IN RE THE MATTER OF AN ARBITRATION
UNDER THE B.C. LABOUR RELATIONS CODE

BETWEEN:

THE CITY OF WHITE ROCK

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 402-01,

(the "Union")

AWARD

[redacted] Grievance)

Board of Arbitration	Robert Diebolt, Q.C.
Counsel for the Employer	Larry Page
Counsel for the Union	Chris Buchanan
Place of Hearing	Vancouver, B.C.
Dates of Hearing	May 14, 15 and 16, 2013
Date of Award	May 31, 2013

I.INTRODUCTION

This arbitration arises out of two suspensions imposed on the grievor, Mr. [redacted]. Each suspension is the subject of a separate grievance which the parties agreed would be heard together. The parties agree that I am properly constituted as a board of arbitration with jurisdiction to hear and determine the matters in issue in the two grievances.

II. BACKGROUND

The grievor is a regular full-time employee who works in the Public Works Operations Department. He holds a posted position the job title of which is Tandem Truck Driver. He was appointed to that position in 2007 and in recent years has operated that unit along with performing various labouring assignments.

The first suspension, a three-day suspension, was imposed following events that transpired on September 18, 2012. Mr. Paul Slack, Manager of Operations, advised the grievor of the suspension by letter dated September 24, 2012. The body of the letter reads:

> As communicated in my letter of September 18, 2012, we had recently become aware of possible misconduct on your part specific to your refusal to operate the Overhead Compactor and leaving work while on shift without authorization. You were involved in the investigation and you provided your explanations in a meeting on the morning of September 19, 2012.
>
> Having completed our investigation, we have concluded that your actions on the morning of September 18, 2012 amount to insubordination in both your refusal

to perform assigned work and in refusing to follow a direction given by your Manager. You confirmed at the meeting that your wrote in the sign out book that you were "sick and tired" and told your Foreman "I am done with this place" following your communicated displeasure at being assigned Overhead Compactor duties. I had met with you on Monday, September 17th to discuss and confirm your temporary assignment to Overhead Compactor. The explanation that you offered on September 19th for refusing your assigned work was not consistent with your actions that day and our conversation at the beginning of the week. After your discussion with your Foreman, I requested that you come to my office. You refused my request and instead decided to leave the work site. This action amounts to serious insubordination in your willful refusal to follow a direction given by your Manager.

[redacted] not only was your behavior on September 18th inappropriate but your actions resulted in the City having to incur an additional expense by bringing in a contractor to complete your assigned work.

Given your disciplinary record, the seriousness of your actions and the resulting cost for the City, the City is suspending you without pay for three (3) days, effective Tuesday, September 25, 2012. You will be expected to work on Friday morning, September 28, 2012.

[redacted] it is my hope that this suspension will cause you to reflect on how you conduct yourself at work and I expect an immediate and significant improvement from you. Any future misconduct on your part may result in further disciplinary action, up to and including termination of your employment.

Slack testified about events leading up to and occurring on September 17, 2012. Some but not all of that evidence was uncontroversial. Mr. Chris Poulsen, the usual Overhead Compactor operator, was unable to drive the vehicle because of medical limitations. The other qualified operators of that unit were not available due to medical or WorkSafe absences. In these circumstances, Slack decided to train, refresh and assign the grievor to drive this vehicle until the other qualified operators again became available. He testified that he did so because the grievor had driven this unit "extensively" in the past. Poulsen, while not medically fit to drive the vehicle, would be assigned to instruct the grievor in its operation.

Slack instructed the acting Foreman, Mr. Paul Buxton, to advise the grievor of the decision at the September 17 Monday morning muster. Morning musters take place daily in the lunchroom in the works yard. Their purpose is to advise bargaining unit employees of their assignments for the day and to issue related instructions. Slack testified that when he issued his instruction to Buxton, the latter replied that the grievor "would not like this" but Buxton did not say why that would be so. Slack said he told Buxton that if there was an issue Buxton should tell the grievor to see him. After learning his assignment the grievor did go to Slack's office.

Slack testified as follows about that meeting. He said he told the grievor he wanted him to be trained to operate the Overhead Compactor. He said the grievor stated he did not feel safe driving this unit because he had not done so for a long time. Slack said he responded that there would be training and that the trainer and trainee would decide if the grievor were ready to drive the vehicle.

During the meeting Slack said he pointed out that driving the Overhead Compactor was within the grievor's job description and that he reviewed it with the grievor. A copy of the job description was adduced at the hearing. Under the section headed Responsibilities, item 4 reads: "Relief driver for the Sweeper, Recycling and O/H Compactor".

With respect to relief Recycling driver, Slack testified that he did not threaten the grievor with an assignment to that position. His evidence was that mention of that job was part of his review of the job description. That job, it

emerged on the evidence, would be hard on a person with bad knees because it requires the operator to jump out of the truck repetitively. Slack testified he was aware the grievor had bad knees and that in 2011 he had talked with the grievor about obtaining a medical note so that he would not have to operate the recycling vehicle. Asked how the meeting ended, Slack replied that he "thought it went fine" and that the grievor was in an "OK mood".

Slack was cross-examined about the Monday morning meeting in his office with the grievor. After noting that the grievor had expressed safety concerns about operating the Overhead Compactor, it was put to Slack that he had asked the grievor whether he was refusing to drive the vehicle. Slack testified that he could not recall asking that.

The cross-examination also canvassed the matter of the recycling truck and whether there had been a threat of assignment to that duty. Slack testified, "I read the job description. That is not threatening". He did agree however that it was a type of duty the grievor could be assigned. The condition of the grievor's knees was then raised. Slack's reply was that their condition was the reason the grievor had not been assigned to that duty, and he again raised the topic of a doctor's note. Asked again if he had intended to threaten the grievor, Slack responded that he read from his job description. Finally in relation to the meeting, Slack was asked about the tone of the meeting. Referring to Slack's evidence in chief, counsel attributed to Slack the words "friendly" and "calm". Slack replied that he thought it had been.

The grievor also testified about events on Monday, September 17, including his meeting with Slack. In his direct examination, he said he wanted to mention to Slack that he had not been on the Overhead Compactor for a while and that it would be "weird to get on without training or familiarization". Asked whether he had regularly driven the unit, the grievor answered that it was long ago and that he might have filled in when needed.

Asked to describe Slack's reaction to his comments, the grievor testified as follows. He said that Sklack "asked right out if I was refusing work". The grievor said he answered no, that he was mentioning safety factors. He testified that Slack "then got into mentioning my job description and then said I could put you on recycling if I want to". The grievor said he did not know how to react.

Testifying about the anticipated length of the Overhead Compactor assignment, the grievor's evidence was that it would be as long as they wanted him, and that it did not matter to him how long the assignment would be. With respect to the tone of the meeting, the grievor said, "It was a pretty good conversation, pretty mellow" and that he left the meeting confident that he could do what he needed to do.

Describing what he did on the Monday, the grievor said he went with Poulsen on the Overhead Compactor. More specifically, he said they pre-tripped the unit, and he looked over the controls and switches to see if there were any changes. He said they then went around the works yard picking up containers.

Later they went to the arena and picked up containers, getting the feel of the unit. At the end of that day he said his confidence level was good.

The grievor was cross-examined about the Monday morning muster and his subsequent meeting with Slack. He agreed that Buxton had told him he would probably be driving the Overhead Compactor with Poulsen and that he could talk to Slack about the assignment. Moving to the meeting, the grievor agreed that after he had raised his safety concerns, Slack had said the assignment would just be training, adding that Slack wanted him to familiarize himself with the unit. Asked whether he and Slack had agreed there was no safety issue by the end of the meeting, the grievor said his final words had been that he would do his best and let Slack know. He was then asked to agree that there was no safety issue to resolve. The grievor's response was "no, not at that point".

The cross-examination turned to the grievor's job description. He agreed that Slack showed him a copy of it. Counsel then referred to Slack's testimony that he had reviewed the document with the grievor and the grievor agreed that Slack did. He also agreed that Slack had pointed out that the grievor was a relief driver for the Overhead Compactor and the recycle unit. Questioned about the tone of the meeting, including the grievor's use of the word mellow, the grievor replied, "yes, it was quite mellow" but he added, "I mentioned safety. He said are you refusing work".

Moving to Tuesday, September 18 Mr. Neil Koleszar, the regular foreman, testified about events at and surrounding the morning muster. He is a bargaining unit employee who appeared under subpoena issued by the Employer.

Koleszar testified that he had left instructions the previous Friday for the acting foreman, Buxton, to assign the grievor to training on the Overhead Compactor on Monday, September 17. When he arrived on Tuesday he said he did not initially know what had transpired on the Monday and assumed the grievor had engaged in training and would continue to do so on Tuesday.

Focusing on the Tuesday morning muster and its aftermath, Koleszar gave the following account. He said that the muster commenced at 7:00 a.m. and the employees were dressed in their work clothes (which included steel toed boots and safety vests), ready to disperse to their assignments following the muster. He testified that during the muster he stated that the grievor would train with Poulsen on the Overhead Compactor. The grievor, he said, would drive because Poulson was not then medically able to do so. Koleszar said the training would take place in the works yard where there were bins the grievor could practice picking up. The idea, he said, was to get a feel for driving and operating the unit.

Testifying about the grievor's reaction when the assignment was given, Koleszar said there was not much of a reaction and that nothing was said at that time. Kolezsar testified that he completed the muster and then went to his office to copy the task list. A minute or so later, while at his desk, the grievor came in

to the front counter, grabbed the sign-out book and said he was leaving. Asked if he said anything else, Koleszar said the grievor stated, "I am done with this place". Describing the grievor's demeanor, Koleszar said he seemed agitated, as if something was bothering him. He added that the grievor was not happy.

Pausing here, the Employer keeps a sign out book at the front counter. There is a page reserved for each employee which bears the employee's name and sets out fields in which the employee enters date, time, reason for departure and expected return. The grievor completed the date and time. In the reason field he wrote "sick and tired". In the expected return field he placed a question mark.

Resuming the chronology, asked what the grievor later said about his compactor assignment, Koleszar described the following exchange. He stated the grievor said he shouldn't be doing that job; that younger people should be trained to do it. In reply, Koleszar said he stated that more training would be coming up but they were then "in a crunch", that the one person available had a medical condition, that the grievor had some past experience and was capable if given time to be acclimated. In reply to that, said Koleszar, the grievor said he just thought that he should be a tandem driver.

Koleszar said that after his discussion with the grievor, he went to Slack and told him the grievor was leaving. Slack, he said, asked him if the grievor was sick. Kolezsar informed Slack that was what the grievor wrote in the sign out book. Slack, said Koleszar, then told him to get the grievor so Slack could talk to

him to see if he was sick. It should be added here that Slack, in his testimony, also stated that he instructed Koleszar to tell the grievor he wanted to see him. Koleszar testified that he did return to the grievor and told him "Paul wants to see you". He said that the grievor's response was that he had talked to Slack the day before about the assignment, that he was not feeling good, that he had a headache and was going to leave.

At that point in the direct examination, Koleszar was taken to hand printed notes that he prepared and signed Wednesday, September 18 in response to a request from Slack. They read:

TUESDAY, SEPTEMBER 18, 2012

INCIDENT REPORT

-MUSTER AT 7 AM

-[redacted] CAME INTO THE OFFICE AND SAID "I'M LEAVING NEIL"

-I SAID "ARE YOU SIGNING OUT?' AND HE SAID "I AM DONE WITH THIS PLACE"

-HE WROTE IN THE SIGN OUT BOOK AND WENT INTO THE LUNCHROOM/CHANGING AREA

-I WENT TO PAUL'S OFFICE AND SPOKE TO HIM ABOUT WHAT HAPPENED

-PAUL TOLD ME TO GO TALK TO [redacted] AND ASK IF HE WAS SICK

-I WENT BACK INTO THE LUNCHROOM AND [redacted] WAS WALKING AROUND THE TABLE AND WAS AGITATED

-I ASKED [redacted] WHAT WAS WRONG AND HE SAID WHEN HE CAME BACK TO WORK ON MONDAY THAT HE HAD TALKED TO PAUL AND THAT PAUL HAD "THREATENED TO PUT ME ON RECYCLING" BECAUSE IT WAS IN HIS JOB DESCRIPTION

[redacted] THEN WENT UPSTAIRS TO CHANGE

-I WENT BACK TO PAUL'S OFFICE TO TELL HIM THAT [redacted] WAS UPSET ABOUT HAVING TO DRIVE THE OVERHEAD COMPACTOR TRUCK AND HE SAID THAT OTHER GUYS SHOULD BE TRAINED ON IT

-PAUL TOLD ME TO GO AND BRING [redacted] IN TO SEE HIM

-I WENT BACK TO [redacted] AS HE WAS WALKING OUT THE DOOR AND I TOLD HIM PAUL WANTED TO SEE HIM AND [redacted] SAID HE HAD TALKED TO PAUL YESTERDAY (MONDAY) AND HAD TO GO BECAUSE HE HAD A BAD HEADACHE AND HAD TO LEAVE

WED. SEPT. 19, 2012

NEIL KOLESZAR

"Neil Koleszar"

Koleszar was asked a series of questions about specific entries in the quoted notes, to confirm their accuracy. His answers to those questions were consistent with the content of the notes.

The direct examination subsequently moved to a review of handwritten notes made by Ms. Ashley Tiearney, a human resources advisor. They are an account of what Koleszar said to her in an October 9, 2012 telephone conversation. They read:

Conversation w/Neil – 11:24 am Tues. Oct 9

- At muster, I said to Chris you'll be on truck again with [redacted] doing training.
- Not a bit (sic?) group, [redacted] to left and Chris to my right, continuation from the day before
- [redacted] was inside lunchroom already to go, said let's talk outside to be discrete wanted to be respectful said Paul wanted to talk to him, he said he'd already talked to him the day before. Then he said he was sick – first time. He signed book, I hadn't looked at book.

  I took it like he didn't want to be here anymore. He had already made up his mind, said Paul wanted to speak with him. After that, not much said, him kind of walking away. On his way walking away. Conversation pretty much done. In that situation, he made up his mind he was leaving.

Asked who had suggested talking outside, Koleszar stated he had, because the grievor was agitated and others were then performing stretching exercises (a daily ritual at the conclusion of the muster). Taken to the entry "first time" he was asked what he had meant by that. Koleszar responded as follows.

He stated that initially the grievor had come into the office, said he was leaving, that "he was done with this place" and then walked back to the lunchroom. Then, outside, Koliszar said the grievor stated he was sick and that it was the first time the grievor had said he was sick. Reminded that Koliszar had previously signed the sign out book, Koleszar agreed but said he had not looked at the book.

Kolizsar was then taken to a second document, also prepared by Tiearney. In her direct examination she described it as a typewritten version of her handwritten notes but the document is obviously not an exact copy. Quoted below, it should be noted that the name Tiearney was using at that time was Johnson. The document reads:

> Ashley Johnson telephone conversation with Neil Koleszar – 11:24 a.m. Tuesday October 9
>
> - Neil communicated out duties at the morning muster and recalled that it was a small group with [redacted] on his left and Chris Poulsen on his right. Neil said "Chris you will be on the truck again with [redacted] doing training". This was a continuation of the day before.
> - Neill didn't see the sign out book, only saw [redacted] after and didn't have the sense that he had any kind of illness.
> - When Neil returned to talk to [redacted] after seeing Paul Slack, [redacted] was in the lunchroom wearing his street clothes appearing ready to leave. Neil suggested they step outside with the intent being to have a private conversation and be respectful to [redacted] (there were others in the lunchroom).
> - Once they were outside, Neil said to [redacted] that Paul wanted to see him. [redacted] replied that he had spoken to Paul the day before. He also said that he was sick and needed to go home. This was the first that Neil had heard of [redacted] being sick. Neil felt that [redacted] had made up his mind, wasn't going to go see Paul and that he had decided to leave the work site and go home. After [redacted] made his comment, there wasn't much said afterwards, [redacted] was pretty much walking away and Neil was left standing there. Neil didn't however feel though that [redacted] had left in the middle of a conversation.

- Neil felt that he could have perhaps been more insistent with [redacted] and will treat this as a learning situation, but he feels [redacted] was clear that Paul wanted to see him.

Focusing on the second bullet Koliszar was asked if he had in fact told Tiearney he did not have a sense that the grievor had any kind of illness. Kolizsar confirmed making that statement. He added "at the very end while walking out" the grievor said he had a headache and that when he first signed out he was "just agitated – didn't say anything about illness".

Moving to Koleszar's cross-examination, he agreed the grievor did not react or exhibit displeasure at the time Koleszar informed him of his assignment. With respect to the events at the front counter where the sign out book is kept, Koleszar agreed he did not ask why the grievor was leaving. Upon being advised that the grievor would testify that the comment "I am done with this place" was spoken later, and not at the desk, Koleszar replied that he remembered it being spoken when the grievor was leaving the office area. Koleszar agreed he did not then ask the grievor what he meant by his statement and that he did not examine what was written in the sign out book before going to see Slack.

Taken to his previously quoted notes, it was pointed out that he did not record the grievor being agitated at the front counter. Koleszar's reply was that the statement "I am done with this place", while not spelling out agitation, suggested it. In response to the suggestion that the grievor's statement could mean he was unwell, the witness replied, "I guess you could read into it that way. I knew he was unhappy about something". Given that the grievor had already signed out, Koleszar was asked to agree that it was unusual to request a

confirmation of sickness. He would not agree, referencing the grievor's statement at the counter and his view that the grievor was unhappy.

The cross-examination turned to the subsequent events in the lunchroom. Questioned about the grievor's actions, Koleszar stated that the grievor was basically getting things together, pacing around and talking a little bit to him. When it was pointed out that he did not ask the grievor if he were sick, Koleszar replied that he did so after they went outside. Initially, he said he asked the grievor what was wrong. When it was suggested that the grievor's response was that he was threatened, Koleszar replied that was part of his complaint, but that he was also talking about the training of others on the Overhead Compactor.

Kolezsar was asked a series of questions designed to elicit agreement with the proposition that the grievor's sole complaint in the lunchroom was his view that he had been threatened with a recycling assignment. Koleszar would not agree. His evidence was that the grievor was concerned about both recycling and the Overhead Compactor, and that his concern was not predominantly about recycling. His also stated that the grievor had said if more people were trained on the compactor he would not have to operate it. Returning to the fact that Koleszar did not ask the grievor at this point whether he was sick, Kolezsar said the grievor was "venting" about the Overhead Compactor and recycling, and that the exchange about sickness only came out when the grievor was leaving.

The cross-examination explored what Koleszar said to the grievor as he was leaving. He was asked a series of questions designed to elicit agreement

with the proposition that Koleszar did not give the grievor a clear order to see Slack. It was put to him that he had said, "I think Paul wants to see you". Koleszar replied, "The way I recall it I said Paul wants to speak to you because that was what Paul said". When it was suggested to him that he was not positive, he said "No, that is what I said". Kolezsar did agree that he did not say to the grievor that he could not leave without seeing Slack, adding that the grievor had made up his mind not to see speak to him. Kolezsar also agreed that he did not state that the grievor had to work the Overhead compactor and could not leave.

Counsel then suggested there had been not been a clear order that the grievor could not leave the work site after he had signed out and said he was sick. Kolezsar answered, "It came down to him making a choice to leave". Counsel suggested that the grievor had that choice because there was not a clear order. Koleszar's answered that he did not know if he could make the grievor not leave.

Turning to the grievor's evidence in chief, he testified about aspects of his physical condition prior to his return to work on Monday, September 18, following a two week vacation in the United States. He said that prior to the vacation he experienced a bit of bronchitis, chest congestion, sinus difficulties and headache. The trip, he said, was a key to feeling better. During the trip he said he experienced some difficulty hiking and purchased an over-the-counter decongestant for relief.

When he returned to work on September 17, he said he was a "little drawn" after a lengthy drive, adding it is always a little weird to return to work after a holiday. His evidence about work that day has been reviewed earlier in this Award. That evening the grievor testified that he was not feeling too well. He said he felt a little "weakish" and congested and was up and down during the night. In the morning, the grievor stated, he was tired, drawn, congested and his sinuses were tightly packed.

Asked what duties he anticipated doing on Tuesday, September 18, the grievor responded that it would probably be the Overhead Compactor but that it could be something different. Asked why he would attend work given the previous night, he said "I do that", adding it was his style and nature even if not 100 per cent.

Testifying about his recollection of the morning muster, the grievor stated that he was feeling "crappy" and Kolezsar was giving out instructions. He said he did not hear Kolezsar mention his name so he turned to Buxton and asked what he would be doing that day. He said Buxton shrugged his shoulder whereupon Poulsen said he thought the grievor would be with him.

Asked if he worked with Poulsen that day, the grievor said no. He testified that he was almost feverish at that point and had an extremely bad headache. He said he felt sick enough that he had to go to the office, so he went there and signed the book.

Describing his understanding of the process to leave, the grievor said that, in either order, you get the sign out book and advise the supervisor, letting him know you are going home sick. Asked why he entered the words "sick and tired", the grievor replied it was because he was. Asked if any part of his decision to leave was motivated by his work assignment, the grievor responded, "not at all". Asked his motivation to leave, the grievor said he "never heard the instruction", was feeling bad and going home.

The grievor gave the following evidence about what occurred after he had signed the book. He said he "indicated" to Kolezsar he was signing and going home. Kolezsar, he said, just looked up, acknowledged the book was being signed and nodded. The grievor said he then went to the lunchroom, grabbed his shoulder bag, walked across the table and got his lunch from the fridge. He then went and changed into street clothes.

The grievor also testified about his conversation with Kolezsar in the lunchroom. He said he wasn't quite sure what he said and then stated he had "blurted, I am out of here". The grievor went on to say that he wanted to change and go home but, at the same time, he wanted to talk to Kolezsar. Asked why that was so, the grievor replied that he wanted to let Kolezsar know that he was not very impressed, that he felt threatened by Slack saying he could be put on recycling. He repeated that he took Slack's statement as a threat, adding that he didn't feel it was needed. Asked if it played any role in his decision to leave, the grievor's answer was no.

With respect to his later conversation with Kolezsar, the grievor said that after he had changed and was going out the door Kolezsar followed him and said "Just a minute. I think Paul wants to see you before I go". Asked if he were confident Kolezsar said that, the grievor replied that he was very confident, adding that Kolezsar "always says I think". The grievor said his response to Kolezsar was that he had seen Slack the day before, that he was not well and was going home.

The grievor then testified about subsequent matters. He said he went home, took a couple of Advils and noted that he had to wait until 9:00 a.m. to attend a clinic. So he lay down for a half hour and then went to a clinic where he saw a doctor. He said the doctor examined him, noted wheezing, and concluded that he might have a chest or lung problem. The doctor, he said, was unable to do anything for him at that point and suggested seeing a specialist. After leaving the clinic, the grievor said he returned home, used a "med iPod" for congestion and went to bed.

Three to four weeks later, he said he got a call and saw a specialist who sent him for sinus and lung x-rays. The grievor testified that he was later scheduled to see a lung on April 15, 2013 but he rescheduled that appointment because it conflicted with the hearing dates in this arbitration.

In direct examination, the grievor was also questioned about Wednesday, September 19. His evidence was that he attended work and drove the Overhead Compactor with Poulsen as his swamper. During that day he went to City Hall to

attend a meeting with Slack. The next day, Thursday, the grievor said that although he was not 100 percent, he operated the Overhead Compactor on scheduled runs.

At the close of the direct examination, the grievor was asked whether the Employer had ever asked for a medical certificate. His answer was no. Finally, he was asked to respond to the Employer's allegations of insubordination, more specifically, the allegations that he refused to operate the Overhead Compactor and that he refused to see Slack. He replied, "I only know I came in that day not feeling well enough to work". So, he said, he followed the sign out procedure. What he did that day, he said, had nothing to do with what work he was to do that day.

The cross-examination opened with questions concerning whether he heard Kolezsar assign him to the Overhead Compactor at the Tuesday muster. His evidence was that he had not heard his name, but he agreed he learned from Poulsen that he would continue training with him on the compactor.

He was asked a series of questions designed to obtain agreement that he was frustrated, agitated and upset after the morning muster. Counsel referred to his statement, "I'm done with this place", that he wrote "sick and tired" in the sign out book and that he took three lines to write those words. The grievor would not agree that these factors were indicia of frustration and maintained he was not in fact upset. Asked again whether his evidence was that he was not agitated at

that point, the grievor responded that his mood was basically that he was tired and needed to hurry up and get going.

Focusing on his return to the lunchroom after signing the book, the grievor was referred to Kolezsar's evidence, previously recounted, that the grievor appeared to be agitated and was pacing. Based on that evidence it was suggested he was upset. The grievor disagreed, saying he was under the weather and that it was best to hustle and go upstairs.

The questioning addressed Kolezsar's query as to what was wrong. The grievor agreed that he spoke about the Overhead Compactor and recycling, saying he wanted Kolezsar to know what Slack had said about the compactor and that Slack had "kind of" threatened recycling. It was then suggested that the Monday meeting with Slack was still bothering the grievor Tuesday, to which the grievor replied that it was not the nicest thing to say.

It was put to the grievor that he did not tell Kolezsar in the lunchroom that he was sick. The grievor's response was that he did not have to because Kolezsar had seen him sign the sign out book and because he had said "I'm out of here". In response to the ensuing question, however, he agreed that his actual words had been "I'm done with this place". Asked whether that expression had no particular meaning to him, the grievor replied that it is just a form of expression, made because of the recycling discussion on Monday. Asked if he thought Slack was unfair, the grievor answered that Slack was aware of his knee surgery. He was then asked if he had felt threatened. At this point in his

evidence he said he did not feel threatened, although later in his cross-examination he returned to his earlier view, saying it was a "kind of threat".

The cross-examination returned to whether the grievor was frustrated with work on Tuesday, given his statement that he was done with the place. His answer was, "for recycling yes, for anything else no". He would not agree that he was frustrated because of the compactor assignment. In this connection he said, "I was not frustrated at all, not feeling well". Counsel then referred to the grievor's statement to Kolezsar that younger people should be trained on the compactor, suggesting that it showed he was upset and that others should do that work. The grievor did not agree with this characterization.

The cross-examination returned to the fact that the grievor did not declare sickness to Kolezsar in the lunchroom. Counsel noted that in response to Kolezsar's query as to what was wrong, the grievor mentioned a recycling threat and that younger people should be trained on the compactor but he made no mention of illness. Again, the grievor responded that Kolezsar had seen him sign the sign out book. Questioned about the purposes of that book, he agreed that it was not limited to sickness and that it was also used for doctor's and dentist's appointments.

The questioning then explored what Kolezsar said after the grievor had changed and was walking out the door. It was put to him that Kolezsar said, "Paul wants to see you". The grievor answered no, adding "his exact words were I think Paul wants to see you before you go". He said it was "clear as a bell".

Asked if he was saying that Kolezsar's evidence was wrong, the grievor's answer was yes. Counsel then referred to the grievor's statement that he had seen Slack the day before, and suggested this showed that the grievor understood that Slack wanted to see him. The grievor answered, "It wasn't like he was telling me to go. If Neil had said go see Paul before I go I would have". Asked if the grievor was saying there was no direct instruction the grievor replied yes. Asked further if the grievor was saying the order was not clear enough to him, the grievor replied "correct". Asked to agree that he said he had a headache at this point, the grievor responded that he was not 100 per cent sure, but he knew he had a headache.

The cross-examination continued to explore what Kolezsar said to the grievor as he was leaving. Asked to identify the first thing Kolezsar said, the grievor replied that Koleszar hesitated and said "I think Paul wants to see you". He added that Kolezsar seemed somewhat nervous. Asked about hesitation, the grievor said Kolizsar was literally thinking of the way he was going to say it. Asked how he responded, the grievor said he told Kolezsar he had a terrible headache and had to go. Counsel then suggested that was not correct, that he responded with a statement about having seen Slack the day before. The grievor replied that he said that too.

Counsel reminded the grievor that a couple of minutes previously in the cross-examination he had not been 100% sure he told Kolezsar he had a headache. He suggested that the grievor was not 100% sure about that or 100% sure about the words he used about having seen Slack the day before. The

grievor responded that he could not recall the sequence and that it had been a while ago.

Moving to events after the grievor left the work site, counsel suggested that the potential lung issue was unrelated to headache. The grievor disagreed, saying bronchitis affects the lungs and nasal passages and builds up to a very severe headache. He agreed that the clinic doctor did not do anything for him that morning, other than examine him. He also agreed that from September 2012 to the point of the arbitration he had received no treatment for an underlying lung issue. He also agreed that underlying issues have not stopped him working since September 2012.

The cross-examination later returned to the Tuesday muster. The grievor agreed that he attended dressed for work, saying "full gear". Asked if he was waiting to hear instructions, he replied, "Whatever they gave me". Counsel then noted that upon learning his assignment he went to the sign out book and said he was done with the place. The grievor's answer was that the men were then doing stretching exercises and it was his opportunity to go and sign.

In light of the fact that he was dressed for work and in the muster, the grievor was asked whether his health deteriorated when he learned his assignment. The grievor answered no, that his prior intent had been to go home. In light of that evidence, the grievor was asked why he sat through the muster. The grievor responded that Kolezsar was giving instructions and he was being polite, extending Kolezsar courtesy. He added he knew he was going home sick.

Asked, if that were so, why he asked Buxton what he would be doing that day, the grievor said it was because his name had not been mentioned.

Moving to the second grievance, the Employer imposed a five day suspension on the grievor following an incident on October 1, 2012. Slack communicated the suspension to the grievor by letter dated November 2, 2012. As revised, it reads:

> As communicated to you in my letter of October 31, 2012, we recently became aware of possible misconduct on your part specific to you failing to follow legislated safety requirements when participating in an excavation on October 1, 2012. A safety investigation was completed and it was found shoring requirements for the excavation were not met and that you entered the trench without the required shoring. As you know, you were involved in this safety investigation and then in a subsequent investigation on November 1, 2012 where you provided your explanations to us.
>
> After completing the investigation, I have concluded that you failed to follow safe work practices when you failed to ensure the required shoring. Your failure to follow the legislated safety requirements could have potentially resulted injury and/or death to yourself and others who were at the work site.
>
> During the course of the investigation, you acknowledged that you had received a letter of expectation on February 3, 2012 in which I emphasized the importance of ensuring that excavation related hazards are controlled by using shoring, trench boxes or other acceptable means as outlined in the Regulation, and in which I stated my expectation that you will adhere to all future communicated guidelines and procedures. As well, during the course of the investigation, you acknowledged that you received training in July 2012 on Shoring and Excavation and that you entered the trench without shoring.
>
> With the February 3rd letter of expectation and the training you received in July of this year, you ought to have known the shoring requirements and the potential risks to yourself an others. I wish to reemphasize my expectation that you are required to follow safe work practices, the Workers Compensation Act and Occupational Health and Safety Regulation. You must ensure that you analyze your surroundings and any potential risks when working in proximity to an excavation site, including measuring trench depth. Every worker must take reasonable care to protect their own health and safety and the health and safety of others who are at the work site.
>
> Given your disciplinary record and the seriousness of your actions, the City is suspending you without pay for five (5) days, effective Monday, November 5, 2012. You will be expected to report to work on Tuesday morning, November 13, 2012.

[redacted] it is my hope that this suspension will cause you to reflect on the importance of safety in the workplace and I expect and immediate and significant improvement from you. Any future misconduct on your part may result in further disciplinary action, up to and including termination of your employment.

The essential facts are relatively straightforward and free of material dispute. On the morning of October 1, 2012 the grievor was part of a crew dispatched to carry out an excavation on private property on Lee Street, which is approximately three blocks from the works yard. The excavation was being made to expose an old sanitary sewer line running to the main.

Because of the proximity of Lee Street to the works yard and because it was not initially known how deep the excavation would eventually be, at the morning muster Kolezsar instructed the crew not to take shoring to the work site. They were instructed that should shoring become necessary they should return to the works yard and collect it.

The crew attended the work site and commenced excavation. At a certain point ambiguity developed concerning the direction of the old pipe. Accordingly, the crew contacted Kolezsar, seeking instruction. Subsequently, Slack and Kolezsar attended at the site in the course of additional duties. Upon their arrival, they observed the grievor in the trench. Slack's evidence was that the trench was "obviously" more than four feet deep.

Slack ordered the grievor out of the trench and instructed one of the crew to measure its depth. The measurement revealed a depth of five feet. Slack testified that the measurement was taken in the same spot as the grievor had

been standing. Documentary evidence generated in the course of the subsequent investigation recorded another member of the crew as stating that the measurement was taken approximately three feet away from where the grievor had been standing and that this person felt the trench was shallower at that spot. Neither party called that person as a witness.

Under the WorkSafe regulatory framework shoring is required when an excavation exceeds four feet. Shoring is an important safety measure. Without it serious injury can result. In some cases there is a possibility of fatality. In cross-examination the grievor agreed that the Employer and external trainers emphasize that excavation is the most dangerous work the Employer does.

All but one of the crewmembers had previously received formal shoring and excavation training in July 2012. The grievor was among those who received that training. In addition, over the years there had been "toolbox" sessions addressing shoring requirements and practices. The grievor attended such sessions in 2007, 2010, 2011 and 2012. In addition, he had received a letter of expectation, dated April 19, 2012 after an investigation that concluded he had been in an excavation without shoring that exceeded four feet.

The grievor testified about the Lee Street incident but he did not dispute the essential facts. His position respecting the incident was that he felt safe, given the soil conditions and structure of the ditch. Further, he said he was not the only person in the excavation that day. In his direct examination, he identified [redacted] as one who was in the trench, saying they were taking turns with the

shovel. In cross-examination, he stated that Mr. [redacted] was also in the excavation. Taken to an investigatory report which recorded him as stating that he was not sure if [redacted] had been in the trench, the grievor maintained that he had a clear recollection of [redacted] being in the excavation.

Following the investigation, the grievor received a five day suspension. [redacted] and [redacted] each received discipline in the form of a written warning. Mr. [redacted] received no discipline, on the basis that he was a recent employee who had not received shoring training. Testifying about the differential treatment, Slack said the grievor was being given progressive discipline and "it seemed to be back to issues". [redacted] and [redacted] he said, had no prior disciplinary records. In addition, in response to a question about the placement of the other crewmembers at the excavation site, Slack responded that they were not in the trench; they were waiting for instructions. In cross-examination, it was suggested that everyone at the site was equally culpable, to which Slack replied "somewhat". He then agreed with the suggestion that the grievor's misconduct was no more serious than [redacted].

The foregoing is not an exhaustive account of the background and further references to the evidence are made later herein, but the background has been sufficiently recounted to permit me to continue to the next section of the Award. I note also that I have not found it necessary to refer explicitly to three Employer witnesses. That said, in what follows I have endeavored to be mindful of all of the evidence adduced at the hearing.

III. THE PARTIES' POSITIONS

The Employer's position respecting the first allegation of insubordination was that the grievor was not ill and that his conduct constituted a refusal to perform his work assignment. With respect to the second allegation of insubordination, its position was that the grievor was given and refused to obey a clear direction to see Slack. In taking these positions the Employer submitted that on all of the evidence the grievor was not a credible witness with respect to these matters. It submitted that insubordination is a serious employment offense and given the grievor's disciplinary history and the principle of progressive discipline a three day suspension was a just disciplinary measure.

The Employer's position respecting the second grievance was that the grievor indisputably engaged in misconduct October 1 and that taking into account the grievor' attitude to the misconduct, his disciplinary history and progressive discipline, a five day suspension was a just and equitable measure.

The Employer presented the following authorities, cited in order of their appearance in its brief, and a further loose authority: *Brown & Beatty*, Can. Law Book, paras. 7:3600 and 7:3610; *General Coach, a division of CITAIR, Inc. v. United Steelworkers of America, Local 1-423* (Somjen); [2005] B.C.C.A.A.A. No. 65; *British Columbia Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258*, [2011] B.C.C.A.A.A. No. 123 (Holden); *International Union of Operating Engineers, Local 115 v. Williams Machinery Limited Partnership*, [2012] B.C.C.A.A.A. No. 93 (Dorsey); *Richmond Steel*

Recycling Ltd. (Re), [2012] B.C.L.R.B.D. No. 38 (Miller); *Richmond Steel Recycling v. Ironworkers, Local 712*, [2011] B.C.C.A.A.A. No. 132 (McEwen); *VitalAire Canada Inc. v. Teamsters Local Union No. 213*, [2011] B.C.C.A.A.A. No. 144 (McPhillips), and *Tonolli Canada Limited and United Steelworkers, and its Local 9042*, [2013] CanLII 15108 (Surdykowski). The following decision was separately presented: *Heritage Credit Union v. United Steelworkers, Local 1-405*, [2009] B.C.C.A.A.A. No. 86 (McConchie).

The Union's primary position with respect to the insubordination allegations was that the grievor gave no cause for any discipline. With respect to the first allegation, its position was the grievor did not refuse to perform the assignment given to him September 18. It submitted that he was in fact sick and that there was no reasonable basis for a contrary conclusion. Because he had signed out and informed his supervisor in accordance with the Employer's sickness policy, it was submitted that the grievor was then free to depart.

With respect to the second allegation of insubordination, the Union's position was that the Employer had failed to prove its case. Specifically, it submitted that the case was not made out because the Employer did not give the grievor a clear order to see Slack and did not order him not to leave. In addition, the Union submitted that the Employer did not have the right to detain the grievor if the reason is health.

Alternatively, if discipline were merited, the Union's position was that a three day suspension was excessive for two reasons. It submitted that because

Slack relied only on a prior two day suspension (and not the grievor's disciplinary record prior to that) the record prior to the two day suspension is irrelevant to my determination of an appropriate level of discipline. Second, it relied on the fact, conceded by the Employer in argument, that the assertion of increased cost in the discipline letter was not proven. In these circumstances it submitted that the three day suspension must be reduced.

With respect to the second grievance, the Union acknowledged that the grievor's conducted merited some discipline. Its position was that the five day suspension was excessive. It submitted that the five day measure was a "wrote" application of progressive discipline. The doctrine, it submitted, does not contemplate automatic increases in discipline. In addition, it submitted that the five day suspension was excessive in light of the Employer's treatment of the other members of the crew.

The Union presented the following authorities cited in order of their appearance in its brief: *Meat Connection Inc. v. United Food and Commercial Workers International Union, Local 1105P*, [1985] O.L.A.A. No. 2 (Solomatenko); *United Parcel Service Canada Ltd. v. Teamsters, Local 938*, [2005] C.L.A.D. No. 136 (Springate); *ATCO Lumber Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-405*, [2001] B.C.C.A.A.A. No. 231 (Munroe); *Alcan Smelters and Chemicals Ltd. and C.A.W., Loc. 2301* (1958), 77 L.A.C. (4th) 303 (Hope); *Emergency Health Services Commission v. Ambulance Paramedics of British Columbia*, [2003] B.C.C.A.A.A. No. 365 (Glass); *Coulson Forest Products Ltd. (Re)*, [1995] B.C.L.R.B.D. No. 329 (Parkinson); *Richmond Intermediate Care*

Society (Rosewood Manor) (Re), [2000] B.C.L.R.B.D. No. 328 (Hall); *Health Employers Assn. of British Columbia v. Hospital Employees' Union*, [2000] B.C.C.A.A.A. No. 104 (Jackson); *Lifestyle Retirement Communities Ltd. (Whitecliff) v. British Columbia Government and Service Employees' Union*, [2007] B.C.C.A.A.A. No. 120 (Hickling), and *Lilly Industries Inc. and U.S.W.A., Loc. 13292-02* (2000), 86 L.A.C. (4th) 397 (Dumoulin).

IV. ANALYSIS AND DECISION

This section will first address the September 18, 2012 incident. Focusing on the evidence, if one were uncritically to accept at face value the grievor's assertions that he left because he was ill and that he was not given a clear direction to see Slack before leaving, it would follow that he engaged in no misconduct. An important issue, however, is the grievor's credibility.

In approaching this issue I have endeavored to follow the well-known principles articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA). The following passages from the leading judgment of O'Halloran J.A. merit quotation:

> 9. ...But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanor of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time....
>
> 11. The credibility of [an] interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus

> can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and those shrewd persons adept in the half-lie and of long and successful experience in combining skilful (sic) exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half of the problem. In truth it may easily be self-direction of a dangerous kind.
>
> 12. The trial Judge ought to go further and say that evidence of the witnesses he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial judge's finding of credibility is based not on one element to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

Applying those principles in the context of all of the evidence and the surrounding conditions, I am unable to conclude the grievor was a credible witness regarding his assertions. My reasons follow.

The grievor's testimony was that illness, not a refusal to operate the Overhead Compactor assignment, was his sole motivation for leaving the work site following the Tuesday muster. In my view, his evidence on that point was sometimes internally inconsistent and also inconsistent with aspects of his conduct Tuesday morning.

The grievor attended the morning muster and then, having learned his assignment, promptly signed out. He denied that his health had deteriorated during the muster, saying he had a prior intent to go home sick that morning. Yet he had come to work, changed into work clothes and gone to the muster. In my view, those actions are inconsistent with the prior intent he asserted. Further, his stated reason for sitting through the muster, a courtesy to Kolezsar, is simply not

persuasive. The fact is, attending the muster afforded him the opportunity to learn what his assignment would be that day.

Only after learning his assignment did the grievor proceed to the desk and sign out. I do not attach significance to the facts that he used the words "sick and tired" to express the reason for the sign out or that they occupied three lines of the book. A prior entry in the book indicates that he can express sickness with a colorful expression. One entry said "sick, sick, sick".

On the other hand the grievor's statement to Kolezsar, "I am done with this place" is, to use the Employer's word, telling. At the September 19 investigation meeting, asked to explain what he meant by that statement, the grievor said it meant that he was sick. In my view no reasonable person would interpret such a statement in that fashion. Notably, he did not repeat that explanation at the hearing. At the hearing he connected it to his asserted recycling threat.

The grievor's subsequent conduct and statements in the lunch room were also inconsistent with the asserted sickness. When Kolezsar asked him what was wrong, the grievor did not mention sickness. He said that Slack had threatened him with a recycling assignment and complained that younger persons should be trained on the Overhead Compactor. If illness were the issue, one would have expected him to raise it. I am mindful of his assertion that he did not have to tell Kolezsar that he was sick because he had written that in the sign out book. But the grievor did not observe Kolezsar examining the entries. The

grievor mentioned illness for the first time as he was leaving the building, as part of his reasons for not going to see Slack at that time.

I pause here to address the grievor's assertion that Slack had threatened him with a recycling assignment. In his evidence, Slack denied making any threat. He said he mentioned recycling in the course of reviewing the grievor's job description. Notably, as previously recounted, that job appears in the same line as the other relief duties: "Relief driver for Sweeper, Recycling and O/H Compactor". So it would be natural to mention that duty. Perhaps more important, Slack was aware the grievor had undergone knee surgery, and he had encouraged him to get a medical note so that he would not be assigned that work. Finally, the grievor did not describe the Monday meeting as confrontational. He did testify that Slack had asked him if he were refusing work, but he described the meeting as "mellow". In all of these circumstances I am not prepared to conclude Slack threatened the grievor or that there was a reasonable basis for an apprehension of threat.

The Union placed reliance on the fact that the grievor attended a clinic shortly after leaving work, that he has attended one specialist in connection with a potential lung issue and is currently waiting to see another. None of those facts was disputed. But it is also true that he has received no treatment for lung issues and they have not precluded his attendance at work since September 2012. Indeed, he attended work Wednesday, September 19.

I turn now to examples of internal inconsistencies in the grievor's evidence. In cross-examination he initially maintained he was not frustrated or agitated at the sign out desk. He also disagreed that he was upset in the lunchroom. Later, however, the cross-examination returned to whether he had been frustrated with work on the Tuesday. This time, asked whether his statement, "I am done with this place" meant he was frustrated, he answered, "for recycling yes, anything else no".

A second example of internal inconsistency was his testimony about recycling. In cross-examination he initially stated that he had felt threatened. As previously recounted, at a later point in the cross-examination he said he had not felt threatened. Still later, he moved back toward his initial evidence, saying it was a "kind of threat".

I have already stated I am unable to conclude Slack threatened to assign the grievor to recycling. Ultimately, I agree with the Employer's submission that the grievor was focusing on recycling to deflect attention from his aversion to the Overhead Compactor assignment. Notwithstanding his complaints about it on Monday and in the lunchroom Tuesday, he could not admit his assignment to that unit frustrated him, because it would support the insubordination allegation.

When the grievor's assertion of illness is tested against the considerations addressed above, I am unable to accept his evidence that he was ill and left for that reason. To use the previously quoted words of O'Halloran J.A. in *Faryna v. Chorny, supra,* his evidence was not consistent with the probabilities affecting the

case as a whole. I conclude the grievor was not sick and did not leave the work site for that reason. In my view he was feigning illness to conceal a refusal to perform his Overhead Compactor assignment. Accordingly, the first insubordination allegation has been proven.

I turn now to the allegation that the grievor refused a direction to see Slack before leaving the work site. His evidence was that Kolezsar did not give him a clear direction; he testified that Kolezsar said "I think Paul wants to see you". That evidence, of course, conflicts with Kolezsar's evidence as to what he told the grievor. Which version is the more probable?

The grievor did not assert that Kolezsar had said "I think" at the investigation meeting. That language surfaced in his testimony at the arbitration. To support it, he said that Kolezsar always says "I think". But he offered no foundation for such a habit.

Slack testified that he instructed Kolezsar to tell the grievor to see him. That evidence was not controversial. Kolezsar, despite vigorous cross-examination, maintained he had stated to the grievor that Slack wanted to see him. He would not agree that he used, or might have used, the words "I think". His evidence is not surprising and what one would expect. Given Slack's instruction it is reasonable that Kolezsar would convey that instruction. Second, it is perhaps worth mentioning, although I do not rely on it, that Kolezsar is a bargaining unit employee who appeared under subpoena.

Weighing the evidence and the probabilities, I am satisfied that Kolezsar's version of what he said is correct and I accept it. On that basis, I am satisfied the grievor was given a clear order. I am also satisfied that he understood that order. It was not complex. Indeed, the grievor testified he would have seen Slack that morning if Kolezsar's version of his statement had been the case.

I propose next to address the Union's position that the grievor had followed the Employer's staff directive respecting sickness sign out and was therefore free to leave the work site. I am unable to accept that submission. The written directive commences with the phrase "When an employee is unable to work due to illness, injury or some other emergency situation....". At a minimum those words express the thought that an employee must entertain a genuine perception that he or she is unable to work due to illness. That is not this case. The sign out directive cannot operate as an instrument enabling an employee to engage in insubordination. In fairness to the Union's position on this issue, it may be it only intended to advance this position in the event of a finding that the grievor was in fact ill.

I am unable to accept the applicability of the Union's authorities standing for the proposition that an employer cannot prevent an employee from leaving the work site to obtain medical assistance. Those cases, on their facts, are distinguishable because there was real or perceived illness. Further, the jurisprudence is not totally prohibitive. It requires an employer to act reasonably. In my view, even if one were to conclude the grievor were genuinely ill Tuesday,

his condition was not such that it would have been unreasonable to expect him to see Slack before leaving.

In conclusion on the second allegation, therefore, I am satisfied that the grievor engaged in insubordinate behavior by declining to follow the instruction to see Slack.

Given that both insubordination allegations were proved, some discipline was merited. Proceeding to the second question posed in *Wm Scott & Co.*, [1976] BCLRB Decision No. 46/76 (Weiler), was a three day suspension an excessive measure of discipline in all of the circumstances of the case? The Employer hired the grievor in 1995. It adduced the following history since that time:

1. In 1997 the Employer gave the grievor a letter recording that he had refused to perform a temporary recycling assignment. The letter, having characterized his conduct as insubordinate and serious, stated that it would serve as written notice of his actions. The letter did not use the word warning but it was not a mere letter of expectation.

2. In 1998 the Employer gave the grievor a letter summarizing his absences from work, stating that he had an "inordinate" amount of absenteeism. It went on to state that the letter would be placed in his personnel file and might be used in the future to support termination if his absenteeism continued to be excessive. In response to my request for clarification, the Employer acknowledged that the letter referenced non-culpable conduct and stated that it did not rely on the letter to support the three day suspension.

3. In 1998 the grievor received a three day suspension that was subsequently reduced to two days. The suspension letter recorded that the grievor was unable to complete his shift due to a hangover headache.

4. In 2011 the grievor received a letter imposing a one day suspension for sexual harassment and ordering him to attend the Employer's Respectful Workplace training. (The training was to be a one-on-one 3 ½ hour session.)

5. On April 19, 2012 the Employer sent the grievor a letter of expectation because he had entered an excavation site without the required shoring. The letter was not disciplinary.

6. On June 12, 2012 the Employer imposed a two day suspension for making statements of a disrespectful and harassing nature.

Before imposing discipline for the two incidents of insubordination, Slack took advice from Ms. Jacquie Johnstone, the Employer's human resources director, who advised him to impose progressive discipline. But it was Slack who determined the measure of discipline.

As previously noted in its alternative submission, the Union challenged the three day measure on two bases. First, it submitted that because Slack only considered the June 12, 2012 two day suspension, the disciplinary history prior to that is irrelevant to my determination. Second, it submitted that the penalty required reduction because the Employer had not made out its allegation of additional costs consequent upon the refusal to operate the Overhead Compactor.

Leaving to one side for the moment the two submissions in the preceding paragraph, I am satisfied that a three day suspension was not an excessive measure of discipline in all the circumstances. Considered in isolation, insubordination, as the Employer's authorities reveal, is not a trivial offence, although of course the seriousness of such misconduct can substantially vary. In addition, here there were two incidents of insubordination. When the foregoing

observations are coupled with the grieovor's disciplinary history and progressive discipline is applied, I am satisfied that a three day suspension was not excessive.

I have reflected upon the Union's submission respecting the relevance of the disciplinary history prior to the 2012 two day suspension. I am unable to accept that submission. In my view to do so would be to ignore the instruction in *Wm. Scott, supra,* to have regard to the whole of the person's employment history. In the event that I am wrong, and that I am limited to the prior two day suspension, I would still be of the view that the three day suspension was not excessive.

The Union's second submission is more troubling. The Employer acknowledged in argument that it had not proved its increased cost allegation. Should that failure mitigate the appropriate measure of discipline? There is certainly a measure of appeal in the Union's position. However, the Employer's citations included authority that an arbitrator should not disturb the measure of discipline if the discipline is still in the "ball park" after an unproven allegation has been set aside: *British Columbia Hydro and Power Authority v. International Brotherhood of Electrical Workers, Local 258, supra.* In my view, notwithstanding failure to prove the cost issue, the three day suspension for the acts of insubordination remains within a "reasonable range of disciplinary responses": *International Union of Operating Engineers, Local 115 v. Williams Machinery Limited Partnership, supra.*

In sum therefore, on the first grievance I have concluded that some discipline was merited and that a three day suspension was not an excessive measure of discipline imposed for the two incidents of insubordination. There is therefore no need to proceed to the third question posed in *Wm. Scott, supra*.

Turning to the second grievance it is common ground the grievor engaged in misconduct meriting some discipline. The issue is whether a five day suspension was excessive. I am mindful that excavation is the most dangerous work carried out by the city. The grievor acknowledged that fact and also awareness of the regulatory requirements respecting shoring. Assessing this misconduct in the context of the April 15, 2012 letter of expectation and his disciplinary history the doctrine of progressive discipline supports a penalty greater than a written warning.

The difficulty is the differential treatment of the other members of the crew. Two were given written warnings. One of them, Mr. [redacted] had also received a letter of expectation after being in an unshored excavation exceeding four feet. The third, a junior employee untrained on shoring requirements, escaped discipline. The Employer submitted that the two receiving the warnings were distinguishable because they were free of prior discipline and because it was the grievor who was observed in the ditch.

On all of the evidence I am unable to determine if the grievor was the only person in the ditch that day when its depth exceeded four feet. The grievor's evidence, recounted earlier, was that he and [redacted] were taking turns with the

shovel. But it did not emerge whether that was before or after a depth exceeding four feet had been reached. The documentary evidence generated in the subsequent investigation was also not free of ambiguity. Part of it suggests no one other than the grievor entered the ditch when it exceeded four feet. Other entries are not clear. Accordingly, I cannot safely conclude the grievor was the only person in the ditch at times it exceeded four feet. He might, or might not, have been the only one.

In any event, in my view who was, and who was not, in the trench are not controlling factors. The excavation was a joint enterprise. Slack, a forthright witness, in response to the suggestion that everyone at the sight was equally culpable, responded "somewhat". In response to a further suggestion that the grievor's misconduct was no more serious that[redacted]s he said "I agree".

In my view, apart from the untrained junior employee, the crew members were equally culpable. Normally, like offences should attract like discipline. That principle, of course, is subject to the offender's employment history. Here the grievor had a prior disciplinary history. Applying the principle of progressive discipline appropriately, in my view the Employer was justified in imposing a level of discipline greater than a written warning.

The question remains, however, whether a five day suspension was excessive in all of the circumstances. Progressive discipline does not require an automatic escalation of discipline in response to each succeeding offence. As

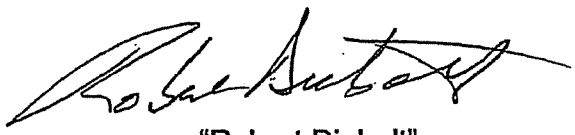
Arbitrator Hickling put it in *Lifestyle Retirement Communities Ltd. v British Columbia Government and Service Employees' Union, supra*, at para. 163:

> Nor does the doctrine dictate that each successive event must invariably result in an increase in penalty. The fact that discipline has been imposed in the past is one of several factors that may be considered in determining if the particular penalty was just and reasonable in the circumstances.

In my view, the five day suspension was disproportionate in view of the level of discipline imposed on the other two members of the crew. The fact that warnings were selected is some indication of the Employer's assessment of the gravity of the matter on October 1. In saying this I am mindful that the Employer was apparently proceeding on the basis that the grievor was the sole occupant of the trench when its level exceeded four feet.

Ultimately, having regard to the discipline imposed on the others, my conclusion is that a five day suspension was excessive. In my view, it was an erroneous application of the principle of progressive discipline. Addressing the third question posed in *Wm. Scott, supra*, what is a just and equitable measure of discipline? A warning would not be appropriate. That would essentially ignore the grievor's employment history. Crafting a penalty arbitrally is obviously not an exact science. However, weighing the grievor's history in the context of the warnings imposed on the others I have come to the conclusion that a two day suspension is a just an equitable measure. As a remedy I order that the grievor be compensated for his loss of income.

In conclusion the first grievance is dismissed. The second grievance succeeds to the extent that the five day suspension has been reduced to two days. IT IS SO AWARDED.



"Robert Diebolt"

Robert Diebolt, Q.C.