IN THE MATTER OF AN ARBITRATION

BETWEEN:

GREATER VANCOUVER REGIONAL DISTRICT

(the "Employer")

AND:

GREATER VANCOUVER REGIONAL DISTRICT EMPLOYEES' UNION

(the "Union")

McGREGOR SUSPENSION GRIEVANCE

ARBITRATOR:	WAYNE MOORE
COUNSEL for the EMPLOYER:	GABRIELLE SCORER & JULIE A. MENTEN
COUNSEL for the UNION:	STEPHANIE DRAKE
DATES of HEARING:	OCTOBER 24, 25, 26 & NOVEMBER 22, 2016
PLACE of HEARING:	VANCOUVER, B.C.

Introduction

This grievance pertains to a three day suspension issued to Chris McGregor [the "Grievor"], an employee at the Coquitlam Watershed location ["Coquitlam"], for his actions involving a temporary employee. The employee will be anonymized using the term "XY" or the "Complainant".
The three-day suspension was issued following an investigation by a lawyer retained by the Employer of a September 2012 complaint filed by XY alleging bullying and harassment by the Grievor [the "Complaint"]. Mr. Bob Cavill ["Cavill"], Watershed Division Manager outlined the Employer's rationale for the three-day suspension in his January 11, 2013 letter, which reads, in part:

> The investigator concluded that your conduct towards the complainant violated Metro Vancouver's Workplace Harassment Prevention Policy and directly contributed to a detrimental work environment for the complainant while he was employed by Metro Vancouver. Specifically, the investigator found that you were responsible for creating a harassing and discriminatory posting about the complainant and placing it in the Coquitlam guard house. In addition, the investigator found you made discriminatory and harassing statements about the complainant in the workplace. The investigator also concludes that you were not fully forthcoming with him during the investigation process. We accept the investigator's findings and conclusions regarding your conduct. We conclude that your behaviour has been both discriminatory towards the complainant and has also violated Metro Vancouver's expectations of appropriate employee behaviour.
>
> As a result, and effective immediately, you are suspended without pay for a period of three (3) – 12 hour shifts…"

In the context of the adjudicative framework mandated by the Labour Relations Boaod in its seminal *Wm. Scott* decision the Union argues that the Employer has failed to demonstrate just cause for discipline and, in the alternative, the three-day suspension is excessive. The Employer argues that the actions of the Grievor are serious constitutes just cause and require a significant disciplinary response such that a

three-day suspension is reasonable and should not be disturbed.
As a result of a preliminary application I determined that the report of the investigator and its source material attracted solicitor-client privilege but that it had been waived. As the Union limited its disclosure request to exclude the actual report I ordered that some identified types of supporting documentation be produced. (*GVRD -and- GVRDEU (Solicitor-Client Privilege),* (June 26, 2015) (Moore – BC)

The current matter proceeded, in part, by way of an Agreed Statement of Facts ("ASF") which reads as follows:

BACKGROUND

1. The Union and the Employer are bound by a collective agreement that expired December 31, 2015: attached as Appendix "A". The parties are currently engaged in collective bargaining.

2. The Employer is a partnership of 21 municipalities, one Electoral Area and one Treaty First Nation that collaboratively plans for and delivers regional-scale services. The Employer's core services are drinking water, wastewater treatment, parks, and solid waste management.

3. The Employer also manages a regional parks system. Its regional park systems cover a total of 14,500 ha, which includes 23 regional parks, three regional reserves, two ecological conservancy areas and five regional greenways.

4. The Employer also manages three watersheds, each with a water collecting reservoir, to provide 2.5 million residents with a clean, reliable and affordable supply of drinking water. The three watersheds are the Capilano Watershed, the Coquitlam Watershed and the Seymour Watershed.

5. The watersheds are closed to the public for protection from pollution, erosion, fire and other hazards, with the exception of registered tours.

WATERSHED EMPLOYEES

6. The collective agreement defines "regular full-time employees" as employees who are employed on a full-time basis of forty hours (or such other number of weekly hours as is recognized in the agreement) and "temporary full-time employees" as employees who are employed on a full-time basis for a definite and limited period of time which may be extended or cut short.

7. At the material time (commencing fall 2011) the Division Manager for the Watershed Division was Bob Cavill.

8. Ken Juvik was the Watershed Forester, which is equivalent to the Superintendent level of the organization and an exempt position.

9. Clyde MacLeod was one of two Security Coordinators, which is a bargaining unit classification. The Security Coordinators are responsible for overseeing Security staffing at the three watersheds. Mr. MacLeod was replaced by Brent Thomson in or around August, 2012 after Mr. MacLeod retired.

10. Each watershed has patrol coverage.

11. There is a bargaining unit classification for some watershed employees called Security Patroller. Originally, this classification just consisted of employees who patrol multiple areas within the watershed (the "Patrollers"). Subsequently, the Employer hired employees to monitor the entry gate to the watershed (the Gate Guards). Out of administrative convenience, the Gate Guards were placed in the Security Patroller classification, where they remain, though they do not have patrol duties.

12. The Employer typically schedules one regular full-time employee as a Security Patroller at each of the three watersheds for the daylight hours. The Employer also hires full-time temporary Security Patrollers for the summer season due to the extended daylight hours.

13. The exception is the Coquitlam Watershed, which currently employs not only Patrollers who patrol multiple areas, but also but a day-time temporary full-time dedicated Gate Guard whose primary duty is to monitor the gate and who has limited patrol functions (collectively the "Security Staff").

14. At the Coquitlam Watershed, there is a need for continuous on-site security coverage. Therefore there are permanent full-time Gate Guard positions at that watershed that are responsible for night time gate monitoring.

15. At the material time the Security Staff employees reported to Mr. MacLeod (and then Brent Thomson). Mr. MacLeod (and then Mr. Thomson) reported to Mr. Juvik, who reported to Mr. Cavill.

16. Mr. Juvik, Mr. MacLeod and Mr. Cavill have all retired from employment with the Employer.

COQUITLAM WATERSHED

17. The Coquitlam Watershed consists of approximately 20,000 hectares of wilderness. Patrollers spend the majority of the day patrolling this area to monitor projects and ensure that there is no trespassing.

18. At the Coquitlam Watershed there is a Gatehouse at the south end that allows a gate to open and close, permitting vehicle entrance to the watershed.

19. The Gatehouse, (since demolished) was similar to the layout of a small house. There were two main entrances. The bulk of the traffic was in the main area, which was approximately 250 square feet and consisted of two computer stations at one end, and a conference table with chairs in the other area.

20. In the main area was a wall with a whiteboard on it. The whiteboard was approximately one metre by one and a half metres. The whiteboard is contained within a wooden cabinet structure, and can be covered by two wooden cabinet doors.

21. The area where the whiteboard was located was used by employees and by contractors and vendors when they received their orientations to the Coquitlam Watershed.

Construction on the Coquitlam Watershed

22. In or around 2011 the Employer started major construction of a UV treatment plant, which was a very large construction project, just inside the gate at the Coquitlam Watershed.

23. During construction it was very busy at the Coquitlam Watershed, with lots of traffic coming in and out bringing all forms of construction supplies (i.e. gravel, rock and soil) to the construction site.

24. The Employer decided to hire temporary full-time dedicated Gate Guards in addition to the Patroller for the Coquitlam Watershed because of the increased traffic to the Coquitlam Watershed.

25. To date there are still dedicated Gate Guards employed as temporary full-time workers at the Coquitlam watershed to facilitate access for ongoing construction.

Duties and Responsibilities of Patrollers/Gate Guards at the Coquitlam Watershed

26. The primary purpose of the work of the Security Staff is to protect the watershed and keep it secure.

27. A key responsibility of the Patroller is to monitor the watershed boundary and look for any security breaches. Although the watersheds are closed to the public, some people find themselves in the watersheds either by accident or design. They can pose a risk to drinking water quality and the surrounding area.

28. Patrollers help in other ways including maintaining contact with other watershed staff to ensure their safety and sometimes to liaise with BC Hydro, North Shore Search and Rescue and others on access and issues of common concern.

29. The Patroller will typically spend most of the day patrolling the watershed in a vehicle, or sometimes on foot or by boat, depending on the circumstance.

30. Dedicated Gate Guards have no patrol functions. Their primary role is to monitor the gate and ensure that the vehicles coming into the Coquitlam Watershed are authorized to enter the site, and that they are accounted for and logged out when they have completed the work that took them into the watershed.

31. While the majority of the roving Patroller's job is to patrol, it is appropriate for Patrollers that are patrolling multiple areas to be at the Gatehouse from time to time. It is a starting point for the day for the Patroller because the Gatehouse is at the south end of the watershed, and is a shared office space, location for email access, etc.

32. To protect the Coquitlam Watershed, prior to anyone entering the Coquitlam Watershed, the Security Staff are responsible for providing visitors/contractors with an orientation to obtain their initial watershed access permit. The orientation consists of the permittee viewing a video which explains the importance of protecting water quality while working in the watershed.

33. The Security Staff member also handles the logistics and ensures that the permittee signs a declaration promising to abide by the watershed regulations; the rules of what and what not to do when working in the closed watershed.

34. During the construction of the UV treatment plant, the dedicated Gate Guard's primary duty was to ensure that trucks bringing materials into the Coquitlam watershed were those previously approved by Mr. Cavill or Mr. Juvik.

35. The Gate Guards, who received information about the type/volume of authorized materials, were to track the number of trucks coming in with the approved materials, because only a certain amount of volume was approved for importation onto the site.

36. When a truck with materials approached the gate, the Gate Guard would confirm the purpose of the trip with the driver. The Gate Guard also confirmed the type and

quantity of materials they were carrying. The Gate Guard would record that information as part of an overall truck tally on the UV imported material sheet.

37. Because it would sometimes get busy at the gate, the Employer's general expectation was that the Patroller, if present and available, could be requested to assist with gate functions, returning to the function of patrolling the watershed once the assistance was provided.

XY's COMPLAINT

38. XY commenced employment with the Employer in or around 2008 as a temporary full-time employee, first within the Parks department. He then commenced work with the watershed Security Patrollers in or around 2009. Upon starting work as a Security Patroller, XY initially worked at the Seymour Watershed.

39. XY was transferred from the Seymour Watershed to the Coquitlam Watershed to fill the dedicated Gate monitoring position as a Security Patroller on a temporary full-time basis in or around October, 2011.

40. At the time of his transfer to the Coquitlam Watershed, the Security Staff on XY's shift at the Coquitlam Watershed consisted of the grievor, Mr. Chris McGregor, who was employed as a regular full-time Patroller, and Mr. Nicholas Crawford, who was employed as a temporary full-time Patroller.

41. Mr. McGregor had been employed with the Employer since 2002, first as a full-time temporary employee and then as a regular full-time employee. At the material time he had been working full-time at the Coquitlam Watershed for approximately 7.5 years. Mr. McGregor was the most senior employee working as a Patroller at the location on his shift.

42. XY, Mr. McGregor and Mr. Crawford (the "Coquitlam Security Staff") reported to Mr. MacLeod, and then to Mr. Thomson after Mr. MacLeod retired.

43. XY transferred from the Coquitlam Watershed to the Capilano Watershed in or around April or May, 2012.

44. On or around September 10, 2012, XY provided the Employer's Acting Senior Human Resources Director, Ms. Donna Brown, with notes via email detailing his complaint that certain employees at the Coquitlam Watershed had bullied, harassed and mistreated him at the work place: attached as Appendix "B".

45. In response to this email, Ms. Brown asked XY via email if he wanted to make a formal complaint. XY replied via email that he wished to launch a formal complaint on or around September 13, 2012 (the "Complaint"): attached as Appendix "C".

46. At the time the Complaint was made the Employer had a "Workplace Harassment Prevention Policy" (the "Policy") effective December 19, 2008: attached as Appendix "D". The Policy has been updated since the Complaint was made.

47. At the material time the Policy defined harassment as "any conduct, comment, gesture or contact based upon any of the prohibited grounds of discrimination… that is unwelcome and ought reasonably to be known to be unwelcome, and that detrimentally affects the work environment or leads to adverse job-related consequences for the person being harassed."

48. The Policy stated that all complaints would be responded to promptly and any employee who violated the Policy may be subject to discipline, up to and including dismissal from employment.

49. The Complaint named three respondents: Mr. Crawford and Mr. McGregor, both bargaining unit employees and members of the Coquitlam Security Staff, and Mr. Thomson, the bargaining unit Security Coordinator responsible for supervising the Coquitlam Watershed.

50. Most of the allegations in the Complaint centered on conduct which was alleged to have occurred during XY's employment at the Coquitlam Watershed.

51. All of the Complaint allegations concerning the conduct of the grievor Mr. McGregor towards XY described conduct which allegedly occurred after XY commenced working at the Coquitlam Watershed.

52. The Employer retained its legal counsel, Mr. James Kondopulos (the "Investigator"), to conduct an investigation into the Complaint (the "Investigation").

53. During the course of the Investigation Mr. McGregor agreed:

(a) that he put a picture of XY up on the whiteboard of the Gatehouse;

(b) that the picture was of XY pointing his finger at the camera with a funny angry look on his face;

(c) that he wrote on the whiteboard "employee of the year" around the picture with a dry erase marker;

(d) that he lost his temper with XY and spoke rudely to him on one occasion. This occurred when XY asked him for the 10th time where to put a traffic cone. Mr. McGregor told XY something to the effect of "you need to do your job. If you can't do your job we don't need you."

54. Mr. McGregor was interviewed by the Investigator. Subsequent to the interview Mr. McGregor was provided with the Investigator's follow-up questions via email through the Union President, Mr. Eastwood. The questions are attached as Appendix "E".

55. Mr. McGregor responded to the Investigator's questions via email to Ms. Brown: attached as Appendix "F".

56. Mr. McGregor later told Mr. Kye Mikkelson, a co-worker at the material time, that he had put the picture of XY on the whiteboard.

57. The picture stayed taped on to the whiteboard for at least four to four and a half months.

DISCIPLINE

58. After the Investigation, on January 11, 2013, the Employer gave Mr. McGregor a disciplinary letter signed by Mr. Cavill imposing a three-day suspension: attached as Appendix "G". The discipline was imposed because the Employer concluded that Mr. McGregor had:

(a) violated the Policy;

(b) conducted himself in an unacceptable and inappropriate way towards XY; and

(c) not been forthright in the Investigation.

59. The Union grieved the three-day suspension. The Union's grievance letter is attached as Appendix "H".

REASONS THAT XY IS NOT TESTIFYING

60. XY ceased to be employed by the Employer on September 30, 2012.

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61. XY was diagnosed with cancer in or around November, 2015.

62. Since his diagnosis, XY has undergone treatment. On September 14, 2016, he underwent major surgery. XY is recovering from the surgery and has advised the Employer that he is medically unable to attend the hearing to testify.

Each party supplemented the ASF with *viva voce* evidence. The Employer called: Cavill, Graham Oberson ["Oberson"] (who had acted as Watershed Coordinator at times), Kye Mikkelson ["Mikkelson"] (a former employee who worked at the Employer's

various watersheads as a seasonal employee from 2005 – 2010, as a Forest Worker in 2010 and as a Patroller in 2012); and Donna Brown ["Brown"] (an in-house Human Resources professional who was the Division Manager of Organization and Development at the relevant times). The Union called the Grievor and Brent Thomson ["Thomson"] (a co-worker of the Grievor's who, in the summer of 2012, replaced the previous Watershed Security Coordinator, McLeod), and the Grievor. Crawford and Juvik did not testify in these proceedings. As indicated in the ASF XY was unable to testify in these proceedings for what the parties agree are bona fide reasons. The Union does not seek the making of an adverse inference. It does, however, argue that XY's absence has a significant effect on the evidence I may consider.

Donna Brown

Brown testified as to the purpose and existence of the Employer's Workplace Harassment and Prevention Policy [the "WHP Policy"]: to establish policies and procedures supportive of the dignity and self esteem of all employees. She also testified that expectations regarding appropriate workplace behaviour were not limited only to interactions with employees protected by the list of prohibited grounds in the *B.C. Human Rights Code* as that would be too a narrow perspective. Employees were expected to interact respectfully, with courtesy, support and assistance in problem-solving but without derogatory comments, gossip or disparaging remarks. Brown testified that type of respectful interaction that contributes to a positive work environment rather than a negative or toxic one, was the baseline. When challenged on the Employer's communication of these expectations in cross examination, Brown claimed they were common sense. Brown also outlined the procedure for complaints under the WHP Policy. She discussed the link between the outcome of an investigation and the decision to impose discipline.

Kye Mikkelson

Mikkelsen was employed in a number of capacities in the Employer's various watersheds until he left in 2013 and subsequently became a Fish & Wildlife Officer in Alberta. He was injured and did not work in 2011 when the UV construction project was underway at the Coquitlam. He returned in 2012 working as a patroller initially at all three watersheds until he was assigned regularly to Coquitlam. This assignment occurred after XY had left Coquitlam. Mikkelson had previously worked with XY at

the Seymour Watershed ("Seymour") and was aware that XY had been working at Coquitlam.

Mikkelson testified as to the nature of the workplace at Coquitlam and what he had heard with respect to XY. In cross examination he agreed that he was aware of the culture of pranks and jokes at Coquitlam. He did not recall telling the Grievor that he was not okay with those activities. Although he could not recall he acknowledged it was possible that he has posted a picture of Baby Huey on another employee's locker as that was his nickname. He did recall complaining to Crawford after a homophobic comment was put on his licence plate and was told that the Grievor had done it. Mikkelson could not recall any pranks or jokes being played on him after that.

Along with a co-worker, Lloyd Norman, he had opened the white board cabinet and was surprised by the 'goofy' picture with the childlike employee of the year inscription around it which did not reflect on XY positively. He testified that Norman took the photo down and threw it into the garbage. He initially testified that the photograph was in colour but after it was suggested that the gatehouse had only a black and white printer he acknowledged it was possible that it was a black and white photo. He agreed that the white board cabinet was usually closed. Mikkelsen testified that he had a clear memory of discussing the photo with the Grievor who told him that he had found the picture on the internet and had put it up on the white board. He did not recall being told that it was Crawford that had printed the picture.

With respect to comments made about XY Mikkelson could not remember the specific comments or their context. He described the contents as unflattering and negative. The Grievor's demeanour was joking but negative in tone. He remembered comments being made about XY's volunteer service with North Shore Search and Rescue ("NSSR"), the mistakes he had made, his inability to do the job and the level of his intellect. With respect to the NSSR comments he could not recall if it was related to XY listening in on the NSSR radio frequency. He agreed that he had never seen the Grievor make any such comments to XY.

Graham Oberson

Oberson testified as to his observations of the behaviour of XY. He indicated XY was over reactive, overly friendly, overly excitable, with very high energy, talked loudly and stood close to individuals. Oberson stated XY was complimentary and highly motivated to fit in but could be a little overwhelming.

Oberson testified that he had personal experience working with XY and that XY repeatedly asked questions (even when he should have known the answers). Oberson said XY had trouble making rapid decisions at the Gate and trouble when people came to the watershed. As a result he would ask questions of Oberson or the Grievor.

On November 25, 2011, Oberson testified that, while he was Acting Watershed Security Coordinator, he had an emotionally charged incident: a telephone conversation with the Grievor that stood out in his mind. Oberson stated that he initially called the Grievor to discuss staffing levels but the Grievor, angry and frustrated, explained difficulties he was having working with XY (such as the repeated similar questions), claiming that XY was overwhelming to him, and expressed concern that the work was not being done properly by XY. Oberson stated that the Grievor's concerns included XY's knowledge of the rules and ability to apply them; his decision-making without assistance, and his record keeping.

While in attendance at Coquitlam, Oberson stated that he heard the Grievor commenting on XY's work performance including his behaviours such as repeatedly asking the same questions about how to do his job and his poor record-keeping. Oberson testified that the Grievor was working on the computer in the office at the time and speaking to Crawford and/or McLeod.

Oberson testified that, after the Grievor did a review of the imported materials log he told Oberson that XY had made errors such as putting information in the wrong column.

Bob Cavill

Cavill, the Watershed Division Manager, testified that he was not aware of any joking or pranking culture and had never seen such behaviour at the Coquitlam. Cavill stated that if he had seen it, he would not have supported it. He testified that if XY participated in this culture, it was because of pressure to fit in to the group, as the newest employee on the shift. All he had seen was a high level of respect. He acknowledged that in 2001-2002 when Metro Vancouver had started to provide watershed security, the culture had been different. He testified "we in watershed Security" had worked on it for 10-12 years.

Cavill testified that Watershed employees were highly autonomous and expected to behave professionally. He confirmed that exempt managers are normally at their

office in Vancouver and rarely on site at Coquitlam. However, he asserted that his expectation of respectful behaviour was not new to anyone.

Cavill reviewed the Complaint in the Fall of 2012, and sought assistance, specifically from Johnstone Hardie of Metro Vancouver's Labour Relations Department. Cavill concluded that the Grievor made the country club comment to XY to isolate XY and demonstrate that XY was not in the country club so, therefore, as a member of the country club the Grievor had power over him.

Cavill testified that he also concluded the Grievor posted the unflattering Employee of the Year photo and had written the caption in a childish manner; mocking XY and making fun of his struggles in the workplace. Cavill said he also concluded that the Grievor had not been honest about his actions.

Cavill made the decision to impose discipline on the Grievor after concluding the Grievor had engaged in serious misconduct in contravention of expected employee behaviour (including the WHP Policy). Although Cavill admitted people would joke, he felt the Grievor's conduct went beyond that and merited a balanced sanction.

If the Grievor had admitted making a mistake, Cavill said there would have been a different outcome. However, Cavill stated that since the Grievor did not do so and failed to acknowledge the seriousness of the situation, he was not convinced that the Grievor would not repeat the same or similar conduct in the future so a three-day suspension was his way to send a message to the Grievor.

Brent Thomson

Thomson testified that he had worked as a patroller at the watersheds for approximately 12 years prior to being promoted to Watershed Security Coordinator (A Block). He confirmed that there was an atmosphere of pranking and joking. He identified a photograph he had circulated in 2007 showing a sleeping co-worker that was labelled with the caption "Employee of the Month". He testified that he had circulated it to the Grievor and two other employees.

Thomson also confirmed that some time between 2006 – 2008 (during the seismic upgrade) Juvik told the Watershed employees to tone it down. In cross examination Thomson agreed that he was not condoning jokes and pranks that were derogatory or hurtful to other employees.

Grievor

The Grievor has worked for Metro Vancouver since 2002 and is now in a regular full time position.

The Grievor testified that there was a culture of joking and pranking at Coquitlam. He listed some of the pranks that had occurred: water balloons on shelves (that would fall when the shelf was opened), air horns under seats, paper on bumpers, and unflattering photos of employees. There was also an annual slide show at the Christmas party of the same nature. According to the Grievor, XY participated in the atmosphere at Coquitlam.

The Grievor also identified a photo of himself holding an empty dish and suggested it was a joke poking fun at him about his weight; the inference being that he had consumed the entire dish of food. In cross examination, he agreed that it was not an attack on his intelligence.

The Grievor testified about an "Employee of the Month" photo circulated by his co-worker which showed a sleeping employee; indicating that labelling the sleeping employee as the Employee of the Month was not sincere.

The Grievor agreed that Juvik told the Coquitlam employees to tone it down during the seismic upgrade of 2006-2008 (when more outsiders were coming and going from the area) and agreed that the Christmas slide shows ended in 2007/2008. In cross examination, the Grievor, responding to the absence of the Employer's Policy at the relevant time, agreed that he did not need anyone to tell him how to behave.

The Grievor denied putting a homophobic slur on Mikkelson's license plate in May 2012. He also denied Mikkelson's claim that he had been annoyed by XY's interest in NSSR.

He further denied the allegation by Oberson and Mikkelson that he engaged in derogatory remarks about XY with Crawford. He testified that a member of his own family has ADHD so he would not engage in discriminatory or demeaning activities pertaining to anyone with a disability. He denied making a derogatory comment about XY's intellect.

In his testimony pertaining to the alleged comments suggesting that Coquitlam is a country club, the Grievor indicated that he was responding to an inquiry from

Crawford and XY as to how he had established such a close relationship with McLeod and was descriptive of McLeod's approach.

The Grievor testified that he was initially upset and concerned by the fact that XY was placed on day shift contrary to an earlier indication he received and by the fact that McLeod declined to explain the shift change stating he had been told not to talk about it. He described the atmosphere at the gatehouse upon XY's arrival to be awkward. He agreed that he was frustrated with XY as he often asked him the same question repeatedly. However, he testified that despite the challenges during the initially period, things settled down with XY by November 2011. In essence, the Grievor testified that XY eventually fit in and became part of the Coquitlam team.

Positions of the Parties

Employer

The Employer argues the Grievor engaged in serious and culpable conduct that constituted just cause for discipline and the three day suspension was a reasonable if not generous, disciplinary response. Therefore, the first *Wm. Scott* question must be answered in the affirmative and the second in the negative.

The discipline flowed from the Employer's conclusions that the Grievor had violated its principles and policies, and engaged in a series of inappropriate actions that bullied and harassed XY. The Employer concluded that, between November 25, 2011 and December 9, 2011, the Grievor created and posted an inappropriate "Employee of the Year" photograph on the white board in the Coquitlam Security office, captioned in, (what Mikkelson described as) a childish manner that was demeaning to XY. In addition, the Grievor's inappropriate interactions with XY that included stating Coquitlam was a country club and an employee was either in the club or not. The Grievor, the most senior employee on XY's shift, had been a regular full time employee of Metro Vancouver for 7.5 years at that time and considered himself to be part of the inner circle of the watershed Security Coordinator, McLeod. Therefore, the Employer asserts the Grievor's statements constituted and were perceived as, a threat to the job security of XY.

The Employer draws a distinction between good natured fun and actions that are not meant in jest but instead, are purposely demeaning. Notwithstanding that distinction,

the Employer further claims that its management corrected any prior atmosphere of pranks or joking by 2006-2008, (the time of the seismic upgrade of the dam). For example, Christmas slide shows ended and Juvik instructed the employees to "tone it down".

It argues that the evidence supports the overall conclusion that when he returned to work in October 2011, the Grievor resented the presence of XY because he was expecting to work with another employee. The Grievor had received that news from McLeod and had been asked to change the schedule but did not know why the change had been made. In reaction, the Grievor engaged in inappropriate conduct.

The Grievor acknowledged the tension and admitted it was awkward, especially since the other employees did not know why XY got the dayshift.. Another cornerstone of the evidence relied upon by the Employer in this area is Oberon's testimony that the Grievor expressed frustration about XY in a telephone conversation on November 25, 2011 and outlined the difficulties he was having working with XY.

These difficulties included XY's repetitive questions and poor work performance. According to Oberon, the Grievor expressed anger about working with XY and said he found XY to be overwhelming. In corroboration of this conversation, the Employer also points to the fact that Oberon overheard the Grievor making uncomplimentary comments about XY and his work performance to other coworkers: Crawford and McLeod in the back room at the Watershed office. The Employer further points to Mikkelson's testimony that the Grievor continued to disparage XY to Crawford in May 2012, after XY left Coquitlam.

The Employer submits that Mikkelson's evidence is consistent with the Employer's conclusion that Grievor's made comments to XY that Coquitlam was like a country club; suggesting that an employee's job security depended on whether an employee was either in or out of the club.

While the Employer acknowledges that the Grievor maintained a credible demeanour throughout his testimony, it submits, consistent with the principles outlined in *Faryna v. Chorny*, [1952] 2 DLR 353 (BCAA), that where there are differences between the testimony of its witnesses and the Grievor, the evidence of the Employer's witnesses must be preferred. Mikkelson is a sworn peace officer without any motivation to lie. The Grievor was not forthright and honest with the investigator and in his testimony. At times, he contradicted the ASF.

The Grievor has a direct interest in the removal of the discipline and during his testimony, he omitted important information (i.e. during the investigation), minimized his behaviour and played down interactions that cast him in a negative light. Where his evidence conflicted with Oberson, Mikkelson and Cavill, the Grievor testified that they were wrong. The Employer also argues that there is no direct evidence (such as evidence from Crawford) to corroborate the Grievor's testimony that XY had settled in to the job by December 9, 2011 (around the time of a sector meeting).

Further, the Employer asserts that an adverse inference should be drawn from the Union's failure to call Crawford to support the contentions pertaining to the atmosphere and the interactions between the Grievor and XY including the Grievor's evidence that the country club comment was in response to an inquiry from XY and Crawford. Crawford also could have corroborated the Grievor's evidence that XY's work performance was improving. Therefore, an adverse inference must be drawn from the Union's failure to call him. In support if this position, the Employer relies on *Canadian Labour Arbitration, Brown & Beatty* section 3:5120 and particularly the statement that an adverse inference may be drawn by an arbitrator where an individual (such as Crawford) can by his own testimony through light on a matter and failed to do so. The adverse inference in the current matter being that the evidence of Crawford would not have supported the evidence of the Grievor.

The Employer further states that I should presume Crawford would not have corroborated the Grievor's testimony such as the Grievor's claims it was Crawford who searched the internet, found the photo of XY and printed it out. This evidence is in contrast to Mikkelson's evidence that the Grievor told him about searching the internet for the photograph of XY. According to the Grievor, Mikkelson was mistaken. However, the Employer submits that Mikkelson, an independent witness without any motivation to lie, was firm in his recollection whereas the Grievor is attempting to minimize his actions.

The Employer argues that I should not accept the Grievor's testimony that XY laughed when he was shown the Employee of the Year photo of himself. I should also decline to accept the Grievor's testimony that he and Crawford told XY about a Gate Guard who had been the subject of an Employee of the Year Christmas photo. This evidence is uncorroborated and an adverse inference must be also drawn from the fact that Crawford did not testify to support the Grievor's claims.

The Employer further submits that none of the uncorroborated testimony of the Grievor pertaining to Crawford's internet search, XY's reaction or the Christmas photo, was brought to light during its investigation. The Grievor had an opportunity to do so and was asked specifically by the investigator to provide as much detail as possible about the circumstances. This lack of candour affects the Grievor's credibility and in light of the failure to call Crawford, this evidence should not be accepted.

Also relied on by the Employer is the Grievor's frustrated late February or early March 2012 interaction with XY in relation to the placement of traffic cones, that he lost his temper and told XY that if he could not do his job, he was not needed. The Employer points to the fact that the Grievor would not admit he lost his temper despite that acknowledgement in the ASF.

The Employer further points to the Grievor's *viva voce* testimony that he told XY that if he was not able to do the job, they would get someone who can, referring to Metro Vancouver. This testimony is different from the ASF, at paragraph 53(d), in which the Union admitted that the Grievor's statement included the phrase: "If you can't do your job we don't need you".

These changes in evidence and attempts to cast his behaviour in a more favourable light, should affect the Grievor's credibility in other areas of his testimony. For example, his *viva voce* evidence that it was Crawford, not him, who searched for the disparaging Employee of the Year photo of XY despite the fact that Mikkelson testified the Grievor, told him the opposite at the time and the Grievor never advanced the claim it was Crawford to the investigator despite having ample opportunity to do so. Moreover, Mikkelson was clear as to his recollection and had no motive to lie.

The Employer submits that the Grievor knew or ought to have known that XY struggled to learn his job (due to the frequent and repetitive questions asked by XY as well as his mistakes). Therefore, even if there was a culture of jokes and pranking, which is not acknowledged, posting of the "Employee of the Year" photo and caption was not consistent with that culture because it was hurtful, demeaning and derogatory; mocking XY and his learning difficulties. As someone with a family member who has ADHD, the Grievor could be expected to be more in tune to the presence of a disability or more aware of the signs of a learning disability. He should have known that creating the Employee of the Year photo and caption would be unwelcome to

someone in XY's position and could effect the work environment for his coworkers as well.

His actions are in contravention of the WHP Policy because they are actions (conduct, comment, gesture, or contact) based upon a prohibited ground of discrimination, mental disability, that were unwelcome and ought reasonably to be known to be unwelcome and that detrimentally affected the workplace.

The WCB Bullying and Harassment Policy [the "WCB Policy"] was not in effect at the relevant times. However, the Employer submits that I should rely on the definition of bullying and harassment in the WCB Policy and/or the definition established in *Re Burnaby Villa Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40, April 15, 1994 (McEwen – BC)* ["*Burnaby Villa*"] and set out with approval by Arbitrator Larson in *United Food and Commercial Workers Union of B.C., Local 1518 v 55369 B.C. Ltd. (cob Shopper's Drug Mart No. 242) (Harassment Grievance) [2007] BCCAAA No. 130 (Larson - BC*), ("*Shopper's*") in the following terms:

"Objectionable conduct or comment directed towards a specific person(s), which serves no legitimate work purpose and has the effect of creating an intimidating, humiliating or offensive work environment."

The Employer argues that this definition has been accepted and applied by other arbitrators [see, for example: *Houston (District) v. Canadian Union of Public Employees, Local 23086, (Harassment Grievance) [2008] B.C.C.A.A.A. No. 118 (Holden – BC ("Houston") &, Shopper's]*. Moreover, as was noted in *Shopper's* a finding of personal harassment does not depend on there being a specific provision in the collective agreement; it is based on the implied obligations on employers to provide a safe and positive work environment. Harassment normally involves persistent conduct or a course of activities such as intimidation or bullying that causes the person distress detrimental to a safe and positive work environment.

The Employer submits that the Grievor conduct, in its totality, constituted bullying and personal harassment of XY. He had power at Coquitlam, both as a senior employee and one who had a good relationship with McLeod; in contrast to the position of XY. The Grievor admitted that XY came to him, seeking input as to how to do his job and seeking his approval. The Grievor also engaged in the country club comment and the comments that followed inquires about the cones, implying to XY

that the Grievor had power over XY's employment. It is logical to conclude that XY believed that Grievor had control over his work environment.

The Grievor's actions met the arbitral definition of personal harassment because the Grievor's actions served no legitimate work purpose and had the effect of creating an intimidating, humiliating or offensive work environment not only for XY, but also for Mikkelson and Norman.

In the alternative, the Employer argues that the Employee of the Year posting by the Grievor was a single egregious act (consistent with the analysis in *Tyee Village Hotel (1999) 81 LAC (4th) 365 (Albertini – B.C.); Re Leaf Rapids (Town), unreported, November 9, 2003*) [cited in *Shopper's*] that constituted bullying and personal harassment of XY. The Grievor knew or ought to have known that his actions would be unwelcome to XY.

Therefore, the Employer submits that it has demonstrated that the Grievor engaged in serious misconduct that constitutes just cause for discipline. Having demonstrated that the Grievor's actions constituted just cause for discipline, and, since bullying and harassment are serious employment offences worthy of significant discipline, the Employer also submits that the discipline selected by it should not be disturbed. Arbitrators should not second guess the choice of disciplinary penalty. [see: *West Fraser Mills Ltd (Chasm Sawmill) v United Steelworkers, Local 1-417 (Brown Grievance), [2011] BCCAAA No. 133 (Hall – BC) ("West Fraser"), Pacific Inland Resources v. Northern Interior Woodworkers' Association (2006), 84 CLAS 252* as cited in *Eurocan Pulp and Paper Ltd. v Communications, Energy and Paperworkers' Union of Canada, Local 1127, (Welsh Grievance), [2006] BCCAAA No. 173 (Coleman – BC) ("Eurocan")*].

The Employer argues that the aggravating factors relevant to the consideration of whether the penalty is excessive include the seriousness of the offense and the Grievor's refusal to admit he has engaged in any inappropriate behaviour. In addition, the Employer submits that the offense was serious because the bullying and harassment which had a profound effect on XY and caused XY to file the Complaint. While the Grievor was not entirely responsible for the actions referenced by XY in the Complaint, the Employer asserts that the Grievor is responsible for causing XY some emotional distress.

Bullying and harassment are serious employment offences deserving of significant discipline; attempts to downplay the significance of the actions of the Grievor should not be accepted because his actions constituted bullying and harassment. Brown's

evidence as to the emotional state of XY should be accepted and demonstrates that the actions at the Watershed, caused in part by the Grievor, caused emotional distress. Therefore, the three-day suspension was a reasonable disciplinary response, proportional to the Grievor's misconduct.

The Employer points to *Cariboo Pulp & Paper Co. v Unifor, Local 1115 (Sankey Grievance), [2015] BCCAAA (Keras - BC)* in which Arbitrator Keras, after finding the threats and similar misconduct of a 30-year employee with a clean disciplinary record was serious, substituted a four-day suspension for an eight-day suspension to be consistent with others who had similarly engaged in the blameworthy conduct.

The Employer also references *Madill Equipment Canada v. United Steelworkers, Local 1-80, CLC (Brown Grievance), [2008] BCCAAA No. 17 (Burke - BC)* ["*Madill*"], in which Arbitrator Burke (as she then was) upheld the termination of employment of an employee who had poisoned the work environment by making degrading, humiliating and offensive remarks to a co-worker. The Employer asserts the following conclusion is on point with the current matter:

> Even if expressed as a "joke" or to be funny, I conclude it was deliberately at Sheepwash's expense, and as Sheepwash expressed, to make him feel "stupid" and "intimidated" in front of co-workers. These cumulative comments went well beyond the communication difficulties and served to create the poisoned work environment and harassment of Sheepwash by the Grievor. (at para. 126)

Arbitrator Burke dismissed the Union's argument that the grievor did not know the effect on Sheepwash on the basis that the conduct was brought to his attention and he had a previous verbal warning. She concluded he had an apparent lack of appreciation of his behaviour and in order to accept his evidence she must reject the evidence of several other witnesses.

The Employer argues that *Madill* is on point in the current matter. The Grievor testified that his conduct was meant to be a joke; Mikkelson and Oberson saw the Grievor's conduct differently; and there is no reason to doubt the veracity of their testimony.

Brown and Cavill testified that, consistent with obligations of an employer pursuant to prevailing legislation such was the Workers Compensation Act and the Human Rights Code, respectful and courteous interaction is expected of all their employees, especially where they are required to work autonomously without on-site supervision. This positive obligation on employees creates an atmosphere free from intimidation or humiliation by jokes or pranks.

Cavill's testimony established that there were efforts over the years to change the Coquitlam workplace culture. Thomson testified that Juvik had told the Coquitlam employees to tone it down during a sector meeting between 2006-2008 and the Grievor acknowledged that the Christmas slide show had been discontinued. Therefore, *Madill* stands as support of the three-day discipline chosen by the Employer in the circumstances.

The Employer also relies on *Teck Metals Ltd. (Trail Operations) v. United Steelworkers, Local 480 (Oliver Grievance), [2015] BCCAAA No. 27 (Nichols – BC)* ("*Teck*"), in which Arbitrator Nichols upheld the termination of a 34-year employee, engaged in a dispute about overtime with another employee, engaged in inappropriate behaviour toward the co-worker. In *Teck*, progressive discipline of the inappropriately behaved employee had not resulted in changes to his conduct. Arbitrator Nichols concluded that the workplace had changed to reflect a respectful and harassment-free environment and noted evolution toward that perspective even in an industrial setting.

In *Kerness Mines Ltd. v. International Union of Operating Engineers, Local 115, (Goudreau Grievance), [2006] BCCAAA No. 118 (Hope - BC) ["Kerness"]* Arbitrator Hope concluded that whether or not the comments made by the grievor were intended to create offense, viewed objectively, they could be expected to do so and had, in fact, created offense. A suspension was substituted for a termination in Kerness when Arbitrator Hope concluded that the racist comments were not intended to be racially harassing and were not malicious. In *Children's Hospital of Eastern Ontario v. Ontario Public Service Employees' Union (Labreque Grievance), [2015] OLAA No. 342* (*Parmar – Ont.*), an termination was upheld for an employee who engaged in behaviour so toxic she could not be reinstated.

The Employer submits that while no mitigating factors have been established by the Union, the evidence points to aggravating factors such as the failure of the Grievor to be honest and forthright both during the investigation and in his *viva voce* testimony.

The failure to be honest and forthright during an investigation has been accepted as a factor against reduction of a penalty. [see: *Health Employers' Association of British Columbia v. British Columbia Nurses' Union (Kennedy Grievance), [2014] BCCAAA No. 175 (Gordon - BC)]*. A similar conclusion has been reached in circumstances of dishonesty at an arbitration hearing. *[see: B.C. Ferry Services Inc. v. B.C. Ferry and Marine Workers Union (Farquharson Grievance), [2007] BCCAAA No. 167 (McEwen - BC); North Okanagan-Shuswap School District #83 v. Canadian Union of Public Employees #523 (Anthis Grievance), [1998] BCCAAA No. 404 (Thorne – BC)*]

Another aggravating factor, according to the Employer, is the Grievor's failure to admit any wrongdoing or express any remorse for his misconduct either during the investigation or at these proceedings. He does not comprehend the fact that his conduct was unacceptable and continued to point to the joking and pranking culture at Coquitlam.

The Employer points to Cavill's testimony that if the Grievor had recognized that he had made a mistake and expressed remorse, the outcome could have been different, but, since the Grievor had not, Cavill was not confident that the Grievor would engage in conduct of that nature again in the future. The Grievor, in cross examination denied that the photo and its caption were derogatory, demeaning, and mocked the fact that XY was having trouble learning his job. He denied that he had done anything wrong in respect of his conduct toward XY.

The failure to acknowledge his misconduct and sincerely apologize are aggravating factors that must lead to the conclusion that a lesser penalty should not be substituted because it invites the conclusions that there is no capacity for correction and, that the behaviour will be repeated. [see: *Howe Sound Pulp & Paper Ltd. v. Canadian Paperworkers' Union, Local 1119, [1993] BCCAAA No. 91 (as cited in Bullmoose Operating Corp. v. Communication, Energy and Paperworkers' Union of Canada, Local 443 (Walsh Grievance), [2000] BCCAAA No. 10 (Moore - BC) & Surrey (City) v. Canadian Union of Public Employees, Local 402 (Saliken Grievance), [2007] BCCAAA No. 8 (Foley - BC)*].

In summary, the Employer argues that the evidence demonstrates the Grievor engaged in serious workplace misconduct (for which he failed to accept responsibility or apologize); the jurisprudence supports the discipline selected; and, the principles of non-intervention should apply. Therefore, the three-day suspension should be upheld. It is important to send a message that inappropriate behaviour of this nature will not

be condoned or tolerated in the workplace.

Union

The Union argues that the first *Wm. Scott* question must be answered in the negative. The Grievor has not acted in a manner that would justify imposing any discipline. In the alternative, even if the Grievor's conduct was worthy of discipline, the discipline selected by the Employer was an excessive response and must be reduced.

Although the Union does not take issue with the relevant law as set out in *Shopper's* and *Burnaby Villa* it argues that objective evidence is required to establish harassment [see: *S. v. M, G, Z, [1995] BCCAAA No. 139 (Laing*)] ["*S. v M, G, Z."]* In addition, a finding of harassment involves consideration of the definitional terms of an employer's workplace policy or whether there has been harassment on a prohibited ground [see: *Eurocan Pulp & Paper Co. and Communication, Energy, and Paperworkers' Union of Canada, Local 298 (Verde Grievance), [2001] BCCAAA No. 214 (Greyell – BC*)]]. Not every act of workplace foolishness was intended to be captured by the word harassment; a serious word that should be not trivialized, cheapened or devalued by using it to describe petty or foolish acts or where there is no intent to be harmful. [see: *S. v. M, G, Z*].

The Union points out that the Collective Agreement in force at the relevant time was silent with respect to harassment. The Union further submits that at the relevant time, the Employer's Policy addressed only harassment on a ground prohibited by the B.C. Human Rights Code that was unwelcome and ought reasonably to be known to be unwelcome, and detrimentally affects the work environment or leads to adverse job-related consequences. In the Union's submission, the current facts do not constitute harassment under the Policy.

The Union also argues that although arbitrators have the discretion to admit hearsay, using the tests of necessity and reliability, uncorroborated hearsay should not be preferred to direct sworn testimony and cannot, on its own, establish a crucial fact. [see: *Nanaimo School District No. 68, [1976] BCLRBD No. 68 ("Nanaimo")*; *Re 7-Eleven Canada Inc. BCLRB No. B91/2000; Re E. Raitt Painters Ltd., BCLRB No. B371/96 ("Raitt"); Shaw Cablesystems G.P. v Telecommunications Workers Union (Arsenault Grievance), [2011] CLAD No. 144 (Moore – Can.*)]

The Union argues that the Employer has not established that the Grievor engaged in any conduct that would give rise to discipline. In the alternative, the Union submits that the discipline imposed on the Grievor was excessive. While the Union does not ask that an adverse inference be drawn from the Employer's failure to call XY, the Union was still deprived of the opportunity to cross examine him; an important opportunity.

In reviewing the evidence, context is important and particularly, the circumstances of XY's arrival in Coquitlam; the culture at the workplace; and, the Grievor's relationship with XY as a whole. The Employer claims that the environment was unwelcome. The Grievor was candid in his testimony. He said there was tension when, without any explanation from the Employer, XY was put on a preferred shift and another employee was moved to the graveyard. The Grievor's testimony about the November 25, 2011 telephone call with Oberson indicates his frustration was with management rather than it being targeted at XY. The Union argues the Grievor's tone reflects the fact that the Watershed security employees did not receive management support when XY started working with them yet during the call they were being criticized by Oberson for their decisions; decisions they had made as a team. The Union points to the Grievor's viva voce evidence that "For the first six weeks we were left on our own and told to figure it out… No one was there when we were reporting XY's difficulties".

The Union submits that the evidence of the Grievor is consistent and honest should be accepted. He acknowledged XY had initial difficulties with his job but, while XY struggled at first, and could be frustrating, the Union points to the Grievor's evidence that XY improved and became part of the team; even participating in the joking. Turning to the late February/early March 2012 incident, where the Grievor lost his temper with XY, the Union claims that the incident was taken out of proportion. Further, the Grievor's country club comment was merely in response to an inquiry about how the Grievor became so close to McLeod. The Union points to the Grievor's evidence that he shared with XY the fact that had become closer to McLeod in the past while assisting McLeod's family. The Union submits that the Grievor's evidence demonstrated that his communication with XY suggested that the Watershed group was a close knit group but never gave XY the impression that the door was shut.

The Union points out that during this time the Grievor was never advised of any accommodation of XY. In addition, the Union notes that the Grievor also experienced a health scare and it was a difficult personal time for him.

However, the Grievor testified that XY settled in around November 2011 and a more relaxed, joking rapport developed. There was no written policy on respectful workplace conduct in effect at that time. And although Cavill and Brown testified generally about expectations, neither Cavill nor Brown were involved in day to day oversight of the Watershed. Juvik was responsible and involved. He reported to Cavill. Brown acknowledged she did not know what the watershed employees had been told about expectations. Juvik was not called to provide that information.

The Union maintains there was a culture of pranking at the Watershed and management, such as Juvik, were aware of it. This direct evidence was led by both Thomson and the Grievor. The Grievor testified that Juvik referred to him and another employee as the prankster twins or jokester twins. This testimony included descriptions of a slide show attended by Juvik. Cavill, who attended one slide show, was not impressed but did not share that opinion with the employees.

The Union points out that the Grievor was candid when he admitted posting the photo of XY and writing "Employee of the Year" below it in regular script so I should accept his evidence that he had not written the caption in a childish manner. The Union points to the evidence of a Christmas photo of another employee sleeping that was also labelled "Employee of the Year", a wanted poster with an unflattering photo of an employee, a photo of the Grievor holding a pot of moldy chili and a sign saying parking was for future victims of Chris McGregor only, making fun of the Grievor for having a car accident at work. These unflattering and teasing photos and signs are evidence of the environment that existed at the time; an environment that included water balloons, air horns under chairs and paper on bumpers.

Juvik was the subject of a prank himself when he sat on a chair, setting off an air horn; a prank he laughed off. He also inadvertently discovered a container of water inside a cupboard.

Thomson, who worked at the watersheds for 12 years before becoming a Watershed Security Coordinator (on A Block) by August 2012, confirmed the existence of the atmosphere. He also testified that Juvik had instructed employees to tone it down

during the 2006-2008 period of the seismic upgrade because they did not know who could walk in.

The Union notes that there is no evidence to support Mikkelson's belief that the Grievor was responsible for a bumper sticker that Mikkelson found to be offensive. The Grievor testified that Mikkelson was the only employee who did not enjoy the pranks and, once Mikkelson communicated his dislike, they did not involve him in any more pranks. Further, the Union relies on the evidence of Mikkelson, who acknowledged in cross examination that he had witnessed pranks. He also admitted he may have put up a cartoon photo of Baby Huey to tease Crawford.

The Grievor testified that XY participated in the pranking and joking culture, by making water balloons, putting flagging tape on vehicles, making jokes about the Grievor's weight and, had a book of bumper stickers and told the Grievor he had put a bumper sticker on Crawford's car.

The Grievor testified that he was shocked by XY's allegations because he believed their working relationship was fine. The Union notes that XY was interested in going to MacLeod's retirement party, which occurred after XY had left the Watershed. The Union noted that it was not afforded the opportunity to cross examine XY on this and other inconsistencies.

The Union also points to the uncorroborated hearsay of XY's complaint, and argues that it is evidence that does not meet the test of necessity and reliability. It is not evidence that has a circumstantial guarantee of trustworthiness. If it is admitted for the truth of its contents the Grievor would be prejudiced and denied a fair hearing by its admission in the absence of the ability to cross examine XY. This hearsay should not be used to establish a claim of harassment as it offends the rule established in *Nanaimo*.

Additionally, the Union submits that the evidence of Mikkelson and Oberson is too vague to corroborate XY's allegations and should not be given any weight because none of their evidence dates from the time when XY worked at the Watershed.

The Union further submits that the Employer has not established based on clear and cogent evidence that XY suffered from a disability and that the Grievor was aware of it. The absence of a disability and absence of knowledge of a disability on the part of the Grievor are fatal to the Employer's harassment allegations against the Grievor.

There is insufficient evidence to establish that the Grievor engaged in harassment on the basis of a disability. Only the assertion by XY in the complaint and Brown's testimony that he told her he had a disability are in evidence in these proceedings. Cavill testified that he was not aware that XY had a disability. The Union argues that the evidence demonstrates the Employer was not even aware that XY had a disability until the complaint was filed.

Discussion & Decision

The are little, if any, material differences in the parties' views of the arbitral jurisprudence with respect to harassment. The real dispute in this case is with respect to the evidence and, then, its application to the law. The Employer, who bears the onus in this case, in addressing the evidence has advanced two main themes. First, that the evidence of the Grievor ought to be rejected whenever it is in conflict with the evidence of others. Second, that an adverse inference ought be drawn as a result of the failure to call Crawford who appeared to be in a position to corroborate disputed parts of the Grievor's testimony.

In addressing the Grievor's credibility the Employer acknowledged that McGregor in the giving of his testimony appeared credible but, nonetheless, argued that the approach in *Faryna* requires a more searching inquiry as to the inherent probability of his testimony. It noted that the Grievor sought to minimize his conduct and disagreed with portions of the ASF. The Employer also points to the Grievor's disagreement with the testimony of other witnesses and in particular that of Oberson and Mikkelson.

With respect to Oberson the Employer says that the Grievor's testimony in relation to the November 25, 2011 telephone conversation was significantly different and represents an attempt to shift the source of his frustration and anger. As to Mikkelson the Employer argues that Mikkelson's testimony, as that of a former employee with no motive to lie, should be preferred over that of McGregor. Two areas of disagreement in the evidence were focussed upon. First, the evidence with respect to disparaging comments which were largely denied by the Grievor. Second, the evidence with respect to the genesis of the photo placed on the white board and the nature of the writing surrounding the photo.

Finally, the Employer relies on the Grievor's testimony that it submits is contrary to the ASF which McGregor acknowledged he had reviewed and in particular paragraph 53(d) which indicates that it is agreed:

> that he lost his temper with XY and spoke rudely to him on one occasion. This occurred when XY asked him for the 10th time where to put a traffic cone. Mr. McGregor told XY something to the effect of "you need to do your job. If you can't do your job we don't need you."

The Employer identifies two differences in the Grievor's testimony. First, the grievor testified that the comment he made to XY used the word "they're" and not "we" which the Employer submits is a significant difference. Second, the Grievor's evidence was that he was "exasperated" but not angry or yelling in his telephone conversation with Oberson.

For its part the Union says that the Grievor's testimony was credible. He acknowledged the initial period of tension and his frustration with XY. His evidence about the joking and pranking culture of the gate house was confirmed by both Mikkelsen and Thomson. The evidence that XY took part in the jokes and pranks without complaint is uncontradicted. The only evidence of disapproval was from Mikkelsen who not only acknowledged that he may have taken part in the activity but that after he complained no further jokes or pranks aimed at him occurred.

In considering the conflicting credibility issue I start with the observation that credibility is not simply a matter of truthfulness. It also includes an element of reliability impacted by a number of considerations such as interest in the dispute, ability to see or hear the events in question and an individuals ability remember and, then, to effectively convey his or her testimony. The Employer in this case has focussed on Mikkelson's lack of interest in the proceeding and, thus, his absence of a motivation to lie which it contrasts with the obvious interest of McGregor in the outcome. While I agree that this is a consideration I believe it must be applied with caution as if were to be too heavily relied upon every grievor would enter the witness stand at a disadvantage. In my view, reliability in this case is most strongly affected by the passage of time and its affect on powers of recollection with a greater chance of modification of recollections based upon interest. The testimony was given in this case some five years after the events in question. In my opinion, these considerations were evident in much of the testimony presented and in particular in the evidence of

the main evidential antagonists, Mikkelson and McGregor. It was apparent and sometimes acknowledged that these witnesses resorted to considerations of what they believed they would have likely done rather than a recollection of the actual events. McGregor's testimony in a number of instances showed signs of reconstruction. This reconstruction of evidence is not unusual, particularly given the gap between the events and the testimony and does not necessarily reflect on honesty. As observed in *Faryna* witnesses by the time they give their testimony often believe inaccurate recollections to be true. On this basis I find that much of the testimony I heard as to the alleged events to be problematic. In addition to the use of reconstruction rather than recall, there was an unevenness of the degree of recollection with respect to contemporaneous events where one where one would expect their memories to be as clear if not clearer. By way example Mikkelson testified as to a clear recollection of some specific statements while his recollection of contemporaneous comments was non-specicfic and his memory of events such as the colour of the photo were not as clear and perhaps inaccurate. There were also instances of certainty and a reluctance to acknowledge the possibility of uncertainty that manifested itself as defensiveness in much of the testimony. Taking these considerations into account I have concluded that most of the evidence presented by both parties suffered from problems affecting reliability. That is not to say that their testimony can or should be dismissed in its entirety. Rather, I have concluded that the memories of the witnesses are such that the acceptance of their evidence must be tempered by the unlikelihood of certainty and in that sense represents more vague than specific recollections. Their evidence must be examined in the context of the considerations identified in *Faryna* and, in particular, the inherent probability of the witnesses' testimony.

In reaching this conclusion I have not been persuaded by a number of the arguments advanced by the Employer in support of its contention that the Grievor was dishonest. The Employer asserts that the Grievor exhibited a lack of candour with the investigator. As this is one of the grounds for discipline it will be more fully addressed below. Suffice to say at this point that I am not satisfied that the Grievor's failure to provide context in response to the Investigator's written queries amounted to a lack of candour.

Next the Employer argues that the Grievor's testimony was contrary to the ASF. I start from the point that I do not believe that it is open to either a witness or a party (such as the Grievor in this case) to resile from the facts as agreed upon. In my view,

it is not appropriate to revisit facts once they are agreed upon and submitted. I agree that the Grievor did in some instances take issue with either the wording agreed upon or the characterization of his conduct. The most concrete evidence of the former is the difference between 'we' as agreed upon and 'they're' as testified to by the Grievor. Leaving aside, as was noted by the Union, that the quotation referenced is modified by "something to the effect of" I am not convinced that such a change, although arguably self serving and probably a recollection affected by interest, supports a finding of dishonesty. In my view, that would in the circumstances amount to a too technical expectation of perfection in the giving of evidence. Moreover, it does not take into consideration the issue, which on its face is more than just potential in this case, of a witness upon more careful review coming to the conclusion that the agreed upon fact is inaccurate. This leaves a witness in the difficult position when questioned in the hearing of agreeing with a factual assertion they believe to be inaccurate while testifying under oath. In my view, a more appropriate way to address this issue and maintain the viability of the useful tool of agreed statements of fact is simply to rely on what is agreed upon.

I should note that in coming to these conclusions and upon a careful review of McGregor's testimony I am not persuaded that his evidence is an untruthful fabrication.

My next general observation relates to the the Employer's assertion that an adverse inference should be drawn as a result of the failure of the Union to call Crawford as a witness. The Employer points to a number of areas where Crawford apparently was in a position to corroborate the Grievor's testimony including; that XY had settled in after a period of time, that XY's performance was improving, the circumstances surrounding the country club comment, the atmosphere and culture of Coquitlam, the search for and creation of the photo and XY being shown the photo and laughing at it. I am not satisfied that this is an appropriate circumstance to draw the adverse inference sought. It should be noted at the outset that Crawford although a potential witness was not a party to the proceeding. While I accept that an adverse inference may be made with respect to witnesses and not just parties I am of the view that the failure to call a witness is less compelling that a failure to call a party. I also note that the Grievor's testimony as to the culture and atmosphere at Coquitlam was corroborated by the testimony of Thomson. There is no obligation on a party to call all potentially corroborative witnesses. With respect to many of the evidential areas

referenced by the Employer there was either no evidence or only hearsay evidence that challenged the testimony of the Grievor. I will address the hearsay issue more fully below. The significance of the evidential differences between Mikkelson and the Grievor as to the creation of the photo is limited given the Grievor's admission that he posted the photo which is, in large part, the gravamen of the alleged misconduct. Taking all of the above into consideration I cannot conclude that the failure to call Crawford, although he may have been able to throw some light on the matter, justifies the making of an adverse inference.

The next general evidential issue to be considered is the use of hearsay evidence in this proceeding. As noted at the outset XY was not able to testify for reasons that are accepted by the parties as bona fides. The Union does not seek an adverse inference being drawn but does rely on XY's complaint being hearsay and its ultimate unreliability. It is trite to observe that by statute labour arbitrators in this province may admit evidence that that would not be admissible in the ordinary courts. Nonetheless the Labour Relations Board determined in *Nanaimo* that arbitrators cannot rely on uncorroborated hearsay to prove a critical or crucial evidential point. That approach was later maintained by the LRB in *Raitt* while considering that the courts had adopted a principle rather than rule based approach to the exceptions to the hearsay rule. In my view, this provides considerable difficulties for the Employer's case as XY's allegations are hearsay and for the most part uncorroborated. While XY's bona fide absence, in my opinion addresses the principle of necessity I have concluded that the principle of reliability has not been satisfied in this case. There is nothing in the nature of the manner in which the allegations were made that makes them inherently reliable. Moreover, in my opinion, given the nature of the case and the critical importance of XY's evidence the Union's inability to cross examine XY operates to the significant detriment and prejudice of the Grievor.

With these general observations in mind and in the context of the adjudicative framework set out in *Wm. Scott* . I turn first to consider the evidence with respect to the grounds relied upon by the Employer to establish just cause for the imposition of discipline. Broadly stated the Employer relies on three grounds:

1. conduct directed at XY that is in violation of the WHP,
2. discriminatory and harassing statements about XY and the posting of a harassing and discriminatory photo about XY,
3. not being forthcoming in the investigation.

Violation of the WHP

As indicated above the WHP in place at the time was based upon conduct that discriminates against individuals with respect to the specific statutory grounds then extant. The Employer argues that the Grievor's conduct towards XY offends the prohibition against discriminating against individual on the basis of a mental disability. The Union joins issue initially in the basis that there is no reliable evidence of the existence of a mental disability and argues, alternatively, that either any such disability was not known or that, in any event, the conduct of McGregor does not amount to discrimination.

The first indication of a learning disability arose in XY's email to Brown in September of 2012 in the following words "I also have a learning disability and sometimes make spelling mistakes". There is no indication of him having mentioned this previously to either managers or co-workers. There is also no indication of when, by whom or in what circumstances this diagnosis was made or the extent of the disability other than it affects spelling. This was the first time that Brown was aware of this information and Cavill testified that if he had been aware of it earlier he would have taken steps to address it. None of the witnesses who were operationally involved with XY testified that they were aware of it. The Employer argues that as a member of McGregor's family had a mental health issue he should have been more attuned to the existence of XY's mental disability. I do not accept that suggestion. The disabilities are unrelated and, in any event, in my view, it stretches credulity to expect someone who is not medically trained to make a diagnosis in this situation. In sum and substance the only reference to a mental disability is in XY's email which in the circumstances is hearsay. Given that the WHP is specific as to the types of disabilities which give rise to a violation of the policy, proof of a mental disability is crucial to a finding that of a breach of the WHP in this case. Uncorroborated hearsay does not satisfy the onus placed upon the Employer and, accordingly, this ground for discipline is rejected as unproven.

Harassing or Bullying Conduct

At the risk of overgeneralization this ground encompasses a number of instances of conduct by McGregor which the Employer submits were bullying and harassing. The Grievor has admitted that he was responsible for some of the objective conduct the Employer relies upon including; having once lost his temper with XY and speaking to

him rudely, words 'to the effect of "you need to do your job. If you can't do your job we don't need you" ', making the country club reference and that he was frustrated by XY's repetitive asking of the same questions. While the objective evidence in regard to these events is undisputed the parties have differing views as to their meaning in context and their significance either individually or cumulatively.

Although the parties disagree with respect to both some of the content and the characterization of what was said in the November 25, 2011 telephone call between Oberson and McGregor I accept that it is more probable than not that McGregor was angry and yelling as oppose to just raising his voice. I accept the Grievor's characterization of him being 'exasperated' but I think in the circumstances described by McGregor it likely presented itself and took the form of anger. I reach this conclusion based upon the testimony as the context in which the telephone call arose and McGregor's testimony that he was upset by Oberson as it seemed that he was placing the blame for XY's location and what he was doing, as well as for staffing issues generally, on him. That said, it must be remembered that anger and frustration expressed to another party, in this case a supervisor, and not at XY is not in itself necessarily evidence of either harassment or bullying.

The next area of significant evidential conflict relates to the allegation that the Grievor made comments disparaging of XY. Oberson testified that McGregor had made comments to co-workers about XY's work performance and his repeated questions. Mikkelson, although he could not remember specific wording, described the comments as unflattering and negative with McGregor's demeanour being joking – although the comments were negative in tone. The comments covered such areas as XY's involvement with NSSR, his mistakes and inability to do the job as well as the level of XY's intellect. It should be noted that Mikkelson's testimony was that he had never seen McGregor make such comments to XY and Oberson's evidence in no way suggests that the Grievor had done so. McGregor denied that he had made disparaging comments about XY and took particular exception to the suggestion that he would disparage an individual in regard to their mental capacity as he had a family member with a mental disability. Taking all of this evidence into account I have concluded that it is more likely than not that the Grievor did criticize XY's work performance with co-workers. I accept that he did so in his telephone conversation with Oberson and this it is likely he would have made similar comments to his co-workers as a result of his frustration with XY's work performance. That said, I am not

able to accept Mikkelsen's assertion that the Grievor criticized XY's intellect as it is ultimately just a characterization based upon what I have found to be vague recollections. In the face of McGregor's specific denial, rooted in his family situation and which I considered sincere, I find the Grievor's evidence in that regard to be more reliable. Again, it should be noted that none of these comments were made directly to XY and their significance and probative value must be considered in that light.

I turn next to the parties' disagreements as to the atmosphere or culture at Coquitlam. This arises in two respects; first, the atmosphere upon XY's arrival at Coquitlam and second, the culture of joking and pranking at Coquitlam. The Grievor does not dispute that the workplace was tense and the situation awkward when XY arrived and was working the dayshift but asserts that this ended when XY "fit in" some six weeks to two months after his arrival. It is the latter assertion that the Employer takes issue with. There is, however, no direct evidence to the contrary. Oberson's evidence regarding conduct in the workplace during the time XY was there was with respect to comments made to co-workers not in the presence of XY rather than the general tone of the workplace. Moreover, even if one assumes that the Grievor's anger and frustration manifested itself in the workplace the telephone conversation took place within two months of XY's arrival which is within to the range of time that the Grievor acknowledged tension and awkwardness issues. Mikkelson's evidence also focussed on comments made and, in any event, he was not working at Coquitlam at the relevant time when XY was there. Thomson's evidence was focussed on the culture issue which will be addressed below. In sum, the evidence does not support a finding that the Grievor's acknowledgement of an initial period of tension and awkwardness that lasted some six weeks is unreliable.

The second aspect in which the issue to workplace atmosphere arose is with respect to the culture of joking and pranking at Coquitlam. The Employer asserts that such conduct had earlier been addressed and corrected by the Employer. In this regard it points to the ending of Christmas slide shows and Juvik's direction to "tone it down". In my view, the evidence does not support a finding that the culture had been corrected. McGregor, Thomson and Mikkelson all testified as to the joking and pranking culture. Their testimony indicates that this culture had persisted long after the Employer's corrective actions took place. Mikkelson, who testified that he was offended by some of it, acknowledged the possibility that he had taken part in such

conduct. XY's complaint although critical of the behaviour acknowledged that he had engaged in such conduct which he described as a matter of self defence. All of the testimony by those in a position to routinely observe the culture is not indicative of an environment that had been corrected. Indeed, it is proof of very much to the contrary.

However, all of that being said, the legal issue to be determined is whether the proven conduct meets the general arbitral definition of harassment or bullying in that the conduct served "no legitimate work purpose and ha[d] the effect of creating an intimidating, humiliating or offensive work environment". The Employer takes two general positions in that regard (although not in this order); first, that the photo and inscription on the white board is such egregious conduct that it in itself supports a finding of bullying and harassment and second, that the Grievor's conduct when considered in the aggregate constitutes bullying and harassment.

Turning first to the issue of the white board posting there is absolutely no question that the placement of the photo with inscription did not serve a legitimate work purpose. The real question is whether or not on the facts of this case an 'intimidating humiliating or offensive work environment' that would be either harassing or bullying was created. From an objective point of view it could be inferred that a 'goofy picture' with attendant caption could be considered humiliating or offensive. Whether such an inference can be supported by the evidence in this case remains to be considered. There is no doubt that McGregor did post the photograph and write the inscription. As to its childlike manner I am not persuaded that Mikkelsen's recollection of the display on the white board is sufficiently reliable to counter the Grievor's denial as to the nature of the script. Beyond that, the evidence with respect to its effect in these circumstances and in this environment is not, in my opinion, sufficient enough to reach a conclusion that a harassing or bullying environment was created. The evidence clearly establishes that a joking and pranking culture was extant at Coquitlam. McGregor's evidence that XY took part in the jokes and pranks and laughed when he was shown the photo was not contradicted. XY's complaint confirms the former from an objective point of view. The evidence with respect to Mikkelson's objection to the conduct demonstrates that once an objection was made the conduct ceased which, in my view, indicates that the pranking and joking conduct was not likely malicious or relentless. In these circumstances I am not prepared to conclude that, in and of itself, the display on the white board is a sufficient basis for a funding of harassment or bullying.

The Employer's alternate argument is that all of the Grievor's conduct related to XY when considered together proves that harassment and bullying occurred. I have concluded that the evidence, including the admissions by McGregor, shows that the Grievor was initially upset at the point of XY's arrival by both the shift he was assigned and by XY's work performance issues and repeated questioning. That contributed to the initial tense and awkward work environment. I have also found that McGregor raised his concerns and frustrations with both supervision and co-workers but that other than the acknowledged case of the Grievor losing his temper with XY and expressing his frustration with XY directly suggesting that there may be implications for his future employment, most of the criticism of XY was not directed at XY personally. The Employer argues that given the Grievor's position as a senior employee and his apparently close relationship with McLeod his conduct and particularly the reference relating to job security should be considered intimidating. I have two difficulties in reaching that conclusion. First, there is the absence of any direct evidence from XY as to the events and how they were perceived by him. Second, there is no evidence of this conduct, viv a vis XY, being repetitive or part of a pattern of conduct. Finally, and as a more general comment, I would add that just like arbitrators have exercised caution in drawing the line between management supervision of employees and managers harassment of employees I am of the view that a similar form of caution should be exercised when addressing discord or criticism amongst employees. While such conduct is not desirable, in my view, arbitrators should be careful to ensure that the conduct in question does in fact amount to harassment or bullying when that is alleged. As was stated in *S. v. M.G.Z* not all foolish or inappropriate conduct by employees constitutes harassment or bullying. I cannot say that in this case the conduct proven satisfies the arbitral standard. In the circumstances I find that the more generalized allegation of harassment and bullying is not proven.

This determination should not be construed as an endorsement of or licence to continue the types of conduct considered in this case. The type of allegations made by the Employer if proven by more and better evidence may well lead to a different conclusion. This is particularly true in light of the workplace conduct policies now in effect.

Not Fully Forthcoming with the Investigator.

The Employer's final ground for discipline is its determination that the Grievor was not fully forthcoming in his responses to the Investigator. In the discipline letter that is stated to be the conclusion of the Investigator and the Employer then states that it "accepts the investigator's findings and conclusions regarding your [the Grievor's] conduct". As noted above the practical result of my earlier ruling with respect to solicitor client privilege was that although the privilege had been waived the Employer was not ordered to produce the Investigator's report as the Union declined to request it. The report was not placed before me in evidence and as a result I do not know in what respects and in what manner the Grievor was found by the Investigator to not be fully forth coming. The Employer argues based upon the Grievor's testimony that he did not provide adequate background or context in his responses to the Investigator's written inquiries. I take it that means that McGregor by failing to provide background or context in areas testified to in direct examination and identified in cross examination in essence mislead the Investigator.

I am not persuaded by the Employer's submissions for two reasons. First, the allegation in the disciplinary letter specifically references and adopts the Investigator's findings. I have no evidence as to what the Investigator found to not be fully forthcoming or his reasons for reaching that conclusion. Second, and in any event, I agree with the Union's submission that it was and is not realistic to place upon an individual, such as the Grievor, who is unfamiliar with legal processes and procedures, an obligation to understand and determine the necessary breadth of response. Nothing in the Grievor's written responses to the Investigator's queries leads me to conclude that he was either intentionally withholding information or attempting to mislead. For those reasons I have concluded that the Employer has proven cause for discipline in this regard.

In summary, I have concluded that the Employer has failed to meet its onus to prove just cause with respect to all of the grounds set out in the disciplinary letter. It follows that it is not necessary for me to consider the other questions posed in the *Wm. Scott* framework and that the grievance is allowed. The Grievor is entitled to be made whole with respect to any losses incurred in relation to the suspension.

It is so awarded.

Dated at Vancouver the 23rd of August 2017.

"Wayne Moore"

Wayne Moore, Arbitrator