

**THE AWARD ON THE MERITS**  
**OF A DISPUTE**  
**between**  
**HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND**  
**AS REPRESENTED BY TREASURY BOARD**  
**("the Employer")**  
**and**  
**NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC & PRIVATE**  
**EMPLOYEES**  
**("the Union")**

**The Grievor:** Mr. Stephen Dyke

**APPEARANCES:**

**For the Union**

Presenter: Mr. Bert Blundon, NAPE Secretary Treasurer  
Witnesses: Mr. Stephen Dyke, the Grievor  
Mr. Chris Henley, ERO, NAPE  
Ms. Trudy Blake, ERO, NAPE  
Mr. Terry Kennedy, (under subpoena)  
Ms. Nancy Benson, (under subpoena)  
Ms. Marie Ryan, (under subpoena)

**For the Employer:**

Presenter: Mr. Don Saturley, Staff Relations Specialist  
Advisor: Ms. Tina Follett, Public Service Commission

**The Arbitrator:** Dr. John A. Scott

**Statement of Grievance** reads: "Violation of the General Service Collective Agreement re: Articles 12.07, 33.01, 33.02, 33.07 and all other pertinent articles."

**Requested Adjustment** reads: "Full redress."

The hearing opened on December 12 & 13, 2007, continued on March 8, 2010, and concluded on November 22 & 23, 2010 in St. Johns.

**AT THE OPENING SESSION OF THE HEARING THE PARTIES AGREED THAT:**

- the Arbitrator was properly appointed with 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;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- 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 were no preliminary objections to be raised.
- all witnesses were to be 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 sixty (60) calendar days they will be referred to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for sixty (60) calendar days after publication of the award to deal with matters of interpretation should they arise.

**ITEMS TAKEN INTO EVIDENCE**

Consent	#1	General Service Collective Agreement expiring March 31, 2008
"	#2	Grievance July 18, 2006
"	#3	Job Posting for two Environmental Biologists, September 19, 2005
"	#4	Letter, Sept 6, 2005 Manager of Human Resources to Mr. Dyke
"	#5	Grievor's resumé
"	#6	<i>Public Service Commission Act</i>
"	#7	<i>Labour Relations Act</i>
"	#8	<i>Public Service Collective Bargaining Act</i>
"	#9	July 18, 2006 letter: Mr. Blundon to Director of Human Resources
SD	#1	4/28/2006 - 10:18:23 AM e-mail: Ms. Benson to Grievor
"	#2	4/28/2006 - 1:45:46 PM e-mail: Ms. Benson to Grievor (further to SD #1)
"	#3	5/2/2006 - 1:44:306 PM e-mail: Grievor to Ms. Benson
"	#4	Feb 09, 2005 e-mail: Mr. Michielsen to Grievor
"	#5	July 08, 2005 e-mail: Mr. Michielsen to Grievor (et al)
"	#6	July 17, 2006 e-mail: Mr. Michielsen to Grievor
"	#7	11/22/2007 Posting for Environmental Engineer
"	#8	Grievor's resumé (for SD #7)
"	#9	August 1, 2008 e-mail exchange: Grievor & Ms. Noseworthy
"	#10	Nov. 17, 2010 e-mail exchange: re "references"
"	#11	Ms. Ryan's Aug 28/08 Employee Reference Form A for the Grievor
"	#12	Oct 16, 2008 letter: Grievor's Confirmation of appointment
"	#13	July 19, 2005 e-mail: Ms. Ryan to Grievor
"	#14	Dec 11, 2010 e-mail: Grievor to Mr. Blundon
"	#15	June 25, 2002 Letter: Mr. Kennedy to Grievor re Permanent Status
CH	#1	General Service Collective Agreement expiring March 31, 2004
"	#2	Oct 2, 2000 Union's Initial Proposals re Article 33.10
TB	#1	January 12, 2006 Letter: Mr. Kennedy to Ms. Brake

TK	#1	April 21, 2006 Letter: Mr. Blundon to Mr. Kennedy
"	#2	April 4, 2006 Letter: Mr. Kennedy to Grievor
NB	#1	4/19/2006 - 1:45:46 e-mail: Ms. Benson to Ms. Goldie Porter
"	#2	Applicant Assessment Matrix Environmental Biologist EC.EB.(T).050585058
"	#3	PSC Selection Referral Certificate Feb 14, 2006 re NB #2
"	#4	PSC " " " May 12, 2006 EC.EB.(T)( RCC).06011
"	#5	6/6/2006- July 7, 2006 e-mail exchange: Grievor and Ms. Benson
"	#6	PSC Selection Referral Certificate Nov 25, 2005
"	#7	Policy Statement re "References"
"	#8	Policy Statement re "Issuance of Recommendation for Appointment"
"	#9	Mr. Picco's May 1/06 Employee Reference Form A for the Grievor
"	#10	Mr. Michielsen's May 2/06 Employee Reference Form A for the Grievor
"	#11	Ms. Ryan's May 1/06 Employee Reference Form A for the Grievor
MR	#1	Dec 7, 2005 e-mail: Ms. Ryan to Grievor
"	#2	Undated letter: Ms. Ryan to Mr. Burley

**ARTICLES CONSIDERED**

**ARTICLE 1**

**PURPOSE OF THE AGREEMENT**

- 1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Union and to set forth certain terms and conditions of employment relating to remuneration, hours of work, safety, employee benefits and general working conditions affecting employees covered by this Agreement.

**ARTICLE 3**

**EMPLOYER RULES, REGULATIONS AND POLICIES**

- 3.01 In the event that there is a conflict between the context of this Agreement and any rule, regulation or policy made by the Employer, this Agreement shall take precedence over the said rule, regulation or policy.

**ARTICLE 5**

**DEFINITIONS**

- 5.01 For the purpose of this Agreement: ...
- (v) "promotion" means an action, other than reclassification resulting from the correction of a classification error, which causes the movement of an employee (i) from his/ her classification to a classification giving a higher pay range number, or (ii) from his/her existing employee grouping to a higher ranked grouping within his/her classification.
  - (bb) "temporary appointment" occurs when a permanent employee obtains a temporary position through a competitive process approved by the Public Service Commission while retaining rights to his/her permanent position in accordance with Clause 33.05.
  - (cc) "temporary assignment" occurs when the Employer assigns the employee to a higher

or lower position for periods up to thirteen (13) weeks without the necessity of a competition.

- (dd) "temporary employee" means a person who is employed for a specific period for the purpose of performing certain specified work and who may be laid off at the end of such period or on completion of such work.
- (ii) "vacancy" means an opening in a permanent, seasonal, or temporary position which is in excess of thirteen (13) weeks duration, and in respect of which there is no employee eligible for recall.

**ARTICLE 12**  
**GRIEVANCE PROCEDURE**

12.07 Employees shall have the right to grieve against suspensions and alleged unfair treatment on promotion or transfer and such grievances may be submitted in the first instance at Step 3 of Clause 12.01.

**ARTICLE 13**  
**ARBITRATION**

13.16 An arbitration board may not alter, modify or amend any provisions to this Agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

**ARTICLE 33**  
**JOB COMPETITION**

- \* 33.01 (a) Where the Employer determines that a vacancy in a bargaining unit position is to be filled, the Employer shall post notice of the competition for at least seven (7) calendar days in readily accessible places.
  - (b) All vacancies identified in accordance with Clause 33.01(a), will be posted within the public service prior to outside applicants being considered except where, in the opinion of the Public Service Commission, it is not in the public interest to comply with this provision.
- 33.02 Notice of job competitions shall contain the following information:
- (a) the classification title and, where applicable and required, the organization title;
  - (b) description of position;
  - (c) Step 1 - Step 3 and GS level;
  - (d) required qualifications;
  - (e) location of the position;
  - (f) closing date;
  - (g) shift work where applicable; and
  - (h) this position is open to both male and female.

33.05 Temporary Appointment

- (a) A permanent employee who is temporarily appointed to fill a temporary position or backfill a permanent position as a result of a competition held in accordance with this Article shall retain his/her permanent status.

33.07 Whereas the parties recognize:

- (a) opportunity for promotion should increase with length of service;
- (b) The parties therefore agree that in evaluating candidates who have been recommended by either the Public Service Commission or a chair of a department selection committee for promotion, the permanent head shall consider three criteria: qualifications, ability and seniority.
- (c) where the recommended candidates are evaluated as being relatively equal, the senior recommended candidate shall be selected for appointment.

33.09 Trial Period

The successful applicant shall be placed on trial for a period of two (2) months. Conditional on satisfactory service, the Employer shall confirm the employee's appointment after the period of two (2) months. In the event that the successful applicant proves unsatisfactory in the position during the trial period, or if the employee is unable to perform the duties of the new job classification, he/she shall be returned to his/her former position, wage or salary rate and without loss of seniority. Any other employee promoted or transferred because of the re-arrangement of positions shall also be returned to his/her former position, wage or salary rate, without loss of seniority. The parties may mutually agree, in writing, to extend the trial period. Where the Employer and the Union agree, the employee may revert to his/her former position prior to the completion of the trial period.

**ARTICLE 41**  
**PERSONAL FILES**

- 41.04 When a formal assessment of an employee's performance is made, the employee concerned must be given an opportunity to acknowledge receipt of the assessment form in question. When as a result of this assessment, the performance of an employee is judged to have been unsatisfactory, the employee may present a grievance in accordance with Article 12.

**ARTICLE 42**  
**DISCIPLINE**

- 42.03 The Employer shall notify an employee in writing of any dissatisfaction concerning his/her work within five (5) working days of the occurrence or discovery of the incident giving rise to the complaint. This notification shall include particulars of work performance which led to such dissatisfaction. If this procedure is not followed, such expression of dissatisfaction shall not become a part of his/her record for use against him/her at any time. This Clause shall apply in respect of any expression of dissatisfaction relating to his/her work or otherwise which may be detrimental to an employee's advancement or standing with the Employer.

## **PRELIMINARY MATTERS**

This award follows an interim award published on December 20, 2007 and a second interim award published on March 11, 2010. I continue to hold jurisdiction in the matter to deal with the merits.

Further, I note for the record that Ms. Jocelyn Tucker, the Employee recorded in the interim awards as an "interested party", withdrew early in the final hearing of this matter in view of changed circumstances: that is, Mr. Dyke has now secured a permanent position, and is not now seeking, as part of any resolution to the instant grievance, appointment to the position she now occupies.

## **OPENING STATEMENTS**

**FOR THE UNION**, Mr. Blundon claimed violations of Articles 12.07, 33.01, 33.02, 33.07 and all pertinent articles as set out in the grievance, Consent #2. The Union maintains the Grievor was at the time, a temporary employee and was treated unfairly in the job competition that would inevitably have led to his promotion. The Employer's actions were unreasonable, discriminatory, and unfair. The result was that a position was left vacant. In the Union's submission, the Employer acted in bad faith in all matters relating to competitions at issue. Several breaches of the Collective Agreement relate to the procedures and implementation of the competitions.

First, the Employer relied on subjective judgements, including one reference which the Employer treated as negative, but which was not shown to be so, in the Union's view. These were at variance with other realistic and objective assessments available, including the Grievor's resumé and interview. The Employer acted on improper grounds. There was no balanced assessment of all the information given to the Employer during the process.

The Employer also rejected original references submitted by Mr. Dyke, and coerced him to use two references provided by referees selected by the Employer, itself: Mr. Dan Michielsen and Ms. Ryan. The Employer insisted on using references from its own representatives in violation of Article 42.03 of the Collective Agreement. Ms. Nancy Benson did the reference checks, but one of the referees, Ms. Marie Ryan, had been involved in a grievance by the Grievor concerning an earlier competition. There was clearly a bias, or at least an apprehension of bias, involved in her reference being used.

The original competition was overturned because there was apprehension of bias arising out of the possibility of a positive bias toward another candidate and a negative bias against Mr. Dyke. The Employer knew, or ought to have known, what had spoiled the first competition and should have weighed the facts against the (re)use of a reference that had been collected for that overturned competition.

Further, the Employer failed to give the Grievor information that would refute the references or to give him the opportunity to respond to allegations made. Finally, the Employer relied on criteria that were not specified by the posting in violation of Article 33.02 .

In summary, the Employer has acted unfairly, unreasonably and arbitrarily. This adds up to bad faith. The Employer's assessment of the Grievor's qualifications and abilities failed to meet its own standards. The Union undertook to show, *prima facie*, that the Grievor had the required qualifications and abilities according to the standards in play in the posting.

The Union also alleges that the Employer violated Article 33.01 by failing to fill a posted vacancy, even though none of the circumstances of filling the vacancy had changed. The Union argues that the Employer decided not to fill the vacancy in order to circumvent Mr. Dyke's right to claim the position for which he was the only remaining candidate.

The Employer manipulated Article 33.07 by determining that Mr. Dyke could be not qualified based on an alleged poor reference. Thus, the Permanent Head assumed a discretion that the Collective Agreement had very specifically fettered. Under Article 33.07(b) the Permanent Head has a role to determine relative equality, and select the senior candidate (Article 33.07(c)) only on the secondary evaluation. There was no secondary evaluation available in this case. But this provision is irrelevant as the Grievor was the only candidate remaining.

Mr. Blundon indicated that the Union would rely on Articles 3.01, 5.01(ii) and (v), 12.07, 13.17, 33.01, 33.02, 33.07, 33.09, 41.04, 42.03 and Schedule A. The Union seeks full redress for the Employer's having denied Mr. Dykes' promotion to the vacant Environmental Biologist post.

Notwithstanding his entitlement to this vacant position, the Grievor has since been promoted to a full time higher post. Therefore, the Union seeks compensation for wages and benefits lost in the interim period.

**FOR THE EMPLOYER**, Mr. Saturley reviewed the facts as the Employer understands them. Mr. Dyke began his current employment on June 25, 2002, and is a Permanent Employee. Four years later, in 2006, the Department was looking to fill two temporary Environmental Biologist positions under a posting labelled EC.EB(T)(RCC).06011. The Employer understands that Ms. Nancy Benson was the chair of the selection board. This was not posted, but the committee used EC.EB.(T).05058 material for the competition to hire an additional temporary Environment Biologist. This is in evidence as Consent #3.

Shortly thereafter, in April 2006, Ms. Benson contacted the Grievor to obtain the names of referees in order to do a preliminary evaluation. The references were provided by three individuals on the Grievor's behalf. They were Mr. Robert Picco, Ms. Marie Ryan, and Mr. Dan Michielsen. Because of the references supplied, the Grievor was not recommended, and the second evaluation by the Permanent Head under Article 33.07(b) was not required.

Nonetheless, Mr. Blundon submitted the instant grievance (Consent #2) on July 18, 2006. The grievance form itself makes clear which articles are complained of, and there is no reference in that grievance form to Articles 41 or 42. If the Union insists on going in that direction the Employer will see this as an expansion of scope.

The simple fact is that, since the Grievor was not recommended, no secondary evaluation took place. There is, therefore, no violation of the Collective Agreement. The Arbitrator has no jurisdiction. In the Employer's view the grievance is without merit, and must be denied.

**FOR THE UNION**, Mr. Blundon objected to the Employer's now raising what is, in fact, a preliminary objection going to the Arbitrator's jurisdiction. In the Union's view, that matter has been settled by the second interim award. Mr. Blundon insisted that the Union must not be trapped by the Employer raising what a preliminary matter after the Union has made its case.

**FOR THE EMPLOYER**, Mr. Saturley responded that the Employer does not here raise this matter as a preliminary object, but does intend to argue the point. Mr. Saturley insisted that the Employer is fully aware of, and accepts, the interim ruling; but that ruling does not prevent the Employer raising the matter as a function of its argument.

**THE ARBITRATOR** ruled that the Union's objection in the matter was not sustained. It is open to the Employer to raise an objection that may have implications for the Arbitrator's jurisdiction

if that objection arises from within provisions of the Collective Agreement itself.

The Arbitrator also ruled that the Union should proceed to present evidence and argument on the merits of the matter of its grievance, and that the Arbitrator would entertain motions relating to any shift in onus as circumstances may occasion such motions.

### **EVIDENCE**

**THE FIRST UNION WITNESS** was the Grievor, who has worked with the Department of Environment and Conservation for thirteen years. Currently he is Environmental Engineer paid at GS 44 level, having started out in the Water Resources division as Engineer III at GS 40. During the mid-nineteen nineties he was laid off but returned, through bumping, as an Engineer II, and was then reclassified to the Water Resources Division as Engineer III. During the competitions at the focus of this dispute he was Engineer III and is now Engineer IV. The Environmental Biologist position that is the focus of the instant grievance was GS 41.

Mr. Dyke confirmed that Consent #3 is the job posting for two Environmental Biologist positions, "temporary to March 21, 2006 with possible extension". The competition number was EC.EB(T).05058. Mr. Dyke also confirmed that Consent #5 was the resumé he submitted in with his application for that competition. He testified he made that application based on his qualifications, and added:

The title on the job was a misnomer. It should have been called an Environmental Scientist. It deals with waste management, and falls under Civil Engineering.

Asked to compare his resumé with the required qualifications set out in Consent #3, Mr. Dyke testified that he lacked none of qualifications listed on Consent #3.

No. My Civil Engineering studies, completed at Waterloo, deal with water, *etc.* I was seconded to Waste Management for two years. I had been in Industrial Compliance, but I was seconded to Waste Management. There is an overlap between the two. It was easy to make the transition. Environmental Biology is within Waste Management. I was seconded over there to deal with technical issues. I had a foot in each sector.

*For the Employer*, Mr. Saturley objected to the line of questioning since, in the Employer's view, the issue is irrelevant. Nothing turns on the Grievor's qualifications.

*For the Union*, Mr. Blundon responded that, according to the Arbitral Jurisprudence, it is the Union's responsibility to establish a *prima facie* case that the Grievor was qualified and able to

do the job, and that, once that is established, the onus should switch to the Employer to demonstrate why the Grievor did not get the position.

*The Arbitrator* denied the objection, and directed the Union to proceed with the questioning.

Mr. Dyke described his work experience drawing on his qualifications, including his dealing with regulations and policies.

I have to write regulations that turn up in regulations and policies , and it's a very important project. I did write several policies for our Department and completed a forty hour course in hazard waste management.

Mr. Dyke also described his general working relations with colleagues, and added that he had been involved in setting up

a course in hydromet technology as it applied to Voisey Bay. I arranged, through Memorial, that a guy from Australia came to provide the course.

He confirmed he has a Bachelor of Civil Engineering, a Masters Degree in Water Resources from Waterloo, and a Masters Degree in Environmental Engineering together with five years experience in Waste Management. "I had at least that. I worked with private industry prior to government."

Asked whether any of the duties set out in the Environmental Biologist posting (Consent #3) caused him any difficulty, Mr. Dyke answered, "I could perform all these duties."

Mr. Dyke confirmed he had received a response to his application for the position dated September 6, 2005 (Consent #4) ... "and another notice that the competition was overturned, and I was reentered for a second one." The selection board for the first competition comprised Mr. Derrick Maddocks, Director of Pollution Prevention division; Ms. Marie Ryan, Manager of the Waste Management section; and Ms. Anne Marie McGrath representing the Public Service Commission. The selection board for the second competition comprised two people, Mr. Bas Cleary and Ms. Karen Seward. Asked whether he actually recalls applying for the second competition, Mr. Dyke said: "I guess I would have, ya... I'm not clear if I had to. I'm not sure if we had to reapply. I think it was the same people who were all interviewed."

Mr. Dyke also explained he had been asked to do the hydromet appraisal in 2003 and recognised, in doing the preparatory reading that...

it would be useful if a particular individual were to come and give a course at Memorial. MUN got involved and the course was presented to approximately

forty people largely drawn from government but also from local industry and some from out of Province.

Mr. Dyke also reviewed his own professional training (as set out in Consent #5) and his previous work experience and related credentials. He identified, as SD #1, an e-mail from Ms. Nancy Benson dated 4/28/2006-10:18:23. He noted that this followed the interview for the second competition, and that Ms. Benson here asked for two references, since the Employer might be hiring two further Environment Biologists for a total of four. Mr. Dyke provided the references. The referees he provided were Mr. Bob Picco and Mr. Phil Graham. Mr. Dyke identified SD #2 as his e-mail response to SD #1, and also noted that Ms. Benson thanked him for his quick response, but adds that she "will need to do a reference with one of your recent supervisors in the Pollution Prevention division." She goes on to say:

I can do a reference with Bob Picco as a former supervisor, but we normally conduct a reference check with an applicant's current supervisor, where possible. I would appreciate it if you could provide me with this additional information....

Mr. Dyke noted that his current supervisor was, in fact, Ms. Marie Ryan whom he had named as a member of the Selection Board for the first competition.

He also confirmed that he had named Ms. Karen Seaward and Mr. Bas Cleary as the interviewers on the second competition. Asked whether Ms. Nancy Benson was involved, herself, in the second competition, Mr. Dyke answered: "No, Nancy was not at the second interview... I checked with... and she said that she was not there." Asked if he knows why Ms. Benson was involved, therefore in organising matters for the second competition, he said, "I have no idea." Mr. Dyke was also asked to explain the question he asked in SD #2:

"If someone provides a malicious reference, do I get a chance to defend myself? I'm not implying my references would, I would just like to know."

Mr. Dyke said:

Ya, I didn't have confidence in Marie. I had been in her office. She was talking about Jocelyn, and being such a hard time for a girl to get ahead, and she'd have to give me a bad reference. I was left with the impression that, in order to take me out of the competition, she'd provide me with a malicious reference. That's why I asked about it.

Mr. Dyke confirmed that the comment had been made before he had actually submitted her name as a referee. Asked why he had used Ms. Ryan, in light of her comment, Mr. Dyke said:

"Because Nancy was implying current supervisor. She was the only one." Mr. Dyke noted Ms. Benson's (SD #2) response to his question:

"Information from a reference check can be accessible to the applicant. I am not exactly sure of the process but we will check it out for you, if need be"

He assumed "that she would get back to me, but she never did."

Asked when the discussion with Ms. Ryan about Ms. Tucker had taken place, he said:

This was just after Jocelyn started work at the Department: about a week after she started. (Ms. Ryan) mentioned there may be two posts to be advertised in her section, and how Jocelyn may apply, and it was so hard for a woman to get ahead ... She may have to give me a bad reference.

Asked whether he had submitted a new application and resumé, Mr. Dyke said: "I can't be sure, but I think they just took everybody's resúmes from the first competition." He confirmed that SD #3 is an e-mail exchange between Ms. Benson and himself in which he agrees with her contacting "Dan or Derrick" because Mr. Picco's supervision had been in 1994/95, some ten or twelve years prior to these events. Mr. Dyke said:

I'm not sure if they would just fill in the knowledge areas that Bob could not comment on or provide complete new references.

Asked whether Ms. Benson had indicated why Mr. Graham was dropped, Mr. Dyke said:

No. I had done a good project for him, and I thought that he'd be a good reference, a pretty good reference on a complex file.

Asked whether he had ever enquired why Mr. Graham's reference had not been used, he said:

No, and she never said why she would not use Mr. Graham, not specifically. She never gave me a reason, no.

Mr. Dyke explained that the "Dan" referred to in the e-mail was "Mr. Dan Michielsen, a new Manager of Industrial Compliance section, Derrick Maddock's section of the Department." Mr. Dyke confirmed that Mr. Maddocks was the person who had served as a member of the selection board on the first competition, which had been overturned. Mr. Dyke also confirmed he was aware that Ms. Benson was "Manager of Human Resources section of my Department, Environment and Conservation" and that she reported to Mr. Terry Kennedy, Director of Human Resources. In response to SD #3, Mr. Dyke had

... told her to contact Dan or Derrick. I did not indicate a preference for either. I spoke to Dan about the Offshore Petroleum Board, and he said that he'd give me a

reference; but I did not apply, and therefore I didn't get his reference for that.

Mr. Dyke said he had not asked Marie Ryan whether she would have been willing to give a reference: "No. In light of that conversation we had ... No."

Mr. Dyke also identified, as SD #4, a February 9, 2005 e-mail from Mr. Michielsen to himself concerning a "result form". Mr. Dyke explained that, "I'd been working on a template in Word Perfect. I sent it to him to save him the work of doing it again."

Asked whether he knows whether Ms. Benson had ever contacted "Derrick" as mentioned in SD #3, Mr. Dyke answered:

I have no idea... I only found out after I was told that I was unsuccessful based on negative references. I asked for the references. Derrick was not used and Dan was.

Mr. Michielsen supervised the Grievor because...

he was hired as Manager in Industrial Compliance in 2005. That was my section, so I was reporting to him briefly; and Marie Ryan had requested that I be transferred to her in Waste Management. So that was done. Dan supervised me for five to six months.

Mr. Dyke worked with Mr. Michielsen for a year between 2003 and 2005. He was supervised by Mr. Picco for "about two years", and had last worked for him in 1995. Mr. Graham ...

was heading up several projects, developing regulations for the Environmental Protection Act. He requested that I help him with that, so I did for about a year. He retired in 2005/2006. I was told that he retired just prior to my e-mail (SD #2). Mr. Picco still works with the Department.

Asked whether he had spoken with Mr. Graham about providing a reference before submitting his name, he said: "Yes, he said he'd give me a good reference."

Mr. Dyke identified as SD #5 as an e-mail from Mr. Michielsen to himself and to Derrick Maddocks and Marie Ryan, noting Marie Ryan's request that he be transferred to her section to help out with work load. Asked whether he knew why she specifically requested his transfer to her section, Mr. Dyke answered:

Since 1997 I always seemed to have one foot in Waste Management and one in Compliance, always using me for technical advice. I had done some waste management in the past and other managers may have spoken favourably about me to her... Dan had asked me about it verbally, and I had agreed to it. My primary goal was to help with approvals and straighten it out... New approvals had to be written for several different companies. That went well... I stayed in

Waste Management for about two or three years. I was there until I got the new Engineering position I applied for in 2008. So I was in Waste Management from 2005 until 2008.

Asked whether there had been any problems, Mr. Dyke answered:

Yes. When I went to work there, there was some friction: all tied in with Jocelyn concerning the bad reference to get me out of the way. But after that, it all seemed to go away and settle down.

Mr. Dyke identified SD #6 as an e-mail exchange between himself and Mr. Michielsen which he described as relating to events arising after he had

... failed to secure the job posted as Consent #3. Ms. Benson said that there were negative references. I asked her for a copy of the references and it appeared that the negatives were Dan Michielsen and Marie Ryan. Dan's was negative, Marie's not obviously so. I went and asked him the basis for his negative assessment and Dan told me that it was based on a file... I tried to see what e-mails he sent me to base it on. There were two other grievances. I sent him an e-mail to ask what file he was talking about, and he told me that, it was 'e-mails and notes I had while supervising you.' Apparently it was a secret file that he had kept on me, but I never saw it despite asking for it. I was perplexed. I'd asked him in 2003 or 2004 for a reference. I had asked him and he said, without prompting, 'Ya, I'll give you a good reference.'

Asked whether the 'file' referenced in SD #6 had ever been provided, Mr. Dyke said, "No."

Asked if he has any idea what's in it, Mr. Dyke said, "No." Asked if it is in his own personnel file, Mr. Dyke answered: "No, I checked that." Asked whether he had ever been given a letter describing what Mr. Michielsen is referencing, Mr. Dyke said, "No."

Mr. Dyke testified that Ms. Marie Ryan, Mr. Bob Picco and Mr. Terry Dollard had referred him for the Environmental Engineer (Engineer IV) position he now holds. The Environmental Biologist (Consent #3) position he sought was at GS 41 level. At the time of his application under Consent #3 he was Engineer III at GS 40. The difference between GS 40 and GS 44, his current pay scale, is approximately \$10,000 per year. Mr. Dyke confirmed that he is now a Permanent Employee.

*For The Employer*, Mr. Saturley objected to this line of questioning as post grievance.

*The Arbitrator* ruled that the Union has the right to explore details of the Consent #3 job posting including its monetary implications.

Mr. Dyke identified as SD #8 the resumé he submitted with the application for his current position and noted differences between it and his earlier resumé, Consent #5. He noted that "the experience had changed with a few points added and his own professional development profile had been updated." Asked whether he sees significant difference in the qualifications required for the two jobs, Mr. Dyke answered that "the Consent #3 position is broad ranging and the SD #7 job requires a higher standard than Consent #3." Asked if he sees any difference in duties, Mr. Dyke said: "Not really. There is overlap... essentially the same thing."

Mr. Dyke also identified as SD #11 the references submitted in August 2008 by Ms. Marie Ryan, Mr. Picco, and Mr. Dollard in respect of the current position, and, as SD #12, the notice of his successful promotion, dated October 16, 2008. He also identified as SD #13, a July 19, 2005 e-mail exchange between himself and Ms. Ryan which refers to the probability that, "We'll be able to fill some env. biol. positions in the early fall, in particular Paula's maternity leave. This would be an opportunity for you." Mr. Dyke observed:

She seemed positive towards my position description form. She is giving me a heads up on possible positions so I understand it is positive.

Mr. Dyke also identified as SD #14, a December 11, 2006 e-mail exchange between himself and Ms. Ryan concerning potential jobs in Calgary, in which Ms. Ryan indicated that she would give him a good reference.

**On Cross Examination**, Mr. Dyke testified that he is now a Permanent Employee. Asked when he became a Permanent Employee, Mr. Dyke answered: "When I got this new job. Prior to that I was full time." Asked again when he believes he actually became a Permanent Employee, Mr. Dyke answered, "I'm not clear on what I was." He identified, as SD #15, a June 25, 2002 letter to him from Mr. Terry Kennedy, Director of Human Resources, informing him, in part:

"In the last round of negotiations of the General Service Collective Agreement, NAPE and Treasury Board agreed to conduct a review of long term temporary bargaining unit employees and convert to permanent status those who met the Union's criteria. I am pleased to advise you that based on this review, Treasury Board has approved the conversion of your employee status from temporary to permanent... This status change is effective immediately..."

Asked if he understands from this letter that, as of June 25, 2002, he was permanent, Mr. Dyke answered, "Apparently so."

Mr. Dyke also explained his comment on direct examination that the title for the position posted in Consent #3, "Environmental Biologist", was a "misnomer". "Yes. It was changed to Environmental Scientist afterwards." He also confirmed that he had been seconded to the Waste Management unit as an Engineer III. "I was seconded. I was mostly writing approvals. I was one of the approvals persons." Mr. Dyke provided further testimony about his qualifications, and his having completed a waste management course.

Mr. Saturley also explored his response to a question from Mr. Blundon in which he had referred to "friction" in the work place. Invited to expand on this reference, Mr. Dyke said:

There is always gamesmanship concerning reclassification to a higher level. One of my co-workers (in a different section from me), cooked up a false project... totally false... (... The Manager... made it all possible). So I ended up having to do status reports on his false project. That was the source of the friction. That was the main one.

Asked if that was why he put in a request for a document (SD #13) relating to a classification change, Mr. Dyke said, "Yes there were a lot over twelve to fifteen years." Asked whether he had succeeded, Mr. Dyke answered: "No. But I did appeal. After three or four attempts I got stone walled." Asked to explain SD #13, Mr. Dyke said: "I had done up a new PDF and sent it to Marie Ryan to sign, and I was wondering about her review." Asked if it caused any friction with Ms. Ryan, Mr. Dyke answered:

No. She did sign it, and she did pass it up. But then she passed it back without the signature done and indicated that this PDF is not going anywhere. I'd have to assume that she had signed; so it appears that he told her to give it back without the signature.

Asked how he felt, Mr. Dyke said: "It was disappointing, but I interpreted it as Derrick's 'No'." Asked whether he concluded, therefore, that Derrick was not one from whom he could expect a favourable recommendation, Mr. Dyke answered, "That's true."

Mr. Dyke was also questioned about the hydromet course he had referred to on direct examination.

I initiated it, and MUN flew with it... I was present. There was local interest because of Long Harbour. My role in the matter was to suggest someone to come to MUN to teach the course.

Mr. Dyke confirmed he had received a letter stating that the initial competition had been

overturned, and that, in the second competition he had been interviewed and had received a letter stating he had been unsuccessful. Asked about the third competition for an additional two Environment Biologist positions that the government decided to fund, Mr. Dyke confirmed that the first two competitions had been conducted under the number EC.EB.(T).05058. The third was conducted under the competition number EC.EB(T)(RCC).06011, but "there was no competition for it. They just used the information from the first competitions apparently." Asked whether he had gotten any notice in respect of the third process, Mr. Dyke said that Ms. Benson e-mailed him that he had not been successful. Mr. Dyke again confirmed he had been interviewed under the first competition, and had also been interviewed by the second competition, where Mr. Bas Cleary and Ms. Karen Seaward were the selection committee; but he could not recall being interviewed for any competition in respect of the two additional positions.

Mr. Dyke does not believe he was asked for references in relation to the first or second procedures, but does recall being asked for references in respect of the third. "When I was asked for these references, it was stated that I was 'being considered for a job'." His two nominees as referees were Mr. Phil Graham and Mr. Bob Picco. Mr. Picco had supervised him "for about two years in the late nineties at the Water Resources division" where Mr. Picco was the Engineering Manager. He had worked to develop a new regulation for Mr. Phil Graham, then Director of Special Projects, over the period from 2004 to 2005.

He has not worked with Mr. Picco since 1995. Asked whether Mr. Picco would have been familiar with the academic portions of his CV subsequent to 1995, Mr. Dyke answered: "We're friends. We chat sometimes... a kind of professional friend."

Mr. Dyke confirmed his earlier testimony about a meeting in Ms. Ryan's office, in which she had commented how hard it is for a woman to get ahead. "Yes, it was a constant theme of hers. She brought that up on several occasions." Asked specifically whether she had said that she had to give him a bad reference, Mr. Dyke answered, "Yes, that's what she said, yes." Asked to provide a date for this conversation, Mr. Dyke answered:

I'd just started with Marie. At the time, Jocelyn Tucker was about to start... about the time the jobs were posted, perhaps just September 2005. I can't recall if she had or was about to start. She had been there for about a week before... This called for five years experience, but she had just graduated from her degree with no work experience. She was working at the Geo Centre.

Asked whether Ms. Ryan's comment had been a general observation or related to a specific competition, Mr. Dyke answered:

I went there to talk about other things. There was a reference to her being highly recommended by the Minister but it was hard to get ahead. I took it that I would have to get a "bad reference" ... She said, "bad", not "malicious."

Mr. Saturley pressed Mr. Dyke to be precise on whether the comment about it being "hard for a woman to get ahead" and the comment about a "bad reference" were actually linked in the conversation or separated in time and context. Mr. Dyke answered: "They were tied together. All one context: jobs." Asked whether the (Consent #3) posting had already been put up, Mr. Dyke answered, "It may have been. I don't know." Asked whether he could explain why she would have said, "I'll have to give you a bad reference." Mr. Dyke answered:

Well Marie is a bit flighty. You never know what she's going to say, not nicely logical.

Asked whether he had put her comment down to her "flightiness", or whether he had taken the comment seriously, Mr. Dyke answered: "Yes... Oh yes ... I took it targeted to me."

The Grievor confirmed that he had asked Mr. Michielsen for the CNLOPB reference just after he had come in as the new Manager of Industrial Compliance in 2004 and 2005:

I asked him just after he got the "Industrial Compliance" Manager's job. I was reporting to him for one month, and then I got transferred to Waste Management.

Asked to describe his relationship with Mr. Michielsen, and whether, in his view Mr. Michielsen knew his job, Mr. Dyke answered:

He was kind of folksy... He did not seem to have any industrial experience before he got the job. He'd been a technician with Transportation and Works, and he was one of five. We were interviewed for it and he got it...

The reference Mr. Dyke had asked him to provide was for ...

a position with the Offshore Petroleum Board to go to the CNLOPB. Mr. Michielsen never provided that reference because I did not need it in 2004/2005. I did not apply for the position.

Mr. Dyke confirmed he had agreed to Nancy Benson's request to use Ms. Marie Ryan as a referee. Asked whether he had brought her comments concerning a possible bad reference to anyone else's attention, Mr. Dyke said, "No... It's pretty well a waste of time." Asked if he might not have grieved, Mr. Dyke said: "Yes, but it's a waste of time. It takes four years." Asked why

he had used Ms. Ryan as referee in 2008 in the competition for the position that he now holds, and whether she had seen the light, so to speak, Mr. Dyke said:

I was told; but also she seemed to settle down and I felt more comfortable with her... I guess I felt more comfortable. She had run into some political problems in the Department and she 'saw the light'.

Asked why he thinks he had been unsuccessful in the Consent #3 competition, Mr. Dyke answered: "The successful candidates were most likely politically connected." Asked whether he lacks political connections himself, Mr. Dyke answered, "So far as I know." Asked whether, in his view, merit plays no role in this at all, Mr. Dyke answered, "Very little." Asked how, therefore, he explains his own current higher paid job, Mr. Dyke answered:

I was surprised too... Mr. Michielsen was not on the board. The board was an independent board... My perception that the board was a bit more neutral.

Mr. Dyke confirmed he had requested a reference from Ms. Ryan for an outside position with the CNOPB. Asked whether, in his view, the Consent #3 reference was worse than the one that she provided for the CNOPB position. He said:

I ... asked for that CNOPB reference, yes. I did not get the job. Yes, she gave me a letter of reference. It was a good reference. It was more favourable... I believe that she was under political pressure on the earlier occasion... office politics.

**On redirect examination**, Mr. Dyke testified that the only evidence he has of political interference was the conversation with Ms. Ryan in her office in which she referred to Ms. Tucker being "strongly recommended by the Minister" before she even started work.

Asked whether he had real option in using Ms. Ryan given the instruction (SD #2) that recent supervisors be used. Mr. Dyke said, "No, not really... I had to use her, yes."

Mr. Dyke also testified that he has no idea what "permanent status" means or what a "permanent appointment" means as that phrase is used in the October 16, 2008 letter, SD #12.

**THE SECOND UNION WITNESS** was Mr. Chris Henley, ERO for NAPE from 1990 onward. He testified about his involvement in negotiating the Collective Agreement, on the basis of which SD #15 was written by Mr. Kennedy to the Grievor. He testified that:

The history of temporary employees with the GS unit goes back to the mid-1980s. There was a long road, and we made a one time attempt to make temporary employees permanent. Based on a number of criteria we tried to make the process more fluid.

*For the Employer*, Mr. Saturley objected that there was no ambiguity in the Collective Agreement and going into bargaining history is not, therefore, permissible or relevant. He also raised a second objection relating to the fact that Mr. Henley was not, himself, the author of SD #15.

*The Arbitrator* noted the Employer's objection, but permitted the line of questioning to continue since it relates not to any ambiguity in the Collective Agreement but to a document, SD #15, already put in evidence on cross examination by the Employer, in which the Union's participation in a "review" of the matter at issue is referenced.

Mr. Henley testified that the Union had proposed three criteria.

First, that any employee involved must have accumulated two years of continuous service. Secondly, that there was an ongoing operational requirement for the position. And finally, that the employee had obtained his or her position through an approved selection process. This was set out in the GS Agreement ending March 31, 2004 (CH #1 p. 172), as a Letter of Understanding which reads, in part:

"The Collective Bargaining Division of Treasury Board will initiate, within one (1) month of the signing of the agreement, a review of temporary employees and convert to permanent those who meet the criteria proposed by the Union's Opening Proposal."

Asked what "convert to permanent status" (SD #15) means, Mr. Henley answered:

It means permanent status on a personal basis. The employee still occupies a temporary position, but has permanent status as a particular employee for the purpose of bumping, etc. Temporary employees are limited to the headquarters and department for bumping and recall, but a permanent employee has broad access for bumping purposes.

Mr. Henley's attention was directed to the Oct 16, 2008 letter confirming the Grievor's current appointment (SD #12) which uses the phrase, "... appointment to the permanent position of Environmental Engineer..." Mr. Henley stated that this reflects the distinction he is making.

In 2002 there was a committee involving both bargaining unit and Employer representatives who approved those getting permanent status. That committee had a person sitting on the committee whose prime job was to see to it that the criteria was observed, that the selection process was a valid process.

**On Cross Examination** Mr. Henley confirmed that the Union's proposal in this matter was included, not as a clause in the Collective Agreement but as a letter of understanding. He also confirmed that, in his view:

There is a real distinction between a "permanent appointment" and a person with "permanent status"... The "permanent employee" (under Article 33.05) retains his or her permanent status if he or she moves to a temporary position; and retains bumping and recall rights.

Mr. Henley also responded to the Employer's questions concerning definitions of temporary appointment (5.01(bb)), temporary assignment, (5.01(cc)), and temporary employee, 5.01(dd). Mr. Henley confirmed that a temporary employee as defined in 5.01(dd) ...

has limited access to provisions of the Collective Agreement. "This changes with increased length of service.

**On Redirect Examination,** Mr. Henley confirmed that

permanent status means that you have the rights of a permanent employee, but does not mean the employee is in permanent position.

**THE THIRD UNION WITNESS** was Ms. Trudy Brake, an Employee Relations Officer with NAPE for the past sixteen years, who has had dealings with Mr. Dyke on a number of occasions, since she was responsible for the Department in which he works. "I would handle any work-related issues he had." She had received a December 1, 2005 letter (TB #1) from Mr. Terry Kennedy, which deals with a grievance filed by Mr. Dyke over the initial EC.EB.(T).05058 competition. In the letter, Mr. Kennedy suggests that the grievance is "moot", and might be withdrawn by the Union, since

"(T)he above competition has been reviewed by the Department, in conjunction with the Public Service Commission, and it has been determined that a reasonable apprehension of bias existed. In that respect, a new selection board will be constituted and the candidates be assessed by a new selection board."

Ms. Brake testified that the Employer, therefore, acknowledged an apprehension of bias, and, as a result, the competition was replaced by a subsequent competition.

**On Cross Examination** Ms. Brake testified that the grievance, which had been withdrawn, had related to the fact that Mr. Dyke was the senior qualified candidate but was not successful. "His grievance claimed unfair treatment under Article 33.07."

*For the Union* Mr. Blundon moved that the burden shift to the Employer at this point since, in his view, the Union has discharged its onus by demonstrating *prima facie* that the Grievor was, in fact, qualified for the position and should, on the basis of his seniority, have been awarded it.

*For the Employer,* Mr. Saturley responded that, in his view, the onus remains with the Union

since this is not a matter governed by *prima facie* considerations. There is no evidence that the Grievor was ever recommended by the Permanent Head, and, under the provisions of Article 33.07(b), there really can be no grievance. There is no evidence that the Grievor was a candidate "... recommended by either the Public Service Commission or a chair of a department selection committee for promotion..." (33.07(b)).

*The Arbitrator* ruled that there is no shift in onus at this point. It remains for the Union to make its case as to the "violation of the General Services Collective Agreement re: Articles 12.07, 33.01, 33.02, 33.07, and all other pertinent articles."

**THE FOURTH UNION WITNESS** was Mr. Terry Kennedy who appeared under subpoena issued at the request of NAPE. Mr. Kennedy is currently Director of Classification and Compensation for the Public Service Secretariat, but was, at the time of the grievance, Director of Strategic Human Resources for several departments one of which was the Grievor's. Mr. Kennedy confirmed he had written TB #1, and that it referred to the (Consent #3) competition for an Environment Biologist, for which Mr. Dyke had applied. Asked to explain the background to his reference (TB #1) to competition EC.EB.(T).05058 having been "reviewed". Mr. Kennedy said:

I recall that, after the competition was conducted, one candidate came forward with a concern and an allegation that another candidate had been coached by the management representative on the selection board. I can't recall if I had a conversation with the management representative and asked what had transpired, but she said that she and that individual had had a conversation about the work involved, but it had not involved telling her the questions and answers, but simply about the type of work involved. But I felt it was a little bit more than the normal level of briefing, so I thought that we'd redo it with a different panel and a different chair from the Commission.

Asked who had served on the original panel, Mr. Kennedy said:

I think only two: Anne Marie McGrath and Marie Ryan. At the time, Anne Marie McGrath worked with the Commission, and Marie Ryan was with Environment and Conservation, I think in Waste Management, but I am not sure of the division ... She was temporarily assigned, or had competed for a temporary job to that management position. She was the Manager at the time. The allegation went from a candidate to Anne Marie McGrath and to me, and I had the conversation with Marie Ryan. I think the decision to quash the competition was made jointly between me and Anne Marie McGrath... To the best of my knowledge they conducted another competition with a different board...

Asked who composed that different board, Mr. Kennedy answered:

I'll guess it was Karen Seaward for the Commission and I believe Bas Cleary... but I'm not really sure. But other than the quashing and the issue covered in TB #1, that was my only involvement. Bas Cleary was a Director in the Department at the time. Karen would be the Chair and Bas, management representative.

Asked whether the second competition was conducted under the same posting as the overturned competition, or whether a new posting had been done, Mr. Kennedy said: "We may have seen no reason to reapply, but that was for the Commission to determine." He does not know who secured the job or the candidates who applied. Mr. Kennedy knows Mr. Dyke. "Yes, but no knowledge of him from the competition." Asked why Ms. McGrath had not done the second competition, Mr. Kennedy said:

I don't know. Ask the Commission. It was quashed because of a personal apprehension of bias against the board, so we may have replaced the whole board... Or she may have been busy.

Asked whether he knows with whom Ms. Ryan was alleged to have discussed the job with, Mr. Kennedy said:

I believe it was the one who ended up getting the job. I can picture her but I can't remember her name...

Mr. Kennedy described the meeting that he'd had with Ms. Ryan.

It was only myself and her to my recollection... Not the kind of thing you want to have other people involved.

Asked why the Public Service Commission was involved in the Consent #3 competition, which was a temporary position, Mr. Kennedy testified that:

There were a number of competitions Stephen was involved in, and he felt he'd been wrongfully dismissed. He felt the Human Resource Division was biased against him and, to ensure he felt no bias, at least from our perspective, he'd get a fair opportunity at the job.

Asked whether he had moved this to the Public Service Commission because of their legislative requirements, Mr. Kennedy answered:

Not in terms of who was required to deal with the competition. It was just that he felt that we might be biased against him, and the Commission had a similar process.... Just to be sure that there was no apprehension of bias.

Asked whether Public Service Commission would not have been involved if Mr. Dyke had not been a candidate, Mr. Kennedy answered:

Maybe not... We organized it because of some sense of bias concerning the discipline... He still regards me ... via e-mail... If someone else had the same sort of view we'd have engaged the Commission.

Asked whether there was any other reason to use the Public Service Commission in this competition, Mr. Kennedy answered:

I'm not sure. I and Nancy are certified board chairs with the Commission , and maybe others; and we have the delegated authority to do this.

Asked whose authority he was exercising over a temporary competition, Mr. Kennedy said:

It would have been our own. The Department had authority to go for temporary positions.

Mr. Kennedy was asked whether he is familiar with the July 18, 2006 letter (Consent #9) Mr. Blundon had sent him concerning the instant Grievance, which was attached. Mr. Kennedy said, "I can't deny getting it, but I do get hundreds." Asked whether he recalls anything about a meeting on July 14, 2006 referred to in the 2<sup>nd</sup> paragraph of Consent #9, he said:

To the best of my knowledge, that meeting was on a grievance about the previous competition, and you (referring to Mr. Blundon) came along, and we'd already filled it. I can only recall one meeting on the issue, and after that we decided to send it to arbitration.

Mr. Kennedy's attention was directed to the middle paragraph of the first page of Consent #9 which reads:

"To avoid any confusion, at our meeting of July 14, 2006, NAPE and Mr. Dyke became aware that additional vacancies were filled using an earlier competition process. You may recall that the earlier competition resulted in a similar grievance from Mr. Dyke. I should also point out that Mr. Dyke has never received any letter stating that he was unsuccessful for a remaining vacant position arising from the consideration of the applicants from the earlier competition."

Asked whether that paragraph is accurate, in the facts it recounts, Mr. Kennedy said:

I thought there was a letter back to you on this about time limits. I think the meeting was (a privileged meeting) about the previous grievance.

Asked whether he had ever written a response objecting to Mr. Blundon's account in Consent #9. Mr. Kennedy answered, "I do recall a letter re timeliness, but I can't go further than that." Asked whether he recalls any positions that had been left vacant, or what happened at all in respect of these matters. Mr. Kennedy answered, "No, not at all."

Mr. Kennedy's attention was directed to Article 41.03 concerning the removal of

documents from personal files. Asked whether the disciplinary process against Mr. Dyke that he had referred to earlier was two years prior to the events here in dispute, Mr. Kennedy answered:

I was not saying it was at all related to the competition, but just that we felt that he might have felt there was a bias. It was three days after I got to the department...  
But I agree it was not in.

Asked whether the discipline was a factor in the competition, Mr. Kennedy answered: "Not to my knowledge... I'm sure it was not used in any way. "

**On Cross Examination**, Mr. Kennedy confirmed that there were two positions initially listed under Consent #3, and both were temporary positions. Asked whether there is a requirement to fill both posted positions, Mr. Kennedy said:

No. The Agreement determines the vacancy, but the Employer has the prerogative to fill vacancies. Things can happen. There's no obligation to fill both.

Mr. Kennedy also confirmed that TK #2 is an April 4, 2006 letter from himself to Mr. Dyke informing him that, in respect of the competition EC.EB.(T).05058, "other applicants were recommended to the department for final selection."

Asked whether the decision to quash the initial competition had been taken in conjunction with the Public Service Commission, Mr. Kennedy answered:

I can't really recall. I was informed about the complaint and then had the talk with Ms. Ryan. I believe I did go back and talk to Anne McGrath.

Asked whether he had met with other members of the selection committee other than Ms. Ryan, Mr. Kennedy answered:

No, only Marie Ryan and possibly Anne McGrath afterwards. We reviewed the complaint. Ms. Ryan was new to the job as a temporary, so we put it down to her being new, not experienced. She had never sat on a board before, to the best of my knowledge.

Asked whether the board looks at seniority when making its primary selection, Mr. Kennedy said:

No, that comes into play at the secondary evaluation. The board is exclusively based on the merit of the candidates.

Asked if he knows if it has ever happened that a board has not recommended anyone, Mr. Kennedy answered: "It's an oddity, but it came happen."

Mr. Kennedy 's attention was directed to SD #15, his June 25, 2002 letter to Mr. Dyke

concerning "permanent status" for temporary employees. Mr. Kennedy recollects...

an agreement similar to previous ones dealing with this sort of issue. During that period we had quite a number of employees based on hiring freezes, some still ten years continuous employment with the Employer but temporary. So there were criteria in place, and if you met all three you got "permanent status". Anyone who met the criteria got it. We had to go through the lists of temporary employees and send the lists for review. You had to have the competition... On June 25, 2002 he changed from temporary to permanent.

Asked if there is difference between an employee with permanent status and a permanent employee, and whether he had ever been involved in collective bargaining, Mr. Kennedy said:

Not to my knowledge, no. I was involved for the last round for the MOS and Air Services, and prior to that I was involved in General Services, not as Chief Negotiator.

**On Redirect Examination**, Mr. Kennedy was again asked about the difference between permanent status and a permanent appointment. He testified that:

Permanent status was a function of the old agreement, used to convert status while people were occupying temporary jobs to make them permanent employees. To have a permanent position is a function of the Treasury Board and of the Minister, who decide, through budget or through a department, on the creation of a permanent position. It is Treasury Board which determines which positions are permanent. But permanent status is a function of the Collective Agreement, and it is the procedure where temporary employees become permanent. Competition would be for a permanent job, and it was run by either the department plus a certified board chair. But it would be on behalf of the Public Service Commission if it was a permanent position, on the authority of the Public Service Commission. If it is a permanent job it is run out of the Public Service Commission.

Asked about the Consent #3 competition, Mr. Kennedy testified that

It was posted internally and therefore not open to the public... A position gets posted when we determine that we have a need for work to be done, but we post and cancel for a variety of competitions... I can't recall who decided not to fill the second one.

**THE FIFTH UNION WITNESS** was Ms. Nancy Benson who has been with Classification and Compensation at the Executive Council since August, 2008, but still maintains her original position with Employee Relations in the Resource sector with the Department of Innovation, Trade and Rural Development. The same structure was in place in 2006. "Yes,... I still handle Environment." Ms. Benson has been with the government since 1978. Ms. Benson is also

appearing under subpoena issued at the request of NAPE and had arranged for the provision of the subpoenaed documents as well.

Ms. Benson identified, as NB #1, a 4/19/06 e-mail from herself to Ms. Porter, Shop Steward for the Department of Environment and Conservation, referring to a grievance involving Mr. Dyke. Ms. Benson testified that she could

... not recall the nature of this grievance. At the time I was Manager of HR for the Department of Tourism and Culture, and we provided HR to Environment and Conservation. They normally went to Terry Kennedy, but sometimes people would come to me directly. I don't know what Terry's process was.

Ms. Benson confirmed that she recalls some details of the Environmental Biologist competition in 2006. While she does not remember the competition number, EC.EB.(T).05058, she recognizes that SD #1 is her e-mail, but does not know the details of that competition. She does recall a competition involving Mr. Dyke, and identified NB #2 as an applicant assessment matrix form with the same EC.EB.(T).05058 competition number as cited in SD #1.

She'd also identified, as NB #3, a February 14, 2006 Public Service Commission selection referral certificate. She was not involved in NB #3.

It was chaired by an officer of the Public Service Commission and two individuals were chosen. We then subsequently had a request for two more based on the results of the Public Service Commission to formulate a new recommendation. I had authority to formulate a recommendation list from the NB #2 competition, relying on the information provided by the NB #2 board... It gave me a list of candidates earlier recorded as recommendable to base a further recommendation.

The board was chaired by Karen Seaward and she would have recommended the top four in order of ranking. It is a rule of three. You can round up to three if they are recommendable. If there are two posts you can recommend four. So numbers one to four were on Karen Seward's list (NB #3), and numbers one to four went to the Minister based on Karen Seward's competition; and, based on that, two candidates were accepted: Mr. Pittman and Ms. Brenda Rowe. The four met the basic qualifications to get screened in and to get interviewed and then recommended to the department.

Referring to SD #1, Ms. Benson was asked how many referees she would recommend in the context of "filling up to two more Environment Biologist positions." Ms. Benson answered, "Four if they are recommendable."

*For the Employer*, Mr. Saturley objected that the Arbitrator has no authority to review the work of the Newfoundland Public Service Commission, and, therefore, documents used by the

Commission cannot be considered as evidence in an arbitration matter.

*The Arbitrator* overruled the objection. The documents are properly before me, it having been represented that they have a bearing on the matters of fact central to this arbitration. As Arbitrator, I have no authority to review the Commission or any of its acts or any of its products, and am not doing so. My sole concern is with the grievance at arbitration and the Employer's actions in respect of that matter. It has been reasonably asserted that these documents bear on aspects of the Employer's actions, and as such they are properly and relevantly before me.

Ms. Benson testified that she did not contact either the Chair, Ms. Seaward, or selection member committee, Mr. Cleary.

No, I took the list and framed a recommendation. Number one and two were selected. I established a new file with a new number (EC.EB(T)(RCC).06011) as a 'Recently Conducted Competition'... The candidates would not normally get to see this new number, and the job would not be posted. Numbers one and two were offered and accepted the positions; and then, later on, two more were needed. So under the Public Service Commission policy involving Recently Conducted Competitions, I contacted the next in order of ranking, the next four people. That is numbers three, four, five and six... Mr. Dyke was number six.

Asked whether she had seen these candidates' resumé's, Ms. Benson said:

NB #2 tells me they are recommendable... (I did not issue NB #3. It was issued by the selection committee and it related to NB #2.) The four names there listed were the top four names from the matrix, NB #2. Numbers one and two listed on NB #3 accepted the position. All references of all four listed on NB #3 would have been checked before going forward to the Minister on NB #3... If a reference check had proven negative... normally we go forward subject to a positive reference, so a second reference would be sought after the selection process but before giving a job offer. Mr. Dyke was contacted for his references. I consulted him and told him that I needed references.

Ms. Benson confirmed that the only thing that stood between the Grievor and the new job were the references...

Yes, but I'd have taken three, four, five and six, so he would have been fourth. He might not have been first on the list.

Asked how the request for references fits into the competition process, Ms. Benson said:

It's a step in the process. The first is the screening. The interview is the next stage, and the reference check is the next one. Reference does not have anything to do with the ranking. Ranking is based on the matrix and based on the interview performance. The reference doesn't have anything to do with the ranking. It gets

you on to the referral certificate. The references validate the procedures. If the reference is not acceptable under Public Service Commission policy, you are not recommended for an appointment. If the interview were strong, but a reference were negative, I would go and do another reference under the policy. The references – in the plural – are a veto.

Ms. Benson confirmed that these same practices were in place in 2006. She also confirmed that, as in NB #4, references previously done were not required to be rechecked. Ms. Tucker was the sole candidate of the three recommended candidates listed on NB #4 who accepted. The first two of the three recommended candidates declined the position.

We had a request for two positions to be filled, but we only had three recommendations that we could forward to the Minister; so, therefore, only one post was filled, although there were two originally planned to be filled... Mr. Dyke's name was not put forward, because his references were not acceptable. (The seventh ranked was not listed. He said he was not interested.) Mr. Dyke's references had determined his unacceptability.

Ms. Benson confirmed that NB #5 is an e-mail exchange between herself and Mr. Dyke over the period from June 6, 2006 and July 7, 2006. She was asked to explain an apparent tension in this exchange. In the message she sent Mr. Dyke on June 30, 10:51 AM, she says that because it "is anticipated that" its incumbent "will be returning from maternity leave in September" the 4<sup>th</sup> position "will not now be filled in the interim". Her final comment, however, in the July 7<sup>th</sup> at 10:54 AM message she notes, in response to the Grievor's (July 4<sup>th</sup> at 8:21 AM) question concerning "negative references" that "Concerns were noted by both Dan and Marie" Asked why she had not told him the real reason that he did not get the job, Ms. Benson answered:

I am responding to his e-mail question. I answered it. I think that Stephen and I had a conversation, and then he e-mailed me and I responded.

Asked whether it would be a common practice not to contact people involved concerning the results of a competition, Ms. Benson said:

If they were recommended for the appointment, they would be contacted. But since he was not recommended, no action was taken.

Asked whether she had provided Mr. Dyke with an opportunity to respond to what was said in the references, Ms. Benson said:

No... It's never our position to go back to candidates. The candidates do have access, and they can complain.

Asked whether it was too late by that time, Ms. Benson answered:

No, because up to then we did not have the fourth position filled - at the point he was notified he was not recommended because of poor references and we had exhausted the list.

Ms. Benson agreed it was possible that he could have done so through the grievance procedure.

Ms. Benson's attention was directed to SB #2, in which she writes (4/28/2006 1:12 pm) that, "... we normally conduct a reference check with an applicant's current supervisor, where possible...". Ms. Benson agreed that Mr. Dyke, effectively, had no other choice than to use Ms. Ryan as his referee. She also confirmed that she was satisfied in using Ms. Ryan as reference:

Yes, she was the current supervisor... I contacted Robert Picco and did not contact Phil Graham. He was not a supervisor. I contacted Robert Picco first. I can't recall if I contacted Phil Graham: not a supervisor relationship. And then I asked Steve for the current supervisor. Robert Picco could not give recent comment. He couldn't comment on the knowledge components; so, once I had contacted Marie, I still needed another reference... I did not contact Mr. Graham because it was not a supervisor/employee relationship... You are free to name whoever you like, so long as they meet Public Service Commission standards, including supervisor/employee relationships.

Asked about Mr. Picco's inability to comment on "knowledge components", and why she had not gone back to Mr. Dyke for other suggestions as she had done in NB #2, Ms. Benson answered: "Because it is policy that we validate what the interview questions reveal." Asked whether she thinks this is fair given that weaknesses were not identified in knowledge components, Ms. Benson answered, he "... was not turned down on the basis of knowledge. It was abilities and..."

Asked whether Mr. Picco had identified any problem, and whether anyone had ever made it clear to Mr. Dyke that Mr. Picco was not used as the referee, Ms. Benson answered: "Not that I recall... I do say that he is not able to make a comment, so it is implied." She said that she had not told the Grievor that Mr. Picco would not be used. Asked why she had requested authority to use "Dan" or "Derrick", and why she did not just simply ask for other references, she said:

Dan Michielsen is Manager. He is one of the Managers in the division. And Derrick is Director of the Division. I knew the Division and knew who the Managers were in the division. I was not telling him he had to. He had the opportunity to say no... I don't know why I chose Dan. I have no recollection.

Asked whether she had done a complete reference check or whether the reference check had dealt

only with "knowledge components", Ms. Benson answered, "Complete, yes."

Asked who had conducted the reference checks that are described in the comments column of NB #4 as "previously conducted", Ms. Benson said, "Probably Anne Marie McGrath." and confirmed that the "previously conducted" reference checks had been done for the competition that had been overturned.

Any re-evaluation of the references would have been done then by either Karen Seaward or Anne Marie McGrath. Since Jocelyn Tucker does not appear on NB #3, probably it would have been Anne Marie McGrath.

Again Ms. Benson confirmed that this would mean that the references would have been evaluated by Anne Marie McGrath under the first competition which was overturned. Asked if it was likely, therefore, that the references that were used in determining the final outcome were from the overturned competition, Ms. Benson answered, "It would be standard to do so." Asked why that competition had been overturned, Ms. Benson answered:

There was a complaint that the successful candidate... My understanding was that it was issues relating to the successful candidate, perhaps, who was coached for the competition by a technical advisor on the board, Marie Ryan. That's not factual, just my understanding.

Asked why, with that knowledge, Ms. Marie Ryan had been used as a reference, she answered:

I did not do the reference check on Jocelyn Tucker. Marie Ryan's name was given me by Stephen Dyke.

Ms. Benson confirmed, however, that she had informed Mr. Dyke that he was required to use his supervisor as referee. Ms. Benson then checked her recollection by reading SD #2 and said: "If Stephen had any problems with Marie Ryan, he should have raised the issues."

Asked whether Mr. Dyke would have actually known about any problems relating to Ms. Ryan, Ms. Benson answered: "Not necessarily... But the overturned competition had nothing to do with him." Asked whether this means that she did not identify any conflict at all, Ms. Benson answered, "No."

Ms. Benson confirmed that policies she uses are those of the Public Service Commission whenever she runs a competition whether it is for a temporary or a seasonal or a permanent post. She identified, as NB #7, is the Public Service Commission Policy Statement on "References." Asked why she uses the Public Service Commission policies in managing the selection for a

temporary position, Ms. Benson said:

The *Act* governing the Public Service Commission governs me when I perform any recruitment, so I follow those procedures.

Asked if she is familiar with the policies of the Commission she said, "Those relating to recruitment, yes." Ms. Benson's attention was directed to the section of NB #7 entitled "Application", which reads:

"This policy applies to all PSC approved selection processes for positions in organizations scheduled to the Public Service Commission Act and positions not otherwise excluded from Section 4 of the Act thereof."

Ms. Benson could not recall which positions are "excluded from Section 4". Asked which positions are scheduled to the *Public Service Commission Act*, Ms. Benson said: "My understanding would be permanent and temporary positions." Asked whether she is aware of any competition which is excluded from the *Act*, Ms. Benson said, "No." Asked whether she had ever run a competition which she believes to have been excluded, Ms. Benson said, "No."

Ms. Benson identified as NB #8 the Public Service Commission's Policy relating to the "Issuance of Recommendation for Appointment", and again confirmed that "We follow the Public Service Commission policies for recruitment." Asked how an employee of any given department would know how to find the policies of the Employer concerning competitions, she said: "You could consult with the HR division or the Public Service Commission on the web site." She confirmed that the statement of "Application" in NB #8 is similar to that in NB #7.

She also confirmed that the Policy (NB #8) requires, at p. 2, that it is the responsibility of the Selection Board to "ensure that reference checks have been completed on recommended candidates." Ms. Benson said, that in her opinion that means that...

when you go through the process, and are recommendable and, to go on the certificate, reference checks are then conducted.

Asked how the references are conducted, Ms. Benson said:

I can do it over the phone or in person. I would tell the referee I was calling to do a reference check for a particular position, and they would have the right to review the reference. Doing it on the phone or in person would be determined by whether the referee is across town or across the hall. I would also tell the referee that "I could leave the form with you" and they could return the form directly to me. I'd likely say, for example, "... by 4:30"; but there is no time frame or required expiry date.

Ms. Benson confirmed that NB #9 is Mr. Picco's reference signed by herself.

Bob Picco came to my office, and he said for me to go ahead and complete it and he reviewed it and initialled it.

Asked why Mr. Picco's reference had not been used, Ms. Benson said: "It was in 1994 or 1995, and he could not comment on a couple of the knowledge components." Asked if she would have had any concerns if Mr. Picco had been able to fill in the knowledge components, Ms. Benson said, "No."

Ms. Benson identified as NB #10 Mr. Dan Michielsen's reference for the Grievor and was asked why the particular form was not the same as that completed for Mr. Picco, (NB #9). Ms. Benson said: "I'd say Dan completed it in electronic format: same information, but it was typed in." It was pointed out that the NB #9 form completed for Mr. Picco has three areas of questions, whereas the knowledge components completed by Mr. Michielsen has four. Ms. Benson said:

Correct. It should have included all four. I think there was one section missing in connection with Ms. Ryan... That could be the problem here.

Ms. Benson was asked to look at the question regarding "required abilities" where Mr. Michielsen had inserted the number "2" against the heading "Analytical". Ms. Benson said, "Yes '2' represents 'adequate'." Asked how Mr. Michielsen knew the rating guide, Ms. Benson said, "It's from the matrix." Noting that the actual form Mr. Michielsen used, NB #10, does not show the rating guide that appears on NB #9, Ms. Benson was again asked how he would have known what "2" means in the context of the reference. Ms. Benson said, "I don't know why it was cut off." Asked whether she had gone back to check with him, Ms. Benson said:

He would, in my opinion, know the guide. I don't know why it was cut off... This is a copy. I would have to see what I got back. I can't testify that he had a rating guide or not.

Ms. Benson acknowledged that Mr. Picco's reference had been dropped because he had failed to fill in two blanks, but that there are a number of blanks also on Mr. Michielsen's reference. Asked why it too had not been discarded. Ms. Benson answered:

The core components under the knowledge were, in fact, completed by Mr. Michielsen and they were also issues in the interview. She also pointed out that Mr. Picco had not responded to the questions at the bottom of the page, either.

Ms. Benson repeated that she follows the Public Service Commission Policies, and was doing so when determining which reference was to be used and which was not. "I was the only one on the recently conducted competition #EC.EB(T)(RCC).06011, (NB #4)".

Asked whether she is aware how long Mr. Michielsen was the Grievor's supervisor or when that supervision took place. Ms. Benson answered: "It was recent. I worked across the hall." Asked what would happen if it were a candidate – or a referee – with whom she was not familiar, Ms. Benson said, "It does not ask the 'When'". Ms. Benson was asked why she had written "good" instead of used numbers in her noting Mr. Picco's reference. Ms. Benson answered, "Those were his words, and he had the scale."

Ms. Benson was asked why she had interpreted Mr. Michielsen's reference as negative. She confirmed that his answers in respect of the "knowledge components" section were not negative, nor were his answers under "required abilities". She confirmed that neither were sufficient to disqualify the Grievor, but pointed out that "personal suitability traits" section were, in her view, "all weak... It's my assessment."

Ms. Benson identified NB #9 as the reference provided by Ms. Marie Ryan. When asked why each of the sections on NB #10 are followed by a parentheses stating "as outlined in job analysis", Ms. Benson explained that

Job analysis is completed at the first stage of the recruitment and is assessed in the interview using the matrix. Job analysis (NB #2) is a part of a recruitment file.

Ms. Benson was again questioned about her decision not to use Mr. Picco's reference, (NB #9) since he was unable to comment on a knowledge components, (as she says in SD #3). Mr. Michielsen's assessment under the same knowledge components gives the Grievor "very good" to "outstanding" on this component. Asked why, therefore, she needed anything further from Mr. Michielsen in his reference. She answered, "The process is for a complete reference check, not just elements of it." Asked whether she had ever told Mr. Dyke that the reference provided by Mr. Picco was being eliminated in its entirety, Ms. Benson answered, "No."

With respect to Ms Ryan's Reference (NB #11) Ms. Benson said that the "1" that was recorded by Ms. Ryan in answer to his "organizational" abilities would not have eliminated the Grievor,"but the reference from Ms. Ryan was such that I considered it not acceptable." Ms. Benson confirmed that she had compared Ms. Ryan's and Mr. Michielsen's references, but had

not compared Mr. Picco's as well.

The policy is that, if there is one negative, one does a second to see if there's a similar problem. Furthermore, Mr. Picco's was a reference dated from experience based in 1994/1995.

Ms. Benson confirmed that it was a combination of the two references that determined her decision. She confirmed also that, if one negative reference had been followed by a positive one, there would have been a third to determine if there were issues.

Asked if Ms. Ryan's reference, taken on its own, had been sufficiently negative to go for a third reference, Ms. Benson said, "Yes I would have." Asked why, therefore, she had compared the two references rather than go for a third. Ms. Benson answered, "Because it was weak on organizational, and was not acceptable in my view." Asked if it was possible that others did get recommended with weak references, Ms. Benson answered: "It's highly unlikely. I did check this and they were fine."

Ms. Benson's attention was directed to her 4/19/06 e-mail to Ms. Porter (NB #1) and asked to comment particularly on her comment that : "I've discussed the grievance filed by Stephen Dyke with Marie Ryan..." Ms. Benson said:

I do recall it vaguely. She had to respond at the first stage. Stephen was not recommended, so the second evaluation did not apply. So seniority was not relevant, and therefore there was no violation.

Noting her communication with Ms. Porter, NB #1, as compared with her e-mail to Mr. Dyke asking for two referees so that she can conduct reference checks in respect of two further Environment Biologists positions (SD #1), Mr. Blundon asked whether she saw some conflict for herself. Ms. Benson answered, "No. Not at the time, no." Asked whether on reflection she does see some potential conflict, Ms. Benson answered: "Yes. But I'm a professional, and I used my professional judgement." Ms. Benson confirmed that Ms. Ryan had been involved in the first, overturned, Selection Board. When asked whether she had ever considered whether Ms. Ryan might be in conflict, Ms. Benson answered, "No". Asked whether Ms. Ryan had offered any information concerning her own dealings with the whole matter, Ms. Benson said, "No."

Ms. Benson's attention was directed to the e-mail exchange between Mr. Dyke and Mr. Michielsen (SD #6) about a file which was "not an Official Departmental or HR file". Asked if she had ever been aware of such a file. Ms. Benson answered: "No I don't think I was, no."

Referring to NB #1, Ms. Benson was asked how much of the evidence she considered in reaching the determination that there was "no violation". She answered:

Since he was not recommended there was no reason, and therefore no violation. There was no consideration of arguments; just that he was not on the recommended list.

**On Cross Examination** Ms. Benson confirmed that in 2006 she was managing the HR functions for two departments including the Grievor's, and that...

when we do recruitment, we work for the Public Service Commission by which I am a certified Chair under their Policies that govern references and the full recruitment process.

She also confirmed that the posting (Consent #3) and the November 25, 2005 Selection Referral Certificate relating to the first (overturned) competition chaired by Ms. Anne Marie McGrath (NB #6) related to competition # EC.EB.(T).05058. That initial competition was overturned, and Mr. Dyke was not recommended. Finally, she confirmed that NB #4 is the certificate signed by herself relating to the subsequent Recently Completed Competition EC.EB(T)(RCC).06011 that she had conducted, and under which Mr. Dyke had again not been recommended. Ms. Benson said there was no separate report prepared associated with NB #4. "No. I would have done up a Chairman's Selection Board report." Asked whether she would have used Public Service Commission stationary, Ms. Benson answered, "I was working for the Public Service Commission." Asked whether this was for a temporary Environment Biologist position, Ms. Benson said "Yes, I was filling in for one of the two posts." Asked why she had not filled in the second of the two posts. Ms. Benson said:

The person we were backfilling for.. that employee was anticipated back on September 1<sup>st</sup>. So of the two, I only had to fill one, and that was Jocelyn Tucker. We really did not have time to post for the last position. It was two or three months between May 12<sup>th</sup> and September 1<sup>st</sup>.

Questioned about Section 4 of the *Public Service Commission Act*, (Consent #6) where exceptions to the Commission's authority are listed, Ms. Benson acknowledged that Subsections n, o, p and q, specify contractual, temporary, seasonal, and part-time employees. Ms. Benson confirmed that the *Public Service Commission Act* does not apply to such competitions.

Asked whether there is a policy governing conduct of Recently Conducted Competitions covered by the sort of certificate she signed (NB #4) for EC.EB(T)(RCC).06011, she said:

That was our departmental policy, to track so we would either know it was a new or an original competition. I used the Recently Conducted Competitions "RCC" designation because I used results of an earlier competition, Karen Seward's, (NB #3). Policy lets us use the results of prior competitions within a six month period where there is the same classification, same pay scale, and the same geography. We were backfilling two positions.

Referred to her e-mail exchanges with the Grievor (SD #2 & SD #3), Ms. Benson confirmed she had contacted Mr. Picco, and that Mr. Dyke had responded to her proposal of "Dan or Derrick", because they were in supervisory positions, a fact that she was aware of "from personal knowledge. They would meet the Public Service Commission criteria." She said she had not discussed the content of their references with "Dan" or "Derrick" prior to receiving them.

Ms. Benson reviewed her direct testimony relating to the disposition of Mr. Dyke's grievance, and her reading of Mr. Michielsen's typed reference on a form that lacks the rating guide. Ms. Benson also confirmed her advice to Ms. Porter (NB #1) had been that, while the junior employee had been recommended ...

the fact that she was a junior employee was not relevant. Stephen was not on the recommended list. The Agreement says, at Article 33.07, that it only kicks in if there is a recommendation. Stephen was not recommended, so it is not an issue.

Asked whether the Grievor would have been awarded the position if Ms. Tucker had not been successful, Ms. Benson said: "No, because he was not recommendable for appointment." She confirmed that his name had not appeared on the Selection Referral Certificate submitted by Ms. Seaward (NB #3) on the basis of which the first two positions had been filled in March 2006.

He was recommendable in that competition since he ranked 6<sup>th</sup> on the matrix, but he was not recommended since only four can be put forward... It just did not get down to him.

Ms. Benson testified she believes that the process was not conducted under the provisions of the Collective Agreement. It was under the *Public Service Commission Act*.

He was recommendable, but not recommended, since only the top four are recommended. Stephen placed 6<sup>th</sup>, and it just did not get down to him.

She testified that Mr. Dyke had never contacted her and instructed her not to contact any particular people for references. She does not recall if she had any contact, other than as noted in SD #2 & 3, concerning references. She does recall that the Grievor contacted her after the competition "and asked me for copies of references", which she provided.

She again confirmed that this was a competition for a temporary appointment, and she acts as a Chairperson when conducting Permanent competitions. Asked whom she works for when she is doing both permanent and temporary competitions, Ms. Benson answered, "for the Public Service Commission."

**On Redirect Examination** Ms. Benson confirmed that she believes she works for the Public Service Commission when conducting both temporary and permanent position competitions. She also confirmed that her Employer at the time was the Department of Tourism, Culture and Recreation, and that she was never employed by the Public Service Commission during the relevant period. Asked who had authority over what she did and did not do, Ms. Benson said:

The authority is delegated from the Public Service Commission to the Deputy Minister and then to individuals like me to perform on behalf of the Public Service Commission.

Ms. Benson again confirmed that the *Public Service Commission Act* Section 4 explicitly exempts temporary employee competitions. Ms. Benson said,

I was backfilling permanent positions. It was a temporary appointment to a permanent position.

Asked whether the post that she was filling was temporary, Ms. Benson answered:

The position is permanent... I'm appointing to a permanent position on a temporary basis.

Ms. Benson's attention was directed to Article 5.01(ii) which reads:

"vacancy" means an opening in a permanent, seasonal, or temporary position which is in excess of thirteen (13) weeks duration, and in respect of which there is no employee eligible for recall.

Ms. Benson pointed out that

The vacancy was in a permanent position. The person goes into the permanent PCO... I backfill a number of positions. I did not create a temporary position.

Ms. Benson's attention was directed to Article 33.01(a) & (b), "Job Competition" and reminded that the posting, Consent #3, refers to the appointment as "temporary to March 21, 2006 with possible extension." She again said, "I'm backfilling a permanent position." Asked if Ms. Tucker had become a Permanent Employee through her appointment, Ms. Benson answered:

No she was a temporary employee, and did not get permanent status. She's a temporary employee backfilling a permanent position.

Asked how, under Article 33.07(b), Ms. Benson determined that she was working for the Public Service Commission in light of the fact that there are two bodies set out in 33.07(b), "... Public Service Commission or a chair of a department selection committee..." In Ms. Benson's view the two are the "same animal virtually". Ms. Benson confirmed she had used the NB #3 results to arrive at the decision she made.

I formulated my recommendation based on Karen Seaward's, but they were the same as used for the Anne Marie competition.

Ms. Benson again confirmed she had not posted for the fourth person "because of the ending of the leave of the person who was returning to work. No time to run a competition." She also testified that the unfilled position would have been filled if the first of the two candidates listed in the Selection Referral Certificate (NB #4) had accepted rather than declined. In those circumstances, she said, there would have been two appointments, "Definitely yes."

Asked, finally, whether she would say that any competition that she chairs is, in fact, a Public Service Commission competition, Ms. Benson answered: "On behalf of, That's correct." **THE FINAL UNION WITNESS** was Ms. Marie Ryan who has been with Government, since 1992 and the Department "under various titles for over twelve years." Ms. Ryan described her early career with Tourism and her move to the Department of Environment up to 2005/2006, when she was Acting Director of Pollution Prevention. At that time, she supervised about "seven people including a student, at any one time." Her division "has never had a full compliment, what with maternity leaves and the like." Ms. Ryan's attention was directed to SD #5. She said:

Yes, I asked for Stephen. We didn't have enough staff... Dan had plenty of staff, and I asked if Steve were available he might be able to help me. I knew of his degree qualifications and that he could do the work at a level I required. I really did not have many staff... I think he came over with me in a week or so, but he had work to finish up for Dan. By the end of July he was doing waste management stuff.

Ms. Ryan confirmed she had involvement with Consent #3. "When it was first posted, yes I was asked to develop interview questions..." Ms. Ryan's attention was directed to the Nov. 25, 2005 Selection Referral Certificate signed by Ms. McGrath (NB #6). She confirmed that:

Four had been recommended, yes. I did not know who was recommended. We ranked the candidates. They did not have you do this on this form... That was the only interview I sat in on.

Asked whether she recalls when she found out that the competition had been overturned... Ms. Ryan answered, "Stephen complained that I coached Jocelyn Tucker..." Asked when she was aware of a possible problem, Ms. Ryan answered:

I think Nancy or Anne Marie... I don't know. Nancy asked me about it... I think Nancy asked her and Anne Marie. I gave her all my notes.

Ms. Ryan's attention was directed to her July 19, 2005 e-mail to Mr. Dyke (SD #13) which asks about his intentions regarding "reclassification", and notes "it is likely that we will be able to fill some Env. Biol. Positions in the early Fall ..." She said:

I was aware of his application for reclassification. There was no reason not to get him reclassified as a 41 since his work was very similar I encouraged that. I also support reclassifications of others who worked for me.

Ms. Ryan identified, as MR #1, an e-mail confirming her support for the Grievor's reclassification to GS #41 "...if you decide to go this route."

Her attention directed to Ms. Benson's e-mail to Ms Goldie Porter about "... the grievance filed by Stephen Dyke..." (NB #1), she said: "Nancy mentioned it to me, I'm pretty sure".

She also confirmed she had completed the Employee Reference Form for the Grievor relating to the Consent #3 competition (NB #11). Asked whether she had obtained any advice before her completing NB #11, she said:

I was told about the rating scale, but I was not influenced in any way at all... Everything is subjective, but this is how it's done. I did the best I could with it.

Asked whether she was aware what the rating scale numbers would be used for, she said:

Not that this is a statistical thing, no. But we all got asked, and try to put numbers to some of the qualifications.

Her attention was directed to the question, "Would you hire as an Environment Biologist and why?" (NB #11) to which she had responded: "Stephen has the experience and ability to work as an environmental biologist. " Ms. Ryan said:

Yes, I wrote that answer. I meant that he can do the job. Whether I would hire him, I did not say Yes or No.

Asked whether, at the time, she would have hired him as an Environment Biologist or whether there was any reason why she would not have him. Ms. Ryan answered:

There's no reason I would not hire him. Like I said, he has the ability, but it is not the same as getting the work done. Getting work is my responsibility as Manager.

Asked how she intended to portray the Grievor, Ms. Ryan answered: "I had no interest... When I give a reference I try to give the best possible reference." Asked whether she had a complete understanding of how Ms. Benson would use the values she entered, Ms. Ryan said: "No. When it left my hand, it left my hand..." Asked if she understood that a number "2", which the rating scale interprets as "adequate", would exclude Mr. Dyke from competition, she said:

Maybe not. I don't know. Steve had only worked for me for a short time and, at the time, that's what I meant; nothing anti-Stephen about this. I was actually a bit surprised that he did not deal with hazardous waste... The hazardous waste stuck in my mind. I had only been supervising him for nine months, so it was more difficult to assess personal suitability traits. I did notice his leaves and initiative. Over time that might have changed.

Asked whether initiative is a core function, Ms. Ryan said:

No, not a core function; but communication of files and passing on advice are never entirely isolated. So it's desirable to have interactivity.

Asked how she felt about filling out the form, Ms. Ryan said:

I felt it was part of the job. I was glad that the format was there to follow, and the ratings system made it a bit easier to say where the person falls. I felt it was pretty good and reflects what the job needs.

Asked about her reference to the Grievor's "leaves", Ms. Ryan said:

You fill in a leave request form. You need to get advance notice, and often Stephen did not give advance notice. I'd have to approve it - sign it - and often I let him know that I needed him.

Asked whether she has the right to say No, Ms. Ryan answered:

I thought I should have; but to say No if you have to do the job... It's called work because you have to be there. But, generally, if he wanted to go I signed the form but... It was a big problem.

Ms. Ryan's attention was directed to a series of e-mails between herself and the Grievor in December 2006 (SD #14), and she was asked whether this shows she had no problem giving him a reference at this time. She said, "I give the best reference I can for everyone." She also identified, as MR #2, an undated letter she had written the CNLOPB that she estimates was sent, "perhaps in December 2006". Mr. Blundon asked Ms. Ryan to justify her estimation, in NB #11, that the Grievor was "weak" on several of measures. She said:

He wanted out. He was not well... not productive. If you look at my letter to the CNLOPB, I set out in paragraph 2 the work he is assigned to do. If they can hire

him, great. He had the ability, but was not reliable and not productive. That's what the documents say.... I was still concerned about productivity; not for any lack of ability, but getting the work done. Motivation showed in productivity. (About his reclassification), I figured that if a 41 would make him happy, so goes it. If that will do it, go for it. I had no worry with that.

Ms. Ryan's attention was directed to Mr. Kennedy's January 12, 2006 letter to Ms. Brake (TB #1) reporting the disposition of the first competition, and was asked whether she ever had a discussion with Mr. Kennedy. Ms. Ryan answered:

No, I never did. I was not ever told what the grievance was about; not informed of it from then on, right to the end.

She confirmed she had completed a reference for the Grievor (NB #11) in relation to that competition. "It would have been up to Stephen to submit my name. I did not plan or instigate anything." Asked what her working relationship is with Ms. Jocelyn Tucker, Ms. Ryan said:

I supervised her, and took her on for thirteen weeks of work. Her resumé came from the Minister's office, who asked if there was anything there. I met her at a NOIA conference.... sometimes that happens. Sometimes they send resúmes in. It came to Derrick Maddocks. He knew that I was short on people. Derrick asked me to come out to his office. I knew her supervisor at MUN, Moira Wadley... top notch. So she's worth a try if she is one of Moira's students... She came on really quite green, with a Master's degree... I had to train her to figure what to do with registration and policies, *etc.*; and I supervised her for that period of time while I was Manager of Waste Management... I was low on staff, so yes, I'm happy to have her on. She came on and worked very, very hard. She had worked for a year at the Geo Centre. That's how she came on, with very little experience. She did not have any of the (interview) questions, but basically she got a lot of one on one. I don't recall Terry telling me. I'm sure I did not get a copy of that letter..

Asked if she had a preference between Jocelyn Tucker and Stephen Dyke, Ms. Ryan said: Preferably, I needed them both. There are different things that they are both good at. I did not have a preference. I did want both. There's a lot of work, and without staff..."

**There was no cross examination.**

**The Employer lead no evidence of its own.**

### **ARGUMENT**

**FOR THE UNION**, Mr. Blundon undertook to capture the substance of the grievance as the Union perceives it. The Union has alleged (Consent #2) violation of Article 12.07, 33.01, 33.02, 33.07 and all other pertinent articles." It is important that the Arbitrator keep Article 12.07

particularly in mind, and to look also at Article 13.16. There is a lot of jurisprudence concerning an arbitrator's broad powers.

Ms. Benson clearly testified that if Mr. Dyke had been on the recommendation list (NB #4) he would have been hired. That is definite. Ms. Benson's testimony shows that the vacancy was alive at that point.

It is also important that the Arbitrator take note of Article 1.01 which sets the framework of the employment relationship. We've heard a lot of discussion about policies as they relate to the Public Service Commission. Article 3.01 is clear on that. In the case of conflicts, the Agreement trumps. In the instant matter the Employer has no policies, but imports those of the Public Service Commission. The Employer is free to run a competition, but must keep within the 12.07 fairness requirement and Article 33.

Article 33.01 sets out the parameters of the posting, and Article 33.02 declares what shall be in the posting. The Union does not take issue with the job posting, but does take issue with the process of evaluation that was used. There are three or four salary levels involved here. The key issue is the Grievor's ability to do the job. His current job and the job advertised for in Consent #3 are very similar. The core duties obviously are close.

On issues of post-grievance argument that have arisen it is important to look at Browne & Beatty which makes it clear that the evidence entered was admissible. The evidence provided by Ms. Ryan forces us to ask the question why she encouraged him to apply for the position if we are to interpret her evaluation as negative. How does that reconcile with information that came forward. It does not appear that she regards her reference as having been negative.

In the Union's view, Mr. Dyke was mistreated by the Employer. The Employer cannot hide behind anyone else. The post-grievance evidence shows what the reference from Ms. Ryan was. She did not have a clear understanding of the import of her numbers. She had no intention of giving him a negative number. Her testimony was that she had no preferences between Ms. Tucker and Mr. Dyke. "I wanted both... There are things that both of them are good at." Mr. Blundon directed the Arbitrator's attention to *Dexter-Lawson Manufacturing Inc. and USAW Local 2890* (paragraphs 32, 33, 35 and 36) which deal with the rights of a successful candidate and admissibility of post-discipline evidence.

The Union is also very concerned about why Mr. Picco's reference was not admitted. *Commercial Bakeries Corporation and the United Steelworkers of America Local 461* makes it very clear that you cannot look for conditions and competencies that are not required of the job.

The competition appears to have been run simply as a mechanistic exercise. Ms. Benson was clear that the process was one step after the other, and it turns out that the references are vetoes. All else is irrelevant if the references are poor. Therefore, the key question is whether this decision was made in bad faith and relied on subjective judgements. Ms. Ryan actually said that in her opinion it was "all subjective". She also had no idea what the numbers meant. She offered an opinion of things she thought that he was weak in. She thought her own management skills reflected in his improving work, and she wanted him on the job. "I wanted both." There is a real nexus between what she was thinking and what she said. Ms. Ryan did not understand what she was doing. She never intended to disqualify the Grievor. her later recommendation of him, and his own later success, prove it.

Ms. Benson, on the other hand, was acting on her own assessment of what the reference meant. She testified that she had never asked Mr. Dyke about any of the problems. So she had no idea of why he was off on sick leave. There might have been good reasons. The post-grievance evidence is not about the grievance itself, but about the system. The process was unfair, prejudiced and biased on the basis of that fact alone.

Mr. Blundon turned to jurisprudence on the *Public Service Commission Act* and its implications for the Employer's actions in this matter. The Commission's role is to act at arms length from the Employer. But the Employer cannot hide behind the Commission. Mr. Blundon cited *Her Majesty the Queen in Right of NL, Dept. of Finance and NAPE, (Jurisdiction in Cantwell)* Unreported, David L. Alcock, October 24, 2005 as the leading case in this matter. The fact is the Employer cannot allow conflicts to prevail. They cannot go for references from people who are in conflict; and they cannot use information that is not openly available. There must be a right to respond. And, finally, the Employer cannot neglect to notify those who are unsuccessful, thereby denying them the opportunity to respond in a timely matter to the issues that could be raised.

In Mr. Dyke's case there were people in conflict. Ms. Benson testified that, at the time she had not seen herself in conflict, but that, in retrospect, ... "Yes, I was." The first competition

was withdrawn because of what was perceived to be possible unfairness. If Mr. Dyke had been left in the competition he would have got the job. This can't be blamed on Ms. Nancy Benson. The Employer had the duty to ensure that she was not in conflict. The Employer had the responsibility to see that it was fairly run. The Public Service Commission had no responsibility to evaluate anything. It was the Employer who had the responsibility to manage this competition, and the Collective Agreement between the Union and the Employer is what prevails. It is the Employer that is ultimately responsible for the competition.

Article 33.07(b) must be considered. In a question of fairness, it is clear that to be fair is to be correct. There is a high standard called for in Article 33.07(b) which refers to,

"...candidates who have been recommended by either the Public Service Commission or a chair of a department selection committee for promotion...."

Ms. Benson said that, no matter what type of position is involved, she is working for the Public Service Commission and observing the Public Service Commission Policies. The Union argues that she is working for the Employer, and the Employer has responsibility for her actions insofar as she is operating as a "chair of a departmental selection committee for promotion." The Collective Agreement speaks of a "committee". Ms. Benson was chair, but her only "committee" was herself. The Employer completed a competition. That was the first error, appointing a single person. That, in itself, creates an appearance of unfairness. One person exercised the whole function and that placed her in a situation of conflict. It makes sense for the parties to agree, as it does in the Collective Agreement, to have a committee. But that is not where it ends. Ms. Benson acknowledged she could not say what others may have intended by the ranking numbers. It was because a number of "ones" in Ms. Ryan's reference that she deemed the reference was negative. But all Ms. Benson saw was the matrix scores and how they ranked.

Mr. Kennedy, in his totally unchallenged testimony, said that he saw there was an apprehension of bias. It was determined by him, not by the Public Service Commission. It was he who overturned the competition. But despite that competition having been overturned, nonetheless, Ms. Benson used documentation gathered in the course of that overturned competition for the competition she alone completed. A taint is a taint. Therefore all such material should have been withdrawn. Both transparency and fairness require this. If she did not know why the initial competition was overturned, she had the responsibility to find out. Mr. Kennedy certainly

knew that a new competition was ongoing, and he had the responsibility in the matter. One taint means that all is tainted.

Mr. Kennedy said he overturned the competition because he'd received a complaint that Ms. Ryan had coached Ms. Tucker. The complaint was strong enough to overturn that first competition. He said he had met with Ms. Ryan in his office, but Ms. Ryan had no recollection of that conversation with Mr. Kennedy, and was sure she had done nothing inappropriate. Mr. Kennedy had a different view; and he overturned the competition.

Ms. Ryan was an Employer Manager, asked to give a reference for the Grievor. Ms. Benson's testimony is that Ms. Ryan did not, when speaking with her (re NB #1), indicate any conflict of interest in providing a reference for the Grievor. But that does not let the Employer off the hook. The Employer had a duty to ensure a standard of care in the process, and to divulge the reason for the conflict. Then Ms. Benson would have had to decide whether to use Ms. Ryan's reference. Ms. Benson might also have been alerted by the fact that Mr. Dyke's questions (SD #2) arrived during the interview process. The Employer never once challenged Mr. Dyke qualifications or ability for the job. He was excluded on the basis of the references from Mr. Michielsen and Ms. Ryan, both of which were deemed to have been negative.

The Union does not agree that Ms. Ryan's reference was, in fact, a negative reference even though Ms. Benson thought it was. Ms. Ryan, herself, said she would not have excluded Mr. Dyke. So was it negative? It is for the Arbitrator to decide. It is not in dispute that he would have had the job if it were not for those references.

Article 41.04 has a special importance here. It emphasises the importance of fairness. The evidence is clear. In this case, formal assessments were made by the Employer represented in the persons of Ms. Ryan and Mr. Michielsen. Their assessments fall properly under the rubric of Article 41.04. Both were relevant Supervisors, even though Mr. Michielsen was the Grievor's Supervisor for only a few months. Mr. Michielsen was acting on the Employer's behalf. The Employer insisted that the references be done by the immediate supervisor. Mr. Graham apparently was not used because he was not a current Supervisor. But there was no discretion. The Employer did not to give the employee the opportunity, required by 41.04, to challenge the assessments.

Mr. Dyke had to go looking for them. Ms. Benson specifically said in her testimony that she had not told him that he had not got the job. Even in her e-mail she was evasive. She said that Jocelyn Tucker was the successful candidate and that the Employer was not going to fill the fourth position. That reason was simply not true. At that time they were still going to fill it.

It is important for the Arbitrator to look at the context. The scope of Arbitral power is broad enough to permit this. We are talking of an assessment of a candidate. The Agreement requires that Mr. Dyke be notified if someone gives a formal assessment of his performance, but they did not inform him. He lost the opportunity until June or July, by which time the maternity leave was almost up. Article 41.04 is fundamental in ensuring that the employee is treated fairly. The Arbitrator has a great deal of latitude.

Article 42.03 is also pertinent. This clause is found under the heading "Discipline", but that fact is not relevant, since the article addresses not just disciplinary issues, but "*any expression of dissatisfaction* relating to his/her work or otherwise which may be detrimental to an employee's advancement or standing with the Employer" (emphasis added). Article 42.03 requires the Employer to notify an employee within five working days. Mr. Michielsen certainly indicates there was some dissatisfaction. At that moment, the Employer had five days to bring it to Mr. Dyke's attention. It should also be noted that 42.03 specifies shall happen if procedure is not followed. It says that the expression "shall not become a part of his/her record for use against him/her at any time." This is strong language.

It is also remarkable to note that Mr. Michielsen was keeping a separate file on Mr. Dyke, not part of Mr. Dyke's personal file. This was not also brought to the Grievor's attention. There is clear unfairness here. If the Employer had notice of this, the Grievor should have been given an opportunity to rebut it. The last section of Article 42.03 is very clear, and very specific, and must be addressed. This Article cannot be ignored in the context of looking at "alleged unfair treatment on promotion" as set out in Article 12.07.

Mr. Blundon urged the Arbitrator to look at his authority, set out in Article 13.06, that ground his broad powers to provide Mr. Dyke redress for any unfairness. That does not mean the Arbitrator has to accept everything the Union argues. If there is a single unfairness, the grievance must be sustained.

The Union provided its Arbitral Jurisprudence and authorities in the matter, as follows:

*Her Majesty the Queen in Right of NL, Dept. of Finance and NAPE, (Jurisdiction in Cantwell)* Unreported, David L. Alcock, October 24, 2005; *Corner Brook Pulp & Paper Ltd. & C.E.P., Local 60N*, 73 L.A.C. (4th) 1, J.C. Oakley, G. Parsons, K. Burrige, July 7, 1998; *Lewisporte / Gander School District 6 v. NAPE* Grievor Mr. Wayne Watkins, Board J.Oakley & W. Budgell, G. Williams dissenting 2005; *British Columbia Hydro & Power Authority & I.B.E.W, Local 258*, 10 L.A.C. (3d) 56, R. Germaine, January 31, 1983; *Sudbury Regional Hospital and O.P.S.E.U., Local 659*, 67 C.L.A.S. 362, Burkett, January 31, 2002; *Newnes Machhine Ltd. v. I.W.A.-Canada, Lloc.1-417 53 L.A.C. (4<sup>th</sup>) 431* D.R. Munroe, Q.C. 1996; *Sudbury Regional Hospital and O.P.S.E.U., Local 659*, 113 L.A.C. (4th) 380, K.M. Burkett, June 13, 2002; *Corporation of The City of Toronto and C.U.P.E., Local 43*, 17 L.A.C. (2d) 304, D.H. Kates, M. Tare, B.M.W. Paulin, Q.C., Jan. 5, 1978; *Re Delaney; Province of NL Hospital Association v. NAPE*, [ 1983 ] N.J. No. 252, Nfld. Supreme Court of Appeal, June 28, 1983; *Re Kelland: Province of NL Hospital Association v. NAPE*, 1984, Noel. J; *Re NAPE v. Her Majesty the Queen in Right of Nfld.*, [1989] N.J. No. 145, Supreme Court of Nfld. - Trial Division, June 21, 1989, Adams, J.; *Grand Falls - Windsor ( Town) v. CUPE, Local 1349*, [1999] Nfld. L.A.A. No. 5, J. Scott, W. Sainsbury, R. Reid, January 15, 1999; *Waterford Hospital Corporation v. NAPE, Local 6901*, [ 1979] N.J. No. 104, Nfld. Supreme Court Trial Division, March 8, 1979; *Waterford Hospital Corporation v. NAPE, Local 6901* (Nfld. C.A.), [ 1980] N.J. No. 19, Nfld. Supreme Court - Court of Appeal, April 25, 1980; *Government of NL, Dept. of Social Services and NAPE*, Unreported, David L. Alcock, July 15, 1991; *The Worker's Compensation Commission and NAPE*, Unreported, W. Rowe, D. L. Alcock, G. Curnew, Sept. 11, 1991; *Bradbury v. Newfoundland ( Attorney General)*, [ 1998 ] N.J. No. 211, Nfld. Supreme Court - Trial Division, July 21, 1998; *Bradbury v. Newfoundland ( Attorney General)*, [2001] N.J. No. 327, NL Supreme Court - Court of Appeal; *Transcontinental LGM Graphics v. CEP Local 900G, Grievor Mr. Paul Fryza*, Arbitrator Arne Peltz 169 L.A.C. (4<sup>th</sup>) 324; *Dexter-Lawson Mfg. Ink. & U.S.W.A. Loc. 2890*, 1997, Grievor Mr. Frank McFayden, Arbitrator W.A, Marcotte, 68 L.A.C. (4th) 379; *Her Majesty the Queen in Right of Nfld. v. NAPE*, Grievor Mr. Claude House 2000, Arbitrator, John A. Scott.

It should not be forgotten that Mr. Michielsen did not, apparently, have a rating guide in preparing his reference (NB #10). It should also be noted that Mr. Terry Kennedy overturned the first competition on the basis of what he perceived to be a possible positive bias towards Ms. Tucker. That possible bias towards Ms. Tucker runs through all competitions, because it was Ms. Ryan's reference that effectively vetoed the Grievor. As soon as Ms. Tucker secures the job, Mr. Dyke's references from Ms. Ryan suddenly improve.

Finally, there is no weight to be put on the Employer's distinction between permanent and temporary. The Public Service Commission Policy, under "Application", makes this very clear. The *Public Service Commission Act* (Consent #6) is a stand-alone *Act* and has no impact on the Employer at all. Mr. Dyke's "permanent status" has no bearing in this matter, as Mr. Henley made clear. Arbitrator Alcock's "*Cantwell*" Award makes this very clear. The competition was for a temporary position. That is clear and unambiguous. Mr. Dyke's "permanent status" provided the Employer no protection under the Public Service Commission. If you look at NB #9 Mr. Dyke was, in fact, a recommended candidate once the references were checked. The *Cantwell* award is the one on which the Arbitrator should focus.

A fundamental point to bear in mind is that if the Arbitrator finds any unfairness or arbitrariness, or other violation of the Collective Agreement, the Employer's decision must be overturned. That is the standard applied in this case. Mr. Dyke should have got the job. He was the only one left. There was no choice in the matter.

**FOR THE EMPLOYER**, Mr. Saturley invited the Arbitrator to check his notes as to what Ms. Benson actually responded when challenged about a conflict. In Mr. Saturley's view she claimed that she was a professional and acted professionally in exercising her judgement in the matter.

It is absolutely clear that the Public Service Commission is not a party to the Collective Agreement. Article 33.07(b) refers to both the Public Service Commission boards and the bodies belonging to the Employer. In Ms. Benson's unequivocal testimony she was working for the Public Service Commission when she completed the third competition.

Mr. Kennedy's January 12, 2006 Letter to Ms. Brake (TB #1) related to the first grievance that was, itself, withdrawn in the light of the decision to quash the first competition. TB #1, it should be noted, explicitly says that the competition that was quashed was "reviewed by the

department, in conjunction with the Public Service Commission." Furthermore, the finding was of an apprehension of bias, not an actual finding of bias.

Mr. Saturley also invited the Arbitrator to consider carefully the Union's position on Article 41.04. There is a very significant difference between a formal assessment in a "personnel file" and a referee in making an assessment for a reference form. The reference is never to be used for discipline and never used in competitions, as Ms. Benson testified. There should be no lines drawn in these matters. Article 42.03 deals with discipline. The instant matter has nothing to do with discipline. The "Cantwell" Award and Arbitrator Alcock's earlier 1991 case are not on point, since the instant matter is not disciplinary.

No one can draw any conclusions about any reference to Mr. Michielsen's alleged "secret file" (SD #6) since Mr. Michielsen was not called by either party. Mr. Blundon also complains that Mr. Dyke was not informed adequately of his position. But Mr. Blundon fails to take account of the e-mail exchange between Ms. Benson and Mr. Dyke over the period from June 6, 2006 and July 7, 2006 (NB #5). Mr. Dyke clearly was in the loop by early June 2006, and getting information as of 7-4-2006. So any complaint of inadequate or untimely information should not be given any weight.

The criteria for the selection of senior candidates is Article 33.07(b). But that simply never came into play. The procedure deployed by the Public Service Commission through its agent, Ms. Benson, was very clear, very straight forward. The references are sought, and issued, as a continuation of the process that starts with the job analysis and is linked to the matrix. The reference is not a separate issue. It is a validation or a confirmation, as Ms. Benson testified.

The Union also talks of the apprehension of bias, and seems to see Ms. Ryan as pivotal in her treatment of Jocelyn Tucker. It somehow argues that this leads to Ms. Ryan as being in opposition to or biased against the Grievor. But the whole point that Mr. Kennedy made in his testimony was that there was an apprehension of bias and there were two jobs. Even if Ms. Tucker did get the job, that did not deny Mr. Dyke getting the second job.

Mr. Blundon also seems to think that the Grievor was cowed, or somehow forced, into choosing Ms. Ryan as his referee. But a glance at SD #2 will show that there were two references required, and the two he gives were Mr. Phil Graham and Mr. Robert Picco. It is only after that,

that the request from Ms. Benson is for a current supervisor. Mr. Dyke acknowledges this with his casual "sure" in SD #3. Where is coercion or force? There is no evidence of manipulation. Ms. Benson told us she did not know what Mr. Michielsen or Mr. Maddocks would say in their references provide, and she had very valid reasons for excluding Mr. Picco's and Mr. Graham's.

Ms. Benson did interpret Ms. Ryan's reference as negative. That was her professional judgement. But she did not stop there. She went on to check with "Dan" and "Derrick" and got a clearly negative reference from Mr. Michielsen, (NB #10). She has an incomplete reference from Mr. Picco. Mr. Blundon seems to think that Ms. Benson, in her testimony, said she had done nothing but use the original references. That is not the evidence. Ms. Benson did review the matrix scan and sought references from other supervisors. She has an arguably negative reference from Ms. Ryan, and a clear and unambiguous negative reference from Mr. Michielsen . On that basis, Mr. Dyke is not recommended, and does not find his way onto the list of recommended candidates. The matter ends there. 33.07(b) does not come into play.

There is no evidence that Ms. Ryan was biased against Mr. Dyke. She testified that while she was on the first selection board she never had anything to do with the selection after the interview. She said that she did not know who was recommended or why it was overthrown.

Mr. Saturley then reviewed Mr. Blundon's case law, noting that in several cases the matters are disciplinary so therefore not on point. With reference to Arbitrator Alcock's "*Cantwell*" award, Mr. Saturley's urged the Arbitrator to pay particular attention to the comment (at p. 9) that "... the *Act* does not apply to temporary employees", and urged the Arbitrator to bear this central finding in mind, since, in the Employer's view, Mr. Dyke was Permanent (SD #15) at all times relevant to this matter, and therefore was subject to the *Act*. In the Employer's view there is simply no violation of Article 33.07(b).

Mr. Saturley invited the Arbitrator to consider the Arbitral Jurisprudence, including: *Supreme Court of Newfoundland - Trial Division in the matter of an application by the Employer to set aside an award of Arbitration Paul Dicks dated February 26, 1987* [1989] N.J. No. 145 76 Nfld. & P.E.I.R. 353 Action 1988 St. J. No. 963 Adams, J. Judgment: June 21, 1989; *Supreme Court of Newfoundland - Trial Division Newfoundland Association of Public Employees, and Her Majesty the Queen in right of Newfoundland as represented by Treasury Board, Defendant*

[1992] N.J. No. 192, 101 Nfld. & P.E.I.R. 1, 34 A.C.W.S. (3d) 790, 1991 St. J. No. 3600 L.D. Barry J., Judgment: June 29, 1992; *Supreme Court of Newfoundland - Trial Division Her Majesty's Attorney General for Newfoundland and The Newfoundland Hospital and Nursing Home Association, Applicants, and The Newfoundland and Labrador Nurse's Union, Respondent*

[1991] N.J. No. 314, 97 Nfld. & P.E.I.R. 194, 30 A.C.W.S. (3d)1159, 308 A.P.R. 194, 1991 St. J. Nos. 2392 and 2532 Halley J., Filed: November 29, 1991; *Her Majesty the Queen in Right of Newfoundland Department of Justice and Newfoundland Association of Public Employees, Grievor Ms. Catherine Kirby, Arbitrator: Mr. D. Alcock, 1993; Supreme Court of Newfoundland - Trial Division Her Majesty the Queen in right of Newfoundland as represented by Treasury Board, applicant, and Newfoundland Association of Public Employees (re Catherine Kirby), respondent*

[1994] N.J. No. 295; 123 Nfld. & P.E.I.R. 81, 49 A.C.W.S. (3d) 1081, 1993 No. 4466, L.D. Barry J., Judgment filed July 28, 1994.

**IN REBUTTAL ARGUMENT**, Mr. Blundon invited the Arbitrator to bear in mind his findings in the two preliminary rulings in this matter since it is critical to determine the extent to which the Employer is, in fact, hiding behind the legal jargon rather than actually taking responsibility as required under the Collective Agreement.

The June 25, 2002 letter from Mr. Kennedy to Grievor re Permanent Status (SD #15) is critical. Mr. Blundon again urged the Arbitrator to very carefully read the "*Cantwell*" Award. It is the process that is under review here. An Arbitrator has every right to review the entire process since the matter is squarely within the Employer's control and under the Collective Agreement, not under the *Public Service Commission Act*.

### **CONSIDERATIONS**

**Background:** This Final Award follows a first interim award (published on December 20, 2007) dealing with the Public Service Commission's application for intervener status, and a second interim award (published on March 11, 2010) dealing with the Employer's motion to raise a preliminary objection. I continue, herein, to hold jurisdiction to deal with the merits.

**At Issue Between the Parties** is the Union's claim that the Grievor was unfairly treated (Article 12.07), in that (i) the Employer improperly applied Article 33.07(b) to bar his securing a temporary position to which he was entitled on the basis of his seniority; and in that (ii) there were a

number of procedural irregularities in the conduct of the competitions for the positions posted (Consent #3).

Article 33.07 requires that:

Whereas the parties recognize:

- (a) opportunity for promotion should increase with length of service;
- (b) The parties therefore agree that in evaluating candidates who have been recommended by either the Public Service Commission or a chair of a department selection committee for promotion, the permanent head shall consider three criteria: qualifications, ability and seniority.
- (c) where the recommended candidates are evaluated as being relatively equal, the senior recommended candidate shall be selected for appointment.

It is common ground between the Parties that the Grievor's name did not, in fact, appear on the May 12, 2006 PSC Selection Referral Certificate (NB #4) that Ms. Benson submitted showing the names of those "recommended" for competition EC.EB(T)( RCC).06011. The Employer argues that the matter ends there, as the Grievor was not "recommended".

**Positions of the Parties:** *The Employer* argued that the matter ends there for two reasons. First, the "evaluation" involving seniority referred to in Article 33.07(c) applies to "candidates who have been recommended" 33.07(b) only, and the Grievor was not recommended. Second, the process that generates such recommendations is conducted under the *Public Service Commission Act* which gives exclusive management of that process to the "Public Service Commission" (referenced in 33.07(b)). That process is not subject to arbitral review. As the *Act* requires, and ample arbitral jurisprudence confirms, a board of arbitration has no authority to review the actions of the Public Service Commission. Thus, the grievance must fail, in the Employer's view. *The Union* led evidence and argued that while the *Public Service Commission Act* requires, and ample arbitral jurisprudence confirms, a board of arbitration has no authority to review the actions of the Public Service Commission, the process used for the particular competitions conducted under the instant Posting (Consent #3) that resulted in the Referral Certificate (NB #4) for EC.EB(T)( RCC).06011, was not, in fact, properly and actually conducted by the Public Service Commission and under the *Public Service Commission Act*. The process was conducted under the authority and management of the Employer, whose actions are properly subject to review under the Collective Agreement. In the Union's view, the grievance must be sustained in light of the evidence led both on jurisdiction and on the procedural irregularities that amount to unfairness.

**I must, therefore, first determine** the question arising in Article 33.07 and elsewhere, viz.: Were the particular competitions conducted under the instant posting (Consent #3), which resulted in the Referral Certificate (NB #4) for EC.EB(T)(RCC).06011, in fact, properly and actually conducted by the Public Service Commission and under the *Public Service Commission Act*, or were they, in fact, conducted by , and under the authority and management of, the Employer?

I note the substantial line of Arbitral Jurisprudence, including a number of Supreme Court rulings, that confirms the application of the *Public Service Commission Act* to approved selection processes for positions in organizations scheduled to that *Act* as not subject to review by boards of arbitration.

**Depending on the findings on the first question, I may also have to determine** whether there were, as the Union alleges, procedural irregularities constituting unfair treatment of the Grievor.

**Power of the Board:** Article 13.16 provides that:

An arbitration board may not alter, modify or amend any provisions to this Agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

**(i) Who conducted the competitions?**

**The Evidence:**

I note that the Employer led evidence through cross examination (in particular, of Ms. Benson), and argued throughout the hearings, that the competitions were actually and properly conducted by the Public Service Commission and under the *Public Service Commission Act*. Despite the fact that she was and is an employee of the Newfoundland Government as Manager of Human Relations for a number of Government Departments including Environment and Conservation, Ms. Benson maintained that she is also a Board Chair, certified by the Public Service Commission, and that while carrying out her duties as Chair in the context of recruitment procedures (whether in temporary or permanent contexts), she is an agent of the Public Service Commission and functions under the *Public Service Commission Act*. In the Employer's view, therefore, the process and result of competition EC.EB(T)(RCC).06011, under which the Grievor was not recommended, are beyond the reach of an arbitration board.

I also note argument and evidence led by the Union that challenges the Employer's account of the issues and events. In particular, I note Mr. Terry Kennedy's testimony about

management actions undertaken by the Employer itself that led up to the Public Service Commission being asked to conduct the first competition, and the subsequent decision to "redo" it.

I note that when asked why the Public Service Commission was involved in the Consent #3 competition which was a temporary position, Mr. Kennedy testified that:

There were a number of competitions Stephen was involved in, and he felt he'd been wrongfully dismissed. He felt the Human Resource Division was biased against him and, to ensure he felt no bias at least from our perspective, he'd get a fair opportunity at the job.

Asked whether he had moved this to the Public Service Commission because of their legislative requirements, Mr. Kennedy answered:

Not in terms of who was required to deal with the competition. It was just that he felt that we might be biased against him, and the Commission had a similar process ... Just to be sure that there was no apprehension of bias.

Asked whether Public Service Commission would not have been involved, if Mr. Dyke had not been a candidate, Mr. Kennedy answered:

Maybe not... We organized it because of some sense of bias concerning the discipline ... He still regards me ... via e-mail... If someone else had the same sort of view we'd have engaged the Commission.

I conclude, therefore, that the Commission's involvement in the competition for the positions posted under Consent #3 was, in Management's view as represented by Mr. Kennedy, a matter at the Department's discretion rather than one determined by statute. The conduct of the competition was not seen by Employer Management at the time as requiring the Commission's involvement under statute. This conclusion is also supported, in my view, by Mr. Kennedy's testimony about the overturning of the first competition. He said:

I recall that, after the competition was conducted, one candidate came forward with a concern and an allegation that another candidate had been coached by the management representative on the selection board. I can't recall if I had a conversation with the management representative and asked what had transpired, but she said that she and that individual had had a conversation about the work involved, but it had not involved telling her the questions and answers, but simply about the type of work involved. But I felt it was a little bit more than the normal level of briefing, so I thought that we'd redo it with a different panel and a different chair from the Commission.

I note that Mr. Kennedy describes his own involvement in examining the "concern" and his own

thinking as leading to the decision to "redo it with a different panel and a different chair from the Commission". I note also that he testified on direct examination that he thinks the decision was made "jointly" with the Commission.

The allegation went from a candidate to Anne Marie McGrath <the Public Service Commission Employee who had chaired the initial competition> and to me, and I had the conversation with Marie Ryan. I think the decision to quash the competition was made jointly between me and Anne Marie McGrath... To the best of my knowledge they conducted another competition with a different board.

On cross examination, however, Mr. Kennedy is less certain. When asked whether the decision to quash the initial competition had been taken in conjunction with the Public Service Commission, Mr. Kennedy said: "I can't really recall. I was informed about the complaint and then had the talk with Mr. Ryan. I believe I did go back and talk to Anne McGrath."

I conclude that Employer management was actually very much involved, if perhaps "jointly", in decision-making about certain procedures in the conduct of the competition. This confirms my conclusion that Employer management did not interpret or treat the conduct of this particular competition as necessarily within the Commission's legislatively mandated remit.

I also note Mr. Kennedy's response when asked whose authority he was exercising in terms of the (Consent #3) competition. He said:

It would have been our own. The Department had authority to go for temporary positions.

In this context I note that the posting (Consent #3) the closing date for which was September 19, 2005, is headed:

"Environmental Biologist (2 positions)  
Temporary to March 21, 2006 with possible extension" (emphasis added)

**The Legislation:** Was the Employer right, at the time, in viewing its actions as based on its "own authority to go for temporary positions" described as such in the posting, and the Commission's involvement as not required but as something in which the Employer and the Commission might conveniently and "jointly" have input? Did the *Public Service Commission Act* require that the Public Service Commission conduct the competitions in respect of Consent #3 posting?

In my view, Employer was right to view, and to treat, the Commission's involvement as not required by the *Public Service Commission Act*.

I note that Section 11 (Appointments and promotions) of the *Public Service Commission Act* confirms this when it requires that:

Appointments or promotions to positions within the public service, except those positions referred to in section 4, shall not be made except on the recommendation of the commission.

Section 4.(1) the *Act* reads:

This Act does not apply to the appointment of...

- (n) contractual employees;
- (o) temporary employees; (emphasis added)
- (p) seasonal employees; and
- (q) part-time employees.

### **Permanent status?**

I note that the *Act* refers to its not having application to temporary "employees" (emphasis added). Mr. Saturley, for the Employer, argued that the Grievor was at the time an employee with "permanent status" and not a "temporary employee" as referenced in Subsection 4.(1) (o). The Grievor's permanent status was established by the 2002 letter from Mr. Kennedy (SD #15). In the Employer's view, and therefore, 4.(1) (o) of the *Act*, does not exclude him, but does include him within its purview, thus rendering the process immune from arbitral review .

I must determine, therefore, whether the Grievor's "permanent status" (SD #15) has a bearing on the question of whether the *Public Service Commission Act* applies or does not apply to the competition in which he was a candidate. In this context, I note that Ms. Benson testified she was acting as an agent of the Public Service Commission and under the aegis of the *Public Service Commission Act* because she was backfilling a permanent position on a temporary basis.

In considering this question I recall, as noted above, Mr. Kennedy's testimony that the Department had its "own authority to go for temporary positions", and also that the posting itself (Consent #3) described the positions as "temporary". Further, the Public Service Commission Policy Manual "References" entry (NB #7) refers to "positions not otherwise excluded from Section 4 of the *Act* " (emphasis added), and the entry on "Issuance of Recommendation for Appointment" (NB #8) refers to "positions in organizations scheduled to the Public Service Commission Act except those otherwise excluded by Section 4". Thus, the Commission Policy Manual itself focuses on "positions" covered by Section 4. This suggests that Section 4 is treated

by the Manual as dealing *prospectively* with categories of position *to which* employees are seeking "appointment", rather than retrospectively with employees' status at times of competition. I find, therefore, that, despite his "Permanent Status" (SD #15), Section 4 of the *Act*, as referenced in the Policy Manual (NB #s 7 & 8) indicates that the *Act* does not have application to the Grievor in the instant context of the competitions because the positions posted were clearly and expressly "temporary" (Consent #3).

I find support for this finding in Mr. Kennedy's confirmation of Mr. Henley's explanation of how the "permanent status" designation came about in order to address the needs of very long term temporary employees. As Mr. Kennedy testified, Mr. Dyke would not have received the latter or the "permanent status" designation in 2002 had he not been a temporary employee at the time. The Union argued, without challenge, that the Grievor actually became a Permanent employee (as distinct from one with "permanent status") in October 2008, and that on his appointment (SD #12) to the permanent position he now holds, he was no longer a temporary employee with permanent status conferred through a negotiated agreement between the Parties.

I find that the competitions for the Consent #3 posting were not of the sort that fall within the legislative purview of the Public Service Commission as governed by the *Public Service Commission Act*. Those competitions were, in fact, conducted under the authority and management of the Employer, and under its direction. I find, therefore, that I am properly seised of the matter as Arbitrator with authority to review the Employer's conduct in respect of the competitions, and in particular of competition # EC.EB(T)(RCC).06011.

The fact remains, the Grievor was not recommended for the position. Therefore I must now determine whether, as the Union alleges, there were irregularities that amounted to "unfair treatment" (Article 12.07) that led to that fact.

**(ii) Procedural Irregularities?**

**References:**

I note Ms. Benson's testimony that, in conducting the Recently Conducted Competition # EC.EB(T)(RCC).06011, she used Ms Ryan's reference for the Grievor that had been submitted initially for the original competition that was overturned. Ms. Ryan was also, at the time, dealing with a grievance involving Mr. Dyke (NB #1). Asked whether on reflection she sees some

potential conflict in this situation, Ms. Benson said: "Yes. But I'm a professional..." I also note that Ms. Ryan's reference was interpreted as "negative", which had implications for the Grievor's candidacy.

I do not presume to assess whether that interpretation as "negative" was correct or not. I do find, however, that, because of what the evidence shows to have been a potential conflict, it was unsafe to use that reference in view both of its provenance in the overturned competition, and of its author's management responsibility in the grievance matter referenced in NB #1. Therefore, I find that there was unfairness in the conduct of the competition.

### **The Second vacancy unfilled?**

The evidence shows that, when the first two of the May 12, 2006 recommended (NB #4) candidates declined and the one remaining recommended candidate accepted one of the two positions, the Employer chose not to fill the remaining vacancy. The evidence also shows that the Grievor's own actual position vis-a-vis the outcome of the competition, and the Employer's reasons for his exclusion from the competition and for its decision not to fill the second position were not made clear to him until July 4 - 7, 2006 (NB #5).

On June 30, the explanation the Grievor was given for the Employer's decision not to fill the second position was that the incumbent was returning from maternity leave "in September" (NB #5). It did not refer to the "negative" references. I find this was unfair in that the Grievor was not given timely information about the grounds of his exclusion until it was, at best, impractical for him to take effective steps to protect his rights in the matter other than by the grievance procedure.

The evidence shows that, in the circumstances as they unfolded, if the Grievor's name had been on the Referral Certificate May 12, 2006 (NB #4) his success would have been assured. Ms. Benson testified that the unfilled position would have been filled if the first of the two candidates put forward in the Selection Referral Certificate (NB #4) had accepted rather than declined. In those circumstances, there would have been two appointments, "Definitely yes."

There was unfairness, partly in the somewhat confusing and drawn out character of the Employer's explanation (NB #5) of its grounds for not having recommended the Grievor, and partly in the Employer's obligations under Articles 12 , 41.04, and 42.03.

I note that Article 41.04 expressly references Article 12, which is cited in the grievance before me. I also note that, while Article 42.03 appears under the heading "DISCIPLINE" which is not at issue in the instant matter, the principle of transparency and timely information it sets out is consistent with, and corroborates, the principle of fairness set out in Article 12. I note, in this context, the reasoning offered in *The Worker's Compensation Commission and NAPE*, W. Rowe, D. L. Alcock, G. Curnew, Sept. 11, 1991 especially at pp. 16 - 18.

In respect of these findings, I have Arbitral Jurisprudence in view, including *Waterford Hospital Corporation v. NAPE, Local 6901*, [ 1979] N.J. No. 104, Nfld. Supreme Court Trial Division, March 8, 1979; *Waterford Hospital Corporation v. NAPE, Local 6901* (Nfld. C.A.), [ 1980] N.J. No. 19, Nfld. Supreme Court - Court of Appeal, April 25, 1980; and *Government of NL, Dept. of Social Services and NAPE, Unreported, David L. Alcock*, July 15, 1991 at pp. 3 & 9, as well as *The Worker's Compensation Commission and NAPE, Unreported*, W. Rowe, D. L. Alcock, G. Curnew, Sept. 11, 1991 especially at pp. 16 - 18

**My remedial authority:** In fashioning a remedy, I am aware that the Union no longer seeks the Grievor's appointment to one of the positions posted under Consent #3, in light of his subsequent appointment elsewhere.

### DECISION

On the basis of the foregoing considerations, I therefore find that

**The grievance is sustained. The Grievor is to be made whole in respect of all wages and benefits lost due to his having been unfairly treated in respect of the competitions conducted in respect of Consent #3 as set out above.**

**I remain seised, as agreed by the Parties at the opening of the hearings, to deal with matters of interpretation and / or quantum should they arise.**

Respectfully submitted as the decision of the Arbitrator,

John A. Scott, PhD.  
Arbitrator

February 24, 2011