Case Name:

Meadow Gardens Golf Course v. Unite Here, Local 40 (Bouwman Grievance)

IN THE MATTER OF an Arbitration
Between
Meadow Gardens Golf Course (the "Employer"), and
Unite Here, Local 40 (the "Union")
(S. Bouwman Arbitration)

[2012] B.C.C.A.A.A. No. 160

No. A-129/12

British Columbia
Collective Agreement Arbitration

Panel: John L. McConchie (Arbitrator)

Award: December 10, 2012.

(110 paras.)

Appearances:

Counsel for the Employer: Don Percifield.

Counsel for the Union: Michael J. Prokosh.

AWARD

1 This is a dispute which, in the Union's submission, involves a breach of a settlement agreement by the Employer. The Union applies to me for certain declaratory relief invoking a provision in the settlement agreement that provides that I "remain seized with respect to any matter arising out of the interpretation or implementation" of the Agreement.

2 The Employer denies that it has violated the Agreement and submits that I do not have jurisdiction to provide the Union with the remedies, or any of them, that the Union seeks.

Background

3 On April 15, 2011, the Employer suspended the grievor, Sheryl Bouwman for 10 days for misconduct. The Employer's suspension letter read as follows:

> On or about April 2, 2011 you engaged in very serious misconduct constituting personal harassment. Without limiting the generality of the foregoing, you uttered obscene comments that displayed utter disrespect and disregard for certain bargaining unit employees and certain management personnel. You have denied any wrong-doing and shown no remorse.
>
> Given the magnitude of your misconduct, you are hereby subject to discipline in the form of a ten day suspension without pay. This suspension will be served on the following dates: April 20th, 24th, 27th, 30th, May 1st, 4th, 11th, 14th, 18th, and 21st 2011.
>
> Accordingly, on said dates you will not attend work as otherwise scheduled and you will not be paid for this time off work.
>
> This suspension is being applied for the purposes of progressive discipline and as such will be reflected on your employment record.
>
> In closing, please be further advised that any future misconduct on your part may give rise to additional progressive discipline up to and including discharge. You are urged to ensure that by exemplary conduct no such action is necessary.

4 Four days later, the Union filed a grievance on Ms. Bouwman's behalf. The grievance asserted that the suspension was unjust and unreasonable and sought to have the discipline removed from Ms. Bouwman's file and Ms. Bouwman made whole.

5 In 2012, I was appointed by the parties to hear the grievance. After a brief adjournment of the original dates, the hearing was set for July 3 and 4, 2012. As a result of discussions between the parties on the first day of the scheduled hearing, they entered into a settlement agreement (the "Settlement Agreement"). The relevant parts of the Settlement Agreement for present purposes are the following:

> 1. The Employer agrees to reduce the suspension imposed upon the Grievor from ten (10) days to two (2) days ...
>
> ...
>
> 8. The Parties agree that John McConchie shall remain seized with respect to any matter arising out of the interpretation or implementation of this Settlement Agreement.

6 On July 7, 2012, a few days after the Settlement Agreement was made, the Employer wrote a lengthy letter to Ms. Bouwman. It characterizes the letter as a "letter of expectations". The Union characterizes it as a "disciplinary" letter. This letter is the focus of this proceeding. Given its importance, and despite its length, I will reproduce it in its entirety. To make it easier to refer to specific parts of the letter, I have numbered the headings and paragraphs in sequential order in the let-

ter. I have changed nothing else. With the exception of the added numbering scheme, I have reproduced the main body of the letter as written. The letter was on the Employer's letterhead and contained the usual formal address details and signature block:

Dear Ms. Bouwman:

1. Re: Employer Letter Of Expectation Concerning Your Work Performance

2. Introduction

3. Your management has determined we need to embark upon a program to assist you to improve your performance as an employee in two (2) important areas that, hopefully, will also help you to be a happier person in the workplace.

4. Our two (2) main. areas of concern are described and explained as follows under the respective headings of (I) "Being Pleasant At Work" and (2) "Stop Bringing Negativity Toward Your Employer Into The Workplace":

5. Being Pleasant At Work

6. Sheryl, we operate in a very competitive business environment that demands we all do our utmost at every opportunity to provide our customers with a pleasing or pleasant experience when they choose to use the facilities and services of our Meadow Gardens Golf Course.

7. To simplify what we are talking about, one online internet dictionary defines "pleasing or pleasant" as "agreeable or enjoyable; giving pleasure". That must be our goal, Sheryl, we assert and emphasize: that we commit ourselves, each and everyone one of us, as a team, to ensuring our clientele always experience, and can count on, a pleasing and pleasant experience at our Golf Course, regardless of which of our diversified facilities and services they choose to partake.

8. This is the first of the areas where we require you, with our help, if need be, to focus on with respect to improving your work performance.

9. Sheryl, we have, on too many occasions been told by prospective repeat banquet customers that they want again to do business with us -- but they do not want you, by name, to be the bartender for the event. The reason, most commonly given, is, based on their previous experience, that their group, in sufficient numbers, found you not "pleasant" to interact with as the bartender. Many have said, for example, that you seldom, if ever, smile. No small matter. As you know, Sheryl, our banquets typically are held to celebrate happy events or occasions with the result, not surprisingly, that these patrons expect to served by happy, or at least pleasant, staff. Where we fail to fulfill these quite understandable expectations, this is bad

for business -- and our reputation and marketability as a venue of choice for banquets and other related special related events, which, as you know, are critical components of our much-needed business income, particularly in our currently highly-competitive market-place.

10. We have also had too many of our customers tell us that where typically they will stop at the Gazebo for rest, refreshments and/or "munchies", while mid-way toward completing their round of golf, when they see that you are the server they prefer to forego this interlude and instead choose to bypass the Gazebo. Again, Sheryl, the reason commonly given is that their previous experience is that they have found you not "pleasant" to interact with. Bottom-line: this is bad for our business. It can affect adversely on our overall customer gratification and through the potential for "word-of-mouth" criticism of our operations from dissatisfied customers, this can potentially damage our prospects for attracting new business, if not retaining current clientele, all of which can have a negative impact on our overall revenues.

11. Sheryl, it is important you understand and embrace that the duties you perform at and on behalf of the Meadow Gardens Golf Course, and for which we pay you, really have two (2) very important components.

12. The first is that you are able, in a mechanical sense, to serve or deliver to our customers the food and/or beverages that they order from, or are to be provided by, you. This is the simplest part of your duties and, in general, at this time, we have no issue with your ability adequately to fulfill this basic service function.

13. However, the second, and much more important component of your duties, is the way in which, or bow, you deliver service, or are perceived to deliver service, to our customers; the objective being, as we have said, to optimize their "happy-factor". This is the vitally important "customer-pleasing/satisfying" component of your job. And, Sheryl, therein, lies the problem, as we have earlier expressed. We have had too many complaints, from too many customers, for too long, that they have found you, in their previous experience, not to be "pleasing" or "pleasant" in terms of how they have experienced or perceived your delivery of service to them on behalf of the Meadow Gardens Golf Course.

14. The result is that we are advising you of our expectation, as your Employer, that you dedicate yourself henceforward, unreservedly and diligently, to improving significantly your delivery of service to our customers in a manner that they will find to be, overall, "pleasing" and "pleasant".

15. We will be reviewing, and discussing with you, on a reasonably regular basis, for the foreseeable future, your progress toward achieving satisfactory improvement in these respects.

16. If, at any time, you would like discussion or help concerning how you can better conduct yourself to promote a more positive response from our customers with respect to your delivery of service, on behalf of the Meadow Gardens Golf Course, please do not hesitate to contact the undersigned.

17. Stop Bringing Negativity Toward Your Employer Into The Workplace

18. Sheryl, the second area where we require you, with our help, if need be, to focus on with respect, to improving your work performance is described below.

19. Sheryl, we, as management, for too long now, have had to address, "behind-the-scenes", and endure for far too long, too many complaints from too many Local 40 bargaining unit employees upset about the amount of "negativity" toward your Employer that you, by your comments and conduct, have introduced into our workplace.

20. At this point in time, our response is simple, clear and resolute.

21. Sheryl, we will no longer tolerate your poisoning of the work environment at the Meadow Gardens Golf Course by an ongoing onslaught of "negative" comments about our Company made by you while you are at work on our premises. While we must respect your right to "freedom of speech", this does not give you "carte blanche" to say "whatever you want", "wherever you want" about your Employer, without consequence.

22. Equally, Sheryl, we will no longer tolerate conduct by you that demonstrates open disrespect for, or defiance of the authority of management, particularly if such insubordinate conduct occurs in front of other or our employees or any of our customers, or anyone else for that matter.

23. We have certain rights under the law and the Collective Agreement to apply discipline with respect to your conduct or commentary, whether this is done on or off the job. We are alerting you, not to threaten, but primarily for informational purposes, that, henceforward, we will exercise these rights, rigorously.

24. That said, we encourage you to embrace a more benign and "less-said-is-better" positive approach to your employment and your Employer, in particular, while you are at work on our premises. In these respects, we remind you, that if you feel that you have a legitimate complaint about the conduct of the Meadow Gardens Golf Course you have, as you

know, access to the Grievance Procedure under our Collective Agreement with UNITE HERE Local 40.

25. We will be reviewing, and discussing with you, on a reasonably regular basis, for the foreseeable future, your progress toward satisfactory improvement in these respects concerning "Stop Bringing Negativity Toward Your Employer Into The Workplace".

26. If, at any time, Sheryl, you would like discussion or help concerning how you can eliminate the bringing of "negativity toward your Employer" into our workplace, please do not hesitate to contact the undersigned.

27. Conclusion

28. Sheryl, this "Letter Of Your Employer's Expectations" is not intended to be disciplinary in nature.

29. Our objective in clarifying, if not defining, for you, as your Employer, our expectations as management, with respect to certain necessary improvements in your work performance, is intended, primarily, to be informative

30. However, based on the information that we are giving you, if our expectations for necessary improvements in your work performance are not fulfilled, disciplinary action up to and including discharge may result, a consequence that we sincerely hope will not prove to be necessary.

31. We encourage you to ensure that by your exemplary conduct, in future, that no such disciplinary response may be required.

32. If you want to discuss with your Employer, at any time, any of the contents of this communication, please do not hesitate to contact the undersigned.

33. All of which is respectfully submitted for your consideration.

7 On July 20, 2012, the Union filed a grievance on behalf of Ms. Bouwman. The details of the grievance and articles of the collective agreement breached were described as follows:

> I grieve the letter from the employer dated July 7, 2012 and received by me on July 14, 2012.
>
> I grieve pursuant to Articles 3, 6 and any other applicable Articles of the collective agreement or Legislation.

In the cover letter to the grievance, the Union Representative Jean Poulton delivered the grievance to the Employer's General Manager. In the second paragraph of the letter, Ms. Poulton said the following:

> This grievance is without prejudice to any other arbitration, Labour Board matter, or any other legal proceedings (including but not limited to the fact that it is without prejudice to the Union's assertion that the employer's letter to Ms. Bouwman dated July 7, 2012 (the "Letter") is a violation of the July 3, 2012 settlement agreement and therefore, Mr. McConchie is seized and has jurisdiction over it).

8 On July 31, 2012 the Union filed the application which is the subject of this Award. Although this would normally be a natural end-point for a discussion of the necessary background, there are two events which post-date the initiation of this application which must be mentioned.

9 On August 4, 2012, a member of the golf club wrote to the Employer with a number of complaints about the grievor's service to himself and other members. On August 24, 2012, the Employer wrote to Ms. Bouwman meting out a three day suspension, among other things. On August 29, 2012, the Union grieved the suspension. The grievance regarding this particular event is not before me. The letter is admissible for the sole purpose of the Employer using the letter to demonstrate that the July 7 Letter is not mentioned in it. The Employer wishes to make the point that this omission supports its position that the letter is non-disciplinary and does not form part of Ms. Bouwman's disciplinary record.

10 Finally, on August 31, 2012, counsel for the Employer corresponded with Union counsel to provide an undertaking on behalf of the Employer. The focus of the undertaking was the use of the July 7, 2012 letter. In its material part, Employer counsel's letter said the following:

> On behalf of the above-named Company, as their duly authorized agent, the following undertaking is proffered by the Meadow Gardens Golf Course in respect of the grievance submitted dated July 20, 2012 by the above-named Union challenging the propriety of a "letter of expectation" given by the Company to Bouwman ("Grievor") dated July 7, 2012.
>
> The Company undertakes to the Grievor, to the Union, and to Mr. John McConchie, that the "letter of expectation" given by the Company to Bouwman, dated July 7, 2012, does not form part of the Grievor's disciplinary records with the Company, and will not be used by the Company to establish the level of discipline in respect of any future disciplinary action involving the Grievor.
>
> The aforesaid "letter of expectation" will only be used by the Company, if necessary, to show that Bouwman was aware of management's expectations and requirements.

11 The Union takes issue with the use of the term "undertaking" noting that the Employer's counsel is not a lawyer and cannot give legal undertakings. I am assuming that what Employer counsel means by undertaking is a serious and enforceable pledge or promise which is binding on the Employer. I do not have any reason to believe that legal undertakings are either necessary or appropriate in respect of this kind of subject matter.

Basic Positions of the Parties

12 The Union's application focuses its attention on the July 7, 2012 letter.

13 The Union submits that the parties agreed in the Settlement Agreement that I would remain seized with respect to "any matter arising out of the interpretation or implementation" of it. A key provision of the Supplemental Agreement was that the Employer would reduce the suspension imposed on the grievor for the conduct described in its letter of April 2, 2011. The letter of July 7, 2012, which post-dates the settlement, is a disciplinary letter, says the Union, which covers the same conduct that was settled between the parties on July 3, 2012 in the Settlement Agreement. This is a violation of the Settlement Agreement, it says, because it amounts to a double-penalty arising out of the same offence, namely, it is an example of double-jeopardy. The July 7, 2012 letter must be removed from the grievor's personnel file. The Union seeks the necessary declaratory and directory orders to accomplish this objective.

14 The Employer's disagreement with the Union's position has several prongs to it. First, it says that by filing the grievance dated July 20, 2012 the Union has engaged in a type of "forum shopping", the consequence of which ought to be that I refuse jurisdiction and require the Union to bring its complaints about the July 7 Letter in a new grievance. Next, it says that the July 7 Letter was intended to be and is a "letter of expectations" and not a disciplinary letter, and thus does not amount to a second penalty for the same offence.

15 Finally, says the Employer, whether or not the July 7 letter is disciplinary (it urges on me the conclusion that it is not), the letter does not address the same conduct that was addressed in the 10 day suspension letter leading to the arbitration and the settlement of the dispute on July 3, 2012. The suspension letter of April 15, 2011 addressed certain specific events which occurred on April 2, 2011. The letter of expectations covered a much broader spectrum of events and was in no way limited to the April 2, 2011 events if it even can be found to have covered them at all.

16 The parties have addressed the issues by filing comprehensive written submissions. Counsel have set out their arguments in a coherent and organized manner and have supported their arguments by extensive references to the applicable authorities. I have read the submissions carefully and considered all of the authorities. If I do not mention an authority or submission in this Award, it does not mean that I did not consider it. I will set out only those aspects of the debate which I believe are necessary to explain the conclusions I have reached as set out in this Award.

Issues:

17 In this Award, I will address the issues in the following order:

1. Whether I have jurisdiction to decide the issues arising in this dispute by virtue of Article 8 of the Settlement Agreement;

2. Whether the July 7 Letter is a "letter of expectations" or a disciplinary letter; and

3. Whether, if the July 7 Letter is a disciplinary communication, it offends the Settlement Agreement in whole or in part because it covers the same or some of same alleged culpable conduct.

Basic Jurisdiction

18 My jurisdiction over this post-settlement dispute, if I have jurisdiction, arises because of Article 8 of the Settlement Agreement.

19 The Employer says that by filing the grievance of July 20, 2012, the Union demonstrated a lack of confidence that its complaint about the July 7 Letter fit within Article 8. I do not take Employer counsel to be going so far as to say that the Union's action in filing the July 20 grievance was an admission that I did not have jurisdiction but rather an action which belies the Union's claim that I have clearly reserved the jurisdiction it wishes me to exercise.

20 Additionally, Employer counsel says that the filing of the July 20, 2012 grievance was in the nature of "forum-shopping" which, if I have properly gleaned the thrust of the argument, ought to disqualify the Union from invoking Article 8 of the Settlement Agreement.

21 Employer counsel did not spend all of his coin on this particular aspect of the case and I think this was wise. As Union counsel pointed out in his submissions, the Union's cover letter to the July 20, 2012 grievance contained an express reservation of the right to proceed under the reserved jurisdiction clause in the Settlement Agreement. This belies the notion that there was any admission (or something approaching an admission) to the contrary. In addition, I can think of at least one valid reason why a party might wish to file a grievance in addition to preserving rights under the Settlement Agreement. There is always a risk that a party seeking to bring a dispute under a reserved jurisdiction provision will be mistaken about its right to do so. Given that possibility, however remote a party might believe it to be, it is prudent to preserve the right to grieve by filing a grievance under the usual terms of the applicable collective agreement. Here, the Union has taken the next natural step of ensuring that its grievance was filed without prejudice to its rights under the reservation clause. There is no basis here for deciding that the Union is somehow prevented from calling on me to exercise jurisdiction under Article 8.

22 Aside from whether or not the Union will be able to secure a remedy on the merits, which remains to be seen, I can see no impediment to exercising my reserved jurisdiction under Article 8 of the Settlement Agreement to look into this dispute. The primary allegation in this case is that the Employer has violated the Settlement Agreement by issuing a disciplinary letter which issued further discipline to Ms. Bouwman for the same offence that was the subject of the Settlement Agreement. The Employer denies this. The parties have joined issue, and I turn to the next question.

Is the July 7, 2012 letter a "letter of expectations" or a "disciplinary" letter?

Union's Argument and Case Authorities

23 In its initial written submission, the Union refers to two cases to support its position that the July 7 Letter is a disciplinary document:

> *Hilton Villa Care Centre v. British Columbia Nurses' Union*, [2003] B.C.C.A.A.A. No. 30, 115 L.A.C. (4th) 154 (Gordon)
>
> *University of Manitoba v. Assn. of Employees Supporting Education Services*, [2011] M.G.A.D. No. 32 (Werier)

24 The Union relies on the *Hilton Villa* case as the "leading case" in British Columbia. It refers to *University of Manitoba* case as one which provides a helpful review of the more recent cases on the issue of when a communication will be properly characterized as a "letter of expectations" instead of as a "disciplinary" document.

25 In *Hilton Villa*, the issue was whether a letter issued by the employer to the grievor was a disciplinary notice or an "adverse report", both of which were subject to the grievance procedure under the Collective Agreement. Arbitrator Gordon did not ultimately have to make a finding with respect to whether the letter was an adverse report but concentrated her Award on the question of whether the letter was disciplinary. The letter under scrutiny in the case was itself a revision and replacement of a letter given only a few days before. Although the first letter provided the arbitrator with some additional support for her ultimate conclusions, it is not necessary to reproduce it here. The letter in question provided as follows:

RE: LETTER OF EXPECTATION

> I am writing this non-disciplinary letter of expectation with respect to the replacement of the cook.
>
> On Jan. 9, 1999, you were the charge nurse on the day shift. Dietary staff informed you that the cook needed to be replaced. You then informed her that you were too busy to replace any staff. You did not respond or follow procedures appropriately. You could have delegated the 2nd floor R.N. to do the replacement. Rather, you left the residents nutritional needs jeopardized by not prioritizing your duties. Also you left the dietary staff with anxiety by no staff replacement.
>
> The second time dietary staff approached you for a replacement, you stated that you were busy with resident care. Your documentation does not reflect a busy day shift.
>
> We trust you will endeavour in the future to follow proper procedure and prioritise appropriately. If you need further assistance, please do not hesitate to approach me. I am committed to providing you with the support and assistance necessary to ensure that you are able to effectively carry out your responsibilities.

26 It was the employer's evidence in the proceeding that its intentions were not disciplinary but were instead directed to letting the employee know her duties. Arbitrator Gordon summarized that testimony as follows:

> 6 Ms. Drummond testified at the hearing. Among other things, she explained that she issued the letter to the Grievor to "let her know her responsibilities [and to] prioritize her assignments". Ms. Drummond denied any intention to use the letter of expectation as a foundation for future discipline. She also disavowed any intention to give the letter any effect in future performance appraisals.
>
> 7 In cross-examination Ms. Drummond admitted the second paragraph of the letter "looks like" the Grievor had "done something wrong". Ms. Drummond did not dispute the proposition that the allegation in the letter relating to jeopardizing residents' nutritional needs constitutes a disciplinable offence. She went on to say, however, that "we were just letting [the grievor] know she was not following procedures". Ms. Drummond subsequently admitted that in issuing the letter of

> expectation, she "wanted to correct" the Grievor and "let her know her duties". Ms. Drummond also agreed the letter could be characterized as "adverse".

27 It was the union's position in the *Hilton Villa* case that "neither Ms. Drummond's evidence nor the express reference in the letter to it being a "non-disciplinary" document alters the fact that the letter is disciplinary on its face. The Union says the letter sets out allegations of disciplinary offences and any reasonable, objective person would view it as an adverse and disciplinary notice."

28 The arbitrator noted the employer's position as follows:

> 13 The Employer's position is that not every expression of disapproval about an employee constitutes a disciplinary act. The Employer contends that Ms. Drummond's intention at the time the letter of expectation was issued is critical. The Employer concedes Ms. Drummond testified that she intended the letter of expectation to be corrective in terms of the Grievor's behaviour. However, the Employer notes that Ms. Drummond also said her intention was to communicate the Employer's expectation that the Grievor must follow established policy and procedure regarding the replacement of staff. The Employer agrees a shop steward was present when Ms. Drummond issued the letter of expectation to the Grievor. But the Employer refers to Ms. Drummond's assertion that her usual practice is to have shop stewards present when members of management speak to employees.
>
> 14 The Employer does not dispute Ms. Drummond's admission in cross-examination that the letter of expectation was "adverse". The Employer does dispute, however, the characterization of the letter of expectation as an "adverse report" for the purposes of Article 16.02(C). In making this submission the Employer relies on Ms. Drummond's evidence that she did not intend the letter of expectation to have an adverse "effect" on the Grievor's discipline record or future performance evaluation. See *Yaletown House Society -and-British Columbia Nurses' Union*, [1996] B.C.C.A.A.A. No. 425, Award No. A265/96 (Kinzie); and, *Vancouver General Hospital - and-British Columbia Nurses' Union (Yeung Grievance)*, [1993] B.C.C.A.A.A. No. 190, Award No. A188/93 (Taylor).

29 In her analysis, Arbitrator Gordon noted both parties were relying on a previous award of Arbitrator Price (*Re Alberta Hospital Edmonton v. Health Sciences Association of Alberta* (1998), 69 L.A.C. (4th) 289), but for different reasons. The usefulness of what I will call the *Price Award* is that it recognizes that the decision whether to characterize an item of correspondence as being non-disciplinary or disciplinary will not always be an obvious one; it may involve an arbitrator in the consideration of a number of factors. Some of those factors will in a given case tend to support a conclusion that the correspondence is non-disciplinary and others will support the opposite conclusion.

30 In the instant case, both the Employer and Union are once again relying on the *Price Award.* For this reason, it will be worthwhile here to quote from that award at length, as Arbitrator Gordon did in the *Hilton Villa* case. Arbitrator Gordon began by quoting from that portion of the *Price Award* which listed the differences between letters of expectation and disciplinary letters, a listing not created by Arbitrator Price but to which he was drawn in his own case:

17 Included in Arbitrator Price's award at pages 300-301 was a non-exhaustive list of the differences between non-disciplinary expectation letters and disciplinary letters. That list, which was excerpted from an article by Roger Gunn published in the 1993 Calgary Labour Arbitration Conference, is as follows:

Performance Expectations	Disciplinary Letter
Purpose: to counsel and communicate, to identify or clarify expected behaviour in performance of job duties.	Purpose: to correct poor performance or undesirable behaviour -- assumes that discipline is needed to achieve correction.
Employer's Intention: helpful, supportive. Examples used only as a means to clarify inappropriate or acceptable behaviour.	Employer's Intention: disciplinary. Nature of Employee's conduct: culpable -- specific incident of poor performance, or infraction of a rule, policy or standard.
Support is offered by way of training and/or other resources.	Should be clearly stated to be disciplinary.
Develops, with employee's input, mutual goals to encourage employee's commitment to change. Focus: assumes behaviour will change in future, when an employee understands what is expected and is supported in an effort to change	Does the employee have to grieve the letter to be able to respond effectively to it? "Focus: expected behaviour is identified, but consequences are attached to present and any future failure to meet prescribed standards."
A review period is set to give feedback on progress of change	"May require compliance with provisions of the collective agreement, such as the presence of a union representative when discipline is imposed."
A future disciplinable offence will be treated with no reference to this letter as a foundation for any progressive discipline. This letter may only be used to show that the employee was aware of the employer's requirements.	Negative impact on employee's work record. Part of progressive discipline -- further incidents of a similar nature may be followed by further possible increased discipline.

31 Arbitrator Gordon then observed that:

> 18 Arbitrator Price held that the burden of proving a prima facie case that the memorandum was disciplinary in nature fell to the union. Once such a prima facie case was made out, the burden then shifted to the employer to prove it had just cause to impose the discipline.

32 And further:

> 19 Arbitrator Price found that the proper characterization of disputed letters issued to employees by management is ultimately a question of fact based on all of the circumstances of the case including the following:
>
> > other relevant correspondence and surrounding circumstances, if they help the arbitrator to interpret the memorandum;
> >
> > whether the memorandum was specifically directed at particular employees;
> >
> > whether the letter accused the employees of misconduct of a culpable nature;
> >
> > whether the letter referred to possible disciplinary action if the conduct persisted;
> >
> > whether the letter suggested that the employee's actions were ill-founded or improperly handled;
> >
> > whether the language used in the memorandum refers to communications of performance expectations rather than the identification of concerns or unacceptable or insubordinate behaviour possibly warranting discipline in the future if continued;
> >
> > whether the purpose of the memorandum appears to have been to correct undesirable behaviour by specific employees;
> >
> > whether the employer addresses its concerns in a supportive manner and whether any support is offered to improve or overcome the perceived problems;
> >
> > whether the memorandum itself is in a disciplinary format.

33 As can be seen, the list set out by Arbitrator Price was not identical to the list prepared by Mr. Gunn, nor did it seek to place a particular factor on the pro or con side of the debate. What appears obvious from the *Price Award* and the other decisions cited by both Employer and Union counsel (a description of which will come below) is that there is no specific formula for deciding whether a communication is disciplinary or non-disciplinary.

34 Arbitrator Gordon then proceeded to review the treatment by the *Price Award* of an issue that our own case and the *Price Award* had in common. The question is to identify the impact on the discussion in a circumstance in which an employer specifically confirms, both in the communication and outside it, that it did and does not intend it to be disciplinary.

35 It will be recalled that in our own proceeding, the Employer has provided an undertaking/pledge with respect to the use (or, perhaps more accurately, what will not be the use) of the July 7 Letter. A similar undertaking was given in the *Price Award.* In paragraph 20 of her Award, Arbitrator Gordon refers to the opinion expressed by Arbitrator Price about the value of such an undertaking:

> 20 In terms of the employer's undertaking tendered at the outset of the arbitration hearing, Arbitrator Price adopted the reasoning of Arbitrator Ponak in *Re Foothills Provincial Hospital - and- U.N.A., Loc 115 (Chrystal)*, unreported award, November 23, 1992, and held that if an employer communication is disciplinary either by its intent or on its face, a statement by the employer that is not disciplinary or will not be used in future disciplinary proceedings cannot alter its basic character:
>
> > The undertaking will be something the board can take into account, if it helps the board assess the intention of the employer at the time the letter was given to the grievor. The intention of the employer many months later at the date of the hearing may not be of much assistance ...
>
> 21 Following a detailed analysis of all of the surrounding circumstances, and notwithstanding the employer's undertaking as well as a number of factors pointing to the opposite conclusion, Arbitrator Price found the memorandum to be disciplinary in nature. He also noted, as an aside, that:
>
> > If the employer's argument were accepted, the grievors would be left with the memo on their personnel file. They could not remove the memo from their file the way disciplinary action could be removed after 2 years (article 37.07). The memo could not be explained by the grievors in the way that employees are allowed to respond to Evaluations under Article 36.03(B), which provides that employee responses must be placed on their personnel file. The matter would not even have a review date when the employee and the employer could together assess the employee's progress as might occur with the regular performance expectation letter. The memo would just remain on the file unchallenged and unexplained.
> >
> > If the employer's argument that we have no jurisdiction were accepted, the logical extension is that any disciplinary action that failed to meet with any of the procedural requirements prescribed in the Collective Agreement would fall outside our jurisdiction. The result would be that failed discipline would remain on the employee's personnel file, not as discipline to be sure, but as information, unchallenged and unexplained, that might be available for an indefinite period in the future for other non-disciplinary

> reasons. In light of the provisions in the Collective Agreement allowing employees to grieve discipline and to record their side of the story on evaluations, to allow items from failed discipline attempts to remain on a personnel file would make no labour relations sense ...

36 Arbitrator Gordon then proceeded to a close examination of the letter in the case before her finding, as Arbitrator Price had done in his own case, that the letter to the grievor in her proceeding was a disciplinary one. As I will have to do with the July 7 Letter, Arbitrator Gordon first considered the wording of the letter, noting that, as in the *Price Award*, "certain circumstances supported the Union's characterization of the January 26th letter of expectation, while other circumstances supported the Employer's characterization. (at para. 22):

> 23 Turning first to the language used in the letter of expectation itself, I note that in the first paragraph the letter is expressly represented to be "non-disciplinary". This is consistent with certain aspects of Ms. Drummond's evidence relating to her intention.
>
> 24 At the same time, I find that the Grievor's conduct is discussed in the second paragraph in culpable terms. A specific incident is referred to and an infraction of the Employer's procedure and standards for the In-Charge Nurse is alleged. The overall tone of paragraph two is, I find, accusatory: "You did not respond or follow procedures appropriately"; "you left the residents' nutritional needs jeopardized by not prioritizing your duties"; "you left the dietary staff with anxiety by no staff replacement". In my view, the conduct described in paragraph two is usually characterized, in the labour relations context, as culpable conduct likely to attract the imposition of disciplinary sanctions.
>
> 25 Additionally, paragraph three can be construed as a veiled accusation that the Grievor was dishonest with dietary staff when she advised them she was too busy with resident care to arrange for a replacement cook. Again, this accusation is in the nature of serious culpable conduct on a specific occasion.
>
> 26 Paragraph four switches to a somewhat different tone. It assumes or expresses the expectation that the Grievor's behaviour will change in the future. No specific support or assistance is offered, but a willingness to provide support and assistance if the Grievor requests it is expressed.

37 Arbitrator Gordon then addressed the issue presented by the fact that "there is no express reference in the letter to any negative effect on the Grievor's work record - i.e., no intention to use the letter for any disciplinary purpose and no intention to negatively affect future performance evaluations." Two factors, she said, were to be taken into account in this regard:

> 28 First, it was Ms. Drummond's uncontradicted evidence that her purpose was, in part, to correct the Grievor's behaviour. As such, the letter constituted an adverse comment on the Grievor's conduct. Ms. Drummond also admitted that although it was not her intention to impose any adverse effect on the Grievor's employment record, the letter of expectation is, on its face, adverse to the Grievor.

> 29 Second, I find the January 26th letter of expectation should be interpreted in the context of the earlier correspondence dated January 21, 1999. In paragraph four of the earlier letter the Employer described the Grievor's conduct in relation to "G" as "another concern" that had to be brought to the Grievor's attention. Although that patient care concern is excised from the second letter, I find that characterization of the Grievor's conduct on January 9 reinforces my finding that the purpose or intention of the Employer's communication to the Grievor was something more than the clarification of performance expectations; its purpose was also to correct misconduct at the workplace.
>
> 30 I have taken Ms. Drummond's evidence of a non-disciplinary intention into account. I have also considered the fact that the letter is specifically addressed to the Grievor and comments adversely on the Grievor's conduct on a specific occasion.
>
> 31 In view of all of the facts and circumstances of this case, I am persuaded that the basic character of the January 26th letter of expectation is that of a disciplinary letter seeking the correction of specific culpable conduct. As I have already observed, some of the circumstances of this case support the Employer's characterization, while others support the Union. On balance, I am satisfied the letter seeks to correct poor performance or undesirable behaviour.

38 Having reached her conclusions on characterization of the letter before her, the arbitrator turned to the consideration, once again, of the harm that would result even if the letter were not used as a disciplinary document in the future:

> 32 I am also persuaded by the Union's submission that the above-quoted "aside" remarks of Arbitrator Price are equally applicable here. If the Employer's argument were accepted, the January 26th letter would remain on the Grievor's personnel file indefinitely and could not be explained by the Grievor in the way she is entitled to respond to performance evaluations under Article 16.02(A). Ms. Drummond expressed an assurance regarding the limited future use of the letter, but the letter may well remain on the Grievor's file long after Ms. Drummond has left the employ of the Employer. Moreover, if a prospective employer contacted the Employer for a reference, this letter of expectation containing allegations of misconduct including dishonesty towards co-workers could be referred to inadvertently. This would undoubtedly have an adverse effect on the Grievor's employment prospects.

39 In view of her finding that the letter was disciplinary, Arbitrator Gordon ordered that it be removed from the employee's file in compliance with the terms of the Collective Agreement.

40 As previously mentioned, the Union relied on the *University of Manitoba* case for its recital of the facts and reasons of recent cases. While I have read that recital, what I think bears reproducing here are Arbitrator Werier's own reasons for the findings he made in his own case and the factors that led him to those findings. The following passage is lengthy but instructive:

> 50 A review of the arbitral jurisprudence in this area confirms that whether or not a letter to an employee dealing with work performance issues is disciplinary or not, is dependent on a number of considerations. Arbitrators will weigh a number of factors, with none being determinative.
>
> 51 Arbitrator Rose in *Peel District School Board et al* summed it up this way:
>
> > "In reviewing the submissions, it is recognized that arbitrators have formulated checklists or established criteria to determine the threshold issue whether certain documents are disciplinary. Such an analytic framework is useful up to a point. It is not without limitations. For one thing, the criteria are not exhaustive. Nor is there a formula for establishing the relative importance of individual criteria. Additionally, some of the criteria may support the union's characterization of the letters, others may support the employer's position, and still others may have no application to the matter in dispute. At the end of the day, each case must be decided on its own set of facts and the weighing of criteria will involve a degree of subjectivity."

41 I pause to say that I think that this is as good a description of this arbitrator's task in evaluating the July 7 Letter as can be found in the jurisprudence.

42 The implication of this approach is, of course, that employers drafting communications which they fully intend to be non-disciplinary are going to be required to take care that the manner in which they construct their non-disciplinary message does not cause it to fall into the de facto disciplinary camp. For reasons which I will elaborate on later, this does not merely expose employers to meritorious grievances but to having their best laid plans for the rehabilitation of an employee "gang aft agley" (to quote Robbie Burns). This could easily have a more negative impact on the situation leading to the letter than the possible humiliation of having to remove that same letter from circulation by virtue of an arbitrator's order.

43 Arbitrator Werier went on in the *University of Manitoba* case to propound his own list of the factors that applied to the case before him:

> 52 Some of the factors set out in the authorities which I have taken into account in this case are as follows:
>
> Are the allegations of culpable misconduct?
>
> Will the letters be relied upon to support disciplinary action in the future?
>
> Do the letters refer to disciplinary action being taken if the conduct or poor performance persists?
>
> Is the letter directed specifically to the employee?
>
> Does the letter provide future expectations?
>
> Does the letter address its concerns in a supportive manner and offer advice and counselling?

Will the letter remain on the employee's personnel file?

44 For sake of space, I will turn now to Arbitrator Werier's comments about the appropriate role of letters of expectation in managing performance and his conclusions about the correspondence in front of him:

> 58 A few other comments are warranted. An employer has the right to manage its workforce, subject to the management rights clause in its agreement, and subject to restrictions agreed to by the parties.
>
> 59 In the absence of any restrictions, management should have some leeway and discretion in how to direct its workforce. Letters of expectation are an important tool in carrying out this direction of the workforce.
>
> 60 The discretion however is subject to limits. Communications to employees, even though specifically stated to be non-disciplinary, have to be analyzed to assess whether they are in fact disciplinary.
>
> 61 Against this backdrop, I turn to the letters in question. For the reasons that follow, I have determined that the letters are disciplinary, the grievances succeed, and the remedies requested by the Union are granted.
>
> 62 Overall, in my view, the letters cross the line between non-disciplinary and disciplinary. I accept that the University intended them to be non-disciplinary and accept their position that letters of expectation can be an effective management tool. I am also mindful that the University prefers to not increase the number of disciplinary actions against its employees and wishes to allow a certain degree of latitude to its various managers throughout the University.
>
> 63 Why am I persuaded by the Union's arguments? On balance, the contents of the letters are disciplinary. The tone of the letters is confrontational. The content of the letters is to address specific, culpable, work performance issues. For example, in the letter to L.W. all three elements referred to in the letter imply that the employee was guilty of culpable conduct. The conduct was of such a concern that it had to be dealt with at a meeting. The letter sets out culpable conduct of excessive personal calls at work. The letter sets out that failure to show a "significant improvement may result in further disciplinary action". The language in the letter certainly implies that the performance issues have been ongoing despite the University's efforts.
>
> 64 Another example is the letter to D.H. which is also confrontational in tone. The letter's language sets out that there is a recurring problem with D.H.'s performance in spite of efforts made by the University. Also, the proposed remedial action in the letter is increased surveillance.

> 65 The letter to A.M. is similar. The letter accuses the employee and targets culpable behaviour, e.g. "you did not move forward on admission of these students; you did not advise the faculty or anyone in our office that you made the decision not to follow this direction".
>
> 66 The letter to A.J. referred to the employee's "lack of insight and/or insubordination".
>
> ...
>
> 70 In summary, for all of the above reasons, the grievances succeed.

45 In its submissions, the Union relies on these authorities to make the following points. In support of its position that the July 7 letter was disciplinary, the Union points out firstly that the nature of Ms. Bouwman's alleged conduct, to which the Employer referred in the July 7, 2012 Letter, was culpable conduct and the references were repeated references. Second, says the Union, the Letter contains numerous references to consequences attached to any future failure to meet the prescribed standards. Third, the Employer's July 7 Letter was specifically addressed to Ms. Bouwman. Fourth, the Letter was accusatory in tone and critical in relation to alleged behavior that is classified as culpable. Fifth, despite the Employer's assertions in the Letter that it was a "Letter of Expectations", the intent to counsel was clearly not achieved by the language used. Sixth, based on a review of the Letter, it is easy to conclude that the Employer will be keeping a copy of it in Ms. Bouwman's personnel file. Finally, says the Union, the overall content of the Letter is clearly disciplinary.

Employer's Argument and Case Authorities

46 In the Employer's comprehensive written submission, its counsel relied in the main on three case authorities:

> *Re Alberta Hospital Edmonton v. Health Sciences Association of Alberta, supra* [called the *Price Award* in this decision]
>
> *Telus Communications Inc. v. Telecommunications Workers' Union (Ng Grievance)*, [2012] C.L.A.D. No. 132; LAX/2012-223 (Brown)
>
> *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services) (Pilger Grievance)*, [2011] O.G.S.B.A. No. 118 (Abramsky)

47 I have already reviewed the Price Award, and so need not do so again here. I will review the Employer's submissions on the things it draws from that case which favour its position in these proceedings.

48 Although the Employer appeared to place its greatest reliance on the *Price Award* (which is understandable and sensible in that it sets out what have come to be accepted as the major factors in these kinds of cases), it did as well bring to my attention two other decisions that it asserted favoured its position. In the recent British Columbia arbitration case of *Telus Communications, supra*, Arbitrator Mark Brown addressed, in part, the issue of whether certain letters of expectation were disciplinary or non-disciplinary.

49 At Paragraph 125, Arbitrator Brown addressed the important differences between communications which occur in the routine direction of the workforce (which includes the promulgation of expectations) and those which occur in the disciplinary process. Speaking about what had been learned in a previous arbitration between the parties before him, Arbitrator Brown said the following:

> 125 In the *Telus -- Burke* case, three grievances were filed by three employees claiming a right to have a Union Steward at certain meetings. In the meetings the grievors were given Letters of Expectation. The Employer argued that the letters and conversation did not have a "penal effect". The Union maintained that the facts demonstrated events that were disciplinary in nature. The panel dismissed the grievances concluding:
>
> > The facts in this case make clear this is management direction in the form of communicating expectations to the employees. Finalizing those expectations in writing does not change the character of the letter and the meetings. The Employer in this case has said clearly and consistently the letter of expectation will not form the basis of discipline. While it is on file and may be used to establish clear expectations exist, that does not move it into the disciplinary process. While the Union portrays the matter as a significant event as it occurred once a month and was not part of the day-to-day management, we do not agree with that characterization. The nature and purpose of the meeting is critical to our determination. The matter before us is a situation much more akin to the routine direction of the workforce, albeit in a somewhat more formal sense.
> >
> > The Union's argument that this is part of a process which creates a record which could be used in a disciplinary process, could well apply to all direction provided in the workplace. That is why there is a distinction established in the jurisprudence which recognizes the Employer's right to manage the workplace and balances it against the Union's right to represent employees in the administration of the collective agreement. (paras. 27-28)

50 I can say at this point that the distinction being discussed is a very significant one in workplace law and practice. In my view, the "correction" of poor performance is best attempted by an employer in as many non-disciplinary ways as are reasonable and resort to discipline as a means of discipline should be undertaken only when these other measures have failed. Discipline is serious and is most often taken seriously by an employee. An employer whose managers are able to make its expectations clear and provide needed support and turn the employee on to a productive path do best when this is accomplished in the pre-disciplinary phase. There is simply a much greater opportunity for normalized relations between the employer and the employee when correction does not require the imposition of discipline.

51 The Employer's third case, which I will refer to as the *Pilger Grievance*, dealt with the issue, among other things, of whether certain attendance meetings between employer representatives and employees and letters dealing with attendance constituted "discipline". In the course of deciding this case, the arbitrator provided reinforcement for the notion that while "written warnings" may be ei-

ther non-disciplinary or disciplinary in the context of a given case, the distinction is important to the proper management of the workforce.

52 At Paragraph 42, Arbitrator Abramsky said the following:

> [42] In Re OPSEU (Halall), supra at par. 34 and 35, the Vice-Chair quoted two other GSB decisions concerning what constitutes "discipline." In *Re OPSEU (Barillari) and Ministry of Community and Social Services*, GSB No. 2002-2390 (Dissanayake), the grievor was given two counseling letters which set out the Employer's expectations concerning her behaviour and criticized certain events in which she was involved. The decision noted that the grievor was distressed with the information in the letters but that was not the test to be applied. It continued at par. 62:
>
> > Certainly, if the grievor repeats the conduct which was the subject of the letters, the employer may take disciplinary action, as union counsel suggests. In that event the employer will be obligated to establish just cause in the event the discipline is grieved. However, that does not have any relevance to whether the letters are themselves disciplinary. The employer is entitled to initially attempt to correct an employee's conduct in a non-disciplinary way. As the Board observed in *Re Black*, that is to be encouraged. If the non-disciplinary approach does not produce the corrective results, it is open to the employer to initiate a disciplinary response. The non-disciplinary letters, etc. will not form a step in the progressive discipline system, but may well serve to establish that the grievor was made aware of the employer's expectations of the employee should that be an issue. In regard to the other cited decision, *Re OPSEU (Cloutier) and Ministry of Revenue*, GSB No. 108/77 (Swinton), Vice-Chair Briggs stated at par. 35:
>
> > It was said in *Re Cloutier (supra)* that when an employee is advised that they may be disciplined in the future, "it is implicit in such an admonition that such an appraisal is not being made at that time." Further, it was said that "the employee is simply being forewarned that such an appraisal is a distinct possibility if certain conduct about which the employer complains is not rectified."

53 The Board went on to state the following:

> [44] The Board, at p. 4, quoted an excerpt from Brown and Beatty, Canadian Labour Arbitration (2nd). In part, that quote reads:
>
> > It follows from what arbitrators conceive to be the essence of disciplinary sanctions that a written warning which forms part of the grievor's employment record, which is intended to induce her to alter her behaviour and which may have a prejudicial effect on her position in future grievance proceedings will likely be regarded as being disciplinary in nature. Con-

> versely, where the written warning forms no part of the employee's record for the purpose of determining the severity of future discipline, or where it does not involve a change in status or a monetary loss, or where the warning merely indicates what disciplinary or other action might be taken in the future, arbitrators have ruled that such notations are not disciplinary in nature..."

54 Based on these case authorities, and in particular the listing of factors in the *Price Award*, Mr. Percifield for the Employer argues that the July 7 Letter "almost overwhelmingly encourages and supports a finding by you that this communication was and is, indeed, "non-disciplinary".

55 The highlights of the Employer's full submission are as follows

56 Basing its argument on the factors listed in the Gunn table, in particular, the Employer asserts that the July 7 Letter falls "almost overwhelmingly" in the "non-disciplinary" camp.

57 The Employer first submits that the purpose of the July 7 Letter is to counsel and communicate, to identify or clarify expected behaviour in performance of job duties. In support of this, the Employer refers to para. 16 of the July 7 Letter and argues that this is a clear example of clarifying expectations. The Employer also refers to para. 26 of the July 7 Letter as an example of providing a means for improving performance. The Employer emphatically submits there is nothing contained in the July 7 Letter that reflects an assumption by management that "discipline is needed to achieve correction". The Letter was "helpful and supportive" as opposed disciplinary.

58 When considering whether the correspondence used examples only as a means to clarify inappropriate or acceptable behaviour or instead described the nature of the employee's conduct: in respect of culpable and specific incidents of poor performance, or infraction of a rule, policy, or standard, the Employer submitted that the July 7 Letter defined no "specific incidents of poor performance, or infraction of a rule, policy, or standard." Instead, in general terms, it seeks to "clarify inappropriate or acceptable behaviour".

59 It is the Employer's submission that the July 7 Letter itself makes it clear in express terms that it is not disciplinary. This position was reinforced by management's letter to the Union dated August 31, 2012 and the Employer has subsequently acted consistent with this commitment.

60 As the Employer sees it, the July 7 Letter develops, with the employee's input, mutual goals to encourage the employee's commitment to change. This is to be distinguished from a situation in which the employee has to grieve the letter to be able to respond effectively to it. The Employer denies that there is any need for Ms. Bouwman to grieve the July 7 Letter. The fact is, says the Employer, that the Letter is not disciplinary and does not prejudice her.

61 The Employer acknowledges that the July 7 Letter does set out potential "consequences" for "failure to meet prescribed standard" but submits that on the case authorities, this does not make the correspondence disciplinary. It is only if the necessary improvements in Ms. Bouwman's work performance are not fulfilled that disciplinary action up to and including discharge may result.

62 Tracking the Gunn criteria, the Employer argues that the July 7 Letter establishes a review period to give feedback on the progress of change, pointing to paragraph 25 of the July 7 Letter.

63 In sum, it is the Employer's position that, while acknowledging the presence of language about consequences, such language has not itself led arbitrators to find letters of expectation to be

disciplinary, and the July 7 Letter is clearly non-disciplinary and meets the criteria for such under the *Price Award.*

Analysis

64 The case authorities make it clear that an arbitrator's decision as to whether or not an item of correspondence is disciplinary or non-disciplinary is based, if not solely, predominantly on what the impugned correspondence says on its face. An Employer's intentions and its subsequent innocent use of the letter are factors but not conclusive ones. In themselves, they cannot convert a letter which is, in its construction, disciplinary into a non-disciplinary letter regardless of the sincerity and good faith of the Employer.

65 While they do not provide a formula, the factors discussed in the cases provide a means of examining the structure of a letter and determining on which side of the line it falls.

66 Given that there is a point at which a non-disciplinary communication crosses a line and can no longer claim such a characterization, I find it helpful to picture a continuum running from left to right. At the far left of the line is what I will call for sake of a better term an "obvious letter of expectations". On the far right is its counterpart, an obvious letter of discipline. A review of the contents of July 7 Letter, analyzed in light of the various factors, will help to determine where on this continuum it lies.

67 To begin with the far left point of the continuum, the purpose of a letter of expectations is to serve as a vehicle for an Employer to advise an employee or employees of what is expected of them. Providing expectations is part of a manager's duty. The exercise of this duty can be entirely non-controversial, as where a manager provides expectations to new employees during an orientation. It can become more controversial in circumstances in which the expectations are delivered more formally to an employee because of concerns that the employee is having difficulties. As part of a manager's non-disciplinary toolkit, the term "letter of expectation" has come into common use to describe what is perhaps the most formal non-disciplinary means of delivering expectations and the implicit message that they must be met. This may often be used by an employer as a last effort at correction before turning to discipline. (I am mindful that I use the term "correction" in this context even though that term is often seen by arbitrators as being indicative of discipline. I believe that I am using this term here in a different context. For the reasons I mentioned earlier, "correction" can be non-disciplinary as well as disciplinary.)

68 The quickest way to show-case the "obvious letter of expectations" is to refer to a case in which one was called into question. Of course, the fact that the letter was called into question demonstrates that the word "obvious" has its limitations.

69 I refer to *Saint Mary's Hospital v. Hospital Employees' Union (Griffith Grievances)*, [2001] B.C.C.A.A.A. No. 391 (Jackson). The employer in that case had provided the grievor with a "letter of expectation" after it learned of an apparently inappropriate discussion between the grievor and another employee. The employee challenged the letter on the footing that it was disciplinary and unwarranted. He had a different view of the events leading to the letter and wanted to challenge the employer's justification for writing it.

70 The letter, in its entirety, read as follows:

para 21 A copy of this letter is being placed in your personnel file. This letter is written for the purpose of recording that the performance expectations described herein have been communicated to you. This letter is a non-disciplinary document and will not be used during any subsequent proceedings other than for the sole purpose of establishing that you have been apprised of the following expectations of performance.

Expectations of Performance

As an employee of Saint Mary's Hospital, it is our expectation that:

-you will not make course (sic) or threatening remarks to your supervisor or manager;

-you will not demonstrate a contemptuous attitude or defiance of managerial authority in your communications with your supervisor/manager or other persons in the workplace;

-you will treat your supervisor/manager in a respectful manner in all dealings with them;

-you will treat your fellow employees with the respect to which they are entitled in their work and not threaten or intimidate them in any way.

If you have any questions about these expectations, please ask for clarification.

71 The arbitrator was called on to consider the union's argument that the grievor's conduct did not justify a disciplinary letter. The arbitrator said the following:

para 23 As I see it there are three questions to address.

para 24 The first question is whether the Letter was a disciplinary letter. The only reasonable conclusion that can be drawn from the wording of the grievance is that the Letter was being challenged as though it was disciplinary in nature. However, I cannot agree that it was. The Letter expressly stated that it "is a non-disciplinary document". It is significant that there was no criticism, reprimand, censure or adverse remark in the content of the Letter. I accept that the Letter was not written for a disciplinary purpose and it follows that it cannot be considered to constitute disciplinary action.

para 25 This leads to the second question. Since the Letter was not a disciplinary one, is it necessary to determine exactly what was said in either of the conversations that led to the Letter? In my view it is not necessary since the Letter did not impose discipline for what had allegedly been said by the grievor in those two conversations. While those conversations may have prompted the writing of the Letter, the Employer chose not to treat the matter as one of alleged wrongdoing and made no mention of those conversations in the Letter.

> para 26 The final question is whether the Employer was entitled to communicate its reasonable performance expectations to the grievor in written form. In my opinion the Employer was so entitled: see *Workers' Compensation Board of B.C. and Compensation Employees' Union*, Unreported, March 12, 1997 (Somjen) at paragraph 41. The events that may have led the Employer to take this step are irrelevant.
>
> para 27 In sum, I have determined that the August 23rd, 1999 Letter is not a disciplinary one but simply an expression by the Employer of its performance expectations which the Employer was entitled to communicate. There has been no violation of the collective agreement and the grievance with respect to this Letter must be dismissed.

72 Although the arbitrator in that case phrased her conclusions in terms of the "purpose" of the letter, she determined the purpose from a review of what the letter said on its face. It contained no "criticism, reprimand, censure or adverse remark". Although there were reasons for the delivery of the letter, they were irrelevant because the letter did not contain any recital of the allegations of fact that had led to its issuance. It focused solely on the expectations -- to the exclusion of any warnings of future consequences or any reference to any past conduct by the employee -- while advising its recipient that the letter was non-disciplinary and would be used only for a limited purpose.

73 An "obvious letter of discipline" on the far side of the continuum will look starkly different. It will most likely reflect the very different purpose of discipline which was succinctly set out by Arbitrator Hope in *Re MacMillan Bloedel Ltd.* (1993) 33 L.A.C. (4th) 288 (Hope) where he said:

> 50 The principles of progressive discipline require the fashioning of penalties that will bring home to an employee the seriousness with which particular acts of misconduct are viewed.

74 Reflecting its purpose, an "obvious disciplinary letter" will, of course, state what discipline is being meted out. But more to the point for present purposes, it will contain a recital of the "particular acts of misconduct" which have led to the discipline. Unless challenged through the grievance procedure, these assertions of fact will be binding on the employee. It is very difficult, albeit not always impossible, to challenge these assertions at such later time as further discipline is issued. A comprehensive discipline letter (there are many examples in the jurisprudence) can be expected to identify the standard, rule or expectation which has been breached, discuss the impact of the misconduct on other employees, clients, the organization itself and whoever else is involved, and in many cases, will itself set out or re-affirm the employer's expectations. Inevitably, the letter will warn the employee about the consequences of further misconduct.

75 Where does the July 7 Letter rest on this continuum: closer to the far left point of the line where it will be properly characterized as a letter of expectation, or closer to the far right point of the line where it will be properly characterized as a letter of discipline?

76 Reviewing the factors in this case, there are a number which place the July 7 Letter on the left side of the continuum.

77 First, as mentioned, the letter states in its own terms that it is non-disciplinary (see paragraphs 28 and 29 of the July 7 Letter). In this respect, it resembles a letter of expectation and not a letter of discipline. I have already discussed the limitations of this factor.

78 Second, the July 7 Letter does provide a recital of the Employer's expectations with respect to Ms. Bouwman's alleged customer service and "negativity" issues. I refer here to statements of expectations in several paragraphs: 5, 6, 13 (in part), 14 and 24. I say "in part" with respect to paragraph 13 because the expectations set out in that paragraph are mixed, in the same paragraph, with strongly worded complaints about Ms. Bouwman's work performance, which cannot be characterized as "expectations".

79 Staying with the issue of expectations for the moment, the July 7 Letter may be contrasted with the letter which Arbitrator Gordon addressed in the *Hilton Villa* case. There, the much shorter letter was virtually devoid of any statement of expectations, other than that the employee must "follow proper procedure and prioritise appropriately." While these may be classified as expectations on their face, they could only have meaning for the employee if contrasted with the more extensive part of that letter dealing with what the employee had done wrong. In the July 7 Letter, which as will be seen does not suffer a dearth of statements about what Ms. Bouwman is said to have done wrong, the expectations were clearly more fulsomely described. Needless to say, to be characterized as a "letter of expectations", the letter should in fact provide expectations. This is done in the July 7 Letter.

80 Third, the July 7 Letter does in paragraphs 15 and 25 provide for a review period. In paragraphs 16 and 32, the letter offers additional support. These are factors which support a conclusion that the letter is tending towards the left side of the continuum although, as the *Saint Mary's* case demonstrates, they are not indispensable elements of a letter of expectation.

81 There are a number of factors which, in the current context, I would evaluate as being neutral in their application.

82 The letter itself is a formal document on the Employer's letter-head and not a less formal type of communication such as a memo or email. Letters of expectations are often formal in appearance and tone. It is the content of the letter here that matters, not its form.

83 The July 7 Letter is directed solely to Ms. Bouwman and not other employees. A communication of expectations made to an entire department will, I would expect, only rarely attract a claim that it is disciplinary. On the other hand, the fact that a letter of expectations is given to only the employee who is seen at a given point as needing it does not in itself characterize the letter as being disciplinary.

84 Finally, the sense I have from the cases is that the use of a warning of future consequences is not in and of itself a hallmark of a discipline letter. The significance in a given item of correspondence flowing between an employer and an employee of a description of consequences is entirely dependent on its context. Although I would not consider that attaching a warning to a letter of expectation will ever become a best practice in the non-disciplinary supervision of employees, I have treated it as a neutral consideration in this case.

85 Left at that, the Employer's letter would be characterized as being non-disciplinary and in keeping with its declared intentions.

86 However, there are a number of factors that, in their totality, give the resting point of the July 7 Letter a hard push towards the right side of the continuum.

87 First, the purpose of the July 7 Letter is, on its own terms, to cause Ms. Bouwman to make "necessary improvements in your work performance (see paragraph 29). This is a theme struck as well in paragraphs 4, 8, 14, 18 and 25. The fact that a letter of expectation is prepared with a view to helping an employee improve their work performance is not itself indicative of discipline. However, to the extent this becomes a predominant theme in a letter whose apparent purpose is to deliver expectations, it can raise doubts about the non-disciplinary character of the correspondence. This is particularly so when the work performance being complained of is culpable misconduct.

88 That is the case here. The July 7 Letter identifies two fundamental complaints. The first is with the grievor's repeated failure to be "pleasing"' or "pleasant" in terms of how customers have experienced or perceived her delivery of service to them on behalf of the Meadow Gardens Golf Course (see paragraph 13). A failure to comply with an employer's directions to treat customers in a civil or friendly manner can be culpable conduct, particularly where this goes to the heart of the employer's business. The second is the grievor's negativity towards the Employer, described in paragraph 21 as leading to a "poisoning of the work environment" and in paragraph 22 as demonstrating "open disrespect for, or defiance of the authority of management", particularly when done in front of others. Needless to say, these are assertions of serious culpable misconduct.

89 I agree with the emphasis in the *Hilton Villa* case that an assertion of culpable misconduct in the body of a letter of expectations is a significant indicator that the letter must be seen as disciplinary. In and of itself, the preoccupation of the July 7 Letter with Ms. Bouwman's culpable conduct would be telling. This is exacerbated in the July 7 Letter by the manner in which the Employer has presented its concerns. Its descriptions of the misconduct are couched in terms that clearly demonstrate anger and intense frustration. The letter presents an Employer -- to borrow a phrase from elsewhere -- which is "mad as hell, and ... not going to take this anymore!"

90 One example of this is found at paragraph 19 where the Employer has written:

> Sheryl, we, as management, for too long now, have had to address, "behind-the-scenes", and endure for far too long, too many complaints from too many Local 40 bargaining unit employees upset about the amount of "negativity" toward your Employer that you, by your comments and conduct, have introduced into our workplace."

91 Paragraph 21 expresses the Employer's frustration in similar terms:

> Sheryl, we will no longer tolerate your poisoning of the work environment at the Meadow Gardens Golf Course by an ongoing onslaught of "negative" comments about our Company made by you while you are at work on our premises, While we must respect your right to "freedom of speech", this does not give you "carte blanche" to say "whatever you want", "wherever you want" about your Employer, without consequence.

92 The use of the phrase "we will no longer tolerate", repeated in both paragraphs 21 and 22, suggest a sense of urgency on the Employer's part. Paragraph 23 establishes that the Employer has

the authority to correct the problem. Its authority is described in terms of its ability to bring discipline to bear on the situation:

> We have certain rights under the law and the Collective Agreement to apply discipline with respect to your conduct or commentary, whether this is done on or off the job. We are alerting you, not to threaten, but primarily for informational purposes, that, henceforward, we will exercise these rights, rigorously.

93 I need not parse the July 7 Letter any further as I am prepared to say that based on the analysis to this point alone the July 7 Letter clearly pushes across the mid-point of the line into the territory of discipline. It identifies culpable misconduct as a pressing problem which it will no longer tolerate and that it has the disciplinary powers to correct. The more supportive aspects of the Letter are overwhelmed by the emphatic stress of the Letter on the urgent correction of longstanding misconduct. It is not a saving point that the letter does not identify a specific incident of misconduct; it instead identifies an alleged continuing course of misconduct which has over time led the Employer to the breaking point.

94 It must be remembered here that this is not an inquiry into whether the Employer is justified in its concerns for its business and how it has expressed them. The sole concern here has been to determine whether the July 7 Letter is disciplinary or non-disciplinary. As I have said, in my view, it is clearly disciplinary.

95 Before closing on this issue, it may be useful to draw back for a moment to the Employer's concern that it had identified the July 7 Letter as non-disciplinary, had given a commitment it would be treated as such, and had in fact demonstrated that it had treated it as such in the August 4 disciplinary letter to Ms. Bouwman. In that respect, the Employer has done everything it could to provide assurances about its future use. It may be forgiven for wondering how a document can be anything but non-disciplinary in view of these circumstances.

96 Part of the answer to that is found in the earlier discussion regarding the continuing life of the document and its ability to prejudice the employee. Disciplinary or not, the July 7 Letter lives on in Ms. Bouwman's personnel file. At a minimum, there are two circumstances in which it could seriously prejudice her. Of course, disciplinary letters do prejudice employees but those same employees have presumably had the opportunity, if they chose to take it, to attack the foundations of the discipline through the grievance procedure. Here, Ms. Bouwman would have had no opportunity to challenge the assertions that are at the root of the July 7 Letter. Anyone coming upon the file and reading the letter (perhaps a new manager or human resources employee) would be tempted to conclude that, disciplinary or not, the letter described a serious "problem employee", someone to be watched out for. A second way in which prejudice could occur is if and when the July 7 Letter were to be presented to an arbitrator in order to demonstrate that certain expectations had been put to Ms. Bouwman. Could the unproven allegations of misconduct remain or would they be redacted? If they had to be redacted in order not to prejudice the employee, what does this say about the character of the letter in the first instance?

97 I have concluded that the July 7 Letter is disciplinary and that the Union has met its onus to establish same. This Award does not speak in any way to the merits of the allegations in the letter. However, if Ms. Bouwman is to be fixed with responsibility for misconduct, as the letter does, she must have an opportunity to challenge the letter in the normal way.

Does the July 7 Letter offend the Settlement Agreement in whole or in part because it covers the same or some of same alleged culpable conduct

98 Having concluded that the July 7 Letter is a disciplinary letter, I must turn now to a consideration of the implications.

99 For sake of clarity, my sole remaining jurisdiction under the Settlement Agreement is to determine whether the July 7 Letter offends it by disciplining Ms. Bouwman for a second time for the same offence. It does not extend to addressing any other subsequent discipline issued to Ms. Bouwman, including the August 4 discipline nor does it extend to any actions taken by the Employer of any kind subsequent to July 3, 2012 with the sole exception of the question noted above.

100 Turning to the task at hand, it seems clear to me after a number of reviews of the written submissions that the "evidentiary record" with respect to this issue is not complete. I will come back to that but first I will express some conclusions with respect to the applicable law and the refined issues that arise from it. I have reviewed the thorough submissions of the parties on the applicable law and have been guided by them. I do not intend to repeat those submissions other than as may be necessary to resolve a particular dispute.

101 First, I accept as a guiding principle of the law the decision of the arbitrator in *Kitchener (City) v. Kitchener Professional Firefighters Assn.* [2008] O.L.A.A. No. 15 (Luborsky), where the arbitrator said:

> 194: This rule against "double jeopardy" is at its root a notion of fairness that an employee ought not to suffer multiple penalties for the same offence: see *Canada (Attorney General) v. Babineau* [(2005) 143 L.A.C. (4th) 129 (F.C.T.D.)] at p. 136 referring to the lower grievance adjudication decision, *Re Treasury Board (Correctional Service of Canada) and Babineau* (2004), 133 L.A.C. (4th) 442 (M.G. Cummings) at p. 448. It also promotes the finality of workplace disputes by prohibiting higher levels of management from revoking the decision respecting discipline by a lower level of management and imposing a harsher penalty for the same offence: see *Re U.E.W. Loc. 520 and A.H. Tallman Bronze Co. Ltd* [(1957) 7 L.A.C. 253 (Laskin)] at pp. 255-256 and *Re Oxford Pendaflex Canada Ltd. and Printing Specialities & Paper Products Union, Loc.* 466 [(1976) 14 L.A.C. (2d) 104 (Schiff)] at pp. 107-108.

102 What this means is that if the July 7 Letter imposes any disciplinary measure on Ms. Bouwman for the same offence for which she was disciplined previously (the 10 day suspension, later reduced to 2 days in the Settlement Agreement), then this is a violation of the Settlement Agreement. It seems to me only common sense that where parties agree on a measure of discipline for a particular incident or incidents of misconduct, it is not open to the Employer to simply add to that discipline by imposing more. That would be a failure on the part of the Employer to implement the Settlement Agreement and rectifiable under the reserved jurisdiction clause. However, in case I am mistaken about that, this would also invoke the concept of double-jeopardy, as the parties have argued.

103 Under the double-jeopardy doctrine, there cannot be more than one penalty for the same offence. Although the cases often do speak about the prohibition against the Employer imposing a "more severe" penalty, I accept the argument of the Union that this is not a condition to the applica-

tion of the doctrine but rather a recognition that this is the usual fact pattern which leads to grievances.

104 What kind of comparison must be done?

105 The Union points to the proximity of the Settlement Agreement (July 3) and the date of the "new" discipline (July 7) and submits that "there was no subsequent event to which new discipline could attach unless it were to attach to the matters settled on July 3." Without deciding the matter, it seems to me that this would only be the case if the parties had, on July 3, agreed that their Settlement Agreement covered all alleged misconduct to that date. I have no evidence of what was said at that meeting. All I have at this point is the Settlement Agreement itself. The Settlement Agreement purports to settle a grievance against discipline issued on April 15, 2011 which was itself based on alleged misconduct which was said to have occurred on April 2. The Employer thus argues that the proper question is whether the July 7 Letter imposes discipline for any matter settled in respect of the events which occurred on April 2, 2011. By implication, no other events constituting alleged misconduct, whenever they may have occurred, would be covered by the Settlement Agreement

106 This is perhaps not so difficult to resolve from an evidentiary perspective but it is not the only concern. The unfortunate fact is that the allegations of misconduct in the letter are not dated, even in the most general way. As Employer counsel put it in his submissions, the July 7 Letter "clearly canvasses a much broader range of work performance issues in respect of Bouwman of concern to the Employer than what happened specifically on April 2, 2011 and over a much more extensive time period than this singular, isolated date."

107 This raises the question of whether this "extensive time period" pre-dated April 15, 2011, when the original discipline was imposed and, if so, what effect if any this has on the double-jeopardy rule.

108 Finally, there is the fact that the July 7 Letter addressed two types of alleged misconduct, one involving service of customers and another involving negativity and insubordination. I will be asking the parties to refine their submissions so as to provide me with their positions on whether the July 7 Letter is being said to cover both or only one of these two types of alleged offences.

109 Having said that, I wish to have a conference call with the parties to discuss the state of the evidentiary record on this issue and whether there may be a solution acceptable to both about how this matter ought to proceed from here. Could counsel please contact my assistant, Tina Norvell, to make the arrangements. I will reserve jurisdiction over this aspect of the referral under the Settlement Agreement.

110 It is so awarded.

DATED AT North Vancouver, British Columbia, this 10th day of December , 2012.

John L. McConchie

qp/e/qlspi