In the matter of an arbitration

B E T W E E N:

Canadian Nuclear Laboratories

"CNL"

("the Employer")

and

Chalk River Nuclear Security Officers' Association

"CRNSOA"

("the Union")

and in the matter of the grievance of Ian Fidler

Elaine Newman, Arbitrator

Hearings held at Pembroke November 25, 2019, and by video conference on April 14, 15, June 15, August 18, 26, September 1, November 26, December 10, 15 , 2020.

Appearances:

For the Union

Georgina Watts,	Counsel
Ashley Low,	Articling Student
Charlene Nero,	Union Representative
Ian Fidler,	Grievor

For the Employer

John Saunders,	Counsel
John Hosbons,	Human Resources Consultant
Jim Blackmore,	Manager, Physical Security Operations and Training Manager
Noelle Caloren,	Senior Legal Counsel, Employment and Labour
Dan Sullivan,	Manager, Ethics and Business Conduct Office

A w a r d

This award addresses the April 11, 2019 grievance against discipline, a suspension of 132 hours. This Board of Arbitration was appointed jointly by the parties pursuant to their collective agreement. There are no objections to the jurisdiction or timeliness.

The Union had filed an additional grievance alleging harassment and discrimination of the grievor during and following the investigation process, which grievance was withdrawn, without prejudice, in the course of this hearing.

Introduction

There is a group operating in the Ottawa Valley and in other regions of Canada that targets pedophiles. The group's role and purpose is to publicly expose suspected child predators. Their tactic is to have members go to online dating sites, pose as fictitious persons, and develop relationships. In the course of the online relationship, they tell the stranger that they are under age. They then lure the stranger into a meeting with the virtual child, for the ostensible purpose of a sexual encounter. At the meeting, they appear as their true selves and confront the stranger, accusing him of attempted pedophilia. They videotape this confrontation and often post it their web site in order to expose the alleged perpetrator. The members of the organisation turn over their texts and videotapes to police in an effort to assist with prosecution. (Throughout this award the group with be referred to as "the organisation.")

The grievor is not a member of the organisation. The evidence demonstrates that he is neither a directing mind of it, has no role to play in design or development of tactics, and has no editorial control over its posts or publications. On one occasion, on February 22, 2019, he helped a co-worker and friend, McEvoy, confront and videotape an alleged pedophile. That alleged pedophile (hereafter "Mr. X") turned out to be another co-worker.

The Employer did not discipline the grievor for participating in the confrontation of the alleged pedophile. It considered that activity to have been off duty conduct and beyond the scope of its authority. It disciplined the Grievor on three grounds:

First, the Company alleges that the grievor brought the videotape into the workplace and showed it to groups of co-workers on two occasions, disclosing personal information about Mr. X, for the purpose and with the effect of humiliating, demeaning and embarrassing him, contrary to Company anti-harassment policies.

Second, in a further act of harassment, the Company alleges that the grievor approached the Company's Investigator and Intelligence Analyst in bad faith, discussed the incident, and tried to get Mr. X fired.

Third, the Company further alleges that the grievor was dishonest in the investigation into these matters.

The Union takes the position that there was no misconduct and no dishonesty. The grievor participated in the confrontation with Mr. X on the night of February 22, 2019. He admits to showing parts of the videotape, briefly, to a small group of co-workers on Monday February 25, and does not dispute evidence that he also showed it to a small group on Tuesday February 26, 2019. He did this to warn his friends and colleagues, many of whom have children, that there was a pedophile operating in their community. The grievor had never been told, and had never been warned, that doing so would be considered misconduct.

Previous Company responses to similar incidents, in which confrontation videos had been posted online, were not met with discipline.

The grievor approached the Company's Security and Intelligence Analyst with the story because he felt under an obligation to report.

The grievor denies dishonesty during the investigation.

In the alternative, if misconduct is found, the Union seeks substitution of the extreme penalty of 132 hours, which amounted to suspension for almost a full month's work.

The Facts

The grievor is an employee of Canadian Nuclear Laboratories, a workplace with significant security requirements. The grievor works in an environment that demands strict adherence to security and company policy. He is a nuclear response officer, a member of the employer's elite security department. This is a highly skilled armed security force whose members carry automatic weapons in the course of their duties and are responsible for the round-the-clock security of the entire facility. This is a workplace in which strict attention to duty is imperative. Disruptions and distractions must be avoided.

It is not disputed that on the evening of Friday February 22, 2019, the grievor accompanied his friend and co-worker, Dave McEvoy, to confront Mr. X at a local fast food restaurant. The videotape of that encounter is in evidence. It establishes to my satisfaction, based on the balance of probabilities (and it is not in dispute), that Mr. X attended the restaurant thinking that he would meet with a 13 year old boy, with whom he thought he had been communicating online. It leaves little doubt that Mr. X believed he was attending for the purpose of engaging in a sexual act with that child.

The grievor testified that he attended as a witness, and as "backup in case things went wrong." He was not armed. The grievor did not speak directly to Mr. X and did not videotape the confrontation. He watched McEvoy confront Mr. X. He watched McEvoy tape the confrontation. The grievor describes his own reaction as disgust. He said the whole thing had been shocking for him.

There is no dispute that the grievor was disturbed by the confrontation. There is no dispute that he felt strongly about the need to expose the alleged pedophile. The grievor is a father of young children and fears the threat of pedophilia in his community.

CNL is situated within a small community. Word travels fast. As early as Sunday February 24, there was rumour that Mr. X had been confronted and alleged to be a pedophile.

His name was known. The rumour may have started because at least one other CNL employee had been eating his dinner at the restaurant where the confrontation took place.

The Employer immediately began discussions about how to address the disruption and potential conflict such a situation could cause in the workplace. It had some experience in this field—there had been two similar episodes in the summer and fall of 2018 in which McEvoy had confronted two other CNL employees with similar allegations.

The grievor next attended work on the morning of Monday February 25, 2019. Early that morning, he spoke with Dan Sullivan, Manager of the Ethics & Business Conduct Office. Neither the grievor nor Sullivan recall whether their conversation had been in person, perhaps while passing each other, or by email. They agree that the grievor informed Sullivan of the confrontation with Mr. X. They agreed to meet to discuss the matter the next day, Tuesday, in the afternoon. There is no dispute that a scheduling conflict for the grievor caused them to postpone this meeting until Thursday, February 28.

Sullivan said nothing more about the matter and provided the grievor with no instructions or warnings about the confrontation or the videotape.

The grievor had a link on his phone to the McEvoy's video. The grievor testified that he did not show that video to anyone over the weekend. He did not post it online. There is no evidence that he disclosed it to anyone, in any form, before Monday.

The First Misconduct Allegation

It is not disputed that on Monday February 25, 2019, the grievor, who has expertise in firearm's theory, was assisting with training in that subject. In the few minutes before the training began, the grievor told the class about the confrontation with Mr. X and showed parts of the video. He testified that he can not recall what he might have said about Mr. X.

The evidence of Matthew Foote, who is a trainer at CNL, was clear, concise, and appeared to have been provided in a straightforward manner. His evidence is accepted as

accurate and reliable. Mr. Foote testified that before the training began, the grievor showed the video. He had it on his cell phone, showed a part of the confrontation with Mr. X, and played the audio of the confrontation. Foote could not hear the audio. Foote understood that Mr. X had been trying to solicit sex with a minor.

Foote said there were six or eight people in the room at the time, all members of the guard force. He could not say that everyone was watching the video, but some were. Foote learned that Mr. X was also a CNL employee. He thinks the grievor provided that information to the group.

Foote testified that he could see Mr. X's face on the video, and that having reviewed the video prior to hearing, believes that he could identify him. That recent review also revealed Mr. X's licence plate—something Foote did not remember seeing initially.

Foote described the grievor as passionate about the incident. Foote's impression was that the grievor brought a "sense of pride" to the showing and telling of it – "like he felt he did a service, perhaps."

The grievor testified that he does not recall showing the video to a second group of co-workers the next day, Tuesday February 26. He will not, however, challenge the word of Cameron Duff, who testified as follows:

Duff is a trainer in the Security Branch Emergency Protective Service. He presented his evidence in a matter-of-fact manner, with no obvious interest or opinion regarding these events. Duff was able to provide a detailed recital of his evidence that enhanced its reliability. His evidence is accepted as credible.

On the Tuesday, Duff was overseeing "slip simulator" training. There were approximately 8 people in the class, plus the facilitator. During a break in the training, Duff observed the grievor take out his phone and say "another CNL offender" had been caught. He said something like, "We got another one."

Duff described the grievor playing the video on his phone, fanning it out for all to see. Duff heard McEvoy on the tape confronting Mr. X, saying that he had come here to meet a 13 year old boy, and telling Mr. X that he had all of the texts between him and the person he thought was the child. Duff heard McEvoy use Mr. X's first name, thus revealing that much of his identity to the room. Throughout the playing of the video, the grievor narrated the events, and explained how the organisation went about its business of exposing suspected pedophiles.

Duff testified that the grievor provided disturbing details. He reported that Mr. X had instructed the supposed 13 year old, in his texts, on how to physically prepare his body for the sexual encounter—how to shave and clean himself.

Duff testified that the people in the room reacted to the disclosure with disgust. They were "grim" about it. One of them reacted by saying, about Mr. X, "what a piece of shit."

Duff testified that "he had known that the grievor had been involved with the organisation," but on cross examination admitted that he had no first hand knowledge of that fact. He made that assumption because the grievor had the videotape.

Duff testified that the grievor disclosed personal information about Mr. X—his identity, his relationship to CNL, and said that the man was married, had children, and described his position with the Employer. He said that the grievor seemed "more than happy" to show the video and to describe the confrontation. He seemed to have been "invested" in the process.

Duff testified that based on his viewing of the video at that time, he would recognize Mr. X at present. Duff estimated the total time of the exposure of the video to the group at about two minutes, but on cross examination agreed that it might have been as short as "a little bit at the beginning, and another ten to fifteen seconds at the end." The entire display, he said, was no more than one to two minutes.

Duff described the videotape as showing Mr. X very quiet during the confrontation, perhaps shocked or stunned. Mr. X asked what was going to happen to him next.

Duff, uncomfortable with what he had seen in the training room, reported the incident to his supervisor. The incident of the grievor displaying the video had occurred on company time, he said, and he knew that news of the confrontation with Mr. X was getting around and wanted to ensure that he was reporting the event appropriately. He had heard of the grievor's discussion of it at training on the previous day. Duff expressed a concern that the organisation that the grievor had become associated with was "putting these people (suspected pedophiles) out there to the wolves."

These assertions form the first ground of the Company's position that the grievor was guilty of misconduct. By showing the videotape in the two training sessions, and by disclosing personal information including the identity and position of his co-worker, Mr. X, and accusing him of attempted pedophilia, the grievor is said to have run afoul of CNL's harassment and violence prevention policies. His stated motive—to warn his friends and co-workers that a pedophile was operating in the community, is no defence to the undisputed fact that the grievor disclosed this information, knowing that such disclosure would be unwelcome, in order to embarrass, demean and humiliate Mr. X. The Employer adds that his behaviour put Mr. X in danger, as he aroused the anger of co-workers and incited their disdain of his conduct.

The Second Misconduct Allegation

On February 28, 2019, the grievor reported the confrontation with Mr. X to Steve Nordin, CNL's Investigator and Intelligence Analyst. The Employer asserts that the grievor's harassment of Mr. X continued, as he again brought the matter into the workplace and made this report in bad faith in an effort to get Mr. X fired.

The grievor does not dispute that he went to Nordin's office on that date. He testified that he went there to report that "we had caught another CNL employee in a pedophile sting."

Nordin testified. He impressed this Board as a man who takes his job seriously, and who does things by the book. As he reported during the investigation process, his impression was that the grievor's goal was to get Mr. X fired.

Nordin explained that CNL is a secure facility, and anyone working there is required to have a certain level of security clearance. If one's security clearance is denied, revoked or suspended, they could no longer work for CNL

Nordin testified that the grievor came to him on February 28 to report that he and McEvoy had been involved with another employee "off-site and not on CNL property" and that they had "been engaged with a third CNL employee who was trying to engage a minor over the internet." Nordin formed the impression that the fictional child victim was female. The grievor, he said, wanted him to open up a security investigation into Mr. X.

Nordin testified that the grievor did not report that any of the alleged activities of Mr. X took place on Company property, as the grievor testified at hearing. (This point is disputed).

Nordin testified that he told the grievor that no one had been charged or convicted, but that if the grievor brought him some evidence, such as the texts or videotape, he would take a look at them. However, he thought that ultimately, this sounded like a police matter.

Nordin also testified that he advised the grievor that "bringing this type of activity into the workplace may not be within his best interests," and that it could be perceived as "a bullying or harassment type of scenario." The grievor, he testified, retorted by saying that if this "came back on him, he would have to go to the media and say that CNL is protecting a pedophile," and that he would threaten CNL's reputation. Nordin said he hoped that things would not go down that path.

Nordin then, as required, reported the conversation to his direct manager. He also repeated this version of events in the subsequent investigation.

Nordin was asked, in cross examination, if it was the Company's expectation that an employee, aware of the illegal conduct on the part of another employee, would report that illegal conduct. Nordin said, "If the activity related directly to CNL, it would be that employee's responsibility to report it to us. We have a Code of Conduct that requires employees to report anything that is related to CNL."

The Third Allegation of Misconduct

Dan Sullivan is the Company's Manager, Ethics and Business Conduct Office. He is the Company's key witness in this matter. He not only conducted the investigation into the grievor's conduct but represented the Company's perspective on the issues raised. His evidence, taken over the course of several days, forms the third ground upon which the Company's conclusion of misconduct is based: the grievor's alleged dishonesty in the course of the investigation.

Sullivan explained that the Company had some difficult prior experience with the anti-pedophilia organisation. In the summer of 2018 and again in the fall, there were two incidents in which CNL employees were identified as alleged pedophiles.

When the incidents took place, Sullivan had talked to McEvoy and explained that he supported the agenda to protect children in the community. He said that his activity with the organisation was off-duty conduct and was not to be brought into the workplace. The sensational video of the incident in the summer of 2018 had been widely distributed in the community and was well known among employees. Although the video was password protected, everyone, it seemed, had the password. It had more than 500,000 "hits" online.

The incident caused considerable disruption in the workplace. At least one employee came to Sullivan and questioned why the alleged perpetrator was still working at CNL. That person confessed that he did not think he could control himself if he saw the alleged perpetrator and felt that he might punch him. Sullivan warned him against committing workplace violence.

In the fall of 2018 there had been a second, less sensational incident that again, involved a CNL employee. Because the posting of the video had been delayed in that case, Sullivan said the matter was somewhat less disruptive. Again Sullivan spoke to McEvoy and stressed his primary message: "I support what you are doing, but this is off duty conduct and you must keep this out of the workplace."

Because the two incidents in 2018 were disruptive to the Company's business, senior management invested considerable discussion time in considering how to prevent future issues. Their concerns included the fact that such incidents caused disruption, distraction and upheaval in the workplace. The matter presents a considerable public relations challenge—one does not want to be seen as sympathizing with pedophiles, but at the same time, the Company cannot support the public online shaming of its employees. These incidents can lead to workplace violence and could expose the Company to legal liability. He feared that the incidents would expose the Company to claims of defamation, and even charges of child pornography if the video was circulated in the workplace. The Company has no authority over off-duty conduct, but there was frustration around the extent to which the consequence of this off-duty conduct was affecting the workplace.

Sullivan himself was reprimanded by Senior Management, who had been blindsided on the issue and feared corporate embarrassment. Sullivan was under some pressure to control the potential disruption this time around.

Sullivan explained that a lot of his work in administering CNL's *Code of Conduct* involved coaching and providing guidance to employees. This is what he did with McEvoy in the two previous cases. He told him to "keep this out of the workplace."

Sullivan's introduction to the instant event came on Sunday February 24, 2019, when he got an email from his boss, Doug McIntyre, saying that McIntyre had heard that "another creep was caught, this time from ERM." Sullivan replied first thing Monday morning. He named Mr. X, and then said:

Apparently it's all over the site now, as the confrontation occurred in a restaurant with a bunch of people from work there. [McEvoy] is waiting to put the video up online until he gave us a heads up and made sure we were ok with it. He's waiting to do the right thing by his employer, which is good.

Anyway, from the sounds of it, this one has gotten out without [McEvoy] even posting the video, just based on the confrontation in the restaurant.

The grievor reached out to Sullivan first thing Monday morning and asked to see him. The two agreed to sit down and talk the next day. The grievor had to postpone that meeting until Thursday February 28, due to scheduling conflicts. Sullivan gave the grievor no instructions regarding the incident and gave him no warning about keeping the information or the video out of the workplace.

On February 28, 2019, Sullivan met with the grievor and McEvoy. The meeting did not go well. The priorities of the grievor and the Company came into sharp contrast as the conversation unfolded. Sullivan said that this activity was disruptive to the workplace and the activity would not be appreciated by senior management. The grievor was dejected by this reaction, disappointed that the Company did not consider it appropriate to investigate the conduct of Mr. X. The grievor commented that "it was just all about the bottom line here," upset that the employer seemed to prioritize business over child protection.

The meeting ended without further agenda. Sullivan emphasized that the incident should be kept out of the workplace. The video, which was in McEvoy's control, was never posted online. Sullivan did not ask if the video had been shown in the workplace, and the grievor did not volunteer that he had shown it twice earlier that week.

At this point there was no concern that Fidler had been guilty of misconduct. There was no investigation, because there was no workplace issue to be investigated. That changed the next day, when Sullivan heard from Noelle Calloren, Senior Legal Counsel, that Caley Greiner, Director Facility Decommissioning, reported that the video was "on everyone's phones" and was "all over the site."

On the understanding that the video was widely circulated in the workplace (an understanding that turned out to be false), Sullivan began an investigation. He wanted to know who had the video, how many people had copies, how many people in the workplace had shown or seen the video, and what the extent of the exposure and disruption were. In the Company's view this was no longer just off-duty conduct—it was now a workplace issue. Even though there was no complaint by anyone, investigation of the matter fell into Sullivan's jurisdiction because of the potential concern for violations of the *Code of Conduct*.

Sullivan was on vacation from March 4 to March 7, returning one day early to attend to the matter. On March 8, 2019 he spoke with Todd Romain, a supervisor in security, to begin his plan of speaking with employees in the Security Division. He was told to talk to Cameron Duff. He met with Duff and Foote, learning of their witness to the grievor's video showings on February 25 and 26. Sullivan concluded that the grievor had thereby "imported the video into the workplace."

Sullivan did not immediately question the grievor. Sullivan concluded that Fidler was not being forthcoming about the circulation of the video. It was at this point in the narrative that the formerly good relationship between Sullivan and the grievor started to break down.

Sullivan proceeded to interview about a dozen people, all of whom reported that they had heard that a video was circulating. None of them had actually seen it. He then went to talk to the security team on C shift who, he understood, had been at the training sessions with the grievor. He talked to two employees, Quilty and Jefferson, but neither, he concluded, were cooperative with that inquiry.

The Union took issue with this interview, which formed part of the basis of the harassment grievance which was withdrawn during the course of this hearing. It challenged Sullivan's decision to speak to these two men together, instead of separately, and it challenged his decision to question them in a common area, rather than in the privacy of his office.

Sullivan asked Jefferson and Quilty if they had seen the grievor display the video on Monday February 25. He did not ask them if they saw the video on Tuesday February 26. This becomes an important point pertaining to the grievor's cooperation with the investigation.

Sullivan decided that it was time to speak directly to the grievor. The grievor had learned of the investigation and learned that Sullivan was asking questions about him. The grievor found this very concerning and stressful. He did not perceive that he had done anything wrong. Because he had been an aggressive Union President and had achieved considerable gains for his members, the grievor was concerned about being harassed.

Sullivan sent the grievor an email on March 15, 2019, setting out the concerns he had about the grievor having brought the video into the workplace. He warned him that by showing the video in the workplace, a concern arises that he may have demeaned, harassed, humiliated and embarrassed a co-worker. His behaviour might have fallen into the arena of harassment and might have violated the *Code of Conduct* and *Harassment Prevention and Options for Resolution* policy. Sullivan sent the email in the interests of disclosure, wanting to avoid any sense that the grievor would be "ambushed" in an interview.

The grievor responded by email, accusing Sullivan of harassing him by pressing co-workers for information, and doing so in a public area. He accused Sullivan of violating his privacy, and of instituting a "witch-hunt" against him, and undermining his position as Union President.

Sullivan responded, offering apologies if the investigation caused the grievor stress, and providing detail about the questions he needed to ask. A meeting was conducted on March 28, 2019, between Sullivan, the grievor, and Union Representative, Charlene Nero. By this point in time, the Union had filed its harassment grievance, citing Sullivan and criticizing his methods of investigation. The Union began the meeting by demanding that Sullivan recuse himself from the investigation into alleged wrongdoing of the grievor. That demand that was refused. The interview proceeded.

Sullivan asked the grievor if he showed the video. The grievor said he showed it on the Monday February 25, at training.

Sullivan asked the grievor if he made any comments or provided commentary on the video. The grievor said he didn't remember.

Sullivan asked the grievor if he recalled what others in the room said. The grievor said, "Nobody knows who the person is. I don't know what I said or anything to the effect…"

Sullivan asked if there were other times when the grievor showed the video in the workplace. The grievor said "I don't recall any other time I showed the video." Sullivan prompted him by asking, "anti-slip training?" According to Sullivan's note of the meeting, the grievor answered and said, "I don't recall it." Sullivan does not believe that, and says the grievor was lying. Sullivan had only asked Quilty and Jefferson about the Monday showing, not the Tuesday. Sullivan assumed that the grievor thought he, Sullivan, only had knowledge of the one showing on Monday.

The grievor explained that this video was never posted online, as a courtesy to the employer.

Sullivan explained that his concern was about workplace comments made regarding Mr. X. The grievor said, "I can tell you there were other people there when the incident took place. Before I'd ever seen or spoken to anyone, it was already out there. Nobody even had a clue who he is."

Sullivan asked the grievor if he specifically remembered telling people that Mr. X was a CNL employee. The grievor said "Yup. But I don't know his name. I know his child-luring name." Sullivan says the grievor was not telling the truth. McEvoy used Mr. X's name in the video, and the grievor knew who he was.

In the interview, the grievor confirmed that he had not sent the video to any other CNL employee. He confirmed that he had gone to see Nordin and asked about Mr. X's security clearance. He confirmed that he felt that this employee had compromised his security

clearance, and that he, the grievor, felt rebuffed by Nordin right away. The bigger deal here was workplace bullying. Sullivan remained convinced that the grievor was trying to get Mr. X fired and using CNL in bad faith to try to further the goals of the anti-pedophilia organisation, which he considered to be a vigilante group.

Sullivan explained that CNL did not investigate the conduct of Mr. X. The methods of the vigilante group are highly problematic from a legal perspective, and it exposes people to considerable legal risk. The vigilante group operates a public shaming spectacle, potentially jeopardizing police work on the case, and if CNL acted in support of them, they could be sued. To involve CNL in these matters would be to potentially put it at risk. Sullivan said, "I am wholeheartedly against what these people are doing (pedophiles engaging children), but these are police matters. Our *Code of Conduct* is inapplicable here." CNL does not investigate vigilante activity. It does not investigate that which does not occur at the workplace."

The Union challenged Sullivan on a number of points, as will be seen from a review of its position. But one point in particular requires attention. The grievor testified that included in the text exchanges between McEvoy and Mr. X is information that reveals that Mr. X was trying to solicit sex with a minor while he, Mr. X, was on Company property. This would bring the matter into the workplace and within Sullivan's purview.

That evidence, hearsay by nature, is not relied upon in this award as the foundation for any finding of fact. Sullivan testified that the first time he heard about such an allegation was at hearing. That aspect of the allegation does not appear in any of the contemporaneous documentation, emails, notes or investigation evidence. It does not appear in the grievor's email to Sullivan on March 17. There is no evidentiary basis upon which this Board can determine that any part of Mr. X's alleged behaviour took place on Company property or on Company time.

Sullivan discussed CNL's *Code of Conduct* and explained why he felt that the grievor had breached it. The *Code of Conduct*, he admits, requires employees to report illegal activities of CNL employees, and as will be seen, protects those who report from reprisal. But, he says, this protection only applies to those who report in good faith, and the grievor

did not. The grievor, he said, helped create the trap that was set for Mr. X, then used the information from the confrontation to accuse him. He then tried to get Mr. X fired, based on facts that he helped create. He was trying to further the goals of the vigilante group. This was bad faith, and he is not protected by the *Code of Conduct*. He also explained that in the Company's view, the grievor "brought the matter into the workplace" by discussing it with Steve Nordin. That was not as serious as showing the video but was a separate and important act of misconduct.

It became clear in the evidence that a high degree of animosity developed between Sullivan and the grievor in the course of these events. It was certainly evident by March 17, 2019, when the grievor emailed Sullivan accusing him of a witch hunt. It was enhanced when the Union filed a harassment grievance against Sullivan, and it was aggravated when the grievor, five months later, entered a post on an online website that Sullivan took as a personal threat against him. Throughout the giving of evidence, that animosity was evident in the testimony of both Sullivan and the grievor.

Sullivan's investigation report of April 4, 2019 was presented to management and relied upon as the basis for the Company's decision that the grievor had committed acts of bullying and harassment, in violation of the *Harassment Prevention and Options for Resolution* policy and the *Code of Conduct*. He agrees that his views of the activities of the vigilante group coloured his interpretation of the application of the Code to these events. There is no question that he strongly defends the Company's decision to refuse to investigate incidents brought to its attention through vigilante tactics, and that he strongly defends the Company's decision to discipline the grievor, not for his off-duty conduct, but for bringing the matter into the workplace and then being dishonest about doing so.

Sullivan reported that the *Code of Conduct* was revised in February 2019, after the two earlier incidents of alleged pedophilia, but before the instant facts arose. The *Code of Conduct* was not revised so as to specifically refer to these incidents. Sullivan felt that the Code, the Company's over-arching document, contained general language that was sufficient to cover the circumstances.

The Imposition of Discipline

Will Graydon is CNL's Director of Emergency and Protective Services. He is generally responsible for the protection of special nuclear material, ensuring a safe and secure environment on site. Graydon consulted with Human Resources and determined that the 132 hour penalty for the grievor was, in the circumstances, proportionate and appropriate to the severity of the offence. It was the longest period of suspension imposed at CNL in anyone's memory.

The discipline was intended to provide both specific deterrence to the grievor, and general deterrence in the workplace. Graydon, a fair and credible witness, agreed that discipline is a confidential matter, but he is confident that notwithstanding that confidentiality, the rumour mill is sufficient to accomplish general deterrence. He testified that the grievor's position as Union President did not figure into his decision.

What figured prominently in Graydon's judgement was the severity of the misconduct and its potential for workplace violence, the grievor's bad faith in setting the stage for the confrontation and then relying on that as the basis of his report to Nordin, and his "deliberate intent" to harass Mr. X.

Graydon testified that the grievor's reported lack of cooperation in the investigation did not figure prominently in determining the level of discipline.

Graydon spoke to a previous case in which a CNL employee had been disciplined for harassment. The case was one in which an officer had said to another employee, "You stink" in front of a group of co-workers, and caused him to remain outside while others filed into a training space. The Union pointed out that in that case, in which there was harassment causing humiliation, the offender received the lowest possible form of discipline: a letter of caution.

Graydon said the two cases had nothing in common, and that this was a much more serious incident of deliberate misconduct and bad faith on the grievor's part. Graydon admits that no violence was caused in this case, and Mr. X did not file a complaint of harassment. He himself never interviewed Mr. X, and is aware that no one in the Company did so. Graydon did not, himself, watch the video of the confrontation. He did not interview the grievor and apparently based his conclusion about the grievor's "bad faith" and "intentional misconduct" on the Sullivan investigation report.

Graydon was asked a number of hypothetical cases, both in cross and reply examinations. He impressed the Board as a most candid witness—completely committed to defending the Company's approach in this case, while recognizing that there may be a lack of clarity in the *Code of Conduct*, when its language is applied to certain circumstances. He agreed that a CNL employee who suspects another of wrongdoing should report that suspicion but said that what troubled him in this matter was that the report was not made immediately. He agreed that if a CNL employee failed to report a security risk, the employee could be subject to discipline.

Graydon said that the bad faith element was not a key factor in the decision to invoke such a heavy penalty.

He also testified that he had not known that the grievor reported the incident to Sullivan first thing Monday morning. If his motivation had been in good faith, he would have approved of that report.

In reply evidence, Graydon clarified that he would not have approved of the grievor's reporting to Nordin if he had also shown the video to a group of coworkers. The grievor's motivation matters. His report to Nordin occurred later in the week, and does not evidence good faith.

In sum, Graydon believes that the grievor had a duty to report under the *Code of Conduct*. He had a duty to report even if he had been involved in the set up. But if there was

a genuine security concern, this should have been reported immediately. The video ought never to have been shown in the workplace.

On the broader question of whether the grievor was or was not under a duty to report the incident to Nordin, Graydon candidly noted that there was nothing in the *Code of Conduct* that specifically addressed this situation and that he really didn't know how to answer the question. Graydon leaves the impression of one who cares deeply about the security of this workplace and who is committed to its protection. He does not strive to overstate his view of the facts. He spoke evenly and in a fair-minded manner about the complex issues raised in the case.

The Grievor's Evidence

The grievor testified that his goal in showing the video to the two groups of coworkers was to warn them that there was a pedophile operating in the community. He explained that his group of coworkers are very close, like family, that they have no secrets. His purpose was to help them protect their children.

The grievor testified that he did not remember what personal information about Mr. X he disclosed when he showed the video.

The grievor testified that he was acting in good faith throughout. He knew that McEvoy had been involved in two similar episodes, that the videos in those cases were widely seen, that it was the talk of the community and the workplace, but that McEvoy never got into trouble at work for his activity. That is why the grievor felt confident in approaching Sullivan first thing Monday morning—he felt he should report the confrontation. He was not expecting to be criticized for his actions. He was surprised and disappointed when that occurred.

The grievor testified that he went to Steve Nordin, in good faith, to report what he took as illegal conduct on the part of his co-worker, Mr. X. He felt that he was under an

obligation, dictated by the *Code of Conduct*, to report that fact. He denies trying to get Mr. X fired. He felt his was doing his duty and protecting the Company from someone who might have been vulnerable to blackmail. The grievor testified that he was not trying to have anyone fired. His own security training had emphasized that the greatest threat to security of this workplace was the "insider threat:" the compromised employee who could be persuaded to provide information to potential adversaries.

The grievor denies making any threat about going to the press. What he said was, "Imagine if the press learned that CNL went after employees that reported a pedophile, rather than going after the pedophile himself. Imagine if that was on the news…"

The grievor said that on the day of his interview with Sullivan, in the investigation, he was very upset, feeling targeted, and was nervous. He had never been in trouble at work before. He did not remember some of the details about the prior events. He did not remember showing the video the second time but would not dispute Duff's word. He did not recall what he said about Mr. X. He said that he didn't know Mr. X's real name – he only knew his "child-luring name," and no one knew who Mr. X was.

The grievor was disappointed with the Sullivan, Nordin, and the Company's reaction to the incident. He continued to believe that the Company should not have criticized him, but should have investigated Mr. X. However, the grievor adds (for the first time at hearing) that had he known that showing the video at work would have been a problem, he never would have done it. Had he known the Company's view that this was considered harassment, he would have done things differently, and perhaps may not even have gone out with McEvoy on the confrontation.

The grievor has not apologized for his behaviour to Sullivan, Nordin, or to anyone. The relationship between him and Sullivan soured, his own harassment grievance was pursued, and the incidents have remained the subject of this grievance process for the past two years.

The Policies

The Company's *Harassment Prevention and Options for Resolution* policy, approved January 30, 2018 is relied upon, in its entirety, by the Company. The policy is clear in purpose, scope, requirements, definition, rights and responsibilities. It clearly defines the prohibited conduct of bullying and harassment, and defines the latter as follows:

> Harassment is any behaviour that demeans, offends, humiliates, embarrasses, threatens or intimidates a person, and that a reasonable person would know or ought to know would be unwelcome. Harassment can be physical or verbal, and includes actions (e.g. touching, pushing), verbal or written comments (e.g. jokes, name-calling), or displays (e.g. posters, cartoons). It may take the form of a single incident or continue over time. It includes harassment within the scope of the Canadian Human Rights Act (CHRC).

Without reprinting the entire policy in the body of this award, the following key sections warrant note:

> **1. Scope and Applicability**
>
> CNL is committed to the fostering and maintenance of a harassment-free workplace where all individuals are treated with dignity and respect. This Management Control Procedure (MCP), which addresses workplace harassment, is applicable to all individuals who work for, or on behalf of CNL, including employees, contractors, agents, seconded personnel, members of the Board of Directors, and representatives in both domestic and international operations. It applies on site, as well as at venues where CNL business is conducted.
>
> This MCP also applies to all behaviour that is in some way connected to work, including behaviour engaged in during off-site meetings and training sessions, at conferences where attendance is sponsored by the Company, on business trips, and at CNL-sponsored events, including social events.
>
> Details on the applicable standards of behaviour and procedures for addressing workplace harassment are found in the following sections of this document, including relevant definitions, roles and responsibilities and the options for redress available to individuals who have been subjected to harassment.
>
> **2. Purpose**
>
> The intent of the *Harassment Prevention and Options for Resolution* Management Control Procedure is to:
>
> (a) ensure, promote and maintain a safe and respectful work environment, free from all forms of harassment;
> (b) prevent harassment through education and training;
> (c) encourage those present in the workplace to report their concerns about experienced or observed harassment; and

(d) provide appropriate redress options to those who have been subjected to workplace harassment. In this regard, CNL is committed to treating all harassment complaints seriously and processing them to ensure their quick, confidential, and fair resolution. Employees who are found to have harassed another individual are subject to appropriate disciplinary action, as are supervisors and managers who do not act properly to prevent or end harassment, and those who retaliate against an individual for filing a harassment complaint.

This document is also intended to ensure that the Company is compliant with its obligations under the *Canadian Human Rights Act* and the *Canada Labour Code*.

3. Requirements

Harassment is not tolerated at CNL from any person in the workplace, for any reason, at any time…

This MCP outlines the standards of behaviour and expectations that ensure that CNL's commitment to the establishment of a harassment-free workplace, and legal obligations regarding harassment are met. It describes the right to be free from harassment and explains what to do if harassed, or upon becoming aware of a harassment situation.

Responsibility for compliance with this document rests with every CNL director, officer, manager, supervisor and employee, as with all those non-employees of CNL subject to this MCP.

CNL, as a corporate entity, has full responsibility for ensuring its work environment is free from harassment, through the implementation of adequate prevention, protection and redress mechanisms.

All managers and supervisors have a responsibility to prevent harassment and maintain a harassment-free work environment. They are expected to act immediately on observations or allegations of harassment and to address potential problems before they become serious.

All individuals subject to this MCP are expected to uphold and abide by its terms by refraining from engaging in any form of harassment, striving to eliminate harassment in the workplace, and by cooperating fully in any investigation of a harassment complaint.

Individuals who are found to have harassed another individual are subject to appropriate disciplinary or corrective action, as are supervisors and managers who do not act properly to prevent or end harassment, and those who retaliate against an individual for filing a harassment complaint.

In accordance with the principles of confidentiality and the desire to fairly resolve any harassment complaint made under this MCP, CNL respects confidentiality and limits the use and disclosure of information to the extent possible. CNL does not disclose the names of the parties involved in a harassment situation or the circumstances related to a harassment complaint, except when disclosure is necessary for the purposes of adequately and thoroughly investigating the complaint, taking disciplinary or corrective action, or if required by law.

It is also expected that all parties to a harassment complaint will respect the privacy and confidentiality of all other parties involved and limit the discussion of a harassment complaint to those who need to know the information.

4. Definitions and Acronyms

This document relies primarily on word meaning as found in common dictionaries. The current Glossary of Controlled Terms and Acronyms contains specific meanings for those words that require further clarification.

4.1 Definitions

Bullying	A form of harassment in the workplace, which may be verbal or physical but can also be aggression expressed psychologically and emotionally.
Harassment	Harassment is any behaviour that demeans, offends, humiliates, embarrasses, threatens or intimidates a person, and that a reasonable person would know or ought to know would be unwelcome. Harassment can be physical or verbal, and includes actions (e.g. touching, pushing), verbal or written comments (e.g. jokes, name-calling), or displays (e.g. posters, cartoons). It may take the form of a single incident or continue over time. It includes harassment within the scope of the Canadian Human Rights Act.

The policy includes examples of behaviour that generally constitutes harassment both in general and specific terms and provides a reliable foundation for the teaching and enforcement of the rules required to prevent harassment in the workplace. Although none include factual examples that mirror the complex facts of the instant case, the policy document itself clearly defines and prohibits harassment.

There can be no doubt that at the time of these events, the anti-harassment and anti-violence policies of any workplace form basic, foundation documents. They define the organisation itself. They reflect the law of the Province of Ontario.

I am satisfied that the grievor, as all employees, was appropriately trained in respect of this policy. I am satisfied that he knew or ought to have known its content.

The Company's Standard *Code of Conduct*, revised and approved February 2, 2018, is also relied upon by the Company. The policy addresses all appropriate aspects of a comprehensive and vibrant code for ensuring a high standard of ethical business conduct and absolute integrity in the workplace.

The *Code of Conduct* is a comprehensive document, obviously the product of careful and considered effort by the Company to highlight its high standard of behaviour among

employees. In article 6.1.3 it highlights integrity, and of relevance to this matter, requires that employees "avoid gossip and honour those not present."

In article 6.1.4. it highlights respect, and requires that employees, "behave with courtesy toward one another."

In article 6.2, it addresses personal conduct, and highlights the fact that personal actions, external employment or other relationships may result in perceptions that could be damaging to the employer. It says, "if in doubt, please consult your Supervisor or make a disclosure. "

In article 6.2.3. it states:

6.2.3 Discrimination, Harassment and Violence in the Workplace

CNL is committed to providing a workplace where all individuals are treated with respect and dignity and where business is conducted with fairness and equity. We seek to create a work environment that helps all workers to reach their potential and that is supportive of individual differences.

It is a violation of this Code if any CNL worker:

- Discriminates against anyone on the grounds of race, national or ethnic origin, colour, religion, age, gender, gender orientation, sexual orientation, marital status, family status, disability, or a conviction for which a pardon has been granted or a record suspended; or
- Engages in unwelcome or inappropriate behaviour that demeans, humiliates, or embarrasses another person; or
- Engages in workplace violence of any kind, including threatening violence or using intimidation or coercion.

For more information, please read *Harassment Prevention and Options for Resolution* and *Preventing Violence in the Workplace*.

Article 6.2.6 states:

6.2.6 Relationships in the workplace

CNL is committed to a work environment that is built on mutual respect, professionalism, and fairness. We expect you to act in a respectful manner when dealing with colleagues, supervisors, customers, suppliers, partners, and everyone you come into contact with in the course of business.

Cooperate with each other to act in CNL's best interests, practicing teamwork, trust, personal accountability, and being open to others' points of view.

6.2.6.1 Personal Relationships

We recognize that personal relationships may exist or develop between CNL workers, with members of our supply chain, or within the local community. If you become involved in such a relationship, you are required to act appropriately and not create or appear to create a conflict of interests with regard to your duties and responsibilities to CNL.

Improper behaviour, abuse of authority, conflicts of interest or any biased actions will not be tolerated. If you have a personal relationship that overlaps with your professional or managerial responsibilities, you are required to disclose it to your Supervisor without delay.

6.2.6.2 External Employment and Service

You must not engage in any paid or unpaid activity outside of your employment with CNL that could be in conflict with the best interests of CNL, without the prior written consent of the Manager, Ethics & Business Conduct.

CNL must be considered to be your primary place of employment. If you have a secondary job, you must not let it interfere with the performance of your duties at CNL; nor may you conduct outside business during regular working hours or do so using CNL property, assets or information.

If you intend to engage in any paid or unpaid employment or other activity, including service on public bodies, committees or councils, you are required to disclose the details to your Supervisor and seek consent from the Manager, Ethics & Business Conduct. CNL consent shall not be unreasonably withheld subject to you meeting the conditions contained within *Disclosure of Information Concerning Violations/Wrongdoing*.

6.2.6.3 Political Activity

You are free to participate in political activities during non-working hours. In doing so, you are required to make it clear that you are acting in a personal capacity and that any actions or statements you make should not be taken to be representative of CNL.

Any participation must not jeopardize your impartiality in your work for or on behalf of CNL.

If you intend to seek election or appointment to political office at any level, you must seek prior written approval from the Manager, Ethics & Business Conduct, who will advise you of any conditions that may apply.

Truthfulness and integrity must guide all of your work for and on behalf of CNL.

6.2.6.4 Use of social media

Your responsibility to CNL does not end at the end of your work day. For that reason, this section applies to both company sponsored social media and personal use as it relates to CNL.

You are required to exercise discretion and sound judgement, and to:

- **Disclose your affiliation:** If you discuss work related matters that are within your job responsibility, you must disclose your affiliation with CNL.
- **State that it is your opinion:** You must state that views expressed are your own, unless authorized to speak on behalf of CNL.

- **Act ethically:** Do not misrepresent yourself in role, responsibility or capacity within CNL.
- **Live the CNL core values:** The same values, ethics and confidentiality policies employees are expected to live everyday also apply to functioning within the electronic world.

You should never disclose:

- **Non-public financial or operational information:** If it's not already public information, it's not your job to make it so, unless authorized to do so on behalf of CNL.
- **Personal information:** Never share personal information about our customers or employees without their consent.
- **Legal information:** Never discuss legal issues or cases without the consent of CNL's legal department.

The *Code of Conduct* requires employees to disclose potential conflicting relationships and ask for guidance if they are in doubt about this important aspect of their obligations to CNL. Because the Company does not rely on the grievor's relationship with the organisation, I will not focus on these provisions in this award to any great extent. (They become significant only to the extent that the Company argues that the grievor, if he had been acting "in good faith" should have asked for guidance about his involvement with the confrontation of February 22.)

6.3.1 Anti-Bribery and Corruption

At CNL, we abide by the Canadian Corruption of Foreign Public Officials Act as well as all other international and national laws that apply to our business operations internationally.

It is a violation of this Code if any of our workers engage in any form of bribery, corruption, extortion and/or embezzlement. This applies regardless of whether the intended recipient is a public official, a private individual or another company.

When working for or on behalf of CNL, you must never directly or indirectly allow:

- Any kind of bribe, kickback, gift, or anything else of value to be offered or given where it could be perceived, known or intended to gain improper influence or competitive advantage for CNL; or
- Any kind of bribe, kickback, gift, or anything else of value to be requested, demanded or accepted in return for any improper act; or
- Any "grease" or facilitation payment to be offered or paid (these are payments to public officials to expedite or secure the performance of any act of a routine nature that is part of that official's duties or functions); or
- Any payments, gifts or other benefits to be given to public officials, political parties or candidates for political office for the purpose of influencing government decisions in favour of CNL or for securing any other improper advantage.

Article 6.7. states:

> **6.7 Seeking Guidance and Reporting Concerns or Violations of This Code**
>
> If you need further guidance on the application of this Code, you should initially contact your Supervisor, if not directly involved in this issue, or refer to CNL policies, Procedures or other guidance notes as identified in this Code or in the list at the end of this document.
>
> If you are still unsure regarding any specific aspect of this Code, or if you have a question about what is the right thing to do, contact your HR Consultant, the Manager, Ethics & Business Conduct, CNL's Vice President (Legal), or any member of the CNL legal team.

Finally, Article 6.7.1. explains how to report concerns or make a disclosure. It states:

> **6.7.1 How to Report any Concerns or Make a Disclosure**
>
> All CNL workers are required to report immediately any concerns about possible violations of this Code or to disclose actual or suspected violations of any relevant laws or regulations.
>
> This obligation extends to any observed or suspected actions of others, including other CNL workers, suppliers, contractors or clients.
>
> Suspected violations of this Code of Conduct or any relevant laws, statutes or regulations may be disclosed direct to CNL's Manager, Ethics & Business Conduct, who can be contacted at CNL Business Conduct Office.
>
> Alternatively you may use CNL's externally hosted confidential reporting facility by calling +1-866-505-9912 or by accessing www.clearviewconnects.com. When using this facility you have the option to make an entirely anonymous report. However, that may hinder CNL in making a full investigation of any allegations, so if you do choose to disclose your identity, you can be assured of confidentiality within the CNL Ethics & Business Conduct Office.
>
> If you make a report in good faith, you can be assured that CNL shall protect you from any retaliation…
>
> In the event that you are involved in a workplace investigation, in any capacity, you are required to fully participate, and be honest and forthcoming during the process. Failure to do so can result in disciplinary action up to and including termination.

Factual Findings and Conclusions

This decision is not about the need for members of our community to abide by the rule of law. Nor it is about the need for members of our community to protect children. This

award will not resolve the conflict between these values. It will not resolve the conflict faced by the Ottawa Valley.

This labour relations award will apply the law and appropriate principles to address the questions here raised: Was there misconduct? Does that misconduct attract discipline? If so, what is the appropriate penalty?

Was there Misconduct by Showing the Video?

Having considered the evidence in this case, it is clear that the grievor did, on March 25 and March 26, 2019, show videotape of the McEvoy's confrontation with Mr. X, a co-worker, to two groups of colleagues at work. He did so on Monday February 25, 2019 and on Tuesday March 26, 2019. These showings were brief, each perhaps two minutes at most.

I find as a fact, based on the evidence of Duff and Foote, that the grievor did provide narration while showing the video, that he explained that Mr. X was trying to solicit sex with a minor, and that the grievor did describe the incident in a manner that assumed Mr. X's guilt.

I find, based on the evidence of Duff and Foote that the grievor disclosed personal information about his co-worker, Mr. X, without permission of that person. He provided the man's name, marital and family status, and the fact of his employment with CNL.

I accept that the grievor was motivated by the intention of trying to warn his colleagues that a sexual predator may have been operating in their community. However, in so doing I also find that the grievor was acting out of disgust and anger, and showed the video in order to publicly shame Mr. X.

No complaint was filed in this case. However, the Employer's Harassment Prevention policy defines harassment in an objective manner and does not require complaint as a precondition to a finding of harassment. The policy defines harassment as behaviour that "demeans, offends, humiliates, embarrasses, threatens or intimidates a person, and that a reasonable person would know or ought to know would be unwelcome."

The Employer urges that the principles governing the situation are those that have become clear law in Canadian jurisdictions over the past decades. I agree. It is beyond debate that one of an employer's primary responsibilities is to provide a workplace that is safe and that is free from harassment. This often means that strict enforcement of anti-harassment and anti-violence polices is required. The point is made in the award in City of Kingston and C.U.P.E. 109, 2011 CarswellOnt 9046 (E. Newman), and in Hinton Pulp & Hinton Wood Products and C.E.P. 2009 CarswellAlta 2317 (C.L. Sims). In the latter, at para 60, the award says:

> Harassment is not a simple problem because it is often not simple, deliberately obnoxious behaviour, but instead is unintentional behaviour rooted in ignorance. Solutions have recognized that much can be achieved my education. But sometimes, it is just deliberate and obnoxious behaviour…. In such circumstances… examples need to be set.

The Employer also argues that even where the behaviour constitutes a single incident, or a first incident of an otherwise compliant employee, positive, strong and effective action should be taken by an employer when obnoxious behaviour threatens the safety, dignity or security of another employee, particularly when the behaviour poisons the workplace and sets in place a "ticking time bomb" for violence or retaliation. This is made clear by the award in O.P.S.E.U. and Ontario (Ministry of Natural Resources), 2003 CarswellOnt 3343 (Petryshen). That strict penalties must apply to such misconduct is made clear by the award in S.G.E.U. and Saskatchewan, 2009 CarswellSask 913 (Brossart) and by Metropolitan Hotel and Hotel Employees Restaurant Employees Union, Local 75, [2003] O.L.A.A. No. 767 (Springate).

Offending behaviour is not just that which is listed in policies, but includes that which a reasonable employee ought to know would be unwelcome by the victim. In the instant case, the Employer argues that regardless of one's view of vigilante organisations (and here there is no accusation that the grievor's involvement in one on February 22, 2029 constituted misconduct), it is obvious that bringing the video of the confrontation into the workplace and showing it was an act intended to humiliate a co-worker. It is an act that clearly falls within the broad definitions of misconduct in this Employer's policies, and required, for the reasonable employee, no further clarification.

The Employer continues, easily establishing that an employee must consider and foresee the consequences of their actions. Thus, in a case where one spread rumours of sexual activity among one's co-workers, they could have anticipated that the rumour would be unwelcome and that the target of the rumours would be upset, humiliated and embarrassed. This was the conclusion in Toronto Hydro-Electric System and C.U.P.E., Local 1, 1994 CarswellOnt 1885.

I have considered the Employer's authorities in this case and can find no reason to disagree with, distinguish or deviate from the principles that any of them articulate. It's *Harassment Prevention and Options for Resolution* policy and *Code of Conduct* are vibrant statements and reflect the Employer's obligation to provide and maintain a workplace free from harassment and the potential for violence.

I have no hesitation in finding that on February 25 and 26, 2019, by showing the videotape to colleagues in the workplace, the grievor violated the *Harassment Prevention and Options for Resolution* policy. By showing the videotape to his colleagues on two occasions on February 25 and 26, 2019, the grievor committed acts of bullying and harassment contrary to that policy. In particular, I find that he demeaned, offended, humiliated, embarrassed and intimidated his co-worker, Mr. X, in a way that he knew or ought to have known was unwelcome.

I have no hesitation in finding that through his actions on those dates, the grievor committed acts of misconduct by violating several provisions of the *Code of Conduct*, and in particular:

Contrary to Article 6.2.3., the grievor engaged in unwelcome behaviours that demeaned, humiliated or embarrassed another person, a co-worker;

Contrary to Article 6.2.2., the grievor failed to act in a respectful manner when dealing with his colleague, Mr. X;

Contrary to Article 6.2.6.4, the grievor violated the prohibition against disclosure of personal information without that person's permission, (although though no social media was involved).

I also find that through his actions, the grievor created a situation of potential violence in this workplace by inciting anger against his co-worker, Mr. X.

Does Discipline attach to the misconduct? If so, what is the appropriate penalty?

The analysis must have regard to a critical point made by the Union. It is fundamentally unfair to permit an Employer to rely on conduct as the basis for discipline when it has, through its own conduct, led the grievor to believe that such conduct was permissible. (Re Frito-Lay Canada Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers, & Allied Employees, Local 647, 1975 CarswellOnt 1365 (Beatty). In Frito-Lay, the board of arbitration found as a fact that the company had permitted the conduct which formed the ground of the discipline. The Board said, at para 11:

> …it would, in our view, be grossly unfair to allow the company to suddenly and without any prior warning or admonition, rely on the conduct of the grievor to support his discharge, when by its own conduct it had led him and indeed other driver-salesmen … to believe that such conduct [consuming alcohol] was permissible and proper behaviour. To paraphrase the language of another board of arbitration, it simply is not proper for the company to have allowed Mr. M. to have climbed out on a limb so that they could saw him off. Re Civic Employees Union, Local 43 and City of Toronto (1967) 18 L.A.C. 273 (Arthurs). Having induced the grievor to believe that it was permissible for him to consume nominal amounts of alcoholic beverages at the conclusion of his last service call, the company simply cannot, without any warning rely on that conduct as the basis on which they would discharge him regardless of the meaning that is placed on the relevant provisions of this agreement. Whether one characterizes the company's conduct as amounting to a waiver of their contractual rights, a condonation or tolerance of such conduct, or as raising an estoppel, it is the basic unfairness inherent in suddenly characterizing as culpable, behaviour which until then the company had unequivocally treated as permissible, which justifies the conclusion that the company cannot rely on its contractual rights however they are construed.

I understand the Company's concern and frustration with the repeated disruptions these incidents have on the workplace. I particularly have a concern about the fear of workplace violence these incidents have potential to generate. But I am not satisfied that the Company's approach and communication to employees has been clear or consistent. In the summer and fall of 2018, videotapes of similar confrontations were widely circulated in the community and in the workplace. One employee of CNL had caused videotape of a similar confrontation with another CNL employee to be posted online. There were 500,000 hits on

that video, and countless CNL employees viewed it. The fall 2018 video was also posted online. Yet in neither of those cases did the Company even admonish the employee who was responsible for the disruptions. It took the view that this was off-duty conduct and not a workplace issue. It verbally warned McEvoy "to keep it out of the workplace".

The Company's Office of Ethics and Business Conduct spends, according to Sullivan, a great deal of its resources in education and guidance pertaining to the *Code of Conduct*. It did not, however, provide education or guidance to its employees about how it viewed these continuing confrontation episodes with alleged pedophiles. Even if it did consider these to be off-duty conduct and outside of their realm, it did not provide education or guidance to employees about "keeping it out of the workplace."

When these incidents caused the serious disruption that is alleged to have been caused in 2018, the Company might have issued a memo to employees to provide that education and guidance. Or, when the Company revised its *Code of Conduct* at the end of 2018, it might have included an example describing these repeated incidents and inform its employees that "bringing the matter into the workplace" would be considered misconduct.

When the grievor told Sullivan, first thing on Monday morning, February 25, that he was involved in such a confrontation, he might have been warned "not to bring it into the workplace." He might have been told what that meant.

The grievor did not think he had done anything wrong. He did not think that he had committed an act of misconduct. To his mind, he had done what McEvoy had done in the past, and for which McEvoy had not been reprimanded in any way. The grievor did not think he had committed an act of harassment. He had never been warned about this behaviour. The grievor did not think he had put himself into a position of conflict of interest with the Company, because McEvoy had done the same thing and was never warned or accused of conflict of interest. He did not ask for guidance before heading out on the confrontation, because McEvoy had done that on at least two prior occasions and had not faced any problem.

In order for behaviour to be considered disciplinable misconduct, the Company must have, at the very least, communicated that the behaviour would be considered misconduct. Mr. Saunders argues that it is not necessary to educate or warn an employee that punching

someone in the nose would be considered harassment or violence. Everyone knows it is. And that much is true. But in the circumstances of this case, where another employee has twice created serious workplace disruption by creating and making available shaming videos of co-workers and making them available to the entire community (as well as the workplace), the grievor had no basis to predict that his showing the video at work would attract an allegation of misconduct, let alone severe discipline.

The Company argues that the grievor's conduct was different. He did what he did on his own time, outside of the workplace, but he crossed the line when he showed the video at work. He "brought it into the workplace." In the circumstances, I find this to be a distinction that was by no means made clear to employees. It is, in my view, a distinction without a difference. McEvoy had previously publicly shamed a co-worker on two occasions, posted humiliating videos on line, and was warned of the Company's boundaries regarding these things. The grievor committed a similar act, by showing the video at work, but he showed it to far fewer employees than McEvoy had by posting a similar video online.

I will venture to say that an employee of CNL who demeans, humiliates, embarrasses or intimidates a co-worker by making remarks online and posting those remarks to the community at large, which community includes CNL employees, will be accused of violating the Company's *Code of Conduct*, Article 6.2.6.4. I will venture to say that an employee who discloses personal information about a co-worker online in the context of an allegation of pedophilia will be accused of the same. To take the position that such an employee will attract a verbal warning, but one who shows the online content to others while physically in the workplace will be severely disciplined is, in my view, an inconsistent approach to the problem.

It is my conclusion that the Employer was not clear or consistent in its approach to the behaviours here considered, that it condoned very similar behaviour in another. It never warned the grievor about "bringing the matter into the workplace". It can not, without having appropriately educated or warned the grievor, impose discipline upon him for these behaviours.

The grievor feels strongly about the prevention of child endangerment. He does not apologize for his views on the work of the organisation he aided on February 22, 2018. He

disagrees with the Company's approach to the broader issues. But he does say, convincingly, that he regrets having caused a problem for his Employer and would have done things differently if he had known the Company's views. His position is respectful. He disagrees with the Company but does not question its ability to set the rules and define the boundaries. He just wasn't told what the rules were on this complicated point.

The Company had condoned similar behaviour in the past, even when it caused far greater disruption to the workplace than did the present incident. If the Company drew a line between posting such material online and showing it in the workplace, it, in my view, was obliged to make that distinction clear to employees in general, and to the grievor in particular, as soon as he volunteered his involvement in the confrontation.

In the result, I can not find it appropriate to attach discipline to the grievor's conduct of March 25 and 26, 2019. In my view, a non-disciplinary letter of coaching should be placed in his personnel file, explaining the Company's position on these matters.

In the interests of thoroughness, I add that if I am in error on the point of condonation, I would have exercised discretion under section 60 (2) of The Canada Labour Code to substitute a lesser penalty for the grievor's violation of the anti-harassment policy and *Code of Conduct*.

It is my conclusion that an important reason for the imposition of such a severe penalty was the Company's mistaken belief that the video had been shown "all over the site." Another was the mistaken belief that the grievor was invested in the organisation to a much greater extent than he was. These errors and assumptions, corrected through the evidence at hearing, weaken the Company's defence of the 132-hour suspension.

For a seven year employee with a completely clear record of discipline, I would have considered the extraordinary penalty to have been excessive and in disregard of the principles of progressive discipline. The grievor lost almost a full month's work and suffered significant consequences. I would have thought that a suspension of one week would have sufficed to penalize and provide both the specific and general deterrence that the Company sought.

Was there Misconduct by Reporting to Nordin?

The Company's second position is that by reporting the incident to Steve Nordin and by asking him to review Mr. X's security clearance, the grievor was guilty of misconduct. This report has been characterized as a further incident of "bringing the matter into the workplace." It has also been characterized as "bad faith reporting."

The Company's interpretation of Article 6.7.1. of the *Code of Conduct* is that an employee who reports in good faith will be protected from reprisal, but the grievor was acting in bad faith: entrapping Mr. X, creating the evidence of the confrontation then relying on that evidence to try to have him fired.

Sullivan, Nordin and Graydon all testified to their conclusion that the grievor had been acting in bad faith when he reported to Nordin. Sullivan testified that the grievor had set up Mr. X and reported to Nordin in an effort to get him fired, thereby serving the goals of the vigilante organisation. Nordin said that if the grievor had been acting in good faith, he would have taken the matter to the police.

Graydon said the *Code of Conduct* may indeed have required the grievor to report his concern that a CNL employee may have put himself in a compromising position—that it is not entirely clear what the Code requires—but that had this grievor been acting in good faith, he would have reported to Nordin immediately, not several days after the incident.

Counsel argued that had the grievor acted in good faith, he would have taken the matter to the police, would have avoided the confrontation, and would have refrained from showing the video. He would have volunteered to Sullivan on Thursday Feb 28 that he had already shown the video at work on two occasions. He would have cooperated completely and honestly in the investigation.

The Union argues that the debate about the grievor's state of mind when he reported to Nordin and asked about Mr. X's security clearance is misplaced. The *Code of Conduct* requires that he report his concerns to the Company. He did what was required. The "good faith" proviso in Article 6.7.1. of the Code of Conduct is intended to address a situation in which an employee makes a false claim about a co-worker, and not when one has a legitimate concern about the potential compromising position that a co-worker places himself in when

he engages in child-luring or other nefarious and possibly illegal activities. The reprisal language is intended to protect an employee from the reprisal of another, against whom a report is made, but which turns out not to be substantiated.

It is useful to reprint the relevant language of Article 6.7.1. of the *Code of Conduct*:

> All CNL workers are required to report immediately any concerns about possible violations of this Code or to disclose actual or suspected violations of any laws or regulations.
>
> This obligation extends to any observed or suspected actions of others, including other CNL workers, suppliers, contractors or clients.
>
> If you make a report in good faith, you can be assured that CNL shall protect you from any retaliation.

My view of the meaning and intent of Article 6.7.1. is coincident with that of the Union. The *Code of Conduct* is a critical corporate document that is intended to educate and inform employees of the elements of the high ethical standard and standard of absolute integrity they must follow as employees of CNL. It is primarily, as Sullivan would say, a teaching document. It informs and guides employees about their obligations to ensure that the high ethical standards are maintained.

Regardless of how one views the activities and tactics of the organisation that seeks to expose alleged pedophiles, in the present context of labour relations, we are concerned with the respective rights and obligations of employer and employee. The grievor suspected that Mr. X had committed a crime of child endangerment. The grievor believed that Mr. X had put himself in a compromising position and was at risk as a target of blackmail. The Code of Conduct addresses bribery and corruption, and the Company's training had taught him to be concerned about "insider" issues.

My view is that the Company's position that the grievor reported to Nordin in bad faith, and therefore committed an act of misconduct, is based on a misreading of the language of the Article 6.7.1. of the *Code of Conduct*. The provision refers to protection from "retaliation." I take this to mean that if one honestly reports illegal or improper behaviour by a co-worker, or reports that they suspect wrongdoing, the Company will protect the reporter from retaliation by the person accused. I do not take it to mean that if one reports what they

believe or suspect is wrongdoing, and the Company disagrees, or considers the alleged wrongdoer's conduct to be permissible off-duty conduct, that they will be disciplined for having made the report. I interpret Article 6.7.1. to place an obligation on the employee to report, and to give the Company an opportunity to determine its course of action. That is what the grievor did. That is not misconduct.

I am satisfied that the grievor reported the facts to the Company immediately when he next appeared at work. He did so in his first call to Sullivan on the Monday morning.

It is, in my view, a reasonable and probable conclusion based on the evidence that when the grievor approached Nordin to report his activity and to suggest a security check, he felt under an obligation, and in the best interests of the company, to report what he considered to be a potential security violation.

Based on the evidence introduced in this case, I have found that the grievor was motivated by his anger and disgust for Mr. X. But he honestly believed that Mr. X was guilty of trying to solicit sex with a minor, an illegal act.

Taken on its face, the *Code of Conduct*, in my view, created an obligation on the grievor to report the "possible violation" of the law. In my view his interpretation was, under the circumstances, a reasonable one.

The second ground of misconduct is not supported.

The Allegation of Dishonesty

I conclude that the grievor was not honest in the investigation meeting with Sullivan on March 28, 2019. He admitted facts that Sullivan had been told, such as the video showing on Monday February 25. He claimed to have forgotten the second. He denied knowing the name of Mr. X, although McEvoy had used his name several times in the confrontation. He himself reported the name when showing the video. He was not telling the truth when he said, "I only know him by his child-luring name." He was not honest when he said, "No one knows who he is." I do not accept his evidence that he forgot if he disclosed Mr. X's personal details to his colleagues when he showed the tape.

I have considered the fact that the grievor was upset at the time of the investigation meeting. I appreciate that the entire situation generated extreme emotion. The grievor's priorities were at odds with those of the Company on the child endangerment issue. He was disappointed and angry. He felt that he was being harassed by Sullivan and targeted by the Company. Because similar behaviour by another had attracted no discipline, he was surprised to find himself as the subject of an investigation. He did not believe he had done anything wrong. He had a concern that his Union position was at the root of his problem.

These are not excuses for any employee failing to cooperate with a workplace investigation. An employee's duty is to cooperative completely and tell the truth. This point is made clear in the Company's *Code of Conduct*, Article 6.7.1., final paragraph:

> In the event that you are involved in a workplace investigation, in any capacity, you are required to fully participate, and to be honest and forthcoming during the process. Failure to do so can result in disciplinary action up to and including termination.

That provision requires no interpretation. It is abundantly clear.

In determining a penalty for this offence, I take into account the fact that lying in a workplace investigation is a very serious offence. (See for example, DHL Express (Canada) Ltd. and CAW-Canada, Local 4215, 2010 CarswellNat 6237, (Ish) and Ontario (Ministry of Community Safety and Correctional Services) and OPSEU (Marshall), 2013 CarswellOnt 13106 (Abramsky).

I take into account the fact that the grievor was an employee with a seven year service record devoid of discipline. I do not consider it a mitigating factor that he was angered by the Company's investigation into his conduct. It is an employee's obligation to cooperate and to be honest in an investigation, angry or not.

I do take into consideration a unique fact that arises in this case. The grievor was significantly affected by the excessive penalty implemented for his misconduct in showing the video at work. Although that penalty has been eliminated in this award, he has suffered as a result of that month without work.

In my view the circumstances here warrant some relief. I would impose a suspension equal to 3 twelve-hour shifts for the grievor's dishonesty in the investigation meeting.

In the result, the grievance is allowed. The grievor shall forthwith, and no later than 14 days following the release of this award, be wholly reimbursed for ninety-six (96) hours' compensation, and shall be made whole in all respects, (subject to the suspension equal to three twelve-hour shifts for dishonesty in the investigation). This suspension is calculated in a manner consistent with the calculation of suspension contained in the Discipline Letter of April 9, 2019.

I remain seized of this award for purposes of interpretation and implementation.

DATED at TORONTO this 27th day of January, 2021

Elaine Newman, Arbitrator