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**File:** 166-02-34755

**Citation:** 2006 PSLRB 113



*Public Service  
Staff Relations Act*

Before an adjudicator

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BETWEEN

**PAULA EWEN**

Grievor

and

**TREASURY BOARD  
(Correctional Service of Canada)**

Employer

Indexed as  
*Ewen v. Treasury Board (Correctional Service of Canada)*

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

**REASONS FOR DECISION**

***Before:*** [Barry D. Done, adjudicator](#)

***For the Grievor:*** [Neil Harden, Professional Institute of the Public Service of Canada](#)

***For the Employer:*** [Adrian Bieniasiewicz, counsel](#)

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Heard at Winnipeg, Manitoba,  
May 25 and 26, 2006.

## REASONS FOR DECISION

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### I. Grievance referred to adjudication

[1] The grievor in this case is Paula Ewen, who is employed as a nurse with the Correctional Service of Canada (CSC) at Rockwood Institution in Manitoba. Ms. Ewen's substantive position is classified at the NU-HOS-03 group and level, and her terms and conditions of employment are contained in a collective agreement signed on December 24, 2001, by the Treasury Board and the Professional Institute of the Public Service of Canada for the Health Services Group bargaining unit (Exhibit G-1). On April 7, 2003, she grieved the denial of her application for education leave to complete her Bachelor of Nursing, for the period from September 30, 2003, to May 30, 2004. Her grievance reads as follows:

...

*On or about March 26, 2003, I was informed by my Warden that I have been denied education leave and allowance in lieu of salary and assistance for books and tuition. I had pursued the completion on my Bachelor of Nursing degree with the understanding that I would be considered for support when I am within 8 months of receiving my degree. The denial was based on a Regional decision not to grant any such leave and allowance this year. Such a decision represents an attempt to avoid terms of the collective agreement. By denying my leave, the employer has violated Article 18 and other related articles of the SH Group Collective Agreement. I therefore grieve.*

...

[2] Provision for the granting of education leave is found at clauses 18.02(a) and 18.05(a) of the collective agreement, and provision for an allowance in lieu of salary is found at clause 18.02(b) of the collective agreement (Exhibit G-1). These clauses read as follows:

...

#### **18.02 Education Leave**

- (a) *An employee may be granted education leave without pay for varying periods up to one (1) year, which can be renewed by mutual agreement, to attend a recognized institution for additional or special studies in some field of education in which special preparation is needed to enable the employee to fill his present role more adequately, or to undertake*

*studies in some field in order to provide a service which the Employer requires or is planning to provide.*

- (b) *An employee on Education Leave without pay under this clause shall receive an allowance in lieu of salary equivalent to from fifty per cent (50%) to one hundred per cent (100%) of the employee's basic salary. The percentage of the allowance is at the discretion of the Employer. Where the employee receives a grant, bursary or scholarship, the education leave allowance may be reduced. In such cases, the amount of the reduction shall not exceed the amount of the grant, bursary or scholarship.*

...

#### **18.05 Selection Criteria**

- (a) *The Employer shall establish Selection Criteria for granting leave under clauses 18.02, 18.03 and 18.04. Upon request, a copy of these criteria will be provided to an employee and/or the Institute Representative.*

...

[3] Provision for reimbursement for tuition, textbooks and other materials is found in the *CSC Standard Operating Practices — Education Leave (287)* dated August 27, 1998 (Exhibit G-9), which, though current at the time of Ms. Ewen's application for education leave, was revoked on June 11, 2003. The relevant provisions read as follows:

...

21. *Reimbursement may be considered for the following expenses:*
- a. *tuition, registration, laboratory, examination and other institutional fees;*
  - b. *textbooks and other materials prescribed as part of the course requirement;*
  - c. *actual transportation expenses to and from the educational institution, where it is not within the work location of the employee;*
  - d. *travel expenses in accordance with the Treasury Board Travel Policy; and*

- e. *moving expenses in accordance with the Treasury Board Relocation Policy, when it is more economical than the payment of travel expenses.*

...

[4] Ms. Ewen referred her grievance to adjudication on June 11, 2004. The parties attempted to settle this grievance through mediation, without success. Due to the parties' availability, the hearing of this grievance was scheduled for May 25 and 26, 2005.

[5] 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*, this reference to adjudication 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").

## II. Summary of the evidence

[6] At the outset of the hearing, the parties provided me with an "Agreed Statement of Facts" (Exhibit 1), as well as seven documents on consent (exhibits E-1 through E-7). Additionally, the grievor submitted eight exhibits (exhibits G-2 through G-9), and the employer submitted exhibits E-8 to E-17. Although the grievor called no witnesses, she testified on her own behalf. The employer called two witnesses. At the grievor's request, I excluded the witnesses.

### A. Agreed statement of facts

[7] The "Agreed Statement of Facts" reads as follows:

...

1. *The Grievor started employment with Correctional Service of Canada ("CSC") as a registered nurse (NU HOS 3) on November 17, 1996.*
2. *On February 5, 2001, the Grievor presented an Application for Education Leave. The Grievor requested leave from September 1, 2001 to July 1, 2002. (exhibit E-1)*
3. *By email dated April 3, 2001, the Grievor was advised by Bruce Campbell, Warden, that an Education Leave with pay could not exceed 8 months. (exhibit E-2)*

4. *By email dated April 4, 2001, the Grievor amended her initial Education Leave period and requested leave from September 6, 2001 to April 30, 2002. (exhibit E-2)*
5. *By memorandum dated April 18, 2001, the Grievor was advised that her Education Leave request was considered by the Regional Personnel Committee ("RPC") and decided that her request could not be approved, at that time. The RPC agreed that: "financial assistance with tuition and books should be provided". The Grievor was encouraged by RPC to discuss a strategy for achieving her educational goal with the Warden. (exhibit E-3)*
6. *On January 18, 2003, the Grievor filled out a second Application for Education Leave. The Grievor requested leave from September 30, 2003 to May 30, 2004. (exhibit E-4)*
7. *On January 21, 2003, Bruce Campbell, Warden, sent an email to all users informing them that upon the review of the Regional Budget, it was determined that "no education classes/tuition/books will be approved by the Senior Management Committee at Rockwood and no education leave will be approved by RHQ. This decision will be applied at all CSC operational sites within the Prairie Region". (exhibit E-5)*
8. *On October 6, 2003, Bruce Campbell, Warden and Mike Pollmann, D/Warden informed the Grievor that: "Mandatory training is supported. Mutually agreed upon courses all supported subject to availability and institutional budgetary measures". (exhibit E-6)*
9. *As a result of the first level grievance response, on June 17, 2004 the Grievor was paid \$3,500,00 for tuition and books as recommended by the RPC's in its memorandum dated April 18, 2001. (exhibit E-7)*

...

[Sic throughout]

B. For the grievor

[8] Ms. Ewen began her career with the CSC in 1976. In July 2005, she began a secondment to the Medical Services Branch of Health Canada, where she was still working at the time of the hearing. Ms. Ewen's educational qualification for her substantive position was a diploma. She believed that, in order to position herself for either vertical or lateral advancement, she needed a Bachelor of Nursing. She felt that

the employer was moving toward requiring all nurses to possess a Bachelor of Nursing in the foreseeable future. This led her to apply, on February 5, 2001, for a 10-month education leave, from September 1, 2001, to July 1, 2002 (Exhibit E-1). She also requested funding of salary, tuition fees, travel/living expenses and other related expenses, such as nursing registration, student fees, and CPR training. Her request amounted to \$66 294.

[9] On April 3, 2001, by email, Gina Rodrigue, Prairie Region Administration, Personnel, advised Bruce Campbell, the Warden of Rockwood Institution, to have Ms. Ewen resubmit her application for education leave, this time for a period not to exceed the eight months prior to the completion of her Bachelor of Nursing (Exhibit E-2). On April 4, 2001, Ms. Ewen did as requested, this time amending her application for education leave for a period of just over seven months, from September 6, 2001, to April 30, 2002 (Exhibit E-2).

[10] On April 18, 2001, the grievor received a memorandum from Ms. Rodrigue, advising her that her education leave request was denied but that “. . . financial assistance with tuition and books should be provided. . . .” (Exhibit E-3). In fact, an undated document submitted on consent as Exhibit E-7, and signed by then Acting Warden Michael Pollmann, shows that payment to the grievor of a sum of \$3500 was authorized for tuition fees.

[11] On an annual basis, employees are required to submit to their supervisor a form called “Personal Development Plan” (PDP) (Exhibit G-2), indicating both compulsory and elective training, which Ms. Ewen submitted on December 12, 2001. This form was signed by her supervisor, Deputy Warden Pollmann, on December 10, 2001, who wrote the following comments:

*Essential courses are required to allow Paula to perform her duties. Mutual [sic] agreed courses and developmental activities are supported pending availability.*

[12] On December 18, 2001, Warden Campbell signed the grievor’s PDP as manager, commenting “I concur as resources are available”. On the reverse side of that document, Deputy Warden Pollmann wrote “Paula has the abilities to qualify to [sic] an administrative position within CSC. Her plan to continue her education is supported.” Concerning Ms. Ewen’s career plans, Warden Campbell wrote the following:

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*I support Paula's plan to work towards her degree. When she can be considered for ed. leave, her request will be presented to RMC [Regional Management Committee] for consideration.*

[13] The grievor explained that her understanding of the above remarks by both the Deputy Warden and the Warden was that books and tuition for the whole bachelor's program would be paid by the employer, and that she should resubmit her education leave request within eight months of completion of her bachelor's. Confident that management supported her education and career plans, Ms. Ewen proceeded with her bachelor's. Beginning in May 2001, she took courses during evenings, weekends, and in the summer, as well as challenging some courses, as opposed to personally attending them.

[14] On January 18, 2003, Ms. Ewen submitted a second application for education leave for the period of September 30, 2003, through May 30, 2004 (Exhibit E-4), a period of eight months. In this application she requested payments of \$42 000 for allowance in lieu of salary, \$3200 for tuition and \$800 for books, for a total of \$46 000. She left her application, together with a letter from the University of Manitoba (Exhibit G-3), in her supervisor's lock box. Several weeks later, Deputy Warden Pollmann told her that her education leave application was denied.

[15] Between her submitting her education leave request and her receiving her supervisor's oral reply, the grievor received an email from Warden Campbell dated January 21, 2003 (Exhibit E-5). It is this communication that gave rise to the grievance (Exhibit E-12), specifically the following excerpts:

...

*... it was determined that regionally we are not in a position to be paying for these requests. An RMC decision was made not to pay for any Education Leave for the fiscal year 2003/2004. This means that no educational classes/tuition/books will be approved by the Senior Management Committee at Rockwood and no education leave will be approved by RHQ. This decision will be applied at all CSC operational sites within the Prairie Region.*

...

[16] The grievor reacted to that communication by emailing Deputy Warden Pollmann on February 5, 2003 (Exhibit G-4), asking whether "... the remaining costs of

tuition and books will not be covered in spite of the letter I received from Regional Headquarters.”

[17] Ms. Ewen sent a letter dated February 10, 2003 (Exhibit G-5), to Deputy Warden Pollmann, regarding her belief that her costs for both tuition and books would be covered, as well as commenting on the status of her progress towards a Bachelor of Nursing. As her request for a meeting with Warden Campbell (Exhibit G-6), which she emailed to Deputy Warden Pollmann on February 26, 2004, remained unanswered, Ms. Ewen contacted her bargaining agent concerning the situation, and expressed the wish to grieve against a breach of earlier commitments made by Deputy Warden Pollmann and Warden Campbell. Her grievance was presented on April 7, 2003. As corrective action, Ms. Ewen asked:

*To have my request for Educational Leave and allowance in lieu of salary, and support for books and tuition granted by the employer. To be made whole in every way.*

[18] Ms. Ewen commented on the general impact that the denial of education leave had both on her and her family, as well as on the financial impact. She prepared Exhibit G-7 on April 5, 2005, and sent it to her bargaining agent’s representative. This exhibit outlines, as the grievor concedes, the rough, approximate cost of obtaining her Bachelor of Nursing, as well as outstanding balances of \$2577.80, which she alleges remain to be paid by her employer. The grievor further entered exhibits G-8 and G-9.

[19] Exhibit G-8 is *CSC Bulletin — Policy, issue No. 49*, dated August 27, 1998, which rescinded *Commissioner’s Directive 287* and replaced it with the *CSC Standard Operating Practices - Education Leave (287)*, also dated August 27, 1998 (Exhibit G-9). These practices were the result of collaboration between a revision team, regional specialists, bargaining agents and the CSC’s Policy Division. Topics covered by this document are:

- who is eligible for education leave;
- the application procedure;
- factors to be considered in approving applications; and
- what costs can be considered for reimbursement.

The grievor said that she had obtained exhibits G-8 and G-9 from the CSC’s website in late May 2003.



[20] In cross-examination, Ms. Ewen explained that the reference to essential courses in her PDP means compulsory courses, and that she had not yet taken those courses at that time. However, she took those courses in the four years that followed. As well, she conceded that the word “considered” in the April 18, 2001, memorandum from Ms. Rodrigue denying her education leave (Exhibit E-3) does not mean “approved”, and that she had not been given any guarantee of education leave. As well, she acknowledged that her applications for education leave (exhibits E-1 and E-8) referred to the cost of the educational leave that she was requesting for the period of September 1, 2001, to July 1, 2002, only, and not to the full cost of her obtaining a Bachelor of Nursing. She further conceded that she was reimbursed the exact tuition fees that she had claimed in her application, a sum of \$3500. However, as Warden Campbell had not specifically limited the period for which tuition and books would be reimbursed, she understood that all tuition and books necessary for her obtaining her Bachelor of Nursing would be reimbursed.

[21] Ms. Ewen was asked about her performance evaluation report covering the period from October 30, 2000, to October 30, 2001 (Exhibit E-10). On page three of that report, both Deputy Warden Pollmann and Warden Campbell wrote that they supported her continuing education. When asked whether her performance evaluation report specifically referred to financial support, she responded that it did not. However, she added that financial support was the only support that she requested. She was also aware of Deputy Warden Pollmann’s comments on her PDP dated October 6, 2003 (Exhibit E-6), indicating that his support was “. . . subject to . . . institutional budgetary concerns.” The grievor said that, at the time of her grievance, she was unaware that section 20 of the *CSC Standard Operating Practices – Education Leave* (287) specifically mentioned the size of the budget allocated to training and development as one of the six factors used to determine which education leave requests will be approved.

### C. For the employer

[22] Donald Kynoch spoke about his employment history with the CSC, including periods as a parole officer, manager, deputy director, district director and warden. At the time of the hearing, Mr. Kynoch was the Director of the Manitoba – NW Ontario District Parole Office. He is, as well, a member of the Prairie Region’s Regional Management Committee (RMC) composed of wardens, executive directors, district directors, two assistant deputy commissioners and one deputy commissioner. The

RMC reviews applications for education leave. Education leave is not separately funded, and funds must be found within existing resources. Ultimately, it is the Deputy Commissioner who decides and sets aside money for approved applications, usually early in the fiscal year.

[23] Following a letter from Regional Headquarters - Prairies to the RMC, employees are invited to apply for education leave and training allowance and to submit a PDP. These forms must be presented to their supervisor, who reviews them and indicates whether he/she supports the applications. The forms then go to the institutional head, who does the same and forwards them to the Regional Administrator, Personnel. These forms are tabled every six weeks at an RMC meeting, where applications are discussed and the Deputy Commissioner decides which ones to approve.

[24] At one of these meetings, Mr. Kynoch recalls Ms. Ewen's application being discussed (Exhibit E-8) and denied, as it was not within eight months of graduation. Her application was not allowed in the 2003-2004 fiscal year because of serious financial problems.

[25] There was a high volume of overtime and, according to Mr. Kynoch, the Prairie Region was "two million dollars in the hole." National Headquarters could no longer help Rockwood Institution balance its budget, and a Budget Committee was set up to come up with ways to save money, which ranged from energy saving to recalling employees that had gone on French language training. The Deputy Commissioner decided that there would be no education leave in 2003-2004, as "we couldn't afford it". To allow Ms. Ewen's application would have cost approximately \$80 000. Mr. Kynoch is not aware of any education leave requests having been approved in 2003-2004. The witness was shown the minutes of the RMC's meeting of March 18 and 19, 2003 (Exhibit E-13). He attended this meeting, and recalls the decision that "Education leave will not be funded this year." The witness next commented on a memorandum dated April 9, 2003, entitled "Budget Decisions 2003-2004 and Regional Budget Committee Results" (Exhibit E-14). This document confirms that education leave, tuition and books were suspended for one year, by which \$300 000 were expected to be saved.

[26] A further two exhibits were introduced through Mr. Kynoch: a memorandum to the RMC dated February 26, 2004, suggesting that the RMC not commit to "... funding for long term Education Leave with Allowance at this point. . . ." (Exhibit E-15), and a

recommendation and approval form for education leave dated February 19, 2001 (Exhibit E-16). This last document recommends that "... some support to continued education should be provided." Warden Campbell recommended that "Paula has yet to clear up the credits she will require. Further info is needed prior to RMC's meeting and this should be provided. This isn't needed at the present time in her capacity at R.I."

[27] In cross-examination, Mr. Kynoch acknowledged that managers must abide by the collective agreement. He conceded that, once salary increases were negotiated, he would have to implement them. He acknowledged that paragraph 13.b. of the *CSC Standard Operating Practices - Education Leave (287)* provides that job performance at the fully satisfactory level or better during the previous two years was a criteria used for basic eligibility for education leave. He was able to confirm that the budget for one of nine institutions in the Prairie Region was \$25 million and that the budget for the Prairie Region certainly exceeded \$100 million.

[28] Last to testify was Deputy Warden Pollmann, who spoke of his employment with the CSC since 1984. He has been, at various times, a correctional officer, a parole officer, a unit manager and an assistant warden. He is currently the deputy warden at Rockwood Institution. Though not a member of the RMC, and not personally involved in the decision to deny Ms. Ewen's education leave request, he believed that that denial was based on the *CSC Standard Operating Practices - Education Leave (287)* (Exhibit G-9). As well, he believed that consideration would be given to where (at what stage) an applicant was in a given education program, and whether a degree was a job requirement.

[29] Deputy Warden Pollmann spoke of the difficult financial situation in 2003-2004, of the difficult decision that was made not to approve any applications for education leave, and of cuts that were made at Rockwood Institution to reduce costs. When shown the email of January 21, 2003, advising staff that no education classes, tuition or books would be approved in 2003-2004 (Exhibit E-5), he believed that Ms. Ewen was the only one at Rockwood Institution who was applying for education leave, and that no such applications were approved. He said that, although a degree was not necessary for Ms. Ewen, his recommendation for "some support" meant opportunities for time off to write an exam, or some tuition, adding "I'd support that". He was Ms. Ewen's supervisor in 2000, and acknowledged that she was an excellent nurse and that he had no issue with her abilities, but that a degree was not required for her position. When

shown paragraph 20 of the *CSC Standard Operating Practices – Education Leave* (287), he said the size of the budget (paragraph 20.d.) was important, as “. . . if there are no funds, we can’t send anyone”. He advised that the financial situation did not change, and, so, funding of education leave was never revisited. He explained that, although he could not recall having seen Ms. Ewen’s application for education leave for the period from September 30, 2003, to May 30, 2004 (Exhibit E-4), he may well have seen it, but that he had not promised Ms. Ewen any assistance, even for tuition or books, as it was not within his authority to do so.

[30] In cross-examination, Deputy Warden Pollmann was shown the first-level reply to Ms. Ewen’s grievance, which he gave on May 5, 2003. He was asked whether he denied Ms. Ewen’s application for education leave for the period from September 30, 2003, to May 30, 2004 (Exhibit E-4). He said that he did not, but pointed out that his first-level reply was in reference to her original application in 2001 (Exhibit E-1). The witness recalled seeing Ms. Ewen’s email enquiring about funding for tuition and books (Exhibit G-4). He was unsure whether the original April 18, 2001, denial of education leave (Exhibit E-3) referred to the eight months prior to completion of her Bachelor of Nursing, but acknowledged seeing the letter from the University of Manitoba (Exhibit G-3), which, he conceded, removes all doubt that the period of eight months was from September 2003 to April 2004, prior to her graduation. Deputy Warden Pollmann said that, although it was not his position to say that Rockwood Institution was underfunded, it was his belief that, although “. . . we basically get the money we need to operate. . . .”, there was insufficient money to cover a number of things, and cuts had to be made. He said that Ms. Ewen had the potential for advancement to a management position, but that a degree was not necessary for all management positions, and gave as an example the fact that the Deputy Commissioner himself did not have a degree, nor was there a requirement for wardens to have a degree.

### III. Summary of the arguments

#### A. For the grievor

[31] There can be no doubt that Ms. Ewen’s application for education leave for the period 2003–2004 was received, contrary to what the employer inferred. Ms. Ewen gave evidence to the effect that she left her application in Deputy Warden Pollmann’s lock box. Deputy Warden Pollmann himself conceded that he may have seen Ms. Ewen’s

application, and said that he did see the University of Manitoba's letter (Exhibit G-3) that was attached to her application.

[32] Ms. Ewen argued that *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.) does not apply in this case. She explained how her grievance referred to the denial of her application of education leave having been made in bad faith, even though those words were not used.

[33] The main argument, and the issue as seen by Ms. Ewen, is the use of or extent of the employer's discretion. The intent of clause 18.02(a) of the collective agreement is clear: to provide for the possibility of education leave. The employer's discretion in that regard is not absolute, but limited. It cannot be used in a manner that is arbitrary, discriminatory or in bad faith. There must be a genuine use of discretion, which must not result in a patently absurd decision. Clause 18.05(a) of the collective agreement obliges the employer to establish selection criteria for granting leave under clause 18.02. However, those selection criteria must give effect to the intent of clause 18.02(a), and must be capable of being followed in selecting applicants. Once established by the employer, these criteria are incorporated by reference into the collective agreement, and not applying the criteria violates the collective agreement.

[34] Ms. Ewen concedes that budget is a consideration, but money must be allocated in the first place. The employer's decision not to allocate funds for education leave and allowance is analogous to "holding a wad of cash in one's left hand and pleading there is no money in one's right hand". Ms. Ewen urges me not to consider the size of the budget as a determining factor, because the size of the budget should not be used as a selection criterion. The highlights of the *2003 Budget* (Exhibit 1, tab 7) show a surplus of between 4.8 and 8.8 billion dollars at the federal government level. This shows that in fiscal year 2003-2004 the Government of Canada had no financial crisis that would justify denying Ms. Ewen's education leave request.

[35] Deputy Warden Pollmann's evidence was that the budget for the Prairie Region in 2003-2004 exceeded \$100 million. Given that Ms. Ewen's education leave would have cost only \$80 000, the employer's denial was arbitrary, capricious and in bad faith. Henry Campbell Black, in his *Black's Law Dictionary*, abridged 5th ed. . . . (1983), defines "arbitrary" and "bad faith" as follows:

. . .

**arbitrary.** *Not done according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic. Without fair, solid, and substantial cause; that is, without cause based upon the law, not governed by any fixed rules or standard. . . .*

. . .

**Bad Faith.** *The opposite of “good faith,” generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties. . . .*

. . .

[36] The employer’s decision not to allocate any funds for education leave in 2003-2004 frustrates the intent of the collective agreement, negates one of its express terms and amounts to bad faith. This was no accidental result, but a foreseeable consequence.

[37] Ms. Ewen referred to *Salois v. Treasury Board (Correctional Service of Canada)*, 2001 PSSRB 88, *Allad v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-24466 (1995) (QL), and *Nav Canada v. Canadian Air Traffic Control Association* (2000), 86 L.A.C. (4th) 370. In that last case, an arbitrator found as follows:

. . .

*. . . the blanket requirement . . . is not compatible with the exercise of discretion . . . what it does in fact is eliminate any notion of discretion, i.e., one where proper consideration would be given to the actual circumstances giving rise to an individual employee’s claim. Even in cases where coverage would be denied, management would need to consider the circumstances giving rise to the claim.*

. . .

[38] Ms. Ewen also referred me to *Meadow Park Nursing Home v. Service Employees International Union, Local 220* (1983), 9 L.A.C. (3d) 137, where an arbitration board decided that:

. . .

*. . . there must be a genuine as opposed to a purported use of discretionary power. This means that the decision-maker*

*charged with taking the decision shouldn't act under dictation from some other person . . . the discretion should be exercised in relation to each individual matter and should not be fettered by reason of a rigid policy laid down in advance.*

. . .

[39] Ms. Ewen concluded her submission by noting that, as she has now completed her Bachelor of Nursing, she is requesting a declaratory order that education leave was denied in violation of the collective agreement, plus an order for payment of monies that should have been paid in accordance with her rough calculations of costs to obtain her Bachelor of Nursing (Exhibit G-7).

B. For the employer

[40] Clause 18.02(a) of the collective agreement provides that education leave may be granted. This confers a very broad discretionary power on the employer, depending on operational needs, budget and all relevant factors. The employer accepts the three criteria set out in *Salois*. Section 20 of the *CSC Standard Operating Practices - Education Leave (287)* sets out six factors, but the size of the budget (paragraph 20.d.) is the ultimate one; it would be absurd to ignore it. The evidence shows that in 2003-2004 the CSC had serious financial problems that required making cuts. Knowing the gravity of those financial problems, it was not open to the CSC to approve education leave - "it was impossible." The same rule applied to everyone and, in fact, Ms. Ewen was given exactly what she requested for tuition in her application for leave (Exhibit E-8), and was provided with funding. The grievor acknowledged that she was not promised financial assistance for the entire period of study.

[41] The employer argued that the collective agreement is silent on payment of tuition and books. The collective agreement speaks only to education leave and allowance in lieu of salary. Nor is there to be found in the collective agreement any requirement for the employer to establish criteria for payment for tuition and books. As the grievor cannot refer to adjudication something not found in the agreement, the adjudicator is without jurisdiction to hear and determine that part of the grievance.

[42] It is the grievor's burden to establish that discretion in this case was exercised in a discriminatory or arbitrary manner, or in bad faith. She has failed to do it. Indeed, as the grievance does not expressly raise any allegation of abuse of discretion, the grievor is precluded from arguing it at adjudication, as the employer was not given the

opportunity to address these allegations during the internal grievance process. The employer referred to *Burchill* and alleged that it has been taken by surprise by those allegations being raised for the first time at adjudication.

[43] The employer argues that the precedents on which the grievor relies to argue that the employer adopted a blanket policy have no application in this case, because the CSC has not adopted any policy to deny all education leave applications for 2003-2004. The factors identified in the *CSC Standard Operating Practices – Education Leave* (287) are always reviewed when applications are received, and “. . . the fact that no applications could be granted is not a policy, just a decision that had to be made as there was no room to manoeuvre.” The denial of Ms. Ewen’s application for education leave was not capricious, and was based on real financial problems.

[44] As the grievor failed to establish that the employer’s decision not to grant her education leave application breached the collective agreement, and as no evidence has established such a breach, the adjudicator must deny the grievance. Last, the employer argued that Ms. Ewen’s document estimating the costs to obtain her Bachelor of Nursing (Exhibit G-7) is not independent evidence, and that, even if it were, the employer is not obliged to support those costs, and the failure to pay them is not adjudicable.

#### C. Rebuttal by the grievor

[45] Although the collective agreement is silent about entitlement to payment for tuition and books (Exhibit G-9), the *CSC Standard Operating Practices – Education Leave* (287) is incorporated by reference into the collective agreement. The grievor concedes, however, that, if that were not the case, she would agree with the employer that the portion of the grievance dealing with payment for tuition and books is not adjudicable.

[46] Last, the grievor submits that the employer’s decision not to grant her education leave application in 2003-2004 is a policy, fettering the use of genuine discretion.

#### IV. Reasons

[47] Central to this dispute is the denial of Ms. Ewen’s application for education leave in order to obtain her Bachelor of Nursing. However, to her credit, Ms. Ewen was able to obtain her degree by attending classes outside working hours. She graduated in



August 2004, despite the denial of education leave. She now requests a declaration that, in denying her leave application, the employer violated the collective agreement. In addition, she asks that I order the employer to reimburse the difference between her education-related costs and the assistance that she received from the employer.

[48] In considering this, I turn first to the employer's objection to my jurisdiction over payment for tuition and books. I take the employer's point that there is no provision in the collective agreement for payment for either tuition fees or books. Indeed, the only provision for tuition and books is found in the *CSC Standard Operating Practices - Education Leave (287)* (Exhibit G-9), at paragraphs 21.a. and 21.b.

[49] Paragraph 92(1)(a) of the former *Act* provides for the reference to adjudication of a grievance that has not been dealt with to the satisfaction of the employee. Other than termination of employment, demotion or disciplinary action resulting in suspension or a financial penalty, the only matters that may be referred to adjudication are those arising from a collective agreement or an arbitral award.

[50] The grievor submits that the *CSC Standard Operating Practices - Education Leave (287)* (Exhibit G-9) is incorporated into the collective agreement by operation of clause 18.05(a) of the collective agreement. I disagree. Clause 18.05(a) of the collective agreement speaks only to the establishment of selection criteria for granting education leave; it does not address what expenses may be considered for reimbursement. The latter is found in paragraph 21 of the *CSC Standard Operating Practices - Education Leave (287)*, and is in no way related to the selection criteria. It is only once the selection process has been completed that paragraph 21 can operate. Nor is there any suggestion in the collective agreement that the *CSC Standard Operating Practices - Education Leave (287)* are incorporated therein. As the grievor conceded, this renders the issue non-adjudicable, and I so find.

[51] That leaves the request for a declaration that the manner in which Ms. Ewen's application for education leave was handled violates the collective agreement. There is no doubt that the employer agreed with Ms. Ewen's wish to upgrade her education. As early as mid-December 2001, Deputy Warden Pollmann supported her plan to further her education. Warden Campbell supported her as well. This is consistent with the payment of \$3500 for tuition (Exhibit E-7), as claimed in her application for education leave (Exhibit E-8).

[52] I would like to address the employer's submission on the application of *Burchill*. Simply put, I see no application in this case. The employer claims that it has been "caught by surprise" by the grievor's bad faith argument. *Burchill*, as I understand it, prevents a grievor from arguing one case before the employer and an altogether different one before an adjudicator. In the grievance before me, the substance of the grievance was and still is constant: that "... the decision not to grant any such leave and allowance this year ... represents an attempt to avoid terms of the collective agreement." This is tantamount to an allegation of bad faith.

[53] Historically, grievors have never been required to outline their arguments on the face of the grievance. Rather, they are obliged to provide sufficient details to enable the employer to understand the matter being grieved. The employer's grievance form asked the grievor to provide "details of grievance", not details of the arguments on which she intended to rely. There are a host of reasons for this, not the least of which is that to adopt the employer's argument would limit a grievor to only those arguments spelled out on the grievance form, disregarding pertinent arguments that a perhaps more skilled or experienced representative would make at the different levels of the grievance process or at adjudication.

[54] There is common ground between the parties in that the employer enjoys discretion in the granting of education leave. The words "may be granted" in clause 18.02(a) of the collective agreement confer such discretion upon the employer. Whether and how discretion was exercised in denying Ms. Ewen's application for education leave is the issue that I must determine.

[55] The exercise of discretion cannot be arbitrary, discriminatory or in bad faith. This principle was followed in *Salois* and *Allad*. D.P. Jones and A.S. de Villars, in *Principles of Administrative Law*, 2nd edition (1994), discussed the exercise of discretion as follows:

...

*... unlimited discretion cannot exist. It is an abuse for a delegate to refuse to exercise any discretion by adopting a policy which fetters his or her ability to consider individual cases with an open mind.*

...

*After all, the existence of discretion implies the absence of a rule dictating the result in each case; the essence of discretion is that it can be exercised differently in different cases. Each case must be looked at individually, on its own merits. Anything, therefore, which requires a delegate to exercise his or her discretion in a particular way may illegally limit the ambit of his or her power.*

...

[56] The jurisprudence also requires that, in the exercise of discretion, individual circumstances be considered. For example, in *Allad*, the adjudicator made the following comments:

...

*. . . I also agree with counsel for the grievor that the discretion which the Deputy Minister is conferred under this provision, must be exercised in respect of the particular circumstances of this grievor. . . .*

...

[57] Also in *Nav Canada*, the arbitrator found as follows:

...

*. . . the blanket requirement imposed by management in its May 17, 1998 policy is not compatible with the exercise of the discretion conferred upon it by sections 9.02 and 9.03. What it does in fact is eliminate any notion of discretion, i.e. one where proper consideration would be given to the actual circumstances giving rise to an individual employee's claim for sick leave. Even in cases where coverage would be denied, management would need to consider the circumstances giving rise to the claim.*

...

[58] Finally, in *Meadow Park Nursing Home*, the arbitration board made this finding:

...

*. . . In partic- ular [sic], we think that the exercise of the employer's discretion must be in good faith, must be a genuine exercise of discretion and not merely the application of a rigid policy, and must include a consideration of the merits of each individual case. . . .*

...

[59] The question that I must ask myself is whether the facts surrounding the employer's use of its discretion meet the tests or standards set out above.

[60] First, I accept the employer's evidence that the Prairie Region, including Rockwood Institution, was in financial difficulty in the year 2003-2004. The testimony of Deputy Warden Pollmann and Mr. Kynoch is consistent on this point. Also, I do not accept the proposition that the global financial situation of the Government of Canada in 2003-2004 is indicative of that of the CSC during the same period. It was of little use to know that the Government of Canada enjoyed a surplus in the same year, as uncontradicted evidence established the CSC to be, according to Mr. Kynoch, "two million dollars in the hole." However, these dire financial straits do not relieve the employer of either its contractual obligations or the requirements to exercise its discretion in a proper manner.

[61] The education leave-granting process was outlined in great detail by Mr. Kynoch. In early April, at the start of the fiscal year, a letter serving as a reminder goes out concerning applications. Employees' applications are submitted to their supervisor, the warden, the Regional Administrator, Personnel, and the RMC, at a meeting of which the Regional Deputy Commissioner decides whether a request is granted, after discussions of the relative merits of each application.

[62] The process was short-circuited, however, regarding the only applicant, Ms. Ewen. The email from Warden Campbell dated January 21, 2003 (Exhibit E-5), makes it abundantly clear that, a full three months prior to fiscal year 2003-2004, the RMC had decided that:

...

*... it was determined that regionally we are not in a position to be paying for these requests. An RMC decision was made not to pay for any Education Leave for the fiscal year 2003/2004. This means that no educational classes/tuition/books will be approved by the Senior Management Committee at Rockwood and no education leave will be approved by RHQ. This decision will be applied at all CSC operational sites within the Prairie Region.*

...

This decision not to allow any education leave applications was made before Ms. Ewen submitted her application for 2003-2004.

[63] How then can the employer argue that Ms. Ewen's individual circumstances were fairly considered? In fact, Ms. Ewen testified that it was only weeks later that Deputy Warden Pollmann informed her that her education leave application was denied. This evidence was not challenged. Yet, that denial came weeks after a decision had already been made that all education leave applications would be denied. The email from Warden Campbell dated January 21, 2003 (Exhibit E-5), clearly states that "... this means that no educational classes/tuition/books will be approved by the Senior Management Committee at Rockwood. . . ." This is hardly open to review.

[64] This brings me to the employer's closing arguments that there was no blanket policy not to grant education leave in 2003-2004, and that, however, a decision had to be made, as there was no room to manoeuvre. I disagree. This is exactly the kind of abuse of discretion contemplated by Jones and de Villars, when they wrote "... adopting a policy which fetters his or her ability to consider individual cases with an open mind." They also explain that:

...

*The adoption of an inflexible policy almost certainly means that the delegate has not exercised the discretionary power granted to him or her.*

...

These comments stand for the proposition that adopting an inflexible approach converts a discretionary power into a rule applicable in all cases.

[65] The answer to the question whether the employer's denial of Ms. Ewen's application for education leave in 2003-2004 meets the tests set out in both the jurisprudence and the treatise referred to above is in the negative. Further, such a denial, based solely upon a predetermined, inflexible policy, and without due regard to Ms. Ewen's individual circumstances, violated the collective agreement; it was made arbitrarily and in bad faith.

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

*(The Order appears on the next page)*

V. Order

[67] The part of the grievance that relates to payment of tuition and books is denied.

[68] I declare that, in denying Ms. Ewen's request for education leave, the employer violated the collective agreement by failing to properly exercise its discretion, which failure resulted in its acting arbitrarily and in bad faith.

October 17, 2006.

**Barry D. Done,  
adjudicator**