3, 4, 5) to the Union's request for a written apology and the removal of the letter from the file, and he was asked why he wanted a written apology. He answered:

Because of the way I was treated in Mr. MacDonald's office. If someone asked me to leave for an investigation, that is one thing; but not like a common criminal without even speaking to me. It's not a very good feeling. I felt – and still feel – that I deserve an apology. After 23 years of service, better treatment is required.

Asked if he feels he had done nothing wrong, he said, "Yes."

He testified that Mr. Dolter had not identified the three persons who reported hearing the radio call. Asked about the reference to keeping within boundaries (MD #3 paragraph 3), he said:

I would never step over boundaries. They've got a job to do, and guidelines are in place. I have no problem following them.

Asked if his actions had anything to do with his Union affiliation, Mr. White said:

My Union representation is always kept separate, but I'm only a figurehead when I go in there. Everyone is entitled to representation.

Asked if he had "coached" employees to refuse work or gave them direction "how the work should be conducted" (MD #3 paragraph 5), Mr. White said:

No, I did not. I refer them to the right to refuse, and how to choose what to do. It is their right, not mine... I suggested that they should have a flagman. I was speaking as a fellow worker and as Occupational Health & Safety representative.

Asked to respond to Mr. Dolter's assessment that the matter was not sufficiently urgent or "imminent" threat, Mr. White said, "Any time you are in the road without a proper backup, you are taking your life in your hands." He also denied he had insulted the institution or subverted authority. "No, I suggested that they call, or radio, the Foreman to ask for a flagman. He had the right to respond to their request." Mr. White confirmed a warning was put on his file in 1990,

But I put a letter back on the file. He did not understand the situation, and he apologised afterwards and recommended me for the job after that, too. There was no investigation in 1990 and there was no grievance.

He confirmed there was a warning in 2006 for violating cell phone policy. Asked if he had ever held a supervisory position, Mr. White said: "Yes I did, 10 years ago, for six months, roughly."

He also identified, as TW #6, the City's Cell Phone Usage policy. He testified that the

policy is everywhere ignored. He also acknowledged, as TW #7, the record of a verbal warning

dated July 21st, 2006 for bringing a personal cell phone into work. But the policy was not posted until July 26th. I was not disciplined for that, but it is still in the back of somebody's head somewhere.

Asked if he was, as indicated in MD #3, issued a January of 2007 letter by the Director of Community services regarding withdrawal of services in the Animal Control Division, he said:

No, I can't say that. What was said was that it was not a letter of reprimand but a "clarification". No one has ever asked me to that job since... So far as I know there was no investigation. I was never asked anything..

Referred to his December 2008 letter which Mr. Dolter says was sent to the "City Council" regarding the City's hiring procedure, Mr. White said:

I never did write to Council. I sat down with the Mayor and discussed something concerning my son and concerning my Supervisor who had said, "That's your young fellow. I'm not having two of you work here..." I contacted the Mayor with a valid concern to let him know, and he was asking Mr. Dolter to investigate. I never heard anything since. The Supervisor was Craig Kennedy.

Responding to Mr. Dolter's comments paragraph (MD #3 paragraph #8) on the *Occupational Health & Safety Act*, he said that he does not see himself as having the liberty to take "any action" I "see fit"... I try to get an understanding of what's going on."

Mr. White also confirmed that TW #8m 9, and 10 document the issues cited in Mr. Dolter's letter. TW #11 is a letter that he had sent to Mr. Dolter concerning ongoing Health and Safety difficulties that the Union appears to have had with administrative actions. Mr. White testified that in his view, TW #11 demonstrates ongoing concerns with what the Union perceives as management's failure to take safety issues seriously. Asked why the matter had not been dealt with directly through the Supervisor, as would be expected in the chain of command, he said:

Mr. Ellsworth would not allow the items of clothing to be worn. It was not a matter for Mr. Ellsworth to deal with. This was my concern. He had these ice grippers in his desk drawer for two weeks.

Mr. White cannot say whether the matter went before the Health & Safety committee or not. Asked what he intended to achieve in writing Mr. Dolter, Mr. White said: "There was no cooperation. The attitude was, 'They can buy the creepers themselves.'" He confirmed there is a Labour Management Committee that meets once every three months and those attending vary:

Either the President or the Vice President. Sometimes Mr. Kennedy or any Director that is available. It varies. There is no way of knowing how many or who will show up. Grievances are not dealt with, but anything that wants resolution is discussed. Health & Safety issues do go there.

ON CROSS EXAMINATION, Mr. White confirmed his familiarity with the information set out in the City's organisational chart, Consent #4. He confirmed also that Mr. Ellsworth, the person to whom he refers in TW #11, appears on that organizational chart as Assistant Director of Operational Services, and that Mr. Ellsworth would report to Mr. MacDonald, who would then report to Mr. Dolter. Mr. White pointed out that, in March 2009, the post Mr. Ellsworth now holds was vacant and Mr. Ellsworth was Manager of Public Services at that time. He was, therefore, directly reporting to Mr. Dolter, the Chief Administrative Officer, at the time. Asked if his letter did, therefore, observe the chain of command, Mr. White said:

The issue was what was said. It was what was said about compensation to the workers. I felt it needed Mr. Dolter's attention, and I was speaking as Vice President of the Union, not as a worker. So I wrote Mr. Dolter.

Asked again if this was not, in fact, stepping outside the chain of command, Mr. White said again, "The issue was the seriousness of what was said about compensating the workers."

Asked why he had chosen not to approach Mr. Dolter, the Chief Administrative Officer, about his concerns over what was said about his son, rather than going to the Mayor and Council, Mr. White said: "Because I was dealing with the issue and not getting a response. I felt that it was a father / son issue."

Asked whether Mr. White would agree that the "suggestion" he made on the radio might be easily confused as an "instruction" by someone on the receiving end, Mr. White said: "Those involved testified that it was a suggestion." It was pointed out to Mr. White that he wielded some authority as he was Vice President of the Union and portraying himself as on the Health & Safety Committee, and was active on issues like the "creepers" issue (TW #11).

He confirmed that the "creepers" issue was resolved. He also acknowledged he was not a personal witness to some of the issues reported in TW #11, but had relied on information from others. Mr. Smith suggested a parallel behaviour might be discerned in his behaviour on March 20th when he took someone's report of a dangerous situation and, without investigating it, acted very quickly. Mr. White said, "There were cars all around, and they were going to get killed."

Asked if he had enquired whether Mr. Whelan had, himself, warned the two workers, and whether in fact Mr. White himself actually knew where the workers were at the time, he said: "They were working. I did not know what exactly they were doing." When it was noted that when he radioed Mr. Frost and Mr. Specker they were not actually working, Mr. White said:

I had no way of knowing if they were working or not... I did not know if they were finished or not. I felt that, if I left the situation alone I could be charged... The seriousness of what was said by Mr. Whelan is my obligation to let them know that they are in harms way. That's all I did. My worry was that there were two people in danger. That was my worry as an Occupational Health & Safety rep, not as a Vice President.

Asked it does, nonetheless, serve his purposes as Vice President of the Union, he answered:

I take a role to the best of my ability. As a Vice President it's not my job to increase employment. If there is a minimum manning requirement, it is not my job to change that; but there is a minimum level. We share the responsibilities, Rick and Larry and me.

Asked what reason there was to believe that the workers were in imminent danger, he said:

One of their co-workers came in and said, they were going to get killed. "Killed" is danger. Objectively it's an ongoing, unsafe practice.

It was pointed out that Mr. Frost, the senior man involved, had not reached that conclusion until after Mr. White's intervention. Mr. White said:

He called back to me and said, "Were you looking for me?" After the call, it was over to them. That was when I went back to work.

Asked if that returned call was the second call that Mr. Clancey had heard, he said: "I can't tell you, except that Carl said, 'Did you call?', and I said, 'Yes, it's taken care of.' Asked why he had not described the issue to the senior man, Mr. White said:

I don't know. The question was, 'Were you looking for me?', and I answered, 'Yes, but I got it taken care of.'

Asked if, in the conversation, he had identified himself either as an Occupational Health & Safety Committee member or as Vice President, Mr. White said:

As I sit here. I was a fellow worker. I'll stand by what I heard and did. My objectives were under all those three hats.

Asked for the source of the obligation he feels, Mr. White answered: "From the March 6th meeting: that we are all responsible 'for each others' backs.'"

When it was pointed out that all that was required to meet that obligation was that he report the matter, Mr. White said: "It was a serious situation. Mr. Whelan brought it to our attention, so you can't ignore him under OHS rules." When it was pointed out that Mr. Whelan should, himself, perhaps have stopped and told the workers, Mr. White answered:

He had a right to. He chose to act as he did. There was no attempt or intent other than for them to be safe.

When it was pointed out that having flagmen is, itself, is no guarantee of safety, Mr. White answered:

In order to manage the risk you need to know the circumstances... Someone should assess the danger before putting someone in harms way... By my lights, what I did was, to the best of my ability, to help others not get hurt.

It was suggested that Mr. White was hasty in his interpretation of Mr. McIsaac's shrug. Mr. McIsaac was, perhaps, saying, quite simply: "So? They've done that for years." Mr. White answered. "But he should have said so. I told him, and he shrugged his shoulders."

Mr. White acknowledged that he did not know, at the time, it was what the workers had done for years. Mr. White responded that:

As Vice President and a member of the OHS Committee, telling the workers that they need a flagger was just because of what I had just been told.

Asked whether he does not see that his action did, in effect, undermine the authority of the managers, Mr. White said:

No, I do not. It was a split second decision about life and death for me. I stand by what I did today...It's not undermining any authority at all.

Asked about his choice to use the word "call" in reporting what occurred in the lunchroom, he said: "But I was called in the lunchroom. My name was called out in the lunchroom."

Asked whether, in contacting Mr. Frost and Mr. Specker, he had asked whether they felt they needed a flagman, Mr. White answered: "No I did not... I suggested... I was trying to get the message out fast. I was trying to help people not get injured."

With respect to JS #2 Mr. White said it had been drafted by someone else in the Union. "I was probably dictating, and based on my information."

Asked whether he was, in fact, appointed as an Occupational Health & Safety Representative for the City of Corner Brook, Mr. White answered: "I was supposed to be. Don Cook

wanted to step down. I accepted". He confirmed that he is "not a representative appointed by the City under legislation, but appointed by the workers... If there are more than ten employees."

Asked if his references to his role in Occupational Health and Safety were based on his membership in the Committee or representing Occupational Health interests generally, he said:

Being a representative and being a member of the committee is one and the same thing under the *Act*. I've never said 'a worker representative.' I said I was an OHS representative. I have responsibility to let people know they are in harms way. Peer pressure is the best way required to let them know they're in harms way.

Asked the basis for his claim of responsibility, independent of his work on the committee, and whether he was speaking as a worker as well, Mr. White said

As an OHS representative I have responsibility to warn people if they're in harms way. It arises from my having taken the course... It's all three. I said earlier. The worker is under the *Act* where it says to 'cooperate with the employer...'

Asked where he derived his duty to go on the radio and interrogate them about a flagger and suggest they get one, Mr. White answered:

I approached the foreman. He did not appear to care. I did co-operate. It is still your right to warn people of danger. They are in harms way. It's an obligation.

Mr. Smith pressed Mr. White to show the basis for what he appears to think is a legal obligation. Mr. White answered: "From the OHS regulations, as a fellow worker." It was pointed out that Mr. White is, at best, a member of the OHS committee. He answered:

That entitles you to be appointed as a representative. By law you are obligated to warn people, based on the course I took 15 years ago, that's right.

When it was suggested that, under the *Act*, the responsibility he had was to bring any concerns, through the Committee, to the Employer, Mr. White said:

Yes. We did that several times. But on the day in question I acted on the report I'd been given, and contacted the workers to check they were okay and to suggest they ask for a flagger.

Asked whether he sees a danger in making a suggestion to a worker without reference to the Foreman, or up the chain. Mr. White answered: "No danger at all. I did what I did, hopefully, to save a couple of lives."

Asked whether he sees no problem in doing what he did when the Supervisor did not see any imminent danger, Mr. White responded: "No. Paul McIsaac said I did not speak to him... He

did not say one word to me while I was on that radio."

Asked whether he sees anything specific in the legislation that gives him the power or authority to act outside the committee, Mr. White answered, "Not what I see there."

Mr. Smith asked "Would you say that it is all right, from your perspective, for someone to claim the right not to investigate, not check the procedure and not to ask what they are doing, but merely to take the statement of the person who reported to you, and to suggest a safety resolution, a flagperson, equipment, whatever you decide to suggest? Mr. White answered:

I did take his word seriously. Someone else did as well because they put two flaggers out. Mr. McIsaac says so, not me.

Mr. Smith asked if he was prepared to object to the way the Employer investigated the matter, and yet to accept Mr. Whelan's judgement matter without investigation. He said:

Yes, I accepted Mr. Whelan's judgement; and I didn't have time to do any investigation.

Asked whether this approach, in effect, licences him to make any intervention he likes. Mr. White said, "That's not so." It was pointed out to Mr. White that the two foremen thought he was undermining their authority. Mr. White said, "That's not what Clancey told me. Nowhere near it." Asked how the event had got reported if Mr. Clancey had not done so, Mr. White said: "To my knowledge Mr. Keith Costello reported it."

It was pointed out that Mr. White did not appear to know that the appropriate step was to go to his Supervisor, and the next step was to the superintendent. Mr. White said:

Yes and I did. I went to Mr. Costello's office and I went to the Foremens' office after that. I went to Mr. Costello's office first and then to the Foremens' office... Larry wanted to go there first to find out... I was not criticising Mr. Frost and Mr. Specker, and they said I wasn't.

Mr. Smith asked whether it isn't reasonable to assume he thought that the two workers they were doing something at variance with what they should be doing, and whether the public would not likely see that as a criticism, Mr. White answered: "The public should be concerned with what were the dangers." Asked whether he had concluded that they should have a flagger, Mr. White said: "On the information I was given... I acted on what was told to me... They were out on the road in harms way..."

Asked whether he is aware that, by statute, it is the CAO that is responsible for hiring, Mr. White answered, "I'm not 100% sure of that." He confirmed he had chosen to go to the Mayor "as a father. I do have different roles." Asked whether he sees it as also skipping the chain of command, Mr. White answered, "It was a different issue. He said, 'I'm not having two of you'..." Asked why he had not taken it to the CAO, Mr. White answered, "Because you are dealing with part of the problem. You're not listened to."

Mr. White's attention was directed to Consent #8(f). He agreed that meeting was the first one after the accident on March 3rd, and answered questions on his discussions with Mr. Wayne Giles about the appropriate regulations.

Mr. Giles told me that his comments had been related to the four lane scenario. He said, what I suggested was a four lane situation, not into ongoing traffic.

Mr. White confirmed Exhibit 8 relates to the stop work order and to Mr. Giles' intervention.

ON REDIRECT EXAMINATION Mr. White testified that in using the radio, "getting workers back from recall was the furthest thing from his mind." He also testified that the *Act* specifically requires the worker to exercise a "general duty" to protect others. He also denied that his action on the radio had, in anyway, constituted criticism of the workers.

Responding to Questions from the Arbitrator, the Grievor acknowledged that TW #11 was not on Union letterhead. "It would not have been sent through Canada Post, but through internal mail." He agreed it was not copied to Mr. Ellsworth. "My mistake. It should have been."

ARGUMENT

FOR THE EMPLOYER, Mr. Smith pointed out that, notwithstanding the fact that we have been listening to testimony for four days, in the Employer's view a lot of the testimony has nothing to do with the discipline given Mr. White. As is clear in the letter of March 23rd (Consent #2) Mr. White was not disciplined for cell phone use. Consent #2 is a letter of reprimand. The suspension itself was reversed, so it became only a letter of discipline.

There are therefore two simple questions before the Arbitrator. (1) Did Mr. White do something that warranted discipline? (2) Was the discipline imposed appropriate in the circumstances?

In the Employer's submission there is a shift in onus operating here. First, the Employer has the onus to demonstrate that the underlying facts merited discipline on the balance of probabilities. The onus then shifts to the Union to demonstrate that the discipline imposed was too severe or inappropriate in some way.

As set out in Consent #2, the March 23rd letter of discipline, Mr. White was disciplined for being critical of fellow employees and undermining the authority of supervisors by acting as he did: taking it on himself to make a communication over the public radio to the City of Corner Brook. In the Employer's view, he was critical of other employees and undermined Supervisors' authority. Consent #2 told him that what he did was unacceptable.

This hearing demonstrates, either that the parties are crazy to spend four full days on this issue, or that there is something seriously wrong. In the Employer's view it is the latter. If Mr. White's action does not merit discipline as levied, then the workplace will be a very significantly different place. The issue is absolutely fundamental.

It is fundamental in the sense that nothing justified his action. Nothing has been shown to justify Mr. White's action, beyond his claim that "I am an OHS official and, as such, I am entitled to interfere in the direction of the working force if I believe there is a health & safety issue that requires my immediate intervention." Fundamentally, this is about the right of management to manage the workforce as set out clearly in the Collective Agreement. That right overrides Mr. White's opinion that he has an obligation, either as Union Vice President or as an OHS official, to intervene if he concludes that there is a health & safety issue not being addressed on his time table.

In the Employer's submission, the Arbitrator must be very careful in reading, understanding, and interpreting the Regulations (Consent #9). Mr. Smith pointed to the August 7, 2009 date on which the Regulations regarding traffic control came into effect. That is after the events at the focus of the instant matter. Regulation 70/09, S. 373, ss. 2 and 3. Section 3 clearly states that municipalities continue to set procedures pertaining to their own jurisdictions.

What is at issue between the parties, however, does not relate simply to flag people. It is not just the fact that Exhibit 3, the *Newfoundland Traffic Control Manual for Roadway work Operations*, and Exhibit #4, *Traffic Control Manual Dept of Transportation & Works* did not

come into effect 'til after the incident. These documents have no evidence value in this matter in any case. Mr. White cannot rely on Regulations or on his health and safety training, which is something like 15 years out of date. Regulation 1165/96 (the first 6 pages of Consent #9, and in particular S. 106) does set out the City's obligation under the *Occupational Health & Safety Act*. That is it. There is no obligation on the part of the City to have flagmen for work that conformed with the relevant regulations at the time. Regulations pertaining to the Department of Works Services and Transportation are not applicable. The supplement only came into effect as of August 7, 2009. Regulation 1165/96 S.106 (a)ii makes it clear where a flagger is to be used.

Mr. White acted on the basis of an uncorroborated comment from a fellow worker. The issue was not subject to the Occupational Health & Safety regulation. It is also worth noting that Mr. Whelan, whose report appears to have triggered this act, was not asked to testify. There was no evidence that the traffic volume was heavy. And, in fact, the work in the roadway was already completed by the time the radio call was made. Therefore there was no "imminent" danger to the workers, even if there is some inherent danger in such work.

Mr. White did not know what the situation was when he picked up the radio. Logically, It is impossible to act on some "imminent" danger without such knowledge. That is why the general definition of workers in section 6 of the *Occupational Health & Safety Act* specifies that the worker is to be understood to be the worker "*while at work.*" (Mr. Smith's emphasis) That is, the event must actually occur at the workplace. Otherwise, how can you assess the actual danger, imminent or otherwise, of something that is taking place some five minutes away by car. The worker's obligation, and what it calls for, cannot be discharged by remote control, or based on absent or insufficient facts. Basically, the Grievor interfered with the workers as they were about to head to another location, according to Mr. Frost's testimony. He was senior man on the job.

Mr. White is an advocate for workers. He has been for years. But the legislated "general" duty, on the basis of which he seeks to justify his act, simply does not apply. To be required to act as Mr. White claims, the "worker" would have to be at the workplace. There is no effective duty at play in Mr. White's acts, either as an Health & Safety committee member or as a worker. Indeed, the specific duty of the worker is to co-operate with the Employer.

In this Collective Agreement, the Employer retains the rights to manage and direct the workplace, including the number of employees. So an act that, without the of the Collective Agreement, interferes with the requirements of that Agreement, is an offense against it. That fact was pointed out to him in the mildest form, a letter of warning. The case law makes it very clear that you cannot imply a positive duty to stop work or to prevent work unless there is an imminent danger being witnessed by the person involved. There is, therefore, no evidence under Regulation 1165/96 Section 106 that Mr. White was justified in his action.

The most telling fact is that this particular kind of work and work practice had been in place for something like eight years. It was a weekly check that had been conducted without incident. It is not rational to infer that there was some "imminent" danger on the morning of March 20th that could have justified Mr. White's action. The work had already been done. Mr. White did not know what they were doing, and yet he felt compelled to intervene as he did.

The Grievor made strong accusations against the City management, and inflammatory statements about their desire for a safe workplace. Yet, as a father and as a Vice President, he is anxious to have his son employed by that Employer. There is an inconsistency here.

It is interesting to note that Mr. McIsaac and Mr. Frost have similar versions of what actually happened. Mr. Frost said they were told to go back to get a flagger. Mr. McIsaac says that they were told to stop work and call in for a flagman. And it is clear that's what Mr. White's intention was. Mr. White, however, still thinks that the workers had an option. The employees had no option. He did not say it that way, but that was the effect.

The essential elements of the event have been proven. Mr. White's use of the radio was not the normal use we've heard about, such as calling for a piece of equipment. The essential implication of his message was that flagmen are required; particularly when it is understood in the context which he mentioned that "We've had a call..." and his reference to being run down. This is the Vice President of the Union and a member of the OHS committee calling, and he is calling to recommend a cessation of work without a flagman. So these two workers were criticised for not having a flagman, and it was suggested that they get one. And this is despite the fact that Mr. Frost had already determined that a flagman was not necessary, and it was a waste of City resources. As a result Mr. Frost and Mr. Specker did not go on to the next location. They

either went back to the Depot, or stood around waiting for the flagman. The essential element has been established.

In Mr. Osmond's view, it was the function of the Supervisor to make any such call. Why did Mr. White call the workers? Why did he interfere, with little or no knowledge of what was going on. Mr. White's interest was not just to deal with a dangerous situation. The simple fact was that Mr. White was not following procedure. Despite the fact that he had been on and off the Committee for years, and knew the protocol, he breached it on a number of counts and occasions. For instance, in approaching the Mayor about his son, and doing an end run around the Chief Administrative Officer and others employed by Council, some with statutory duties.

Mr. White insists on wearing a variety of hats, and changing them to suit his needs at any given moment. At one moment he is a Union Vice President, covered by the Agreement. Then he is a member of the Occupational Health & Safety Committee. Then he's acting on his son's behalf, as a father and a citizen. It is this kind of activity that Mr. White continually engages in? He does what he wants to do. But the workplace is governed by the Collective Agreement.

Mr. Smith introduced jurisprudence for the Arbitrator's instruction: *Kemiss Mines Ltd., v. International Union of Operating Engineers Local 115*, Jeff Hollett, Grievor, British Columbia Arbitrator Nicholas Glass, August 2008. In the Employer's view, nowhere in any legislation is there any authority on which the Grievor can base his behaviour. There simply is no obligation on the Grievor to act as he did. The Employer has made out its case for the discipline and the written reprimand is very light. He has been there. He is the Vice President. He is under the Administration. His responsibilities are imposed on him by the Collective Agreement.

The Employer requests that the Arbitrator deny the grievance.

FOR THE UNION, Ms. Coen invited the Arbitrator to consider Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 7:4210 with reference to the Employer's position vis-a-vis *Kemiss Mines*. In the Union's view, that case is very far from the situation we are dealing with here, but insofar as it is relevant at all it actually support's the Union's position. There has been no misconduct on the Grievor's part. There is no justification for the discipline. The grievance must be sustained.

Mr. White asked Mr. McIsaac to act. He did not respond. The discipline imposed by the

Employer can not be justified. Section 49 of the *Operational Health and Safety Act* applies. There is discrimination against the Grievor. The Employer has breached Section 49(a) of the *Act*. There has been a failure to co-operate as Article 9.01 requires. This was discrimination, not just against the Union member, but in particular against a Union officer.

The *Occupational Health & Safety Act* is key, particularly where the procedure set out in the Policy on Employee Conduct 10-05-10 (MD #6) applies. The testimony shows that there was no investigation, of the sort required under MD #6, on which the Employer could base its determination to discipline the Grievor. Mr. MacDonald said he chatted with an HR representative, but no one did any investigation. That also is key here. Two of the three management people we heard from made no effort to inquire of anyone involved, and more particularly of Mr. Specker or Mr. Frost. That is a clear part of the grievance. Mr. Smith's analysis of the law does not take note that the City was violating the law on March 20th.

But the question here is, Did the Grievor do anything wrong?

Ms. Coen directed the Arbitrator's attention to p. 20 of the *Traffic Control Manual Dept of Transportation & Works* (Exhibit #4), published in May 2010, and asked him to compare what appears there with *Traffic Control Manual for Roadway work Operations* Field Edition (Exhibit #3) at p. D3, paras (b) and (e). They both say exactly the same thing. This supports Mr. White's position. Mr. White was simply following what the manuals always made very clear. Even Mr. Dolter agreed that he was right in his analysis of what was required. That evidence is key to the ongoing tension in the workplace.

The Union fundamentally disagrees with the Employer's understanding of the *Occupational Health & Safety Act* S. 6. The phrase "while at work" must be distinguished from "while at home" or "while on vacation". It does not, as the Employer suggests, limit acts to those taken precisely at the site of a particular piece of work. Mr. White felt he had an obligation to act as he did, and that there were three grounds for him to do so: Occupational Health & Safety requirements, as a Union Vice President, and as a worker. All are recognised under S. 6 of the *Act* and as specific duties set out under S.7, particularly at section 7(b), which requires him to "co-operate with the occupational health and safety committee". So there is statutory support for Mr. White's feeling obligated to do what he did.

It is clear that he did, in fact, go through and speak with management. Mr. Osmond also acted in the same way. Mr. Whelan clearly felt concern and reported that concern. An attempt was also made to find Mr. Costello. Mr. White's action was reasoned and reasonable. He did have general knowledge of what was occurring based on information provided by Mr. Whelan. His own photographs of the site clearly show where the two employees were working.

The test is not whether there is "imminent" rather than inherent danger. Nor is the right to refuse work the appropriate criterion. The test is the reasonableness of the Grievor's actions in light of the statutory obligations and of the Collective Agreement. Mr. Clancey's evidence is at variance with Mr. McIsaac's on this, and Mr. Clancey's should be preferred. Mr. White spoke with Mr. McIsaac before, not after, speaking on the radio. Mr. Clancey's statement supports Mr. White's account. Mr. McIsaac testified that Mr. White was speaking with Mr. Clancey; but that is not likely, because the Grievor knew that the two employees were not under Mr. Clancey's supervision but under the Water and Sewer Foreman's. Mr. Clancey's own testimony is much more likely and consistent with Mr. White's. So was Mr. Specker's. In any test of credibility, Mr. White's testimony is very secure.

Mr. Clancey testified that he'd heard Mr. White on the radio prior to the call the Grievor made from the Foremen's office, but that is simply not supported on the evidence. The only possible explanation is that Mr. Clancey was recalling the subsequent conversation when Mr. Frost had called back, and asked whether Mr. White needed him and Mr. White said, "No, the matter is dealt with."

Mr. Frost's testimony was significant as well for its support of the overall position taken by the Union. He had only learned about the discipline a few days prior to this hearing. In hindsight, he came to the conclusion that it was good to have a flagger. The past practice was not the justification of his own earlier decision. In his view, it is about risk management, not about being brave and fearless. It's about acting in a reasonable manner, attending to safety. This became clear also in Mr. Cook's own testimony.

While the Grievor's behaviour was, perhaps, not exemplary in all respects, it does not invite discipline. And this is very clearly corroborated by subsequent events. The manhole inspection is now on the list to be flagged, as it should have been on March 20th, 2009. In fact,

on March 20th the evidence shows that two flag people were actually assigned after the radio call.

Mr. White's concern had to be taken seriously, especially after the March 3rd accident and the March 6th meeting in the lunchroom. The City was developing its own policy; but it was not to address flaggers for manhole sewer inspections. The policy was to address cold patching.

Mr. White's conversation with the Mayor is not before us in evidence. Reference to it was made in Mr. Dolter's letter, but the evidence shows there was no discipline. That cannot now be held against the Grievor.

Mr. White has the courage to stand up. That is the role into which he is elected by his peers, a role which he is careful to exercise within proper boundaries, as a worker, and as an OHS representative, and as Vice President of the Union. The City is not allowed to discriminate or to deal with him as, for example, in Mr. MacDonald's request that he not join the committee. Mr. MacDonald's acknowledged behaviour demonstrates why Mr. White felt he needed to get the various statements signed by his colleagues that were entered into evidence.

The Employer's suggestion that Mr. White acted as he did in order to increase employment and get people recalled is simply mischievous. There is no evidence for that suggestion.

There was evidence that Mr. White was regarded as "hard nosed" on safety. That is not what the evidence actually shows. It shows a man who is concerned for a legitimate problem. The City policy (MD #6) must be read in light of the actual facts in evidence.

There is no evidence that Mr. White criticised anyone. He spoke in a civil and respectful manner on the radio. The Employer did not allege insubordination in this matter. There is an urgency to act in a way that prevents injury or death in the workplace. It is clear that Mr. White knew the rules and did not break them, as all evidence shows in all accounts of what happened on the radio.

Ms. Coen introduced cases and arbitral authorities in support of the Union's position, specifically: *Supreme Court of Ontario, R. V. Cotton Felts Ltd.* Martin, Zuber and Blair JJ.A. December 1982; *Communications, Electronic Electrical, Technical and Salaried Workers of Canada, Local 410 v. Newfoundland Telephone Co.*, *Michael J. Power Grievance*, 31 L.A.C. (3rd) 104, Oakley.

In the Union's view, the Employer's evidence has established nothing. The Foreman's shrug of his shoulders said everything. In the Union's view the grievance must be allowed and the disciplinary record be reversed.

IN REBUTTAL FOR THE EMPLOYER, Mr. Smith argued that legislation does not sustain what the Union wants it to sustain. It does not justify the Grievor's actions. The Arbitrator must carefully review the evidence and the testimony.

Mr. White interprets his action as having been required by the regulations, but the Manual does not, in fact, apply to the City. There is no *carte blanche* available to Mr. White to justify his acts. Regulations do not require flagmen in all situations. Yet that does seem to be Mr. White's understanding. He created the impression of conflict with management, and that is Mr. White's vision: the one on which he acted. To support his action in sustaining the grievance would be to sew the seeds of decay in the core of management's rights to manage the workforce.

There is a process. Mr. White did not observe it. "Past practice", as Mr. Specker and Mr. Frost use the term, does have a relevance here and provides understanding of what was going on. That is why the Employer is so concerned about the conflicts appearing in the workplace. Mr. White should have taken his concern to the committee. He did nothing. He knew nothing. He had a statement from a co-worker and acted on it without any substantiation.

His obligation, insofar as he had one, was to report, not to interfere. He was disciplined for interfering, for not reporting. If Mr. White were exonerated for doing what he did, then all are licensed for taking procedures into their own hands. When he feels like it, he can act without any reference to the facts, based on his 15 year old training.

The letter (Consent #2) is a written record of discipline which cannot be changed. That is the written record. What the Union seeks in respect of that letter is already, in effect, achieved, since the discipline is now moot. The suspension was part of the record, but it is not pertinent because it was reversed by the Employer. That is what the letter says and what the record shows.

The Employer was variously attacked and castigated for not carrying out an investigation. But Mr. White, himself, carried out no investigation prior to his action. For Mr. White to say that Mr. McIsaac had no knowledge is quite ironic since Mr. White, himself, had no knowledge of the actual facts of the situation. His own action was based on the uncorroborated comment of

a co-worker. He did not, according to his own testimony, attempt to secure further information from Mr. Whelan. Instead he bolted into action. Any danger that might have existed was stale by the time that Mr. White had acted. This is a very dangerous pattern of behaviour to licence.

It is significant that, in response to Mr. Frost's call back, Mr. White had that the matter was dealt with. But how could Mr. White say that? He knew nothing, on his own testimony, about what action the Employer was or was not going to take. What was dealt with? Was it simply the fact that he had uttered the instruction, and so the matter was taken care of?

The Arbitrator does not have to go so far as to look at the information that he did or did not have. It is clear he had insufficient information to interfere and to undermine the Supervisor's role. Furthermore, on the suggestion that there was something improper in Mr. MacDonald's dealings with Mr. White about the OHS committee, it should be noted that the evidence is this was a "favour" Mr. MacDonald was asking.

The simple fact is that Mr. White has significant difficulty sorting out his various roles, and is very, very quick to take a position.

CONSIDERATIONS

At issue between the Parties is the Union's claim that the Employer has violated the Collective Agreement having disciplined the Grievor without cause and in contravention of its own policy. The Union further alleges that, in acting as it did, the Employer discriminated against the Grievor in violation of the Collective Agreement and a relevant statute.

It is common ground between the Parties that the Employer disciplined the Grievor following his use of the City's radio communications system to contact two other employees concerning the conditions under which they were performing their assigned tasks.

The Employer argued and led evidence to show that in acting as he did, the Grievor contravened City policies, criticised co-workers, and undermined supervisory authority in a way that warranted written reprimand, which was a very light level of discipline in the circumstances.

The Union argued and led evidence to show that the Grievor had done nothing whatsoever to justify the discipline, and that his actions were not only free of culpability, but were actually required of him under statute and by virtue of various positions he held with the Local Union (as

Vice President) and with the Occupational Health and Safety Committee. It seeks removal of the discipline from the Grievor's personnel file and a written apology.

The Onus lies with the Employer to show, on the balance of probabilities, that the Grievor's behaviour warranted the discipline.

The Arbitrator's powers are defined in Article 15.03 which says, in part, that my "decision... shall be final and binding on all parties but in no event shall I "have the power to alter, modify, or amend, this Agreement in any respect." The Arbitrator is required to "determine the difference or allegation" (Article 15.02) including, whether appropriate discipline was imposed.

The Evidence: Background and Context... The evidence of both Parties shows that there were ongoing workplace communication and co-operation issues relating to safety. Mr. MacDonald, appearing for the Employer, and others, testified that he had requested a "favour" of the Grievor to help with difficulties the Employer was experiencing in work with the Occupational Health and Safety Committee. The discipline letter (Consent #2) also states the Employer's "observation over many months that you (the Grievor) frequently ignore proper chain of command and established regulations."

Union evidence confirms a workplace culture marked by some mistrust of the Employer's commitment to "co-operate in continuing and perfecting the safety measures now in effect and agree that the Occupational Health and Safety Act and Regulations are in effect" as required by Article 9.01. Testimony from the Grievor and others portrayed some workers as confused over the appropriate safety procedures & standards applicable, in particular, to the deployment of flag persons and the appropriateness of requesting flag persons in certain work situations.

There were, clearly, a number of circumstances that aggravated this cultural atmosphere at the time of the March 20, 2009 incident. Mr. Osmond suggested that the Employer's concern to secure success under PRIME had been a possible source of some pressure. Evidence, such as TW #11 dated March 10, 2009, suggests that some personal attitudes may also have been at play.

But, clearly, the single most obvious and pressing event contributing to workplace anxiety was the March 3, 2009 accident where two employees were injured. Several witnesses referred to this event. Awareness and concern for safety were clearly heightened. The Employer organised a meeting in the lunchroom on March 6th where issues of safety were aired, detailed discussions

opened, and reassurances offered. Within this context, normal maintenance and municipal services continued, including the regular weekly sewer checks that, according to unchallenged Employer testimony confirmed by Union witnesses, had been performed without flag persons for eight years or more.

The Evidence: the March 20, 2009 Radio Contact...

Most of the general facts relating to the event that resulted in the Grievor's discipline are not in dispute, but there is deep dispute over the proper way to characterise his actions. The now undisputed facts, as they emerged in testimony, are as follows.

At approximately 8:00 AM on Friday March 20, Mr. Frost and Mr. Specker began their tour of various manhole locations to check the sewer flow. On the way, they discussed whether they should have the assistance of a flag person. Mr. Frost, the Sewer Maintainer and senior worker, pointed to the long established "past practice" of doing the checks without flag persons, and Mr. Specker deferred to his judgement.

At around 10 AM, the usual morning break time, the Grievor was in the lunchroom, when a co-worker, Mr. Whelan, came in, called out to him and hurried over to ask, according to Mr. Cook's testimony, "was Water & Sewer exempt from flagmen?". Mr. Cook testified that Mr. Whelan then reported: "Specker and Frost are out in the road with a manhole cover up in the middle of traffic, not safe."

The Grievor's recollection is substantially the same. He said that Phil Whelan came in the door and called out to me by name, and ran over to where I was and asked if Water & Sewer were under the same OHS rules as Public Works. He wasn't that calm. He was very excited. He said, "You better get somebody... Johnny Specker and Carl Frost are out in the middle of the road with a manhole cover off, and there is traffic going all the way around on both sides and they have no flagman. They are going to get killed."

The Grievor accepted the report without questioning it or Mr. Whelan, and immediately left to find Mr. Osmond, Co-chair of the Occupational Health and Safety Committee. Both he and Mr. Osmond went in search of various supervisors. The Grievor reached the Foremen's office where Mr. Clancey, Foreman of Public Works, and Mr. McIsaac, Foreman of Water and Sewer were sitting working. On the Grievor's own account, he quickly reported what he referred

to as a "call" about the ongoing work on Main Street. The whole conversation was very brief, according to all the participants. Mr. Clancey and the Grievor testified that his report was made to Mr. McIsaac, but Mr. McIsaac testified that the report was made to Mr. Clancey, not to himself, and that he had not paid full attention to what was being said. (I note that Mr. Clancey was, at the time, the Grievor's Foreman, and conclude that it was not therefore unreasonable of Mr. McIsaac to assume that the Grievor was, in fact, addressing something to his own Foreman.)

The Grievor then approached Mr. McIsaac's desk and, having received no response to his report from Mr. McIsaac other than what he interpreted as a dismissive "shrug", he picked up the radio and made a call to Mr. Frost and Mr. Specker. Mr. Frost was not yet in the truck cab, so the Grievor spoke only to Mr. Specker at that time. What precisely the Grievor said is variously reported by various witnesses, as reviewed above, but in speaking with Mr. Specker he asked that Mr. Frost call him back.

At the time the call was made, Mr. Specker and Mr. Frost were just returning to their truck – having finished the inspection at the site where Mr. Whelan had observed them – and were preparing to move on to the next inspection site. The result of the radio call was that a request for flag person help was made and approved, and the workers returned to the Depot. In the end, two flag persons were dispatched to work with Mr. Frost and Mr. Specker for the rest of the March 20 sewer check. The Grievor returned to work. Mr. Frost did, as requested, call him back on the radio, but the Grievor told him that the matter was now taken care of.

In the subsequent months the sewer checking procedure was changed. Flag person assistance is now assigned for a number of the manhole sites, including the Main Street site where Mr. Frost and Mr. Specker were working on March 20, 2009.

The Evidence: The Employer's response ...

The undisputed evidence is that the Grievor's radio conversation had been heard by a number of management persons, and that it had prompted various reactions. Mr. MacIsaac thought the Grievor's action had pre-empted his own supervisory responsibility. He and Mr. Clancey went to find their supervisor, and failing to find him, went on to discuss the matter with Mr. MacDonald. Mr. Ellesworth had also found it unacceptable, according to Mr. Dolter's account. Mr. MacDonald summoned the Grievor to his office, and the disciplinary process that resulted in Consent #2 was initiated.

My Analysis of the Key Evidence may be summarised as follows.

A. The Grievor acted in haste and out of a concern for what he understood, from Mr. Whelan's report, to be real and urgent dangers faced by co-workers. That concern was understandable, and perhaps amplified because of the agitation exhibited by Mr. Whelan when he reported it. That concern was also, as noted above, likely heightened in the context of increased awareness occasioned by the March 3 accident and the March 6 lunchroom meeting.

The Grievor's haste can actually be estimated by calculating the time elapsed between Mr. Whelan's observing the workers at the Main Street site and the Grievor's radio contact with them, which was made when Mr. Frost was not yet back in the truck. Both Mr. Frost & Mr. Specker reliably testified that it takes at least 5 and at most about 15 minutes to perform such a check. Thus, Mr. Whelan's travel to the depot and his reporting to the Grievor, followed by the Grievor's finding and report to Mr. Osmond, and then locating and reporting to the Foremen, and finally his making the radio call had all been completed within about 15 minutes. It appears that the Grievor wasted very little time.

There is reason to ask whether this haste may have clouded the Grievor's judgement of options open to him. He might for instance have taken a moment to check background facts that might have clarified the actual level and type of the danger. He might have spent a little more time and effort ensuring he had Mr. McIsaac's attention and in clarifying for him what he saw as the urgent danger, so that Mr. McIsaac might make a more fully informed supervisory decision. He might have considered taking the matter to the Occupational Health and Safety Committee. Or all of the above.

The evidence is also clear that the Grievor's safety concern was real and long standing. That concern can reasonably be seen against the background of his ongoing engagement with management over safety issues such as those he raised, as "Vice President Local 706", in the March 10 letter (TW #11). I also note evidence that the Grievor took a particular, and quite public, interest in safety issues and served at various times on the Occupational Health and Safety Committee. There is evidence that some people regarded him as "hard nosed" about safety, and that one co-worker had said of him at the March 6th lunch-room meeting that "this man never stops talking about it."

There is, again, I believe, reason to ask whether the Grievor was clear about his priorities in pursuing this concern. I note that none of the accounts of what he actually said to Mr. Specker when he established radio contact included enquiring about the workers' actual security. There is no evidence that he asked, for instance, "Are you guys OK?" On his own and others' accounts, his first and only question was whether they had a flag person. I have no doubt that the Grievor was, as he credibly testified, truly alarmed for the actual safety of the workers. The fact remains that, on the evidence, that concern was first expressed as an inquiry about their safety procedures rather than about their actual well being.

On all the evidence, events moved very quickly. The Grievor himself testified that he reached for the radio in immediate response to what he observed as Mr. McIsaac's shrug that he interpreted as dismissive of the concern he was bringing to the Foreman's attention.

The Grievor's immediate reaction, was, in my respectful view, not a well judged action. It failed to allow the Foreman time to recognise that he was the one being addressed, and about something on which he was being asked to make an urgent management decision. I note that the Grievor had quite rightly taken the time and trouble to bring the issue to the Foreman's attention; but, at the last minute, he unwisely failed actually to communicate the issue to the Foreman effectively. The Grievor's instantaneous decision to make the radio call effectively denied the Foreman the opportunity to make a considered and appropriate management response, or perhaps even to explore any possible relevant difference between inherent and imminent risk in the work involved. I note, in this context, contextually relevant evidence in Mr. Clancey's testimony. On cross examination, he said:

If someone has a problem, he normally comes to the foreman. And if he is not satisfied, he goes on to the Supervisor. And still, if there is no satisfaction, then it goes to the OHS committee. There were times that they would tell the Foreman and then go on to Barry or Brandon and skip the in-betweens. That was going on.

In the Grievor's case, of course, the Employer objected, not of his skipping "the in-betweens", but to his acting as though he were himself a supervisor.

I note that it is common ground between the Parties that the Employer did, in fact, assign flag person support to the crew doing the sewer check on March 20, and that the procedure was subsequently modified so that the work is now regularly done with flag persons assigned.

This is interpreted by some, understandably, as an indirect vindication of the Grievor's action on March 20. But it might also be interpreted as evidence that the Employer is open to changing work practices to accommodate health and safety issues as they evolve. The fact that accident-free sewer checking had gone on for years without flag persons does not prevent flag persons being required at a later date due to changing traffic patterns, volumes, or circumstances.

But such openness to change can best be effectively achieved and sustained when Parties are accorded a full opportunity to understand the facts, and are enabled to take the decisions for which they, themselves, are contractually and legally responsible. In that way the organisation as a whole can develop an economically sustainable, mutually supportive culture of accident-free work practices.

In my view, the haste and immediacy of the Grievor's impulsive action, however well intentioned, did unwisely pre-empt what was properly the Foreman's management decision to make. I find therefore, on balance of probabilities based on the evidence before me, that the Grievor's action did justify discipline.

B. The Employer

"Investigation"? Consent #2 was delivered to the Grievor on the Monday morning following Friday, March 20. In the period from Friday until Monday, according to Mr. MacDonald's own testimony, it appears that no actual investigation was conducted. Mr. MacDonald testified:

I had first hand from Mr. White and Mr. Ellsworth, who reported to me. I had some talk with HR about followup procedure. I spoke with Mr. Colborne in HR. I spoke specifically about the 'without pay' issue with the Director of Public Services.

The evidence shows that neither the Grievor nor any of those immediately involved with the actual events were interviewed or questioned. This invites consideration in light of the requirement for investigation in the City's Policy and Procedures 10-05-10 (MD #6). The evidence appears also to conflict with references in MD #5 (Para 3) to "investigation" having been conducted prior to the imposition of Consent #2.

Discrimination? As recorded above, "clarification of the City's position" (MD #5 para 2) in response to the Grievor's action was set out in the ongoing correspondence with the Union, particularly in MD #s 3, & 5. In that correspondence the Employer detailed several concerns. In

MD #3, Mr. Dolter refers, in paragraph 3 to "disruptive actions of a few", and goes on to observe that: "It appears that Mr. White either doesn't know where the boundaries of acceptable conduct are, or he has blatant disregard for those boundaries". In the next paragraph he responds to the Union's claim that the discipline had in fact discriminated against the Grievor by suggesting "that Mr. White is using his membership in the union, and positions that he holds with that union as a screen to hide behind when challenging the role of management". But he does not cite a basis for the claim relying, it would appear, on the Grievor's March 20 action itself as grounds for it.

It is not clear that the Employer had actually established its claims by investigation that, in his radio communication, the Grievor was engaging in "disruptive" (repeated in MD #3 para. 10) action, or showing ignorance or disregard for "boundaries", or that he was "challenging the role of management", or that, (as set out in para 4) he had coached employees "to refuse their assigned work tasks", or "aggravated" matters by using "the public works radio system to communicate his view to the employees on how the work should be conducted."

The Employer argued that no investigation was necessary in view of the public nature of the Grievor's action, and the response it had provoked from "three different managers" who "came forward claiming what they heard was unacceptable" (MD #3). However, absent that Policy-mandated investigation, it is also not clear that these charges are actually sustained by the evidence led in this Arbitration hearing. With respect, I am not persuaded that they are.

I have found above that the Grievor acted in a hasty and unwise way that did justify discipline. The evidence relating to the Grievor's actions on March 20, 2009 shows him responding hastily to an issue that was reported to him as presently ongoing and fraught with urgent danger for two co-workers. It is an acknowledged fact that the Grievor was an officer of the Union, formally and publicly identified with work of the Occupational Health and Safety Committee. Thus, Mr. Whelan's report was made to someone equipped to act on the information appropriately. He did act. As noted above, that action turned out to be less wise and less well thought through than it might have been. Certain managers found it "unacceptable". The Employer describes it as having been "disruptive".

I assume that the *disruption* to which the Employer refers consists, in part at least, in the sewer checking having been delayed because of the workers' request for flag person assistance,

which was prompted by the Grievor, and the time needed to provide the flag persons.

The Employer variously describes the Grievor's radio call as "coaching" the employees "to refuse their assigned work tasks" or issuing the employees "instructions (MD #3para. 5) on "how the work should be conducted".

The credible testimony of the witnesses does not, however, in my view, support these characterisations of what the Grievor said on the radio as "coaching ... to refuse tasks " or as giving "instructions". There is no doubt that workers were prompted by the Grievor to call in for flagger help, and that their tasks were thereby delayed. Most witnesses, cross examined on the point, testified that the Grievor had "suggested" the workers call their Supervisor and ask for a flagger. In my respectful view on the balance of probabilities, – and absent evidence that the Grievor was making mischief by knowingly inflating the situation – it is not accurate to label his action, taken by a Union officer with established Occupational Health and Safety Committee involvement and responding in good faith to an alarm raised by a bargaining unit member, as "disruptive", or coaching to refuse work, or as issuing "instruction".

In both Consent #2 and in MD #s 3 & 5, the Employer did suggest its view that there was inflation. But there is no persuasive evidence of such intent. The Employer argued that the same sewer checking practice had been in place for eight years or more without incident, and that the risk involved was therefore, at most, inherent and not "imminent" as that word is used in the *Occupational Health and Safety Act* at S.8. But there was no evidence that the Grievor actually knew that the work Mr. Whelan was reporting was the weekly sewer checking, or that he knew of its long history. The evidence shows the Grievor did not pause to find out the background facts.

In my view, the Employer did have a right to expect that a leader like the Grievor, with his level of insight and experience, would have considered his options somewhat more carefully, less impulsively. But it is, in my respectful view, inaccurate, in the absence of investigated evidence, to characterise the Grievor's actions in some of the language used in Consent #2 as clarified in MD # 3 & 5. I am concerned, further, that, were such language to stand, unqualified and in its current form unsupported by investigated evidence, a claim of discrimination against a Union officer with publicly recognised Occupational Health and Safety Committee involvement might be found credible.

I do not find that the evidence persuasively shows the Employer did actually discriminate against the Grievor on grounds prohibited either by the Collective Agreement or by legislation. Rather, I am persuaded by the evidence that intense communications static created by the background tensions noted above, and by the Grievor's own hasty action, led to the use of verbal and written rhetoric that was somewhat intemperate and open to misinterpretation as discrimination.

Removal of Consent #2 and "Apology"?

In framing my decision based on the foregoing evidence and considerations, I note that the Union has asked that "the letter of March 23, 2009 be removed from his personnel file and Mr. White receive a written apology from the City for the treatment and lack of proper procedure displayed toward him."

I note that the Collective Agreement, at Article 16.02, requires an "adverse report shall not become a part of his/her record for use against him/her at any time. The employee's reply if filed within forty-five (45) days of receipt of the adverse report shall become part of his/her record." Nowhere in the Collective Agreement do I find any warrant to "remove" a document from the record. I infer from Article 16.02 that the record is, rather, open to receive a "reply". I am unwilling in the present circumstances to make an order to "remove" anything. In light of my considerations, set out above, I am similarly unwilling to order an apology.

DECISION

In light of the above considerations, I find that the grievance is sustained in part. While the Grievor was liable to discipline for his action, the actual letter of discipline as imposed was inappropriately worded and not based on adequate investigation. I note also that the Employer has already restored the financial loss associated with the suspension imposed in Consent #2.

I find therefore that:

The Letter of Discipline is to be rescinded. The Employer is to place a letter on the Grievor's file noting that the March 23, 2009 Letter of Discipline (Consent #2) is rescinded pursuant to this Order.

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D.
Arbitrator

April 4, 2011