

IN THE MATTER OF THE ONTARIO *POLICE SERVICES ACT*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE REGIONAL MUNICIPALITY OF NIAGARA POLICE SERVICES BOARD
- The Employer

-and-

NIAGARA REGION POLICE ASSOCIATION
- The Union

AND IN THE MATTER OF a grievance of William Mullin

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Bradley J. Troup - Counsel
Linda Jerome - Manager, Human Resources

On behalf of the Union:

Barrie Chercover - Counsel
P. DiSimoni - President
L. McClay - CAO/General Counsel
William Mullin - Grievor

Hearing held May 30, July 9, July 10, July 11, July 28, September 17, September 22, October 6, November 10, November 24, November 25 and December 18, 2008, and January 5, 2009, in St. Catharines, Ontario.

AWARD

INTRODUCTION

This is a dismissal case. The grievor, a mechanic, was fired on the basis of four complaints. The first complaint was from a female co-worker - the grievor was alleged to have called her a “fucking bitch.” The second and third complaints followed promptly from the grievor’s supervisor alleging that the grievor stared, leered and otherwise paid inappropriate attention to female recruits and other female visitors to the Employer’s garage, and alleging that the grievor engaged in intimidating and aggressive conduct at work. The fourth complaint came more than two months later from the female co-worker who made the initial complaint. She alleged that the grievor “cut off” her husband when her husband was driving and she and her son were passengers in the car.

The Union conceded that the grievor made the “fucking bitch” comment, but said the use of this type of language was common in this workplace. The Union disputed the other three complaints.

The Union submitted that the grievor was entitled to his full pay until the end of the arbitration process because of the particular language of this collective agreement. The Union said the right to full pay was independent of the outcome of the grievance.

THE EVIDENCE

The Regional Municipality of Niagara Police Services Board, the Employer, operates the Niagara Regional Police Service. The Niagara Region Police Association, the Union, represents many employees, including this bargaining unit of civilian employees. William Mullin, the grievor, worked as a civilian mechanic in the Employer’s Fleet

Services from 1996 until he was dismissed in December 2007.

I heard evidence from 15 witnesses over 12 days, with an additional day devoted to the parties' submissions. There were considerable differences in the evidence and differences as to what conclusions should be drawn from that evidence. I begin with a brief overview of the events.

At the time of his dismissal the grievor was discipline free under the terms of the parties' collective agreement. December 2007 the grievor was dismissed on the basis of four complaints made against him. In brief, those complaints are as set out below. The first three complaints were made in late May, 2007.

1. The grievor was alleged to have called a fellow employee, Carolyn Janzen, a “fucking bitch.”
2. The grievor was alleged to have stared, leered, and paid a great deal of attention to female recruits and other female visitors to his workplace.
3. The grievor was alleged to have intimidated and acted negatively toward his co-workers.
4. August 14, 2007, the grievor was alleged to have cut off Ms Janzen's husband while he was driving on the Queen Elizabeth Way (QEW) in Niagara Falls, accompanied by Ms Janzen and her son. The QEW is a high speed, limited access, multi-lane expressway.

The grievor and the Union conceded that the grievor had referred to Ms Janzen as a “fucking bitch” and conceded that some form of discipline was appropriate for that comment. The grievor has been willing to apologize for his comment. However, the Union disputed the seriousness of this misconduct, arguing that “fuck” and other swear words were commonly used in the grievor's workplace. As for the second matter, the attention paid to females, the Union submitted that the grievor acted toward female visitors in a manner similar to the other mechanics and, in fairness, the grievor should not be singled out for discipline for that common conduct. As for the third matter, intimidation and negativity, the Union said that no discipline

was warranted for that allegation. Finally, as for the fourth complaint involving driving on the QEW, the Union denied that any employment discipline was appropriate. The grievor had no memory of the alleged event, but even assuming that the grievor had cut off the Janzen family, the Union submitted that this was not an intentional act, it was after work hours, and it occurred away from work.

Following the first three complaints in late May, the Employer began a full investigation into the allegations. The lead investigator was Scott McLean, an Inspector with the Employer, and he was assisted by Linda Jerome, the Employer's Human Resources Manager. The fourth complaint about the QEW driving incident was made in mid-August and soon after the grievor was suspended with pay. Inspector McLean investigated this final complaint along with the first three complaints.

Inspector McLean concluded in his October 30 report to the Chief of Police that a 24 hour (i.e., three work days of eight hours per day) suspension without pay should be imposed, along with a requirement that the grievor apologize. Inspector McLean made various other recommendations including that training and education be provided to all the workers in the grievor's workplace. It initially appeared to Inspector McLean that his recommendations were going to be accepted by the Chief of Police and would go forward to the Police Services Board. However, in a subsequent meeting with the Employer's then newly hired Chief Administrative Officer, Guillermo Fuentes, it was determined that the recommendation to the Police Services Board would be termination.

The recommendation for termination prepared for the Police Services Board acknowledged difficulties in the Employer position. For example, the recommendation notes that the Employer solicitor had been consulted and that the solicitor had recognized that “. . . there are substantial challenges to demonstrating just cause for termination . . .” (report, at p. 15). The solicitor's letter was appended to the report; that letter states, in part, that the recommendation for termination “. . . is tempered by my caution that the facts likely do not constitute just cause . . .”

(letter, at p. 3).

Notwithstanding these concerns, the termination recommendation was accepted by the Police Services Board and the grievor was dismissed. This grievance followed.

The Employer has an eight bay garage in which four mechanics and a lead hand look after the Employer's fleet of vehicles. The grievor was responsible for repairing the Employer's cars, vans, trucks, motorcycles, all terrain vehicles, boats, etc., in what is referred to as Fleet Services.

While the grievor's competence as a mechanic was not an issue in the hearing, I note that it was generally accepted that the grievor's mechanical skills were good. For example, the Employer has a well-developed employee appraisal system which requires that each employee be evaluated each year on their anniversary date (April for the grievor). The grievor was evaluated in the spring of 2005, but not in 2006 or in 2007. His 2005 evaluation rated him as satisfactory (the top category) in all areas. From the spring of 2005 until the complaints made in May 2007 there was no written record of any concern regarding the grievor's work, conduct or behaviour.

It was accepted by most witnesses that the grievor is not, and never has been, an easy going employee. Among the mechanics he has long been the one with the most forceful personality and the one most likely to speak up if he feels something is wrong. It was also commonly accepted that when things bothered the grievor, whether at work or outside of work, he was unpleasant to be around at work.

As noted, 15 witnesses testified. Eight of the witnesses were the eight employees in Fleet Services. Carolyn Janzen was the service advisor in Fleet Services. She made two of the complaints. Sam Patterson was the Fleet supervisor and he made the other two complaints. At the relevant time there were four mechanics in Fleet Services and they all testified - that is the grievor, Ron Naylor, Rob Harris and Tom Craig. In addition, I heard from Mark Harris who was the lead hand or lead mechanic and Kathy Nixon who was the clerk in Fleet Services.

Quartermaster Stores is located in the same building as Fleet Services and that is where uniforms and other equipment are housed and dispensed to police officers. The staff in Fleet Services and in Quartermaster Stores have commonly worked together and they often eat lunch together. Four persons from Quartermaster Stores testified - Rob Schottlander, the Quartermaster, Craig Johnson, the Assistant Quartermaster, Annette Carrey, the purchasing clerk, and Chris Cincio who was the Quartermaster from 2003 to 2006. Staff Sergeant Cincio had also been in charge of Fleet Services from 2004 to 2006.

Scott McLean was the Executive Officer to the Chief of Police and he conducted the Employer's investigation into the complaints against the grievor. Guillermo Fuentes was the Chief Administrative Officer for the Employer, he pressed for the dismissal recommendation, and he presented the dismissal recommendation to the Police Services Board. Finally, Paul DiSimoni was the President of the Union. These three all testified at the hearing.

Given the nature of the issues before me, I now provide a summary of the evidence of each of the above 15 witnesses, in the order that the witnesses testified.

Carolyn Janzen's evidence

Carolyn Janzen has worked for the Employer as a service advisor in Fleet Services since October 2006. She schedules maintenance on the Employer's fleet and she tracks vehicle warranties and recalls. In addition, she is in charge of parts used in Fleet Services.

Ms Janzen testified that she and the grievor had worked together during the ten months from her October arrival until the grievor's August suspension. She said that they spoke on average 5 to 10 times per day. She gave the grievor work orders, took telephone calls for him, and spoke to him about parts and the timing of repairs. She said that they were not friends although they had both participated in some group functions related to work. She said that she had found the grievor to have mood swings and that she kept her distance from him. She said that the grievor

would sometimes confront other employees although she said that she and the grievor had never had any disagreements. Nevertheless, she said that she saw the grievor as a bully, a person who would try to intimidate others and stare them down.

Ms Janzen said that on May 11, 2007, the employees in Fleet had a meeting about procedures to be followed. She said she thought that they were all on the "same page" after the meeting, but that she subsequently found that the grievor started making life difficult in the garage, that he was "almost defiant." For example, she said that on one occasion she had asked the grievor if a vehicle was done and he answered "yes." After that she pulled the vehicle out of the service bay. Ms Janzen said that should not happen - the grievor, as the mechanic working on the vehicle, should have removed the vehicle from the bay - and she was frustrated by it, but she agreed that she did not raise it with the grievor.

Ms Janzen said that shortly thereafter a driver asked whether his vehicle was ready and she, in turn, asked the grievor who had been working on it and who was then near the counter. The grievor replied that the vehicle was ready and he told the driver that Ms Janzen would pull the vehicle out, which she did. Ms Janzen testified that in this instance the grievor had spoken to her in a demeaning way and that she had then made a verbal complaint to Sam Patterson, the Fleet supervisor. She did not speak to the grievor about this, and she did not know what had happened to her complaint. She said that Mr. Patterson advised her to put her complaint in writing but that she did not do so.

Ms Janzen also complained about an incident on May 24. That day she had asked the grievor when a vehicle would be ready, and he had replied that it would be ready when it was done.

Ms Janzen testified that a few days later on May 28 someone had called to check the status of a vehicle and the keys were on the finished board (where the keys were to be placed after the repairs were finished). She went to the garage and checked with the grievor whether the vehicle was finished. Ms Janzen said the grievor told her "yes" and that the grievor then, under his

breath, called her a “fucking bitch.” Ron Naylor, another mechanic, was standing nearby and Ms Janzen said Mr. Naylor soon came to her and asked her if she had heard what the grievor had said. Ms Janzen said that she had replied to Mr. Naylor that she had heard the grievor.

Ms Janzen said that the grievor had called her a “fucking bitch” once before, under his breath but audibly. She could not recall those circumstances and agreed that she had not complained after that earlier incident. She said that she had felt it better to ignore the earlier comment. She said that on one earlier occasion she had told the grievor that she did not appreciate the way he spoke to her.

Soon after the grievor’s May 28 comment, Ms Janzen spoke to Sam Patterson who advised her to put her concerns in writing. May 29, 2007, she made a written complaint about the grievor. She submitted her complaint to her supervisor Sam Patterson and to Mark Harris, who was the lead hand and had some responsibility regarding the grievor’s employment.

In her complaint Ms Janzen raised concerns regarding the procedures followed by the grievor in dealing with the paperwork and the keys for vehicles he had been working on, but her main concern was as follows:

On May 28, 2007, in the morning, the Quarter Master called as to the status of a vehicle. The keys were hanging on the finished side of the key board. When I asked Bill if the vehicle was completed, he responded “Yes”. As I was walking to the door, Bill spoke loudly enough for another technician to hear, when in a very derogatory manner, called me a “Bitch”.

In her next paragraph Ms Janzen provided her own assessment of the concerns which she had raised. She wrote as follows:

I have for many years worked in a male dominated environment. I have never experienced anything before like Bill Mullin’s lack of co-operation and rude harassing behaviour. His behavior is disruptive to the team atmosphere, negatively effects morale. Lastly, I find his attitudes, actions and behaviors toward me personally offensive.

Ms Janzen testified that her written complaint was accurate, except that the comment had

been “fucking bitch” and that she had left the word “fucking” out of her complaint as she did not speak that way.

Ms Janzen said she was advised by Sam Patterson to record any further concerns. She testified that she did so. July 12 she sent an e-mail indicating that the grievor had dressed with the curtain left open in the men’s change area, notwithstanding the fact that a curtain had recently been installed at the grievor’s request. July 17 she sent another e-mail raising a concern about the grievor staring at a female recruit. She stated in that e-mail that the grievor’s staring had made her feel uncomfortable “because it was so obvious.” In the same message, she noted that she had also observed the grievor tuck in his shirt while his pants were undone.

Ms Janzen said that she spoke to Sam Patterson about each e-mail but that she did not speak to the grievor about any of these issues. She also identified a later e-mail from Mr. Patterson advising staff to draw the curtain when changing in the change area.

The next incident that Ms Janzen spoke of happened August 14, 2007. Inspector McLean’s October report, at page 13, records that in an August 17 e-mail she had reported the incident as follows:

On Tuesday August 14, 2007 my husband, son and I were on the QEW traveling [sic] south between McCleod Rd. and Lyons Creek Rd. @ 7:11 p.m. At this time a white truck driven by Bill Mullen [sic] (I saw him driving and verified license plate) sped beside us and cut in front of our vehicle and then sped off down the highway. We were travelling south on Sodom Rd. in Stevensville and there is a small bar/restaurant called Scuttlbutts were [sic] at this time Bill was standing outside of the door to the restaurant staring us down until we were out of sight. A line has been crossed here! He has now involved my family and pulling his intimidating reckless behaviour outside of the work place. I now fear for my safety at work and outside of the work place and foremost for the safety of family. Something has to be done immediately

At the hearing Ms Janzen testified about this incident in greater detail. She said her husband was driving under 100 km per hour along the QEW and that the grievor’s truck had “whipped” in front of them. She said that she was sitting in the front passenger seat,

but was turned toward the driver so that she could speak to her husband and to her son who was in the back seat, and that she saw the grievor as he passed beside her vehicle. She said that the grievor had his head turned toward her vehicle as he passed, that they made eye contact, and that the grievor would have known that they were there. She said that, when he pulled in front of them, the grievor's truck was so close that she could not see the license plate, but when he accelerated away she made out his license number. At the bar/restaurant (referred to above) she said the grievor was outside with an intimidating stance and stared at them. She said that she knew that the grievor knew who it was.

Ms Janzen reported the matter the next day to Sam Patterson, her supervisor, to Mark Harris, the lead hand, and to Scott McLean, the Inspector investigating the earlier complaints, and she put it in writing as recorded by Inspector McLean. She said she had also reported the matter to the Ontario Provincial Police. Ms Janzen's OPP report records that the grievor was driving a GMC pick-up and that Ms Janzen's husband was driving a Sable four door sedan.

Ms Janzen said she had not spoken to the grievor since then.

Ms Janzen acknowledged that she was familiar with the concept of shop talk. She described it as conversation that guys have, that it may include swear words, such as "fuck" or "crap," and she agreed that there was shop talk at Fleet. She said that "fucking bitch" was not part of shop talk.

Ms Janzen said that she had never been spoken to or treated in the way she was by the grievor. As a result of the grievor's treatment of her, she said that she was now very cautious, constantly looking out for a white truck, and checking her vehicle. She said that she had seen her doctor who had given her some medication samples, but Ms Janzen

said that she was not given a prescription for any further medication.

Ms Janzen said that going to work after the grievor's discharge was a pleasure. She said that she felt it was fair that the grievor had lost his job in part due to her complaints.

In cross examination, she said that she and Sam Patterson had both been service advisors at the same Ford dealership before Mr. Patterson left for the Police Service, and that she had known him there.

Ms Janzen agreed that on occasion mechanics were delayed in making repairs because the needed parts are not in stock. In addition, she agreed that on occasion she has ordered the wrong part which further delayed the mechanics in making the necessary repairs.

Ms Janzen agreed that the grievor was not the only man working in her building who had "checked out" attractive young female recruits.

Ms Janzen agreed that she had not been summoned to traffic court regarding her complaint to the OPP and that she was not aware of the grievor ever being charged regarding her complaint. Finally, she agreed that the vehicle which her husband had been driving at the time of the incident on the QEW was the vehicle which was generally driven by her husband, not the vehicle she normally drove.

Sam Patterson's evidence

Sam Patterson is the Fleet Supervisor in Fleet Services and was responsible for that service when the grievor was dismissed. He worked in supervisory roles in an automotive environment for many years in Australia and before that he had worked in Canada in a family owned business. When he returned to Canada in 2005 he worked as a service

advisor for a short time in a Ford dealership and while he was there he met Carolyn Janzen who held the same position. He applied for the Fleet Supervisor position, was successful, and began work in December 2005. He said that when he began it was unclear to whom he reported - either Chris Fisher or Chris Cincio. He said that in his job description it seemed that he reported to Fisher but that there had been a restructuring and Cincio was placed in charge of Fisher.

Mr. Patterson said that when he began working for the Employer Fleet Service was stagnant, there was no new innovation, it was a case of "same old, same old." He said that the Police Service had conducted an investigation into Fleet Services as it had operated under his predecessor and that there seemed to have been a disregard for procedure and improper expenditures. He said that from his retail background he felt there was little sense of urgency or enthusiasm, little regard for the front line customer, no teamwork, and poor morale.

Mr. Patterson testified that soon after he arrived he met one-on-one with all staff, including the grievor. He said that he and the grievor saw things similarly, that they shared views on better ways to do things and on areas in which Fleet could improve. He also said that he concluded from their meeting that the grievor had a sense of negativity and resentment regarding the workplace and some of the other employees.

Mr. Patterson said that by May 2007 there was still a division within Fleet. He said there were obstacles which the staff in Fleet Services could not overcome in order to be a team.

He said there was some interference from outside departments (i.e., Quartermaster), but the biggest obstacle was the grievor's unwillingness to be team oriented. He said that Mark Harris, Ron Naylor and Tom Craig all cited the grievor as the reason Fleet was not moving forward. Mr. Patterson said that Mark Harris was unwilling as lead hand to approach the grievor on quality and efficiency issues, that Tom Craig had little regard for

the grievor and his attitude in the workplace, and that Ron Naylor feared for his safety.

Mr. Patterson testified about a number of meetings he held with his Fleet staff. The first was a "tool box" meeting he held with the mechanics and the lead hand in October 2006 before Carolyn Janzen began work in which he had reminded them of the need to watch their language. He spoke of another meeting in which it was decided, following a suggestion by the grievor, to install a curtain on the change room. He also testified about a May 2007 meeting to discuss work flow, handing over work orders, and reporting on work that had been finished.

Mr. Patterson testified that soon after that May 2007 meeting Ms Janzen had come to him and expressed concerns verbally. Mr. Patterson said that he advised Ms Janzen that her verbal complaints were inadequate for him to act and he advised her that, if she felt strongly, she should put her concerns in writing. He said that soon thereafter Ms Janzen handed her written complaint to him.

Mr Patterson then wrote his own memo to Chris Fisher, at that time Mr. Patterson's manager, setting out Mr. Patterson's own concerns. Shortly thereafter Mr. Patterson forwarded both Ms. Janzen's complaint and his own memo to Linda Jerome, the Employer's Human Resources Manager. Mr. Patterson testified that he had not spoken to the grievor about the complaints, but said that he understood that Mr. Fisher spoke to the grievor.

Mr. Patterson's own complaint describes the grievor as an unpredictable person in terms of his work output, attitude, demeanour and general character. Mr. Patterson expressed a desire to bring "this matter to a head." He mentioned concerns about the grievor's attitude and manner, about his confrontational approach, and asked that Mr. Fisher take

steps to deal with it.

The investigation by Inspector McLean, assisted by Linda Jerome, began soon afterward.

Mr. Patterson testified that before these complaints he had a number of conversations with the grievor about the grievor's aggressive and confrontational conduct and attitude. Mr. Patterson said that he had received a number of verbal complaints from other staff since he became supervisor in 2005 about similar issues regarding the grievor.

Mr. Patterson agreed that there was swearing at Fleet and that employees favoured the "four letter word" (i.e., fuck). Mr. Patterson said that he had never engaged in swearing.

Mr. Patterson said that after the firing there had been a change in the culture of Fleet, that there was more laughter, more openness, more honesty, and less tension.

In cross examination, he agreed that there had been a "traumatic investigation" at Fleet before he arrived, an investigation which had left a "sour taste." He said that he had been informed of some of those problems when he began.

Mr. Patterson agreed that he tried to make Fleet more like a commercial garage, that he used the term "real world" regularly, and that making the changes which he wanted to make had been a slow process.

Mr. Patterson agreed that the operation of the Police Service was driven by policies and by general orders. He agreed that the General Order "Civilian Performance & Development Appraisal" requires an annual appraisal of the work of all civilian employees. He agreed there had been no appraisal done of the grievor's work in either

2006 or 2007, contrary to the policy. He said it was the lead hand's responsibility to do appraisals of the mechanics. He denied having seen even a draft appraisal of the grievor for 2006 or for 2007. He agreed that no one had been disciplined or otherwise corrected for failing to perform an appraisal of the grievor's work in 2006 or 2007.

In addition, Mr. Patterson said he was familiar with the Employer's General Order regarding Incident Files and he agreed that this General Order required that incident files be maintained and that they were to record both positive and negative behaviours. Mr. Patterson agreed that there were no records in any incident file regarding the grievor during Mr. Patterson's time at Fleet. He agreed further that incident files help in making accurate appraisals of employees. Mr. Patterson did, however, indicate that after the complaints made in May 2007 he had recorded in an August memo various concerns he had about the grievor's work.

Mr. Patterson testified that he had a number of discussions with the grievor in which Mr. Patterson suggested that the grievor get "outside help." He agreed that the grievor had advised him in the spring of 2007 about the illness, and later the death, of his fiancée's brother (whom I refer to in this award as the grievor's brother-in-law). Mr. Patterson agreed that the grievor had asked to change his vacation because of this illness and expected death and that the grievor had been accommodated. Mr. Patterson agreed that the grievor had changed his work hours in the summer of 2006 and had asked again in 2007, but that his 2007 request was turned down. He agreed that the complaint from Ms Janzen was around the time of the death of the grievor's brother-in-law.

Mr. Patterson agreed that he had spoken to the grievor about changing jobs within the Police Service and becoming a "prisoner escort" and that he knew the grievor wanted to stay with the Police Service because of the pension and benefits.

Mr. Patterson said that he had not seen the grievor's response to the complaints made in May 2007 until he saw the response at the hearing.

Mr. Patterson denied telling employees that he had gotten rid of two problem people and was working on a third. He denied belittling employees. He denied referring to a visitor to Fleet as a "dyke." Mr. Patterson agreed that he did not get along with Annette Carrey which he suggested was because he did not want "collateral interference" with Fleet. He agreed that he did not have a good relationship with the Quartermaster, Sergeant Schottlander. He agreed that Sergeant Schottlander thought he had a vendetta and agreed that Sergeant Schottlander felt he was trying to get rid of Annette Carrey.

In re-examination Mr. Patterson expressed his view that the grievor "can not come back to my workplace," that the problems had lasted too long without resolution, that there had been too much confrontation and fear, and that there was no chance people would want to work with the grievor.

Craig Johnson's evidence

Craig Johnson is the Assistant Quartermaster and works in the same building which houses Fleet Services. He reports to Rob Schottlander, the current Quartermaster, and before that he had reported to Chris Cincio. Mr. Johnson said he worked at a counter about ten feet from Ms Janzen.

Mr. Johnson said he did not get along with the grievor. He said that they had never hit it off, a fact which he attributed to the differences in their personalities. He said he found the grievor to be negative and confrontational and that it got to the point about five years ago that he just tried to stay away from the grievor.

Mr. Johnson said he overheard the grievor call Ms Janzen a “bitch” in a quiet voice one day and that the grievor then went in the shop. Ms Janzen had asked him if he heard it and he had told her he did. He also said that he had observed the grievor stand and stare at female recruits. He recalled that the grievor sometimes said odd things in the lunch room, such as when he once commented that he knew people who could be hired for a few thousand dollars to kill somebody. Following the grievor’s termination he said the atmosphere seemed lighter and nicer.

In cross examination, Mr. Johnson indicated that Quartermaster Stores had originally been under a civilian supervisor, but more recently functioned under a uniformed supervisor (that is, a police officer). In recent years Chris Cincio had been Quartermaster and he had been followed for a short time by Des Carter and then by Rob Schottlander. He said that Chris Fisher had been in charge of both Fleet and Quartermaster for some time and therefore had been over Cincio in the hierarchy. Fisher was replaced by Lisa Didonato-Dechellis, a civilian working downtown. Mr. Johnson said that he had never complained about the grievor to Cincio, Carter or Schottlander.

Mr. Johnson said that the Fleet area is filled with swearing, including swearing by the supervisor, Sam Patterson. He agreed that he did not recall the grievor saying “fucking bitch” to Janzen but acknowledged that the word “fucking” may have just gone over his head. He agreed that, while the grievor “checks out” female recruits, others, including Mr. Johnson himself, do the same. He agreed that he had heard all the mechanics complain about the difficulties that they had in obtaining parts after Ms Janzen had become responsible for the supply of parts, and that he had heard them all complain that there was nothing they could do about that problem because Ms. Janzen was “Sam’s choice.” He acknowledged hearing Rob Schottlander describe Sam Patterson as “a little

petty man and a liar” as well as “a bully” and “a tyrant.” He acknowledged hearing Sam Patterson say that he had gotten rid of two of the problems and was working on the third. Mr. Johnson said he thought the third was Annette Carrey. He agreed that he had heard a manager, Ms Didonato-Dechellis, indicate that she was afraid to be alone with Mr. Patterson. Mr. Johnson agreed that Mr. Patterson had referred to Mr. Johnson as a “fat bastard.” While it was suggested that Mr. Johnson had heard Mr. Patterson refer to Ron Naylor as “the load of wad your mother should have rejected,” Mr. Johnson said that while both he and Mr. Naylor had been present when that comment was made, he had understood that Mr. Patterson had directed that comment to him, not to Mr. Naylor. In any event, Mr. Johnson agreed the comment had been made. He also agreed that, although the mood in Fleet is now lighter, all the mechanics are still unhappy because of Sam Patterson’s supervision, his belittling of them, and because of the problems in obtaining parts from Ms Janzen. As for the extent of the swearing in Fleet, he said that three swear words in a sentence was common.

Ron Naylor’s evidence

Ron Naylor is one of the mechanics in Fleet. During the grievor’s employment, Mr. Naylor was the most recent hire among the mechanics and he described himself as the most timid or sensitive of the mechanics.

Mr. Naylor said that he got along with the grievor most of the time. He acknowledged that he would occasionally get frustrated with the grievor and when that happened he would usually confront the grievor and they straightened it out. He said that he sometimes felt intimidated by the grievor and that was when he confronted him. When he

spoke to the grievor, Mr. Naylor said the grievor generally replied that he was under pressure and that Mr. Naylor was taking it the wrong way and should relax. Mr. Naylor said that he had never complained about the grievor.

Mr. Naylor testified that on one occasion he overheard a conversation between the grievor and Ms Janzen about a vehicle. He said the discussion had ended and Ms Janzen was leaving the garage. As Ms Janzen left the garage, the grievor made a comment to her that she was a "fucking bitch." He said that Ms Janzen later asked him if he had heard what the grievor said and he said "yes."

Mr. Naylor said that the grievor had brought the matter up some time later, after the incident had been brought to the grievor's attention. Mr. Naylor said that he told the grievor that he had been at the computer when it happened and the grievor said then that he had no recollection of making the comment.

In cross examination, Mr. Naylor said that there were four mechanics and a lead hand when he started and that the then lead hand, Rob Harris, had spent a large portion of his time doing mechanic work. Since he began, Mr. Naylor said that the size of the fleet had increased considerably and that the new lead hand, Mark Harris, did little work with the tools as a mechanic, increasing the workload for the other four mechanics. He agreed that the fact Mark Harris did very little work as a mechanic was a source of frustration for the mechanics and that he and the grievor would grumble about it.

Mr. Naylor agreed that there is a lot of swearing in the garage. He testified that the male mechanics all noticed when an attractive recruit came for uniforms. He agreed that comments were made about attractive women and he agreed that all the mechanics were equally guilty of doing so.

Mr. Naylor testified that things ran smoothly under Chris Cincio when he acted as Fleet Supervisor. He described Staff Sergeant Cincio as one of the best people he had ever worked for, but Mr. Naylor said that things had deteriorated under Sam Patterson. Mr. Naylor indicated that he felt a lot of pressure under Mr. Patterson, and that the pressure led to stress. He said that if a person questioned Mr. Patterson, Mr. Patterson became angry and would belittle him/her. Mr. Naylor said that while Mr. Patterson said that he had an open door policy, Mr. Naylor was not comfortable to go in as he felt that to complain was a waste of breath.

Mr. Naylor described Mr. Patterson's approach to managing as aggressive, insulting, demeaning, in your face, and that he yelled and was a bit of a bully. Mr. Naylor said he had heard Mr. Patterson make comments about people's weight. He agreed that the situation at Fleet had become so bad in the summer of 2008 that a number of employees had complained to the Union about, among other things, Mr. Patterson's management style, Ms Janzen's failures regarding parts, and Mark Harris' lack of work as a mechanic.

Mr. Naylor agreed that the stock of spare parts for the mechanics had been better before Ms. Janzen took on that role, and that it was much more common for Ms Janzen to order a wrong part than it had been for her predecessor. He indicated, for example, that he had once asked for a Ford alternator and Ms Janzen had obtained a GM alternator which he could not use. He said that he had complained but there had been no improvement as of the time he testified.

Finally, Mr. Naylor agreed that he perceived that the grievor had become more angry at work about the same time that Mr. Patterson had begun working as supervisor at Fleet.

Mark Harris' evidence

Mark Harris has worked for the Employer for 9 years, initially as a mechanic, and the last 7 years as lead hand. As the lead hand he supervises the mechanics. He estimated that he also spent 3-4 hours per day doing a mechanic's work.

Mark Harris testified that during the years that he supervised the grievor they had some good days and some bad days. He said the grievor had mood swings, and that one would not know from day to day what the grievor would be like. Mark Harris said that he often felt like he was walking on egg shells. He said that the grievor's mechanical abilities were excellent but said that he was easily distracted. He assessed the grievor's attitude as poor 90% of the time, and said that if it was not a good day for the grievor, it was not a good day for anyone in the work place. He said that he had a number of verbal complaints about the grievor, but no formal or written complaints.

Mark Harris testified that every time a female visited the area the grievor would drop what he was doing and make his way to the counter. Mark Harris described this as inappropriate.

Mark Harris said there was no issue regarding shop talk or swearing at Fleet although he agreed that he normally goes home at lunch and was not aware of what happened at lunch in the lunch room. Finally he said that, since the grievor's termination, morale had been good and productivity had been up.

In cross examination, Mark Harris agreed that as the grievor's supervisor he was partly responsible for performance appraisals and he agreed that no appraisal regarding the grievor had been done since June 2005. He said he had started one in June 2006, but that Sam Patterson had then said that he would do it. Mark Harris did not finish his own

2006 evaluation of the grievor.

Mark Harris said that he understood Rob Harris had left the lead hand job because he did not wish to deal with the grievor.

Mark Harris said he had not been aware that the grievor's brother-in-law was dying until the day before his death.

Mark Harris agreed that the mechanics were frustrated about the difficulties they were encountering in obtaining parts now that Ms Janzen was responsible for parts. He agreed that he had heard all the mechanics say they were frustrated by this.

Finally, Mark Harris said he had been present at a meeting in which Rob Schottlander had called Sam Patterson a bully but he did not recall any liar comment. In addition, he recalled that Lisa Didonato-Dechellis said she would not meet Sam Patterson alone but he did not recall her expressing a reason for that position.

Tom Craig's evidence

Tom Craig has worked for the Employer as a mechanic for 16 years and is second in seniority among the mechanics. He said that during the 10 years he has worked with the grievor they had not gotten along as they were "entirely different people." Mr. Craig said he tried to be up-beat and happy, whereas the grievor wanted to stand out from the crowd, to rebel, and appeared to enjoy being "the freak." Mr. Craig said he did not socialize with the grievor other than in a couple of group functions involving other employees from work. Mr. Craig said that he and the grievor did not normally eat lunch together or take breaks together; instead Mr. Craig said he usually joined Craig Johnson and that the two of them choose not to eat in the lunch room.

Mr. Craig said that the grievor did not get along with Ms. Janzen and he attributed that to the process of Ms Janzen's hiring. Mr. Craig said that he believed Mr. Patterson had Ms Janzen picked out from the start, whereas the mechanics thought there were other applicants who should be interviewed or hired. He said that Ms Janzen seemed to have been hired because she was Sam Patterson's friend. The other mechanics had let it go, but Mr. Craig said the grievor did not.

Mr. Craig described the grievor's mechanical skills as good and said that the grievor, Ron Naylor and Mr. Craig did the "grunt" work.

Mr. Craig said that if a boss told the four mechanics something, the grievor was the one among them who might question or challenge it. He said that the grievor had a temper and if he was upset by something he might simmer all day.

Mr. Craig agreed that the grievor looked at good looking women who visited the shop and was likely to find a reason to go to the front counter and "schmooze" them. He agreed that there was shop talk involving bowel movements and women. But Mr. Craig said there was not a lot of swearing - although he said that he felt it was not swearing to say "fuck" and "Christ."

Mr. Craig said it was a breath of fresh air after the grievor was fired because the sense of walking on egg shells was gone.

In cross examination, Mr. Craig agreed that the fact that he and the grievor did not hit it off had been recognized by both of them and that they nevertheless had a working relationship and the situation was fine with both of them. He agreed that they were both

there to work as mechanics, not to make friends.

Mr. Craig acknowledged that his job as a mechanic with the Employer had job security, good benefits and pension, that he would not get those in another mechanic position, and that he would do anything to keep his job.

However, Mr. Craig agreed that there were frustrations in this mechanic's position. One frustration was the fact that Mark Harris, the current lead hand, spent so little time doing the work of a mechanic, which Mr. Craig estimated as 1 hour or less per day. Another frustration was the problem with parts. Mr. Craig said that under Mr. Patterson the garage did not stock as many parts and, in addition to the delay from having to wait for parts that used to be kept in stock, there were sometimes additional delays when Ms Janzen brought in the wrong part. He said this problem of delay attributable to obtaining the wrong part had not occurred when Ms Janzen's predecessor was working there.

Mr. Craig agreed that he had observed Mr. Patterson belittle other mechanics. Mr. Craig said he felt the reason that Mr. Patterson did not belittle him was because he was older than Mr. Patterson. He agreed that he had heard Mr. Patterson say he had gotten rid of two out of three problems and was working on the third. Mr. Craig said that Mr. Patterson did not name the persons but he knew that the two he had gotten rid of were Chris Fisher and the grievor, and he said he thought the third was Annette Carrey.

Mr. Craig said that he had been around the lunch room when Kathy Nixon and Annette Carrey had spoken of sex. He agreed that the shop talk was not limited to men.

Finally Mr. Craig agreed that he understood that the reason Rob Harris had stepped down as lead hand was because he was not willing to spy on the grievor and that he did not wish

to “write up” the grievor in the way that the supervisor wished him to do.

Robert Harris’ evidence

Rob Harris has worked as a mechanic for the Employer since 1983. He is not related to Mark Harris, the lead hand.

In the late 1990's Rob Harris served as lead hand but left that position when the then supervisor wanted him to find things wrong with the grievor's performance. Rob Harris said the pay difference as lead hand was small, the work load was higher, and he was not getting support from his supervisors so he went back to being a mechanic.

Rob Harris said that in his opinion the grievor was competent doing any repairs but that his diagnostic ability was a bit weak. Rob Harris said that he and the grievor got along. If the grievor felt something was wrong he would challenge it and Rob Harris said that Sam Patterson did not like that about the grievor. Rob Harris said he had not noticed any change in the work place after the grievor's discharge.

Rob Harris said that there was a lot of swearing in the garage and, while that amount of swearing would be excessive for a dental office, he did not think it was excessive for a garage.

In cross examination, Rob Harris said that when he had been lead hand the then supervisor “had a bone to pick” with the grievor. Rob Harris said he did not feel he got support for his contrary view, and so he left the lead hand job.

Rob Harris also spoke of frustrations as a mechanic. One was the lack of time that the

current lead hand, Mark Harris, spends doing the work of a mechanic. In addition, he said that Sam Patterson can be a frustration as he has a “my way or the highway” attitude.

He agreed that Mr. Patterson had said that he had gotten rid of two problems and was working on a third. Rob Harris speculated that the third was Tom Craig, although he agreed it could also be Annette Carrey as she and Mr. Patterson did not get along. He said that Mr. Patterson seemed to want to “clean house.” Rob Harris also agreed that the lack of proper parts was a frustration for all the mechanics, and that it was compounded by a feeling that the mechanics could do nothing about that problem as Ms Janzen was seen as Mr. Patterson’s protege. Rob Harris said there was a similar feeling of frustration about the hiring of a new mechanic after the grievor was fired - he said Mr. Patterson had asked the mechanics who they felt was the best of the several temporary mechanics, the mechanics had advised him of their view, and yet Mr. Patterson had hired another person. Rob Harris agreed that when the grievor was working the mechanics had someone (the grievor) who would stand up for them to Mr. Patterson or the lead hand in the event of a disagreement.

In terms of foul language, Rob Harris said that the grievor was no better and no worse than the other mechanics. He agreed that in the lunch room there was talk of everything, including sex, and that the women joined in the conversation. As for visiting females, Rob Harris said that, while all the mechanics might notice, the grievor was more likely to go and talk to the visitor. He agreed that he had never heard any female in the building complain about the grievor. He also agreed that if Annette Carrey, with whom Rob Harris was living common law, had a problem with the grievor he would know, but Rob Harris said that Ms Carrey had no such problem.

Guillermo Fuentes’ evidence

Guillermo Fuentes is the Chief Administrative Officer for the Employer. As Chief Administrative Officer he is one of three employees within the Police Service hired on a personal contract with the Employer - the others being the Chief of Police and the Deputy Chief. He has responsibility for administrative functions and has about 250 persons reporting to him through various directors and managers.

Mr. Fuentes began work November 19, 2007, after Inspector McLean's report had been completed but before any recommendation was made to the Police Services Board. He said that he first heard of this matter soon after he started. Mr. Fuentes had been working for only one week when a meeting was held November 26 to deal with this matter. At the meeting Mr. Fuentes, Inspector McLean, Ms Jerome and the Employer's solicitor, Mr. McKaig, were present. A discussion ensued. Mr. Fuentes said that he did not think the penalty recommended by Inspector McLean was serious enough. Mr. Fuentes said that he was particularly concerned by the QEW incident. He expressed the view that the Police Service needed to have a zero tolerance policy for violence. He did not feel the suspension was adequate.

Mr. Fuentes testified that the subsequent report to the Police Services Board, although appearing to be the recommendation of the Chief of Police, actually contained Mr. Fuentes' discharge recommendation. Mr. Fuentes said that at the Board Meeting he had presented the discharge recommendation and had been responsible for answering questions about it.

Mr. Fuentes said he felt that termination was the only reasonable option. He agreed that he did not know what Inspector McLean thought of the discharge recommendation.

In cross examination, Mr. Fuentes said that he dealt only with Inspector McLean's report.

While it had been explained to him that there were historical issues, he said that he had not let them weigh much in his decision. He agreed that Inspector McLean had told him that proving the QEW incident in traffic court would be almost impossible. He said that he understood that the language used in this garage was common for a garage environment. He agreed that he had not been shown the written response that the grievor had made to the first three charges against him.

Mr. Fuentes agreed that he had heard that Mr. Patterson's supervisor had indicated that she would not meet with Mr. Patterson alone. He agreed that he had heard Rob Schottlander call Mr. Patterson a liar and a bully. He agreed that Sergeant Schottlander had written a letter of complaint and that Sergeant Schottlander had given his complaint to his supervisor. Nevertheless, Mr. Fuentes said that, while he had heard of several concerns about Sam Patterson who was the grievor's supervisor, there had not yet been a formal complaint.

Scott McLean's evidence

Scott McLean is an Inspector with the Niagara Police Service. He has been employed there for 27 years. At the time of Ms Janzen's and Mr. Patterson's complaints regarding the grievor, Inspector McLean was the Executive Officer to the Chief of Police. Because of his position, the task of investigating these complaints fell to Inspector McLean.

Inspector McLean was initially advised of the complaints by Linda Jerome, the Manager of Human Resources, and the two of them subsequently worked together in the investigation. Although the two investigated together, Inspector McLean said he was accountable for the investigation and for the recommendations. The two of them conducted many interviews together, but two interviews were conducted by Ms Jerome

on her own, and Inspector McLean conducted other interviews on his own.

In his testimony Inspector McLean identified the four areas of concern - the four complaints I have used throughout this award - and he reviewed the conclusions he had expressed in his report to the Chief of Police. He said that although he was responsible for the report and the recommendations, his report and his recommendations had been reviewed by both Linda Jerome and by the Employer's Solicitor, Woodward McKaig, and that the three of them were all comfortable with all the recommendations.

Inspector McLean said he had concluded that the grievor made the "fucking bitch" comment, that the incident on the QEW had occurred "in a manner similar to the description supplied by" Ms Janzen, that the grievor had stared and leered at females, and that other persons thought that the grievor was intimidating and negative. He then made eight recommendations, which can be summarized as follows:

1. Suspend the grievor without pay for 24 hours for his comment to Ms Janzen;
2. Require that the grievor apologize to Ms Janzen;
3. Provide counselling to the grievor through the Employee Assistance Plan to address his emotional issues, anger management, self-esteem concerns, and work relationships;
4. Provide training to all staff in Fleet Services and Quartermaster Stores on Harassment in the Workplace;
5. Conduct follow-up meetings with the grievor and other employees to report on the findings of the investigation;
6. Consider transferring the grievor to another position such as court services;
7. Schedule training at Fleet and Quartermaster on team-building, communications and conflict resolution; and,
8. Establish role clarity, anticipated management obligations, and performance appraisal instruction for supervisors in Fleet.

Following his report, Inspector McLean said that he had discussions with various other persons. However, the recommendation presented to the Police Services Board came from a discussion in a meeting among a smaller group consisting of Inspector McLean, Guillermo Fuentes, Linda Jerome, Woodward McKaig (the Employer Solicitor), and Monica George (a member of the Employer's management staff). At this November 26, 2007, meeting the decision was made to recommend the termination of the grievor's employment to the Police Services Board. Inspector McLean said that as a result of the discussion he was directed to prepare a new report to the Police Services Board with the dismissal recommendation. Although Inspector McLean said he understood that his original position was sound, the difference in the discussion was the perspective of Mr. Fuentes who felt dismissal was appropriate.

In cross examination Inspector McLean confirmed that his original report recommending a 24 hour or three work day suspension had reflected the views of both he and Ms Jerome who had conducted the investigation together, and also reflected the views of Mr. McKaig, the Employer's solicitor, from whom they had sought advice and who had input into Inspector McLean's report. He agreed that the grievor's willingness to apologize played a part in the recommendation that he apologize. Inspector McLean agreed that he had heard in his investigation that the grievor had some earlier discipline but said that he had not considered that discipline in formulating his recommendations because of the provisions of Article 39(3) of the collective agreement (below).

He had reviewed the grievor's file and there had been no discipline in the previous 24 months. He agreed that the grievor had been frustrated in the period before his dismissal. After his original report had been considered by the Chief of Police, Inspector McLean indicated that he felt the Chief had been disappointed by the recommendations but that she had recognized that there was a two year window on discipline such that only current complaints could be used to formulate discipline.

Inspector McLean confirmed that after the meeting with Mr. Fuentes he had been directed to prepare a new report to the Police Services Board. He did so. He agreed that the new report prepared at Mr. Fuentes direction included reference to discipline which had occurred outside the

24 month window; that is, reference was made to discipline which could not be used in assessing the discipline in this instance because of the language of Article 39(3).

Annette Carrey's evidence

Annette Carrey is the long time purchasing clerk in Quartermaster Stores. She is also the common law spouse of Rob Harris, one of the mechanics.

Ms Carrey agreed that there is obscenity and foul language in the building which contains Fleet and Quartermaster but she said that she had never been offended by it. She said the language was similar to other work locations and that the women laugh it off. She said the language in the lunch room was similar and always turned to sex or to shit. She said that the grievor's language was the same as others, no better and no worse. She said that, to her knowledge, the grievor had never tried to look down her shirt or blouse. She said that it was fine working with the grievor, that if she had a problem she would confront the grievor and they would deal with it.

On the other hand, she said that if the grievor was unhappy with her he would tell her spouse, Rob Harris, to tell her to tone it down. Ms Carrey said she had never felt intimidated by the grievor and could not recall any colleagues saying they had been intimidated by him.

Ms Carrey said that she did have problems with Sam Patterson. She said that the difficulties flowed from the way that Mr. Patterson treated her. She said that she and Mr. Patterson disagreed on a number of issues, including whether staff in Fleet and staff in Quartermaster should work together (Mr. Patterson saying no and Ms Carrey saying yes), and whether the place should operate like "the real world" (Mr. Patterson's view) or like "the police world" (Ms Carrey's view).

Although Mr. Patterson was never her supervisor, Ms Carrey said that he questioned things that she was doing. She said that Mr. Patterson had advised her to stay out of Fleet or that he would have her job, that is he would have her fired or transferred. She said Mr. Patterson's style of

supervising was “his way or the highway.” Ms Carrey testified that she had heard Mr. Patterson say he had gotten rid of two people and was working on the third, and that she knew that she was the third person. Ms Carrey agreed that she had been in a meeting in which Lisa Didonato-Dechellis had indicated that she was scared or intimidated by Mr. Patterson and was afraid to meet with him alone. Finally, she said that Mr. Patterson had described her as “another Mullin but with a fat ass.”

In cross examination, Ms Carrey said that she worked with 15 or 16 men and that the grievor’s language had been the same as the others. She agreed that the grievor was moody and agreed that she had described the grievor as “out there,” which she explained was intended to convey that he was distracted, that his mind was not on the job, that he was off in his own world, and that he did not pick up on conversations. As for the “fucking bitch” complaint, Ms Carrey said that she had previously been called that same thing at work - not by the grievor - but that she had not complained about it.

Rob Schottlander’s evidence

Rob Schottlander is the Quartermaster Sergeant and has been employed as a police officer with the Employer for 34 years. He began in Quartermaster Stores in February 2007. He said that when he arrived the staff in both Quartermaster and in Fleet seemed quite tense.

Sergeant Schottlander said that his position and that of Sam Patterson were equivalent. The mandates of the two services were different but as they were in the same building and as staff needed to work together there were issues that they needed to discuss. He indicated that they were initially able to discuss matters, but after a time he said that Mr. Patterson began to make comments on how Sergeant Schottlander ran his operation and that Mr. Patterson placed the blame for problems in Fleet on Sergeant Schottlander and his staff not doing their job well. He said that Mr. Patterson made a number of derogatory comments, including suggestions that Annette Carrey did nothing.

Sergeant Schottlander said that he accepted that Quartermaster Stores could be improved. However, Sergeant Schottlander said that he had enough work running his own area and was surprised that Mr. Patterson, who ran a similar sized operation in Fleet, had time not only to do his own job but also time to find faults in Quartermaster Stores. Sergeant Schottlander said that Mr. Patterson blamed all the problems in Fleet Services on Quartermaster Stores. He said that over time Mr. Patterson seemed more and more angry, that his tone was negative and adversarial.

Sergeant Schottlander said that by January 2008 the situation had reached the point where he complained in writing about Mr. Patterson. Among other things, he indicated that Mr. Patterson had been on the offensive with him, had used the word “fuck” repeatedly with him, had referred to Annette Carrey as a “fat ass,” and had advised Sergeant Schottlander that he “managed with my head inside a part of my anatomy that is behind me” (which I understood to be a sanitised version of Mr. Patterson’s actual, and more colourful, words). Sergeant Schottlander said that he was particularly concerned about the attack on Annette Carrey which he felt was totally misplaced and uncalled for and that he feared for her ability to work in Quartermaster.

Sergeant Schottlander said that after his January 2008 written complaint Mr. Patterson had apologized but that similar problems arose later. Mr. Patterson was again blaming Quartermaster Stores for causing problems in Fleet Services and Sergeant Schottlander said that soon after that there was a meeting among staff in the two areas together with Monica George who was then Mr. Patterson’s boss and Lisa Didonato-Dechellis who was by then Sergeant Schottlander’s boss.

Sergeant Schottlander said that in this meeting Mr. Patterson had been aggressive, angry and agitated, and had referred to Sergeant Schottlander’s management style in a negative way. Sergeant Schottlander acknowledged that he had responded that he felt Mr. Patterson was the cause of the problems and that he had described Mr. Patterson in unflattering terms, including saying that Mr. Patterson had not been honest, that he lied.

As for the grievor, Sergeant Schottlander said that he had neither heard nor seen any problem with the grievor’s deportment or demeanour. He said that he had spoken to the grievor on occasion and knew that the grievor was under pressure at work. Sergeant Schottlander said he

saw tension in the grievor and had recommended that the grievor try the services available through the Employee Assistance Plan.

In cross examination, Sergeant Schottlander said that in the February - May 2007 period he could not recall any staff raising any concern about the grievor. However, he said he knew that Craig Johnson did not like the grievor and that he understood this stemmed from events that had happened years earlier.

Finally, Sergeant Schottlander agreed that some of Mr. Patterson's suggestions were fair. Sergeant Schottlander said that he had agreed with some suggestions and that he had taken steps to rectify some of Mr. Patterson's concerns.

Kathy Nixon's evidence

Kathy Nixon is the Fleet Maintenance Unit Clerk. She began in 1999 and has taken two temporary assignments in other areas of the Police Service, including one such assignment from November 2006 to January 2008.

Ms Nixon said that in the lunch room there was some swearing and talk of sex but that the grievor was no worse than anyone else. She said that she did not often visit the garage and could not comment on the talk there. She said that she got along fine with the grievor, that she had never felt intimidated or uncomfortable with him. She said that although she had experienced another mechanic trying to look down her blouse, she had never noticed the grievor doing that. Following her return in 2008 she said a lot of the same problems were still there - the same negativity, Sam Patterson and Annette Carrey not getting along, complaints about the supervisor (Sam Patterson) and about the lead hand (Mark Harris), and complaints about Ms. Janzen not keeping enough parts and ordering the wrong parts.

In cross examination, she said that she had not been there at the time of the "fucking bitch"

comment, but that she had spoken to the grievor about the complaint later. She said that she recalled asking him if it was true and that the grievor had replied “I don’t think so.”

Paul DiSimoni’s evidence

Paul DiSimoni is the Union President. He said that after Inspector McLean’s report, but before the termination, there had been discussions between the Employer and the Union. He said that the Union had attempted to resolve the matter.

Mr. DiSimoni agreed that during this period he had attended a training session in which it had been suggested that the training of the harassment investigators was very important. He said that after that training session he had inquired about the training of Inspector McLean and Ms Jerome. He said he thought the Chief of Police had taken offense at his inquiry. In any event, he said he had been surprised that there had been no further discussion after his inquiry and that the Employer had moved to dismiss. He said he had felt there had been a chance for a win-win resolution.

Chris Cincio’s evidence

Chris Cincio is a Staff Sergeant with the Employer. He has been a police officer for 22 years. From 2003 through 2006 he was the Quartermaster Sergeant. In April 2004 he also took on responsibility for Fleet Services and was in charge of both areas from then until June 2006.

Staff Sergeant Cincio said that while the grievor was under his command he had been a very competent mechanic. He said the grievor was creative as a mechanic and noted situations in which the grievor had found very creative solutions to vehicle problems, including improving security on the prisoner escort van and improving the balance on Harley-Davidson motorcycles.

Staff Sergeant Cincio said that he found that the grievor tended to over analyse things. Staff

Sergeant Cincio said he knew of earlier problems the grievor had with Mr. Patterson's predecessor but that he advised the grievor to stop worrying about the past and not let it affect him. He said his goal was to have the grievor put those things behind him. Staff Sergeant Cincio said that he had never had occasion to discipline the grievor.

Staff Sergeant Cincio agreed that the language used by both males and females at Fleet and Quartermaster was sometimes rough and he acknowledged that he had probably been guilty of it at times himself.

Staff Sergeant Cincio described Mr. Patterson's management style as very direct, and said that Mr. Patterson was forceful and demanding.

In cross examination Staff Sergeant Cincio said that he had never been approached directly about the grievor's behaviour but that some employees had advised that other employees were upset that the grievor was playing his music too loudly or was in a bad mood. He described the grievor as a leader in the shop and, whether the grievor knew it or not, the grievor set the tone in the shop.

The grievor's evidence

The grievor, Bill Mullin, is a 46 year old mechanic. He grew up in the Niagara region, finished Grade 12 and then went to work in a Chrysler dealership in Toronto and in time became a Class A Mechanic. In 1986 he moved back to the Niagara Region and worked in an auto recycling business. April 1, 1996, he began working as a mechanic for the Employer. The grievor said the day he got the police job was the proudest day of his life. He said he was especially pleased with the job security, pension plan, and professional work environment which he could not get elsewhere.

The grievor said that in the spring of 2007 he had personal problems outside of work. Chief

among these was the fact that his brother-in-law was diagnosed with lung cancer April 11, at age 47, and he passed away May 23.

The grievor said that he could not remember calling Ms. Janzen a “fucking bitch” and agreed that if he did do so it was inappropriate. He said that the first time he heard of that was in a car ride on May 30 with Chris Fisher. At that time Mr. Fisher asked the grievor to prepare a response to that allegation, and to the concerns raised by Sam Patterson. The grievor did prepare a response and in his written response he expressed a willingness to apologize to Ms Janzen. Asked why he had not done so, the grievor said that he felt that with a formal investigation under way he should not approach her, and he said that he was told by the Union not to talk about the investigation.

As for the August 14 incident on the QEW the grievor agreed that he drives home on that highway most days and that he could have been on the road that day at 7:11 pm. He said that he normally drove fast and often passed a number of cars on the road. He said that he had no memory of seeing or of passing any vehicle containing Ms. Janzen that day. He denied “cutting off” Ms Janzen’s husband deliberately or with an intention to frighten Ms Janzen.

As for the suggestion that he had later “stared down” Ms Janzen when her family drove past the bar/restaurant, he agreed that he occasionally stopped for a beer and smoke at the place. He said that he always entered by the side door off the parking lot and that the door was 40 or 50 feet from the road. He said that it would take a vehicle which was travelling at the posted speed limit about 1.5 seconds to pass the parking lot - that the car would be visible from the door area for only that length of time. He denied seeing or staring at them.

The grievor agreed that other people saw him as a person who analysed issues in too much detail. He agreed that he was seen as negative and that he tended to speak up when he saw a problem. The grievor said that he had always felt that things would only improve if he voiced his concerns, rather than remaining silent about them. He described himself as opinionated.

The grievor said that work had gone well in the year prior to Sam Patterson starting work. The grievor said that Mr. Patterson began in December 2005 but that he and Mr. Patterson had first met to discuss the garage in March 2006. The grievor said that at that March meeting Mr. Patterson had conveyed to him a very negative view of the grievor's abilities, had indicated that the grievor had become stale and should switch careers. In general, the grievor said that Mr. Patterson insulted his whole career in that first meeting. The grievor said that he, in return, had told Mr. Patterson that if he had concerns he should address them through the annual evaluation process. The grievor said he had received no evaluation after 2005, that is none after Mr. Patterson began.

Following the March meeting and other incidents, the grievor said that he concluded that he needed to be careful in his dealings with Mr. Patterson. The grievor described Mr. Patterson's approach as tyrannical, "his way or the highway," with no care for others.

The grievor testified that about this time a female service manager from a local Chevrolet dealership, a woman who was well known to be a lesbian, had come for a site visit. The grievor said that Mr. Patterson had told the grievor to "get rid of the dyke" as he did not want to talk to her.

The grievor testified that 2006 had not been too bad for him. However, he said that things had changed for the worse after Ms Janzen was hired. Following her hiring he said it was "hell" for him.

The grievor's brother-in-law was sick and then died May 23, 2007. The grievor took bereavement leave at the end of that week and came back to work Monday May 28. He said that there had been a meeting May 28 and that he had been sitting on duct work. After the meeting he said he was "told" by Ms. Janzen to put the duct work back but that he just kept walking. He said that he told Mr. Patterson soon thereafter that if Ms Janzen had asked him, rather than

ordered him, he would have put it away. The grievor said this was the first clash he could recall with Ms. Janzen.

The grievor said that Ms Janzen was in charge of the normal supply of parts and in charge of ordering those parts which were not kept in stock. The grievor said that he had problems with the availability of parts and with obtaining special order parts when Ms Janzen was in charge of parts. He said that he had previously told Ms Janzen when parts were wrong, but he did not think they had clashed over parts issues before May 28. The grievor also testified regarding the incident about which Ms Janzen had complained, involving pulling cars from the bay. As the grievor recalled, on May 17 he had been at the counter completing the paper work and the car was still in the bay. He recalled Ms Janzen saying something like “well I guess I’ll pull it out for you” in a sarcastic manner which the grievor said he had viewed as joking. Later he was at the counter again, another vehicle was done, and he said he gave Ms Janzen back some of her sarcasm by saying that Ms Janzen would pull it out. He said that he did not realize it was an issue until he saw the complaint.

As for Ms Janzen’s evidence regarding an issue which arose May 24, he said that, as he recalled, he was having trouble solving an electrical problem and Ms Janzen asked when he would be done. The grievor said that he did not know how long it would take and so he had replied to Ms Janzen that it would be done when it was done.

As for the “fucking bitch” comment, the grievor said that it would have been later on May 28, after the meeting and the duct work incident. He said he had no recollection of making the comment. He agreed that it was language which he had used in the past.

May 30 the grievor said that Chris Fisher had invited him for a drive and had asked him to respond in writing. He did that. He said that after that ride he had become anxious and had later seen a doctor and had been taking treatment for over a year as of the time he testified in November 2008.

As for the QEW incident, he denied having tried to intimidate Ms Janzen and said that he had done all he could to try to avoid her after he had learned of her complaints.

As for Inspector McLean's recommendations, the grievor said he thought they were a fair solution and he would have gladly accepted them. He said his career was very important to him and that the worst day of his life had been the day he was fired. He said that he felt that his whole life hung in the balance with this arbitration.

In cross examination the grievor agreed that he had never filed a grievance about his various complaints and said that he tried to remain anonymous in life.

The grievor said that both he and Mr. Patterson had strong personalities. He said that he felt they got along initially, but not after Ms Janzen was hired.

The grievor said he felt Mark Harris lied. He said Mark Harris would say one thing to one person and something different to the next person. Because of that the grievor described Mark Harris as a "weasel," but the grievor said he had not let it impede him in doing his job.

The grievor described Tom Craig as eccentric and agreed that they kept their distance from one another most of the time. He agreed that he and Craig Johnson did not get along and said he did not speak to Mr. Johnson unless he had to do so. He said that he got along with Ron Naylor but recognized that Mr. Naylor was a sensitive person and he tried to treat him in a way that accommodated that fact.

The grievor agreed that there was vulgar language used at Fleet and accepted that he used vulgar language. He agreed that he used "bitch" and that he used "fucking bitch," but said that he liked to think he did not use "fucking bitch" often. He said he could recall Ron Naylor using "fucking bitch" at work. As for insults generally, he said Annette Carrey had called him a "fucking

asshole” in the lunch room.

As for the “fucking bitch” comment he made to Ms Janzen, the grievor said he had no recollection of it but that he had been frustrated on a number of occasions regarding parts and that it appeared to have taken place later in the same day after the meeting and the duct work comment from Ms Janzen.

The grievor said that he felt Ms Janzen had not been truthful in her testimony, especially as to the QEW incident.

The grievor said he could not recall any incidents of him leering at the counter but agreed that he did talk to a lot of people at the counter.

Finally, the grievor agreed that on a work order in May 2007 he had written the part description and the part number for the first five parts he wanted, but that in the section of the work order where he was supposed to write the part number for the sixth part he had written “Don’t “F”in know.”

THE COLLECTIVE AGREEMENT

The key provisions of the parties’ 2006-2008 collective agreement are as follows:

1.4 MANAGEMENT RIGHTS

1.4.1 The Association and the members recognize and acknowledge that it is the exclusive function of the Board to:

- i. Maintain order, discipline and efficiency;
- ii. Hire, discharge, direct, classify, transfer, promote, demote, and suspend or otherwise discipline any employee, provided that a claim . . . that any such employee has been discharged or disciplined without just cause, may be the subject of a grievance;
- iii. . . .

20 GRIEVANCE PROCEDURE

...

20.14 A claim by a Civilian member of the Service who has completed a six month probationary period that he or she has been discharged or disciplined without reasonable cause may be submitted as a grievance in accordance with the provisions of this Agreement.

...

20.17 In the event a Civilian Member is disciplined, and such discipline includes a loss of time and/or pay, and in the event that the Member grieves any aspect of the discipline, the imposition of such loss of time and/or pay is suspended pending the outcome of the grievance.

39 DISCIPLINE RECORD

...

39.3 A member's record of discipline shall not be used against him/her at any time after twenty-four (24) months following the discipline provided that there is no record of discipline for any reason, related or unrelated, during such period of time.

EMPLOYER POSITION

The Employer submitted that there were three issues:

1. Did the grievor engage in misconduct?
2. If so, was discharge appropriate? and,
3. If discharge was not appropriate, what is the remedy?

The Employer submitted that there were “basic rules that inform civility and respect owed to others in a workplace” and that “recognize the right to be free from harassment.”

The complaints by Ms Janzen and Mr. Patterson led to an investigation by Inspector McLean who concluded that the grievor called Ms Janzen a “fucking bitch,” that the grievor had cut off Ms Janzen's husband on the QEW and later stared them down as Ms Janzen had said, that the grievor stared and leered at female recruits, and that others found the grievor intimidating and

negative. The Employer said it relied upon and accepted those conclusions and said the evidence supported them also.

Inspector McLean did a thorough investigation assisted by Linda Jerome, the Human Resources Manager, and he developed various recommendations to address the misconduct. Those recommendations did not include termination, although the Employer ultimately decided to terminate. The new Chief Administrative Officer, Guillermo Fuentes, testified as to the reasons.

Mr. Fuentes started working for the Employer after Inspector McLean's report but before a formal recommendation. Mr. Fuentes brought a new approach. He said he felt not enough emphasis had been placed upon the QEW incident and that a penalty more in keeping with the misconduct was needed. Mr. Fuentes view was reflected in the report that was submitted to the Board and the Board terminated for cause. The penalty of termination was appropriate as it matched the penalty with the misconduct. Anything less than termination would be unfair to the Police Service and to Ms Janzen.

The Employer then reviewed the evidence. The Employer said that Ms Janzen had testified in a candid and forthright manner and that she had a clear recollection of events, including the "fucking bitch" comment. As for the QEW incident, Ms Janzen said that she made eye contact with the grievor and the Employer submitted that, to the extent that her evidence was in conflict with the grievor's evidence, I should prefer Ms Janzen's version. There was an escalation from the comment to the road incident and Ms Janzen became more fearful. The Employer said that termination was the most effective way to protect Ms Janzen.

After receiving Ms Janzen's complaint, Sam Patterson wrote his own complaint. His complaint provided context and his complaints were independent grounds for discipline. Other witnesses supported Mr. Patterson's concerns. Ron Naylor said the workplace was better after the grievor's discharge as there was no need to worry about the grievor's bad moods. Craig Johnson did not get along with the grievor and he noted that the atmosphere was lighter after the termination. Tom Craig noted that there was no longer any need to walk on egg shells. Mark

Harris also talked of walking on egg shells around the grievor and said he felt the grievor's behaviour around women was inappropriate and that the morale and productivity had improved since the grievor's discharge.

The Employer said that the grievor's memory of events was selective. He could not remember the "fucking bitch" comment, although he did defer to Ron Naylor, and he could not recall passing Ms Janzen's husband's car, nor seeing Ms Janzen, on the QEW, although he was certain he had not made eye contact with Ms Janzen, had not intentionally cut off Ms Janzen's husband, and did not stare down the Janzens later. There was nothing in the grievor's evidence to suggest that he was sorry or would change his behaviour if he were to be reinstated.

The Employer then reviewed the cases noted below. It said the first eight cases support the following propositions:

1. Inappropriate and insulting language is grounds for discipline, and can even lead to termination;
2. Threatening behaviour is grounds for termination;
3. An employee's lack of genuine remorse is a factor in considering whether the employment relationship is viable; and,
4. A grievor's lack of truthfulness is suggestive that the employment relationship is not viable.

The Employer said that termination was appropriate and asked that the grievance be dismissed.

In the alternative, relying in part on the *Lethbridge* decision, below, the Employer said that assuming I found termination to be an excessive penalty, I should nevertheless find that reinstatement was not a viable option. In that situation, rather than reinstate the grievor, the Employer said I should award the grievor damages in the amount of 8 to 10 months pay, subject to the duty to mitigate.

In reply to the Union submission that Article 20.17 of this collective agreement required the Employer to pay the grievor his full pay through to the end of this arbitration process regardless of my award, the Employer said that in Article 20.17 the parties use of discipline did not include discharge. Elsewhere in this collective agreement, in both Article 1.4.1 and in Article 20.14, the parties have used discharge and discipline as separate concepts but in Article 20.17 they used only the word discipline. I should find that they did not intend to include discharge. It followed that the Employer could discharge a civilian employee before it had an arbitration decision and had, therefore, not violated Article 20.17

The Employer relied upon the following authorities: *Finning (Canada) v. International Assn. of Machinists and Aerospace Workers, Local 99 (Turgeon Grievance)* [2003] A.G.A.A. No. 25, 116 L.A.C. (4th) 324 (Sims); *TRW Canada Ltd. v. Thompson Products Employees' Assn. (Caroselli Grievance)* [2002] O.L.A.A. No. 45, 103 L.A.C. (4th) 411 (Barrett); *Thompson Products Employees' Assn. v. TRW Canada Ltd.* [2003] O.J. No. 541, 169 O.A.C. 144 (Div. Ct.); *Extendicare (Canada) Inc. - St. Paul v. Canadian Union of Public Employees, Local 2677 (Yettaw Grievance)* [2006] A.G.A.A. No. 29, 151 L.A.C. (4th) 84 (Smith); *Pope & Talbot Ltd. v. Industrial Wood & Allied Workers Canada, Local 1-423 (Wilson Grievance)* [2002] B.C.C.A.A.A. No. 95, 106 L.A.C. (4th) 19 (Chertkow); *Re ITT Cannon Canada, Division of ITT Industries of Canada Ltd. and C.A.W., Local 1090* [1990] O.L.A.A. No. 131, 15 L.A.C. (4th) 369 (H.D. Brown); *McCain Foods (Canada) v. United Food and Commercial Workers International Union, Local 114P3 (Ellis Grievance)* [2002] O.L.A.A. No. 361, 107 L.A.C. (4th) 193 (Simmons); *Purolator Courier Ltd. v. Teamsters Union Local 938 (Mather Grievance)* [2002] C.L.A.D. No. 278, 108 L.A.C. (4th) 417 (Roberts); and *Alberta Union of Provincial Employees v. Lethbridge Community College* [2004] S.C.J. No. 24, 2004 SCC 28, [2004] 1 S.C.R. 727, 238 D.L.R. (4th) 385.

UNION POSITION

The Union first submitted that Article 20.17 was similar to a “Justice and Dignity Clause.” In

brief, Justice and Dignity clauses in other collective agreements generally provide that in the event of a suspension or discharge the Employer is to hold off actually imposing any such penalty until after the outcome of an arbitration - that is, the penalty is imposed only after an arbitrator has agreed that the Employer had just cause. The Union noted that the uniform Police Officers who are represented by this Union are not disciplined or discharged until after a process set out in the *Police Services Act*. The Union said that this collective agreement includes a similar provision under which discipline is not implemented until after the conclusion of any arbitration.

Relying on Article 20.17, the Union said that the grievor should be paid in full until the date of this award, regardless of my decision on the merits of the dismissal.

Turning to the merits, the Union said that termination was only allowed for just cause and, in the absence of just cause, reinstatement was the normal remedy. Even in those cases in which reinstatement has not been made, it has generally been noted that it is an exceptional case and that reinstatement is the normal remedy.

The Union began with the highway incident. The Union said that the incident was not threatening and should be viewed as irrelevant to the employment relationship as it was not employment related.

In any event, Ms Janzen said that when the grievor cut her husband's car off, the grievor's truck was so close that she could not see his license plate. But even at a red light one can see the plate of the vehicle mere inches ahead of you, especially if the vehicle is a truck, as the grievor drove.

The grievor had agreed that he sometimes stopped at the bar/restaurant for a beer and he agreed that he sometimes stopped outside for a smoke. But the grievor said that if he did so he would be standing at the actual entrance which is located on the side of the building near the parking area and that it would take only one or two seconds to drive past. The grievor said he may have passed Ms Janzen and he may have cut her husband off that day, but that he did not see her that day, he did not stare her down, and he did not do anything to her intentionally.

As for the grievor not apologizing to Ms Janzen, he was doing as he had been advised by Chris Fisher - that is, to stay away from Ms Janzen.

The general environment should be kept in mind. The grievor was being pushed to increase his productivity. Ms Janzen's failure to maintain an inventory of proper parts and her ordering of the wrong parts was frustrating to the grievor and to other mechanics. When the grievor raised this issue, his concern was dismissed. Ron Naylor agreed that the parts problems continued and Mr. Naylor said there was no point in complaining to Sam Patterson as Ms Janzen was Mr. Patterson's protege. Moreover, all this took place in a typical garage. There is considerable swearing. Sam Patterson, the supervisor, belittles people, brags about firing people, is such a tyrant that his boss is afraid to meet with him alone, and was called a liar by Sergeant Rob Schottlander. On the other hand, Staff Sergeant Cincio who was a recent supervisor described the grievor as overly analytical, a person who stands up for his rights. The last lead hand, Rob Harris, quit that job and returned to being a mechanic because the then supervisor wanted Rob Harris as the lead hand to help "set up" the grievor. Staff Sergeant Cincio was open about trying to clean up the place and thought he had done so, but he could understand that the grievor may have felt paranoid based on his experience. Moreover, Sam Patterson and Mark Harris, the current lead hand, could not agree on who would do performance appraisals so that none were done of the grievor after June 2005. Finally, the spring of 2007 when the grievor called Ms Janzen a "fucking bitch" was the same time that his brother-in-law was dying of cancer and, in fact, the "fucking bitch" incident occurred on the grievor's first day back after his bereavement leave.

The Union then addressed each of the four issues. On the first, the grievor said he could not recall calling Ms Janzen a "fucking bitch" but he accepted that he had done so. He was willing to apologize and to take a 24 hour suspension for it, and had been willing to do so long before his dismissal. As for the second issue, the leering, he had never been disciplined for this although the evidence suggested it had been going on for some time. There were no incident reports on this topic. None of the women he is alleged to have leered at were called to testify; all the

evidence was from persons who had seen or heard of the grievor doing it to other persons. The evidence made it clear that the grievor was not unique, he was neither better nor worse than many others. But the grievor was the only employee to be disciplined, and to single out one employee from among many is not just. On the third issue of being intimidating, only Ron Naylor testified to being intimidated and he said that when he had raised it with the grievor, the grievor apologized. The grievor had never been disciplined for it and there were no incident reports on this issue. On this issue the grievor was no worse than his supervisor, Sam Patterson. It was discriminatory to discipline the grievor for this. As for the fourth matter, the highway incident, this is the only one the grievor denied, in the sense that he said he did not intend to cut off Ms Janzen's husband, did not stare them down, and did not try to intimidate her.

The Union then reviewed the evidence in detail. The Union noted that all the incidents in Ms Janzen's initial complaint occurred during the period of the grievor's brother-in-law's illness and death.

The Union noted that while Sam Patterson had concerns about the grievor, there was no indication that he had ever offered help to the grievor through the Employee Assistance Plan, or otherwise.

This was a dysfunctional unit. Inspector McLean included many recommendations to try and improve the operation of the unit. Two previous managers had been removed. It was accepted that earlier managers had tried to "get" the grievor.

The grievor's appraisals in 2004 and in 2005 were entirely satisfactory. Although the Employer's appraisal policy says that an appraisal should be done every year, the Employer did no appraisal of the grievor in 2006 or in 2007. That same policy also specifies that a special appraisal is to be done to document any deteriorating performance. No special appraisal was done.

Moreover, the Employer has an Incident File policy which requires that supervisors record in an incident file both good and bad events. There were no incident reports regarding the grievor.

The Union asked that I:

1. Substitute a 24 hour suspension,
2. Accept the grievor's offer to apologize to Ms Janzen, and
3. Award full compensation under Article 20.17.

The Union relied upon the following authorities: *Easton Coating Corp. v. United Steelworkers of America, Local 7062 (Smith Grievance)* [2000] O.L.A.A. No. 770 (Swan); *GSW Water Products Inc. v. United Steelworkers of America, Local Union 3789 (Manhas Grievance)* [2007] O.L.A.A. No. 328 (Reilly); *Re Kingsway Transports Ltd. and Teamsters' Union, Local 938* [1982] O.L.A.A. No. 32, 4 L.A.C. (3d) 232 (Burkett); and *Re Tenant Hotline and Peters and Gittens* (1983), 10 L.A.C. (3d) 130 (MacDowell).

CONCLUSIONS

In discipline cases such as this I follow a three step approach:

1. Did the conduct of the grievor justify a disciplinary response?
2. If so, was the discipline imposed - in this instance, discharge - excessive? and,
3. If the discipline was excessive, what penalty should be substituted?

Did the grievor engage in misconduct justifying a disciplinary response?

There were four areas of misconduct identified in the report to the Police Services Board which contained Mr. Fuentes' discharge recommendation. The Employer's decision to discharge the grievor was based on that recommendation. I have used those same four categories of misconduct in this award.

The first concern was the “fucking bitch” allegation. In many ways this is the easiest to assess on the facts because both parties agreed that it was made in the way alleged by Ms Janzen and confirmed by Mr. Naylor. Based on all the evidence before me I agree that the grievor made such a comment and, notwithstanding the amount of swearing and vulgar language commonly used in this workplace, I agree that the grievor’s comment merits discipline.

The second concern was that while at work at Fleet Services the grievor had repeatedly stared, leered and paid specific attention to the movements of female recruits and to other female visitors to the building. On this issue the parties did not substantially differ. The dispute was whether the grievor was worse than other employees who had engaged in similar conduct and whether the grievor could be singled out for discipline. As the Union noted, no other employee was disciplined for similar conduct.

On this second issue of the grievor’s conduct toward females and whether he stared, leered and paid specific attention to them, Mr. Johnson said that while the grievor “checks out” females, he and other male employees do the same. Although Ms Janzen testified about this, she agreed that the grievor was not the only one who “checked out” females. Mark Harris said that the grievor would drop what he was doing and make his way to the counter when females visited. Mr. Craig said that the grievor was likely to find a reason to go the front counter and “schmooze” female visitors. Rob Harris said that while all the mechanics might notice a female visitor, the grievor was more likely to go and talk to the visitor. Finally, while the grievor could not recall leering, he did agree that he talked to a lot of people at the counter. Based on all the evidence I conclude that the grievor paid more attention to female visitors to the Fleet building than did other males working at Fleet and, in particular, I find that he paid more attention than did the other mechanics.

There was no suggestion that the grievor had any work related dealings with most of the females, many of whom were there to visit Quartermaster Stores and obtain their uniforms and other equipment. The grievor had no work related reason to pay them this amount of attention. He

was taking time away from work and engaging in conduct with no work value.

No Employer witness testified as to why they thought this conduct was deserving of discipline. Staring at females, leering at females, and paying attention to females, is the type of language often used in complaints of sexual harassment. But no female testified that the grievor had leered or stared at her and no female said that she felt uncomfortable by the attention the grievor paid to her. In fact, although Ms Janzen in her July 17 e-mail said that she was uncomfortable because the grievor's staring had been "so obvious," no other female testified that she was made uncomfortable about this conduct of the grievor toward other females. Apart from Ms Janzen, only two female witnesses testified and both Ms Carrey and Ms Nixon (both employees who worked in the Fleet building) were called by the Union. Neither Ms Carrey nor Ms Nixon expressed any concern about the grievor and both were asked about what might be termed as inappropriate looking at them - that is, did the grievor try to look down their blouse - and both said that to their knowledge he had not done so. It seems, then, that this is not misconduct which can be labelled as sexual harassment, since there was no evidence that this was unwelcome by the persons to whom the grievor paid attention.

Since it was not sexual harassment, what, if anything, was wrong with this conduct? I accept that the grievor was wasting work time. I also accept that his wasting time annoyed some of the other employees who did not engage in similar activities.

On the other hand, I note that the evidence indicated that this conduct had been ongoing for some unspecified number of years. I note that while the Employer has a policy requiring that incidents of inappropriate conduct be documented (Incident File - General Order - 038-03) there were no documented incidents of this sort of behaviour by the grievor. Moreover, there was no discipline of the grievor for any such misconduct. This would suggest to me that while the Employer may have come to view this behaviour as serious after it had received other complaints about the grievor's conduct, it had not viewed this as a matter of concern before that time.

Looking at this complaint from the grievor's point of view, he had done this for years with no

negative consequences. Moreover, this was conduct which all the mechanics engaged in and none of the other employees were disciplined. Only the grievor was disciplined.

Nevertheless, my conclusion on this issue is that the grievor knew, as would any mechanic, that it was wrong to down tools and leave the garage during work hours in order to visit with female visitors. The grievor was the worst offender in this area - that is he was most likely to stop work entirely and “go visiting.” In that sense, I view the grievor’s conduct as more serious than the other mechanics and I conclude that it was conduct for which the Employer can impose some discipline. But I must indicate now that, (1) given the absence of any evidence from any female witness to whom this “attention” was paid, (2) given that, although he did more of this, the grievor was not the only person to engage in this misconduct, and (3) given that the Employer long did nothing about this widespread behaviour, I find that it merits only a very mild disciplinary response.

The third area of concern was that other employees viewed the grievor as “negative” and they found him to be “intimidating.”

Dealing first with the negative part, many people have a negative approach to life. The grievor acknowledged that he was perceived by others as being negative. Other employees expressed a similar view of the grievor. On the evidence before me, I agree.

While it would be nice for an employer to have only positive or cheerful employees, I conclude that this Employer cannot now, after some 11 years, discipline the grievor on the basis of his basic negative personality. Employees should be disciplined for the things they do, or do not do, not for who they are. The Employer may discipline for particular incidents or activities which flow from an employee’s negative outlook, but it cannot discipline the grievor simply because he has an overall negative outlook on life or on work. Just cause requires that there be evidence of incidents of “negative” conduct, not simply evidence of a negative personality.

In my opinion, the more serious part of this third concern is the allegation that the grievor intimidated others. This part of the allegation moves from a personality trait (negativity) to certain behaviours - intimidation.

I view it as wrong for one employee to deliberately intimidate other employees. One of the difficulties with intimidating conduct in the workplace is that such conduct tends to prevent other employees from doing their job in a normal manner. An intimidated employee may feel that he or she has to act in a certain way to please the other person, so that the person doing the intimidating will not retaliate against them.

But I did not hear any evidence suggesting that the grievor did anything to try to intimidate other employees. Rather, it appeared that some employees at times felt constrained by the force of the grievor's personality, or by his gloomy outlook, or by his moodiness. Mr. Naylor was the only witness who acknowledged having been "intimidated" by the grievor. However I think Mr. Naylor used intimidated in a different way than is common, as Mr. Naylor said that when he was intimidated by the grievor, he simply confronted the grievor, the two of them talked things over, and they went on with business as before.

Were I persuaded that the grievor had engaged in particular recent conduct in an attempt to intimidate other employees, I would agree that the Employer could discipline him for that conduct. But there was no evidence that there was anything the grievor did which suggested that he was engaged in any deliberate intimidating action for which he should be held accountable.

Apart from the basic factual concern, I would be hesitant to support discipline for behaviour which appears to have been similar for a number of years and about which there is not one recorded incident of inappropriate conduct in any Incident File and for which there is no discipline. Once again it appears that this is a matter which only became of concern to the Employer when it wished to raise other matters regarding the grievor's conduct. It is unfair for the Employer, when one issue arises, to go back over an employee's work history and seek to

impose discipline for conduct which was well known at the time it happened, but about which the Employer had chosen to do nothing. Such an approach is inconsistent with discipline being imposed only for just cause.

The fourth and final complaint was the QEW driving incident. This incident has caused me concern. If it had happened in the manner that Ms Janzen testified it did, then I would agree with the Employer that it was serious and merited serious discipline. But I do not accept that it happened in the way Ms Janzen testified and, in particular, I do not accept that her view about what the grievor intended was accurate.

I have reproduced above the e-mail account of the event written by Ms Janzen soon after this incident happened. Her evidence before me was different and it is with some of the details of her oral evidence that I have difficulty.

Ms Janzen's e-mail says that while she and her family were driving along the QEW the grievor sped beside them, cut in front of them, and sped off down the road. In her testimony she said that the grievor "whipped" in front of them. The grievor testified that he drives fast and often passes other cars. While the grievor testified that he had no memory of this event, I accept Ms. Janzen's version of events up to this point. I accept that on that day, after working hours, the grievor passed the Janzen family on the QEW, that he cut in front of her husband, and that the grievor then sped away. But that is not, on its own, misconduct justifying Employer discipline.

Ms Janzen testified that her husband was driving and that they were in the car which her husband usually drives, rather than the vehicle which Ms Janzen usually drives. The car Ms Janzen's husband drove was a Sable sedan. She said that she was in the passenger seat but was turned toward the middle so that she could more easily speak to her husband and to her son who was in the back seat. She said that when the grievor passed them he turned toward their vehicle. Ms Janzen testified that she and the grievor made eye contact and that the grievor would have known they were there.

At that time Ms Janzen said her husband was driving under 100 km per hour. She made no estimate as to the grievor's speed but she did testify that the grievor "whipped" past and I take that to indicate that the grievor was going considerably faster than her husband. Her e-mail says the grievor "sped" beside them and then "sped" away which also suggests a considerable difference in speed. The grievor said that he drives fast. I conclude from all this that the grievor went past the Janzen vehicle quickly, and that he was travelling in excess of 100 km per hour.

I begin with the issue of whether the grievor recognized Ms Janzen. Although I heard no evidence of this issue, I assume the grievor's seat in his truck was higher than the seat in the Janzen car, as would be normal. This difference in height would make it a bit more difficult for the grievor to see a person in the passenger seat of the Janzen car as he passed it. I accept that many drivers glance toward a vehicle they are passing and I can accept that the grievor glanced at Ms Janzen's husband's car as he passed it that day. What I have difficulty with is Ms Janzen's testimony that, driving in excess of 100 km per hour, the grievor looked from his higher seat, past the passenger area in his own truck, past Ms Janzen's husband who was driving his own car, and into the car's passenger seat, and that the grievor held that glance long enough that he made eye contact with Ms Janzen and that he recognized her travelling in a strange car. Because she was not driving and because she did not need to watch the road, I can accept Ms Janzen's testimony that she was facing toward the grievor's truck and that she recognized the grievor when he went past. But I do not find that the grievor did the same. In my view, the only way he could have done that is if he had taken his eyes off the road for an unusually, and dangerously, long time given the high speed at which he was travelling and nothing in the evidence suggested that the grievor was the type to have done so. On this issue I note that, while the grievor did not deny that he may have passed the Janzen car, he did deny recognizing Ms Janzen on the road. I accept the grievor's evidence on this point.

As for how close the grievor was when he cut in front of them, Ms Janzen's e-mail provided no details. However, in her oral evidence she said the grievor was so close that she could not see

the license plate on his truck. I heard no detail as to where the plate was on the grievor's truck, but my experience suggests that a person in a car can see the license plate on a truck in front when the truck is very close. Had the grievor cut in front within inches of Ms Janzen's husband's car I would have thought that this important detail would have been worth including in her e-mail, but there is no mention - it simply reports that the grievor "cut in front" and "sped off." I do not accept that the grievor was as close as Ms. Janzen's oral evidence suggested.

I accept that the grievor passed them when Ms Janzen's husband was driving his car, that the grievor cut in front of them, and that he then sped off down the road. I do not accept that the grievor knew who he was passing, nor that he recognized Ms Janzen in the car, nor that he was so close that his license plate could not be seen initially, nor that any of this was done to intimidate Ms Janzen.

As for the later staring while outside the bar/restaurant, the evidence was a person standing near the door from the parking lot could see a vehicle passing on the road for only about 1.5 seconds and the vehicle would then be out of sight. I can accept that the grievor stopped for a beer and a smoke, something he acknowledged he did on occasion, and that he was standing near the door having a smoke when the Janzen car passed by. Moreover, given how little there is of interest in the average parking lot, I can also accept that the grievor was turned toward the road and was watching the roadway traffic at that time. But I do not accept that the grievor "stared them down" as was alleged by Ms Janzen, or that he even knew who was in the passing vehicle.

This incident occurred away from work and it occurred outside work hours. I do not accept that the grievor knew who he was passing, nor do I accept that he had any intention of conveying any message to Ms Janzen, whom he had generally been avoiding, nor do I accept that he stared them down later. It follows from my conclusions as to the facts that I find no grounds for employment discipline based on this incident.

Was discharge an excessive disciplinary response?

I have found that only two of the four concerns relied upon by the Employer merit any disciplinary response. In particular, I have found that the two concerns proven by the Employer which warranted discipline were (1) the grievor called Ms Janzen a “fucking bitch,” and (2) the grievor wasted time watching and talking to female recruits and other females who came to the Fleet building.

There are a number of factors which persuade me that discharge was an excessive disciplinary response in this instance.

First, in order for any discipline to be for just cause, the discipline should be corrective - that is, the discipline should be intended to change the employee’s behaviour not merely to punish the employee. In addition, just discipline is normally thought to involve progressive discipline - that is the Employer should begin its effort to change behaviour through a mild disciplinary response and increase the severity of the discipline imposed if the employee does not change his or her behaviour. There was no indication that the grievor has difficulty learning - he was generally viewed as very capable. In any event, I find that the grievor is a person who would likely learn from a lesser form of discipline.

On the issue of learning from discipline, I note that these parties have agreed in Article 39.3 that, if an employee remains discipline free for 24 months, then any previous discipline shall not be used against that employee. In essence, these parties have agreed that the earlier discipline has corrected the behaviour. The fact that this grievor had earlier discipline which cannot now be used against him because of Article 39.3 suggests that the grievor has, in the past, learned from discipline.

A second factor causing me to conclude that discharge was excessive is the information relied

upon by the Employer in making the termination decision. It was clear that the grievor had previous discipline but that he had then been free of any discipline for at least 24 months before his discharge. However, the report that went to the Police Services Board with Mr. Fuentes' discharge recommendation included information on the grievor's previous discipline and the discharge recommendation was "Based on an assessment of all the information obtained during the investigation" (at p. 14). The report itself did not make it clear that the Employer could not use that old discipline against the grievor, although Mr. McKaig's letter which was appended to the report did make the point. I note that no member of the Police Services Board testified as to what information from that report was relied upon. Because the Board was informed of the earlier discipline and because it appears that the Board may have relied upon that information in violation of the collective agreement, I view the discipline imposed by the Employer in this instance as suspect.

Although I have a concern regarding the information relied upon by the Police Services Board in reaching its decision, I do not have a similar concern about the information Inspector McLean relied upon in reaching his original recommendation. Inspector McLean made it clear that he knew of the collective agreement limitation on the use of any of the grievor's earlier discipline and he testified that he had not relied upon that discipline in coming to his recommendation. Without relying on the earlier discipline, I note that Inspector McLean reached a recommendation for a much less serious form of discipline, that is a recommendation for a 24 hour, or three working day, suspension.

Thirdly, in order to be just, the discipline which is imposed is also generally viewed as having to bear some relationship to the individual employee, in the sense that a longer serving employee would ordinarily receive a lesser form of discipline than would a junior employee who had done the same thing, assuming similar discipline records. I note that the grievor had been employed more than 11 years as of the time of his discharge and, in my view, that is long enough to entitle him to favourable consideration under this concept.

Apart from the above three considerations, in order to be just, the discharge of an employee who has no discipline requires an unusually serious offence. I now consider whether this was an unusually serious incident.

I turn to the particulars of the actual misconduct. The grievor called Ms Janzen a “fucking bitch.” He did this the day he returned from the bereavement leave he had taken after his brother-in-law died. The time around his brother-in-law’s illness and death was stressful for the grievor. The comment was made the same day that the grievor felt Ms Janzen had ordered him to replace the duct work he had been sitting on at a meeting - a comment the grievor indicated annoyed him. Both these factors suggest to me that some small measure of leniency regarding the comment may be appropriate.

In addition, I note all the evidence which I recounted above regarding the type of language used regularly in this workplace. Most employees testified that there was a lot of swearing and vulgarity. Mr. Johnson said that three swear words in one sentence was common. Although Mr. Craig said there was not a lot of swearing, I note that he felt the use of the words “fuck” and “Christ” was not swearing. I, on the other hand, view “fuck” and “Christ” to be common swear words. Although Mr. Patterson said he did not swear, many other witnesses testified that he did. I do not accept Mr. Patterson’s evidence on this issue. I find that Mr. Patterson, the Fleet Services supervisor, swore frequently. In fact, I conclude that most employees in both Fleet Services and in Quartermaster Stores swore frequently. It follows that swearing in this workplace cannot be treated in the same way that it might be in another work environment where swearing is uncommon.

In this work place, the grievor was viewed as a person who swore about the same as did the others; it seems that he was no better and no worse.

The “fucking bitch” comment was made after Ms Janzen come into the garage to check whether a vehicle, a vehicle for which the grievor had already placed the keys in the finished area as he

was supposed to do, was in fact ready. While the grievor testified that he could not recall his comment, I can understand that the grievor might have found Ms Janzen’s query to be annoying.

Given the workplace climate regarding swearing, given the other events of that day, and the other factors considered above, I find that calling Ms Janzen a “fucking bitch” was not an unusually serious offence and I conclude that it did not merit a discharge.

As for the second concern of staring at and talking with females, as I noted above, I do not view this as particularly serious in all the circumstances. On its own, given the similar conduct of other employees and the fact that the grievor had a discipline free record, this second concern would merit an oral reprimand. But this second concern did not arise on its own. Instead it was included with the “fucking bitch” comment.

Considering these two matters together, I conclude that discharge for these two matters is excessive.

What penalty should be substituted?

Selecting an appropriate penalty after concluding that discharge is excessive is sometimes difficult. The Union submitted that a 24 hour - i.e., three day - suspension was fair in all the circumstances, as Inspector McLean had recommended. I conclude that a three day suspension is within the range of just disciplinary responses and I therefore substitute a three working day unpaid suspension for the discharge. To be clear, this three day suspension is substituted as the discipline for both the “fucking bitch” comment and for the grievor’s staring at females and leaving work in order to visit with them.

In addition, the grievor has indicated his willingness throughout this lengthy process to apologise to the grievor. He did not do so earlier because of the advice he received. I think an apology is appropriate and I direct the grievor to do as he has indicated he is willing to do - that is, I direct

him to apologize to Ms Janzen for his “fucking bitch” comment.

I am sure that my award will come as no surprise to anyone involved. Inspector McLean investigated this matter fully in the period from early June to the end of October, 2007. He was assisted by Ms Jerome, the Employer’s Manager of Human Resources. He sought advice from the Employer’s solicitor, Mr. McKaig. Inspector McLean formulated recommendations which would, in the views of the three of them, have fairly addressed the grievor’s misconduct. The three of them concluded, as have I, that a three day suspension and an apology was just.

Inspector McLean made other recommendations. The evidence before me suggested that there is considerable merit in those other recommendations. But I have no jurisdiction over those matters and so I make no comment on them.

There were two further matters which arose in argument.

Firstly, when discharge is found to be excessive, the normal arbitral remedy is to reinstate the grievor. However, the Employer asked that I exercise my jurisdiction and not reinstate this grievor. While I agree that in some situations the normal remedy of reinstatement may be inappropriate, I see no basis upon which I can conclude that this grievor should receive any remedy other than the usual one. I direct the Employer to reinstate the grievor in his former position.

Secondly, when a grievor is ordered reinstated, as I have now done, it is normal to award the grievor compensation in the amount of pay and benefits lost, less deductions for employment income earned during the time between the discharge and the reinstatement. However, the Union submitted that Article 20.17, above, entitled the grievor to his full pay from the discharge until the date of this award. In essence, the Union said that in this situation there should be no set-off from the normal damage award for any earnings the grievor had while he was discharged and that there was no place for the concept of mitigation of damages. The Employer said Article

20.17 applied only to discipline less than discharge and had no application to these facts.

The word discipline is often used in collective agreements to include all forms of employee penalty, including the most serious one - discharge. On the other hand, discipline and discharge are also often used in collective agreements as separate concepts. The issue is: how did these parties use the word “discipline” in this clause - what did they intend to include?

Two factors persuade me that these parties did not intend to include discharge in their use of the word “discipline” in Article 20.17.

First, the parties have specified only “discipline” and they mentioned grieving only discipline. They have addressed discipline which results in a “loss of time and/or pay.” This notion of the “loss of time and/or pay” is more commonly used in suspensions, where the loss of work and pay is key, but it is less common in discharge, where the loss of the job itself is central. While the “loss of time and/or pay” is well suited to suspensions without pay, I would have expected to see some reference to the loss of the job itself if the parties had intended to include discharge in this provision.

Secondly, and much more importantly, these parties have elsewhere used discipline and discharge as two distinct concepts. In the Management Rights provision in Article 1.4.1 (above) the Employer can “discharge . . . or otherwise discipline” an employee provided that a claim that the employee has been “discharged or disciplined without just cause” can be grieved. Earlier in this same Article 20, that is in Section 20.14 (above), the parties have provided that a claim that an employee “has been discharged or disciplined without reasonable cause” may be grieved. Unlike Article 1.4.1 and Article 20.14, in Article 20.17 the parties have made reference only to an employee being “disciplined” and grieving “discipline.” When these parties clearly intended to address discharge they have specified discharge as well as discipline, but in Article 20.17 they have only mentioned discipline and only speak of grieving discipline. I conclude that the parties’ omission of discharge was deliberate. I conclude that by omitting any reference to

discharge the parties intended to address only discipline which falls short of discharge. I conclude that Article 20.17 does not apply to the grievor's discharge.

In terms of remedy for this grievor, in addition to reinstating the grievor, I direct the Employer to compensate the grievor in the usual manner - that is for all his lost pay, benefits, pension, etc., but to do so in the normal manner applying the concept of mitigation. The compensation is also, of course, to be reduced by the three day unpaid suspension.

Before I conclude this award I wish to add a comment.

I am concerned about the implementation of the reinstatement remedy I have directed. It seemed that there are many problems in Fleet Services, that problems began years ago, and that problems continue. But I heard evidence both from witnesses called by the Employer and from witnesses called by the Union about concerns with the current Fleet Services supervisor, Sam Patterson. Many credible witnesses suggested that Mr. Patterson belittles employees, that he intimidates employees, that he has a "my way or the highway approach" to supervision, that he is "cleaning house," that he has a list of people to "get rid of" and is working his way through his list (with the consensus being that the next person he hopes to get rid of will be Annette Carrey), and that he is not receptive to concerns raised by his employees other than, perhaps, concerns from Ms Janzen. In addition to concerns from his staff, I heard from Sergeant Schottlander, who holds a parallel position within the organization, about some of the problems that he encountered in working with Mr. Patterson, and I heard from several witnesses that Mr. Patterson's manager had said that she was unwilling to meet with Mr. Patterson one-on-one. While I make no factual findings on these points, they do serve to introduce the following. Mr. Patterson himself testified before me that the grievor "can not come back to my workplace." Notwithstanding Mr. Patterson's view, I have directed the Employer to reinstate the grievor as a mechanic in Fleet Services. Given Mr. Patterson's own evidence, and the concerns about his approach to supervision which were raised by others, it appears that implementing my reinstatement remedy may not go smoothly - it may well require the involvement of other representatives of the

Employer and perhaps also the assistance of the Union.

Summary

The grievance is allowed as set out above. I direct the Employer to reinstate the grievor as a mechanic and to substitute a three day suspension without pay for the discharge. I direct the Employer to compensate the grievor in the usual manner for his lost wages and benefits. Finally, I direct the grievor to apologise to Ms Janzen for his “fucking bitch” comment. I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 27th day of February, 2009.

Howard Snow, Arbitrator