2-11-2004

CUPE, Local 3010 v Children's Aid Society of Cape Breton

Innis Christie

2004-005

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 3010
(The Union)

and

THE CHILDREN'S AID SOCIETY OF CAPE BRETON
(The Employer)

RE: James B. MacNeil (The Grievor)
Grievances against Suspension and Termination

BEFORE: Innis Christie, Arbitrator

AT: Sydney, N.S.

DATES OF HEARING: December 9, 10, 11, 16, 17, 18 and 19, 2003

FOR THE UNION: Lionel Clarke, Legal and Legislative Representative, CUPE
Jacquie Bramwell, National Representative, CUPE
Arden White, President, Local 3010, CUPE
Scott Clarke, Vice President, Local 3010, CUPE

FOR THE EMPLOYER: G.S. Khattar, counsel
Paul Sampson, articling clerk
Marie Boone, Executive Director, CAS Cape Breton-Victoria
John Janega, Unit Director, Sydney Office CAS Cape Breton-Victoria
Mairi MacLean, Unit Director, Sydney Office CAS Cape Breton-Victoria

DATE OF AWARD: February 11, 2004

Employee grievances alleging breach of Article 13 of the Collective Agreement between the parties effective January 1, 1988 - December 31, 1989, and remaining in effect by virtue of Article 30.01, which the parties agreed is the applicable Collective Agreement, in that the Grievor was suspended for five days on March 17 and then discharged on March 27, 2003. The Union, on behalf of the Grievor, requests that he be reinstated with full seniority and be compensated for all lost pay and benefits.

At the outset of the hearing the parties agreed that I am properly seized of these matters, that I should remain seized after the issue of this award to deal with any matters arising from its application, and that all time limits, either pre- or post-hearing, are waived.

AWARD

Introduction. The Grievor, a senior social worker, was terminated for non-compliance with the Employer's standards by failing to report a matter referred to him by the Police, as a result of which, according to the Employer, a child was put at risk. This was treated by the Employer as a culminating incident following upon other performance failures, principally in meeting case documentation standards. Immediately prior to termination the Grievor had been suspended five days for failure to meet case documentation standards. He grieved that suspension. His Grievances against both his suspension and his discharge are before me here.

The letter of suspension, dated March 17, 2003 and signed by Marie Boone, Executive Director of the Executive Director, CAS Cape Breton-Victoria, states:

RE: 5 DAY SUSPENSION WITHOUT PAY

Dear Mr. MacNeil:

On Feb. 7, 2002 you were given a 2 day suspension from work with pay for reasons the included you refusal to comply with the agreed-upon plan to bring you case documentation up to date.

A review of you work record since then shows that immediately following your suspension, you went on sick leave returning to work September 3, 2002. Since your return to work, there has been no marked improvement in your level of job performance. The case documentation problems I identified to you on February 7, 2002 continue.

For example: John Janega, Unit Director met with you on December 11, 2002 regarding your continuing failure to meet standards respecting case documentation. You promised to rectify the situation by January 1, 2003. On March 4, 2003, John discussed the matter with you again. Unfortunately, your case documentation showed no real improvement over what it was in February, 2002.

In my February 27, 2002 letter of suspension, I advised you that further disciplinary action would result if you failed to meet the expected standards.

In accordance with this, you are, therefore, suspended from work without pay for a 5 day period commencing today, March 17, 2003. Further, if you job performance does not meet the requisite level within 4 weeks of your return to work on Monday, March 24, 2003, I will have no choice but to terminate your employment.

The letter of termination, dated March 27, 2003, also signed by Ms. Boone, states:

RE: Termination of Employment

Dear Mr. MacNeil;

This letter is to confirm the meeting of earlier today during which I advised Scott Clarke, CUPE Loc. 3010, Vice President, that your employment with the Children's Aid Society of Cape Breton-Victoria is terminated immediately, for just cause.

In arriving at this decision, the following information was relied upon:

- On Feb. 7/02, you were given a 2 day suspension without pay for reasons that included your refusal to comply with agreed-upon plan to bring your case documentation up to date. (*ref. February 7/02 letter attached*)

- On March 17/03 you were given a 5 day suspension without pay for failure to maintain your case documentation at the required level. (*ref. March 17/03 letter attached*)

- On March 1/03, you were on standby duty when contacted by a police officer to deal with a family situation involving a child.

  You know, in such cases the agency requires the standby employee to immediately involve the appropriate supervisor.

  You failed in your duty to notify the supervisor as required.

  You also failed to file the required intake referral in a timely fashion.

These omissions are serious and may yet have adverse consequences for the agency.

In light of your habitual neglect of duty, therefore, and attendant performance problems as referenced in the above paragraphs, we have no alternative but to terminate your employment immediately for just cause.

All wages owing to date and any outstanding vacation pay will be forwarded to you shortly.

Ms. Boone's February 7, 2002 letter imposing the two day suspension, which, as indicated, was attached to the letter of termination, states:

The decision for taking this disciplinary action against you is, as expressed to you, based on the following:

- refusal to comply with the agreed-upon plan to bring you case documentation up to date
- lack of evidence of support for your statement on February 4/02 that you "were working on it"
- repeated refusal to provide a date when you would have your documentation in compliance with job expectations
- taking time away from work without prior approval
- concerns addressed regarding your work while on Standby duty
- your uncooperative and insolent behaviour

I must also advise you that should your unacceptable performance and/or conduct continue, and you fail to meet standards expected of you, further disciplinary action will be taken including termination of your employment. I sincerely hope it does not come to that.

The final three bullets in this letter bring into consideration three aspects of the Grievor's performance up to February 7, 2002 that go beyond poor case documentation; time away from work without prior approval, concerns regarding work while on stand-by duty and uncooperative and insolent behaviour. The March 27, 2003 letter of termination also refers to "habitual neglect of duty".

In any case of discipline or discharge, the first issue is whether there was just cause for any discipline. I have concluded that there was just cause for discipline here. That being so, the second issue is whether the discipline imposed by the Employer was excessive. This is a very serious issue here. In deciding it I have taken into account not only the culminating incident but events leading up to it, the Grievor's disciplinary record while in the bargaining unit and mitigating factors of the sort commonly considered relevant by arbitrators in discharge cases,

principally in this case the Grievor's seniority and fifteen year record as an able and caring social worker. I have found that discharge was an excessive penalty here, and have therefore ordered the Grievor reinstated, subject to the disciplinary suspension which, based on all of those same considerations, I have decided is appropriate. I have ordered the Grievor reinstated as of the date of this Award, but, because of the seriousness of his recent misconduct, without back pay

The Facts: Overview. The Grievor first worked as a social worker with Family Services of Eastern Nova Scotia, following his graduation in 1976 from the Maritime School of Social Work with an MSW. In 1981 he obtained a Diploma in Family Therapy from Smith College for Social Work. Commencing in 1988, he worked as a "Child Protection Worker" with the Employer for five years. He was then promoted to the non-bargaining unit position of "Unit Director", essentially supervising programs and staff, first in North Sydney, then in Glace Bay and then in the Sydney office. In the Autumn of 2000 he returned to the bargaining unit as a "Children in Care Worker" in the Sydney office.

The Union's position is that, on the evidence, what the Employer has called the culminating incident involved only a minor, if any, failure by the Grievor to perform his duties and that nothing in his disciplinary record justified serious discipline, let alone discharge. The Collective Agreement contains a two year "sunset clause":

> 13:04 The record of any suspension or disciplinary action against any continuing employee shall be removed from his record after two (2) years following such action. ...

The relevance of the Grievor's prior employment record is complicated by the fact that for seven years prior to the Autumn of 2000 he was a member of management. The Employer sought to introduce evidence of events that occurred while he was a Unit Director "to show continuity of conduct and bad attitude". While objecting to the admission of this evidence, counsel for the Union asserted that other evidence from the period when the Grievor was a Unit Director should be admitted to show that the Executive Director was "out to get" the Grievor. Specifically, the Union asserted that evidence that the Grievor had made a report adverse to the Executive Director's son, who was an employee of the Employer, was relevant to this submission and should be admitted. The Union's allegation was that this evidence would support a finding of bias and bad faith on the part of the Executive Director in discharging the Grievor.

Counsel for the Union objected to evidence of discipline imposed on the Grievor while he was in management on the grounds that to do so was contrary to Article 13:04 and that it was otherwise irrelevant, or at least inappropriate, because the Grievor was then subject to a different employment regime and not protected by the Collective Agreement or a union. Counsel for the Union submitted that, if I were to conclude that Article 13:04 was not directly applicable, it at least demonstrated the parties' intent that unfavourable notations on an employee's record made more than two years previously were not to be taken account of.

I ruled that, if the Union was to enter evidence purporting to show bias on the part of the Executive Director based on events while the Grievor was a Unit Director,

the Employer's evidence from that period would be also admitted, subject to my determination of the weight to be accorded all of the evidence from that period in dealing with the issues before me here.

Article 13.04 has no direct application to a member of management, so the Employer was entitled to maintain its records of discipline imposed on the Grievor as Unit Director. However, I do not reject as insubstantial the other grounds upon which counsel for the Union argued I should not admit such evidence. My decision to admit this evidence was in large part based on the Union's insistence that I consider the evidence it wished to introduce to show that Ms. Boone was "out to get" the Grievor; evidence of a matter that had also arisen while the Grievor was a member of management. It seemed clear that both parties wished to put what each regarded as "the whole story" before me.

In the result, I have accorded little weight to any of this evidence and describe it below only briefly. I have not taken any of the evidence about the Grievor's "conduct and ... attitude" in management into account in determining whether there was just cause for his discharge or discipline, although I have taken account of it in assessing the Union's allegation of bias.

In attempting to understand the complex issues of fact here I have found it most useful to deal with the Grievor's employment with the Employer Agency chronologically. Accordingly, in what follows I will state the relevant facts as I have found them, from the Grievor's initial employment to his discharge. The Grievor's relationships with others in the Agency, where relevant, will be dealt

with as part of that story. I will also recount the expert testimony of Carol MacLellan, Child Welfare Specialist with the Provincial Department of Community Services, responsible for the Eastern Region, which includes the Employer Agency, on the relevant social work standards and the importance of record keeping.

I heard a great deal of evidence that does not relate to the grounds upon which the Grievor was suspended for five days and discharged, which were the culminating incident immediately prior to his discharge, his case documentation, his pre-February 7, 2002 time away from work without prior approval, concerns regarding work while on stand-by duty and uncooperative and insolent behaviour, and, generally, his alleged habitual neglect of duty. I have tried not to burden this award with the details of that irrelevant evidence.

The Facts: Chronologically. Following his graduation the Grievor first worked as a social worker with Family Services of Eastern Nova Scotia. As the holder of an M.S.W., he was at the time one of the best qualified social workers in Cape Breton. He was very deeply involved in matters relating to his job, his Union and his profession, he was active in community affairs and well respected. Commencing in 1988 the Grievor worked as a "child protection worker" with the Employer for five years. He was then promoted to the non-bargaining unit position of "Director", essentially supervising programs and staff, first in North Sydney from 1993 to 1996, and then in Glace Bay from 1996 to 1999 and from 1999 to 2000 in the Sydney office. In the Autumn of 2000 he returned to the bargaining unit in the Sydney office as a Children in Care Worker. Since then there have been

three disciplinary incidents upon which the Employer relied in terminating him, as set out in the March 17, 2003 letter of suspension and the March 27, 2003 letter of termination quoted above. The Employer has characterized the events of March 1, 2003 as the "culminating incident" because they did not come to light until March 25, a characterization which was not disputed.

Marie Boone, the Executive Director who made the decision to terminate the Grievor and authored the termination letter of March 27, 2003, testified about the Grievor's performance, both while he was a Unit Director from 1993 to 2000, and as a Children in Care Worker thereafter, on the basis of records and her personal experience

Just a few months before the Grievor joined the Employer's Sydney office in 1988 as a Child Protection Worker, Marie Boone had commenced to work in that same role. Prior to that, since 1974, she had been working for the Employer as a Children in Care Worker. She and the Grievor were colleagues until he became the Unit Director in the North Sydney Office in 1993. A few months later she became a Unit Director in the Sydney office. From 1988 on, until she became Executive Director in September 1999, they were close friends, both at work and with their families, as well as colleagues. When Ms. Boone took leave in 1996-7 to obtain her MSW from the University of Toronto, the Grievor provided one of her letters of reference and contributed some of his vacation time to support her in that endeavour.

Ms. Boone testified that when she became Executive Director she welcomed the opportunity to work with the Grievor, not only because of their friendship but also because of his qualifications and experience. She testified that she had always respected his formal qualifications and clinical skills. She felt some trepidation, however, because, from discussions at the time with staff and the Grievor, she knew about adverse comments by staff on his performance as Unit Director in both North Sydney and Glace Bay, and difficulties between him and her predecessor Executive Director. When Ms. Boone became Executive Director she was briefed on these matters by her predecessor and had access to the Grievor's file.

In 1994 the staff in North Sydney had formally complained about the Grievor's "lack of physical presence" in the office. The Grievor testified with respect to this, but I make no finding on whether or not the complaints were justified. He felt he had not been appropriately supported by the previous Executive Director. After three years in North Sydney the Grievor transferred to Glace Bay

The Grievor became Unit Director in the Glace Bay office in 1996. His relationship with the then Executive Director was not happy. In a letter of March 5, 1997 to the Executive Director he set out the reasons why he felt "confused and hurt". I see no point in setting them out here. I have no basis upon which to determine whether or not the Grievor's sense of injury was justified, and I unable to see that the reasons for it are relevant.

In September 1998 the Union wrote a letter of complaint to the then Executive Director making essentially the same points as had been made by the North Sydney staff. Both the Grievor and Ms. Boone in cross-examination testified with respect to the pressures and demands on him in North Sydney and Glace Bay. A significant factor was that the Grievor's wife was seriously ill. Beyond saying that the evidence leaves no doubt that those were difficult times, in many respects, for the Grievor and for the CAS in Cape Breton, I will not detail that evidence here because it is not relevant to my decision. I make no finding on whether or not the complaints of staff in either office were justified, or on the actions of the then Executive Director.

I do accept the Grievor's undisputed testimony that the affairs of the CAS in Cape Breton through this period were marked by considerable internal conflict

The evidence is that in this period the Grievor felt he was suffering from alcohol abuse, which resulted in high blood pressure and led him to enter a five day residential treatment program in the Spring of 1997 and in the Autumn, a twenty-eight day residential treatment program, ending on October 17, 1998. His testimony was that he is an alcoholic, with a weekend drinking pattern. He remained alcohol free for two years after October 1998, and has not had a drink since the summer of 2002. He also testified that he suffers from anxiety attacks.

Ms. Boone testified that she had not known of the Grievor's going into residential treatment for alcohol abuse at the time, nor, indeed, apart from vague rumours, had she been aware that the Grievor had a drinking problem until she was briefed upon

becoming Executive Director. In testifying about this the Grievor again ascribed his difficulties in part to lack of support by the previous Executive Director.

The Union did not put alcoholism forward as a basis for accommodation. I will, therefore, not deal the evidence of the Grievor's difficulties with alcohol or his treatments in any greater detail.

While the Grievor was Unit Director in Glace Bay a matter arose, which, Counsel for the Union submits, is relevant because it supports the Grievor's allegation that Marie Boone, when she became Executive Director was "out to get him". Documentary evidence from the Employer's records was put before me by Ms. Boone and the Grievor, and Charles Coleman, the Employer's Director of Residential Programs, testified with respect to this matter.

In essence, in the Spring of 1999 the Grievor, in his capacity as Unit Director, brought to the attention of Ms. Boone's predecessor as Executive Director, problems he saw in pay claims made by Ms. Boone's son as a "mentor" working on contract for the Employer. It is clear that these matters fell within the Grievor's area of responsibility for cases were assigned in the Glace Bay office. At the time Ms. Boone's son was also a part-time employee at the Boy's Residential Centre, which is part of the Employer's operations. The Grievor fully documented the problems in a Report to the then Executive Director, with the suggestion that there be a proper audit. The Grievor was quite persistent in insisting that this matter be properly pursued, to the point of annoying the then Executive Director, who, said simply that "he would handle it from here". In the result, Ms. Boone's son was

reprimanded for disorganization and failing in his responsibility to be accountable, but retained in employment. It is clear, of course, that it is not for me to pass judgement on the appropriateness of this disposition of the matter.

I note, however, that through Mr. Coleman counsel for the Employer introduced an "Internal Audit Report" attached a letter to the Deputy Minister of the Department of Community Services dated October 27, 2003. Corporate Internal Audit, part of the Nova Scotia Department of Finance, reported that, at the Department of Community Service's request, it had been engaged "to review the actions taken by management of the Children's Aid Society of Cape Breton Victoria to deal with the specific issue of possible misappropriation of funds by an employee in April, 1999 and determine if the actions take were reasonable and carried out in a timely fashion." The text of the Report makes it clear that this related to the matter to which I have been referring. The "Conclusion" is:

> It is our opinion that the issue brought forward in April, 1999 was addressed in a timely and reasonable manner by the Executive Director of the Children's Aid Society of Cape Breton Victoria. It was the Executive Director's responsibility to consider all factors in bringing the matter to a timely conclusion, and we cannot find fault with the process which was employed by the Executive Director.

Departing briefly from the chronology, to complete my findings of fact on the matter involving Ms. Boone's son; after his two day suspension in February of 2002 the Grievor made application to the Nova Scotia Workers Compensation Board for payments for the period February to November, 2002 based on injury due to work related stress, although, perhaps unknown to him, non-post traumatic stress is not covered by the Nova Scotia Workers' Compensation Act. Without

using names, his allegation was that Ms. Boone was subjecting him to workplace stress because of his role in the matter involving her son. In support of this application he submitted the documents on the matter in his possession, although his signed oath of confidentiality dated October 11, 1996 states:

> I hereby acknowledge that as a member of staff and management of the Children's Aid Society of Cape Breton, I may be entrusted with knowledge of personal, private and professional affairs certain persons including staff members as well as financial affairs of the agency. I hereby undertake not to divulge any of this knowledge nor to discuss it at any time or place with any unauthorized person, either during the term of my employment with the Agency or thereafter , except in the course of my duties as a member of management of the Children's Aid Society of Cape Breton. I also acknowledge that a breach of this undertaking may result in my suspension or dismissal from the Children's Aid Society of Cape Breton.

Ms. Boone first testified she only saw the materials on the Grievor's application for workers' compensation in the Spring of 2003, after the Grievor's discharge, although under cross-examination she admitted that it could have been in November 2002 that she first saw them. When asked whether she had opposed the claim on behalf of the Employer, Ms. Boone answered "Yes, I expect I did". Counsel for the Union submitted that because of her involvement she ought not to played any further role. She responded that after her initial response she had left that matter to the Chair of the CAS Board.

In cross-examination the Grievor testified that he deeply regretted having used the matter of Ms. Boon's son in his application for workers' compensation, adding "I was in a pretty bad way at the time".

I will return to this below in considering the Union submission that Ms. Boone did not act in good faith in discharging the Grievor. I do point out here, however, that nothing relating to this is in any other way an aspect of the discipline and discharge under consideration in this Award.

Returning to the chronological statement of the facts; shortly after Ms. Boone became Executive Director in September, 1999 she had a request from the Grievor that he be moved to the Sydney office "to make a fresh start". She granted this request. At an initial interview, which was the Grievor's first official meeting with Ms. Boone after she had become Executive Director, there was a discussion of "five or six" concerns she had.

One of the first things the Grievor did at that meeting was to raise with Ms. Boone an item her predecessor had included in the Grievor's file, which he felt was unfair. It dealt with an occasion upon which the Grievor had swapped duties with Ms. Boone, and he was sure she agreed with him that the Executive Director's recorded assessment of his behaviour on that occasion had been unfair. He asked her to "get rid of this garbage". She replied that she could not change "a matter of record". He testified that her response "shocked him" and that he "sensed from her demeanour that this was probably a matter that is coming back to haunt me." For the remainder of the meeting, the Grievor testified, he was "not really concentrating".

Ms. Boone then raised what she perceived to be the Grievor's "lack of commitment to the mission statement", lack of leadership and lack of direction to the office.

They briefly discussed the Grievor's past difficulties with alcohol, but did not get into treatment details. The Grievor stated his perception that the previous executive Director had been "out to get him", and the discussion moved on to how it would be for Ms. Boone to be his supervisor. He testified that his feeling in this meeting was "this was not the lady I knew".

On December 2, 1999 Ms. Boone wrote to the Grievor, following up on a September 30 meeting in her office about his work performance as Unit Director, specifically about his failures to record his absences from the office properly on his timesheet. She stated that she had imposed a one day suspension and a three month probationary period on him. Ms. Boone testified that she subsequently decided not impose the suspension and the probationary period, because the Grievor convinced her that it was not necessary; that he had depended unduly on secretarial assistance and reminders from the accounting department in these matters and that he would adopt a new office procedure, using a board to show absences and availability, which would be transferred to a time sheet on a regular basis. This, he testified, was the system he had used in Glace Bay. Ms. Boone also noted in the letter that he had agreed to contact her whenever he was out of the office.

Difficulties with the Grievor's reporting of his absences from work persisted for the remainder of his time as Unit Director. At a supervision session on April 25, 2000 Ms. Boone raised with him the fact that he had not called in on two days when he was sick the previous week, as they had agreed he would do. His response was to ask for how long he would have to do that, and they agreed on six

months. As shown by a letter from Ms. Boone to the Grievor of September 7, 2000, which is in evidence, he failed to record a vacation day on July 7 and did not report that he was off sick on September 5.

The Grievor testified that his reaction to the suggestion of discipline at the November 30 meeting was that "it was just a matter of time and I'd be out the door".

There are two other documents about a disagreement between Ms. Boone and the Grievor which he addressed in his testimony, apparently in support of the position that she "was out to get him". They arose out of management team discussion and the decision about how a new staff position should used. On June 28, 2000 the Grievor and his fellow Unit Director in the Sydney office at the time wrote to Ms. Boone:

> We wish to summarize an important part of our supervision session yesterday. It is in regards to decision making practices between yourself and the administrative staff. It is our understanding you stated there is some form of dissension between the supervisors and yourself.. You then stated, "that this is what is wrong with this Agency". ...
>
> What you are saying to us is that whatever decisions are made by you, in spite of our contrary opinion, we (the supervisors) are to present the decision back to staff as if we fully agree. You feel it should be this way so that you will not be blamed by staff as the person making these decisions. When it was pointed out to you that this would not be a democratic process, you agreed.
>
> Further, you indicated at the Friday, June 23/00 Directors' Meeting that if we were not happy with the decisions you were making, we should re-think whether we want to stay with the Agency as supervisors.

> This style of administration raises a lot of concern for us. This sums up our understanding of your position on the decision making process in the Agency.

Under date of July 11, Ms. Boone replied:

> ... My comments during the June 27th supervision meeting regarding decision-making practice and the Management Team's delivery of the decision to agency staff were the same as those I stated at our June 23rd Directors' meeting.
>
> What I did say was that my decision-making process would include consultation with the Unit Directors, listening and giving consideration to their response. Depending on the type of decision being made, I might find it necessary to consult others .... I would hope that we, as the Management Team, would reach consensus regarding the decision. If that is not possible, then I, as Executive Director of our Agency, will make the decision and take full responsibility. I would then expect the decision to be implemented.
>
> In addition, during our discussions, I stated that I do believe the manner in which decisions are delivered back to staff has great impact on the way in which the decision is implemented. Unit Directors have a responsibility to help staff manage and accept change and your support for change is essential for successful implementation.
> ...

On August 29, 2000 the Grievor applied for a posted Children in Care Worker position in the bargaining unit. He testified that he did so because he felt Ms. Boone "wanted me out", that he "knew there would be trouble down the road" and wanted the protection of the Union. He also testified that work as a Children in Care Worker would be less stressful and was a position often sought by senior social workers.

The Grievor was awarded the position on September 12, but because of illness did not assume his duties until Monday, November 6, 2000. Ms. Boone testified to her

meeting with the Grievor about this application on September 5, her notes of which are in evidence. The Grievor told her that he thought the Children in Care Worker job would be less stressful. According to Ms. Boone's notes she then asked "if any of the differences he and I have experienced over the recent months had impacted his decision to apply for the field position". This led the Grievor to express his continuing disappointment that Ms. Boone had "sided with" the previous Executive Director and to Ms. Boone expressing concern about his willingness to support her decisions and "the direction we were moving as an agency", and to take direction from a Supervisor. According to Ms. Boone, the Grievor said "he expected John or Shaun would be his supervisor and he expected he could work well with them", and he confirmed this in his testimony, although he testified that he "had some reservations" about Mr. Janega.

Ms. Boone told the Grievor she would have to share her concerns with his Supervisor, specifically those having to do with notification of absences from the office, which led him to raise the difficulty he felt with not having his own secretary to deal with such administrative details. Mairi MacLean was the Grievor's Supervisor very briefly, until John Janega moved from Glace Bay to become a Unit Director in the Sydney office.

Ms. Boone testified that when John Janega become the Grievor's Supervisor, she told him only what he needed to know, in terms of absences, so that the Grievor's "fresh start" would not be "contaminated". She stated that the Grievor was not "singled out"; that she and the supervisors were concerned with other staff who

allowed overtime to accumulate to a point where taking time off affected their responsibilities.

I need not, and will not attempt to, sort out the rights and wrongs of the Grievor's time in management. Therefore, I have not detailed Ms. Boone's testimony, or the Grievor's, about his performance as Unit Director. It is clear that the Grievor was often not in his office, and was not good at staying in touch with his office and letting both his superiors and those who reported to him know where he was. Those shortcomings continued after he returned to the bargaining unit as a Children in Care Worker.

There was a good deal of testimony about the Grievor's absences from the Sydney office after he came back as a Children in Care Worker, but I will not detail that evidence here either. I accept that the Grievor did not deliberately misinform the Employer about these absences, but he did, on several occasions, fail to comply with the administrative practices in the office. The Grievor was relatively frequently not in the office because of overtime he built up by working stand-by.

Social workers for the Employer build up overtime mainly by working stand-by; that is by being the staff member on call outside regular working hours. Those on standby on a weekend also get the following Monday off. Under the Collective Agreement stand-by is administered by the Union. The normal schedule would call for each social worker in the Agency to take two weeks a year on standby. Each Social Worker can work his or her share of stand-by, but those who chose not to can give up their turns and those who want more than their share can fill in.

The Grievor testified that he may have done about three weeks a year, partly because he enjoyed protection work. This was not disputed. Overtime is taken in either pay or time off, with constraints the details of which are not of concern here. The Grievor testified that he much preferred to take his built up overtime in time off.

In cross-examination Ms. Boone testified that there were no performance issues in the Grievor's first thirteen months back in the bargaining unit other than his unreported absences.

The parts of the position description for a Children in Care Worker with the Employer which are relevant to the suspension and discharge of the Grievor are:

> **POSITION SCOPE**
> Under the supervision of the Casework Supervisor, has responsibility for the planning and supervision of children in permanent care and custody and, at times, children in long-term temporary agreements and temporary care orders before the court. Provides casework supervision to children in their living environment which may include foster care, group home, institution or an independent living arrangement. ...
>
> The duties in this position have changed significantly in recent years and it reflects the changing population of Children in Care....
>
> ---
>
> **TYPICAL DUTIES...**
>
> 1. provides casework services to children regarding separation and loss issues associated with leaving their own home ad adjusting to a new family school and community.
>
> 2. evaluates the child's ... needs and the progress being made...
>
> 3. selects and coordinates resources and services which

the child should have to meet his total needs

...

[counselling of various kinds, etc.]

...

15. recording duties which include ongoing maintenance of files for each Children in Care and updating of computer case management system

Occasional Duties:

1. ensures that the child receives annual medical and dental care and other treatment when indicated

...

FACTORS PRESENT IN THE POSITION KNOWLEDGE/SPECIAL SKILLS REQUIRED:

See CSC approved Professional (PR) Position Qualifications Guide for Caseworker III An understanding of the normal developmental needs of children ...; ability to write comprehensive but succinct reports; ability to communicate verbally

...

RESPONSIBILITY FOR DECISIONS AFFECTING COSTS/ RESPONSIBILITY FOR EQUIPMENT AND MATERIALS

a) **Direct Responsibility:**
- planning of own daily work schedule in order to do most efficient job and make the most effective use of time available

b) **Indirect Responsibility:**
- careful control of the purchase of clothing, etc., for children under care
- monitoring of special needs requirements

PHYSICAL, MENTAL, VISUAL DEMANDS

Stable personality with good physical, mental and emotional health to deal with a wide variety of situations, some of which may be stressful and dangerous.

The Employer emphasized #15, "recording duties", in the list of "typical duties", and counsel for the Employer called as his first witness Carol MacLellan, MSW, RSW, Child Welfare Specialist with the Provincial Department of Community Services, responsible for the Eastern Region. Ms. MacLellan's qualification as an

expert witness on Child Protection Standards was agreed to by the Union. I will deal here with Ms. MacLellan's testimony with respect to case recording, and return below to her testimony about the Child Protection Standards relevant to the culminating incident.

Ms. MacLellan testified that agencies such as the Employer derive their authority from the Minister of Community Services under the *Children and Family Services Act*, 1990, which states:

> **2 (1)** The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> **Paramount consideration**
>
> **(2)** In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s. 2.

That authority, and the Agencies' funding, is conditioned on the requirement that they meet the standards adopted by the Department of Community Services. The Standards relevant to Children in Care are set out in the *Manual of Procedure: Children in Permanent Care and Custody of the Minister*, which is in evidence. It states, at p. 62 under the heading "20. Children in Care and Custody Files

20.1 Recording":

> The casework that is done with and on behalf of Children in Care and custody is of tremendous importance. For many Children in Care and custody, the case files

> are the only record of the circumstances when they came into care, background information and significant events while in care and custody.
>
> The goals for the care of the Foster Child and progress toward meeting these goals must be recorded to ensure continuity and an ongoing evaluation of the plan of care.

The *Manual* continues, under the heading "20.2 Contents and Maintenance of Children in Care and Custody Files Standard", to set out precisely what is required. It lists "a) Admission and placement documentation" with twelve specifics, b) "Recording casework plans or reviews" with seven specifics and finally, in addition to all of those specifics, c) "Recording of significant events."

Ms. MacLellan also referred to the *Social Work Code of Ethics* of the Canadian Association of Social Workers, which, while much less detailed, parallels the Province's standards of documentation and underlines the recognition of the importance of record keeping in social work generally. The most relevant elements of the *Code of Ethics* are:

> 5.10 The social worker shall record all relevant information, and keep all relevant documents on file.
>
> ...
>
> 5.13 The social worker who is employed by a social agency that delivers social work services to clients is responsible
>
> (a) to the client for maintaining the client record, and
>
> (b) to the agency to maintain the records to facilitate the objectives of the agency.

The Grievor's failures to meet the Standards of documentation, which led first to the two day suspension of February 7, 2002 and then to the five day suspension of March 17, 2003 were testified to by his Supervisor, John Janega, as well as by Ms. Boone.

Mr. Janega has done social work since 1977, and received his BSW in 1988. He has been a child protection worker, an adolescent worker and a Children in Care worker with the Employer. In November of 2000 he became one of the two Unit Directors in the Employer's Sydney office. The Sydney office was, Mr. Janega testified, in a state of flux, with new social workers, overworked and underpaid, and two new supervisors. Mr. Janega tried to set up monthly supervisions with everybody, but focussed on intake, and on new social workers. Ms. Boone was aware of this and supported Mr. Janega's priorities.

When the Grievor began work as a Children in Care Worker on November 6, 2000 Mr. Janega became his Casework Supervisor. He testified that he had had no complaints from Grievor's clients; children, foster parents or parents from then until the Grievor's termination. It is not the Employer's practice to seek out client assessment of social workers.

The Standards for child care work demand that the social worker consult with his or her Supervisor, or a least a Supervisor, at a number of stated decision points. They also require periodic file reviews with the Supervisor. It is clear that this relationship was difficult for the Grievor, and for Mr. Janega, who had known the Grievor since 1983, had been supervised by him briefly and claimed to have

respected him as better educated and more experienced, but Mr. Janega "knew the Grievor's history". Mr. Janega had applied for the Director's position that was awarded to the Grievor, but denied that having lost to the Grievor affected his relationship with the Grievor at all. He testified, simply, that he thought the previous Executive Director had made a mistake in not choosing him because of his more diverse child welfare experience.

On the evidence, Mr. Janega had no concern with the Grievor's performance as a Children in Care Worker for over a year. There were no serious or documented performance concerns for some thirteen months.

Mr. Janega's first concern, as evidenced by e-mails in evidence, was with the Grievor's use of overtime. The following e-mail to the Grievor of November 27, 2001 captures the appropriate managerial nature of Mr. Janega's concern:

> Good Day: In reviewing the recent information provided from the accounting office and the policy pertaining to this matter, your banked time (69.83 hrs.) is in excess of the policy. The policy states Ot worked can be banked to a total of 2 days and the time in excess must be used up within 30 days. Given the demands of operational requirements we need to reduce your time in line with the policy. I would appreciate hearing you intentions in regard to complying with the policy, thanks!

At about one week intervals Mr. Janega then e-mailed the Grievor, trying to set a meeting on this issue. By December 11 he had added the issue of "your not being here last Friday, how was this recorded on your time sheet!"

By the end of December Mr. Janega had become "very concerned" with the Grievor's case documentation, which he discussed with Ms. Boone, the Executive Director. Ms. Boone testified that when this was addressed it became apparent that there had been a problem for some time.

Mr. Janega testified that "every contact with a child in care must be recorded and should be on the computer ... when, who was there, what was said, how did the child seem; specifics depending on the purpose of the visit ... the story of the child's life in care". He stated that "The Agency has responsibility as a corporate parent to show what we've done to, with and for these children. We are accountable publicly and in terms of liability - we must show that we have lived up to our mandate". This view was shared by Ms. Boone.

Mr. Janega conceded that it is not "outrageous" if there is no note of a particular contact with a child in care, but he noted that while documentation is care related it is also an administrative document, which allows for checks and balances through monthly expense claims and daily logs.

The first documentary evidence of this concern is in an e-mail to the Grievor of December 21, 2001:

> Jim; I believe we need to meet next week while the office isn't very busy. I checked all of your computer files and I wasn't able to find any client contacts/events recorded. I selected a small sample of paper files to review and there were no written contacts therein. You are aware of the Agencies practice of recording client contacts as well as the practice of keeping client contact records as a professional responsibility of Social Work. So can we meet next Wednesday Dec. 27/01 to discuss this situation! Thank you for your attention to this matter!

The Grievor acknowledged in his testimony that he was, in fact, behind in his case recording, but testified that this e-mail "dropped like a bomb".

On Jan 2, 2002 Mr. Janega again e-mailed with regard to "case recording"

> Jim, I am doing a follow up of our discussion last week relating to the status of your case documentation. I believe your response to the lack of recording was you "don't like doing recording" but that you would undertake to do case summaries to bring these cases up to date. You suggested starting in the new year! What we need in this regard is a date of completion of same, might I suggest the first of February 2002. You agreed also that the record of involvement is of significance to and a right of the client and that starting in this new year you will maintain accurate involvement of each case file. Is this your recollection of the outcome of the discussion? I await your response, thank you!

Ms. Boone testified that in her opinion this failure to document constituted non-compliance by the Grievor with his job description. Because, in her opinion, he knew the importance of documentation and fully understood the consequences for children and the Agency, she decided this was not a training problem.

Through the month of January, 2002 Mr. Janega became increasingly dissatisfied with the Grievor, and vice versa. On January 28, he refused the Grievor's request of certified time off (earned by working standby) for the March break, because the Grievor had undertaken to bring his documentation up to par and had not done that. In Mr. Janega's opinion the Grievor should have taken his overtime as a payout, and did not have a heavy case load. The Grievor requested exemption from a training program on adolescent violence which Mr. Janega refused to grant. In his testimony the Grievor described this as harassment.

On February 4, 2002 the Grievor's case documentation, taking time away from work without prior approval and an issue about how he had dealt with a particular child in protection over the Christmas period while he was on standby were the subject of a stormy meeting, attended by the Grievor, his Union representative, at the Grievor's request, and the other Unit Director in the office, Mairi MacLean. The meeting started with Mr. Janega saying "I hear you are going around telling people Children in Care is part time work". The Grievor testified that he had made that joking comparison with Child Protection work, and was taken aback that this was being said to him seriously. Mr. Janega followed that with "You're unprofessional" in not bringing your case recording up to date. The discussion then degenerated into, in the Grievor's term, a "childish" exchange as to who would set the date by which this should be accomplished. At the conclusion the Grievor "bounced his chair right to [Mr. Janega's] knee and stuck his right finger in [his] face" before leaving the room, with the statement "John, you might intimidate these people, but not me". The Grievor testified that he then went to his office, took anxiety medication and then drove home, with great difficulty. This led to the February 7, 2002 letter imposing the two day suspension. That suspension was not grieved. The meeting itself was the main incident of "uncooperative and insolent behaviour", along with the failings to document and absences form the office.

In this connection I heard considerable testimony about the matter of how the Grievor had dealt with a particular child in protection while he was on standby over the Christmas period. The Grievor had volunteered for standby for three days

over Christmas. A female child had been taken into protection and placed in a temporary foster home. At her request and her mother's, on Christmas day the Grievor took her to visit her mother. He did this without the approval of a supervisor, as was required by the Standards. When he was criticised for this by Mr. Janega his reply was, "It was Christmas", and in effect that was still his position when he testified. Mr. Janega explained in his testimony that it was not for the Grievor to balance the necessity of making the visit and of having accompaniment in the car. That sort of determination, he said, for the supervisor under the applicable standards for making casework decisions.
Also, when the Grievor was to go to pick up the child and take her back to the foster home he could not find another employee of the Agency to go with him, as policy demands. He therefore took his brother-in-law with him.

The whole visit was without incident, but clearly did involve a breach of Standards, and, as Mr. Janega stressed, a breach of confidentiality in involving someone outside the Agency with a client. When Mr. Janega asked who the accompanying non-employee had been the Grievor refused to tell him.

Following his suspension of February 7, 2002 the Grievor went off work because of illness. He was granted sick leave for this period. He testified that he suffered from stress and depression, brought on by the fact that he felt "there was a plot to get me out the door". In a letter dated August 7, 2002 Ms. Boone notes that as of that date he had no sick days remaining and goes on to state "I am advised that our office has received a doctor's certificate stating that you will be able to return to work until September, 2002". The Grievor testified that he was first diagnosed as

having an anxiety problem when he went in for his first residential treatment for alcohol abuse in the Spring of 1997. Since then he said it has been "situational". The only medical evidence of this before me is a doctor's note dated March 12/02 which states "the above named patient suffers with work-related stress which is being treated with medication and will be followed up by a specialist."

The Grievor returned to work in early September 2002. He met briefly with Mr. Janega and a Union representative. According to Mr. Janega's testimony, at that meeting the Grievor said that he just wanted to get on with his job. On September 9 he wrote to Ms. Boone in response to her February 7 letter imposing the two day suspension;

> Re: Letter dated February 7, 2002
>
> Supervisor John Janega has directed me to respond to the above-noted letter sent to me regarding suspension of pay.
>
> It is clear to me today after seven months of stress induced medical leave that my actions at the time, as perceived by others, were a result of the shrouded stressful state I was in.
>
> Feeling much more invigorated, I welcome the opportunity, with the help of my colleagues and the Agency to carry out my tasks. I will abide by the rules and procedures as laid out by the Agency.

The Grievor testified that he "was told to write that letter" and did so "to appease the administrators".

Mr. Janega testified that he tried to establish regular supervisions with the Grievor because he was just back at work. This is evidenced by an e-mail from Mr. Janega to the Grievor of September 11, 2002:

> Jim,
> We need to develop a schedule for regular supervision! I am proposing we meet every Wednesday for this purpose. What are your thoughts on this.
> Further to your question, last week regarding your case documentation, please ensure all case notes are recorded on the computer. We can review same at the supervision sessions. Thank you!
> John

The first supervision meeting was set for September 18, and on the 19th Mr. Janega responded affirmatively to the Grievor's e-mail summary of what had transpired adding:

> Also we discussed the use of the computer (case documentation process) for case recording! You suggested up to this point you utilized a mixed approach (hand written and brief computer notes) but the use of the computer would take more time!
> Since your return to work I am glad to see you are practicing your typing skills. Good work, keep it up!

The evidence is that the Department of Communication Services has an employee in the building which houses the CAS, and offers computer training, including keyboard skills. The Grievor never took advantage of that service, but, on the other hand, it would appear that he was never specifically directed to it.

On the evidence, the next couple of months were uneventful. Ms. Boone testified that Mr. Janega told her the Grievor was being completely responsible.

Supervisions soon became bi-weekly. However, the issue of case documentation arose again in mid-November. Mr. Janega e-mailed the Grievor on November 15;

> Jim;
> I have been looking at your case documentation and it appears there is a significant gap in the completion of BF's. We need to set a date by which all outstanding BF's on your caseload are brought up to standard. Let's discuss this Monday morning, thanks!
> John

BF's are computer generated reminders of actions to be taken at points dictated by the applicable standards. The BF is "taken off" by making an entry, regardless of its content. By November 2 the Grievor had satisfied the requirement that his BF's be attended to.

Mr. Janega testified that the Grievor had taken stand-by though the Autumn and, as a result, by the new year a gap had developed in his case documentation. The Grievor testified that there were two particular cases to which he was paying a disproportionate amount of attention at the time. However, there is no basis in the evidence upon which I can find that the Grievor had an unduly heavy workload, such that he could not have met the standards for case recording.

On January 7, 2003 Mr. Janega e-mailed the Grievor:

> Jim:
> At our last supervision discussion in December you stated that you were behind in your recording and that you would be working through Christmas to bring it up to date. I was doing some checking and your documentation is falling behind the standard. Since this has been a problem in the past we need to ensure it is brought

up to standard and maintained accordingly. Can we discuss how you plan to accomplish this at our next supervision session this week. Thanks!
John

The upshot was the five day suspension starting March 17,which is the subject of one of the two Grievances before me here. The suspension followed a meeting between Marie Boone, Mr. Janega, Scott Clarke, Vice President, Local 3010 as the Grievor's Union Representative, and the Grievor. Ms. Boone's notes of that meeting are in evidence. After referring to the Grievor's two day suspension the previous February, the notes go on:

John stated that when Jim returned to work in Sept/02 he made a verbal commitment to him and wrote a letter to me stating he would fulfil his responsibilities. Jim failed to keep his word. He did not complete required documentation and John said that on Dec 1/02 Jim committed to having the documentation completed by Jan./03 John said that still the required documentation is not completed. John asked Jim for a solution to this problem.? Asked what is the reason for lack of documentation. Jim said he is busy, especially with two children on his caseloading "running with them every day".

John said that Jim had a reasonable caseload and reviewed the caseload names, # of children in the same foster home and # of subsidized adoptions requiring little service. John tried to show that with this workload documentation should be up to date, still documentation is seriously lacking. B.F.'s are completed but little else.

Jim shrugged his shoulders & said nothing.

I then said that the reason he gives for not completing his documentation is not accepted. I said Jim you are not fulfilling your obligations as an employee and therefore I am suspending you for one week, effective immediately. I then asked him to bring a written Action Plan outlining how he will bring his documentation up to date with him when he returns to work on Monday. I advised him that he is to have his documentation up to an acceptable level within 4 weeks of his return to work. I told him failure to do so would result in his dismissal.

I also told him that if he goes on sick leave as he did in the past I would require him to see a doctor chosen by our agency.

My last words were "Jim, I wish you would do your documentation".

Jim and Scott then left.

On March 19, Arden White, President of the Union Local sent Ms. Boone the following e-mail:

> Marie:
>
> I am writing to you on behalf of the executive of Local 3010 in regards to Jim MacNeil and supervisor John Janega.
>
> We are requesting a meeting in regards to the above and would like to speak about giving both parties a much needed break from one another. We are requesting that Jim upon his return work be supervised by someone other than John Janega as we feel in fairness to both, they need a break from on another. We are not suggesting in any way that John or Jim are the problem but feel they both need a break.
>
> We request this without prejudice and hope you will take this under consideration. Respectfully submitted.

Ms. Boone testified that she had told Mr. White that she did not believe that the issue was one of personality conflict, but that if the change was what the Union and the Grievor wanted she would do it. Mairi MacLean agreed to take on the supervision of the Grievor when he returned to work.

On March 23 the Grievor sent John Janega an e-mail, copied to Marie Boone, which he apparently thought constituted the "written action plan" required by Ms. Boone. It stated:

> 1. set aside times daily to do recording
> 2. work overtime without pay if required
>
> now, for some assistance.
> do you want a certain form of case recording?

may I have some computer training- particularly for typing.
a micro-cassette would be helpful as well to record my interviews and this would assist me.
may I have a copy of the standards for Children in Care?
I would like to review my caseload with you, e.g. [a girl] asked to be switched to another worker over a year ago because she felt that I had a conflict of interest with her case.
again, if there is anything specific you want in recordings I would like to know.
Thanks,
Jim

Ms. Boone testified that she saw this as a further example of the Grievor's insubordinate and uncooperative attitude. I consider it evidence of what the Employer has termed "habitual neglect of duty" in the letter of termination.

On March 24 the Grievor and Scott Clark of the Union met with Ms. Boone, Mr. Janega, and the other Unit Director in the Sydney Office, Mairi MacLean, to discuss the "written action plan" required by Ms. Boone. The Grievor said he was not familiar with what an "action plan" was and Ms. MacLean elaborated. Later that day the Grievor met with Ms. MacLean and then wrote her a letter of that date enclosing a skimpy document, listing "clients and the dates their recordings will be brought up to date". The letter states "I reviewed the enclosed with Scott Clarke and he feels this is the gist of the request from the meeting today." Ms. MacLean and Ms. Boone accepted the document as the "written action plan" required.

That was how things stood on March 25 when Constable Wayne Forgeron visited the Employer's Sydney office to check with the Grievor on the follow-up of the referral he had made to the Agency while the Grievor was the stand-by worker on March on 1st.

The "culminating" incident. In proving the incident it has put forward as the "culminating" one that justified the termination of the Grievor the Employer relied heavily on the evidence of Constable Wayne Forgeron of Cape Breton Regional Police Service. To give context to Constable Forgeron's testimony, counsel for the Employer called Inspector Miles Burke, who is in charge of the Eastern Division of Cape Breton Regional Police Service. Inspector Burke testified to the "protocol" between the Police and CAS Cape Breton-Victoria arising out of the report entitled *Child Physical/Sexual Abuse[,] Family Violence Prevention Initiative[,] Procedures for a Co-ordinated response for victims of Family Violence*, dated 1994. The protocol, he testified in cross-examination, is not written, but is rather a set of practices.

In accordance with that protocol when a police officer receives a call or encounters a situation which he or she feels is a matter for the CAS the officer calls the CAS office or, if after hours, the 911 service, which calls the CAS standby number. The CAS worker on standby then calls the police officer directly. Following their conversation, assuming no further police role, the police officer is required to document the incident and the discussion with the CAS worker by a computer entry, based on his or her notebook. Unless there is an emergency situation, calling for an arrest for example, from a police point of view that ends the matter, except for a follow-up of the CAS investigation and standard internal supervisory review of the file. The police sergeant responsible for the management of the case would expect to see that the CAS had been contacted on the date of the incident and that there had been a follow-up of the CAS investigation within

twenty-eight days, unless the officer involved had requested an extension. It is not the practice to send a copy of the police incident report to the CAS worker, although there may be further contact, if charges were being laid, for instance, in which case the police would work with the CAS.

With the system now in place once the police officer's incident report is complete it cannot be changed, by him or her, the sergeant or the inspector. All that can be done to correct any error or omission is the filing of a supplementary note.

It is crucial, Inspector Burke testified, that there be proper investigation and follow-up by the CAS, because there is heightened public awareness of violence involving youth, due to some high profile cases that have "fallen though the cracks". Inspector Burke also testified to the importance of a good working relationship between the Regional Police and the CAS.

Constable Wayne Forgeron testified, essentially reiterating the contents of the *General Occurrence Report* he entered into the police computer on 2003/03/01 at 17:38, which is in evidence. Although nothing turns on this, I note that Constable Forgeron did add the final four short paragraphs to this *Report* the next day, because, being then unfamiliar with the system, he had not clicked on "complete" at the end of his entry on March 1. In his testimony he also essentially reiterated the contents of the *Supplementary Occurrence Report* which he entered on 2003/03/25 at 10:40. I will set out those reports here because they capture the essence of what the Employer has relied on as the culminating incident justifying the termination of the Grievor's employment. I have omitted the names of the

people involved in the incident, identifying them simply and "the mother", "the father", "the boy" and "the girl".

The relevant passages in Constable Forgeron's *General Occurrence Report* are:

> On Saturday, March 1st, 2003 Police Cst. Wayne Forgeron, responded to [an address] Sydney, where he met with [the mother], who reported that she has been receiving nuisance phone calls from her ex-husband, [the father]. [The mother] stated that [the father] is at his residence and is intoxicated and that he continues to call her residence just being a nuisance. [The father] hasn't threatened [the mother] but he just continues to call her looking for a part of a video game. [The mother] doesn't fear [the father] what-so-ever. [The mother] just requested the police speak to [the father] and ask him to stop calling her.
>
> While speaking with [the mother], she advised writer that her two children, [the boy] age 12 and [the girl], age 14 have been victims of physical abuse at the hands of their father, [the father]. [The boy] is in Grade 7 at [a school] while [the girl] is in Grade 8.
>
> [The mother] further stated that [the father] has pulled clumps of hair our of [the boy's] head, he beats him with a belt and throws beer bottles at him. [The girl] reported that her father threw a steak knife at her last summer.
>
> [The father] apparently has legal custody of the two children, but [the girl] moved in with her mother when she was 11 yrs old. [The boy] still reside with his father, however he stays at his mother's residence on the weekends.
>
> [The girl] stated that her father spends all his money on liquor and only feeds [the boy] cereal and toast. [The boy] appears to be very thin for a boy of his age. He is 5'2" and only weighs @70-80lbs.
>
> [The mother] was advised to keep both children at her residence and not let them return to their father's residence. [The mother] was also advised that Children's Aid will be notified of the incident.
>
> Writer called Children's Aid and spoke with Jim MacNeil and advised him of the situation. MacNeil was advised that the children are in no immediate danger. MacNeil stated that he would speak with [the mother] and his agency will follow up the matter on Monday.

Constable Forgeron testified that where he finds abuse between husband and wife but not of children directly he might send a fax report to the CAS, but where, as here, there is an "outright allegation of child abuse" he calls the CAS. He testified that he did not make a note of what he details provided to the Grievor, and that he could not say for sure that he had told the Grievor that the father had struck Joey with a belt or otherwise assaulted him, but testified that he "would have" told the Grievor the details that appear in the his *General Occurrence Report* of the incident, stressing that the children were not in immediate danger, and that the incidents happened "six months ago" and "last summer". He testified that he told the Grievor that he was concerned because of the "clumps of hair" and the "steak knife throwing". In cross-examination, he testified that those matters were why he called CAS, although he had no actual present memory of the specifics of the conversation. When counsel pointed out that beating with a belt and throwing beer bottles must also have been of concern, Constable Forgeron reiterated that he could not remember which he told the Grievor about, but those assaults were the reasons for involving the CAS.

Constable Forgeron's *General Occurrence Report* continues with paragraphs evidently added the next day, as explained above:

> 1900hrs Writer attended at [an address] and spoke to [the father] and advised him to stop calling [the mother]. [The father] appeared intoxicated at the time and he stated he will stop calling [the mother] if she stops calling him.
>
> 1000hrs on March 2nd, 2003, Writer spoke to [the mother] and relayed to her the outcome of his encounter with [the father]. [The mother] stated that she hasn't

> called [the father] in several months. [The mother] was satisfied with the outcome of this matter.
>
> The matter involving her children remains under investigation.
>
> [The father] was place on F.I.P. category regarding this file.

Constable Forgeron testified in cross examination that he could not recall whether the mother had said anything to him about getting the daughter's clothes from the father. He testified that he could not recall any conversation with the Grievor to the effect that the mother wanted the CAS to call her and say it was alright for her to keep the children, with respect to transferring Joey to his mother's house or asking the Grievor to call the father.

Constable Forgeron stressed in direct examination that the Grievor had said he would call the mother and that the CAS "would follow up the matter on Monday".

The Grievor testified that he was at home on March 1st, on stand-by, when he received Constable Forgeron's call. His informal hand written notes, on "Children's Aid Society of Cape Breton-Victoria [,] CASE NOTES" letterhead notepad paper, made contemporaneously with the phone call to him by Constable Forgeron, are:

> [The mother] called ex-husband at his residence calling her over & over.
> [The mother] says ex-husband abusing kids & threatening kids.
> Ex - has legal custody of [the boy].
> [The boy] went to stay [with] mom last night
> Father problem [with] alcohol - people dropping in etc.

[The girl] stays [with] mother - sick of father's behaviour (e.g. last summer threw steak knife at her) reported.

Kids attend [a school] [the girl] G8 [the boy] G7

Father spends all money on alcohol.
[The boy] 5'2" very thin - [the boy] dad feeds toast & cereal.

Police - would CAS call mom & say OK to keep children

The Grievor testified that both while talking to Constable Forgeron and after talking to the mother he perceived Constable Forgeron's call to be about an access dispute. Access disputes are not CAS matters, although CAS gets many such calls. He testified that he did not understand that the call was to report child abuse. In this context I note that the Grievor's own record of his conversation with Constable Forgeron includes the sentence "[The mother] says ex-husband abusing kids & threatening kids." He testified that he understood Constable Forgeron to say that the throwing of the steak knife the previous summer had been reported at the time. That, therefore, was not an indication of a child at risk.

When asked in cross-examination why he had not simply told Constable Forgeron that this was not a CAS matter he answered that he always tried to maintain good relations with the police, so he said he would call the mother.

The Grievor's note goes on:

I pl call to [the mother] [phone #]

The Grievor testified that the mother wanted someone in authority to say that it was alright for the children to make up their minds that they wanted to stay with her. His note continues:

> Children OK to stay [with] mom - [the boy]wants to now but children need clothes
>
> [The mother] asked me to call father to send clothes to her.
>
> Ph Call to [the father] [phone #](busy)

The Grievor testified that he must have made the mistake of using his home phone to call the father, because the father called him back the next morning, sounding sober. The Grievor told him that the mother wanted the boy's clothes and asked him if there was any problem. The father said no, so the Grievor called the mother, who arranged for the girl to go down and get the clothes. That, the Grievor testified, was the end of it as far as he was concerned. He did not consider the matter an intake and thought it would not have been accepted as an intake. I find that the Grievor did in fact make the calls to which he testified. His evidence in that respect was not rebutted.

The Grievor testified at length about another case he had dealt with while on standby which had been rejected for intake by the intake meeting, including Mr. Janega, as being a police matter. I return to that testimony below, in assessing the evidence of this culminating incident and the misconduct involved .

However, the Grievor testified that, in retrospect, he realized that he should have written up Constable Forgeron's call and the actions he took on the basis of it as a case note, "just for information, even though it would not have been acted upon". An intake goes to an "intake meeting"; a case note would have been discussed with his supervisor only.

I find that the Grievor did in fact tell Constable Forgeron in the course of their telephone conversation on Saturday March 1st that the matter would be followed up on that Monday, and then did not do so.

In cross-examination the Grievor was asked why he had entered the phone call in his charge sheet if it was not a CAS matter. He replied that the Collective Agreement provides that two hours overtime can be charged for any phone call. I note that Ms. Boone testified that she had been shocked to discover that the Grievor had put the call on his charge sheet but had not followed up with the police. On the facts as I have found them, the Grievor quite appropriately charged for the phone call and did not otherwise simply disregard the incident. He mistakenly considered it not an intake and not a matter upon which he had to take further action.

On March 25 Constable Forgeron went to the CAS office to see the Grievor about the follow-up on this matter because, he testified, the twenty-eight day period for follow-up on the file was coming up and he realized he had not heard anything. He testified in cross-examination that revisiting the file that day might have "come to him as a task". He could not recall, and testified that he "didn't think" he had had a

discussion with his sergeant before going to the CAS office. He testified that he was concerned that someone else on the Police force, such as the youth officer might have been contacted, so he went in person to the CAS office to talk to the Grievor.

Constable Forgeron testified that the Grievor's "face dropped" when he read from his own notes of their conversation that the father "threw a knife". Constable Forgeron went back to the Police station and told his sergeant that there would "be some phone calls" and that he wanted to document his visit to the CAS immediately. He then entered the following *Supplementary Occurrence Report*:

> On Tuesday March 25th, 2003 writer attended the Children's Aid office on Prince St., to conduct a follow-up investigation on the allegations of Child Abuse. Writer met with Jim MacNeil, the case worker that writer had spoken to on March 1st, 2003, the date that the incident was reported to Police.
>
> Mr. MacNeil stated that he recalled the incident and that he did make contact with [the mother], the complainant. Mr. MacNeil further stated that he also contacted [the father], the accused in this matter.
>
> Mr. MacNeil stated that he recalled that [the mother's] daughter wanted to get the rest of her clothes from her [the father's] residence and he recalled that he thought he took care of the matter and there was nothing more to it.
>
> Writer reminded Mr. MacNeil the reason the Children's Aid was notified of the incident was because of the allegations of abuse. ([The girl] stated that her father threw a steak knife at her and [the boy] stated that his father pulled clumps of hair out of his head).
>
> Mr. MacNeil wasn't certain if he had done a formal report on the matter, and initially wasn't sure if he still had his notes on the matter. Mr. MacNeil sifted through some papers on his desk and did find the notes from the conversation he had with the writer on March 1st, 2003, regarding this complaint. Mr. MacNeil read aloud his note pad and he read the notes he made regarding the allegation that [the father] had thrown a knife at his daughter [the girl].

> Mr. MacNeil realized that he had overlooked the "knife incident" and he stated that he would do up a formal report on the allegations and contact writer on the afternoon of this report.

The Grievor testified that when Constable Forgeron told him on the morning of the 25th of March about "the clumps of hair", "my heart sank". He read his notes to Constable Forgeron who said "No, I told you the father pulled clumps of hair". At that point, the Grievor testified, he went to John Janega, his supervisor. Contrary to Constable Forgeron's testimony, it was not, he testified, the recollection of the knife throwing that upset him; it was Constable Forgeron telling him about the clumps of hair.

Mr. Janega testified that on that morning the Grievor came into his office, looking shaken, referred his notes from March 1st, and said "Here's what you need to fire me". The Grievor explained to Mr. Janega that the Police Constable had said that in their telephone conversation of March 1st he had told the Grievor that the father had pulled clumps of hair out of the boy's head, but that he, the Grievor, had not heard that on March 1st. Mr. Janega told him to go to his office and write it up, and that he would take it from there. The Grievor did that. The "Intake Face Sheet - Parts 1 & 2" which he completed is in evidence. It repeats, in somewhat more legible form, the words of the Grievor's note of Constable Forgeron's call of March 1st as set out above, with the addition of:

> Mon 3/03 [The father] called my home - said [the girl] picked up clothes and he would send [the boy's] to him.

When the Grievor took the completed Intake to Mr. Janega, they talked about the Grievor's blood pressure, and, for the first time, about what the Grievor claimed were occasional problems with memory loss. Mr Janega said "you should go home", which the Grievor did.

The Grievor reported sick the next day. He was asked to come to a meeting on the Thursday, March 27th. He testified that he had picked up Scott Clarke, Vice President, Local 3010, his Union representative to go to the meeting, but then suffered a panic attack and "couldn't go", because "I knew all along what was coming down eventually". He has not since returned to the office.

John Janega investigated the matter. In what seems to me to have been a strangely unprofessional interchange he reported what had happened on the morning of March 25th to Ms. Boone, the Executive Director, simply by saying that there had been a "breach of standard procedure". When she naturally asked for details, according to his own testimony Mr. Janega said, "Do you trust me? Don't ask me any questions, I want to deal with this. When I get the details I'll talk to you about it".

The next day Mr. Janega submitted a report, which is in evidence, and discussed the matter with Ms. Boone. The Grievor was not interviewed in the context of his investigation and Constable Forgeron's report was wholly accepted. In fact neither of the children who were the subject of the March 1st phone call had suffered any further abuse, and it turned out that the allegations of past abuse may have been

ill-founded. While that is good to know, I agree with the Employer those findings that is not significant to the issue before me here.

In addition to findings about the culminating incident, Mr. Janega's report reviews the Grievor's discipline record. Anything he says in the report relevant to the grounds given for the Grievor's discharge has already been canvassed here, except the following, at the middle of the third page:

> Another area of concern in relation to Mr. MacNeil's work was a reluctance to make case work decisions. He showed little or no appreciation of the importance of having a positive relationship with all children on his caseload.

The Grievor took strongest issue with the second of these negatives. Considering all of the evidence, including the direct and cross-examination of both the Grievor and Mr. Janega, on this point, I find that there is nothing to substantiate this, other that poor case documentation. My finding is that "having a positive relationship with all children on his caseload" was of the first importance to the Grievor

In his report Mr. Janega states, as he did in his testimony, that there had been no incident similar to that of March 1st since the Grievor's return to work in September 2002. Ms. Boone testified to similar effect.

The Issues: The relevant provisions of the Collective Agreement are Articles 1 and 13:

> ARTICLE 1
>
> The Board of Directors of the Society has full and complete management, management, control and disposal of the operations of

the Society, with full power to do all things for which the Society is incorporated. It is clearly understood that this article will not alter or override any articles of this agreement.

The Executive Director is the Chief Executive Officer of the Society, is responsible for the conduct of the day to day affairs of the Society in all their aspects with full authority to do so in accordance with the policies of the Board granted by the Board of Directors.

Executive Director to name one appointee who will act for him in his absence.

ARTICLE 13 - DISCHARGE OR SUSPENSION

13:01 An employee who has completed his probationary period may be dismissed for just cause. The Executive Director may discipline, discharge or suspend an employee. When an employee is discharged or suspended without pay he shall be given the reason in writing by the Executive Director within one (1) day of such discharge.

...

13.03 Should it be found, upon investigation, that the suspension or dismissal was unjustified the employee shall be reinstated immediately to his former position without loss of seniority or benefits and shall be compensated for any loss of time in an equal amount to his normal earnings. Nothing in this article shall be interpreted so as to restrict an Arbitration Board's power to substitution or penalty.

13.04 The record of any suspension or disciplinary action against any continuing employee shall be removed from his record after two (2) years following such action. Employee shall be given a copy of any suspension action that is recorded in his or her record.

In determining whether the Grievor's five day suspension was justified and whether he was dismissed for just cause I have addressed the following issues:

(1) Has the Union's proven bias or bad faith on the Executive Director's part?

(2) Was the five day suspension justified?

(3) Was there a "culminating incident" that constituted just cause for some discipline?

(4) If so, considering the seriousness of the culminating incident and the Grievor's previous employment record, was discharge excessive?

(5) If so, what discipline should be substituted?

(1) The Union's allegation of bad faith or bias in the discipline and discharge actions take by the Executive Director. As counsel for the Union stated, to give substance to the allegations of bias made by the Union on behalf of the Grievor he had "to show that there was some improper motivation, verging on bad faith". After careful consideration of the evidence and of the facts as I have found them, I reject the submission that the decision of Ms. Boone, the Executive Director, to impose either the five day suspension or to discharge the Grievor was in any way activated by bias or made in bad faith. In both instances the Executive Director's reasons are fully documented. While I have not found just cause for the discharge of the Grievor, there was certainly just cause for the five day suspension and very nearly just cause for discharge. Those findings themselves go a long way toward negativing the suggestion by the Grievor, and the Union on his behalf, that he was disciplined and discharged because the Executive Director was "out to get him".

I admitted the evidence about the Grievor's involvement in the record keeping failures of Ms. Boone's son on the basis that the Union was entitled to attempt to prove its allegation of bad faith and bias, however distasteful that might be to Ms. Boone and the Employer. There is no need to repeat the relevant facts of that

matter here. It suffices to say that it is not for me to assess the appropriateness of the way the former Executive Director dealt with it. On the evidence before me, I conclude that the Grievor was genuinely professionally concerned about what happened, that his concern was not unfounded and that his persistence in dealing with the matter was not inappropriate. There is no basis in the evidence for saying that he was prompted by any personal animosity toward Ms. Boone or her son. Similarly, and much more importantly here, there is no basis for saying that any of Marie Boone's decisions as Executive Director relating to the Grievor were other than highly professional. She had natural maternal concerns for her son's career, to which she testified, but there is no evidence they tainted her dealings with the Grievor. There is not even any evidence that she disagreed with the Grievor's actions in that respect.

I found Ms. Boone to be a highly credible witness and, on the evidence, a completely professional person in her role as Executive Director. The Grievor's return to the Sydney Office and then to the bargaining unit, were moves made to accommodate and assist him; not to "get him". Ms. Boone appropriately documented and testified to the Grievor's inter-personal concerns with her. Her unwillingness upon their first interview to change the record with respect to the incident of time swapping in which she and Grievor had been involved seems to me to have been appropriate, whatever the merits of her predecessor's assessment of the situation. The fact that the Grievor went into a funk about it reflects badly on him, not her. Ms. Boone's dealings with him as Unit Director and during his first year back in the bargaining unit as a Children in Care Worker simply demonstrate good administrative practice and no unfairness whatever. When, upon

the Grievor's return from the five day suspension, the Union President suggested that Ms. MacLean rather that Mr. Janega should be his supervisor. Ms. Boone acceded.

I found the Grievor generally credible as well, but, on the evidence before me, so consumed by his sense that he was being treated unjustly by the Employer that his judgement was faulty. The Grievor's sense of persecution by the Employer, stemming from his time as Unit Director in North Sydney and Glace Bay, hindered him in responding appropriately to changes in the administration of the agency, most importantly in respect of documenting his cases, and in acting professionally in his employment relationships. I accept that the Grievor genuinely thought the business with her son coloured his relationship with Ms. Boone, but, on the evidence, that was not so. The very fact that the matter was put before me here on the basis that it was demonstrates the Grievor's continuing lack of professional judgement in his employment relationship. I must add that, on the evidence, I have not found a similar serious lack of professional judgement in the Grievor's social work.

(2) Was the five day suspension justified? I have concluded without difficulty that the five day suspension on March 17, 2003 for was justified by the Grievor's failure to bring his case documentation up to date, in light of the fact that he had been suspended for two days a year earlier, also, in part, for failures of case documentation. That two day suspension was not grieved.

I accept, as did the Grievor in the course of his testimony, that proper documentation is essential to good social work and required by the standards applicable to the Grievor as a Children in Care Worker for the Employer. The CAS's obligation to Children in Care is to keep records "as if it were a wise and conscientious parent", which includes recording "all significant events". The testimony of Carol MacLellan on this is set out above, as is some of the documentary evidence introduced through her. The evidence is clear that John Janega, the Grievor's Supervisor, had warned him in January that he was once again falling behind in this critical aspect of his work.

Counsel for the Union submitted that the Employer had failed to demonstrate by "real world" evidence that the Grievor had fallen short of any reasonable expectation of how the Employer's social workers should document their cases. However, the testimony of Mr. Janega and Ms. Boone, and indeed of the Grievor himself, satisfies me that the Grievor was significantly in arrears with his documentation. He simply was not getting it done on time, after adequate warning. That case is, in my opinion, made out on the facts.

If the Union wished to convince me that the Grievor was being discriminated against in relation to his case documentation it should have introduced evidence that the Employer was currently allowing others similarly in arrears to get away with it. There was no such evidence. I accept that some social workers with the Employer are better at case documentation than others, that, as Ms. Boone testified, "some have real trouble with it", and that, as the Grievor said, "some of the best note takers are not the best social workers", and Mr. Janega did testify in

cross-examination "I've spent a lot of time with staff who are not up to scratch, but they find a way to work toward that". However, he testified that there was no one in his unit whose case documentation was worse than the Grievor's, and there was no challenge to that.

At the disciplinary meeting preceding the imposition of this discipline the Grievor had no real response to Mr. Janega's statements that he had not kept the commitment he had made upon his return to work in September 2002 to complete required case documentation, nor his specific December commitment to have his documentation completed by January, and that the required documentation was still not completed. Ms. Boone did not accept the Grievor's excuse that he was busy with his case load because his load was relatively light, and there is no basis in the evidence upon which her decision can be held to be incorrect.

The Grievor testified that he was not an adept typist and suggested that he had not been adequately supported by training in this respect. The evidence is that training was available. Certainly, as a professional, if that was a serious problem for him it was within his powers to correct it. The case management system in the Sydney office had been in place since 1989, with upgrades. Every worker had a computer on his or her desk, although some still used handwritten case notes. Further, I do not accept the Grievor's suggestion that he had to chose between serving his clients and record keeping. It was management's judgement that his caseload was such that he was able, or should have been able, to do both, and I have no reasonable basis upon which to question that.

Through Mr. Janega the Employer introduced samples of the Grievor's case documentation into evidence. I do not think it necessary for me to pass upon the adequacy of those particular documents to conclude that the five day suspension of the Grievor on March 17, 2003 was for just cause. If their adequacy were significant to the case I might, indeed, have needed more evidence of what the norms of documentation among the Employer's social workers were.

Quite apart from the samples of the Grievor's case documentation in evidence, I have concluded that the Employer was justified in concluding not only that the Grievor was not keeping his documentation up to date but also that he was not taking this aspect of his work seriously, and, clearly, the Employer was entitled to insist that he did so.

(3) Was there a "culminating incident" that constituted just cause for some discipline? Brown and Beatty, *Canadian Labour Arbitration* (3rd ed., looseleaf) state the doctrine of the culminating incident as follows, at para. 7:4310:

> ... the doctrine of the culminating incident posits that where an employee has engaged in some final, culminating act of misconduct or course of conduct for which some disciplinary sanction may be imposed, it is entirely proper for the employer to consider a checkered and blameworthy employment record in determining the sanction that is appropriate for that final incident. ... one arbitrator has summed up the thrust of the doctrine as follows:
>
> > . . . In all cases where a grievor challenges discipline imposed as the immediate result of alleged particular conduct arbitrators proceed this way: If they find the conduct not established by the evidence or, if established, not warranting a penalty, they allow the grievance and grant the fullest remedy. But, if they find the conduct established and warranting some penalty, they examine the grievor's total record, both good and bad, to determine in the light of all the circumstances whether the particular

> penalty the employer levied fits the wrong and, if not, the nature of [a] penalty fitting better. [*Canadian Lukens Ltd.*(1976), 12 L.A.C.(2d) 439(Schiff)]

The Employer has relied on the Grievor's failure to follow the applicable case work standards in dealing with the referral to him on March 1, 2003 by Constable Forgeron as the culminating incident. Although this occurred before his five day suspension on March 17, because of the Grievor's failure to follow the standards it did not come to the Employer's attention until March 25. It was not seriously disputed that this precluded the Employer from taking into account the grounds upon which the five day suspension had been imposed in deciding that discharge was appropriate. While the explicit warning in the March 17 letter, "if you job performance does not meet the requisite level within 4 weeks of your return to work on Monday, March 24, 2003, I will have no choice but to terminate your employment", obviously could not be relied upon, by the doctrine of the culminating incident as stated above, the Employer was entitled to take the Grievor's total record as an employee in the bargaining unit into account, subject to the sunset clause in Article 13:04.

Counsel for the Union submitted that there was, on the facts, no culminating incident because the was no cause for any discipline in the way the Grievor dealt with Constable Forgeron's referral on March 1st. In his submission, on the Grievor's version of his telephone conversation with Constable Forgeron and his calls to the mother and father, the Grievor quite reasonably assumed he was dealing with a access dispute, not a matter of intake for the CAS. Counsel submitted that the reference in the Grievor's notes to the fact that the father had

thrown a knife at the girl was simply background. Grievor's version of the facts, he said, was internally consistent, consistent with his notes and consistent with the steps he took. There was no reason to doubt the Grievor did in fact call the father and talked to him the next day. This evidence could easily have been refuted if it was not true, but it was not.

On the facts, I reject the submission that there was no culminating incident. I do accept that by the time the Grievor had talked to the father the next day, March 2nd, he had probably allowed himself to be lulled into thinking that this was only an access matter. I have concluded that he did not intentionally sit on a matter where he realized a child might be at risk. However, as I have noted above, the Grievor himself testified that, in retrospect, he realized that he should have written up Constable Forgeron's call and the actions he took on the basis of it as a case note, "just for information, even though [he thought] it would not have been acted upon". Clearly, to conform with the standards of casework for the CAS he had to have done at least that. This underlines role of the standards, as Ms. MacLellan testified, in ensuring that casework "decisions are made consciously, not subconsciously". Further, when he did not write up what happened on the March 1st in any form, he had a serious responsibility to advise the Police that he had not followed the matter up on Monday as he had told Constable Forgeron he would. It does not matter what Constable Forgeron did or did not do on Monday, or why he eventually pursued this matter on March 25th. Without more, these failings by the Grievor constituted misconduct which justified some discipline and brought the doctrine of the culminating incident into application.

(4) Considering the seriousness of the culminating incident and the Grievor's previous employment record, was discharge excessive? I now turn to a more searching consideration of the evidence of the culminating incident, the casework standards breached by the Grievor and the seriousness of his record of misconduct. As stated above, although I have concluded that the Grievor did not intentionally sit on a matter where he realized a child might be at risk, I do think he was guilty of very serious misconduct.

Constable Forgeron testified that when he called the Grievor on March 1st he read from his notes of his discussion with the mother, which are in his Report. I accept his testimony. The opening paragraph makes it easy to believe that the Grievor may have started off thinking that this was an access dispute, but the following statement should have raised a red flag when the constable said that the mother reported that the children "have been victims of physical abuse at the hands of their father" and that "[The mother] further stated that [the father] has pulled clumps of hair our of [the boy's] head, he beats him with a belt and throws beer bottles at him. [The girl] reported that her father threw a steak knife at her last summer." The Grievor apparently heard this as historical narrative, and noted only the steak knife incident. In this he was seriously negligent. As counsel for the Employer said, "he had only to ask 'are you calling because there is a child at risk?' His job was to clarify why the call was made." Nevertheless, whatever the Grievor's shortcomings as an orderly record keeper, there is no basis for concluding that he is not a caring social worker, deeply concerned with children at risk. On the balance of probabilities I am satisfied that as he concluded the matter on March 2, 2003 the Grievor did not remember hearing Constable Forgeron say

that the mother has said that the boy's father had pulled clumps of hair from his head, or beat him with a belt of threw beer bottles at him.

Carol MacLellan, whose qualifications as an expert were accepted, as mentioned earlier, testified about the relevant *Child Protection Standards*, which were applicable to the Grievor's work on stand-by on Saturday March 1st."Stand-by", is also known as "emergency work". These standards were implemented in 1991 when the *Children and Family Services Act*, 1990 was proclaimed, and substantially revised in 1996. There was no suggestion that the Grievor was not, or should not have been, fully familiar with the "General Appendix" to the *Department of Community Services, Family and Children's Services Division, Child Protection Services Policy Manual* from his previous jobs as child protection worker and Unit Director. Ms. MacLellan stressed that these are the minimum acceptable standards.

The stated rationale in the "Introduction" to the *Child Protection Services Policy Manual* is to see that child protection investigations receive the highest priority response time and service delivery; that is skilled investigations and decisions which ensure the safety of children. Ms. MacLellan emphasized Standard #1.2, that social workers are expected to know their responsibilities under the *Act* and the procedures that apply. She noted Standard #8.1, to the effect that children can expect the same level of protection from a social worker on emergency duty as they can during regular working hours.

Standard #2.1 in the *Manual* states that there are nine key decision points in risk management. The first is "1. The decision to investigate or not to investigate a report made to the office/agency". Without doubt the Grievor had to make such a decision after he heard from Constable Forgeron and spoke to the mother on March 1st, 2003. Standard #2.2 states:

> The decision points 1, 2, 3, 4 and 9 shall be made in consultation with a supervisor. In the event such consultation is not possible prior to the commencement of taking action such activities should be recorded on Intake documentation and reported to the Supervisor within 24 hours.

It then repeats key decision point #1quoted above.

Standard #3.2 states eight factors that must be taken into account in the decision to investigate an allegation. The final one, bolded in the *Manual*, is **"seek consultation with supervisor".**

Standard #15 states that "all children alleged to have been abused will be responded to as quickly as possible" and then sets priorities, from I, "High Risk" for "Life Threatening Situations", for which there is a maximum response time of one hour, to IV, "Low Risk" and V, "No Risk" for which the response time is "beyond two working days and within 21 days". Here again, bolded in the *Manual*, is the direction, **"seek consultation with supervisor".**

Standard #3.25 on documentation includes the following:

> Note - if an intake is received during emergency duty it shall be entered on the computer within 24 hours of the start of the nest regular working day.

This is repeated in Standard #7.4 on "Case Documentation - Investigation Process", the first paragraph of which states:

> A record shall be maintained of all calls received through the intake process. This includes general or specific inquiries as well as consultations with other agencies. Outcomes and decisions shall be recorded.

Taken together these Standards leave no doubt that the Grievor was in breach of his duties, even if he was right in thinking that this was merely an access dispute. If it was not a proper matter for intake he should, nevertheless, have recorded it and discussed the matter with his supervisor.

Undoubtedly what Constable Forgeron called the Grievor about on March 1st was an access dispute, but I find that the call contained within it information that a child might be at risk. I find on the evidence that, probably, the Grievor did not think of it that way, but he must have been inattentive and negligent not to.

I accept that there is a sometimes difficult judgement to be made by CAS Child Protection workers in determining whether what they are dealing with is a matter for Intake, within CAS jurisdiction. The Grievor testified about an earlier case he had dealt with on stand-by, also involving the police. The Police Incident Report is in evidence. On December 27 of 2001 two constables responded to a report that a twelve year old girl was threatening her mother with scissors. According to the Report the girl had threatened her mother with scissors which the mother "knocked out of her hand" and then with a knife, in an altercation over whether

she could have pizza for supper. When they learned that the child had not attended school for nearly two months and had been sleeping all day because she "is up all hours of the night" one of the constables called CAS, and spoke to the Grievor, who was on stand-by. According to the Police Report the Grievor "gave authority to take [the girl] out of the house and take her to the regional hospital to speak with a crisis worker". The Grievor met the police and the mother and the girl at the hospital. The mother told them that she was scared to take the girl home that night. According to the Police Report the Grievor determined that a place, other than jail, should be found for the girl to spend the night under supervision. The Grievor called Charles Coleman, the Employer's Director of Residential Programs to arrange that.

The Grievor testified that he called John Janega, his supervisor, that evening, shortly after reaching the hospital. Mr. Janega insisted that "it was a police matter". The Grievor responded "I'll handle it", and spent seven hours at the hospital with a psychologist mediating between the mother and the child, after which the psychologist decided, and convinced the mother, that it would be safe for them to go home. The Grievor then wrote the matter up as an "intake". However, at the intake meeting attended by Mr. Janega and four staff members of the Sydney Office it was determined that this was "turned down for intake", as being a police matter only.

This was put forward by the Grievor and counsel for the Union as a demonstration that it may be a difficult judgement matter whether something is an "intake" or not. I accept that point. However, Ms. MacLellan was clear: "if the person calling believes it's a child protection matter then it is a referral. ... If the standby worker

decides it is not within the Agency's mandate that should be documented and the supervisor should be consulted with respect to the basis for that decision."

It is clear that, even if the Grievor's version of events is fully accepted, he breached the Standards by not documenting the March 1st referral by Constable Forgeron and consulting with his supervisor, if not that day then the following Monday. I do not, however, accept the Grievor's version of events in that I find it more probable that Constable Forgeron did tell him that the mother had said that the boy' father had pulled out clumps of his hair, and probably mentioned that she had said that the father had hit the boy with a belt and had thrown bottles at him, although, for some reason, those statements did not register with the Grievor as indications of a child at risk.

Counsel for the Employer attached considerable importance to John Janega's testimony that, on March 25th, as the Grievor showed him his handwritten notes from the 1st, the Grievor said "Here's what you need to fire me". I take this as demonstrating that the Grievor understood the seriousness of his failure to document the events of March 1st, particularly if they were as reported by Constable Forgeron, but also as flowing from his sense that Mr. Janega and Ms. Boone were "out to get him". As I have already stated, I have concluded that the Union has not made out a case of bias or bad faith on the part of Ms. Boone, but I have no doubt that such was the Grievor's sense of how things were. Thus I do not treat the Grievor's statement as significant in the context of deciding whether his misconduct justified discharge.

In addition to the culminating incident the Employer has relied on the Grievor's "blameworthy employment record" to justify his discharge. I have already considered and found justified the five day suspension of the Grievor on March 17, 2003 for poor case documentation. One aspect of the March 1st culminating incident was also a failure of documentation, but it is important that his negligence and failure to report and consult in that casework context were quite different from anything he had ever done before. The Grievor's unrebutted testimony was to that effect and, in fact, John Janega and Ms. Boone testified to the same effect. The Grievor had never done, or failed to do, anything like this on stand-by before.

That is not to say that the Grievor's previous discipline for failure to bring his case documentation up to date is irrelevant. It is simply to note that the March 17, 2003 letter of discipline to the Grievor addressed only his case documentation failures. In discharging the Grievor the Employer clearly did, however, also rely on the other misconduct that led to his two day suspension on February 7, 2002:

> In arriving at this decision, the following information was relied upon:
>
> - On Feb. 7/02, you were given a 2 day suspension without pay for reasons that included your refusal to comply with agreed-upon plan to bring your case documentation up to date. (*ref. February 7/02 letter attached*)

This brings into consideration not only the Grievor's case documentation, but also his taking time away from work without prior approval, the issue about how he had dealt with the child in protection over the Christmas period while he was on standby and his insubordinate dealing with Mr. Janega at the stormy meeting of February 4, 2002. With respect to the Christmas visit Ms. MacLellan, the

Employer's expert, testified in cross examination that she thought the "only failure from a standards point of view was failure to consult his supervisor." With respect to the breach of confidentiality in taking his brother-in-law in the car with him, she characterized it as "unethical but not a breach of standards". The Grievor's refusal to give the name of the family member who accompanied him on that occasion was, she said "an employment matter". Beyond those comments, a good deal of the evidence and my findings with respect to the matters that were the subject of the February 7, 2002 two day suspension are set out above. It must suffice to say that I find them serious but not indicative of a social worker incapable or unwilling to do his job.

The Employer was, and will be, entitled to deal with the Grievor's record keeping, not only case documentation but also administrative recording of his time out of the office and the like, by expecting him to observe the generally applicable rules and by giving him specific remedial directions which are reasonable in the circumstances, as it did on March 17, 2003. The Employer is entitled to require the Grievor to function effectively in a modern record keeping environment, whether he likes it or not. The Employer will also be entitled to pay particular attention to the Grievor's observation of casework standards, such as those he breached on Christmas Day 2001 and on March 1, 2003. It is fair for the Employer to warn him that he must comply or be disciplined, even discharged. However, given the Grievor's seniority and fifteen year record as an able and caring social worker, I find found that discharge was an excessive penalty here.

(5) Considering the Grievor's relevant employment record, what discipline should be substituted? I note here that in my opinion this was, and is, a matter that cries out for settlement. I made at least two serious attempts through counsel to facilitate such an outcome but mediation was never accepted.

I think discharge is excessive here, for a man who has made a decent contribution through his work and is not far from entitlement to early retirement, but I am also deeply concerned about the workability of the Grievor returning to the Employer's offices. When I raised the question, counsel for the Employer was not prepared to make a submission on the issue of whether this was a case where I should consider not reinstating the Grievor even if I were to find that there was not just cause for discharge. That, of course, was his clear right, and obligation if so instructed. Counsel for the Union simply submitted that I should not consider not reinstating the Grievor and provided me with the leading arbitral authority to the effect that such an order is not to be made lightly where discharge is held not to have been justified; a position with which I agree. Consequently, I say no more about that remedy

Counsel for the Union led evidence of one other discipline case in which this Employer had imposed only a short suspension for what counsel submitted was similar misconduct. He submitted that if I were to find that discipline was justified here the Grievor should be reinstated subject to suspension for only one or two days. I suffices to say that I do not find the two cases to be comparable.

Counsel made it clear that the Union was not putting forward any problems the Grievor might have had with alcohol as a mitigating factor. On the other side of the coin, the Employer did not base the discharge of the Grievor on incapacity, and attempted to cast doubt on his suggestions that he was or had been an alcoholic or that he suffered from any other debilitating medical condition, including panic attacks .

Conclusion and Order. Considering all of the forgoing, I hereby order the Employer to reinstate the Grievor upon receipt of this Award, but, because of the seriousness of all of his relevant misconduct, without back pay.

Innis Christie
Arbitrator