IN THE MATTER OF THE ARBITRATION OF A GRIEVANCE PURSUANT TO THE SASKATCHEWAN *TRADE UNION ACT*, R.S.S. 1978, C.T-17, AS AMENDED AND PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1594
and BELINDA NEW

UNION / GRIEVOR

AND:

REGINA PUBLIC LIBRARY

EMPLOYER

AWARD

Chairman	Kenneth A. Stevenson, Q.C.
Employer Nominee	Katrina Swan
Union Nominee	Elaine Ehman
Counsel for the Employer	Brian Kenny, Q.C. Ms. Courtney Keith
Counsel for the Union	Guy Marsden, National Representative CUPE
Date of Hearing:	November 26, 27 and December 20 Regina, Saskatchewan
Date of Award	January 29, 2014

AWARD

I. BACKGROUND

1. On August 28, 2012, Belinda New, Film Theatre Supervisor, received a three-day suspension as a result of alleged *"... culpable misconduct, specifically dishonesty, fraud, insubordination and breach of trust."* The alleged misconduct occurred in June 2012 in connection with the provision of information and documentation requested by her supervisor, Dr. Collins, Director, Dunlop Art Gallery, and Jeff Grant, Manager of Human Resources.

2. On September 6, 2012, Ms. New filed a grievance alleging unjust discipline. The grievance seeks rescission of the suspension and requests that Ms. New be made whole and that the Employer provide a letter of apology *"... acknowledging that the film industry protocol was followed regarding the incident in dispute."*

3. The parties agree that the panel has been properly appointed with jurisdiction to hear and determine matters raised by the grievance. This matter was heard in Regina on November 26 and 27 and December 20, 2013.

II. EVIDENCE

4. As Film Theatre Supervisor, Ms. New was responsible to lead the delivery, planning, development, and evaluation of Film Theatre programs, and is responsible for the Film Theatre unit resources. The duties include regular contact and negotiation with the film distributors as well as supervision and assignment of work to a staff of four employees. The position has substantial independence; Ms. New works on her own for approximately 70% of her time. Ms. New acknowledges that she works in a position of trust with responsibility to provide financial data and to ensure that the library's dollars are properly handled.

5. On May 26, 2012 the Union served strike notice on the Employer followed by a study session and rally on May 28 and job action on May 29 where members no longer would accept a payment of fines or library fees. As part of its job action, the Union decided that it would not collect admission fees for the Film Theatre's screenings at 7:00 p.m. and 9:00 p.m. on Saturday, June 9, 2012. Ms. New was advised of this job action by Debbie Mihial, President of the Local,

on Friday, June 8. Ms. New was not supportive of the proposed action; she expressed her concerns about potential negative implications for her or her staff with the film distributors. Ms. New was unsuccessful in her attempt to contact the distributors of the films to be screened on Saturday night. Ms. New advised her staff working on Saturday of the proposed job action.

6. Although Ms. New was not scheduled to work on Saturday, she went to the Film Theatre before 6:00 p.m. because it was her area of responsibility so that she could instruct her staff as to the procedures to be followed for the evening: admissions were to be free; employees were not to use the cash box and were to refuse any cash payment; employees were to acknowledge a security camera in the lobby. Ms. New instructed the cashier, Trevor, to physically record the number of persons attending each screening. Trevor recorded that 55 persons attended the 7:00 p.m. screening and 25 attended the 9:00 p.m. screening (Exhibit U-23). On June 9 Ms. New initialed and dated this record of attendees to verify the numbers who attended. Ms. New instructed that after the final screening on Sunday night, these attendance numbers were to be entered into the Employer's Excel statistics document which records the number of persons who attend each of the Film Theatre screenings. These records are maintained on a shared drive and are accessible to Ms. New, her staff, her out-of-scope manager and the Director and Deputy Director of the Regina Public Library ("RPL").

7. Ms. New remained at the Film Theatre until approximately 10:30 during which time no management personnel attended. Other Union members were engaged outside the Film Theatre leafleting patrons.

8. At the conclusion of the Thursday to Sunday screenings, RPL is responsible to provide the film distributor with a Box Office Report ("BOR"). The BOR records full particulars as the genre of those who attend (adult, senior, student) together with the number of attendees in each category and the net amount of revenue for each category, each screening and a total of the Box Office receipts. These BORs are faxed to the film distributor on the following Monday. RPL is then invoiced by the distributor based on the BOR provided for the film.

9. Ms. New's evidence is that she considered RPL to be in breach of its contract with each distributor as a result of the free screenings. She directed that all attendees be recorded as adults;

as there was no revenue to be recorded, RPL needed to "count or buy out" for reporting. Ms. New instructed Trevor to complete the Saturday night portion of the BORs based on the maximum attendance of 109 adults with receipts of $623.48 for each of the screenings (Exhibits U-26 and U-28). Ms. New says this BOR was required to "four-wall" the Theatre as a result of the breach of agreement which permitted the distributor to gross up attendance to the maximum capacity. A second set of BORs (Exhibits U-27 and U-29) were prepared for each film which reflected the free admission and no revenue. No BORs were prepared which included the actual number of persons in attendance on June 9. The films screened June 7 to 10 were: Keyhole distributed by Entertainment One ("E-One") and One-Life distributed by Alliance Films ("Alliance"). According to Ms. New the second set of BORs showing free admission on June 9 and the actual attendance and revenues for the other screenings along with the cash box were taken to the RPL Business Office. This was in accordance with the usual practice wherein the Business Office reconciled the cash receipts with the BORs.

10. On Monday, June 11, Ms. New faxed to E-One and Alliance the BORs based on 109 adults attending the June 9 screenings; she informed the distributors that the screenings were "free" as a result of Union job action. On June 14 Chris at E-One sent an email to Ms. New advising *"... It would be best if the BOR did not include that figure on Saturday, as it was not a real gross."* Chris asked Ms. New to resubmit the box office receipt with Saturday listed at zero dollars and a note describing it as a free screening. On Tuesday, June 26 Chris asked Ms. New if there was any word when they would get a revised box office report with this change. On June 26, Ms. New sent Chris a BOR (Exhibit U-27) showing the June 9 screening as "free admission" and the total receipt of $141.96. Ms. New asked if E-One wished to revisit the original agreement of 35% box office settlement to which Chris responded *"Received, all good, thank you."*

11. Ms. New's initial contact with management about the June 7 to 10 screenings was an email from Dr. Collins on June 12 at 11:52 a.m. as follows:

Subject: June 7 to 10 attendance

Dear Belinda:

> Can you please send me attendance figures for the 7pm and 9pm screenings on June 7,8,9 & 10. Please ensure that the numbers are broken down to each individual screening. I also require the formula used to pay royalties to the respective distributers [sic] based on attendance, and who the distributers [sic] were for Keyhole and One Life.
>
> If you could have this to me by end of day that would be helpful.

12. In response Ms. New provided Dr. Collins with the BORs which she had faxed to the distributors showing 109 adults attending each of the June 9 screenings. At the bottom of the Alliance BOR she wrote *$200 versus 35%*; on the E-One BOR she wrote *$150 versus 35%*. Ms. New says that in a brief conversation with Dr. Collins, he confirmed that this was the information he requested and she explained *"four-walling"* and the reason for the protocol which she believed required this as a result of the free admission breach. She advised Dr. Collins of the Film Theatre's staff concerns about the job action and made clear that she was responsible for all actions and decisions. Ms. New's next contact with management was on June 20, 2012 when Mr. Grant came to her office shortly before noon.

13. Dr. Collins had contacted Mr. Grant because of his concern as to the accuracy of the information that he had received from Ms. New showing 109 adults attended each of the June 9th screenings. This doubt arose from: the attendance at the two earlier and one later screenings of each film, rarely did the Film Theatre have a full house; a review of the security footage did not reflect that many persons attending. Dr. Collins gave Mr. Grant copies of the BORs showing 109 adults attending each of the June 9 screenings. These were dated June 11 and signed by Ms. New. Mr. Grant says his copies of these disappeared from his file.

14. Mr. Grant says he advised Ms. New that he was looking for information re the attendance at the June 9 screenings; this was not a disciplinary matter rather, he was seeking to clarify and obtain more accurate information as to the information provided to Dr. Collins which seemed anomalous. Mr. Grant had the document from Dr. Collins showing 109 attendees; 109 did not seem probable. He says that Ms. New initially said attendance had not been taken but the Theatre was *"quite full"*; it was recorded as 109 attendees to err on the side of caution. This was required by the distributors and required to ensure the distributors were dealt with fairly.

15. Mr. Grant says that when he probed Ms. New for a more reasonable number she said *"we may have kept track"* and later that attendance had been taken. Ms. New looked for an attendance document but could not locate it. During this meeting Ms. New never mentioned or referenced the shared drive as a source of the number of attendees. Later the same day Ms. New gave to Mr. Grant a copy of the sheet of paper on which the number of persons attending each screening on June 9 was recorded (Exhibit U-23); this document was dated June 9 and initialed by Ms. New. It recorded attendance at the 7pm and 9pm screenings as 55 and 25 respectively. Ms. New did not explain the reason for the difference between these numbers and 109.

16. Ms. New's evidence is that on June 20, shortly before noon, Mr. Grant dropped into her office and asked her what she thought of the June 9 job action; she said she disagreed with it. Ms. New says Mr. Grant never advised her that he was conducting an investigation, nor did he offer her Union representation. She told Mr. Grant that the distributors were waiting for advice about the next step re: payment. Mr. Grant brought up the security tape and said don't make me watch four hours to get the attendance.

17. Ms. New says that she told Mr. Grant that they had kept attendance and how many were in the Theatre. She was confused as management knew the head count had been recorded on the shared drive for ten days. She said she needed to find files and would bring documents to him; she assumed he wanted the physical confirmation of what was recorded on the shared drive, although this was not discussed. Ms. New says she believes she used the phrase *"pretty full"*; this was a reference to the Theatre in general and not an estimate of the number of people as she knew the actual number from the record kept. Ms. New located the attendance record sheet and provided it to Mr. Grant shortly after lunch and also gave him a copy of the BORs showing the free admission. Ms. New says there was little discussion of how the distributor was paid, but she said she needed to contact the distributor as she was not finished discussing percentage; she told Mr. Grant that the head count was not relevant to the distributor.

18. After 1:40 on June 20 Ms. New emailed Mr. Grant with more clarification that the second set of BORs which she gave him with the "zero" recorded for June 9 reflected the actual dollar amounts accumulated. Ms. New had these completed to reflect the actual receipts dropped off to

the Business Office with the float and cash. She understands that the dollar amounts taken in on June 7, 8 and 10 balanced.

19. Ms. New acknowledges that there had not been any prior discussions with the distributors about "four-walling", the agreements with the distributors did not require it, and she had not previously "four-walled" a screening. She acknowledges that the term is used in expositions to refer to the buying all the seats. She believes it applied in these circumstances.

20. On August 28, 2012 Mr. Grant provided Ms. New with a Memo re: these events and the employer's decision to impose a three-day suspension. It says that Ms. New's actions with respect to Dr. Collins in the provision of attendance numbers known to be false and identifying the false attendance revenues as having the greatest potential for economic impact on RPL showing combined receipts of $1,246.96 were *"fraudulent, insofar as you provided false information having the greatest potential for detrimental economic impact possible on the Regina Public Library. Further your actions with respect to this interaction were dishonest, insofar as you knew that the information you were providing was false.* Ms. New's actions with respect to her interactions with Mr. Grant when he asked for clarification of the reported attendance numbers and she advised it was very full and erring on the side of caution she chose to report full attendance *"...were dishonest and insubordinate, insofar as you deliberately lied to me when asked the direct question about attendance at the RPL film theatre on June 9, 2012. That you eventually told the truth, while providing a measure of mitigation does not excuse your behaviors."*

21. The Employer paid E-One the minimum guarantee of $150.00 plus GST based on the revenue of $141.96 plus the free admission. It paid Alliance $330.45 plus GST based on 35% of the reported revenue of $944.14 which included $623.48 reported as income on June 9 when no admission fees were collected. Ms. New did not have any discussions with Alliance about the free screening, nor does it appear that she provided Alliance with the second BOR reflecting the free screening. Ms. New says she believed management might contact the distributors about the issue, but was advised by Chris at E-One that no one contacted him. Ms. New acknowledges that she did not advise Dr. Collins to contact the distributors.

22. There was a difficult working relationship between Ms. New and Dr. Collins with little direct communication. Ms. New made an harassment complaint against Dr. Collins; during the investigation of this complaint, Dr. Collins resigned in January 2013. Dr. Collins did not testify at the hearing.

23. Mr. Grant says that the decision to impose a three-day suspension was reached after full consideration of the facts and consultation with legal advisors. The decision was made based on Ms. New's clear disciplinary record and the fact that shortly after his meeting with her, Ms. New brought actual attendance numbers to him and provided truthful and accurate information, including the number of attendees and a second BOR with 'zero' revenue. Ms. New did not personally benefit from her actions.

III. RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT

24. We have considered the Collective Agreement in its entirety; the parties have specifically referred us to:

> 5.01 (b) The Employer agrees that there will be no discrimination directed at any employee by reason of membership or activity in the Union.
>
> 8:03 An employee requested to meet with her out-of-scope supervisor for the purpose of imposing discipline shall have the option of having a Union representative present. Communicating performance expectations, providing feedback on work performance and coaching for performance improvement do not constitute discipline.

IV. POSITION OF THE PARTIES

(a) Position of the Employer

Just Cause to Impose Discipline

25. The Employer says that Ms. New engaged in culpable misconduct: dishonesty, fraud, breach of trust and insubordination; she did not show any remorse for her conduct.

26. The Employer says that the Grievor's dishonesty constitutes a very serious employment offence. Honesty is a touchstone to a viable employer/employee relationship. *Phillips Cables Ltd. and U.E., Local 510* (1974), 6 L.A.C. (2d) 35. Ms. New's dishonesty during the investigative process can itself support disciplinary action. *Sooke School District, No. 62 v.*

CUPE, Local 459, [2002] B.C.C.A.A.A. No. 325; *Fortis B.C. Energy Inc. v. International Brotherhood of Electrical Workers, Local 213 (Beere Grievance)*, [2011] B.C.C.A.A.A, No. 130.

27. The Employer submits that the grievor's dishonesty regarding submission of falsified documents to Dr. Collins in the form of inflated attendance records and her lack of honesty when responding to direct questions about the same from Mr. Grant, constitute serious employment offences which warrant the discipline imposed.

28. The Employer says that Ms. New's conduct satisfies the elements to support a finding of insubordination: (1) Was an order or direction given? (2) Did the employee understand or should she have understood the order or direction given? (3) Was the order or direction given by a person in authority? (4) Was it obeyed? The Employer relies on *Delta Chelsea Hotel v. Hotel Employees Restaurant Employees Union, Local 75*, [2002] O.L.A.A. No. 670 wherein Arbitrator Surdykowski found that the grievor's actions in refusing to sign a daily production sheet when requested to do twice by a manager gave the employer cause to discipline the grievor for clear insubordination. It says the failure to provide information can constitute insubordination. *Zalev Brothers Ltd. and I.U.O.E., Local 793 (Re)*, 1996 CLB 13807.

29. The Employer says that the Grievor was not mistaken or mislead or subject to any misunderstanding about the tasks she was asked to perform. She was clearly asked for the attendance records, not the BORs or any other form of record and she knew that she had these available to her. Instead she decided to ignore the request and provide false records to her supervisor. This insubordination warrants disciplinary action.

30. The Employer says that the Grievor has displayed a lack of remorse and has not provided an explanation for her conduct. Although the Grievor eventually acknowledged that she had kept an accurate tally of attendees, she has continually denied she did anything wrong, rather she was simply following protocol. There has been no apology for her conduct.

The Discipline Imposed Was Appropriate in All the Circumstances

31. With reference to the decision of Arbitrator Weiler in *William Scott & Company* (1977), 1 C.L.R.B.R. 1, the Employer says that a review of the appropriate factors leads to a conclusion

that the penalty was appropriate. The Grievor's offence was extremely serious in that she was dishonest with the Employer and violated the Employer's trust which is integral to the maintenance of the employment relationship. The Employer submits that Ms. New lied to Mr. Grant some 10 days after she presented falsified documents to Dr. Collins and avoided coming clean; this demonstrates that this was not a momentary lapse for which the Grievor feels any remorse. The Employer says that Ms. New's long service and clear disciplinary record was taken into account in deciding on penalty. The Employer says that Ms. New's conduct is so egregious as to warrant discipline based on a single incident and as such, it is not necessary to show that progressive discipline was tried on an earlier time. The Employer takes dishonesty very seriously and the type of discipline is consistent with its policies.

Union Representation

32. The Employer denies the Union allegation that the meeting between Mr. Grant and Ms. New on June 20 violated Ms. New's right to Union representation provided in Article 8.03. It says that the meeting was investigative in respect of the attendance numbers at the Film Theatre on June 9. Mr. Grant went to Ms. New's office to ask some direct questions for the purposes of clarification. The purpose of the meeting was not to impose discipline and no discipline was imposed. Article 8.03 does not apply as Mr. Grant was not Ms. New's out-of-scope supervisor, nor was he imposing discipline, therefore Union representation was not required.

33. The Employer says that a right to Union representation is dependent upon the specific language in a collective agreement; it is not an inherent right. Here the Agreement makes it clear Union involvement is not provided for at an early stage. *Midis Health and Pharmaceutical Services and Teamsters, Chemical and Allied Workers, Local 424 (Sitar)* (2001), CLB 126.

(b) Position of the Union

Just Cause to Impose Discipline

34. The Union says that the Employer has not met the onus of proving that Ms. New engaged in any culpable misconduct and in particular, has not established dishonesty, fraud, breach of trust or insubordination. It says Ms. New provided Dr. Collins with the requested information and documentation; there was no specific request for box office receipts. Ms. New assumed the reference was to the BOR and she provided them with the formula to pay endorsed on each. Dr.

Collins had access to the actual attendance figures on the shared drive. Ms. New was neither dishonest nor insubordinate to Mr. Grant who was gathering information and seeking clarification. Ms. New was confused as to Mr. Grant's inquiry as to how many attended as the information was on the shared drive. In the meeting she advised that attendance had been taken; she recovered the tally sheet and provided the same to Mr. Grant shortly thereafter.

35. The Union says there is nothing in Ms. New's conduct which could support a finding of fraud; there is no intention of Ms. New perverting the truth to induce someone to part with something nor is there any false representation by words or conduct to obtain a material advantage. There is no evidence of any deceitful or dishonest intent or attempt to cover-up any conduct. It says that a deceitful intent is the key element that must be proven and has not been proven by the Employer. *Pacific Forest Products Ltd. v. Industrial Wood and Allied Workers of Canada, Local I-85 (McCrae Grievance)*, [1995] B.C.C.A.A.A. No. 220 (Blasina). The decision identifies the need for a dishonest intent to defraud someone and to receive a benefit to which they know they are not entitled; there must be an intentional character which signifies moral turpitude. *Canada Safeway Ltd. v. United Food and Commercial Workers' Union, Local 1518 (Zak Grievance)*, [2005] B.C.C.A.A.A. No. 96 (Germaine).

36. The Union recognizes that insubordination may be more than just a refusal to obey an order and may include insolent, uncooperative behavior where the same involves resistance to or defiance of an employer's authority. *Southern Railway of British Columbia and Independent Canadian Transit Union, Local 7 (Vail Grievance)* (1996), 60 L.A.C. (4th) 11. The Union says that Ms. New did not disobey any order of either Dr. Collins or Mr. Grant and there is no evidence of a challenge to the Employer's authority in any meaningful way. Ms. New provided the information to Mr. Grant in a timely fashion right after the lunch and did not disobey any order. The Union says that the evidence does not establish that Ms. New deliberately lied to Mr. Grant in response to any direct question about attendance on June 9, 2012.

Union Representation

37. The Union says that the provisions of Article 8.03 are substantive and mandatory; they require Ms. New be given the option of having Union representation at the investigation meeting on June 20 because the investigation process is inherently part of the disciplinary continuum.

Riverdale Hospital v. Canadian Union of Public Employees, Local 79 (Delos Reyes Grievance) (2000), 93 L.A.C. (4th) 195. While an employer is free to investigate when it decides to confront an employee, the employee is entitled to union representation. *Hickeson-Langs Supply Co. v. Teamsters, Local 419 (Laidlaw Grievance)* (1985), 19 L.A.C. (3d) 379.

38. The Union submits that in these circumstances the discipline imposed should be struck down. Alternatively, the Employer should not be entitled to rely on the statements of Ms. New made on June 20 without Union representation. The Union questions the manner in which the June 20 meeting was initiated by Mr. Grant casually dropping into Ms. New's office eleven days after the June 9 events. The circumstances caught the Grievor off guard, otherwise she would have been in a position to locate the handwritten tally of those in attendance. From Mr. Grant's references to examine the tape, it is clear that the Employer suspected Ms. New of wrongdoing and was confronting her to either get an admission or to catch her in a lie. In either circumstance, she is entitled to Union representation.

Delay in Imposing Discipline

39. The Union says that the three-month delay in imposing discipline was unreasonable and that there were no compelling reasons for the delay as there was no ongoing investigation. The delay had a prejudicial effect on Ms. New as she was disadvantaged by being disciplined out of the blue on August 26 without any further contact or communication with her concerning events surrounding the provision of information to Dr. Collins and to Mr. Grant. Having regard to this unreasonable delay, the grievance ought to be allowed. *Aluminium Brick and Glass Workers International Union v. AFG Industries Ltd. (Walton Grievance)* (1998), 75 L.A.C. (4th) 336.

40. In summary Mr. Marsden requests that the grievance be allowed on the basis that there was no just cause for any discipline. He seeks that the three-day suspension be rescinded and the Grievor made whole. The Union requests that the Employer provide a letter of apology acknowledging that film industry protocol was followed regarding the incident in dispute and having regard to the allegations of dishonesty and fraud.

V. ANALYSIS AND DECISION

41. Ms. New received a three-day suspension for alleged dishonesty, fraud, insubordination and breach of trust. These are serious accusations. The burden of proof is on the Employer to establish misconduct on a balance of probabilities with cogent, clear and convincing evidence. Deceitful intent is required to prove dishonesty and fraud; these are matters which involve moral turpitude. *Pacific Forest Products*, supra; *Canada Safeway Ltd.*, supra.

42. The evidence does not establish that Ms. New had the deceitful intent necessary to establish that she was dishonest or engaged in fraudulent conduct or a fraud on the Employer. Nor does the evidence establish that Ms. New was insubordinate.

43. This case is about lacking and poor communication.

44. Dr. Collins asked Ms. New to provide him with the attendance figures for each of the subject screenings along with the formula used to pay royalties to the distributors of the two films. Ms. New provided the BORs which she had faxed to the distributors and which recorded attendance at 109 for each of the June 9 screenings. Ms. New wrote on the bottom of each of the BORs the royalty formula for each distributor showing dollar numbers or percentage.

45. Ms. New's evidence is that when she dropped these off for Dr. Collins she explained "four-walling" and why she believed it was required. Her evidence is that Dr. Collins confirmed that this was the information he requested. This uncontradicted evidence is credible.

46. When Ms. New reported to the distributors, she did so on the basis of her belief that due to the free screening RPL was in breach of an obligation to the distributor which required her to report a full house. While this obligation is not contractually established, we accept Ms. New's evidence that she believed this was required. Accordingly, it was reasonable for Ms. New to provide these BORs which reflected what she believed to be the basis on which the distributor would invoice RPL in connection with these screenings. This is so having regard to Dr. Collins' inquiry about the formula used to pay royalties. Dr. Collins' request could reasonably be construed as relating to RPL's financial obligation to the distributor and not a concern as to the

actual attendance numbers. Ms. New was aware that RPL did not pay these distributors based on attendance but on financial receipts. It appears from Dr. Collins' email that he was of the opinion that RPL paid royalties based on attendance.

47. Dr. Collins subsequently questioned the attendance figures which he received. One could reasonably expect that if he had any questions or needed clarification he would contact Ms. New. Such communication ought reasonably occur between individuals with their respective responsibilities to RPL. It appears that the strained/broken working relationship between Dr. Collins and Ms. New affected what one might reasonably have expected to occur.

48. The Employer argues that Ms. New was insubordinate in her conduct to Dr. Collins when she provided BORs and not the actual attendance records when she had these. The Employer says this was providing false information to an out-of-scope supervisor. We are not satisfied that there was any direct order from Dr. Collins which the Grievor disobeyed. There was a request for information; the Grievor provided information which she thought was material to the potential financial obligations of RPL to the distributors. Dr. Collins advised her that this was the information which he had requested.

49. Without any follow-up request for clarification from Ms. New, Dr. Collins appears to have reviewed the security tape and formed the opinion that the June 9 attendance numbers were inaccurate. He contacted Mr. Grant with his concern. There is no evidence that Mr. Grant made any inquiries or Dr. Collins provided any information about: any follow-up with Ms. New; any discussions that Dr. Collins had with her concerning his request; the information she had provided; why the information was provided; or if it represented the actual number of attendees.

50. On June 20 Mr. Grant dropped into Ms. New's office where a discussion occurred about the June 9 job action. Mr. Grant questioned whether there was more accurate information as to the number of attendees at the June 9 screenings. We are satisfied that Ms. New did not initially respond directly with the actual attendance figures, but did reference the Theatre being "quite full". She advised Mr. Grant that erring on the side of caution to be fair to the distributors, she was required to report attendance at full capacity. Before the end of this short meeting, Ms. New advised Mr. Grant that attendance had been taken. She did not tell him the numbers, but she did

look for the physical record which it was reasonable for her to believe he was seeking. She was unable to locate the record at that time, however delivered it to Mr. Grant shortly after.

51. Ms. New also provided Mr. Grant with a second set of BORs which reflected the total actual dollar amounts accumulated from the screenings showing a zero amount for June 9. Ms. New followed-up with an email to Mr. Grant at 1:40 on June 20 in which she provided more clarification in relation to the second set of BORs and how the matter had been reported and handled with the Business Office.

52. There is no evidence of any dishonest intent in Ms. New's dealings with Mr. Grant. Nor is there any evidence of insubordination. It is our conclusion that there is nothing in the context of the meeting of Mr. Grant and Ms. New which could be construed as a disobeyance of an order or direction. Mr. Grant sought clarification as to the actual numbers who attended and questioned the reported 109 attendees. Ms. New offered the explanation as to what she believed needed to be provided to the distributors.

53. While Ms. New was not directly ordered to provide information as to the actual numbers who attended, it is our conclusion that she was not as forthright and direct as required in the performance of her duties as Film Theatre Supervisor. This is particularly so where she had previously provided the information to Dr. Collins that 109 had attended and it was obvious that Mr. Grant was questioning this number. We do not characterize Ms. New's response as dishonest, but it did lack candor and required further explanation. Ms. New knew that attendance had been taken and the actual attendance numbers; she ought to have so advised Mr. Grant. It is an inadequate explanation for Ms. New to say that the Employer already had this information as the same existed on the shared drive. She ought reasonably to have told both Dr. Collins and Mr. Grant that the actual attendance information was recorded on the shared drive in accordance with the usual practice and what numbers were recorded.

54. In her dealings with Dr. Collins and Mr. Grant, Ms. New showed more concern with the distributors and perhaps her relationship with them versus concern for the interests of RPL. Ms. New believed that RPL was in breach of its contractual obligations with the distributors, however she did not make contact with them to discuss if there was a breach and, if so, what the

effect of such breach might be in terms of reporting attendance or gate receipts. Rather, Ms. New completed the BORs with 109 persons attending each screening without such communication or discussion or the effect of the free admission on the RPLs obligation to report the same. This position created a financial liability for RPL.

55. In response to the BORs filed with the distributors on June 14, Chris at E-One advised Ms. New that it would be best if the BOR did not include the dollar receipts or attendance on Saturday as it was not a real gross. Chris asked Ms. New to resubmit the box office report with Saturday listed as zero dollars and a note describing it was free screening. By June 26 Ms. New had not provided a revised BOR and Chris requested her to send the same. In response, Ms. New sent a BOR showing gross receipts for the screenings of $141.96 in reflecting the June 9 free admission. Notwithstanding the position taken by E-One, Ms. New asked it if it wished to revisit the original amount of the agreement of 35% ; E-One replied that it was "all good". This course of action illustrates that Ms. New was preferring the position of and more concerned about the interests of E-One than those interests of RPL. When she met with Mr. Grant on June 20, Ms. New was aware that one of the distributors did not require that RPL report revenue from a full house. She ought to have made such disclosure, rather than maintaining her position that RPL was required to report a full house.

56. Ms. New had no follow-up discussions with Alliance in respect of free admission and no revenues generated on June 9. She "four-walled" the BOR without any reasonable inquiry as to whether this was required. In light of the position taken by E-One, Ms. New ought to have followed-up with Alliance to explore RPL's obligations. Ms. New's conduct reflects a greater concern for the distributors than the interests of RPL.

57. We would be remiss in our role if we did not comment on the exemplary manner in which Ms. New performed additional duties and exercised concern for RPL and her staff on June 9. Ms. New was not scheduled to work. She went to the Film Theatre for approximately four to four and one-half hours on her own time without billing the Employer. She went out of her concern for her staff so that she could direct them how to perform the duties and the dos and don'ts for the free screening. She was concerned about the integrity of the monies to be received from weekend screenings and accountability to RPL. She instructed the staff not to take any

money and to take actual attendance. She advised the staff to acknowledge the camera. Throughout she expressed her concern that there be no discipline to her staff; she accepted full responsibility for events of Saturday with both Dr. Collins and Mr. Grant.

58. We believe that the Employer's failure to conduct an investigation into what it alleged was very serious misconduct involving moral turpitude contributed to significant discipline and this lengthy grievance process.

59. Mr. Grant says he was not conducting a disciplinary investigation when he met with Ms. New on June 20. He was only interested in obtaining the actual attendance numbers. However, following the meeting with Ms. New and her provision of additional information to him, the Employer concluded that Ms. New had engaged in very serious misconduct; that she was dishonest with and lied to the Employer. When Mr. Grant spoke to Ms. New, he made no reference to the specific email request that had been made by Dr. Collins nor did he ask her about the information she had provided to Dr. Collins, why she had provided the same or if she had any additional discussions with Dr. Collins concerning this information.

60. The Employer then used Mr. Grant's meeting with Ms. New to determine that she had been insubordinate and dishonest with him. This conclusion was reached despite the fact there was no direction or order requiring Ms. New to report the attendance.

61. There was no subsequent follow-up by the Employer to determine from Ms. New why she had provided Mr. Grant with the answers that she had in respect of his inquiries or obtain from her an explanation as to why she had provided the information to Dr. Collins or whether there was confusion about what was required. After Mr. Grant's meeting with Ms. New the Employer simply concluded that she had engaged in very serious misconduct. It ought to have met with her to inform her of its concerns and to offer her an opportunity to provide an explanation. Had such been done, things may well have gone much differently.

62. Given the nature of the meeting between Mr. Grant and Ms. New on June 20, there was no obligation on the Employer to advise her that she had the option of having Union representation present. This meeting was not for the purpose of imposing discipline. We accept

that Mr. Grant was simply trying to ascertain a number of people who attended the June 9 screenings and this matter was not disciplinary.

63. The last events giving rise to the discipline occurred on June 20; discipline was imposed on August 28, 2012. Although this is a substantial delay, we conclude that in all the circumstances the delay ought not to impact the discipline imposed. The delay, in part, is explained by the state of labour relations including on-going job action and the negotiation of a new collective agreement during this interval. We conclude that Ms. New did not suffer any prejudice as a result of the delay. The circumstances involve two discreet meetings and events in unique circumstances. There is no evidence that Ms. New's memory of events faded or was less clear due to the effluxion of time.

64. The Employer has failed to prove that Ms. New's conduct was dishonest, fraudulent, a fraud on the Employer, or insubordinate. The 3-day suspension is excessive.

65. It is our conclusion that Ms. New did fail to fully and fairly execute her obligations, and responsibility to represent and act in the best interest of RPL; rather she showed more concern for the interests of the distributors in relation to matters related to the June 9 screenings. She was less than forthcoming and fully responsive in her dealings with Dr. Collins and Mr. Grant. This might be considered as a minor breach of the trust obligations associated with her position.

66. We find that having regard to all the circumstances and Ms. New's lengthy discipline-free employment record, that the appropriate discipline would have been for Ms. New to receive a written reprimand.

67. This is not a circumstance in which it would be appropriate to direct the apology requested by the Union. No film industry protocol was established. Further, we question whether or not we have jurisdiction to make such an order. Even if we have such jurisdiction and the protocol had been established, we would be very reluctant to direct that an apology be issued. A directed apology appears to be an oxymoron.

68. The grievance is allowed. The 3-day suspension is set aside and in lieu thereof, the Employer shall place a written reprimand on Ms. New's file as of August 28, 2012. The Employer shall forthwith compensate Ms. New for any monetary loss she sustained as a result of the 3-day suspension.

DATED at Saskatoon, Saskatchewan this 29th day of January, 2014.

Kenneth A. Stevenson, Q.C.
Chairman

Katrina Swan, Employer Nominee

Elaine Ehman, Union Nominee