IN THE MATTER OF AN ARBITRATION

BETWEEN

GREATER VANCOUVER REGIONAL DISTRICT

AND

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(Grievances of George Hemmings)

Arbitration Board	:	Donald R. Munroe, Q.C. Chair
	:	Susan Chariton Nominee
	:	Michael Hunter Nominee
For the employer	:	Alan J. Hamilton and Judith A. Macfarlane
For the union	:	David Tarasoff
Dates and place of hearing	:	May 15 and 16, 2000 Vancouver, B.C.

We were constituted by the parties as an arbitration board under their collective agreement with jurisdiction to hear and decide two grievances filed by tht union on behalf of George Hemmings (the grievor). In sequence, the first grievance alleges that a 5-day suspension given by the employer to the grie,vor on November 30, 1998 was not for just or proper cause. The second grievance alleges that the employer's dismissal of the grievor on April 20, 1999, was likewise not for just or proper cause. At the time of the incident giving rise to the 5-day suspension, the grievor was a probationary employee. At the time of the incident giving rise to the dismissal, the grievor was no longer a probationary employee, having completed the six-month probationary period a few days earlier.

The locale of the two incidents was the Stanley New Fountain Residence where the grievor worked as a caretaker on the graveyard shift (midnight to 8:00 a.m.). The grievor's duties included mainly janitorial work; some minor maintenance work; locking and unlocking doors; and dealing in some instances with tenant-behaviour issues.

The Stanley New Fountain Residence is also known as the Gastown Mens' Residence. It is located in the Vancouver downtown eastside. It has 103 dormitory-style rooms for low-income male housing. Many of the tenants suffer from alcoholism and other substance-abuse problems; psychiatric disorders; etc. It is a difficult place to work.

The Suspension

The incident giving rise to the 5-day suspension occurred on November 18, 1998 at about 7:45 a.m., just prior to the end of the grievor's midnight-8:00 a.m.

shift. At about that time, the day shift caretaker, Doug McCallum, arrived at the Residence. As is the practice, he and the grievor were having a discussion in the office about events overnight, after which the grievor would go home. The office is separated from the lobby area by a wall which has a wicket in it. As the grievor and Mr. McCallum were engaged in discussion, a long-time tenant, Peter Mizzi, appeared at the wicket. What happened next was a verbal altercation between the grievor and Mr. Mizzi. There is conflicting evidence about who started the verbal altercation; about the manner and degree of profanity uttered by the grievor; and generally, the extent to which it can be said that the grievor verbally abused the tenant. Those conflicts are not easily resolved. First of all, the tenant, Mr. Mizzi, has since died. Second, Mr. McCallum had a tendency in his evidence to give exaggerated accounts of what happened, and his evidence was in some respects different from earlier statements made by him. Third, the grievor's evidence comprised such a *de minimus* account of what happened as to be patently self-serving (although the grievor did admit to some profanity directed at Mr. Mizzi).

Piecing together the evidence, including the employer's evidence of investigative interviews, we make the following findings. When Mr. Mizzi appeared at the wicket as aforesaid, the grievor paused in his discussion with Mr. McCallum, pointed to Mr. Mizzi, and said: "By the way, this fucking guy is a problem, too; he's complained about the heat in his room, and he turns his stereo up too loud" - or words very closely to that effect. Mr. McCallum's reply was to tell the grievor to calm down, and to make out a report of any problems he may be having with the tenant. Then, Mr. Mizzi said something like, "I don't even have a stereo, and my radio has been broken for two months". The grievor testified that Mr. Mizzi called him a "liar". We find that not to have been explicitly said by Mr. Mizzi, although an implication of dishonesty was clearly present in the words used by him. We find as

well that the grievor's main aggravation with Mr. Mini in the morning of November 18 was not about the stereo, but rather about recent differences between the two of them concerning the heat in Mr. Mizzi's room, and the latter's complaint to the grievor's supervisor about it. The grievor's response to Mr. Mizzi's utterance aforesaid was to say that, "I'm not fucking talking to you"; to tell Mr. Mizzi to "shut the fuck up"; and generally to engage in what Mr. McCallum described in his evidence as "escalating rhetoric" - in which Mr. Mizzi joined to some degree. The situation was of sufficient concern to Mr. McCallum that he stood up from where he was sitting at the office desk (the grievor was standing nearby him); touched the grievor's arm; and told the grievor to calm down, go home, and write a report. The grievor thereupon flung his hands in the air, saying loudly to Mr. McCallum: "Take your fucking hands off me; don't ever touch me". Then, the grievor departed the Residence and went home.

In our view, the employer was correct in thinking that the grievor's behaviour on the morning of November 18 raised issues about his suitability for employment at the Stanley New Fountain Residence, and that a disciplinary response was warranted. That is to say, we agree with the employer that the tenants of the Residence have a right to be treated with dignity and respect by the employees working at the Residence, and that the employees have an obligation to avoid confrontations with the tenants to the extent possible.

But certain facts stand out in mitigation. We were informed that at the prehiring interview, potential employees are told about the difficult working environment at the Stanley New Fountain Residence, and they are asked questions about their ability to avoid conflict; about theft feelings towards drug addiction; etc. However, as best we can gather, they are not provided with any training on

conflict resolution or aggression-avoidance. The caretakers employed at the Stanley New Fountain Residence are not para-professionals or trained caregivers. They are the janitorial staff who, during the graveyard shift, are alone in the building (there is one caretaker per shift, and no other staff on the graveyard shift). We think the absence of training in the behaviours of persons like those living at the Residence, and in aggression-avoidance, etc., is a factor to be taken into account. We repeat that these people are not para-professionals or trained caregivers who can be expected to have come to their employment with that kind of training or orientation already part of their education or employment experience. Certainly, the employer does not have an obligation to re create them as pan-professionals or caregivers. However, the standard against which they are to be judged must be in relation to the expectations in which they are adequately orientated, and for which they are adequately equipped.

That takes us to the second mitigating factor. Simply put, the best evidence before us is that profanity commonly passes in both directions between tenants and staff at the Stanley New Fountain Residence. Neither is it uncommon for there to be confrontations between tenants and staff, in which each verbally stands up to the other. We are of course aware of the distinction for present purposes between “shop talk”, on the one hand, and unwarranted verbal abuse, on the other (an argument can be mounted that in these circumstances, the people living at the Residence are part of the “shop”); and we think that upon proper remedial notice the employer could insist that the caretakers exhibit a higher standard of behaviour toward tenants than presently is uniformly exhibited. However, the standard against which the grievor is to be judged as a relatively new employee is the one which existed in fact at the material time.

We find that the grievor was largely the aggressor in the verbal altercation with Mr. Mizzi, and that his behaviour was at variance with the norm and with reasonable expectations. However, it was not the distance from the norm that the employer's senior managers believed it to be.

Discipline was warranted for corrective purposes. As was acknowledged by the employer, a 5-day suspension for a first offense is "unusually stiff'. While we think in the circumstances that the 5-day suspension was unduly severe, we do agree with the employer that a suspension without pay was appropriate. Our award is that the suspension shall be for a period of 2 days, with the usual remedial consequences.

The Dismissal

The facts giving rise to the grievor's dismissal in late April, 1999, are as follows. The caretaker at the Stanley New Fountain Residence on the afternoon shift (4:00 p.m. to midnight) on April 13, 1999, was Richard Boakye. One of Mr. Boakye's assignments that day was to clean Room 246 which had recently been vacated. When Mr. Boakye unlocked and opened the door to Room 246, but not having turned on the lights, he ". . .saw a gun in a holster on a coat hanger". Mr. Boakye testified that he was "scared" by what he had seen; that he immediately closed and re-locked the door to Room 246; that he then went to the office to telephone the supervisor, Randy Kendall. Mr. Boakye told Mr. Kendall that he'd seen a gun in a holster in Room 246, whereupon Mr. Kendall "...instructed me not to tell anybody; to lock the door and not let anybody in [the room]; and that he'd come to the Residence the next morning to investigate". We note here that Mr.

Kendall supervises the employees at a number of residences; and that his office is not at the Stanley New Fountain Residence, but rather at a headquarters building.

The caretaker for the graveyard shift commencing at midnight on April 13, and going into the morning of April 14, was the grievor - who arrived at the Residence at about 11:50 p.m. on April 13. Mr. Boakye did not construe the instructions from Mr. Kendall as prohibiting him from telling the co-worker who was relieving him about what he'd seen in Room 246; and so "...I told [the grievor] that when I went to clean Room 246 I saw a gun". However, Mr. Boakye also told the grievor that ..... I called Randy and he told mc that I shouldn't tell anybody and that I should lock the door and he'll come in the morning to investigate". Much was made by the union of the fact that Mr. Boakye's recounting to the grievor of Mr. Kendall's instructions did not explicitly include the instruction that he was .... .not to let anybody in the room". However, there can be no doubt about the general tenor of Mr. Kendall's instructions, both as given to Mr. Boakye and as recounted by Mr. Boakye to the grievor: which was that the situation in Room 246 was not to be disturbed.

Upon hearing what Mr. Boakye told him, the grievor said this: "Who's Randy?.. .Are you scared?.. .I'm not scared of guns, let's go, I want to see it." Of course, the grievor knew perfectly well who "Randy" was; that is to say, the supervisor to whom he reported. The words "Who's Randy", and the manner of their delivery as described by Mr. Boakye, were intended by the grievor as the expression of the following insubordinate thought: "Who is Randy to be telling us what to do or not do?" It must be noted, however, that the words were uttered to a co-worker and not directly to the supervisor.

The grievor took the keys to Room 246 from the office; said to Mr. Boakye, “Let’s go”; and headed for the room - with Mr. Boakye following behind. Upon entering the room, the grievor grabbed the gun out of the holster. He immediately realized (as is the fact) that it was a plastic toy gun. The grievor then said to Mr. Boakye words like these: “Did you think it was a real gun; you don’t know what a real gun is.. .this is just a toy gun”. Apparently for the purpose of demonstrating that it was just a toy gun, the grievor (on Mr. Boakye’s testimony) “. . . started fooling around with it, pulling the trigger, and making firing noises

The grievor and Mr. Boakye then returned to the office, with the grievor having the toy gun in his possession. When Mr. Boakye went home shortly after midnight, the grievor was still in the office, and the toy gun was on the office desk. A short while later, the grievor put the toy gun in his knapsack, which was also in the office. The grievor explained that he put the toy gun in his knapsack because he wanted to be the one to show it to Mr. Kendall, and to be the one to reassure Mr. Kendall that it was just a toy. On the evidence, the grievor’s wish to be the one to show the toy gun to Mr. Kendall included an intention to share a “laugh” with Mr. Kendall about Mr. Boakye’s fear of what turned out to be only a toy.

At first blush, it seems odd that the grievor would put the toy gun in his knapsack, rather than, say, in a desk drawer or the office filing cabinet. The grievor’s explanation was that the knapsack was the least likely place for anyone else to see the toy gun; that is to say, the least likely place for someone to find the gun and to thwart his desire to be the one to show it to Mr. Kendall.

Particularly because of his desire to be the one to show Mr. Kendall the gun, it seems odd as well that when Mr. Kendall arrived at the Residence in the morning of April 14, the grievor did not show the gun to him or talk to him about it. The grievor said that with the passage of roughly eight hours, he 'just plain forgot" about the toy gun, with the result that when he went home at the end of the shift, he unwittingly took it with him in the knapsack.

Objectively, some of the facts, and the oddities aforesaid, give the appearance of theft. However, we cannot find an intention by the grievor to steal the toy gun. It is an unlikely thing for the grievor to be motivated to steal; and he could not possibly have thought that he could "get away" with stealing it. As well, the grievor's assertion that he simply "forgot" about the toy gun until telephoned by the police on April 15 (one of the grievor's days off) is in some degree corroborated by his wife who we find to be credible as a witness.

How did it come about that the police called the grievor to ask about the gun? As we have indicated, Mr. Kendall arrived at the Residence in the morning of April 14 to investigate the "gun" in Room 246. In company with Doug McCallum (the day shift caretaker), he went to Room 246; unlocked it; looked around; and found nothing. Mr. Kendall was understandably concerned. The night before, he had received a telephone report of a "gun" in Room 246. And now the "gun" had gone missing. In the result, Mr. Kendall instructed Mr. McCallum to call Mr. Boakye to find out what had happened to the "gun". When Messrs. McCallum and Boakye finally connected by telephone later that day, Mr. Boakye told Mr. McCallum that the grievor had removed the "gun" from Room 246. Mr. Boakye did not tell Mr. McCallum that it was a toy gun. Mr. McCallum reported to Mr. Kendall what he had been told by Mr. Boakye. Being sufficiently

concerned about the matter, Mr. Kendall reported the facts to the police - i.e., as he understood the facts to be. The following morning, April 15, a police officer telephoned the grievor at his home. On the grievor's evidence, that is when "...it dawned on me that I...still had the toy gun...in my knapsack". Apparently, the grievor's assurances to the police officer that the "gun" was just a toy gun were sufficient to avoid a police visit to the grievor's home, but the police officer did instruct the grievor to bring the toy gun that afternoon to a community police office which we gather to be nearby the Stanley New Fountain Residence. It was agreed that the grievor would do so either that afternoon or the following morning. As it happened, the grievor attempted that afternoon to drop off the toy gun at the community police office, but the office was closed. So, he took the toy gun to the Residence office, from where he called the police to let them know where they could pick it up. The grievor left the toy gun in the Residence office in the custody of a Residence clerk, Terry Miller. The police later picked it up. None of this was reported to Mr. Kendall - at least not that day.

On April 15, after hearing from the police, the grievor telephoned Mr. Boakye, commenting to him (among other things) that Mr. Kendall was making a "big deal" of the toy gun; that Mr. Kendall had "sent the police to his home" (which was an overstatement); and that he had had to "go in the garbage to get the toy gun" (which was untrue). The grievor has no sensible explanation for his overstatement or untruth to Mr. Boakye.

The grievor's knowledge by April 15 that Mr. Kendall was making a "big deal" of what the grievor knew to be only a toy gun makes one wonder why he did not immediately call Mr. Kendall to see whether he, too, was aware that it was just a toy gun; and generally to reassure the employer that there was nothing to be

concerned about. But at the same time, one also wonders why Mr. Kendall did not directly call the grievor on either April 14 or 15 to find out for himself what light the grievor could shed on a situation which obviously was greatly concerning him.

In any event, the grievor and Mr. Kendall did not speak to each other until the morning of April 16, at which time they spoke by telephone (overheard in part by Kathy Crossley, the employer's area manager). The call was initiated by the grievor, whose intention was to inform Mr. Kendall that he (the grievor) was ill and therefore not able to report for work that night. Mr. Kendall then asked the grievor the whereabouts of the "gun". There is conflicting evidence about the grievor's exact response to that question. Mr. Kendall's written statement was that the grievor "...said he dropped it off already at the Stanley New Fountain Residence *this morning*" (our italics). Mr. Kendall was unable to attend the arbitration hearing due to a family emergency, and therefore could not be cross examined on that written statement. Ms. Crossley testified that Mr. Kendall's written statement was accurate. However, the grievor's evidence was that he simply told Mr. Kendall that he had dropped the gun off at the office (meaning, in his mind, the previous afternoon). There appears to have been no discussion about whether the "gun" was real or a toy. In any event, having been told for the first time that the "gun" had been returned to the Stanley Fountain Residence office, Mr. Kendall and Ms. Crossley called the office to confirm that information. We were not informed in evidence to whom they spoke. We presume it was not Mr. Miller, because all they were told was that a "gun" was nowhere to be found in the office. Now being thoroughly alarmed, Ms. Crossley immediately called the police; and, after some initial confusion, was told that in fact the gun - a toy gun - was safely in police custody, having been picked up the night before.

We make these two additional observations about the April 16 telephone conversation between the grievor and Mr. Kendall. First, the grievor was not cooperative or forthcoming. Second, he made remarks at times which were inappropriate, unjustified and combative.

The following Monday, April 19, the employer interviewed the grievor in the presence of a union representative. Knowing the purpose of the interview, the grievor had prepared and read out a short written statement. Thereafter, for most of the interview, he was uncooperative and evasive; and in one respect completely untruthful. The grievor's flat-out lie to the employer (which was repeated by him at least twice in the interview) was his denial that Mr. Boakye had said anything to him about having reported the gun to Randy Kendall by telephone in the evening of April 14; or that Mr. Boakye had informed him of any instructions given by Mr. Kendall by telephone that night.

On April 20, 1999, the employer dismissed the grievor from his employment. At the dismissal interview, the grievor's misconduct as regards the "gun" incident was described by the employer as follows: "(1) You removed a tenant's property from Room 246 that you knew you had no right to take; (2) your explanation of your behaviour during this incident is not credible; and (3) you were insubordinate by ignoring Randy Kendall's instructions, as advised by Richard Boakye, to leave Room 246 locked, not to enter, and not to touch anything." The employer also mentioned that, "You have a previous employment record that includes a 5-day suspension for inappropriate conduct in the workplace".

Our analysis of the disciplinary issues begins with this observation: We think that as the graveyard shift caretaker, and as the only staff on duty from midnight to 8:00 a.m., the grievor was entitled to have passed on to him the fact that there was a gun, which was thought to be real, in a vacant room. No doubt, the grievor was insubordinate by his removal of the toy gun from Room 246. However, his culpability in that regard is diminished by his immediate realization on seeing the "gun" that it was a plastic toy.

Now, let us suppose that the grievor had "bagged and tagged" the toy gun, as employees are supposed to do with abandoned possessions found in vacant rooms, and then told Mr. Kendall about it at the first opportunity. Or, let us suppose that the grievor did not "bag and tag" the toy gun, but rather took it to the office (which he initially did) and then reported the situation to Mr. Kendall first thing the next morning. In either event, we doubt that the employer would have issued anything greater than modest discipline for what the employer might reasonably have characterized as the grievor's challenge to his supervisor's symbolic authority.

But neither of those things happened. Rather, the grievor put the toy gun in his knapsack, and then took it home. As we have already stated, we cannot and do not find that the grievor had a guilty mind in doing so. But when, on April 15, it "dawned on him" that he still had the toy gun in his possession, his duty was to contact the employer as promptly as possible to ensure that the employer was put at ease about the situation. Certainly, the grievor's least obligation was to fully cooperate with the employer in its investigation of the matter, and most assuredly not to lie to the employer about the situation.

In short, what began as a relatively minor employment transgression was at each stage made worse by the grievor: first of all by his failure to make timely reports to the employer; then by his lack of cooperation, his evasion and his combativeness when initially confronted by the employer; then by his outright deceit to the employer.

The grievor's explanation for his behaviour, as we have just summarized it, was essentially threefold. First of all, he said that from the moment he realized that the employer was making a "big deal" of the toy gun, he started "running scared" for his job, and making irrational decisions. Second, the grievor said that due in part to what he considered to be the employer's mistreatment of him in the situation the previous November leading to the 5-day suspension, he did not think the employer would accept anything he had to say as truthful in any event. Third, the grievor noted that his first contact with anyone post-April 14 about the "gun" was from the police at the employer's initiation (which was surprising, frightening and intimidating); and he said that when he finally spoke to the employer, the employer's tone was entirely accusatory.

Clearly, a significant factor in what became an unnecessarily overheated situation was the employer's lack of knowledge until April 16 that the "gun" was a toy; and the grievor's apparent failure to appreciate until at least that point the lack of shared knowledge on that score. This lack of shared knowledge, for a surprisingly long time, was for a variety of reasons including: the grievor's failure to make a timely entry in the log book about the discovery of the "gun" and the fact that it was a toy; Mr. Boakye's failure to tell Mr. McCallum during their April 14 telephone conversation that the gun was a toy, or at the least that the grievor said it was a toy; the employer's failure to call the grievor on either April 14 or 15

to ask him directly about the matter; and the grievor's failure to call the employer on April 15 after he was contacted by the police.

As we have said, the situation as it developed in the period April 14-16 became unnecessarily overheated due to circumstances for which the employer, the grievor and others must share responsibility. Then, as we have also said, the grievor made matters worse by his evasions and deceits at the April 19 investigative meeting - although that meeting cannot altogether be divorced from the overheated environment already in existence.

As the union acknowledges, the grievor's conduct in the period April 13-19 warrants discipline. The more difficult question is whether there was just or proper cause for the grievor's dismissal. The grievor's initial employment transgression was not terribly serious, but the situation later got out of hand. In the period April 14-19, it did so for reasons partially but not wholly attributable to the grievor. Then, on April 19, the grievor effectively precipitated his own dismissal by his conduct at the investigative meeting. We do not think it just and proper, in the whole of the circumstances, that the grievor should be dismissed from his employment. But especially in the light of the grievor's conduct at the April 19 meeting, we do not see how the employer can be made to pay back wages and benefits. Our award is that the grievor shall be reinstated to his employment as a caretaker at the Stanley New Fountain Men's Residence; that for purposes of progressive discipline, the grievor's record shall show a four-month suspension in lieu of the dismissal; but that the employer shall not be required to pay back wages or benefits.

We retain jurisdiction to resolve any issues that may arise in the implementation of this award.

DATED THE 26th DAY OF MAY, 2000

"DONALD R. MUNROE"
Donald R. Munroe, Q.C.
Arbitrator

"SUSAN CHARLTON"
Susan Charlton
Nominee

"MICHAEL HUNTER"
Michael Hunter
Nominee