

Date: 20050420

Files: 166-2-31989
166-2-32090
to 32092
166-2-32994

Citation: 2005 PSLRB 37



*Public Service Staff
Relations Act*

Before an adjudicator

BETWEEN

STEVE TWIDDY

Grievor

and

TREASURY BOARD

(Department of Human Resources and Development Canada)

Employer

Indexed as *Twiddy v. Treasury Board (Department of Human Resources and Development Canada)*

In the matter of grievances referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*.

REASONS FOR DECISION

Before: Léo-Paul Guindon, Adjudicator

For the Grievor: Sonia Pylyshyn, Public Service Alliance of Canada

For the Employer: Neil McGraw, Counsel

Heard at Toronto, Ontario,
January 29 and 30 and July 13 to 16, 2004.

REASONS FOR DECISION

Grievances referred to adjudication

[1] The grievor, Steve Twiddy, filed five grievances against his employer's decision to discipline him:

- PSSRB File No. 166-2-31989

A two-day financial penalty for the reasons stated in the August 23, 2001 letter of discipline (Exhibit E-6).

- PSSRB File No. 166-2-32090

A four-day suspension without pay for the reasons stated in the May 6, 2002 letter of discipline (Exhibit E-19), which was reduced to three days at the second level.

- PSSRB File No. 166-2-32091

He was sent home without pay on April 15, 2002.

- PSSRB File No. 166-2-32092

A three-day suspension without pay for the reasons stated in the June 10, 2002 letter of discipline (Exhibit E-11).

- PSSRB File No. 166-2-32994

A 10-day suspension without pay for the reasons stated in the July 7, 2003 letter of discipline (Exhibit E-12).

[2] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, I continue to be seized with these references to adjudication, which must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 ("the former Act").

Summary of the evidence

[3] At the time when Mr. Twiddy presented his grievances, he worked as a Claim Officer (PM-02) at the Scarborough office of the Department of Human Resources Development Canada (HRDC). In his position, he processed Employment Insurance claims submitted by claimants. He had been employed with HRDC since 1970. As a result of a government reorganization announced on December 12, 2003, the grievor's position was moved from HRDC to the Department of Human Resources and Skills Development (HRSD).

[4] At the outset of the hearing, the parties' representatives informed me that Mr. Twiddy had filed a complaint with the Canadian Human Rights Commission (CHRC) on September 4, 2003, alleging that the employer had discriminated against him by treating him adversely and failing to accommodate him based on his disabilities (Exhibit G-9). That complaint is related to the same facts as those at the source of his five grievances listed above.

[5] The investigator assigned to the file by the CHRC outlined in his investigation report, on November 4, 2003, that alternate redresses were available through the public service grievance process:

The allegations in the complaint are ones that can be addressed through the public service grievance process, and the complainant is prepared to proceed with a grievance before having the complaint dealt with by the Commission. As the grievance process is normally completed within a reasonable period of time, it is therefore recommended that the complainant be asked to exhaust this procedure before pursuing the matter under the Canadian Human Rights Act.

[6] The investigator made the following recommendation:

It is recommended, pursuant to paragraph 41(1)(b) of the Canadian Human Rights Act, that the Commission not deal with the complaint at this time because:

- *the complaint could more appropriately be dealt with according to a procedure provided for under another Act of Parliament. At the termination of this procedure, or if it proves not to be reasonably available, the Commission may exercise its discretion to deal with the complaint at the complainant's request.*

[7] The parties recognized that, in the circumstances, I have jurisdiction to hear the grievances and to render a decision.

PSSRB File No. 166-2-31989

[8] The evidence showed the health problems suffered by Mr. Twiddy. Since 1998, the grievor's family doctor has been Dr. Ted Cait. Since July 2002, he has complained to Dr. Cait of gastro-intestinal symptoms, with episodic nausea and diarrhoea. A diagnosis of generalized anxiety disorder was confirmed by Dr. Thomas Ungar, of North York General Hospital, who was requested to proceed to an independent medical examination by Dr. Chernin. Dr. K. Sealy, from the Ajax and Pickering Health Centre, stated that on November 29, 2002, the grievor suffered from (Exhibit G-8):

- mild anxiety disorder secondary to stress at work;
- alcohol abuse; and
- possibility of a personality disorder.

[9] The testimonies of Dr. Cait and the grievor explained the anxiety disorder symptoms and the alcohol problem, which was varying. The evidence demonstrates that financial problems increased the grievor's anxiety, with occasional diarrhoea and vomiting.

[10] Dr. Ungar's reports, filed by the grievor, showed that the alcohol abuse appeared to be in remission as of January 2003 (Exhibit G-8). The grievor received an assessment from the Donwood Institute, on April 2, 2003, to undergo an intensive program to control his alcohol abuse. At the time of the hearing, he had not been able to follow a program, but he has made regular telephone calls to the Institute to be able to get into one. On February 2, 2002, Dr. Cait was providing alcohol therapy to the grievor and noted that the grievor would try to get into a program at the Pinewood Institute. From the grievor's testimony, I understand that he was not able to get into a program at the Pinewood Institute.

[11] A two-day financial penalty was imposed on the grievor for the reasons stated in the August 23, 2001 letter (Exhibit E-6):

On August 22, 2001, you were required as a Designated employee to be at your work station performing your duties for a half day, (authority for absence on annual leave having been previously granted for a half day on that date.)

You failed to obey the direction of your manager Mr. Peter Pantaleo to perform your duties as required, in that you were absent from your work station without authorization for significant periods during your assigned working hours.

[...]

[12] The grievor was assigned, as a designated employee, to assume essential services on August 22, 2001 (Exhibit E-1). Designated employees are expected to report to work to perform duties in the event of a strike. Reminders were sent to inform employees of the status and duties of the designated employees and that they were to attempt to cross the picket lines (Exhibits E-2 and E-3).

[13] On August 22, 2001, picket lines were in place in front of the Scarborough office. The designated employees had to show up at the picket lines and report to their managers to be escorted through the picket lines and into the office. The grievor testified that he showed up shortly after 8:00 a.m. on that date; his normal hours of work are from 8:00 a.m. to 4:00 p.m. On August 22, 2001, he had to work only half a day because his supervisor, Peter Pantaleo, authorized half a day of leave for the afternoon of August 22, 2001.

[14] In picket-line situations, designated employees have to wait in a specific area, in line, for their supervisor to escort them through. Mr. Twiddy's testimony demonstrated that there was a delay of 30 minutes to three hours before they could be escorted through, according to the circumstances. The local union president, Ian Shaw, and two co-workers corroborated the fact that the designated workers had to show up at a specific area at the time they began their shift. Mr. Pantaleo testified that he considered the time they spent waiting to be escorted in counted towards their hours of work. The grievor stated that he got off the picket line to get a coffee between 8:00 a.m. and 10:30 a.m., and returned to be escorted in by Mr. Pantaleo shortly before 10:30 a.m.

[15] Stan Wojick, Director of the Scarborough office, saw the grievor in the building, going to the bathroom, shortly after 10:30 a.m. At about 11:15 a.m., Mr. Pantaleo went to the grievor's desk to speak to him but he was not there. He found him taking a

break on the picket lines and escorted him through again at around 11:30 a.m. He explained to him that he was to put in 3.75 hours and that he should work until 2:00 p.m. (Exhibit E-13). During that conversation, Mr. Pantaleo understood that the grievor told him that he was first escorted in between 8:15 and 8:30 a.m. by another supervisor and that he was finishing a break at 10:30 a.m. He noted that the grievor indicated to him that he was on break at 11:15 a.m., but did not respond when he was questioned about taking a second break. For his part, the grievor testified that he told Mr. Pantaleo that he had reported to work shortly after 8:00 a.m., at the designated area beside the picket lines, that he was first escorted in at 10:30 a.m. and that he took a break at around 11:15 a.m.

[16] The letter of discipline (Exhibit E-6) specified that the grievor did not perform his duties as required by Mr. Pantaleo. The notes of Mr. Pantaleo (Exhibit E-13) stated that after he escorted the grievor through the picket line for the second time at 11:30 a.m., he requested him to perform half a day's work in the following words:

... I told him that he was to put in 3.75 hours, and therefore, advised to work at his desk until 2:00 p.m. today...no more breaks as he had already taken more than he was entitled. I explained to him that he is designated and must be at work if not on annual leave and if not, he could be subject to a monetary penalty. He understood.

[17] Following advice he received from Mr. Shaw (the local union president), the grievor agreed to work after the end of his half day of work (normally ending at 1:00 p.m.), having the possibility to grieve his supervisor's directive later. In his testimony, the grievor stated that he went back to work until 1:15 p.m., took a lunch break until 1:45 p.m., followed by one more hour of work, to finish at 2:45 p.m.

[18] Mr. Pantaleo did not know at what time the grievor stopped working in the afternoon because he did not verify his presence.

[19] Mr. Wojick testified that he saw the grievor on the picket line for at least 20 minutes before reporting it to Mr. Pantaleo at 12:45 p.m. Mr. Wojick left a voicemail message for Mr. Pantaleo, as follows (Exhibit E-4):

...Hi Peter it's Stan. I'm just taking care of the front end while Steve has some lunch. It's quarter to one now. I notice that Twiddy is outside again and he's looking around and talking to people and whatever. But he's not at his

workstation so I think we ought to tell him that definitely there will be disciplinary action if there's one more breach.

[20] After reviewing the facts and after consultation, Mr. Wojick issued discipline on August 22, 2001, on the basis that the grievor failed to obey a directive given to him by his manager (Exhibit E-6). He imposed a two-day financial penalty following the Treasury Board discipline guidelines for designated employees who withdraw their services (Exhibit E-7).

[21] Clause 25.05 of the collective agreement relates to rest periods and reads as follows:

25.05 The Employer will provide two (2) rest periods of fifteen (15) minutes each per full working day except on occasions when operational requirements do not permit.

PSSRB File No. 166-2-32090

[22] On May 6, 2002, Mr. Pantaleo issued a disciplinary letter notifying the grievor of a four-day suspension without pay (Exhibit E-19). The discipline was related to four incidents that occurred in April 2002. The employer disciplined the grievor for having input his own report card for EIC benefits on April 2, 2002. On April 11, 2002, the grievor was sent home because of alcohol odours. On April 12, 2002, he was involved in inappropriate conduct with a claimant. On April 15, 2002, he was sent home without pay after staff members made four complaints regarding his personal hygiene.

Inputting his own Employment Insurance Claim

[23] On the issue of inputting his own employment report card, a departmental policy was issued to employees by a memorandum, dated January 23, 1997, stating that a claim for sick benefits filed by a current employee would be assessed and adjudicated in another HRDC office to avoid the possibility of a conflict of interest or the perception by the public of inequitable treatment of claimants (Exhibit E-9). For the employer, that meant that an employee does not touch his own claim, including all transactions needed in his file.

[24] Mr. Pantaleo was informed by another employee that the grievor had input his own report card through his work computer (Exhibit E-17), in his employment claim for sickness that he filed in another office. On March 26, 2002, the grievor completed

a claimant's report for a previous week (#1283) (Exhibit E-17). Being without news regarding his claim and still waiting for benefits, he verified his file through his work computer and found out that he had not declared himself sick. On April 2, 2002, he filed another claimant's report for the week (#1283) and declared himself sick.

[25] In a meeting held on April 16, 2002, with the grievor, his union representative and Mr. Wojick, Mr. Pantaleo summarized the debate on the incidents in his notes (Exhibit E-18):

Reporting card incident:

I asked Steve why he input his own reporting cards into the system. He indicated that his claim took 6-7 weeks to process and he had been docked pay over the same period so he was desperate for money. He said that he sent his cards in and nothing happened, so he input them himself. He said he could have phoned in his cards and felt that inputting them on the computer was the same thing as calling in his cards like other claimants.

The Director, Stan stated that an employee with 31 years with the department is well aware of the fact that he was not to handle his own claim. He knew enough to file his sick claim outside the office in a manner consistent with any other claimant. The inputting of his own cards was inappropriate behaviour. I also raised the fact that he was using government property and time for personal business.

[...]

[26] In his testimony, Mr. Wojick stated that the Conflict of Interest Guidelines specify that a declaration filed by an employee on his own employment insurance claim should be assessed by another clerk. On May 6, 2002, Mr. Pantaleo issued the disciplinary letter and stated, in relation to that incident (Exhibit E-19), that:

[...]

On April 2, 2002, you input your own report card for Employment Insurance benefits. You indicated that you input the reporting cards as you were desperate for money. You are aware of the methods available to Employment Insurance claimants for reporting. During our meeting I informed you that inputting your own reporting cards is not acceptable behaviour and is considered a violation of the conflict of interest guidelines, section 6(a) and (b).

[...]

[27] The grievor saw no wrongdoing in completing his employment insurance claim report card from his computer at work. He could complete the report by telephone or via the Internet from any other place so it made no difference to do so from his computer. He realized that he made a mistake when he verified the report he completed on March 26, 2002. At that point, he did not realize that he had violated the policy when he assessed his own employment insurance report. His financial situation was critical at that time and the delay in receiving his employment benefits increased his stress and health problems.

Odour of Alcohol

[28] On April 11, 2002, the grievor was sent home by Judy Phillips, Corporate Services Manager, because of an odour of alcohol emanating from him. Mr. Pantaleo stated in the letter of discipline issued on May 6, 2002, that the grievor was requested to meet with claimants in the execution of his duties and his smelling of alcohol gave a bad image to the HRDC in these circumstances. The letter of discipline (Exhibit E-19) detailed the reason for the issuance, as follows:

[...]

On April 11, 2002, a strong odour of alcohol was emanating from you, and as a result you had to be sent home. You indicated that you had been drinking the night before, and into the early hours of the morning. A strong odour of alcohol is unacceptable for the performance of your duties in the workplace.

[...]

[29] The grievor admitted, in his testimony, that he had drunk alcohol at home the night before. He said that he was not impaired and that he was able to perform his duties. For him, it was humiliating to be sent home in front of other employees for that reason.

Misconduct with a Claimant

[30] On April 12, 2002, Anthony Taccogna, Manager of the Claims Processing Unit, witnessed an incident that occurred between the grievor and a claimant during an

interview. The incident reported to Mr. Pantaleo was stated in the letter of discipline issued on May 6, 2002 (Exhibit E-19):

[...]

On April 12, 2002 your conduct with a claimant was inappropriate as witnessed by Tony Taccogna, Service Delivery Manager. During our meeting you concurred that you were yelling at the claimant and that Tony intervened. He advised you that you should not be raising your voice at clients, but rather should be diffusing the situation a [sic] courteous helpful manner. Your behaviour toward the claimant was inappropriate.

[...]

[31] The grievor explained that some guidelines apply when a claim officer has a hard time with a claimant during an interview. If, after the claim officer explains to the claimant the reasons supporting the decision rendered in his file, the claimant does not want to accept it and raises his voice, the claim officer is to involve his supervisor. In such a situation, the supervisor should take over and carry on with the interview.

[32] On April 12, 2002, he explained to a claimant the reasons supporting his decision to impose overpayment and a penalty at a level of \$12,000 to \$16,000. The claimant did not accept the decision and argued with him for one and one-half hours during the interview. The grievor explained the situation to Judy Phillips, his supervisor, who declined to meet with the claimant and take over the interview. The grievor went back to the claimant and explained his decision for another 30 minutes. The claimant kept on arguing and yelling at him so, to end the interview, the grievor told the claimant that the interview was concluded and that he had to leave. He repeated this twice to the claimant, raising his voice but not yelling at him.

April 15, 2002 - Hygiene

[33] The incident that occurred on April 15, 2002, when the grievor was sent home without pay, was stated in the May 6, 2002 letter of discipline (Exhibit E-19):

[...]

On April 15, 2002, I had received 4 complaints from staff members regarding your personal hygiene, and you were sent home without pay for the balance of the day. We discussed your responsibility to report to work in a manner

where your personal hygiene is acceptable for the work environment. You were given written instructions regarding this issue on September 19, 2001.

[...]

[34] A separate grievance was filed on April 23, 2002, contesting that disciplinary measure. This grievance was referred to adjudication (PSSRB File No. 166-2-32091). The evaluation of that discipline will be specified further on in the present decision.

The Penalty

[35] Mr. Pantaleo imposed a four-day suspension without pay for the four incidents related in his letter of discipline. His reasons include (Exhibit E-19):

[...]

By inputting a report card related to your own Employment Insurance claim, by appearing in the workplace smelling strongly of alcohol and by engaging in an altercation with a client, you have betrayed the trust placed in your position of Insurance Officer. Furthermore, you have been insubordinate with respect to the instructions issued to you regarding your personal hygiene. In order to impress upon you the seriousness with which management views your actions, I am suspending you without pay for 4 days effective May 14, 2002.

[36] At the second level of the grievance procedure, the suspension was reduced to three days. One day of suspension was removed because the grievor had already lost pay on April 15, 2002, for inappropriate personal hygiene and the meeting held with his manager following the client interview on April 12, 2002, constituted a verbal reprimand.

PSSRB File No. 166-2-32091

[37] On April 15, 2002, four complaints were forwarded to Mr. Pantaleo from staff members who complained of bad odours coming from the grievor and/or his workstation (Exhibits E-14 to E-16). Following a meeting, Mr. Pantaleo sent the grievor home without pay from 1:45 p.m. to 4:00 p.m., as appears from the incident report note filed as Exhibit E-16. Mr. Pantaleo explained that he sent the grievor home without pay on three previous occasions for unacceptable personal hygiene. A warning letter was delivered to the grievor on September 19, 2001, notifying him of the

situation and that he would be sent home without pay if the situation arose again (Exhibit E-8). He was formally advised in a meeting held in the presence of his union representative that same day that he had to report to work clean and odour-free.

[38] Mr. Pantaleo did not recall if he noticed a bad odour when he sent the grievor home on April 15, 2002.

[39] On September 19, 2001, the grievor had admitted that he had hygiene problems when co-workers complained about bad odours. Since then, he has taken steps to correct the situation and to avoid bringing bad odours, coming from his pets (cats and dogs) and other animals he has at home, to the office. He testified that he feeds the animals before taking a shower and getting dressed for work. He avoids access to the bedroom by the cats, where he stores his clothes. For the next five months, following September 19, 2001, there was no problem with his personal hygiene. In his testimony, the grievor stated that on April 15, 2002, no bad odours were emanating from him. On that day, he applied the same hygiene routine that he did since September 2001. He felt embarrassed when he was sent home directly from the meeting, because some employees saw him leave.

PSSRB File No. 166-2-32092

[40] On June 18, 2002, the grievor filed a grievance against his employer, who imposed a three-day suspension without pay upon him because of unauthorized absences due to medical reasons for May 27, 28 and 31, 2002. The reasons for discipline are listed in the letter of discipline dated June 10, 2002 (Exhibit E-11):

[...]

You have not followed the instructions given to you, therefore the above dates are unauthorized absences. I again stress that you are to provide a medical for every period of absence due to illness. Your leave sheet is to be submitted the day you return to work with the medical attached.

You have been insubordinate with respect to the instructions issued to you regarding submitting a medical for all absences related to illness. In order to impress upon you the seriousness with which management views your actions, I am suspending you without pay for 3 days effective June 11, 2002. Please be advised that further incidents of this nature could result in more severe disciplinary action.

[41] On May 6, 2002, Mr. Pantaleo had issued a letter that specified expected behaviours required of the grievor (Exhibit E-10). That letter of expectations was given to the grievor on May 13, 2002, by Mr. Pantaleo. Some expectations were related to sick leave:

[...]

- ***You are required to call me (or my back up) when calling in sick.*** *You have been previously notified to call me between 8:00 am and 9:00 am if you will not be in due to illness. If my voice mail indicates I will not be available that day, you are to call my back up. If you are unable to reach myself or my back up, you are to contact the director's office.*
- ***You are required to submit a medical certificate for all absences related to illness, and medical appointments, until further notice.*** *Since the beginning of January 2002, you have been absent due to illness for an excessive amount of time. You missed 32 days, most of which was leave without pay as you have exhausted your sick leave entitlement.*
- ***You are required to submit your leave sheets the day you return from an unscheduled absence.*** *This has been discussed with you after your most recent period of illness where you were in an overpayment situation. It is your responsibility to submit your leave sheets, not your supervisor's or manager's.*

[...]

[42] The grievor was requested to submit a medical certificate for his absence on May 27 and 28, 2002, upon his return to work on May 30, 2002. He was also requested to do so after his return to work after his absence on May 31, 2002. The grievor, however, informed Mr. Pantaleo that he was unable to get a medical certificate.

[43] In his testimony, the grievor stated that he suffered from stomach pains and that he was vomiting and had diarrhoea from stress on the days that he was absent. He called his doctor, Ted Cait, on May 29, 2002, but was unable to get an appointment that day; his doctor could not see him until the following week. He did not try to see another doctor to get a medical certificate, stating that the walk-in clinics were away from his home and that it was difficult for him to go there when he was ill. He did not try to see another doctor, thinking that they would all apply the same policy and not give him a medical certificate after the fact.

[44] The grievor stated that he was able to get a medical certificate from Dr. Cait on one occasion only, after his health problem was cured. On that occasion, he went to Dr. Cait's office without an appointment and waited for two and one-half hours before he could be seen. Dr. Cait gave him the medical certificate requested, which specified that he was unable to perform work for the previous day for medical reasons. However, Dr. Cait formally advised him that he would not do so again and that he would only issue a medical certificate after seeing the patient during his illness. Dr. Cait testified to the same fact.

[45] The following clauses of the collective agreement are relevant to the present file:

Granting of Sick Leave

35.02 *An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*

(a) *he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer.*

and

(b) *he or she has the necessary sick leave credits.*

35.03 *Unless otherwise informed by the Employer, a statement signed by the employee stating that because of illness or injury he or she was unable to perform his or her duties, shall, when delivered to the Employer, be considered as meeting the requirements of paragraph 35.02(a).*

35.04 *When an employee has insufficient or no credits to cover the granting of sick leave with pay under the provisions of clause 35.02, sick leave with pay may, at the discretion of the Employer, be granted to an employee for a period of up to twenty-five (25) days, subject to the deduction of such advanced leave from any sick leave credits subsequently earned.*

PSSRB File No. 166-2-32994

[46] On June 20, 2003, the grievor submitted a medical certificate to cover his absence from work from June 11 to 13, 2003 (Exhibit E-27). The medical certificate was incomplete and the physician's signature looked suspicious. Management

contacted the physician (Dr. Cait) and sent him a copy of the certificate for validation. Dr. Cait advised the employer that he had not completed or signed the certificate.

[47] Mr. Taccogna met with the grievor and his union representative on June 30, 2003. The grievor explained that his doctor would not provide a medical certificate after the fact and that he was too ill to visit his office between June 11 and 13, 2003.

[48] The employer advised the grievor that he was required to submit a medical certificate for all absences related to illness, for reasons of excessive absenteeism, as per the letter of May 6, 2002 (Exhibit E-10). The grievor was reminded of that requirement in writing on January 29, 2003, following his return to work after a long period of absence (Exhibit E-20). Mr. Taccogna suspended the requirement on February 18, 2003, and it was seen by Mr. Shaw as a positive sign of the employer's willingness to help the grievor (Exhibit E-22).

[49] Mr. Taccogna submitted the attendance, behaviour and hygiene-related problems showed by the grievor following his return to work on January 27, 2003 (Exhibit E-21) to Dr. Charnin of Health Canada. Dr. Charnin's answer on April 15, 2003, was not ambiguous; he concluded that the problems could not be directly related to a medical problem and recommended that they be handled administratively (Exhibit E-24).

[50] On May 5, 2003, Mr. Taccogna advised the grievor during a meeting that he would be requested to provide a medical certificate for all sick leave taken upon his return to work on a full-time basis (Exhibit E-25). When he called in sick from June 11 to 13, 2003, the grievor was aware of the requirement to provide a medical certificate.

[51] On July 7, 2003, Mr. Wojick issued a letter of discipline to the grievor for his actions, which were considered very serious. The employer outlined the grounds for imposing a 10-day suspension without pay, as follows (Exhibit E-12):

[...]

*Mr. Twiddy, this is no justification for falsifying the medical,
and the signature of a Doctor.*

[...]

By falsifying information on the medical form you submitted you have contravened the values of honesty and integrity required of a Federal Public Servant. This is totally unacceptable.

As a result of these circumstances, pursuant to the authority granted me under the Financial Administration Act, and pursuant to the Public Service Terms and Conditions of Employment regulations, you are suspended without pay for ten days. Your suspension will commence July 10, 2003, up to and including July 23, 2003. As part of this suspension you are not permitted access to any non-public areas of the Scarborough HRC until July 24, 2003 without management's consent.

[...]

[52] At the hearing, the grievor explained that he suffered from general anxiety disorder and was treated by Dr. Cait from 1998 to July 2003. Dr. Cait testified that the grievor has suffered from anxiety, which causes nausea and diarrhoea, since July 3, 2002. He also suffered from alcoholism, which was progressively controlled. The anxiety was related principally to financial problems that distressed him; he found himself in a precarious situation, having exhausted all of his sick leave credits in December 2001. Mr. Pantaleo notified him in writing on February 1, 2002, (Exhibit G-2) that:

[...]

You currently have outstanding leave sheets for illness dating back to Dec. 11, 2001. You have been off 17 days since Dec. 11, 2001, and only have a balance of 6.71 days of sick leave. Therefore, the following dates will be sick leave without pay:

Jan. 9, 2001 (2.11 hours) Jan. 16, 17, 21, 22, 23, 28, 29, 30, 31, Feb. 1, 2002

Sick leave without pay requires medical proof. Since you have not been informed of this until today, you will require a medical for this most recent period of leave from Jan. 28, 2002 onward. Please ensure that you submit this along with all outstanding leave sheets the day you return.

[...]

[53] Sick leave without pay placed the grievor in a difficult financial situation, where he had to repay overpayment in salary, which lowered his net pay by a serious amount. The grievor asked his manager to recover only one day of overpaid salary per pay.

That arrangement was agreed to in July 2002, but could not be renewed and Mr. Pantaleo notified the grievor of the situation by electronic mail on July 25, 2002 (Exhibit G-3):

Steve, as previously mentioned recovery of overpayment of salary due to leave without pay is to be recovered from first available funds. I have taken into consideration your request for a more gradual recovery option due to financial hardship, and have allowed for the most recent 4 days to be recovered at one day per pay. After further consultation with Regional Compensation Services, I have been informed that I do not have that authority. As a result I am compelled to recovering any further overpayment from first available funds. I will honour our arrangements for the 4 days, however, any additional overpayment will be recovered from first available funds.

[54] The grievor requested permission to use vacation leave to cover sick leave without pay and avoid overpayment and pay recovery, but he was not successful. The employer applied the Treasury Board policy, which provides (Exhibit G-5):

(2.1) Recovery from first available funds

The following types of overpayments must be recovered in full from the first available funds payable to the employee:

- *overpayments arising from the normal operation of the pay system, whereby adjustments for absences without pay are made in subsequent pay periods;*

[...]

(2.2) Recovery over an extended period

Treasury Board has authorized that in exceptional circumstances where a full and immediate recovery of large overpayments will impose a financial hardship on an employee, deputy heads and heads of agencies may direct that the recovery of over-payment of salary and allowances or arrears of deductions for rent be extended over a number of pay periods at a minimum recovery rate of 10% of the gross salary entitlement recovery rate. This authority may not be delegated.

[...]

higher rate may also be applied at the employee's request where the deputy head is of the opinion that the employee has contributed to causing the overpayment.

[...]

[55] A summary of the grievor's leave without pay history and salary recovery was prepared for the period from January 1 to July 11, 2002 (Exhibit G-5). It shows that on the eleventh salary cheque, he received a net amount at around \$1,075 (his normal average net salary). The others are at \$442.89 (February 27, 2002); nil (March 27, 2002); \$740.98 (April 10, 2002); \$1,000.69 (May 8, 2002); \$321.51 (May 22, 2002); \$417.22 (June 5, 2002); \$635.94 (June 19, 2002) and \$958.59 (July 3, 2002). Overtime worked on March 2, 2002, (gross \$176.60) was applied in totality to salary overpayment. Overtime worked from March 26 to 30, 2002, gave him a net pay of \$427.68.

[56] Those salary overpayment recoveries increased the grievor's stress level and anxiety. For some time, his co-workers gave him food and he borrowed money from his union representative and friends in order to pay for his medicine (expenses of \$300 per month). Between September 5, 2002, and January 27, 2003, he was on long-term disability leave and had to wait from five to six months before receiving any payment from the long-term disability plan. He was on disability unemployment insurance from October 2002 to January 2003 of that year. His financial problems brought a disruption of telephone, gas and electrical services for that period of time. His anxiety increased and he suffered more panic attacks, along with stomach and intestine reactions.

[57] The grievor explained that the financial problems increased his anxiety and created more panic attacks and stomach and intestine problems. The employer's request that he substantiate his absences with a medical certificate increased his level of anxiety because he was unable to obtain a certificate from his doctor. The suspension without pay imposed in 2002 worsened his financial situation. He wanted to avoid further disciplinary action if he omitted to provide a medical certificate for his absence from June 11 to 13, 2002, and so he falsified one. At the time he falsified the medical certificate, the grievor was aware that he was doing something wrong but did not realize that doing so would only make things worse for him.

[58] The grievor testified that he had a better control of his alcoholism. He was trying to get help from the Pinewood Institute; he went for an assessment but was not able to get into a program.

Differential Treatment

[59] In his complaint to the CHRC filed on September 4, 2003, the grievor's allegation reads as follows (Exhibit G-9):

[...]

ALLEGATION

Human Resources Development Canada discriminated against me in the course of my employment by treating me in an adverse differential manner and by refusing to accommodate my disability, contrary to section 7 of the Canadian Human Rights Act.

PARTICULARS

I believe that Human Resources Development Canada (HRDC), specially the management of the Human Resource Centre of Canada located in Scarborough, has discriminated against me since approximately August 2001.

I had a history of alcohol abuse. I have attended every required medical assessment and added my own doctor's reports to HRDC. I have indicated to them that I have been seeking entry into an alcohol recovery program at the Donwood Institute. They are aware of my medical status, but they continued to view my past absences and difficulties as "behaviors" that justify discipline.

[...]

[60] The complaint is grounded in the incident stated in the grievances in the present matter. Furthermore, the grievor felt threatened by his employer upon his return to work on January 22, 2003, from sick leave, which started on September 3, 2002. At a meeting held on January 29, 2003, the conditions for his gradual return to work and the expectations required of him were discussed in the presence of Mr. Wojick, the Director of the Scarborough office, and his union representative, Mr. Shaw. On January 29, 2003, those conditions and expectations were reconfirmed in writing. Mr. Taccogna reminded the grievor of the conditions that still applied (Exhibit E-20):

[...]

You are required to submit a medical certificate for all absences related to illness, and medical appointments because of your excessive absenteeism due to illness during the fiscal year.

You are required to respect the "Conflict of Interest, and Code of Ethics" guidelines. I have supplied you with copies of each for your reference.

You are required to safeguard the use of equipment assigned to you such as your computer. This is to protect you, and the department.

Regarding hygiene, you are required to report to work in a condition that is non-offensive.

You are required to call me directly at 416-973-5417 between 8:00 a.m. and 9:00 a.m. when you are unable to report for work. If unable to reach me, you are to contact the Director's office at 416-973-4406 to report your absence. You have requested a wallet size card with these contact numbers. This will be supplied to you.

Failure to adhere to these conditions could result in disciplinary action.

Steve, I look forward to your successful return to the Unit, and I commit to working collaboratively with you to make your return as accommodating as possible.

[61] The grievor was previously notified of those requirements by the employer, as follows:

(i) Medical certificate:

- May 6, 2002, letter of expectations (Exhibit E-10)
- June 10, 2002, letter of discipline (Exhibit E-11)

(ii) Conflict of Interest and Code of Ethics and safeguard of computer and hygiene:

- April 16, 2002, meeting (Exhibit E-18)
- May 6, 2002, letter of expectations (Exhibit E-10)
- May 6, 2002, letter of discipline (Exhibit E-19)

(iii) Call in to report sick leave:

- May 6, 2002, letter of expectations (Exhibit E-10)

[62] Mr. Taccogna addressed some specific accommodations necessary for Mr. Twiddy's return to work in his January 29, 2003, letter (Exhibit E-20):

Dr. Birenbaum has declared you fit to "be returned in a graduated manner to your regular duties." He has further recommended a graduated return of half days the first two weeks, increasing by a half day a week "if tolerated" to your full time return. We agreed that these recommendations would be adhered to. In addition, you have provided medical certification from your personal Doctor that you should avoid dealing with "in-person" enquiries for a two week period. As a consequence, you will be kept out of the In-person rotation until February 17, 2003.

In our discussion, I committed to being open to discussing options for supporting your return to work such as training and assigning specific work duties. We agreed that you would approach me with any requests for specific accommodations for consideration. We also agreed to meet bi-weekly to review your progress. Meeting times and dates will be set up by the end of this week.

Regarding your remuneration, I handed you a pay cheque for the three full day period January 27 - 29, 2003. From this cheque was recouped an outstanding overpayment of \$194. However, because you were paid for three full days when you were only entitled 1 1/2 days, you are presently 1 1/2 days pay in arrears. This overpayment will be recouped from future payments. Your pay cheques will reflect actual hours worked, and will be a minimum 5 days pay every pay period. If you need further clarification, we can arrange for you to meet with a Pay and Benefits person.

[...]

You stated that you have a requirement to get up from your work station approximately every two hours to walk around the office to relax your muscles. You have supplied no medical evidence to support his; however, you are not restricted to sitting at your workstation indefinitely. On the contrary, I expect you to move about in the course of performing your duties such as picking up letters from the printer, etc. This is a normal and acceptable requirement of the job, unless it becomes disruptive. Your break and lunch also give you the ideal opportunity to get outside the office and "stretch your legs".

To support your condition, I will be arranging an Ergonomic assessment of your workstation to ensure you are set up in the best possible arrangement.

[63] Mr. Shaw testified that it was inappropriate to address those issues in a meeting to set the terms for the gradual return to work. It might appear as if he were placing the grievor on probation after expulsion for disciplinary reasons. The employer was told that it had made the grievor's anxiety attacks worse by requesting that he provide a medical certificate for each absence, and that issue is related to recovery of overpayment. The grievor stated in his testimony that the employer clearly advised him, at the January 29, 2003 meeting, that he would be closely monitored. In the weeks that followed his return to work, his manager called him to meetings to notify him of an undone button on his shirt, of a tear on his shirt at the shoulder, of some mud on his shoes, etc. He was required to take his backpack out of his office, immediately, because it had cat hair on it.

[64] Mr. Taccogna submitted that after the grievor's return to work on January 27, 2003, he called in sick nine times out of 16 possible work days. Concerned about the grievor's ability to return to work, Mr. Taccogna requested an assessment by Dr. Chernin, Health Canada, Workplace Health on Public Safety Program (Exhibit E-21). He attached to his request a copy of the expectations letter that he had given to the grievor on January 29, 2003 (Exhibit E-20), to be sure that Dr. Chernin had all the information on the situation in the workplace. After two interviews with the grievor, in a letter dated April 15, 2003 (Exhibit E-24), Dr. Chernin concluded as follows:

...At the time we do not find medical reasons why Mr. Twiddy cannot continue on his modified work schedule. However, we note the concerns raised by the department regarding attendance, behaviour and hygiene in the office. As we cannot correlate these directly to a medical problem, we would recommend that they be handled administratively.

[...]

[65] In a meeting held on February 18, 2003, Mr. Taccogna informed the grievor that he had contacted Dr. Chernin to have him assessed. He also informed the grievor that the requirement to submit a medical certificate for his absence due to illness was upheld until further notice (Exhibit E-22). At the meeting held on January 18, 2003, Mr. Taccogna was informed by the grievor that he was to be assessed for a rehabilitation program. Neither the grievor nor his union representative, Mr. Shaw, stated what type of rehabilitation program the grievor was to get into (Exhibit E-22). The requirement to supply a medical certificate to substantiate his absence was put

back in force on his return to work full-time, and he was so notified on May 5, 2003 (Exhibit E-25).

Summary of the arguments

For the Employer

PSSRB File No. 166-2-31989

[66] The grievor's testimony is not credible on the circumstances of the strike activity and his assignment as a designated employee. He stated that he took a break between 8:00 a.m. and 10:30 a.m., when he was on the picket line waiting to be escorted in. He took another break at 11:15 a.m., and was on the picket line for another break. Mr. Pantaleo escorted him in a second time and he was requested to work until 2:00 p.m. to complete half a day's work. At 12:45 p.m., Mr. Wojick saw him on the picket line again for more than 20 minutes.

[67] The grievor clearly withdrew his services on that day, taking three breaks during half a day's work. Clause 25.05 of the collective agreement provides that the employer has to give two rest periods of 15 minutes each per full working day. In the present case, where he had to perform only half a day of work, he withdrew his services without a valid reason when he took three break periods. The two-day financial penalty imposed for withdrawal of services was carried out in application of the Treasury Board guidelines and was appropriate. This grievance should be dismissed.

PSSRB File No. 166-2-32090

[68] The grievor assessed his own employment insurance claim on April 2, 2002, from his computer at work. The evidence shows that he found out that he made a mistake when he input his report card on March 20, 2002, failing to indicate that he was sick for the week, and proceeded to file a corrected report card.

[69] In doing so, he went against the Conflict of Interest Guidelines. The grievor admitted, in his testimony, that he knew that he acted in violation of the policy. The adjudicator should apply common sense to define the conflict of interest.

[70] The employer reduced the four-day suspension without pay to a three-day suspension on the basis that the other incidents stated in the letter of discipline were the object of a verbal reprimand (incident with a claimant; odour of alcohol) and that he lost pay when he was sent home on April 15, 2002. The three-day suspension without pay was reasonable under the circumstances and should be maintained, as a result of the grievor having input his own record card.

PSSRB File No. 166-2-32091

[71] On April 15, 2002, Mr. Pantaleo received four complaints from employees related to bad odours coming from the grievor or his workstation. The grievor was sent home without pay from 1:45 p.m. to 4:00 p.m. on that day. The discipline was minor and reasonable, taking into consideration that the he was sent home with pay on three previous occasions and he was advised formally, by letter dated September 19, 2001.

PSSRB File No. 166-2-32092

[72] The grievor was required to submit a medical certificate for all absences related to illness, as per the May 6, 2002 letter of expectations. That requirement was explained to him in a meeting held on April 16, 2002, and was motivated by an excessive absenteeism of 32 days since January 2002.

[73] The grievor took three days of sick leave in one month where he was required to submit a certificate. Upon his return to work, he did not tell his manager that he was unable to get a medical certificate; he provided an explanation only after he was disciplined.

[74] The grievor was insubordinate with respect to the instructions issued, acting as if he were ignoring them. The three-day suspension without pay is reasonable under the circumstances and this grievance should be dismissed accordingly.

PSSRB File No. 166-2-32994

[75] The evidence shows that the grievor forged the medical certificate for his absence from work from June 11 to 13, 2003. On June 30, 2003, in a meeting called by his manager, the grievor explained that he falsified the medical certificate because his

doctor would not provide a certificate after the facts, and he was too ill to visit the doctor's office.

[76] The grievor did not submit to his manager that he was unable to get a medical certificate when he returned to work. The requirement that he had to provide a medical certificate for all sick-related absences, which was withheld on February 18, 2003, was put back in force at the May 5, 2003 meeting. His health and financial situation were not an excuse for him to act as he did.

[77] Taking into consideration that forging a medical certificate is a very serious offence and that the grievor had been disciplined previously, the 10-day suspension without pay is reasonable under the circumstances.

[78] The Department did not harass the grievor; each disciplinary measure was well-founded and reasonable. The grievor's behaviour had nothing to do with his health problems, as stated by Dr. Chernin in the assessment he provided to the Department in February 2003. The employer did not want to put the grievor under pressure upon his return to work in January 2003, and he was advised that the requirement to provide a medical certificate for his absences was suspended until further notice. It was reinforced in May 2003, after Dr. Chernin recommended that the grievor's attendance problems be handled administratively.

[79] Counsel for the employer referred to the following decisions: *Cohen-Patterson v. Treasury Board (Health and Welfare Canada)*, PSSRB File Nos. 166-2-22692 to 22715 (1993) (QL); *Smith v. Treasury Board (Department of Transport)*, PSSRB File Nos. 166-2-9168 to 9170 (1982) (QL); *Crowhurst v. Treasury Board (Employment and Immigration Canada)*, PSSRB File Nos. 166-2-23667 to 23670 (1994) (QL); *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32; *Therriault v. Treasury Board (National Defence)*, PSSRB File No. 166-2-14782 (1985) (QL); *Long v. Treasury Board (Department of National Defence)*, PSSRB File No. 166-2-16455 (1988) (QL); *Romanik v. Treasury Board (Transport Canada)*, PSSRB File No. 166-2-26280 (1995) (QL).

For the GrievorPSSRB File No. 166-2-31989

[80] The employer requested that the grievor work more hours in the afternoon against his previously granted half day of leave. It was unreasonable to request him to work more hours at his workstation than the other designated employees.

[81] The delay in being escorted was normal and was the result of an understanding between the bargaining agent and the employer regarding the escort procedure through the picket lines. The evidence shows that it could take from 30 minutes to three hours for a designated employee to be escorted through the picket line by a supervisor. The grievor showed up to be escorted at his normal starting time, which was 8:00 a.m., and was only able to be escorted in at 10:30 a.m. He took a coffee break at 11:15 a.m. and was requested by his manager to work until 2:00 p.m.

[82] Furthermore, in order to work in the afternoon, the grievor had the right to rest for lunch; he did not take an excessive number of breaks on that day. He did not fail to obey the direction of his manager to perform his duties until 2:00 p.m., following his undisputed testimony. His testimony on that point was not contradicted by Mr. Pantaleo, who admitted that he did not verify at what time the grievor stopped work in the afternoon. Consequently, the grievance should be allowed and the employer ordered to reimburse the grievor the financial penalty equivalent to two days' pay.

PSSRB File No. 166-2-32090Inputting his own Employment Insurance Claim

[83] The grievor did not make a decision in his employment insurance file; he only completed a weekly declaration. Doing so from his own computer did not create a problem because the same declaration can be completed from a home computer or by e-mail. The grievor did not consider it wrong at the time that he did it, but stated that he would not do it again.

[84] The grievor never received training or attended meetings on conflict of interest, where the issue of an employee inputting his/her own claim from the employee's work computer was addressed. If the employee is not aware of the rules, the employer cannot blame him for not following them.

[85] The grievor's financial and health problems are mitigating factors to be considered in assessing the gravity of the infraction. The evidence demonstrates that financial problems increased the grievor's anxiety and the employer denied all the grievor's requests to be able to take annual leave or to be advanced sick leave to cover the leave without pay after he had exhausted all his sick leave entitlements. The employer did not give any reason for denying those requests.

[86] It was unfair of the employer to add other incidents in the May 6, 2002, letter of discipline. By doing so, the employer was punishing the grievor twice for incidents that led to other disciplinary actions. The employer's attitude increased the grievor's stress and had a negative impact on his health.

PSSRB File No. 166-2-32091

[87] The grievor was sent home without pay from 1:45 p.m. to 4:00 p.m. on April 15, 2002, after his co-workers filed complaints alleging that a bad odour was emanating from him or his workstation. This incident occurred seven months after the September 9, 2001 disciplinary action imposed against him for his lack of hygiene.

[88] The manager testified that he did not detect any evidence of offensive odours emanating from the grievor on that day. The e-mail from one of the complainants stated that he was allergic to cats, meaning that he was more sensitive than others. The employer has made accommodation in the past for people who are more sensitive than others and should do the same in these circumstances. The employer prejudged the grievor on the assumption that he had been guilty in the past, so he must be in the present, as well. On this basis, the grievance should be allowed.

PSSRB File No. 166-2-32092

[89] The requirement to submit a medical certificate for absences related to illness should only be applied to employees who have no reason to take sick leave. In the present case, the employer has no reason to doubt the grievor's sickness.

[90] The employer can request an assessment of an employee when it wants to know if the employee is able to return to work or not. In the present file, the employer requested that Health Canada proceed to an assessment to verify that the grievor was able to return to work and to determine the terms of his gradual return. The employer could have requested that Health Canada assess whether the grievor's absences were for medical reasons instead of requesting that he provide a medical certificate for each absence.

[91] The grievor did not understand from the expectations letter, dated May 6, 2002 (Exhibit E-10), that he would be disciplined if he did not provide a medical certificate. Upon his return to work, he told Mr. Pantaleo that he was unable to get a medical certificate. He testified that he tried to obtain an appointment with his family doctor on the day of his absence, but it was not possible for him to see the doctor until the following week. As he was previously advised by Dr. Cait that no medical certificate would be provided after the fact, it was not possible for him to fulfil the employer's requirement. In those circumstances, the grievance should be allowed.

PSSRB File No. 166-2-32994

[92] The grievor falsified a medical certificate in a panic reaction. He suffered a three-day suspension without pay in June 2002, because he was unable to get a medical certificate for absences related to illness and tried to avoid another penalty as he was unable to get a medical certificate after the facts. His poor financial situation, with an outstanding overpayment to be recouped, was known to the employer, who did not want to accommodate him. These circumstances are mitigating factors and the adjudicator should take them into consideration to reduce the penalty.

[93] In support of his argument, the grievor's representative submitted the following decisions: *Labatt's Ontario Breweries and Brewery Workers Union, Local 304* (1990), 11 L.A.C. (4th) 89; *Re Lumber & Sawmill Worker's Union Local 2537, and KVP CO. LTD.* (1965), 16 L.A.C. 73; *Woodbine Entertainment Group v. Service Employees International Union, Local 528 (Sommer Grievance)*, [2001] O.L.A.A. No. 843.

Reasons

[94] The grievor has been employed with the Department of Human Resources Development Canada (HRDC) since 1970. He was assigned to an agent position (Claim Officer) at the PM-02 classification and is still in that position. In the execution of his duties as a Claim Officer, he has to determine the entitlement of claimants to the benefits of Employment Insurance and he can be called to meet with them to explain his decision or to obtain further information.

[95] The grievor's state of health was submitted as a mitigating factor to be taken into account when examining the disciplinary measures that he challenges in his grievances. Furthermore, he filed a complaint with the CHRC on September 4, 2003, alleging that the employer discriminated against him by treating him in an adverse, differential manner and by refusing to accommodate his disability. The CHRC decided not to deal with his complaint at that time, pursuant to paragraph 41(1)(b) of the *Canadian Human Rights Act*, because it could be dealt with more appropriately through the public service grievance process (Exhibit G-9).

[96] The uncontradicted evidence on the health situation of the grievor showed that he was suffering from generalized anxiety disorder with diarrhoea and vomiting episodes. His alcoholism seemed to be partially under control at the time of the hearing but the grievor was unable to follow a specialized program towards an institution to resolve it.

[97] The grievor's difficult financial situation seems to have had an impact on his level of anxiety and the ability to perform his duties. The evidence shows that he exhausted all of his accumulated sick leave credits back in December 2001. On February 1, 2002, he had been off work for 17 days since December 11, 2001, and had a balance of 6.71 days of sick leave in the bank. Consequently, he was on sick leave without pay for more than 10 days on February 1, 2002, and recovery of overpayment of salary had to be made (Exhibit G-2).

[98] Mr. Pantaleo agreed to a one-day per pay recovery at the grievor's request to apply a gradual recovery option to lower his financial hardship. That arrangement for the four days was honoured, notwithstanding that Mr. Pantaleo was informed by Regional Compensation Services that he did not have the authority to make that kind of agreement. Consequently, on July 25, 2002, the grievor was notified that any

additional overpayment would be recovered from the first available funds in accordance with the Treasury Board's policy on overpayment of salary or wages (Exhibit G-3).

[99] Undeniably, the summary of the grievor's pay history for the period from January 1 to July 11, 2002, shows that the salary recovery related to sick leave without pay had a large impact on his financial situation (Exhibit G-5). The grievor's testimony that he suffered cuts in gas and electricity services, that he had problems purchasing food and medication and that he subsisted on friends' loans and food collection from co-workers demonstrates that he went through a very hard time in 2002 and 2003.

[100] Upon his return to work on January 27, 2003, the grievor was advised of the expectations required of him (Exhibit E-20). The January 29, 2003 letter also stated that management was open to any request for specific accommodations. For the entire period covered by the grievances, the grievor did not request specific accommodations in relation with his generalized anxiety disorder. Management specified that his pay cheques would reflect actual hours worked and would be a minimum of five days' pay every pay period. Notwithstanding that some overpayment of salary would have to be recouped, management proceeded to specific accommodations to lower the impact on the grievor's financial situation (Exhibit E-20).

[101] The evidence demonstrates that Mr. Taccogna requested guidance from Dr. Chernin on February 17, 2003 (Exhibit E-21). Mr. Taccogna's questions are related to work attendance (the grievor had called in sick nine times out of a possible 16 employment days since his return on January 27, 2003), behaviour (disrupted co-workers with conversation and wandering through their work area) and hygiene. A copy of the letter dated January 29, 2003, stating the expectations (Exhibit E-20) was annexed to his request to Dr. Chernin. After two interviews with the grievor, Dr. Chernin concluded that he did not find any medical reason why he could not continue on his modified work schedule. Concerns raised regarding attendance, behaviour and hygiene could not be correlated directly to medical problems and Dr. Chernin recommended that this be handled administratively (Exhibit E-24). On May 5, 2003, Mr. Taccogna met with the grievor to discuss the result of his communication with Dr. Chernin (Exhibit E-25). On that occasion, the issue of taking less money off his pay was also discussed. The requirement to submit a medical certificate for all absences would be back in force on May 16, 2003, upon the grievor's

return to work full-time. He was also advised that his personal hygiene would continue to be monitored (Exhibit E-25).

[102] It appears that his manager was not aware of the nature of his disabilities (generalized anxiety disorder) or that alcohol abuse was an issue. The evidence submitted shows that the Health Canada doctors just gave management their conclusions in relation to the grievor's ability or inability to perform his work without stating the diagnosis supporting their conclusions. The grievor himself, and his union representative, did not state the type of rehabilitation program that he would be assessed for at a meeting held with Mr. Taccogna on February 18, 2003 (Exhibit E-22). The note written by the grievor to notify the employer of an assessment appointment at the Donwood Institute on April 2, 2003, did not state the type of rehabilitation that he wanted to get into.

[103] In January 2003, the employer accommodated the grievor by giving him the opportunity to return to work in a gradual manner and in applying a limited recovery of overpayment of salary on each pay with a minimum of five day's pay (Exhibit E-20). The employer verified with the Health Canada doctors whether the requirements specified in relation to his attendance, behaviour and hygiene could be correlated to medical problems. On the basis of the uncontradicted medical evidence, I have come to the conclusion that the requirements imposed on the grievor by the Department regarding attendance, behaviour and hygiene could not be directly correlated to a medical problem. Consequently, the imposition of these requirements cannot constitute an adverse treatment based on his disability.

[104] For each one of the issues related to the grievances, I will assess the mitigating factors of his health problems that can apply.

PSSRB File No. 166-2-31989

[105] The letter of discipline issued to the grievor on August 23, 2001, stated that he did not perform his duties as required by his manager, Mr. Pantaleo (Exhibit E-6). In more precise terms, the employer reproached the grievor for being absent from his workstation without authorization for significant periods during his assigned working hours.

[106] A strike was going on and picket lines were in place in front of the office on August 22, 2001. The evidence demonstrates that the grievor showed up at the picket line to report to his manager, Mr. Pantaleo, at his normal starting time, which was 8:00 a.m. As with other designated employees, the grievor had to wait in line to be escorted in by his manager. Mr. Pantaleo was able to escort him through the picket line into his office at 10:30 a.m.

[107] On that day, a half day of annual leave was granted to the grievor for the afternoon. Consequently, he should have worked from 8:00 a.m. to 1:00 p.m. The chronology of the events arising on that day are as follows:

- the grievor gets in line at 8:00 a.m., his normal starting time. He got off the picket line to get a coffee and went back to the picket line. He gets escorted in by Mr. Pantaleo at 10:30 a.m.;
- at 11:15 a.m. a co-worker advises Mr. Pantaleo that the grievor went for a break;
- shortly thereafter (around 11:30 a.m.), Mr. Pantaleo escorts the grievor in again. The grievor was advised that he was to put in 3.75 hours of work to complete half a day's work;
- Mr. Wojick left Mr. Pantaleo a voicemail message stating that he saw the grievor outside again, for at least 20 minutes, shortly before 12:45 p.m.;
- the grievor states in his testimony that he worked until 1:15 p.m., taking a lunch break up to 1:45 p.m. and worked another hour, to finish work at 2:45 p.m.

[108] The grievor was requested to work 3.75 hours to perform half a day's work. In his testimony, Mr. Pantaleo summarized the directions he gave to the grievor after he escorted him through the picket line for a second time at 11:30 a.m. and the notes filed under exhibit E-13 confirmed to me that he was clearly directed to work at his desk until 2:00 p.m., without any other break.

[109] The grievor did not obey that direction and took another break at 12:45 p.m. for more than 20 minutes, following the testimony of Mr. Wojick. That action is at the basis of the discipline imposed by the employer, as stated in the letter of discipline, issued on August 23, 2001, and I have come to the conclusion that the discipline is merited because the grievor contravened a clear order by his manager. Accordingly, it is not necessary for me to even consider whether the grievor was entitled to his lunch break.

[110] The two-day financial penalty was imposed to the grievor after he was advised by Mr. Pantaleo that he could be subject of such a penalty if he did not perform work as requested (Exhibit D-13). Consequently, I conclude that the two-day financial penalty is reasonable under these circumstances and the grievance is denied.

PSSRB File No. 166-2-32090

Inputting his own Employment Insurance Claim

[111] A disciplinary letter was issued on May 6, 2002, in relation to four incidents:

- inputting his own employment insurance claim on April 2, 2002;
- sent home on April 11, 2002, due to an alcohol odour emanating from the grievor;
- inappropriate conduct with a claimant during an interview, on April 12, 2002;
- sent home without pay on April 15, 2002, for lack of hygiene.

[112] The fourth incident, having been the object of a specific grievance in PSSRB File No. 166-2-32091, will be considered under that file number and separately from the first three incidents.

Inputting his own Employment Insurance Claim

[113] The grievor admitted that he input the report card in his employment insurance claim filed through another HRDC office. That incident occurred at three different stages. On March 26, 2002, he completed a claimant's report for a previous week (#1283) from his computer at work. On April 2, 2002, as he was without news, he proceeded to do a verification of his employment insurance file from his computer at work. He realized that on the report card, filed on March 26, 2002, he had not declared himself sick. He filed another claimant's report for that week.

[114] In the disciplinary letter, the employer stated that the grievor acted in violation of the Conflict of Interest Guidelines. No evidence was submitted to the effect that the grievor received the Conflict of Interest Guidelines, but he admitted that he knew that he should not have handled his own claim. He realized that he had made a mistake. He submitted that his financial situation was precarious at that time and that it increased his stress and health problems.

[115] On that issue, I conclude that the grievor acted inappropriately when he assessed his own employment insurance claim, by making a verification of his file and of his first claimant's report dated April 2, 2002. The fact that he did it from his own computer is minor in extent and will not be considered as an aggravating factor. I will not consider his precarious financial situation as a mitigating factor to lessen the gravity of the reprehensible action of a conflict of interest.

[116] The employer specified at the second level response to the grievance that a penalty for an action contrary to the Conflict of Interest Guidelines can be from three to five days' suspension. In the present case, the employer imposed the minimum penalty of three days, and I consider that reasonable under the circumstances.

Odour of Alcohol

[117] The second incident at the origin of the discipline occurred on April 11, 2002, when the grievor was sent home because of an odour of alcohol emanating from him. The grievor admitted in his testimony that he had drunk at home the night before. He considered the employer's decision to send him home excessive because he was not impaired and was able to perform his duties.

[118] I agree with the position of the employer, who considered that an odour of alcohol emanating from a claim officer who has to meet with claimants in the execution of his duties is unacceptable. A public officer has to give the Department a good image when he meets with claimants. I will assess the penalty for this incident together with the other incidents listed in the May 6, 2002 disciplinary letter.

Misconduct with a Claimant

[119] The incident that occurred with a claimant on April 12, 2002, was acknowledged by the grievor, who testified to the fact that he had to raise his voice to request that the claimant leave. At one point during the interview, the grievor asked his supervisor, Judy Phillips, to take over but she declined. No evidence was submitted to explain her refusal.

[120] The grievor applied the departmental guidelines, but was confronted by the refusal of his supervisor. By raising his voice, he was trying to put an end to a confrontation that had been dragging on for some time. Those circumstances are mitigating factors that need to be applied to the assessment of the penalty.

[121] The penalty of the four-day suspension without pay imposed on the grievor by Mr. Pantaleo on May 6, 2002 was reduced to three days at the second level of the grievance procedure, as stated above. That penalty was applied for the incident related to the inputting of his employment insurance claim, and I maintain it on the basis that it was reasonable, in the circumstances, to give a three-day financial penalty for wrongdoing based on conflict of interest.

[122] The second level response removed the fourth day of suspension for the latter incidents. The employer specified that the grievor had already lost pay for the April 15, 2002 incident related to his lack of hygiene and considered that the meeting held with his manager following a client-interaction incident constituted a verbal reprimand for the misconduct with a claimant and the odour of alcohol.

[123] A verbal reprimand cannot be referred to adjudication, as per subsection 92(1) of the *Public Service Staff Relations Act (PSSRA)* and, consequently, I cannot conclude on it.

PSSRB File No. 166-2-32091

[124] On April 15, 2002, a co-worker complained to Mr. Pantaleo, and three others to Judy Phillips, that bad odours were emanating from the grievor and/or his workstation. During a meeting, that issue was discussed with the grievor and his union representative. The exhibits E-14 and E-15 are electronic messages that were sent to Mr. Pantaleo by other employees of the department on April 15, 2002, reporting bad odours emanating from Mr. Twiddy or from his workstation. These exhibits are hearsay evidence in writing and their content are not proven. The employees who made those complaints did not testify at the hearing and I cannot accept the exhibits alone as proof of the alleged facts therein.

[125] The grievor was contesting that bad odours were emanating from him or his workstation. He testified that he showered and shaved before he left for work and spent about half an hour on his couch going through some papers. At the hearing, Mr. Pantaleo did not recall if he noticed bad odours when he met with the grievor on April 15, 2002.

[126] The employer has the burden to demonstrate that the grievor showed a lack of hygiene on the day of April 15, 2002, and that he acted against the expectations to report to work clean and odour-free. The employer failed to prove that the grievor acted in the way alleged to justify sending him home without pay from 1:45 p.m. to 4:00 p.m. on April 15, 2002.

[127] The grievance is allowed and I order the employer to reimburse the grievor the salary and the other benefits he is entitled to for April 15, 2002, from 1:45 p.m. to 4:00 p.m.

PSSRB File No. 166-2-32092

Insubordination (Medical Certificates)

[128] The disciplinary letter dated June 10, 2002, states that the reason for the three-day suspension was the failure to submit a medical certificate for his absences on May 27, 28 and 31, 2002 (Exhibit E-11). Previously, that requirement had been explained to the grievor by Mr. Pantaleo in the May 6, 2002 letter (Exhibit E-10), in reference to the taking of 32 days of sick leave in the previous five months.

[129] Subclause 35.02(a) of the collective agreement allows the employer to request that an employee substantiate his absences for sickness in such a manner and at such time as it may determine. In the present file, the employer had a legitimate basis for requesting that the grievor substantiate his absences with a medical certificate, considering that 32 days of sick leave in the past five months was excessive. The grievor was informed in the May 6, 2002 letter of requirements, pursuant to clause 35.03, that he had to submit a medical certificate.

[130] The grievor explained that he was unable to get an appointment with his family physician on the dates that he was sick, and his doctor was not able to receive him before the following week. He did not try to see another doctor to get a medical certificate, stating that the walk-in clinics were away from his home and that it was difficult for him to go there when he was ill. He did not try to see another doctor, thinking that they would all apply the same policy and not give him a medical certificate after the fact.

[131] From the evidence, I conclude that the grievor made some efforts to try to obtain an appointment with Dr. Cait when he was ill. However, he did not make all reasonable efforts to get a medical certificate to substantiate his absences. I consider that it was possible for him to have gone into a walk-in clinic and to have requested a medical certificate from a doctor other than Dr. Cait.

[132] It is a reasonable requirement on the employer's part to request a medical certificate to substantiate all sickness absences, as the grievor's personnel file showed a clear pattern of excessive absences. The grievor had the burden to show that he made all reasonable efforts to get a medical certificate as required, but he failed to meet this burden. For these reasons, I have come to the conclusion that the discipline is merited.

[133] I consider the fact that the grievor made some effort to get an appointment with his family physician a mitigating factor. I reduce the three-day suspension imposed by the employer to a two-day suspension without pay. Consequently, the grievance is allowed in part and I order the employer to reimburse the grievor for one day of salary and benefits.

PSSRB File No. 166-2-32094

Forged Medical Certificate

[134] The evidence demonstrates that the grievor knowingly falsified a medical certificate to substantiate his absences from June 11 to 13, 2003. Following his admission at the hearing, he was aware that he was doing something wrong when he falsified the medical certificate. On that basis, the discipline imposed by the employer is merited.

[135] I do not consider the grievor's financial hardship and the fact that it increased his anxiety problems to be mitigating factors. The forgery is a serious infraction that merits an exemplary disciplinary measure. At the time this discipline was issued, the grievor showed that other disciplinary decisions are in his personnel file, the latest being:

- (i) a two-day financial penalty re: August 23, 2001 (PSSRB File No. 166-2-31989, denied by this decision);
- (ii) a three-day suspension without pay on May 6, 2002, for having assessed his own employment insurance claim (PSSRB File No. 166-2-32090);
- (iii) verbal warning (May 6, 2002) for a client-interaction incident (April 12, 2002);
- (iv) on April 15, 2002, a penalty for lack of hygiene; sent home without pay from 1:15 p.m. to 4:00 p.m. (PSSRB File No. 166-2-32091, voided by the present decision); and
- (v) on June 18, 2002, a three-day suspension for the omission to submit a medical certificate (PSSRB File No. 166-2-32092, reduced to two days by the present decision).

[136] Taking into account the fact that those disciplinary sanctions had been imposed on the grievor in the year previous to the misconduct that took place on July 7, 2003, and that the misconduct of forgery is a very serious offence, the 10-day suspension is reasonable under the circumstances. The difficult financial situation he was suffering cannot be considered a mitigating factor for the misconduct of forgery. For these reasons, this grievance is denied.

[137] For all of the above reasons, I make the following order:

Order

PSSRB File No. 166-2-31989

[138] The grievance is denied.

PSSRB File No. 166-2-32090

[139] The grievance is denied.

PSSRB File No. 166-2-32091

[140] The grievance is allowed; the employer is ordered to reimburse the grievor the salary and the other benefits he is entitled to for April 15, 2002, from 1:45 p.m. to 4:00 p.m.

PSSRB File No. 166-2-32092

[141] The grievance is allowed in part. I order the employer to reimburse the grievor for one day of salary and benefits.

PSSRB File No. 166-2-32994

[142] This grievance is denied.

**Léo-Paul Guindon,
adjudicator**

April 20, 2005.