

Case Name:
**Toronto (City) v. Canadian Union of Public
Employees, Local 79 (Stamicar
Grievance)**

**IN THE MATTER OF an Arbitration
Between
City of Toronto, (the "Employer"), and
Canadian Union of Public Employees, Local 79, (the "Union")
AND IN THE MATTER OF the Grievance
of Iwona Stamicar Concerning her
Discharge, C12-12-0530**

[2018] O.L.A.A. No. 287

Nos. 891207, 10162-RR-18

Ontario
Labour Arbitration
Toronto, Ontario

Panel: Robert J. Herman (Arbitrator)

Heard: March 20, September 29, 2015; February
16, August 16, 2016; January
6, 20, December 15, 19, 2017; July 16, 2018.
Award: August 23, 2018.

(48 paras.)

Appearances:

FOR THE UNION: DOUGLAS J. WRAY, CHARLES VANVLIET, IWONA STAMICAR.

FOR THE EMPLOYER: PHILIP J. WOLFENDEN, PAULINE CHANDARPAUL.

AWARD

1 The grievor, Ms. Iwona Stamicar, was a prosecutor for the City of Toronto (the "City")

who was discharged for three reasons: leaving her assigned work location at Old City Hall to go to a Courts Administration Office when there was no work-related reason for her to have attended there; using her status as prosecutor to circumvent the required vetting process to improperly obtain documents to assist a paralegal in bringing a Reopening Application on behalf of his client; and giving the paralegal unauthorized access to Intake Court and judicial offices and providing a JP with documents for the purpose of the Reopening Application Hearing and accepting a lesser guilty plea. The City asserts that the grievor thereby committed serious breaches of her professional ethical obligations, undermining the confidence and trust the City had in her as a prosecutor, and that her discharge was accordingly justified. The Union, CUPE Local 79, responds that the grievor acknowledged she had acted inappropriately in certain respects by assisting a paralegal in circumventing the customary process for reopening a matter. However, the Union maintains, the grievor did not inappropriately leave her assigned work place, did not inappropriately assist the paralegal in having the matter reopened to accept a plea to a lesser offence, since the grievor was fulfilling a commitment to a plea deal reached earlier with the paralegal and the substituted plea was appropriate, did not grant unauthorized access to the paralegal to restricted areas, and did not act inappropriately in placing material before the JP that he needed in order to consider the matter and make his decision on the Reopening Application and suggested plea. The grievor's inappropriate conduct was relatively minor, asserts the Union, and in the circumstances, discharge was too harsh a penalty and she should be reinstated with compensation.

2 Before setting out the facts, some comment on credibility is warranted. The City witnesses were all credible. They testified in a straightforward manner, they did not appear to craft answers in order to support the City's position, and they readily acknowledged when they were uncertain about specific points or facts. Their recollection of the events in which they were involved appeared to be reasonably good, for the most part consistent with the evidence of other witnesses and documentary evidence. Further, almost all the testimony provided by City witnesses was acknowledged as accurate by the Union or the grievor, except in respect of certain relatively minor facts where the grievor's recollection was occasionally inconsistent with the version provided by a City witness; for example, whether both the grievor and the paralegal, or only the paralegal, had been standing near the Intake Counter in the Courts Administration Office at a particular point in time. I accept as accurate the evidence provided by City witnesses.

3 The grievor also testified in a straightforward manner, acknowledging when she was uncertain in her recollection and acknowledging how she had acted improperly. She did not seek to assign blame elsewhere nor to colour events to favour her position. For the most part, her evidence was internally consistent and consistent with other tendered evidence.

4 Some significant facts remain in dispute. For example, the parties dispute whether the grievor had actually ever made a plea arrangement with a paralegal months before the events in question took place and whether the grievor was assisting the paralegal in order to honour that arrangement. The grievor testified that a paralegal that she regularly worked with approached her one day at work to advise her that they had made a plea deal some

months earlier, when she had been the outside prosecutor dealing with such matters (i.e. the prosecutor assigned to be outside the courtroom to speak with defendants or their representatives about matters such as requests for adjournments, plea bargains, and so on), but because he had been tied up elsewhere when the case had been called, his client had been convicted in absentia on the original charge. The grievor maintains that the paralegal asked her that if he could get the matter reopened would she still honour that plea arrangement. The grievor testified that she accepted the paralegal's recital of what had happened as accurate, as she vaguely remembered what he was telling her, and told him she would honour the arrangement. The City maintains that no such arrangement was ever made and that the grievor fabricated this excuse to try to hide her participation in a plot with the paralegal to circumvent justice and proper court process, for the grievor was not even at work on the day she initially told the City she had made the plea arrangement outside the courtroom with the paralegal.

5 The City asks that I draw an adverse inference because of the failure of the Union to call the paralegal as a witness, and that I conclude that his evidence would not have supported the grievor's version of events. There was no suggestion, however, that the paralegal was not available as a witness and could not have been called by either party, whether in chief or in reply by the City after the grievor had testified. And as noted, the grievor's testimony was largely unchallenged by other evidence, and it is not apparent or likely that the paralegal's evidence would have contradicted the grievor's version of events rather than confirmed it, nor can it be said that the paralegal was the only potential witness in a position to provide relevant evidence of the events. In these circumstances, I draw no adverse inference against the grievor's testimony and her version of events from the failure of the Union to call the paralegal as a witness.

6 Although the grievor's Manager, who was the individual responsible for investigating what took place and who played a central role in the decision to terminate the grievor's employment, also was not called as a witness, it was agreed that she was ill and unable to testify, with no meaningful prospect that she would be able to do so in any reasonable time frame. In these circumstances, it is not asserted that any negative inference ought to be drawn from her failure to testify.

7 In assessing the grievor's credibility, I have considered a number of factors, including the following. First, for the reasons outlined in paragraph 3 above, I found the grievor to generally be credible in her testimony. Second, although in opening submissions the City asserted that the grievor and the paralegal were friends, suggesting that their relationship was why she had helped him, there is no evidence of any friendship or relationship between them other than a professional relationship of two people who interact through work. Third, there is no evidence that the grievor received or was promised any benefit for assisting the paralegal in getting the matter resolved consistent with the asserted plea deal. Fourth, the asserted plea deal was a plea that the grievor had accepted numerous times before in similar circumstances. Fifth, whether the matter was to be reopened and a plea to a lesser offence accepted by the court was a decision to be made by a JP and not by the grievor, so that the grievor did not have any control over the eventual result. Sixth, it is not easy to discern on the evidence any logical reason why the grievor might have

assisted the paralegal except for the reasons she gave to the City during the investigation and at the hearing. Had the grievor been fabricating a story to cover her involvement in any plot to circumvent justice, it seems rather unlikely she would have suggested to the City that she had initially made the plea deal on a day she was not at work.

8 For all these reasons, it is far more likely that the conversation with the paralegal occurred as the grievor testified. In balance, I conclude that the grievor was credible, and I do not conclude that she fabricated her version of events.

The Facts

9 The grievor began working for the City in May 2001, when she was hired as a prosecutor. City prosecutors prosecute charges under municipal bylaws and regulations and under provincial statutes, such as alleged contraventions of the Highway Traffic Act or the Trespass to Property Act. Prosecutors occupy important positions that are integral to the proper running of the courts and the judicial system. They must act, and be seen to act, in a professional manner at all times.

10 The grievor worked out of Old City Hall. At Old City Hall at the time, there were generally two prosecutors on duty for each courtroom, one assigned duties outside the courtroom handling a variety of matters, such as negotiating or accepting pleas and dealing with requests for adjournments, and one inside the courtroom who appeared before the court as required.

11 For some time prior to the events in issue, City prosecutors also attended regularly at a Courts Administration Office at a nearby location, 137 Edward Street, for First Appearance matters. The Courts Administration Office includes an Intake Office open to the public, and a restricted area only accessible through a coded security door. Prosecutors, including the grievor, then shared an office in the restricted area. JP's offices were also in the restricted area, and defendants and/or their representatives and prosecutors appeared before them for purposes such as making plea bargains or setting dates. Amongst other matters, JP's at Edward Street dealt with what are called Reopening Applications, applications whereby convicted defendants seek to have their matter reopened and the original conviction quashed. A Reopening Application is technically an option only available to a defendant within 15 days of when a defendant becomes aware of the conviction in question, provided there has not already been payment of any fine imposed by the Court. If these conditions are not met and the defendant wants to set aside the original conviction, s/he must file an appeal. Prosecutors have no role in Reopening Applications, as it is a JP who reviews these applications and decides whether to grant the requested order, but prosecutors do accept plea bargains for presentation to a JP for endorsement. When the grievor worked in First Appearance Court at Edward Street, on occasion JP's would come and ask her if she would entertain a guilty plea to a particular offence if the JP were to direct that a matter be reopened, even though the defendant was not technically entitled to have his/her matter reopened. If the grievor responded that she would accept a particular plea, the grievor and the defendant, or his/her representative, would then attend in the JP's office, where the JP would order the matter reopened and a guilty plea to the agreed upon charge would be entered.

12 The use of the Edward Street location for First Appearance Court ended around April 2012, however, and as of that time the grievor no longer had any official workrelated reason to be there.

13 Turning to the specific events in question, sometime in the late spring of 2012, the grievor was approached in Old City Hall by a paralegal, Brian Jones, a person who regularly appeared at that courthouse on behalf of defendants. Although the grievor had no personal relationship with Jones, she had come to know him quite well professionally through his many court appearances or attendances at Old City Hall over the years. Jones asked the grievor if she was still willing to honour a plea deal that he asserted they had made many months before, when she had been the prosecutor handling matters outside the courtroom on the date of a trial of Jones' client, and another prosecutor, whom he identified by name, had been working inside the courtroom. Jones told the grievor that his client had been charged with a violation of Section 144 (9) of the Highway Traffic Act, failing to obey a traffic sign, which carried a fine of \$85.00 and three demerit points, and that they had agreed months earlier to a plea arrangement whereby Jones' client would plead instead to a violation of Section 170 (12), interfering with the movement of traffic, which carried the same fine but only two demerit points. Jones said that neither he nor his client had been in attendance inside the courtroom when the case was called, because Jones had been tied up in another courtroom at the relevant time, with the result that his client had been convicted in his absence. Jones told the grievor that he thought he could get the matter reopened and asked if he could, would she still endorse the earlier plea agreement.

14 The grievor vaguely recalled that she had previously made a plea agreement with Jones as he described, and the plea deal was one she would often accept in similar circumstances. Since the particular plea was something the grievor would often agree to, and as she knew Jones from dealing with him frequently in the past, she simply accepted as accurate what Jones told her. She did not then or later attempt to independently verify any of the facts asserted by Jones, such as whether she had in fact been one of the prosecutors at court on the original trial date when the conviction was registered, whether the defendant had in fact been convicted in his absence, or whether Jones had in fact even been on the record as representing the defendant on the date of trial. She simply accepted as accurate Jones' version of what had transpired.

15 The grievor was aware that a Reopening Application was no longer technically available for Jones' client, as the fine had apparently already been paid and more than 15 days had apparently passed since the defendant had become aware of the conviction, and she knew that an appeal in those circumstances was the correct procedure. At the same time, the grievor herself had prior experience with JP's who had ordered matters reopened in order to accept lesser pleas when reopening a matter was not technically available, and a Reopening Application was a much faster and less expensive procedure for both a defendant and the City. She also understood that the procedure suggested by Jones was more predictable than simply appealing the conviction, since a JP could be asked in advance if s/he would agree to reopen the matter and accept the lesser plea. The grievor told Jones that she would honour the previous agreed upon plea deal if he could get the

matter reopened. The two of them agreed to go together at some point to the Courts Administration Office at Edward Street, where Reopening Applications were filed and where JP's considered such applications, to see if Jones could get the matter reopened and to then arrange for the lesser plea to be offered and accepted.

16 Over the next several months, Jones approached the grievor several times so they could coordinate their schedules to work out when they might both be available to go over to the Edward Street Courts Administration Office. Ultimately, the grievor and Jones agreed that on August 17, 2012 they would both go there to get the matter addressed.

17 On August 17, 2012, after the grievor finished her court work at Old City Hall, she and Jones met and walked over to the Edward Street offices, to see if the matter would be reopened and a plea accepted that they had agreed upon earlier. Jones told the grievor that he had already spoken about the matter to the JP who would be there that day.

18 What typically happens at the Courts Administration Office is the following. When someone attends there to file a Reopening Application, they first go up to a clerk sitting at an Information Booth in the Intake Office. This Information Booth Clerk is responsible for finding out what customers want, and s/he provides information about the type of application they might wish to file and about how to make certain applications, and about how to pay a fine, and s/he generally assists the public in how to proceed. When defendants previously convicted of offenses, or their agents, wish to file a Reopening Application, the Information Booth Clerk also determines whether they are entitled to do so, by assessing whether they are seeking to file such an application within 15 days of the defendant becoming aware of the conviction, and whether the levied fine remains unpaid. If satisfied that both these conditions for filing a Reopening Application are met, the clerk then gives the defendant and/or agent the appropriate forms for making the application, if they do not already have them, and a sequential number to wait until it is their turn to be called for further processing of the application. When their number is later called, they go up to an Intake Counter in the same general area to speak to an Intake Clerk. By then, they should either have filled out the forms provided to them by the clerk at the Information Booth, or they would have brought the forms with them to the Intake Office already filled out. The Intake Clerk reviews all the forms to ensure they are filled out properly, calls up on the computer the records of what occurred previously with the case, and if everything is in order, fills out two forms, a Record of Reopening Application and a Certificate of Striking Out Conviction. The Intake Clerk then asks a different clerk, the Document Retrieval Clerk, to retrieve from the file room the original documents related to the offense and the previous court proceedings. The Document Retrieval Clerk does not sit in the public access area of the Office, and members of the public cannot speak directly to this clerk. The retrieval of the original court documents by this clerk typically takes about 10 minutes, and once the requested documents have been provided to the Intake Clerk, s/he logs the application into the Intake Log and combines the original documents obtained from the Document Retrieval Clerk with the application forms or documents provided by the applicant or the person acting on his/her behalf. The application material is then ready to be reviewed by a JP.

19 JP's are assigned to one of the JP offices in the restricted area of the Courts

Administration Office. The Reopening Application file is either taken by a clerk to one of these JP's or the JP comes out from his/her office to get the file. The JP reviews the file, generally without any appearance by defendant or prosecutor, decides whether to grant the Reopening Application, and endorses the record accordingly. Sometimes there are appearances before a JP in his/her offices to address an application, in which case an audio recording device in the JP's office is supposed to be manually turned on by the JP to create an audio recording of the proceeding. After the JP makes the decision on the application, the file is returned to the Intake Clerk, who updates the application material and returns the original documentation, together with any additional documentation resulting from the JP's review and decision, to the Document Retrieval Clerk.

20 This process was not followed by Jones, the grievor, or for that matter, either of the clerks approached by Jones or the grievor. Jones did not first go up to the Information Booth to have the clerk there assess whether he was entitled to file a Reopening Application on behalf of his client. Nor did Jones get a sequential service number from the Information Booth Clerk. Instead, Jones went directly up to one of the Intake Clerks at the Intake Counter, while the grievor lingered a few steps behind him. The Intake Clerk working at the counter knew Jones from the numerous times he had previously attended in the Intake Office. She did not ask him, as she should have, if he had a number to be called for service, nor did she ask him, as she should have, why he hadn't gone to the Information Booth first to have his Reopening Application screened and to receive a number if it was in order. Jones gave the Intake Clerk two forms he had brought with him, and he asked her for the entire package of Reopening Application forms. The Intake Clerk provided Jones with the requested forms. Although she was standing near Jones and could hear the conversation with the Intake Clerk, the grievor said nothing.

21 While Jones was filling out the forms given him by the Intake Clerk, the grievor then went to the security coded door, the same door she had used when she had been appearing at Edward Street in First Appearance Court some months earlier, and punched in the security code and entered the restricted area. She was not at the time required for any work-related reason to be in the restricted area. The grievor went up to where the Document Retrieval Clerk was sitting, whom she knew from when she had been working out of this office. The grievor asked that clerk to retrieve the original police or court documents related to the charge and conviction involving Jones' client. Although a prosecutor is entitled to ask to see such documents in other contexts, such as when they are in court or preparing for a court appearance, the grievor was not authorized in these circumstances to ask the Document Retrieval Clerk to retrieve and provide the documents in question, since prosecutors had no official role in Reopening Applications.

22 The Document Retrieval Clerk was not authorized or permitted to provide the documents to anyone other than to another clerk or a JP. The clerk did not ask the grievor, as she should have, any questions about the propriety of the request but instead retrieved and produced the documents to the grievor.

23 With Jones still sitting in the public area, the grievor then went into one of the JP offices, where she found the JP whom Jones had indicated he had already spoken to about the case. The grievor explained to the JP why she was there, because of a previous

plea bargain concerning Jones' client that had not been followed, and advised that she would accept a guilty plea to the lesser Section 170 (12) offence if the JP would consider ordering that the matter be reopened. She handed the JP the original court documents she had just been given by the Document Retrieval Clerk.

24 The JP looked over the material provided by the grievor and indicated that he would both grant the order to reopen the matter and accept the suggested guilty plea. The grievor then left the JP's office and the secure area and returned to the general Intake Office to get Jones, as they now both had to appear before the JP. The two of them went back through the security coded door into the JP's office. Jones handed the grievor the Reopening Application materials he had filled out or brought with him. The grievor did not read or review them but handed them to the JP. The JP should have turned on the audio taping machine to record this appearance before him, but whether he did or not, no recording was made of the proceeding. During the subsequent investigation of these events, the JP apparently acknowledged that he should have recorded the appearance but did not. In any event, after reviewing the material before him, the JP indicated he was granting the reopening of the matter. The grievor then advised that she anticipated a guilty plea, and Jones indicated that his client would be pleading guilty to a violation of Section 170 (12) of the Highway Traffic Act. The JP endorsed the record accordingly and handed the file documents to the grievor, and asked that she return them to the Intake Office staff for processing.

25 Jones then left the Courts Administration Office at Edward Street, while the grievor returned to the public area and returned all the file documents to the Intake Clerk who had earlier provided the application forms to Jones, and told her what the JP had ordered and that he had asked her to return the documents to her for processing. The Intake Clerk did not immediately review the documents handed to her by the grievor and she asked no questions of the grievor. The grievor then also left the building, returning to Old City Hall.

26 The grievor received no payment or benefit of any kind from Jones or the defendant, or anyone else, or promise of the same, for her actions with Jones that day. At the time, she did not think she had acted improperly in any way.

27 Sometime later that day, the Intake Clerk looked over the documents handed to her by the grievor for re-filing. She was concerned for a number of reasons. The process engaged in by Jones and the grievor seemed quite unusual to her, as prosecutors were not supposed to come to her about an individual case, as the grievor had. On review of the documents, it didn't appear that the defendant was entitled to apply for reopening of his case since he had paid the fine for the conviction over a year earlier. The Application had not been presented to a clerk for review as to whether it was proper on its face, and for recording on the Intake Log, and it was not clear how or why the matter had been processed through to a JP. Some of the forms filed by Jones were not properly completed, because they had not been signed by the defendant where required, or had not been sworn before a Commissioner where required, or because parts of one of the forms were either not filled out at all or were filled out improperly. All these concerns led the clerk to report the matter to her Team Lead, who in turn took the clerk to see his supervisor.

28 The City investigated the incident. As part of its investigation, on September 12, 2012, the Manager of Prosecutions responsible for Old City Hall prosecutors, together with another Manager of Prosecutions from a different area of the City, met with the grievor and her Union representative, and interviewed the grievor. This was the first time the grievor was made aware that the City had any concerns about what had occurred. She explained to her Manager that she was following through on a deal previously made with Jones, to accept a guilty plea to a section 170 (12) violation, on a day when she had been the outside prosecutor for the courtroom where the defendant was to appear. The grievor said that Jones had assured her that the case would be reopened, and had asked that she go with him to Edward Street to honour her plea agreement once the matter was reopened. The grievor acknowledged that she had entered the secure area of the Intake Office, using the code she had used when doing First Appearance Court there, and acknowledged that she had then asked the Document Retrieval Clerk to pull the original documents. The grievor also explained that she had spoken with the JP, and that the JP had gone through the documents and had indicated that he was prepared to reopen the matter and accept the plea. When asked if the Reopening Application hearing in the JP's office had been recorded, the grievor responded that it had been, as she had seen the JP press the button on the audio recording machine. The grievor's Manager then advised the grievor that she had been on vacation on the day of the original trial, inferring that she could not have made any plea deal with Jones that day. The grievor responded that she may have mixed up the defendant's name with someone else, and that she did not remember the date that she accepted the deal. She maintained that she had just wanted to honour the plea arrangement she believed she had made. Although she acknowledged that she had breached the City's Conflict of Interest policy, and apologized, she also noted that she had no vested interest in the matter.

29 After investigating, the City concluded that a number of errors had been made by a number of individuals. It concluded that the Document Retrieval Clerk should not have retrieved and provided the original documents to the grievor when she had asked the clerk to do so, as these documents are only to be made available to other clerks or JP's, and that Jones and the JP had both acted improperly. It disciplined the Document Retrieval Clerk by imposing a suspension (the evidence does not disclose further details of the suspension), and reported Jones and the JP to their respective regulatory governing bodies (the evidence does not disclose further details about what, if anything, happened thereafter with these individuals, except that the JP in question remains an active JP). The City also provided instructions to Courts Administration Clerks that they were not to allow prosecutors in secure areas unless they had appointments with someone authorized to work there, and they were not to provide any court documents directly to prosecutors. The security code on the door to the restricted area was also apparently changed.

30 With respect to the grievor, she was initially suspended with pay on September 19, 2012, and subsequently discharged on November 15, 2012.

31 The discharge letter sets out three grounds for the discharge. First, leaving her assigned work location and going to 137 Edward Street without authorization on August 17, 2012 at the behest of Jones when there was no work-related reason for her as a

prosecutor to be there. Second, on that same date using her status as prosecutor to circumvent the required vetting process and improperly obtain documents to assist Jones in bringing a Reopening Application, when had the proper process been followed and had the Intake Clerk vetted the application, the application would not have proceeded. Third, the grievor gave Jones unauthorized access to the Intake Court and to judicial offices, and provided the JP with the original Certificate of Offence, along with a Court Record of Guilty Plea document, for the purposes of reopening the matter. The City asserted that the grievor had breached her professional obligations, her oath to the City, and the City's Conflict of Interest policy, completely undermining the confidence and trust the City had in her.

Submissions

32 The City asserts that the grievor engaged in serious wrongdoing, compounded by her failure to honestly acknowledge and accept her misconduct. It submits that the grievor and Jones engaged in a scheme to gain a benefit for one of Jones' clients that he was not entitled to, in effect to "fix" his ticket, and that the grievor engaged in numerous activities that she knew at the time were improper. The explanation that Jones' and the grievor had previously made a plea arrangement for his client is not credible, maintains the City, since the grievor claimed when interviewed that she had agreed to the plea arrangement at court on the trial date when she was outside counsel, yet she had not been working the day in question and could not have made any plea deal with Jones that day. Further, submits the City, even on the grievor's version of events, she took no steps whatsoever to verify what Jones told her had happened, but simply accepted his claim that she had made such a plea deal. It submits that the Union's failure to call Jones as a witness should lead to an adverse inference being drawn against the credibility of the grievor's version of events. It notes that the grievor admits that she knew that Jones had already spoken to the JP who would be at Edward Street on the day they went over there, confirming that what was to take place was part of a scheme to get around legal requirements and circumvent the mandatory process for a reopening application. Then on the day in question, the City asserts, the grievor acted improperly in numerous respects. She had no work-related purpose for going with Jones to the Courts Administration Office at Edward Street, and she knew that as prosecutor it was improper for her to play any role in a Reopening Application. Further, submits the City, the grievor knew at the time she participated in the scheme that Jones' client was not entitled to have his case reopened, yet she facilitated just that. The City also submits that the grievor used her position as prosecutor to improperly avoid the customary screening of applications and to avoid waiting in the queue, to improperly obtain court documents, to improperly avoid the matter being recorded in the Intake Log, to improperly enter the secure restricted area, and to improperly speak to the sitting JP to ask that the matter be reopened and a guilty plea accepted. The City asserts that the grievor even now has not accepted responsibility for her misconduct, as she still maintains that for the most part there was nothing wrong with what she did, since although she didn't follow proper procedure throughout, she was simply honouring a plea deal previously made with a paralegal, thereby saving the defendant and taxpayers the cost and court and personnel time involved in filing an appeal. In these circumstances, the City submits that the grievor engaged in serious

misconduct, breached the Conflict of Interest Policy and her professional duties and obligations as a prosecutor to be fair, impartial and act within the law, and the City will never be able to trust her to properly perform her job again. It submits it was justified in discharging her and there is no reason to exercise my discretion to substitute a lesser penalty.

33 The Union acknowledges that the grievor did not follow proper process, but asserts that she committed no misconduct meriting discipline, and any City response should have been non-disciplinary, such as a counselling letter. It submits that she did not breach any professional or ethical standards or policies, and did not commit any moral breach. The Union maintains there was no "ticket fixing" scheme on the evidence, and in any event, this ground was not asserted or relied upon in the termination letter, nor alleged in the City's opening submissions. The Union asserts that there was no evidence that the grievor had any improper motive, or that she received any gain or benefit, or promise of gain or benefit, from her actions. All she did, submits the Union, was to assist a paralegal who she has dealt with before in achieving the same result that could have been and likely would have been achieved through the appeal process, in an effort to live up to what she believe was a plea arrangement she had earlier made with the paralegal. The steps she took, submits the Union, did not follow proper procedure in all respects, but the grievor was motivated by a desire to fulfill the plea bargain she believed she had made, without undo extra cost to the defendant or taxpayers, and without unnecessary use of court resources. The Union points out that the grievor did not act surreptitiously and that everything was done in the open, that she did not participate in obtaining the forms for the Reopening Application and did not fill them out or review them, and that she only placed the appropriate information before the JP and accurately explained to the JP why she was there. It is not disputed it was the JP who was responsible for reviewing the Reopening Application and it was solely his decision whether to order the matter reopened and whether to accept the proffered guilty plea, and that it was the JP that was responsible for any failure to record the hearing. There is no evidence, nor any reason to infer, submits the Union, that the grievor attempted to improperly influence the JP, nor any evidence or logical inference that the grievor compromised the integrity of the judicial system in any way. The Union also notes that the City amended its procedures after these events, only then changing the security lock code and only then notifying staff not to let prosecutors into the secure area of the office and not to retrieve or provide court documents to them in similar circumstances. In the alternative, the Union asserts that some lesser discipline should be substituted for the discharge, and in the final alternative, if I determine that reinstatement as a prosecutor is not justified, it submits that I should reinstate the grievor to some other position with the City.

Decision

34 The first ground set out in the termination letter as the basis of the termination was that the grievor without authorization on August 17, 2012 left her assigned work location at Old City Hall to attend at 137 Edward Street at the behest of the paralegal Jones, without any work-related reason for her to attend there. However, the grievor had finished all her assigned duties at Old City Hall for the day and was not expected to still remain at Old City

Hall for the balance of the work day, and she did not neglect any of her duties and responsibilities that day at Old City Hall. The grievor was not as a general matter prohibited from attending at the Edward Street Courts Administration Office, and there was nothing improper in her leaving Old City Hall on August 17, 2012 when she did, nor anything improper in her mere attendance at Edward Street with Jones.

35 The remaining grounds for her termination concern what the grievor did after she went with Jones to the Courts Administration Office. While a number of her actions there do not constitute improper conduct, others do.

36 Insofar as the assertion that the grievor acted improperly in helping Jones with a Reopening Application and in agreeing to the substitution of a plea to a lesser offense, the Reopening Application was filed by Jones, and not the grievor, and the lesser plea accepted by the grievor was of the sort she had accepted before in similar circumstances. There is no evidence to suggest her acceptance of the lesser plea was not appropriate or within the reasonable exercise of the grievor's prosecutorial discretion to make such an agreement. The grievor had been approached by a paralegal that she dealt with regularly at court, with whom she had had regular and numerous past dealings. He purported to remind her of an arrangement that he told her she had agreed to some months before, and asked if she would honour it and assist him in getting the matter reopened and the agreed upon plea accepted. She had no good recollection of having made the plea arrangement at court, but she vaguely recollected having done so. It is hardly surprising that a prosecutor would not clearly remember a particular plea arrangement agreed to months earlier, when she would have made many, many plea arrangements with defendants or their representatives over such a period. Since she worked regularly with Jones at the courthouse, the grievor simply accepted Jones recital of what had earlier happened as accurate.

37 However, since she didn't distinctly remember having made the asserted previous agreement with Jones, the grievor should have attempted to verify the accuracy of what Jones was telling her, such as checking the court records to see what had transpired on the day in issue. Had she then done so, the events that led to her discharge might not have occurred. At the same time, there was nothing inappropriate per se in her decision to honour a plea deal of the sort Jones indicated she had previously made with him. Although Jones' client was not technically entitled to make a Reopening Application, the grievor was fully aware of this, as she acknowledged to the City when interviewed and in her testimony, and the grievor knew from first-hand experience that JP's nevertheless did occasionally direct that matters be reopened when fines had already been paid and/or it was more than 15 days after a defendant became aware of the conviction. Since it would be a JP that would make the decisions whether to reopen the matter and to accept any plea arrangement, the grievor believed she was just agreeing to honour what she had agreed to earlier and to assist Jones in getting the matter expeditiously before a JP.

38 With respect to the numerous deficiencies or improprieties in the documents filed by Jones as part of his Reopening Application, the grievor was not involved in filling out or reviewing any of the documents, and it was not her decision to approve or reject the application. It was Jones who bypassed the Information Booth Clerk, it was Jones who

either had the application forms with him or obtained them from the Intake Clerk, and Jones who filled them out. The grievor neither helped Jones to fill out the forms nor reviewed them prior to their presentation to the JP.

39 With respect to the grievor's return to the public access area to get Jones and bring him back so he could appear before the JP, the JP was awaiting their appearance before him to speak to the Reopening Application and the proffered plea, so there was nothing improper in the grievor bringing Jones into the JP's office at that point. Nor did the grievor act improperly because of the failure of the JP to have recorded the hearing in his office. It was the JP's responsibility to ensure that a recording was made of any proceeding before him, not the grievor's, and the fact that the grievor mistakenly thought the hearing had been recorded and told the City this during the investigation does not constitute misconduct on her part. Nor did the grievor act improperly in returning the material to the Intake Clerk and/or the Document Retrieval Clerk after the hearing, since the JP had requested that she do so.

40 Other steps that the grievor took in providing assistance to Jones were improper though. The grievor was not responsible for Jones "jumping the queue" and avoiding the Information Booth and the screening process, nor for his going directly to the Intake Counter. The grievor was, however, responsible for using her position to enter the restricted area of the Intake Office, and once there, for asking the Document Retrieval Clerk to retrieve and provide her with the original court documents. With respect to the former action, while there was no official ban of City prosecutors from the restricted area since prosecutors had stopped appearing in First Appearance Court several months earlier, the grievor had no official role there that day, and would have or should have known that she was therefore not entitled to then use the security code to access the judicial offices. And with respect to the latter action, even though a prosecutor in other circumstances is entitled to obtain and review original court documents, such as in preparation for court or for an actual appearance in court, since the grievor had no assigned duties at the Courts Administration Office, she would have or should have known that she was not entitled to direct a Document Retrieval Clerk to retrieve original court documents for the reason she required them. Her actions in these respects were improper.

41 While there is nothing improper in a prosecutor speaking to a JP about whether a plea to a different charge would be accepted if the JP decided to reopen a matter, the grievor had no reason for being in the JP's chambers that day other than to facilitate Jones' Reopening Application and the substitution of a lesser plea for his client. The grievor's actions were instrumental in enabling Jones to have a JP consider his client's application when Jones might not otherwise have been able to get this application considered by a JP. A defendant who was convicted of a specific offense was able to get his guilty plea changed to a lesser plea more quickly and less expensively than would otherwise likely have been the case. Jones and his client received preferential treatment in terms of access, expedition, and cost of process because of the grievor's inappropriate actions.

42 At the same time, there was nothing surreptitious or misleading about the grievor's actions, and she acted in plain view. None of the clerks she spoke to initially considered

her actions at the time sufficiently problematic to raise any concerns with others, she exercised her prosecutorial role properly insofar as she appropriately exercised her discretion whether to accept the lesser plea, and she properly and accurately explained to the JP why she was there. The JP did not consider her appearance or inquiry improper in any respect, as he allowed her appearance before him and appears to have considered the application and plea on their merits. There was never any attempt by the grievor to circumvent the adjudicative decision-making role or to mislead the court in any respect, nor does it appear that she did so in any respect.

43 Indeed, it was only after the events were over, that the same clerk that had previously provided Jones with the application material reviewed the file materials and raised concerns about what had occurred, and it was only after these events that the City made clear that clerks were not to interact with prosecutors as they had that day and that prosecutors were not to enter the secure area any more. The grievor's actions still resulted in the appropriate judicial officer reviewing the appropriate documents and making the decision to reopen and accept the plea. Justice was still meted out by the appropriate official and the record accurately endorsed.

44 When the grievor was interviewed by the City about a month later, although she initially stated that she had made the plea arrangement with Jones as Jones had told her she had, when the City pointed out that she had not been at work the day in question, she acknowledged that her recollection was not that good. She admitted she should not have done what she did and apologized, but repeated that she had wanted to follow through with the plea arrangement. She acknowledged that she had breached the protocol or process for Reopening Applications.

45 Providing preferential treatment as she did was improper. Although the grievor believed that she was honouring a previous plea arrangement and she did not act as she did because of any personal benefit, or promise or expectation of benefit, she did not act professionally or properly in the circumstances, and she acted in a manner inconsistent with the proper execution of her duties and obligations as a City prosecutor.

46 It is not apparent, however, that she brought the administration of justice into disrepute or undermined the integrity and perceived integrity of the administration of justice to a meaningful extent, or that she will not properly be able to exercise her duties as prosecutor again or that she can never again be trusted to act as a prosecutor. This was an isolated event engaged in by the grievor because she believed she was honouring a plea deal already made. She acted inappropriately in certain respects in seeking to honour that arrangement, with the result that a paralegal obtained a result faster and with less cost than would otherwise have been possible, but she did not mislead anyone or provide incorrect information, and she was not responsible for the decision to grant the reopening or to accept the plea to a different offense. There is little reason to fear the grievor will again inappropriately facilitate preferential treatment for anyone by bypassing regular process.

47 Serious discipline was justified for the grievor's knowing failure to follow proper Courts Administration protocol and process, and for giving Jones preferential treatment,

but discharge was too severe a penalty. A lengthy suspension is merited, one that takes into account the importance of the grievor's role and her duties and responsibilities. The discharge is nullified, and a suspension without pay of eight weeks substituted instead. The grievor is to be reinstated to her position as a prosecutor, without loss of pay except for the eight week suspension, with full seniority and other benefits, subject to the usual principles of mitigation.

48 I remain seized for any matters still arising from the grievance or the arbitration, including any outstanding remedial issues.

Dated at Toronto this day of 23rd August, 2018

Robert J. Herman - Arbitrator