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Citation: 2006 PSLRB 117

Public Service Staff Relations Act

Before an adjudicator

BETWEEN

CHANDER P. GROVER

Grievor

and

NATIONAL RESEARCH COUNCIL OF CANADA

Employer

Indexed as
Grover v. National Research Council of Canada

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

REASONS FOR DECISION

Before: Sylvie Matteau, adjudicator

For the Grievor: Paul Champ, counsel

For the Employer: Ronald M. Snyder, counsel

(Decided without an oral hearing).

Additional award

[1] On October 3, 2005, I issued decision 2005 PSLRB 150 in this matter regarding a reference to adjudication of two grievances from Chander P. Grover ("the grievor"). The order read as follows:

> *[145] The grievances are allowed. The grievor is to be reinstated immediately and compensated for salary and all benefits retroactively to July 21, 2004.*
>
> *[146] I will remain seized for a period of 90 days from the date of this decision to address any matters relating to its implementation.*

[2] The employer has filed an application for judicial review of the decision with the Federal Court of Canada. On December 30, 2005, the grievor's representative wrote to the Public Service Labour Relations Board ("the Board") advising this adjudicator that: "The grievor and the employer have been unable to resolve all remedial issues within the 90-day period."

[3] Some of these issues relate to the reinstatement of the grievor, others are of a different nature, such as general and aggravated damages, compensation for lost professional opportunities and compensation for the financial hardship suffered as a consequence of the employer's actions. At the time of the hearing, the grievor's representative mentioned the intention of his client to make such claims, and suggested that the parties proceed on the merits of the grievances and that the adjudicator remain seized with regard to the implementation of the decision and the determination of further remedies, in the event that the grievor was successful on the merits of his case. The employer did not object to this approach, and I recorded the grievor's request in paragraph 113 of my decision, which reads as follows:

> *[113] . . . The grievor requested that he receive his back-pay from July 21, 2004, to date, that he be reinstated with full benefits and accumulated sick leave and that I remain seized to determine further remedies.*
>
> [Emphasis added]

[4] It was my expectation that the parties would be able to resolve all aspects of this case within the 90-day period. This did not come to pass.

[5] By April 20, 2006, the parties had submitted in writing their respective positions regarding the implementation of my order and comments as to how to proceed beyond

this impasse. Clearly, there is disagreement as to whether or not the grievor should benefit from any compensation for damages. The employer submits that under the principle of *functus officio*, based on the wording of the order (paragraphs 145 and 146 of the decision), I would exceed my jurisdiction if I was to order further remedies sought by the grievor.

[6] This decision addresses the *functus officio* issue, as well as the remedies related to the reinstatement order of the grievor.

Arguments

[7] Following the grievor's letter of December 30, 2005, the employer was asked to provide its position with regard to the remedial entitlements it had proceeded to pay or intended to pay to the grievor at that time. The employer sent its submission on January 23, 2006. It reads as follows:

. . .

> *This is further to your letter of January 10, 2006 in respect of the above captioned. On behalf of the National Research Council Canada (NRC), we provide our submissions herein concerning the remedial entitlements of the Grievor.*
>
> *Adjudicator Sylvie Matteau was explicitly and unequivocally clear in her order and limited the remedies arising from her October 3, 2005 decision to the following:*
>
> > "The Grievor is to be reinstated immediately and compensated for salary and all benefits retroactively to July 21, 2004".
>
> *By letter dated December 21, 2005 to the undersigned (**Exhibit "A"**), Counsel for the Grievor had confirmed that his client received his retroactive salary pursuant to the decision. The sole outstanding concerns relate to the reinstituting of benefits for the relevant period. In respect of those concerns delineated in Mr. Champ's letter of December 21, 2005, we respond as follows:*
>
> *(i)* ***Vacation and Sick Leave***
>
> *The Grievor's vacation and sick leave credits cannot be adjusted until such time as his attendance and leave records are updated. The impediment to completing this task is due to the Grievor's failure in having provided relevant attendance and leave information for the periods April 1 to April 12, 2004 and May*

1 to July 20, 2004. Due to the passage of time, the Grievor is now unable to enter the requested information online. As a result, a systems coordinator has now been engaged to manually prepare a spreadsheet which will reconstruct the foregoing periods to enable the Grievor to provide the necessary information.

Upon completion and receipt of the above, the Grievor's vacation and sick leave credits will be revised accordingly.

The Grievor's earned but unused vacation leave credits will be cashed out in accordance with paragraph A.5.3.4.37 of the NRC Compensation Plan for the Management Category (MG).

(ii) ***Bonus Pay***

MG performance bonuses are paid to directors upon completion of a Performance Planning and Review (PPR) assessment with a minimum overall rating of "fully satisfactory". Upon completion of the PPR, an MG Merit Review Input document is prepared by the Director General which contains the recommended performance pay which is subsequently reviewed by an Executive Committee for final approval by the President.

The Grievor is disentitled to any bonus pay for the 2003/2004 and 2004/2005 periods.

*In respect of fiscal Year 2003/2004, the documentary evidence before the Adjudicator was indisputably clear that the Grievor was directed to prepare and provide input to assess his performance during the relevant fiscal year. In a letter dated 08 March 2004 (**Exhibit "B")** [entered as Exhibit E-4 during the hearing], President Carty advised the Grievor of his expectation that PPR's and Merit Reviews would be conducted for all managers. In a letter dated 17 March 2004 (**Exhibit "C"**) [entered as Exhibit E-4 during the hearing], Dr. Hackett repeated his instruction to the Grievor that he provide the relevant documentation to assess his performance. The testimonies of both Dr. Hackett and the Grievor confirmed the latter's refusal to provide said documentation. The Employer's inability to*

complete the Grievor's performance appraisal due to the latter's intransigence and insubordination disentitles him to the receipt of performance pay for the fiscal Year 2003/2004.

In respect of the fiscal Year 2004/2005, the evidence confirmed that during the period April 1 to July 20, 2004, the Grievor worked only slightly greater than 50 percent of the time. The evidence further confirmed that the Grievor failed to participate in "crucial" management, evolution project and promotion meetings. The following excerpts from Dr. Hackett's testimony are to be recalled:

> *This was a serious matter …….. are dealing with the future of the Institute …..its role …..It was his prime duty to attend ….. He was asked to attend these meetings. If Dr. Grover had concerns about attending these meetings, he could have brought it to my attention … major issues/processes to be used at the Institute were under debate and he needed to be there …..We must have senior management participating in the strategic orientation of the Institute.*

It is to be further recalled that the Grievor confirmed under cross examination that not only did he purposely avoid his attendance at these meetings, he would continue to do so after his return to the workplace. To the extent that the Grievor may have completed his other remaining duties, Dr. Hackett confirmed that they were trifling relevant to the importance of his attendance at these meetings. As to any suggestion by the Grievor that he was not informed of the necessity for his personal attendance at such meetings, we respond as follows. Dr. Hackett confirmed that this was a serious performance concern which he intended to raise in the appropriate forum, that being the performance review process of which the Grievor refused to participate. Additionally, given his senior position as a director, it should have been readily apparent to the Grievor as it was to all other directors, the importance of his attendance at these meetings.

In summary, for the first quarter of the fiscal year 2004/2005, the Grievor solely attended work 50% of the time of which he failed to complete his prime

duties. Even if the Grievor had been in the workplace for the remainder of the year, his own confirmation of his resolve to continue not attending these meetings would consequently and inevitably result in an unsatisfactory performance appraisal. To this end, the Grievor ought to be denied any entitlement to a performance bonus for the fiscal Year 2005/2005. In the alternative, if the Adjudicator is so inclined to make provision of a bonus for this year, it ought to be at the minimum scale provided under the NRC protocol.

(iii) ***Christmas Shutdown***

The retroactive salary payment earlier remitted to the Grievor accounted for the closure of the 2004 Christmas Holiday shutdown of the NRC. To this end, the 3.5 days sought by the Grievor under this claim has been paid.

The Grievor has additionally been paid for the 2005 Christmas Holiday shutdown. In accordance with Chapter 5, Section 5.17, Annex 5.17A of the NRC Human Resources Manual, he will be permitted to utilize vacation leave or leave without pay to cover the relevant period of time in accordance with paragraph A.5.17.1.8 of the aforementioned Annex.

(iv) ***Professional Society Memberships***

The Grievor is disentitled to any coverage in respect of professional society memberships for the Years 2005 and 2006.

*Chapter 6 of the NRC Financial Management Manual (**Exhibit "D")** confirms that the NRC will pay membership fees,* inter alia, *when membership is a federal statutory requirement for individual employees to carry out the functions of their positions. Otherwise, personal development and keeping up-to-date on developments in job-related fields is the financial responsibility of employees.*

Effective December 6, 2004 and pursuant to a major reorganization change affecting INMS, the Grievor and two of his groups for which he retained supervisory control were transferred from INMS to the Institute for Microstructure Sciences (IMS). There is no requirement at IMS

> *that directors have memberships in professional organizations in order to carry out their duties. Rather, memberships to professional associations are the personal responsibility of the IMS researchers, directors and the Director General.*
>
> *As stated by J. Maurice Cantin, Q.C. in* **Dagenais v. Treasury Board** *[Board File No. 166-2-16517, June 2, 1987] at page 5:*
>
> > *The employer is therefore free to require or not to require the grievor to belong to the Order and to be entered on its roll. If the employer imposes no such requirement, as is the case here, one must conclude that membership is not a requirement for the continued performance of the duties of her position and the grievor is not therefore entitled to reimbursement.*
>
> *The decision of the Grievor to join or maintain current membership in a professional association is a personal one, for which he, and not his employer, is financially responsible. He is thus disentitled to any coverage for membership fees for the Years 2005 and 2006.*
>
> *We in any event note for the record that the Grievor's claim for Year 2006 membership coverage extends into a period of time well beyond the jurisdiction of the Adjudicator to address.*

Re: Claim for General and Aggravated Damages, Professional Development Opportunities & Financial Hardship

In addition to the above benefit concerns, the Grievor now seeks to secure additional remedies falling under neither of the specified remedial heads ordered by the Adjudicator. These include claims for general and aggravated damages and compensation for lost professional development opportunities and financial hardship.

It is worthy of note that no such remedies were specified and sought as corrective action in the two grievances filed with the Board and no factual foundation was established by the Grievor at the hearing to justify the compensation for same.

Furthermore, although the adjudicator has the right to remain seized for the purposes of implementing her award,

"she has no power, statutory or otherwise, to reconsider or withdraw or change her order". To do otherwise, she would be functus officio *and would thereby exceed her jurisdiction.*

> **Huneault v. Central Mortgage and Housing Corporation**
> *(1981), 41 N.R. 214 (F.C.A.) at para. 8*
>
> **Slaight Communications Inc. Operating as Q107 FM Radio v. Davidson**
> *(1985) 1 F.C. 253 (F.C.A.), affirmed [1989], 1 S.C.R. 1038 (S.C.C.)*

Although the latter Federal Court of Appeal decision of **Huneault** *was in respect of a remedial concern arising out of Part III of the* Canada Labour Code, *"the authority of an adjudicator assigned under section 92 of the* Public Service Staff Relations Act *is no different".*

> **Canada (Treasury Board) v. Exley**
> *(1985), 61 N.R. 121 (F.C.A.) at p. 4*

Even if the Adjudicator had the legislative power to order some or all of the remaining three heads of compensation sought by the Grievor which the Employer does not admit, she in any event would be functus *in ordering the same at this juncture. As stated by Sopinka J. of the Supreme Court of Canada:*

> *Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task.* **If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection.** *Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred by statute [emphasis added].*
>
> **Chandler v. Alberta Association of Architects,** *[1989] 2 S.C.R. 848 (S.C.C.) at para. 23*

The Adjudicator ordered that the Grievor be "reinstated immediately and compensated for salary and all benefits retroactively to July 21, 2004". In the words of Mahoney J. in **Canada (Treasury Board) v. Exley, supra,** *the "order is clear and complete". Whether the Adjudicator might have ordered*

> *that the Grievor be compensated in respect of the three remaining heads of claim, "the fact is that [s]he did not". Any subsequent order to address these concerns "would constitute an amendment to the original decision". In doing so, the Adjudicator would be* functus officio *and cause her to exceed her jurisdiction.*
>
> *In summary, these three remaining claims were neither specified in the grievances as corrective action sought nor was any factual foundation established to justify same. Additionally, the Adjudicator in any event would exceed her jurisdiction by ordering the payment of same.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[8] The grievor responded on February 7, 2006, as follows:

> . . .
>
> *In light of Mr. Snyder's submissions, this letter will be in three parts. First, we will address the remaining salary and benefits issue, namely bonus pay for 2003/2004 and 2004/2005. Secondly, we will address the employer's arguments regarding the adjudicator's jurisdiction in these circumstances to deal with other remedial issues. Thirdly, we will provide our submissions wise issues be confirmed by way of an order. These issues which the NRC suggests are resolved include vacation leave, sick leave, Christmas shutdown pay, and Professional Society memberships. The remaining issue is the failure to remit bonus pay for 2003/2004 and 2004/2005.*
>
> ***(i) Vacation leave, sick leave and Christmas shutdown pay***
>
> *The grievor requests an order confirming that he is entitled to have his vacation leave bank and sick leave bank credited as having accumulated time as an employee working full-time throughout the period of July 2004 to November 2005. The grievor further requests an order confirming that he is entitled to Christmas shutdown pay in 2004/2005 and 2005/2006 as an employee who was working full-time throughout the period of July 2004 to November 2005.*
>
> ***(ii) Professional Society Memberships***
>
> *The grievor has considered the submissions of the NRC in respect of the professional society memberships which have previously been paid on his behalf since becoming an NRC*

employee more than 20 years ago. The grievor submits that the NRC can decide to stop paying these memberships in future and that such a decision can and will be challenged by the grievor in other processes. However, he submits that he should be entitled to have these memberships paid at least for the period during which he was off work involuntarily.

The NRC argues that the grievor is no longer entitled to these memberships because he is in a different institute. However, it is important to emphasize that, for the purposes of the present grievances, the grievor was never advised of this decision until he returned to work in November 2005. Consequently, the adjudicator should order the NRC to pay these memberships at least until that time. The grievor has learned that the NRC did in fact pay his membership fees in the International Society for Optical Engineering but not the Optical Society of America, in which he is a long standing member and fellow. Accordingly, the grievor submits that the adjudicator should order the NRC to pay his membership fees for the Optical Society of America until at least 30 days after his return to work.

(iii) Bonus pay

Counsel for the NRC argues that the grievor should not be entitled to bonus pay for 2003/2004 because he did not complete a Merit Review Input document. However, as Dr. Grover testified, there was an agreement since 1996 that he would be exempt from such reviews. (See paragraph 19 of Reasons for Decision.) Additionally, as Dr. Grover explained, the Merit Review Input document is prepared in relation to the Performance Planning Review (PPR) document for the previous year. In short, the PPR sets out the objectives for the coming year and the Merit Review document compares the PPR objectives with performance and rewards the employee for having met those objectives. Dr. Grover did not understand how his Merit Review document for performance in a previous year could be completed fairly in the absence of a PPR for the relevant year. Unfortunately, Dr. Hackett declined to explain this issue despite Dr. Grover's requests.

While the focus of this grievance was obviously not whether Dr. Grover should be entitled to a performance bonus for 2003/2004, it should be noted that there was some evidence tendered regarding Dr. Grover' s performance over the relevant period. In that regard, the NRC's witnesses acknowledged that Dr. Grover was performing the duties of five positions - his substantive Director position, three Group Leader positions, and those of an administrative assistant. (See paragraphs 30 and 35 of the Reasons for Decision.) Lorna Jacobs testified that the grievor "insisted on doing a lot of work" and in her view "the workload was too much." (See paragraph 29 of the Reasons for Decision.) Dr. Hackett

admitted that he had "no indication that the grievor was not fulfilling any of his duties except for his lack of attendance at management meetings." Dr. Grover testified that this concern about his attendance at management meetings was never raised with him, he was sending a representative in his place, and he was avoiding the meetings because they were causing him undue stress. (See paragraphs 48, 138 and 139 of the Reasons for Decision.)

Given all these factors, including and in particular the past practice of no PPRs or Merit Reviews, and the acknowledgment of the grievor's excessive workload, the grievor should be entitled to bonus pay for 2003/2004 as the deprivation of such bonus was a necessary consequence of being forbidden to attend work and discuss the issue with management. Indeed, the grievor was not at work in 2004 during the June to July period during which bonus pay decisions are normally made. Had the grievor been advised at the relevant time that he would not be receiving the 2003/2004 bonus pay, he could have grieved.

With respect to the 2004/2005 bonus, the grievor was simply not in the workplace for almost the entire period due to the unwarranted disciplinary action. Given that the grievor had received bonuses for seven years in a row prior to 2004, the balance of probabilities would suggest he would earn the bonus in the 2004/2005 year. In other words, receiving a bonus in at least seven of eight years (or eight of eight years if the 2003/2004 bonus is ordered) would indicate that it was more likely than not that the grievor would earn a bonus for 2004/2005.

These bonuses are 5% of the grievor's annual salary each year, which we estimate at $5,750 per year, for a total of $11,500.

B. Jurisdiction to award additional remedies

The NRC has argued that the adjudicator does not have the power to award additional remedies because she is functus officio *and, according to the NRC, the requested remedies were not specified in the grievances. The NRC also claims that no factual foundation was established for additional remedies. This section will deal with these arguments in turn.*

(i) Functus officio *does not apply*

In the opening statement for the grievor, the adjudicator was advised that we would not be leading evidence in respect of all remedies sought. Rather, in the interests of efficient use of resources, we indicated that we would ask the adjudicator to remain seized in the event the grievances were allowed. This position was reiterated in the final arguments for the grievor, as reflected in paragraph 113 of the Reasons for

Decision. Counsel for the NRC did not object to this request in either opening or closing arguments.

It is submitted here that the adjudicator acknowledged this request by the grievor by stating the following at paragraph 146:

> *I will remain seized for a period of 90 days from the date of this decision to address any matters relating to its implementation. [emphasis added]*

In light of the above, it is evident that the adjudicator clearly did not relinquish jurisdiction over "any matters" related to "this decision" and, as such, she is not functus officio. *The "decision" is to allow the grievances and the request for additional remedies is a matter relating to the decision. This is emphasized by the fact that the adjudicator acknowledged at paragraph 113 the grievor's request for her to remain seized regarding additional remedies.*

In the alternative, if this was not necessarily the adjudicator's intent, the grievor submits that the adjudicator nevertheless has the jurisdiction under the Public Service Staff Relations Act *to amend, alter or vary an order in appropriate circumstances. Section 96.1 of the Act provides that an adjudicator has "all the powers, rights and privileges of the Board, other than the power to make regulations under section 22." The Board is given the power in section 27 of the Act to review, rescind, amend, alter or vary any decision or order made by it. It is submitted that, pursuant to section 96.1, adjudicators also have the powers of section 27 to amend or alter decisions or orders.*

The grievor submits that the adjudicator should consider the grievor's request for additional remedies in light of his submissions to this effect at the hearing. If either the adjudicator or the NRC had indicated that this would not be contemplated, the grievor would have proceeded to enter further evidence and make additional legal arguments. The grievor avoided doing so at the time because the hearing was quite lengthy and, as all involved will agree, the matter was already burdened with numerous difficult legal issues (human rights jurisdiction, disguised discipline, and an employer's alleged right to order an employee to attend a physician of its own choosing.)

Before leaving this issue, it should be noted that, previously, the jurisprudence indicated that adjudicators under the Act did not have the power to vary or amend its own decisions. (See Doyon v. Public Service Staff Relations Board et al., *[1979] 2 F.C. 190 (C.A.).) However, this was before section 96.1 was added to the Act in 1993. (See* Public Service Reform Act, *S.C. 1992, c. 54.) The Board considered this issue*

in Murray v. Treasury Board (Transport Canada), *[1996] C.P.S.S.R.B. No. 43 (QL). The Board doubted whether section 96.1 was meant to give adjudicators the power to review or amend its own decisions. However, the Board did not rule conclusively on the issue and observed that, if adjudicators were indeed vested with this power, it should not be exercised to allow the parties to essentially re-argue the merits of the case.*

With due respect to the Board in Murray, *it is submitted that section 96.1 is clear that all powers of the Board are vested in adjudicators with the exception of the power to make regulations under section 22. Given this clear exception, the legal interpretive rule of* expressio unius est exclusio alterius *would point to the conclusion that Parliament intended to give adjudicators the powers in section 27 because it specifically withheld the powers found in section 22. (See* Sullivan and Driedger on the Construction of Statutes, *2002, 4th ed., pp. 186-194.)*
This does not mean that the Board's caution in Murray *regarding the use of this power is incorrect. In the present case, the remedial issues in question were not addressed and therefore this request cannot be characterized as an attempt to re-argue the merits. Given the grievor's request for the adjudicator to remain seized, this would appear to be precisely the sort of case for an adjudicator to consider. Indeed, it would appear that the adjudicator may have forgotten to address this issue in her decision and therefore she should be allowed to consider the question by way of section 27.*

(ii) Request for remedies in the grievances

In the two grievances dealt with by this adjudication, the grievor requested the following corrective actions:

> *As a corrective measure, I ask that I be reimbursed for all losses resulting from the cessation of my pay, including interest, that all references to this decision be removed from my personnel files, and that Dr. Hackett and a representative of the NRC issue a written apology for their actions. [File 166-9-34836]*
>
> *As a corrective measure, I ask that the decision to place me with leave without pay for other reasons be overturned, that I be allowed to return to work immediately to perform all of my former duties, that I be reinvested with full authority to perform those duties as was originally possessed by me, and that I be reimbursed for all losses resulting from the cessation of my pay, including legal fees and interest, that all references to this decision be*

> *removed from my personnel files, and that representatives of the NRC issue appropriate written apologies for their actions. [File 166-9-34837]*

From the above, it is evident that the grievor made a claim for "all losses" resulting from the disciplinary actions. Furthermore, the jurisprudence is clear that a grievor does not have to expressly enumerate all remedies sought in the grievance text in order to assert a claim for such remedies at arbitration. While an arbitrator's jurisdiction is indeed limited by the scope of the grievance, he or she must consider whether the requested remedies are "tantamount to asserting a new grievance". (See Wilcox v. Canada (Treasury Board), *[1985] F.C.J. No. 329 (F.C.A.)(QL) at p. 3.) In the seminal case on this issue regarding scope of the grievance and jurisdiction, the Ontario Court of Appeal held:*

> *Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed. (See* Re Blouin Drywall Contractors Ltd. v. United Brotherhood of Caperpenters and Joiners of America, Local 2486 *(1975), 8 O.R. (2d) 103 (QL version) at p. 5.)*

Accordingly, the adjudicator must consider the "real complaint" between the parties and whether the remedies requested flow from the breach. In this regard, it should be noted that the grievances explained that the grievor was concerned that the NRC was trying to violate his rights to personal privacy and integrity of the person. He also stated that he believed the decisions to cease paying his salary and place him on leave without pay were "designed to intimidate and humiliate me". It must also be noted that the grievances were based on the claim that the employer's actions were disguised discipline.

Arbitral jurisprudence has held that, in light of Weber v. Ontario Hydro, *arbitrators should "have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty, or of the Charter", and fashion an appropriate remedy accordingly. (See* Tenaquip Ltd. and Teamsters Canada, Loc. 419 *(2002), 112 L.A.C. (4th) 60 (E. Newman) (Online version) at pp. 4-5 and 6 for quote from Weber; and* Re Transit Windsor and Amalgamated Transit Union, Local 616 *(2003), 114 L.A.C. (4th) 385 (Brandt) (Online version) at pp. 10-12.)*

*Finally, Public Service Staff Relations Board adjudicators have held that they have jurisdiction to award aggravated damages (*Chénier v. Treasury Board (Solicitor General of Canada - Correctional Service), *[2003] C.P.S.S.R.B. No. 24 (QL)) or otherwise fix damages in light of considerations such as the employer's bad faith and the legal costs incurred by a grievor retaining private counsel (*Matthews v. Canadian Security Intelligence Service, *[1999] C.P.S.S.R.B. No. 31 (QL) at paras. 105-106). It also worth noting that no Board decisions have reconsidered the jurisdiction to award remedies such as interest, legal costs, or punitive damages in light of the Supreme Court of Canada' s judgment in* Vaughan v. Canada, *[2005] 1 S.C.R. 146. The Federal Court has done so in the context of grievance officers considering non-adjudicable grievances under the* PSSRA *and ruled that such officials have jurisdiction to award punitive damages. (See* Bernath v. Canada, *[2005] F.C.J. No. 1496 (QL) at para. 37 and decisions considered therein.)*

C. Damages

The grievor claims for losses resulting from the unwarranted disciplinary actions. Specifically, he states that he should be compensated for loss of professional development opportunities, financial hardship and general and aggravated damages.

(i) Loss of professional development opportunities

As reflected in the evidence, Dr. Grover was forbidden from attending the quadrennial conference of the International Commission for Optics in Japan in July 2004. This is one of the most significant events for a scientist in optics to attend. There was no good reason for the employer's order that Dr. Grover not attend this conference on pain of discipline. [See Exhibit G-14, p. 27, Letter from Dr. Hackett to Dr. Grover, dated July 7, 2004.] Furthermore, the grievor usually visits two to three international laboratories each year. He was denied these opportunities because he was barred from the workplace.

There is no price that can be placed on the damage that this has caused Dr. Grover's career and reputation, but we would ask for compensation in the amount of $20,000.

(ii) Financial hardship

While the adjudicator arguably does not have jurisdiction to award interest, there is nothing that prevents the adjudicator from fashioning an appropriate remedy to address other losses experienced by a grievor. In this case, Dr. Grover and his family experienced considerable financial hardship due to the NRC's decisions to cut him off pay and deny him his right

to exercise accumulated vacation time or sick time. Indeed, he was without pay for fifteen months. As he testified at the hearing, the grievor was also turned down for Employment Insurance benefits because he could neither claim that he was off work due to illness nor that he had been discharged. Dr. Grover was forced to borrow money from a variety of sources and cash out RRSP and unregistered investments simply to pay his monthly bills.

In particular, Dr. Grover cashed in $30,000 in RRSP investments, with a total tax hit of approximately $13,500. (See Exhibit A.) He also cashed in an unregistered investment in the amount of $57,258, with capital gains assessed in the amount of $8,651.82, of which 50% are subject to taxes this year. (See Exhibit B.) If these investments were allowed to remain intact, Dr. Grover would not have been required to pay capital gains and RRSP taxes at a higher rate due to his higher pre-retirement income. It is impossible to calculate the exact loss because it cannot be known when the grievor would have cashed in these investments during his retirement. While complex actuarial calculations would perhaps provide some assistance, we suggest a "rough and ready" approach. It is submitted that NRC should compensate Dr. Grover on the basis he would have paid 20% less in taxes if he had cashed in these investments at a more favourable time post-retirement. Using this method, Dr. Grover's loss is $6,845.

(iii) General and aggravated damages

As discussed in the previous section, the PSLRB has recognized the jurisdiction to award general and aggravated damages in appropriate cases. (See Matthews, supra*; and* Chénier, supra.*) The jurisdiction to award such damages is further supported by the Supreme Court judgment in* Vaughan *and the Federal Court jurisprudence referred to earlier.*

It is submitted that the NRC acted in a high handed and malicious manner in dealing with the grievor in this case. It used financial pressure and threats of further discipline and even termination to try and force the grievor to waive his legitimate rights to privacy and bodily integrity. As the adjudicator noted, the employer not only to chose to place the grievor on "no work, no pay" status, it also refused to allow him to exercise sick leave or vacation leave. (See paragraph 138, Reasons for Decision.) The grievor was also prevented from claiming Employment Insurance benefits because of the untenable position in which he was placed by the NRC. These actions demonstrate that the NRC was not acting in good faith.

The NRC's good faith is also questioned by the fact that it took the contradictory position of disbelieving the grievor was sick but also arguing that he was unsafe to attend work due to poor health. It also refused to consider other reasonable options proposed by the grievor, including and in particular the offer to jointly choose and pay for an independent physician. The grievor testified that he was treated very poorly when he attended work on June 28, 2004, and August 18, 2004. He testified that he felt humiliated and scared. (See paragraphs 40 and 56 of the Reason for Decision.)

The grievor submits that all of the above evidence fully supports an award for general and aggravated damages due to the distress and humiliation caused by the NRC's bad faith actions and unwarranted discipline. Simply put, this is an extreme case of employer conduct which infringed on an employee's private life and well being. In terms of quantum, the grievor submits that $25,000 is an appropriate sum given the nature of the conduct, the harm caused, and the fact he had to retain private counsel. In support of this quantum, the grievor relies on the PSLRB decision in Matthews, supra, *and Re* Toronto Transit Commission and Amalgamated Transit Union *(2004), 132 L.A.C. (4th) 225 (Shime, Q.C.) at pp. 22-23 of online version.*

Conclusion

The grievor submits that there is sufficient evidence to award the remedies requested above. The evidence demonstrated that the NRC was not acting out of a genuine concern about the grievor's health. Rather, given the surrounding circumstances, it is evident that management was trying to impress upon the grievor that he was the servant in this "master and servant" relationship. He should be compensated for all losses flowing from this conduct.

Finally, regardless of which additional remedies are awarded, or their quantum, the adjudicator should order the NRC to complete the Canada Revenue Agency Form 1198, or Statement of Qualifying Retroactive Lump-Sum Payment (QRLSP). As the form indicates, a QRLSP "is a lump-sum payment paid to an individual in a year that relates to one or more preceding years throughout which the individual was a resident of Canada." This includes income received under an arbitration award. Given that the grievor received damages in 2005 for loss of salary from 2004 and 2005, the NRC should complete this form so the grievor can have his taxes adjusted accordingly. There is no reason why the NRC should refuse to complete this form.

. . .

[*Sic* throughout]

[Emphasis in the original]

[9] The employer replied on March 6, 2006 as follows:

. . .

We are in receipt of the Grievor's written submissions dated February 7, 2006 in respect of particularized remedies sought from the Adjudicator. We submit on behalf of the National Research Council the following reply and shall address the remedial headings in the order delineated in the Employer's initial submission dated January 23, 2006.

(i) ***Vacation and Sick Leave Benefits***

The Grievor does not disagree with the facts as set out by the Employer in its initial submission in respect of these heads of compensation. Any order issued should thus reflect the Employer's submissions accordingly.

(ii) ***Bonus Pay***

It is pure folly to suggest that the Grievor is entitled to bonus pay for the period 2003/2004 notwithstanding his outright refusal to participate in the PPR and Merit Review process which was conducted for all other managers. The Grievor's foundation to support the foregoing is predicated on his uncorroborated statement that since 1996, he "was exempt from such reviews".

As previously iterated, regardless of what alleged practice may have previously been in effect, the letters from both President Carty and Dr. Hackett made it explicitly clear to the Grievor that he was mandated to participate in the process for the 2003/2004 period. His outright refusal to participate as confirmed by him during the hearing precluded the Employer from making a performance assessment. Hence, the Grievor, by his own conduct, disentitled him to any such bonus pay.

The Grievor now submits that he did not understand "how his Merit Review document for performance in the previous year could be completed fairly in the absence of a PPR for the relevant year". Aside from the fact that this alleged concern was not put to Dr. Hackett during the hearing for him to address, it is in any event

insignificant to the extent that the Grievor made clear during his testimony that he had no obligation at all to participate in the process notwithstanding letters from his superiors to the contrary.

The Grievor further attempts to substantiate 2003/2004 bonus pay entitlement by making reference that he was performing the duties of five positions and that there was "no indication that he was not fulfilling [them] except for his lack of attendance at management meetings". He further references Ms. Jacob's testimony that "the workload" was too much". In respect of these arguments, we respond as follows.

Firstly, the whole purpose of a Merit Review process is to determine whether, in fact, an employee is carrying out the required duties of a position and to assess his or her level of performance therein. That the Grievor refused to participate in said process negates any opportunity for him now to confirm the level and quality of his work. While Dr. Hackett acknowledged that he had "no indication that the Grievor was not fulfilling any of his duties except for his lack of attendance at management meetings" he did state that he desired to review this very subject matter with the Grievor during the performance review process.

Secondly, as previously iterated by Dr. Hackett, to the extent that the Grievor may have completed his other remaining duties, they were trifling relevant to the importance of his attendance at "crucial" management, evolution project and promotion meetings which he purposely avoided. To this end, he failed to perform the most important substantial aspects of his job as a Director.

Thirdly, while the Grievor submits that his 2003/2004 bonus pay ought to be awarded in any event because of his "excessive workload", any such workload was of his own making. The Employer's previous initiatives to reduce his workload had been met with complete obstinance and insubordination on the Grievor's part. The Adjudicator can take judicial note of Board File 1021-02-04 wherein the Grievor was levied a 3-day suspension for failing to run a competition to fill a Group Leader position which he occupied and would not relinquish. The testimony of Ms. Jacobs further confirmed her attempt to run a

competition to fill his administrative assistant position which the Grievor refused to sign off and chose to carry out the related duties himself. To therefore rely on the "excessive work load" justification to legitimize the award of performance pay is pure madness.

The Grievor further submits (at p.3 of his Brief) that the deprivation of such 2003/2004 bonus pay "was a necessary consequence of being forbidden to attend work and discuss the issue with management. We advise that there has been a complete absence of any evidence tendered in respect of this matter and should be wholly disregarded.

Furthermore, the Grievor cannot on the one hand justify automatic entitlement to the bonus pay on the foundation that he was not required to participate in the Merit Review process and on the other, submit that he could not discuss his performance with his supervisor. The two positions are wholly incongruent.

Finally, the Employer is greatly disturbed that a claim for 2003/2004 bonus pay is being made when the subject matter thereto and the relevant period for its consideration falls outside the parameters of the grievance before the Adjudicator. The Grievor was placed on a no work no pay status on July 21, 2004. The adjudicator was thus jurisdictionally charged with the determination of whether from that point on the Grievor was being disciplined. The Adjudicator has no jurisdiction to determine whether the Grievor has any entitlement to bonus pay for work performed during the period April 1, 2003 to March 31, 2004.

Additionally, contrary to the Grievor's assertion, recommendations for bonus pay are made to senior management in February of the existing fiscal year. Senior management confirmed in February 2004 the bonuses to be paid to its management employees for the fiscal year 2003/2004. Hence, the Grievor, who was still at work during this period and beyond, would have been fully aware or ought to have been aware that he would not and did not receive any bonus pay entitlement for that fiscal year. He nevertheless failed to file a timely grievance in respect of this concern.

In conclusion, aside from the above-mentioned jurisdictional concern, the Grievor has failed to establish any reasonable basis to conclude entitlement to the 2003/2004 bonus pay and his claim should thus be denied.

In respect of the Grievor's claim for 2004/2005 bonus pay, his sole justification for such entitlement is his historical entitlement to such pay. The Grievor, however, does not contradict the Employer's submission that during the first quarter of the fiscal year 2004/2005, he solely attended work 50% of the time of which he failed to complete his prime duties. The Grievor further confirmed in testimony that upon his return to work, he would continue to not perform his most important function as a Director by attending in person the various crucial meetings conducted by Dr. Hackett. To this end, the Grievor would have inevitably been in receipt of an unsatisfactory performance appraisal. Thus, the Grievor should be disentitled to a performance bonus for this fiscal year or alternatively he ought to be granted it at the minimum scale provided pursuant to NRC policy.

(iii) ***Christmas Shutdown***

The Grievor has made no submission or otherwise counters the Employer's facts as related to this heading of compensation. Any order made by the Adjudicator must therefore reflect the Employer's position in this regard.

(iv) ***Professional Society Memberships***

Contrary to the Grievor's belief, he is not entitled to a benefit greater than that provided to his fellow directors in the IMS Institute and as delineated in the NRC Policy.

That the Grievor was not advised that he would be responsible for his own membership fees until his return to work in November 2005 is immaterial. Had the Grievor been notified of the NRC's position at the time of his transfer to the IMS (in December 2004) or in November 2005 (his return to work), the effect is the same. The Grievor is responsible, like all other directors, in maintaining their personal memberships.

We advise that the IMS has paid no membership fees on behalf of its employees to Optical Society of

> *America. This issue was discussed at a Management Committee meeting held on January 24, 2005 during which the Grievor declined an invitation to present his case for a personal membership (**Exhibit "A"**).*
>
> *Save for the Grievor, IMS has similarly paid no membership fees on behalf of its employees to the International Society of Optical Engineering. Concerning the latter organization, the Grievor submitted to IMS a single invoice (**Exhibit "B"**) for both membership to the Society and subscription to various journals that was inadvertently treated and processed solely as an invoice for the subscription of journals. The Grievor has therefore received a benefit at IMS to which he should not have ordinarily received and he should be, if anything, grateful for this oversight.*
>
> *In view of the above, the Grievor is disentitled to any membership fee coverage in respect of the Optical Society of America.*
>
> *The Grievor acknowledges that he "can and will" challenge the NRC's decision to cease paying his memberships in the future in other processes. In fact, judicial notice should be taken of the Grievor's recently revised Amended Statement of Claim in Ontario Superior Court (**Exhibit "C"** – para. 29) alleging discrimination by the Employer as evidenced,* inter alia, *by ceasing the payment of his memberships. The NRC thus requests that the Adjudicator explicitly declare in her Supplemental Decision that the Grievor is disentitled to the requested membership coverage for the relevant Years as claimed.*

Re: Claim for General and Aggravated Damages, Professional Development Opportunities & Financial Hardship

The NRC will respond to the Grievor's submission in respect of the additional remedies sought in the order as presented by counsel at page 3 of his Brief.

(i) **The Application of the Functus Officio**

> *The Grievor submits that the above fundamental principal of law is inapplicable because he requested the Adjudicator to remain seized "to determine further remedies" [**Decision – paragraph 113]** and that the Adjudicator stated that she would remain seized to address "any matters relating to [the*

Decision's] implementation". These two factors, the Grievor submits, confirms the Adjudicator's acknowledgement that she would "remain seized regarding additional remedies" [Grievor's Brief – p.4].

The Adjudicator's Order was clear and unambiguous. Having recognized the Grievor's desire to possibly canvass further remedies after her Decision was rendered, she nevertheless specifically restricted the remedies to the Grievor's immediate reinstatement and compensation "for salary and all benefits retroactive to July 21, 2004". The Adjudicator is crystal clear at paragraph 146 that she remained seized "to address any matters relating to its implementation". On the plain reading of the foregoing, the term "it" refers to the specific remedies identified. It does not expand into other possible remedies that the Grievor now seeks to claim. To reiterate the statement of Sopinka J. in **Chander v. Alberta Association of Architects** *[NRC's Brief – p.5]:*

> *If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection.*

In the words of Mahoney J. in **Canada (Treasury Board) v. Exley,** *[NRC's Brief – p.5], the Adjudicator's "order is clear and complete". She therefore cannot venture upon re-opening her decision to address post-reflective remedies sought by the Grievor.*

As a final comment in respect of the foregoing, we find that Counsel's submission that the Grievor would have made additional legal arguments at the hearing concerning remedies but "avoided doing so because the hearing was quite lengthy ……." does not constitute a legal foundation to override the principle of functus officio *and warrants no response.*

The Grievor, in the alternative, suggests that Sections 27 and 96.1of the Public Service Staff Relations Act *(*PSSRA*) provides the Adjudicator the necessary statutory authority to address these additional collateral remedies not earlier sought by him. To the contrary, the PSSRB decision of* **Murray and Treasury Board (Transport Canada)** *to which Counsel refers [at Tab 5 of his Brief] confirms otherwise.*

In addressing the above-referenced legislative provisions, Yvon Tarte stated at paragraph 7 that:

> *the Board would find it astonishing that an adjudicator could avail himself or herself of the power to review an adjudication decision by virtue of 96.1.*

The Board specifically concluded that:

> *neither section 96.1, section 95.1, nor their combined effect are intended to alter the fundamental role of an adjudicator under the* Act*, that is, to dispose of grievances in a timely manner in a process meant to be final and conclusive [paragraph 8].*

*Of significant import, the Board confirmed that "**the French version of section 96.1 makes it abundantly clear that the adjudicator's powers, however broadened by section 96.1, are nonetheless limited to the matter with which he or she is seized**" [paragraph 8][emphasis added]. Counsel's attempt to ignore the terms of the statute and rely upon the* expression unius exlusio alterius *principle to substantiate his client's claim to additional remedies must therefore fail.*

The Adjudicator specifically remained seized to implement her order concerning the Grievor's reinstatement and compensation of his salary and benefits retroactive to July 21, 2004 should any difficulties ensue. She is thus functus*, and as confirmed by section 96.1 and the* **Murray** *decision, would exceed her jurisdiction, in ordering further remedies sought by the Grievor.*

(ii) **Request for Remedies in the Grievances**

We interpret the Grievor's submissions under this heading to suggest that the functus officio principal *is inapplicable in that there was no obligation to specifically plead in his grievances the additional remedies now being sought. In support of this proposition, he cites* **Wilcox** *[Grievor's Brief – Tab 10] and* **Blouin Drywall Contractors Ltd.** *[Tab 2]. He further states that the "adjudicator must consider the real complaint between the parties and whether the remedies requested flow from the breach" [Grievor's Brief – p.6].*

It is of significant note that in the 'seminal' case of **Blouin** *(Ontario Court of Appeal), the additional remedy being sought by the union and the evidence tendered to support it was dealt with* prior *to the issuance of the Arbitrator's decision and order. Equally so, the Grievor in* **Wilcox** *attempted to secure an additional remedy during the hearing and prior to the issuance of the arbitrator's decision. The foregoing decisions in no way minimize or otherwise discount the full application of the* functus officio *principal.*

As such, these cases are of no assistance to the Grievor in the securing of newly expressed collateral remedies.

The Grievor further asserts that in light of the **Weber v. Ontario Hydro** *decision, arbitrators should "have regard to whether the breach of the collective agreement also constitutes a breach of a common law duty or of the Charter" (at p.6), and fashion an appropriate remedy accordingly. He cites* **Tenaquip Ltd.** *and* **Transit Windsor** *in support.*

The reader is confused as to the relevance of this submission to the extent that no Charter *breach was alleged nor has there been any articulation as to what common law duty has been violated. In any event, we address these foregoing decisions in particular.*

In **Tenaquip Ltd.** *[Grievor's Brief – Tab 7], the union at arbitration sought to expand upon the remedies initially sought by it during the grievance procedure. The Arbitrator applied the* **Blouin Drywall** *case and permitted the Union to revise its remedies claim and to introduce during the hearing evidence to substantiate these additionally claimed remedies. In our case, the barn door has closed and the* functus officio *principal applies. The Adjudicator has issued her decision and order and the Grievor is thus precluded from now attempting to re-open the hearing and submit new evidence for the purposes of securing additional remedies.*

In **Transit Windsor** *[Tab 9], the arbitrator, in ordering the reinstatement of the Grievor, retained jurisdiction "to deal with any unresolved issues as to the liability for and the quantum of compensation" [at page 3] and issued a supplementary award to deal with a number of remedies not specifically claimed during the hearing. It is of note that the very broad nature of his retention provision enabled him to address these additional remedies without having to violate the* functus officio *principal. In our case, the Adjudicator was specific in her articulation of what narrow scope of remedies she was prepared to be remain seized upon and to assist in their implementation. The Grievor's post-hearing claim for additional remedies does not fall within the foregoing parameters and the Adjudicator is precluded from ordering the payment of same.*

Finally, the Grievor relies upon the decisions of **Chernier** *[Grievor's Brief – Tab 3] and* **Matthews** *[Tab 4] to confirm that the Board has jurisdiction to award aggravated damages "or otherwise fix damages in light of considerations such as the Employer's bad faith and the legal costs incurred by a Grievor retaining private counsel". These cases do not in any way override the principal of* functus officio *and the*

Adjudicator is, as stated above, precluded from ordering any additional remedies.

In any event, we will specifically address the issue of the Grievor's claimed entitlement to general and aggravated damages under the relevant heading below. As for the Grievor's reference to his claim to legal costs, we note that the Grievor specifically delineated a claim for legal fees in his grievance and the Adjudicator did not award same.

(c) **Damages for Loss of Professional Development Opportunities, Financial Hardship and General and Aggravated Damages**

For all the reasons delineated in the NRC's initial submission and its position articulated above, we submit that the adjudicator is functus *and will exceed her jurisdiction by ordering payment for any or all of the following claimed remedies. We nevertheless, in the alternative, submit as follows:*

(i) Loss of Professional Development Opportunities

Firstly, objection is taken to the characterization that the Grievor was "barred" from the workplace. As the evidence so confirms, the Grievor in fact was permitted to return to the workplace with the proviso that he tender non-medical information to confirm his fitness to return.

Secondly, there is a complete absence of any evidence on the record to substantiate a claim that the Grievor's "career and reputation" has in any way suffered as a result in not attending the Tokyo or any other conference in 2004. While this perception may be borne by the Grievor himself, he has failed to establish both (i) that there has been any diminution in his career and reputation; and (ii) the necessary factual and legal nexus to confirm that any such diminution, if any, is directly attributable to not attending conferences. In the absence of establishing the foregoing, the Grievor is disentitled to any such claim. In any event, such a claim should have been properly canvassed in the Grievor's claim for general damages and is thus improperly claimed above.

Thirdly, there is no evidence on the record to confirm that the Grievor had the right but missed opportunities to attend other conference in 2004 because he was "barred from the workplace". More particularly, there is no evidence on record to corroborate the Grievor's inference that his

supervisor would have permitted him to attend any other conferences in 2004.

In view of the above, there is a complete absence of any foundation for the Adjudicator to award damages under this head.

We further advise, in any event, that judicial notice is to be taken of the Grievor's Ontario Superior Court action in which he asserts a claim of harassment and intimidation against Dr. Hackett for which he seeks damages. In doing so, the Grievor equally relies, inter alia*, on the Tokyo trip cancellation to further substantiate his claim. (Amended Statement of Claim – para. 22). It is unfortunate that the Grievor is less than forthcoming in advising the Board that he is attempting to "double down' in his attempt to secure damages arising from his cancelled Tokyo trip. It is of further interest to note that there is no assertion in the Statement of Claim of the Grievor's inability to attend other conferences during 2004 or that his career and reputation directly suffered as a result.*

(ii) **Financial Hardship**

Firstly, it is noted that there was a complete absence of any evidence tendered during the hearing to address the damages claimed for financial hardship - evidence which was readily available to the Grievor at that time to present. The Grievor should be precluded from adducing such evidence at this post-decision stage of the proceeding.

There is no evidence, for example, on issues including whether cashing out investments was necessary in the circumstances, whether the nature of the mix of cash-outs was appropriate to minimize any losses on investments and whether room exists to pay additional monies into his RRSP with the reimbursed salary which might negate or minimize any losses incurred on the $30,000.00 RRSP's initially cashed out. It is also worthy of note that given that the Grievor was absent from the workplace for a 15-month period, the rate of return on his unregistered investments cashed in would have been low (approximately 3-4%) and any gains resulting therein would have been minimal. The Grievor's retroactive salary which was paid to him shortly after the Adjudicator's decision was rendered would have enabled him to

replace said investments with minimal difficulty. Clearly, these are just some of the issues which the Grievor would have had to address during the hearing in his attempts to justify any reimbursement under this remedial head of damages.

Finally, we note that Counsel has failed to cite one Board decision in support of his claim for financial hardship. While adjudicators have routinely ordered retroactive reinstatement of full salary, we are unaware of any decision where an adjudicator has held Government departments and agencies liable for financial decisions made by an employee during a period in which he or she is not in receipt of pay. To venture down this path would be to invite detailed cross examination and the presentation of expert evidence to substantiate appropriate courses of action to be taken by employees in such circumstances. In the event that the Adjudicator contemplates the possible awarding of such damages, we reserve the right to present evidence in this regard and to make further submissions.

(iii) General and Aggravated Damages

Contrary to Counsel's assertions, there is a complete absence of any finding by the Adjudicator that the NRC "acted in a high handed and malicious manner in dealing with the Grievor in this case". Rather, she explicitly found that that the Employer did not have sufficient reasons to request a medical examination and thus his placement on a no work no pay status was disciplinary in nature. Notwithstanding the Adjudicator's disagreement with Dr. Hackett's assessment of the situation and of his decision to require additional non-medical information prior to the Grievor's return to work, there is a complete paucity of evidence to elevate and characterize Dr. Hackett's decision as being high handed and malicious in nature. There was no finding that his decision was made in bad faith. This, in and of itself warrants a complete dismissal of this remedial claim.

Secondly, the Grievor, while asserting a claim for aggravated damages arising from his absence from work, is concomitantly seeking similar damages arising, inter alia, *from the same set of facts in his Superior Court Action (see: Amended Statement of Claim – para. 23). With greater*

particularity, the Grievor's Superior Court claim asserts

Continuing discrimination and harassment by the NRC over many years including the period during which the Grievor was placed on a no work no pay status.

This is significant to the extent that the Grievor failed to adduce any evidence before the Adjudicator to confirm that but for his absence from the workplace during the 16-month period, *he would not have experienced hurt feelings, humiliation and emotional distress. His Amended Statement of Claim in its overall context suggests otherwise. As such, the Grievor has failed to establish the necessary nexus between his absence from the workplace and an entitlement to a claim of aggravated damages. He additionally failed to adduce any evidence borne out of medical or corroborative testimony of his alleged experience of distress which arbitrators rely upon in the award of such damages (***Toronto Transit Commission** *– Grievor's Brief – Tab 8 at pp. 21 & 22). He similarly failed to adduce any evidence as to how his absence from work manifested itself to justify a claim for aggravated damages. His claim ought therefore to be dismissed for want of any foundation to establish same.*

In any event, this claim of aggravated/general damages should properly be deferred to the court for its determination given the exhaustive claims made by the Grievor made under this head of liability and the fact that the Grievor, in his Superior Court claim, references his 16 month absence from work in support of his general damages claim. No doubt, prejudice arises to the Employer in having to defend two claims dealing with the same facts which can potentially give rise to differing awards.

Finally, we note that the Grievor makes a claim for $25,000.00 in damages without any evidentiary or jurisprudential support to legitimize this amount. The decisions of **Matthews** *[Grievor's Brief – Tab 4] and* **Toronto Transit Commission** *[Tab 8] to which he refers in his materials do not in any way establish a foundation to award $25,000 in aggravated damages as being sought in the case at bar. It is clear that the Grievor is attempting to secure damages which go well beyond any reasonable amounts that could possibly be*

> *awarded in respect of the narrow grievance before the Adjudicator. To the contrary, this attempt to secure such severer damages reflects his perceived discrimination and harassment over his many years of employment with the NRC. It is for this reason, as pleaded above, that this matter ought to properly be deferred for the court's determination. In any event, should the Adjudicator contemplate the awarding of aggravated/general damages, the Employer reserves the right pursuant to* **Matthews** *to present evidence and to make further submissions therein.*
>
> ***(iv)*** **Canada Revenue Agency Form 1198**
>
> *We advise that the NRC has no objection in completing the above form as requested by Counsel in his Brief.*
>
> *In the event that the Adjudicator elects to issue an order of payment in respect of the additional remedies set out in (c)(i) – (iii) above, we ask that she stay its implementation pending the final resolution of the Grievor's grievance and of her original decision currently subject to judicial review proceedings.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[10] The grievor responded on March 7, 2006 as follows:

> . . .
>
> *There are numerous new issues raised by Mr. Snyder's letter. To address but one, we note that he has included legal pleadings from an action before the Ontario Court which have not been formally accepted by that Court as of yet. In relying on the pleadings, Mr. Snyder suggests that the grievor is seeking double recovery for certain damages. That has never been alleged. Without getting into the details of the legal action, and how the issue of double recovery has in fact already been raised therein by a motion brought by the National Research Council and argued before the Courts, the grievor would simply like to submit here that, in accordance with the jurisprudence, any issues of double recovery are to be dealt with in the subsequent legal proceeding. As there has been no award of damages against the NRC in the Court as of yet, the legal action is irrelevant to this grievance.*
>
> *Mr. Snyder suggests that further evidence may be necessary. The grievor is open to further dates for evidence and*

> *argument on the claims for general and other damages if the adjudicator deems it necessary following her ruling on whether she is* functus officio*. It is also noted that, in the recent decision of* Bédirian v. Treasury Board (Department of Justice) *2006 PSLRB 4, the Board suggested that legal costs can be awarded to successful grievors. In the present case, the grievor is a management employee who does not have the benefit of union representation and has to bear all his own legal costs for contesting these grievances. Furthermore, he expressly requested legal costs in his grievance presentations. As stated in the grievor's submissions dated February 7, 2006, his legal costs should be considered as a factor in awarding financial hardship damages.*
>
> . . .

[11] Further to this exchange of correspondence, a hearing was suggested. Both parties declined this proposal and agreed that I should decide on the issue of *functus officio* based on the arguments they presented in writing. A hearing could be fixed if requested depending on that decision.

Reasons

[12] As confirmed by the parties, the grievor has received his retroactive salary as ordered in decision 2005 PSLRB 150. The parties could not agree on how to reinstitute benefits for the relevant period. These benefits include vacation and sick leave, bonus pay, Christmas paid leave and professional membership fees. As far as these elements are concerned, they should be disposed of in the following manner:

Vacation, sick leave and Christmas shutdown leave

[13] The grievor is entitled to have his vacation leave bank and sick leave bank credited as having accumulated time as an employee working full time from July 21, 2004, the date of the employer's decision to consider the grievor in a "no work, no pay" situation, to his reinstatement in November 2005.

[14] The grievor is also entitled to Christmas shutdown pay in 2004-2005 and 2005-2006, the same as other directors. The employer indicated in its submission that the retroactive salary payment remitted to the grievor accounted for the closure of the 2004 Christmas holiday shutdown. As such, the 3.5 days sought by the grievor under this claim have been paid. According to the employer, the grievor has also been paid for the 2005 Christmas holiday shutdown. The grievor did not contest these facts nor the employer's statement that the employer considered that in accordance with

"Chapter 5", section 5.17, annex 5.17A of the *NRC Human Resources Manual*, the grievor will be permitted to utilize vacation leave or leave without pay to cover the relevant period of time in accordance with paragraph A.5.17.1.8 of the aforementioned annex.

Bonus pay

[15] I will address the grievor's request for entitlement to bonus pay for performance over the year 2003-2004 separately from that of the period of 2004-2005. The events relating to the grievances before me reach back to November 2003 and carry over to November 2004, encompassing the two fiscal years. The grievor was notified both by the President of the NRC and his superior, Dr Hackett, on March 8 and March 17, 2004, respectively, that he was expected to participate in the Performance Planning and Review (PPR) and Merit Review processes like all other managers starting with the period of 2003-2004. I agree with the employer that, regardless of what alleged practice may have previously been in effect, these letters made it explicitly clear that the grievor was to participate in these processes and should act accordingly.

[16] For the period of 2003-2004, the difficulty arises where the grievor did not have the necessary elements to complete the assessment for that period, not having contributed to this process in the past. The grievor bases this request for payment solely on the fact that he always received the bonus pay in the past, without the need for an assessment process. However, I agree with the employer that I have no jurisdiction to determine whether the grievor has any entitlement to bonus pay for work performed during the period April 1, 2003, to March 31, 2004, as this period falls outside the parameters of the grievances before me. Considering the basis for this claim, it should have been the subject of a separate grievance.

[17] As for the 2004-2005 bonus pay, the grievor had been notified in time that he was to participate and provide his input to the PPR and Merit Review processes. The basis for this claim is, therefore, a different one. In this case, his refusal to participate, confirmed by him during the hearing, precluded the employer from making a performance assessment. Hence, the grievor, by his own conduct, disentitled himself to any bonus pay. As stated by the employer, the purpose of a merit review process is to determine whether an employee is carrying out the required duties of a position, and to assess his or her level of quality and performance therein. While Dr. Hackett acknowledged that he had "no indication that the grievor was not fulfilling any of his

duties except for his lack of attendance at management meetings", he was very clear that attendance at these "crucial" management and "evolution" meetings was of the essence for the grievor's position at the time. As such, the grievor had failed to perform the most important and substantial aspects of his job as a director and did confirm before me his resolve to continue to do so in any event.

[18] The grievor submitted that his bonus pay ought to be awarded in any case because of his "excessive workload". However, as the employer points out, the grievor confirmed during the hearing that he did not consider his workload to be excessive and that he felt he was managing all of his duties very well. The employer rightfully adds that the testimony of Ms. Jacobs further confirmed her attempt to run a competition to fill the position for his administrative assistant, but that the grievor refused to sign off on it. The employer also referred to the grievor's refusal to appoint a section leader, the subject of another grievance of which I was not seized. The grievor testified before me that he chose to carry out the related duties himself.

[19] The grievor is not entitled to bonus pay for the period 2004-2005 considering his outright refusal to participate in the performance and merit review processes that were conducted for all managers, despite a timely request from the employer.

Professional membership fees

[20] The grievor argues that he was not notified of the employer's decision to no longer pay professional membership fees until his return to work in November 2005. However, he has learned that the employer did in fact pay his membership fees in the International Society for Optical Engineering but not the Optical Society of America. Accordingly, the grievor submitted that I should order the employer to pay his membership fees for the Optical Society of America until at least 30 days after his return to work. Normally, according to the recognized rule for reimbursement of professional fees, the grievor is not entitled to this benefit unless the employer has made it a requirement for the position. It appears from the representations made that this is no longer a requirement for the grievor as per his new position, as of December 2004. However, considering that he was not notified of this change until his return, his membership fees for the Optical Society of America shall be reimbursed to him for the year 2005. As far as the fees for the year 2006 and the future are concerned, this issue is outside of my jurisdiction.

Functus officio principle

[21] The other issue arising between the parties is that of the claim for general and aggravated damages, lost professional development opportunities and financial hardship, including legal costs. In this regard, the employer argues the principle of *functus officio.*

[22] I have to agree with the employer's interpretation of the principle, its arguments and the supporting jurisprudence presented as they apply in the case at hand. My order was clear and complete. I reinstated the grievor as of July 21, 2004 with salary and benefits and I remained "seized for a period of 90 days from the date of this decision to address any matters relating to its implementation". Therefore, I am functus to make any subsequent order that exceeds the scope of my original order.

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

Order

[24] That the vacation leave bank and sick leave bank of the grievor be credited as having accumulated time as an employee working full time from July 21, 2004, the date of the employer's decision to consider the grievor in a "no work, no pay" situation, to his reinstatement in November 2005.

[25] That the grievor's membership fees for the Optical Society of America be reimbursed to him for the year 2005.

October 31, 2006.

Sylvie Matteau,
adjudicator